REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

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

REPORTER.

PUBLISHED UNDER AUTHORITY BY

L. A. AUDETTE, LL.B., ADVOCATE

REGISTRAR OF THE COURT.

VOL. 10.

OTTAWA:
PRINTED BY THE KING'S PRINTER.
1907.

JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE.

Appointed on the 1st day of October, 1887

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	Archer Martin - - - - -	B. C. do
do	JAMES CRAIG, J.T.C. -	Yukon Territory District.
	His Honour THOMAS HODGINS, K.C.	Toronto do

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports :

THE HONOURABLE CHARLES FITZPATRICK, K.C.
do A. B. AYLESWORTH, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE RODOLPHE LEMIEUX, K.C.
do JACQUES BUREAU, K.C.

ERRATA.

Errors in Cases Cited are Corrected in the Table.

TABLE OF CONTENTS.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

K.

M.

Mc.

O.

P.

Q.

S.

T.

U.

TABLE OF CASES CITED.

A.

B.

C.

H.

I.

J.

K.

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

ST. CLAIR NAVIGATION COMPANY AND THE SOUTHERN COAL AND TRANSPORTATION COMPANY..... } PLAINTIFFS;

1905
June 22.

AND

THE SHIP "D. C. WHITNEY"..... DEFENDANT.

Maritime Law—Collision—Jurisdiction—Foreign Corporation—Discretion.

The Exchequer Court of Canada has jurisdiction in an action of collision brought by a foreign corporation against a foreign ship, although the collision occurred in foreign waters.

2. In such a case the court ought to exercise its discretion to entertain the action.

THIS was an action brought by two foreign corporations, the plaintiffs, against the defendant ship, a foreign vessel, for damages arising from collision.

The main defences were: Want ot jurisdiction, and inevitable accident. The facts of the case are fully set out in the reasons for judgment.

The trial of the action took place at Windsor on the 29th, 30th and 31st March and 14th and 15th April, 1905, when after argument judgment was reserved.

J. W. Hanna for plaintiffs;

W. D. McPherson for defendants.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

HODGINS, L.J., now (22nd June, 1905) delivered judgment.

This is an action brought by the plaintiffs, the St. Clair Navigation Company, a foreign corporation, for damages caused by the defendant steamer *D. C. Whitney* colliding with their ship *Mongaugon* on the night of the 28th November, 1901, at the Baltimore and Ohio Dock at Sandusky, in the State of Ohio, one of the United States of America; and also by the Southern Coal and Transportation Company, a foreign corporation, the owners of a cargo of coal on the said *Monguagon* against the same defendant steamer for loss and damage to the said cargo caused by the said collision. The defendant steamship was arrested in Canadian waters on the 14th of November, 1902.

One of the principal defences raised by the Inland Star Transit Company, also a foreign corporation, as owners of the defendant steamer, after claiming that both ships are of American register, is as follows: "And the said Inland Star Transit Company submit with deference that under the circumstances herein and in the statement of claim set forth, this honourable court has no jurisdiction to try and adjudicate this action; or if this honourable court should be of opinion that there is jurisdiction in the discretion of the court so to do, then that in the exercise of the said discretion this honourable court should refuse in the circumstances set forth so to do, or to compel the said defendants to submit themselves to the said jurisdiction, but leave the plaintiffs to seek such redress as they may be entitled to against the defendants in the proper courts of the United States of America, according to American law."

This challenge to the jurisdiction of this Canadian Court of Admiralty impeaches the opinion of Sir Leoline Jenkins, Judge of the High Court of Admiralty

in the reign of Charles II, "whose opinions," says Wheaton (1), "form a rich collection of precedents in the maritime law of nations," in one of which the judge said: "It is not without a special ease and satisfaction to a foreign plaintiff that we shall have the same marine laws here that we are judged by in his country." (2)

Before considering the question of jurisdiction, it will be proper to refer to the judgment of our Supreme Court in *Monaghan* v. *Horn* (3) which decided that the Vice-Admiralty Courts in British possessions, and the Maritime Court of Ontario (of which this court is the successor), have whatever jurisdiction the High Court of Admiralty in England has over any claim for damages done by any ship, whether to person or property; and by *The Colonial Courts of Admiralty Act*, 1890, under the authority of which the Parliament of Canada established this court, "it is enacted that the jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty Jurisdiction of the High Court in England, whether existing by any statute or otherwise; and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that court to international law and the comity of nations." (4)

About the earliest case in which the jurisdiction of an English Admiralty Court over a foreign ship was considered was the *Two Friends* (5), a case of salvage for the rescue of an American ship by alleged British

(1) Elements of International Law, 4th ed., pp. 27-8.

(2) See Wynne's Life of Sir Leoline Jenkins, vol. i, p. 764.

(3) 7 S. C. R. 409.

(4) Sec. 2, subs. (2).

(5) 1 C. Rob. 271.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

sailors from the enemy on the high seas. Sir William Scott (afterwards Lord Stowell) said. "But it is asked if they were American seamen would this court hold plea of their demands? It may be time enough to answer this question whenever the fact occurs. In the meantime I will say, without scruple, that I can see no inconvenience that would arise if a British Court of Justice was to hold plea in such a case; or, conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions;" and he added: "I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question of such a nature"(1).

The Supreme Court of the United States, in the *Belgenland* (2), concurred in Lord Stowell's decision in the case of the *Two Friends*. Bradley, J. said: "The law has become settled very much in accord with these views. That was a case of salvage; but the same principles would seem to apply to the case of destroying, or injuring a ship, as to that of saving it. Both, when acted on the high seas between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are *primâ facie* proper subjects of inquiry in any Court of Admiralty which first obtains jurisdiction of the rescued, or offending ship, at the solicitation in justice of the meritorious, or injured parties."

Prior to the passing of the Imperial Admiralty Act of 1861, there were some decisions of Dr. Lushington which may be referred to. Thus in the *Johann Friederich* (3), he held that where both parties were foreigners, the important question affecting the jurisdiction of the Admiralty Court was whether the case was *communis juris*, and he held that questions of col-

(1) 1 C. Rob. at pp. 278, 279. (2) 114 U. S. at p. 362.
(3) 1 W. Rob. at p. 37.

lision were *communis juris*. And referring to the law of foreign attachment he said, "it is difficult to understand the ground of disputing the jurisdiction" of the Admiralty Court. See also the *Volant* (1). And in the *Griefswald* (2), he said: "In cases of collision it has been the practice of this country, and, so far as I know, of the European states, and of the United States of America, to allow a party alleging grievance by a collision, to proceed *in rem* against the ship wherever found. And this practice, it is manifest, is most conducive to justice, because in very many cases a remedy *in personam* would be impracticable." See also the *Golubchick* (3), which was an action for wages by Spanish seamen against a Russian ship, the property of Russian subjects.

Legislative history may perhaps show what decisions led to the enactment of sec. 7 of the Admiralty Act of 1861, (24 Vic. c. 10) which provides that "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." And in the *Courier* (4), Dr. Lushington held that under that section the English Court of Admiralty had jurisdiction to try a case of collision between foreign vessels in foreign waters. See also the *Diana* (5) and the *Charkieh* (6).

About the earliest exercise of jurisdiction by a Canadian Vice-Admiralty Court was the *Anne Johanne* (7), where the court held that it had jurisdiction in a case of collision between French and Norwegian vessels on the high seas. See also *Wineman* v. the ship *Hiawatha* (8).

The jurisdiction of the English Admiralty Court over foreign ships has been thus summarized in Mars-

(1) 1 W. Rob. at p. 387.
(2) Swab. at p. 435.
(3) 1 W. Rob. 143.
(4) Lush. 541.
(5) Lush. 539.
(6) L.R. 4 Ad. & Ecc. 59, 120.
(7) 2 Stu. Ad. R. 43.
(8) 7 Ex. C. R. 446.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

den's *Law of Collisions at Sea* (1), "Actions for collisions are said to be *communis juris*, and the Admiralty Court has never refused to entertain an action merely because both ships were foreign, or their owners not British subjects, or because the collision occurred in foreign waters."

In the Admiralty Courts of the United States this jurisdiction over collisions between foreign vessels has long been maintained As said by Marshall, C.J., in the *Mary* (2), "the whole world it is said are parties in an Admiralty cause, and therefore the whole world is bound by the decision." And in the *Invincible* (3) Story, J. said, "The Admiralty Courts of every country have general jurisdiction in cases of torts committed on the high seas, wherever the person or thing by which the tort is committed is within the territory." And in *Clarke* v *New Jersey Steam Navigation Company* (4), the same learned judge said, "If the present were a suit *in rem*, to enforce a right of property or a lien, or to subject it, as the offending thing (as in cases of collision), to the direct action of the court, the case could not admit of any real doubt; for in all proceedings *in rem*, the court having jurisdiction over the property itself, it is wholly unimportant whether the property belongs to a private person, or a corporation, a citizen or a foreigner, to a resident, or a non-resident, to a domestic, or a foreign corporation. In each and every case the jurisdiction is complete and conclusive." Cited with approval in the *Charkieh* (5).

The later cases sustain these opinions. *The Jupiter* (6), was the case of a collision in the North Sea between a Dutch schooner and a Russian barque, the owners of each being foreigners. Blatchford, J.

(1) 5th ed., p. 198.
(2) 9 Cranch at p. 144.
(3) 2 Gall. at p. 35.
(4) 1 Story at p. 537.
(5) L.R. 4 Ad. & Ecc. at p. 95.
(6) 1 Ben. at p. 542.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

said, "A general objection to the jurisdiction of the court is taken by the answer. Without going into any extended discussion of the question I am satisfied that this court has jurisdiction," citing the *Johann Friederich* (1), and other cases.

In the case of the *Eagle* (2), the Supreme Court of the United States held that the Admiralty Courts had jurisdiction to try cases of collision in Canadian waters. And in the *Maggie Hammond* (3) it further decided in favour of the jurisdiction of their Admiralty Courts in Canadian claims, where both the place of shipping and the place of delivery of cargo were foreign ports. That was an action between the Canadian owners of the cargo which was shipped in Scotland, and the Canadian owner of the ship, the arrest of the ship having taken place at Baltimore, in the United States. The court, after commenting on the English Act of 1861, and the jurisdiction exercised under it by the English Courts, held that where Maritime liens were enforceable in a foreign jurisdiction, the Admiralty Courts of the United States would exercise jurisdiction to enforce them, even though all the parties are foreigners; but that its enforcement was a matter of comity, adding that Maritime law partook more of the character of International law than any other branch of jurisprudence.

The defence in this action further contends that in any event the jurisdiction should not, as a matter of discretion, be exercised by this court. *In One Hundred and Ninety-four Shawls* (4) the court held that although it rested in the discretion of a Court of Admiralty to hear and determine a controversy between foreigners, it had found no case in which the court had declined the jurisdiction. And Story, J. in *The Jerusalem* (5),

(1) 1 W. Rob. at p. 36.
(2) 8 Wall. 15.
(3) 9 Wall. 435.
(4) 1 Abb. Adm. 317.
(5) 2 Gall. 191.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

thought that the refusal of jurisdiction by an Admiralty Court might well be deemed a disregard of national comity.

I must therefore hold that this Canadian Court of Admiralty, having the same jurisdiction over the like places, persons, matters things as the High Court of Admiralty in England, has jurisdiction to try the maritime question of collision raised by the pleadings in this case.

The main defence relied upon is "inevitable accident." The evidence of Captain Carney of the *Whitney* is that this vessel is 245 feet long by 40 feet beam and of 1,200 or 1,400 tonnage, or net 1,090 tons. That on the 28th November, 1901, she steamed from Toledo to Sandusky to take on a cargo of coal, that she arrived at Cedar Point in the bay about midnight, and proceeded through the channel to the Baltimore and Ohio Dock; that when about 2,000 feet from the dock he gave the signal to the engineer "to go ahead strong;" that about three times he checked the speed; that owing to the wind blowing about 35 miles an hour, the steamer made lee way, and that each time she did so, he worked her up again; that her speed in approaching the dock was about 2½ miles and not over 3 miles an hour; that after the last signal to stop she moved about 20 feet, and he then gave the signal to reverse the engine, his statement being as follows: Q. 64. "About how far out from the pier was the *D. C. Whitney* at the time you gave the signal to back? A. About 600 feet."

He further states that when about 300 feet from the pier he discovered that the engine did not reverse, owing to its getting on the centre, and that when she reached the pier her speed was about one mile an hour; that the tendency of the wind was to blow her off the dock, making her list to port, and that he was

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

holding her up to the wind. That she struck the side of the dock about 30 feet from the pier and bounded off, and then slipped along the dock to the *Monguagon* and struck her near the centre of her aft upper works and drove her about 150 feet up the dock.

The evidence of Captain Pope of the *Monguagon* is that his ship had a bright light aft about twenty feet above the deck, and about ten or twelve feet from the stern; that the *Whitney* struck the stern of the *Monguagon*, cut her yawl in two, stove in about three feet of the after part of the cabin, opened her seams and drove her up the dock for about 300 feet, causing her to fill and sink. The *Monguagon* is 138 feet long, and was moored to the dock by four lines, one a nine inch hawser, and three others of eight, seven and six inches, as the wind was blowing fresh that night. The force of the collision caused the nine-inch line to pull out the timber-head, and to break the timber-heads each of eight-inch square to which the three other lines were fastened. Other evidence proved the *Monguagon* was moored by the above lines at about 175 feet from the pier of the dock.

The general evidence given by the defendants was to show that it was not customary to keep a man in the crank-pit in close proximity to the pinch-wheel so as to give it the necessary turn to get the engine off the centre; and in giving such evidence Captain Lyons says, "You asked me if it was customary to keep a man standing at the pinch-wheel. You know it is only when you go into port that there would be two men in the engine room It is only down one short flight of steps to this crank room, where he can pinch this off. It wouldn't take a man three seconds to get from the engine room to the crank-pit."

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

The evidence of Mitchell, one of the defendant company's engineers, and of Sager, who was one of the engineers of the *Whitney* at the time of the collision, substantially agree. Sager's evidence is as follows:—Q. 30. "How long did it take to get the engine off the centre from the time you found it was on till you got it off?—A. Not more than a minute and a half, perhaps two minutes." Q. 44. "If you had been standing there now how long would it have taken you to get the engine off the centre?—A. Half a minute;" and to a similar question (Q. 46) he answered "in a minute anyway."

Snider, another engineer witness for the defendants, gave evidence that it was not customary to have a man standing by with the pinch-bar in his hand, and that he had never heard of it "except in places like going up Chicago Creek or Buffalo Creek," and he also said: Q. 48. "You would always have a man pretty close around to get hold of that crowbar? A. I would be around myself." Q. 57. "Is it good seamanship to practice it?" A. "Yes." Q. 52. "Would you say it was a reasonable precaution to take?" A. "Yes, I think so." Q 53. "How long would it take to pry off the centre supposing you were there ready?" A. "A few seconds if you were right there."

Southgate, another engineer witness for the defendants, said: Q. 44. "Don't you think it is good navigation to have either a fireman or second engineer ready to take the engine off the centre in coming into a crowded harbour? A. It would be if we had enough on the boat to do it."

The evidence given by the plaintiffs in rebuttal may be summarized as follows: Tarseney—That if a man was stationed at the pinch-wheel, an engine could be got off the centre in a few seconds, but if he had to go down to the hold, a minute but not more than two.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

And he further stated: "If an engine is left to itself after the steam is shut off there is a certain momentum that will carry that engine a distance. There may be one, two, or three revolutions, but the engineer in charge of the engine can tell by the force of the motion pretty well whether it is going to get on the centre. All he has to do is to give a little quick motion—give a little steam and it is all right." And in answer to my question he said it was the duty of the engineer to stop his engine in such a form that it will take steam immediately, and be ready to go either forward or backward. And he subsequently said: "A careful engineer would have avoided getting the engine on the centre, and therefore it couldn't have been inevitable."

Blanchard gave evidence that a competent engineer could avoid his engine getting on the centre when he saw it coming; and that an engine would be got off the centre in half a minute, by keeping it going; and when the engineer would see it dropping to pull it up a little.

Bowen, Chief Engineer on the U. S. Revenue Cutter *Morrill*, stated that half a minute would be sufficient to go down to the crank-pit and get the engine off the centre; and he said: Q. 17. "If an engine did become centered, and they did not have a man standing by, what would you say it was?" A. "Carelessness." Q. 21. "If an engineer is paying proper attention to the engine, can the engine be prevented from centreing?" A. "Yes;" and he further said that the momentum of a loaded ship would be greater than that of a light ship.

The evidence established the following facts: That the engine of the *Whitney* got on the centre when she was about (600 plus 175) or 775 feet, or over one-eighth of a mile, from the *Monguagon*;

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

that the force of the wind was at the rate of thirty-five miles an hour, blowing the *Whitney* off the pier of the dock at which the *Monguagon* was moored, but that she struck the dock thirty feet from the pier and then slid along the dock about 145 feet further (the *Monguagon* being moored about 175 feet from the pier), and then struck the stern of the *Monguagon*, cut her yawl in two, stove in about three feet of her upper works and cabin, opened her seams, pulled out one and broke other timber-heads to which the lines of the *Monguagon* were fastened, and drove her up the dock for about 300 feet, where she filled with water and sank. The speed of the *Whitney* as she reached the pier was estimated by her captain at one mile an hour, and the engineer stated he got the engine off the centre in about a minute and a half, perhaps two minutes; and that the chief engineer then gave her the steam so that she should reverse. But it has been left more to inference rather than to direct proof that the engineer reversed before the collision, for the momentum force of the large but unloaded ship *Whitney*, striking a dock and then scraping along it about 140 feet and striking a three-fourths loaded schooner fastened by four hawsers to the dock bending one block and breaking others, and cutting the yawl in two and staving in the stern of the *Monguagon*, and driving her about 300 feet up the dock, must be held to lead to the inference that the captain's estimate of the speed of his ship comes within the following observations of Jeune, J. in the *P. Caland* (1) "If it were necessary to consider the matter, I should have to deal with the question of the force of the blow, and the indications which that presents, I am inclined to think that considerations upon that head might arise which might lead me to think that the

(1) [1891] P. 318, affirmed, 1892, P. 191.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

P. Caland's speed was somewhat greater than it is said it was." And this seems to be sustained by the fact that when the *Whitney* was at least an eighth of a mile from the pier the order to reverse the engine was given. If the captain's evidence of the speed is correct, then in the absence of clear evidence the inference would seem to be allowable that the engine was not got off the centre and reversed promptly, or at a safe distance of the *Whitney's* passage over the one-eighth of a mile she had to move to reach the *Monguagon*, after her engine got on the centre.

The law of inevitable accident where the maritime offence of collision is charged, requires the offending party to prove that he could not possibly prevent it by the exercise of ordinary care, caution, prompt action or maritime or engineering skill. It is not enough to show that the damage could not be prevented by the offending party at the moment of collision; for one of the crucial questions is—could previous measures have been adopted which would have prevented it or rendered the risk of it less probable. As tersely put by Dr. Lushington in the *Mellona* (1): "By inevitable accident I mean that which no skill, no vigilance, can possibly prevent. If there be a probability of prevention, it is impossible to say that the party was not to blame." And in the *Despatch* (2), he added "inevitable accident is the act of God which no ordinary skill or caution can prevent. It is not a mere accident, but an accident which human caution could not avoid." And Lord Chelmsford, in appeal, said: "In order to establish a case of inevitable accident, he who alleges it must prove that what occurred was entirely the result of some *vis major*, and that he had neither contributed to it by any previous act, or omission, nor, when exposed

(1) 11 Jur. at p. 784. (2) 3 L. T. N. S. 220.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

to the influence of the force, had been wanting in any effort to counteract it;" and Lord Esher's definition in the *Merchant Prince* (1), may also be referred to

The pinch-wheel and pinch-bar are parts of the machinery of the engine, as much as the steam steering gear is part of the steering machinery of the ship, and should therefore be watched with care when coming into a harbour, or where there is any possible risk of a collision. And in the *Merchant Prince* (2), Lord Esher, reversing Butt, J. (3), commenting on the stretching of the chain of the steering gear of a ship said: "They might have had a man underneath to disconnect the wheel at any moment if they saw the chain getting loose. But then there was the steering wheel aft. Why did they not have a man there so that if anything happened, in a moment he could steer the ship? That is not done. It is said that ordinary sailors would not think of that duty; but these sailors who, I have no doubt, were expert and good sailors, might have thought that there were means of taking the ship out to sea without danger that morning." See also the *Peerless* (4), and the *Merrimac* (5), and *Culbertson* v. *Shaw* (6). The evidence of marine engineers, and of men of nautical skill, in this case proves that an engineer can prevent his engine getting on the centre when he sees it coming, by giving a little steam; and that he could prevent his engine getting on the centre if he skilfully handled it; and that if there was a man standing by the pinch-wheel and pinch-bar, he could have got the engine off the centre in about half a minute. Some of the engineers go so far as to say that it was a want of care to allow an engine to get on the centre. The weight of evidence

(1) [1892] P. at pp. 187, 188.
(2) [1892] P. at pp. 186, 187.
(3) [1892] P. at p. 14.
(4) 2 L.T. N.S., 25.
(5) 14 Wall. 199.
(6) 18 How. 584.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

satisfies me that the term "inevitable accident" is not applicable to this case, according to the definition given in the cases cited.

The evidence of the Captain of the *Whitney* as to the steering of his steamer is, I consider, not consistent with her course from Cedar Point. She had to steer south-west against a strong north-west wind blowing at the rate of thirty-five miles an hour, driving her westerly from the dock; and that in order "to turn into the dock" and reach her berth, she had to use her helm so as to counteract the force of the wind. Her steering gear was not out of order. And the following evidence of the Captain seems to be material as affecting the defence of inevitable accident: 223. Q. "If you had allowed the wind to have had its way, you would have avoided the *Monguagon*? A. If I had allowed the wind to have had its way, we would have been on the channel bank before we got to the *Monguagon*."

Nor does the evidence warrant the finding that a proper lookout was observed on the *Whitney*. As the steamer was nearing the dock, the mate and the lookout man were dividing their attention between the lookout and preparing the ropes for mooring the ship. A similar division of duty was considered in the *Twenty-One Friends* v. *John H. May* (4), where the lookout was dividing his attention between the lookout and reefing sails. The court held in that case that "No one was devoting his undivided attention to the duty of the lookout;" and that where it does not affirmatively appear that a proper lookout had been observed, the court cannot find that the accident was unavoidable.

The defence therefore fails, and the plaintiffs are entitled to a decree declaring the steamer *D. C. Whitney*

(1) 33 Fed. R. 190.

1905

ST. CLAIR NAVIGATION CO. AND THE SOUTHERN COAL AND TRANSPORTATION CO. v. THE SHIP D. C. WHITNEY.

Reasons for Judgment.

liable for the damages caused by the collision. Reference to the Deputy Registrar at Windsor to assess the damages, and to tax the costs of the action and reference.

Judgment accordingly.

INDIANA MANUFACTURING COMPANY ..... } PLAINTIFF;

AND

HARRY WARD SMITH AND THE GOOD ROADS MACHINERY COMPANY, LIMITED ..... } DEFENDANTS.

1905
Oct. 23.

Patent for invention—Pneumatic straw stackers—Combination—Assignment—Right of assignor to impeach validity of patent—Right to limit construction—Estoppel.

The assignor of a patent, sued as an infringer by his assignee, is estopped from saying that the patent is not good; but he is not estopped from showing what it is good for, *i.e.*, he can show the state of the art or manufacture at the time of the invention with a view to limiting the construction of the patent.

2. In an action for infringement against the assignor of a patent for improvements in pneumatic straw stackers, it appeared that an earlier patent assigned by the defendant to the plaintiff excluded everything but the narrowest possible construction of the claims of the second patent. In the latter, speaking generally, the combination was old, each element was old, and no new result was produced; but in respect of one of the elements of the combination there was a change of form that was said to possess some merit. Beyond that there was no substantial difference between the earlier and later patents.

Held, that while as between the plaintiff and any one at liberty to dispute the validity of the later patent, it might be impossible on these facts to sustain the patent, as against the assignor, who was estopped from impeaching it, it must be taken to be good for a combination of which the element mentioned was a feature.

THIS was an action for the infringement of a patent for improvements in pneumatic straw stackers.*

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

June 2nd, 1905.

The case was heard at Toronto.

*REPORTER'S NOTE:—An earlier case between the plaintiff company and the defendant Smith, and others, involving a similar patent, will be found in 9 Ex. C. R. 154.

1905

INDIANA MANUFACTURING CO. v. SMITH.

W. Cassels, K.C., and *W. D. Hogg, K.C.*, for the plaintiffs;

C. A. Masten and *G. Lynch-Staunton* for the defendant, H. W. Smith.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (October 23rd, 1905), delivered judgment.

The action is brought by the plaintiff against the defendants for the infringement of the first and second claims of the Canadian letters-patent numbered 84,183 granted for certain alleged new and useful improvements in pneumatic straw stackers. The defendant Harry Ward Smith sets up four defences: First, that he has not infringed; secondly, that the matter in controversy is *res adjudicata*; thirdly, that the patent is void because of the failure of the plaintiff to carry on in Canada the manufacture of the invention according to the statute; and fourthly, that the patent is void by reason of the importation by the plaintiff of the invention contrary to the statute. The other defendant, the Good Roads Machinery Company, Limited, set up the first, third and fourth defences mentioned; and also that the invention was not new, that the alleged inventors were not the first or true inventors; and that the invention was not useful.

The action as against the defendant last-mentioned has been discontinued.

The patent sued on was granted to the plaintiff company upon an application and specification made by the defendant Harry Ward Smith and his brother Martin Franklin Smith, the specification bearing date of the 26th of December, 1901. On the 15th of January, 1902, Martin Franklin Smith assigned his interest in the invention and application to Harry Ward Smith and the latter assigned to the plaintiff company on the 20th of December, 1902, and the patent was

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

granted to the company on December 1st, 1903. A prior patent for improvements in pneumatic straw stackers had been granted to the defendant Harry Ward Smith and his brother Martin Franklin Smith upon an application and specification made by them. The specification in case of the earlier patent is dated the 26th of August, 1901, and the patent bearing the number 73,416 was issued on the 15th of October of that year. On the 15th of January, 1902, as appears from the allegations and admissions to be found in Exhibit "J", Martin Franklin Smith assigned his interest in letters-patent numbered 73,416 to the defendant Harry Ward Smith, and the latter assigned the same to the plaintiff on the 5th of January, 1903. It will be observed that the first patent was granted prior to the date of the specification of the second patent; and also that the assignment of the first patent (No. 73,416) to the plaintiff bears a later date than the assignment to the company of the second invention and application. The consideration, however, mentioned in the assignment of the second invention is the nominal one of dollar, while the defendant Harry Ward Smith admits having received one thousand dollars as consideration. The following is taken from his cross-examination by Mr. Cassels:

"Q. You were paid a money consideration, were you not, for the assignment of this patent?—A. Yes.

Q. And it amounted to quite a sum of money?—A. Not very much in a case of that kind.

Q. A thousand dollars at first, I understand?—A. There is a good deal of expense.

Q. Just answer my question. It was a $1,000 was it not?—A. Yes."

I infer from this and the fact that the assignment produced mentioned only a nominal consideration that Mr. Cassels and the witness had in their minds

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

the first patent as well as the second, and that the two assignments constituted one transaction although upon the face of the documents there is some sixteen days between the respective dates. In that view of the case, probably, in any view of the case, it becomes important to see wherein, in the matters now in controversy, the two applications and specifications were alike and wherein they differed. And that it seems to me may be most conveniently done by placing extracts therefrom in double columns opposite to each other, by omitting the portions that are not material to the consideration of this case which has to do with a part only of a pneumatic stacker; namely, with the discharge pipe, the sectional elbow, and the arms by which the sections of the elbow are supported in combination with means for collapsing or extending the sections of the elbow, and means for limiting such extension movement.

SPECIFICATION OF AUGUST 26, 1901.	SPECIFICATION OF DECEMBER 26, 1901.
Patent issued October 15th, 1901, and numbered 73,416.	Patent issued December 1st, 1903, and numbered 84,183.
To all whom it may concern:	*To all whom it may concern:*
Be it known that we Harry Ward Smith * * and Martin Franklin Smith * * have invested certain new and useful improvements in Pneumatic Straw Stackers, of which the following is a specification:	Be it known that we Harry Ward Smith * * and Martin Franklin Smith * * have invented certain new and useful improvements in Pneumatic Straw Stackers, of which the following is a specification:
The object of our invention is to devise a simple, cheap and effective pneumatic straw stacker, and it consists essentially of certain improvements in the	The object of our invention is to devise a simple, cheap and effective pneumatic straw stacker and it consists essentially of certain improvements in

means for introducing the straw into the fan housing in the means for discharging the chaff either with the straw or separately; in an improved and simplified turntable and elbow; and in certain other details of construction hereinafter more specifically described and then definitely claimed.

* * *

The discharge pipe H is connected with the interior of the fan housing in the usual manner, its inner side opening substantially at or near the point where the narrow part of the housing and the wide part come in line. See Fig. 3.

* * *

The discharge pipe H passes directly upward and is fitted loosely within the lower end of the elbow M so that the elbow may turn freely around as hereinafter described. The elbow is formed in three pieces *g*, *h*, *i*. To the lower piece *g* of the elbow is secured a metal ring *j* provided in front with two suitably journalled rollers *k* and behind two suitably journalled rollers k^1. The rollers *k* are adapted to engage the underside of the metal ring N and the rollers k^1 the upper side of the same ring. This metal ring is secured to the board *l* by means of outwardly

the means for introducing the straw into the fan housing in the means for discharging the chaff either with the straw or separately; in an improved and simplified turntable and elbow and in certain other details of construction hereinafter more specifically described and then definitely claimed:

* * *

The discharge pipe H is connected with the interior of the fan housing in the usual manner; its inner side opening substantially at or near the point where the narrow part of the housing and the wide part come in line. See Fig. 3.

* * *

The discharge pipe H passes directly upward and is fitted loosely with the lower end of the elbow M so that the elbow may turn freely around as hereinafter described. The elbow is formed in three pieces *g*, *h*, *i*. To the lower piece *g*, of the elbow is secured a metal ring *j* provided in front with two suitably journalled rollers *k* and behind two suitably journalled rollers k^1. The rollers *k* are adapted to engage the underside of the metal ring N and the rollers k^1 the upper side of the same ring. This metal ring is secured to the board *l* by means of out-

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

and downwardly extending lugs *m* so that the free engagement of the rollers *k* and k^1 with the metal ring is not interfered with.

As the weight of the extension O of the discharge pipe presses downward at the rear side of the elbow and upwards at the front side of the elbow the rollers *k* and k^1 provide for the proper taking of this strain with rolling friction on the ring N. Arms *n* are secured to the ring *j* and extend rearwardly to a point or line with the centre from which the sections of the elbow are struck.

Sections *h*, *i* are respectively connected to arms n^1, n^2 on a common centre. The sections *g* and *h* telescope within the sections *h* and *i* respectively, as shown, and thus by telescoping these sections the extension O of the discharge pipe may be given any desired upward inclination.

Short sections of wire or chain *o* may be used to connect the sections of the elbow to limit their motion and retain them in their proper position.

It will be necessary to provide a slot at the point *p* to enable the section *i* of the elbow to work over the arm n^1 of section *h*.

To the metal rim *j* I con-

wardly and downwardly extending lugs *m* so that the free engagement of the rollers *k* and k^1 with the metal ring is not interfered with.

As the weight of the extension O of the discharge pipe presses downward at the rear side of the elbow and upwards at the front side of the elbow the rollers *k* and k^1 provide for the proper taking of this strain with rolling friction on the ring N. Arms *n* are secured to the ring J and extend rearwardly to a point or line with the centre from which the sections of the elbow are struck.

Sections *h*, *i*, are respectively connected to arms n^1, n^2 on a common centre. The sections *g* and *h* telescope within the sections *h* and *i* respectively, as shown, and thus by telescoping these sections the extension O of the discharge pipe may be given any desired upward inclination.

Short sections of wire or chain *o* may be used to connect the sections of the elbow to limit their motion and retain them in their proper position.

(No corresponding provision.)

To the metal rim *j* I

nect standards P on which is journalled a winding drum Q provided with a suitable pawl and ratchet retaining device *q*. A crank handle *r* is also provided by which the winding drum may be operated. A cord *s* connects this drum with the upper end of the arm n^1 secured to the section *i* of the elbow. By operating this drum the elevation of the extension of the discharge pipe may be varied as desired.

* * *

What we claim in our invention is:—

(Then follow ten claims of which the seventh, eighth and tenth only are relevant to the case.)

7. In a pneumatic stacker, a discharge pipe, a sectional telescopic elbow, and arms connected to the sections and pivoted together at a point substantially coincident with the centre from which the curve of the elbow is struck, in combination with means connected with the elbow for adjustably collapsing or extending the section at will, substantially as described.

8. In a pneumatic stacker, a discharge pipe, a telescopic elbow made in three sections and arms connected to the sections and pivoted together at a point

connect standards P on which is journalled a winding drum Q provided with a suitable pawl and ratchet retaining device *q*. A crank handle *r* is also provided by which the winding drum may be operated. A cord *s* connects this drum with the upper end of the arm n^1 secured to the section *i* of the elbow. By operating this drum the elevation of the extension of the discharge pipe may be varied as desired.

* * *

What we claim in our invention is:—

(Then follow fourteen claims of which the first and second only are in issue in this case.)

1. In a pneumatic stacker, a discharge pipe, a telescopic elbow made in three sections and arms connected to the sections and pivoted together at a point substantially co-incident with the centre from which the curve of the elbow is struck; in combination with means connected with the elbow for adjustably collapsing or extending the sections at will, substantially as described.

2. In a pneumatic stacker, a discharge pipe, a telescopic elbow made in three sections, and arms connected to the sections and pivoted together at a point

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

substantially co-incident with the centre from which the curve of the elbow is struck, one of the end sections being slotted to embrace the arm of the centre section when the elbow is collapsed, in combination with means connected with the elbow for adjustably collapsing or extending the sections at will, substantially as described.

10. The tenth claim is identical in terms with the eighth with the addition of the following feature "and means for limiting "the extension movement "of each section," substantially as described.

substantially co-incident with the centre from which the curve of the elbow is struck in combination with means connected with the elbow for adjustably collapsing or extending the sections at will, and means for limiting the extension movement of each section, substantially as described.

It will be observed that the differences between the descriptions of the inventions in the two cases and of the claims made are very slight indeed. In the first specification the middle section as described and shown is carried by a single arm so located and connected with that section that it was necessary to have a slot in the upper section to permit the latter to pass over or telescope the middle section.

That slot is described and claimed as being something necessary and essential.

The drawings attached to the second specification show a different location of the arm whereby the necessity of the slot is obviated; and the elbow when extended does not present an opening through which dirt and small straws might when the stacker is being operated be discharged. That change or improvement in the mode of attaching the arm to the middle section of the elbow is not described in the second

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

specification; but as stated it is shown in the drawings attached thereto. The claim in the second patent is limited to a telescopic elbow made in three sections while in the seventh claim of the first patent the claim is made for a sectional telescopic elbow without any reference to the number of such sections. But in the specification it is stated that this elbow is made in three sections, and it is so shown in the drawings. There is no difference between the two patents in this respect, or so far as they are in question in the action, in any other respect than that which has been pointed out. And with reference to this difference between the second patent and the first it was not at the time a new thing to so connect the supporting arms of an adjustable or telescopic elbow to the sections thereof that such slots as those mentioned were unnecessary. An illustration of a similar attachment or connection of the supporting arms with the sections of the elbow is to be found in the United States Patent numbered 396,773 granted on the 29th of January, 1889, to Lyman Smith for useful improvements in adjustable curved pipe sections or elbows.

But in this case the plaintiffs company derives its title to the invention through an assignment from the defendant Harry Ward Smith and the latter is estopped from setting up or showing that he and his brother were not the first or true inventors of the alleged invention or that it is not new or useful, or that there was no invention or that the specification was not sufficient. It was contended that he could not give evidence of the state of the art or manufacture so as to narrow or limit the construction of the patent. The contention is not of any considerable importance in this case as the first patent, the particulars of which were known equally to both parties to the transaction, shows sufficiently at what stage the manufacture of

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

pneumatic stackers had arrived. But I have seen no reason to modify in any way the view that I expressed on that point in the action between the same parties on the earlier patent. (*The Indiana Manufacturing Co.* v. *Smith* (1). In *Hocking* v. *Hocking* (2), Lord Watson said "the appellant is patentee of the invention "which he is said to have infringed, the respondents "having acquired the right to it by direct assignment "from him. He has probably been well advised in "abstaining from impeachment either of the novelty "and utility of the invention, or of the sufficiency of "the specification, and the case must therefore be dis-"posed of upon the assumption that the patent is in "all respects valid. But notwithstanding the peculiar "relation in which he stands to the respondent, he "cannot be held to have infringed it, if as he alleges "he has done no more than would have been permissi-"ble to any independent member of the public who "admitted the validity of the patent." An assignor of a patent, sued as an infringer by his assignees, is estopped from saying that the patent is not good; but he is not estopped from showing what it is good for; and that can only be done by reference to what was known at the time of his invention.

In the present case there is however as has been suggested no difficulty on that point. The earlier patent assigned by the defendant to the plaintiff concludes everything but the narrowest possible construction of the claims of the second patent now sued on. Speaking generally, and omitting for the moment the minor distinguishing features, the combination is old, each element is old, and no new result is produced. But then in respect of one of the elements there is a change of form that is said to possess some merit. The supporting arm or arms (as the case may be) of the

(1) 9 Ex. C. R. 154. (2) 6 R. P. C. 77.

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

middle section of the elbow is or are so connected therewith that a slot in the adjoining section is avoided. That is all. It may be that as between the plaintiff and any other person who disputed the validity of the patent it would be impossible on these facts to sustain the patent. That is not the question here and I express no opinion as to it. But as against the defendant, or any person who admitted the validity of the patent it must be taken to be good for a combination of the features mentioned of which that is one.

What is it, then, that the defendant has done? He has manufactured pneumatic stackers in which he has used a discharge pipe, a telescopic elbow made in three sections with arms connected to the sections and pivoted together at a point substantially co-incident with the centre from which the curve of the elbow is struck, in combination with means connected with the elbow for adjustably collapsing or extending the sections at will and means for limiting the extension movement of each section. And the supporting arms connected with the middle section of the elbow are so located and arranged that the slot mentioned in the earlier patent is not necessary. As has been observed the specification itself does not show how this is to be done, and it is not clear, I think, whether the drawing shows one arm attached to the lower and inner part of the section or to a ring passing round the section; or two arms passing round the lower part of the section in the form of a bail as it was called. So far as I can see the drawing shows either a ring with one arm or a bail with two; but after all the difference is not important. There is not, it seems to me, a sufficient difference of construction to enable the defendant to escape no matter how narrowly the claim is construed.

1905

INDIANA MANUFACTURING CO. v. SMITH.

Reasons for Judgment.

It is argued, however, that the question is concluded by the former action to which reference has been made. That is not my view of the matter. The present action is brought upon a different and later patent; which if good is good for something that was not granted in the former patent. It is not possible under these circumstances, it seems to me, for the issues to be the same; and as a matter of fact they are not the same. In the earlier case there was a feature in one of the elements that the patentee had declared to be essential and necessary that he was not then using. The particular mode of constructing the elbow has been altered so that this feature is omitted, and its omission is claimed to have, and appears to have, some advantages. A patent has been granted which in respect of this elbow cannot be distingushed from the earlier patent except in respect of this feature, and because of the relation of the parties it has to be be taken to be true, whether it really be true or not that the patent is good. The defendant has manufactured pneumatic stackers in which he uses a telescopic elbow constructed in accordance with the second patent. That question was not in issue in the first suit and is not concluded.

No evidence was offered on the other defences set up.

There will be judgment for the plaintiff company with the relief that it is usual to grant in such cases, but the relief must be limited to the particular thing or part of the stacker in controversy and to its manufacture, sale or use in the particular form described.

And there will be a reference to take an account or to assess damages, and the plaintiff will have its costs.

Judgment accordingly

Solicitors for plaintiffs: *Hogg & Magee.*

Solicitors for defendants: *Masten, Starr & Spence.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

KENNEDY ..... PLAINTIFF; 1905 Dec. 29.

v.

THE *SURREY*.

Collision—Boom—Interference with navigation—Nuisance.

Nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance.

2. Where an interference with navigation is established it is a public nuisance which any one specially injured or damnified by it has a right to remove.

3. While no person has the right to continuously appropriate to himself any portion of the water, or bank or shore of navigable waters for the purpose of making up a boom of logs, the use thereof in a reasonable manner and for a reasonable period, having regard to local conditions, will not amount to an interference with navigation.

ACTION for damages arising out of the collision of a ferry-boat with a boom of logs.

The facts are stated in the reasons for judgment.

November 6th, 1905.

The case was heard at Vancouver before Mr. Justice Martin, Local Judge for the British Columbia Admiralty District.

E. P. Davis, K.C. and *W. Myers Gray* for plaintiff;

Joseph Martin, K.C. and *R. Cassidy, K.C.*, for the ship.

Mr. Cassidy for the ship, referred to R. S. C., 1886, cap. 92, as to the piles driven and boom constructed so as to interfere with navigation of a river. He cited *Wilson* v. *Coquitlam* (1), and *Queddy River Boom Co.* v. *Davidson* (2). The only question is whether this

(1) Unreported. (2) 10 S. C. R. 222.

1905

KENNEDY v. THE SURREY

Argument of Counsel.

particular boom was, if it was one within navigable waters, within the meaning of the Act so as to interfere with navigation. The expression "interfere" does not mean a direct obstruction to the fairway, but something which would interfere with navigation at that point. A person placing an obstruction contrary to the Act is a trespasser and must take the consequences. The ship had a right of access to the landing place without obstruction, and nothing short of leave and licence of the most exact kind can take that boom out of the position of being there at owner's risk. While we might be condemned if guilty of gross negligence, yet there is no negligence proved here, and there is no "wilful collision" as charged in the statement of claim; the navigation was careful and the captain took all ordinary precautions. Evidence is not clear that the ship ever struck the boom rope, and if she did that would not constitute negligent navigation, for the proximate cause of the accident was the rope being where it had no business to be.

This is an action *in rem*, and should have been brought within a reasonable time in order to avoid any complications through a transfer of ownership. Here the writ was not issued until July 31, 1905, and the cause of action occurred in June, 1903. Here there has been a transfer.

Mr. Martin, on the same side, cited *The Kong Magnus* (1); *Abbott on Merchant Shipping* (2). As to laches; a municipal corporation cannot ordinarily be sued after a year. Here the corporation should have been sued and not the new owner of the ship. There is no explanation of this long delay. The claim is statute barred in the ordinary courts, and the Admiralty Court should not allow it to be brought in.

(1) [1891] P. 223. (2) 14th ed. 1040.

1905

KENNEDY v. THE SURREY

Argument of Counsel.

Mr. Davis: A claim is not a stale one which in a little over two years is on trial; *Re Maddever* (1). The delay must be long and unconscionable and such as to make it a fraud or a hardship. There is no suggestion of that here, for it is admitted that the corporation of New Westminster is defending the action. It is true that there is a year's limitation to an action *in personam* against the city, but that is no answer to an action *in rem* here. *Wilson* v. *Coquitlam*, *supra*, does not apply here. It is not to be considered that it is necessary to obtain the approval of the Governor in Council for a boom of logs to be kept in a river for a night or two. R.S.C., cap. 92, applies only to permanent structures, such as a wharf or a boom across the river. It is clear that the boom rope in this case was broken by the ship.

As to negligence; even if the boom was an interference with navigation, defendant must shew that he collided without negligence. He cited *Bank Shipping Co.* v. *City of Seattle* (2) and the cases there cited; *The Uhla* (3); *The Zeta* (4). But if the boom was where it had a right to be, then the defendant should have kept away. Plaintiff had permission to tie up the boom, and later it was moved further down, after notice received. Defendant had no authority to run in and use for a wharf that which was a roadway.

As to skilful navigation, the captain admits that an ordinarily skilful navigator could have got out without striking the boom; he struck it and therefore must have been negligent.

MARTIN, L. J. now (December 29th, 1905), delivered judgment.

A question of general importance is raised in this action affecting the public right in navigable waters, and in particular the rights and obligations of persons

(1) 27 Ch. D. 523.
(2) 10 B. C. R. 513.
(3) 19 L. T. N. S. 89.
(4) [1893] A. C. 468.

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

using such waters for the booming and transportation of logs.

The steamship *Surrey*, a double-ended ferry-boat, owned and operated by the Corporation of New Westminster across the Fraser River to a wharf bridge (or approach) and landing-place, also owned, as is admitted in the Statement of Defence, paragraph 10, by the same corporation, made, in the early morning of Tuesday, June 23rd, 1903, her first trip that day to said wharf; and in making her landing used for the first time a scow moored to the down stream (west) side of the approach to the wharf, which scow had been put into position the evening before. Before that time the landing had been made at a more convenient part of the wharf proper, much further into the stream and better situated for the purpose, but owing to the flooded condition of the rapidly rising river, which was running with a very swift current of some six miles an hour, the wharf had become so damaged and unsafe that the scow had to be brought to enable a landing to be effected. It was placed end on to the said approach to the wharf, which approach, or as it was sometimes spoken of as a bridge or pier, was of planks set on mud sills, the wharf structure proper, being on piles. It is admitted by the defence that this new landing place was closer to the bank than the old one, and the scow so placed projected its full length down stream and towards a boom of shingle bolts owned by the plaintiff. The steamer that morning made her landing parallel to the shore, as described by the witness Smith, and lay end on end to the scow so that the vehicles were driven straight on board; the other end of the steamer pointed in the direction of the boom; I say "end" because properly speaking she has neither bow nor stern, both ends being constructed so as to be used alternately for either

purpose; she was about 120 feet long. At that time the boom was not attached to the wharf but was moored by two shore hawsers to two piles on the bank above high water mark. At a distance of 315 feet down stream from the outer corner of the lower end of the scow was another pile, standing in the stream some seventy feet from the shore line at ordinary high water. The current at the time was always down stream, the flood overcoming the flow of the tide. The boom was also fastened to said pile D, and to another similar pile E lower down and nearer the shore; and these five piles formed part of a set which was driven eighteen years ago at that point for the purpose of making booms fast, and have been so used ever since. The corporation, as well as the officers of the steamer, were aware of the position of the boom, because when the plaintiff began to make it up and fill it with shingle bolts he applied to, and got permission from, the Council to use the wharf for the purpose of unloading bolts therefrom, as set out in the City Clerk's letter of May 6th, 1903. On the 13th of June he had filled his boom and was waiting for the sawmill company to tow it away, but they did not do so as arranged; and though I am satisfied the plaintiff made every reasonable effort to obtain a tug for that purpose he was unable to do so, owing to the rapid rise of the water which rendered it dangerous to attempt to take the boom through the draw of Blue Island Bridge down the river. On the 18th the plaintiff received a notice from the City Clerk asking him to remove the ropes from the wharf owing to the danger from the increased strain caused by the swift current. On the following day he also received, through his brother, a letter from the chairman of the Board of Works as follows:

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

"MR. G. KENNEDY:

"The City Council wished me to see you if you would be kind enough to see your brother about the boom of shingle bolts that is made fast to ferry landing on south side of river. Some of the piles have gone out of place already and the Council is afraid that the extra strain of the boom with so strong a current running might do some damage to the wharf. He could make the boom fast to the boom piles along the shore.

Please have your brother attend to this.

"Yours truly

(Sgd.) W. A. JOHNSON."

On the next day, Saturday, the 20th, he made the boom fast to the shore piles B and C, but left the rope to the wharf still in position. Next day, Sunday, the captain of the steamer cut this wharf rope after notifying the plaintiff to that effect, and the boom dropped a little down stream and nearer towards the shore and into the position it occupied at the time of the accident. In my opinion, in the unusual and uncontrollable circumstances, the captain was justified in cutting the rope on the principle of preservation of property in an emergency pointed out by Chancellor Boyd in *Langstaff* v. *McRae* (1). The top point of the boom was then some 120 feet from the nearest point of the scow and some 20 feet nearer to the shore. The boom was between 360 and 400 feet long, narrow at the upper end, but at the lower, where the current carried most of the bolts, it widened out into something like the shape of a pear. At a point about 300 feet below the scow the boom was a little further out in the stream than the scow.

A dispute arises as to what happened when the steamer left the scow to return across the river, and

(1) 22 Ont. R. 78, 86.

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

the fact that she was the cause of the boom breaking is denied; but I am satisfied beyond doubt on the evidence of the disinterested witness that she was, and that it happened by her backing into it, or the main hauser which held it. The question then arises, assuming that the plaintiff was justified in leaving the boom in that position, was the steamer guilty of negligence in the premises? On a consideration of all the facts and circumstances, and having regard particularly to the flood in the river, the state of the current, the undermining of the wharf, and the changing of the landing place, and the use of the scow for that purpose, thus bringing the steamer for the first time much nearer the shore and boom, I can only come to the conclusion that she was not handled with that "ordinary care, caution and maritime skill" which is the duty of a prudent mariner to exercise. If he had not sufficient appliances to get his vessel away from the scow and out of that position without running the risk of injuring the boom he should not have attempted it; it would admittedly have been a safe manœuvre if a line had been attached to the old piles called the "Three Dolphins." But the captain's contention in the witness box was that a skilful mariner ought to have been able to get his vessel away without resorting to such a manœuvre, and without striking the boom, and he contends he did so. But the facts are against him; and I am afraid that he was more concerned in an effort to "make a schedule trip," as the witness Card calls it, than to loose time on taking the extra precautions that the dangerous state of the locality required.

And further, and in addition, there is much to be said in favour of the contention of the plaintiff's counsel that, in the circumstances, it was the duty of the captain to have notified the plaintiff of the danger, if such there were, of the boom interfering with the new

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

landing. In its former position it had not proved to be any obstruction to the steamer, and even when the landing was changed and moved in closer to the alleged dangerous area, the captain seems to have been satisfied after he took matters into his own hands and cut the rope, and so allowed the boom to drop further down the stream as mentioned. It would have been a simple matter if he still thought the boom was too close, because of the scow and the new landing at a place not theretofore used for that purpose, to have notified the plaintiff and explained the situation to him, and at least given him the opportunity to move his boom still further down to meet the changed conditions. The truth is, in my opinion, that the captain was satisfied that there was no danger from the scow if the steamer were properly handled.

So far, it has been assumed that the boom was lawfully moored along the bank, but the defence is also raised that the plaintiff must be regarded as being a trespasser because he admittedly has not complied with sec. 2 of the *Act respecting Certain Works constructed on or over Navigable Waters*, R. S. C. cap. 92, sec. 2:—

"2. No bridge, boom, dam or aboiteau shall be constructed so as to interfere with navigation, unless the site thereof has been approved by the Governor in Council, and unless such bridge, boom, dam or aboiteau is built and maintained in accordance with plans approved by the Governor in Council."

There is unfortunately no definition of the word "boom" in the Act, but manifestly from the context it is for the purposes of the Act assumed to be a work of a more or less fixed or permanent nature, like the other class of works dealt with, and the words "constructed" "site" and "built" and "maintained in accordance with plans approved by the Governor in

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

Council" exemplify this. There are various kinds of booms in use in different parts of Canada ranging from costly fixed, or permanent structures of great strength and solidity, sometimes miles in length, used in connection with extensive lumbering operations, down to the small and temporary affair frequently made up by the settler in this province out of timber cut in clearing his land, and filled, *e. g.* as here, with shingle bolts, from some convenient point on the river bank preparatory to its being towed away like a raft by the purchaser thereof. In the many cases I have consulted I find some of these classes of booms mentioned—thus in *Bruce* v. *Union Forwarding Co.* (1), there were Government booms, a permanent toll boom of a Boom Company, and a "pocket boom"; in *Queddy River Driving Boom Co.* v. *Davidson* (2); and in *Drake* v. *Sault Ste. Marie Pulp Co.* (3), the booms were of a more or less permanent and extensive nature; while in *Crandell* v. *Mooney* (4); and *Langstaff* v. *M'Rae* (5), they were temporary, and in the latter case "side booms" are spoken of. The definition of "boom" in Murray's Oxford Dictionary is manifestly not an exhaustive one. The expression "to boom a river" is a common and well understood term, and undoubtedly within the scope of the statute; but that is a very different thing from "making up a boom" of logs or bolts on the banks of so great, broad and deep a river as is the Fraser at the place in question. What is or is not the reasonable use of a navigable river depends upon circumstances, and the river may be used in a great variety of ways. Timber, for instance, may be transported on it, in rafts, booms, scows, or vessels, and in the case of scows and ships they may be and

(1) 32 U. C. Q. B. 43.
(2) 10 S. C. R. 222.
(3) 25 Ont. A. R. 251.
(4) 23 U. C. C. P. 212.
(5) 22 Ont. R. at p. 85.

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

are frequently loaded from the bank direct, especially in the case of shallow draft, stern wheel steamers. In this relation I draw attention to a leading authority on the point of navigable waters, *Crandell* v. *Mooney* (1), and particularly to this passage at p. 221, which Mr. Justice Galt says, p. 222, "contains a full and reasonable exposition of the law":—

"The general doctrine to be deduced from the authorities we have collated in reference to the use of navigable rivers, or public streams, as public highways, is that each person has an equal right to their reasonable use. What constitutes reasonable use depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use, with entire precision, so various are the subjects and occasions for it, and so diversified the relations of parties therein interested. In determining the question of reasonable use, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, necessity, and duration, and the established usage of the country. The size of the stream, also, the fall of water, its volume, velocity, and prospective rise or fall, are important elements to be taken into the account. The same promptness and efficiency would not be expected of the owner of logs thrown promiscuously into the stream, in respect to their management, as would be required of a shipmaster in navigating his ship. Every person has an undoubted right to use a public highway, whether upon the land or water, for all legitimate purposes of travel and transportation; and if, in so doing, while in the exercise of ordinary care, he necessarily and unavoidably impede or obstruct another temporarily, he does not thereby become a

(1) 23 U. C. C. P. 212.

wrong-doer, his acts are not illegal, and he creates no nuisance for which an action can be maintained."

This extract was in answer to the contention of the plaintiff's counsel that "as the Fenelon was a navig- "able river and public highway, it was the absolute "duty of the defendant not to obstruct it, or to do any- "thing which in its consequences might prevent "steamboats and other vessels from using it at all "times." Mr. Justice Gwynne, says (1).

"All persons have an equal right to navigate this river with logs or steamboats, which right must be exercised, however, in such a manner as not unreasonably to impede or delay another in the exercise of his right."

The passage above cited has been approved in *Rolston* v. *Red River Bridge Co.* (2), and in *Drake* v. *Sault Ste Marie Pulp Co.* (3); and in the latter case the point is succinctly put by Mr. Justice Osler, p. 257, wherein he says, "when the obstruction of the river by the "logs ceased to be reasonable it ceased to be lawful." In any event the obstruction must be one to prejudicially affect the complainant, for as stated in *Langstaff* v. *M'Rae* (4), by Chancellor Boyd:

"*Quoad* the plaintiff, it appears to me the defendants were not doing a wrongful act in stretching the boom, nor did any particle of damage arise to him from this act."

In *Bruce* v. *Union Forwarding Co.* (5), the plaintiff's boom blocked up the whole width of the stream (p. 53) and he did not open it wide enough to permit a steamer to pass, and therefore was held guilty of contributory negligence, but it was laid down that:

"The defendants would not be justified in destroying or injuring the boom, merely because it was in the

(1) p. 224.
(2) 1 Man. R., 235; affirmed on appeal, 12 May, 1885; Cassels Digest Supreme Court, p. 564.
(3) 25 Ont. A.R., 251.
(4) 22 Ont. R. at p. 85.
(5) 32 U. C. Q. B. 43.

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description, a private person can interfere with it only to the extent to which it is an injury to him, and obstructing his passage." *Dimes* v. *Petley* (1).

As might be supposed, no attempt has been made by any court, at least that I have been able to find after a careful search, to define the meaning of the term "interfere with navigation," which as has been seen, depends upon so many and varied local circumstances. But several cases, in addition to those on booms already cited, have been decided, showing what that expression includes. Thus it has been held on the facts to extend to crib work and piers in a navigable lake, *Atty.-Gen.* v. *Perry* (2); piles driven in a navigable river, *Brownlow* v. *Metropolitan Board of Works* (3); to piles driven in a public harbour *Wood* v. *Esson* (4); to deposit of saw-dust in a navigable river *Atty.-Gen.* v. *Harrison* (5), and *Booth* v. *Ratté* (6); to tailings from a quartz mill deposited in a public harbour, *The Queen* v. *Fisher* (7); to a bridge over a navigable river, *Queen* v. *Moss* (8). On the other hand, for cases where it was held there was no obstruction see the cases cited below. *Rolston* v. *Red River Bridge Co.*, (*supra*); *London & Canadian Loan &c. Co*, v. *Warin* (9); and *Reg.* v. *The Port Perry &c. Ry. Co.* (10).

Where an interference is established it is a public nuisance which any one specially damnified has a right to remove, and "nothing short of legislative "sanction can take from anything which hinders nav- "igation the character of a nuisance:" *Wood* v. *Esson*,

(1) 15 Q.B., 276, 283.
(2) 15 U. C. C. P. 329.
(3) 13 C. B. N. S. p. 768.
(4) 9 S. C. R. 239.
(5) 12 Grant 466.
(6) 21 S. C. R. 637.
(7) 2 Ex. C. R. 365.
(8) 26 S. C. R. 322.
(9) 14 S. C. R. 232.
(10) 38 U. C. B. 431.

(1); *Queddy River Driving Boom Co.* v. *Davidson* (2); and it is none the less so even if the "obstruction "is of the slightest possible degree and of very great "public benefit," *The Queen* v. *Moss* (3); And see *Attorney General* v. *Harrison*, (4); wherein it is also laid down (p. 472), that "no length of time will "legitimize a public nuisance, the soil being in "the Crown, and the user the common inheritance "of the public at large." That the question of long and notorious user may, however, become an important factor in certain circumstances is shown by the cases of *Langstaff* v. *M'Rae*, (5) and *Queen* v. *Moss* (6). Nor is a vessel which becomes helpless by accident strictly confined to the channel generally used in due course of navigation, and if she is forced to leave it and in taking the ground at a place which would have been safe but for an obstruction placed there, and is thereby injured, an action will lie, *Brownlow* v. *Board of Works*, (7).

It does not follow that all portions of a navigable water are used for purposes of navigation, and in rivers especially the nature of a particular locality may change, *Queen* v. *Moss* (6); and see *Attorney-General* v. *Harrison* (4); *Gage* v. *Bates* (8), and *Ross* v. *Corporation of Portsmouth* (9).

Applying all the foregoing principles to the circumstances of the case at bar, I am of the opinion that there has not been an interference with navigation by the plaintiff in the true sense of that term. In so holding I do not wish it to be understood that any person has the right continuously to appropriate to himself any portion of the water or bank or shore of navigable waters for the purpose of making up a boom of logs,

(1) 9 S. C. R. at p. 243.
(2) 10 S. C. R. 222.
(3) 26 S. C. R. 322.
(4) 12 Gr. at p. 472.
(5) 22 Ont. R. 78.
(6) 26 S. C. R. 332.
(7) 13 C. B. N. S. 768.
(8) 7 U. C. C. P. 116.
(9) 7 U. C. C. P. 195.

1905

KENNEDY v. THE SURREY

Reasons for Judgment.

but simply that he may, as hereinbefore set out, in a reasonable manner and for a reasonable period, having regard to local conditions, make use of such waters for that purpose.

So far, then, the defence has failed, but it is pleaded and argued that there have been such unreasonable laches and delay by the plaintiff in enforcing his claim that in the meantime the present owners purchased the ship from the corporation of New Westminster in good faith and without notice, and that consequently this action *in rem* should not be entertained in this court. The accident happened on June 23, 1903, the action was begun on July 31, 1905, and the sale to the present owners was made on February 20th, 1905. The authorities on the point are collected in *Abbott on Shipping* (1). Mr. Davis refers to *In re Maddever* (2), on the general question of mere delay in enforcing legal rights. There is nothing before me to show what is an important element, viz.: that the owners, in any way whatever, have been or will be prejudiced by this not very long delay, and it is not suggested that the Corporation is not in a position to indemnify them against any claim the plaintiff has against the ship; indeed, one of the witnesses for the defence, who had been employed by the corporation in keeping the wharf and approach in repair, stated the corporation was defending the action, though no counsel appears for them; and while too much weight should not be attached to the statement yet it is only what would be expected in the circumstances. Assuming it to be correct that in another Court the municipal corporation could not, owing to a statutory limitation, have been sued after the expiration of a year, I cannot agree that that of itself disentitles the plaintiff to relief here. This defence also fails.

(1) 14th ed., 1901, at pp. 1039-42 *et seq.* (2) 27 Ch. D. 523.

1905

KENNEDY v. THE SURREY

Reasons for Judgment

Judgment, therefore, will be entered in favour of the plaintiff, and there will be a reference to the Registrar, assisted by one merchant, to assess damages.

I should add, since it was referred to by counsel, that the case of *Wilson* v. *The Coquitlam*, decided by me on the 4th April, 1902, affords no assistance in the determination of this action, because it was determined simply on the facts; and I had no difficulty in coming to the conclusion that there had been an interference with navigation by the boom of logs there in question.

Judgment accordingly.

Solicitor for plaintiff: *W. Myers Gray.*

Solicitor for ship: *Martin, Cassidy, Weart & McQuarrie.*

TORONTO ADMIRALTY DISTRICT.

1905
May 17.

BETWEEN

JOHN N. TUCKER.....PLAINTIFF;

AND

THE SHIP *TECUMSEH*.....DEFENDANT.

Admiralty law—Narrow channel—Risks—Collision—Rule of the Road—Right of way—Blast signals.

The Rule of the Road on our rivers and lakes applicable to "Narrow Channels" is set out in Art. 21, R. S. C., c. 79, which applies to foreign as well as to British and Canadian ships and is as follows: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship."

Held, 1. That a channel 800 feet wide comes within the designation of "Narrow Channels" as mentioned above, and that a ship violated said rule when she steered towards the westward and crossed towards the channel on her port side instead of keeping in the channel on her starboard side.

2. When two steamers are meeting on the Detroit River the descending steamer shall have the right of way; and it is no defence to an action for collision to prove that at the moment of collision it was too late to take a precaution which ought to have been taken earlier to avoid the risk of a collision, the rule being that every steamship, when approaching another ship, so as to avoid the risk of collision, shall slacken her speed, or stop and reverse if necessary. The more imminent the risk of collision, the more imperative is the necessity for implicit obedience to the rule.

3. Where a steamer some distance from another has indicated by the course she is steering that she cannot be considered as a steamer "meeting another end on," the state of things does not arise which renders it incumbent on her to give blast whistles indicating which side she proposes to take on passing.

THIS is an action brought by the plaintiff against the steamer *Tecumseh* to recover damages for injuries to his steamer the *Lilly* as the result of a collision

1905

TUCKER.
v.
THE SHIP TECUMSEH.

Argument of Counsel.

which took place on the night of the third day of November, 1903.

The trial of the case took place at Windsor before the Local Judge for the Toronto Admiralty district on the 31st of January and the 1st of February, 1905. A written argument subsequently was put in on which judgment was reserved.

The facts of the case are set out in the reasons for judgment.

J. H. Rudd for the plaintiff:

The first question to be determined in this action as it appears to me, is as to the position of the ship *Lilly* with respect to the channel of the Detroit River just prior to the accident, and upon this point there is a direct conflict of evidence, although the greater weight of the evidence is in favour of the plaintiff's contention.

It was as a matter of fact the usual custom of the *Lilly*, as she plied between Mount Clemens and Toledo, to go on the west side of the Bar Point Lightship; and one would naturally expect to find her from the southerly end of Bois Blanc Island to the lightship, steering in a direction which would take her in her usual course and the nearer she approached the lightship the further westward from the centre of the channel she would be.

Apart, however, from the probabilities of the case, we first have the evidence of Captain Dubay who with the wheelsman was standing in the pilot house commanding the course of the ship, and he states in the most positive terms that from the island down he was well to the westerly side of the channel and at the time of the accident he was in fact west of the channel bank. The unknown steamer at any rate, threading almost the centre of the channel, passed the *Lilly* two or three hundred feet to the eastward, and

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

this of itself is the strongest evidence that the plaintiffs ship was well out of the way of all passing steamers.

Then it is further to be observed, as the evidence establishes, that at the moment of passing the unknown steamer the *Lilly* was heading almost directly for the lightship and the captain then changed his course half a point to the westward so as to keep the vessel clear of the lightship, and as it approached nearer and nearer must have gone farther and farther from the centre of the channel.

The wheelsman of the ship *Lilly* is equally positive as to the position of the ship and the course which it was pursuing. The mate, engineer and fireman were not in a position to know what took place before the accident, but the moment of the collision they rushed up on deck before either vessel had an opportunity to move any appreciable distance, and their evidence is that they found the plaintiff vessel westward of the channel bank and three or four hundred feet from the centre of the channel.

As opposed to this evidence we have the evidence of the captain of the *Tecumseh*, Mr. Anderson and the sailor boy George Decaire, whose evidence, even if it were of any importance, could not, it is submitted, be relied upon as trustworthy, and the evidence of William Spencer, the engineer, who was looking out the side window of the vessel, and is now attempting to swear as to the direction of a ship a mile away.

The very fact that these men swear positively that they guaged the position of the *Lilly* by two range lights, which they claim to have seen upon her, and by these to have determined the position of the approaching vessel in relation to their own, is sufficient of itself to prove that they were absolutely mistaken or were wilfully stating what was untrue, when it is remembered that the evidence of the plaintiff and

a disinterested witness, Captain Stevenson, proves beyond a doubt that not only did the steamer *Lilly* not have an aft mast light but in fact did not even have an aft mast. It was, therefore, impossible for these persons to tell the position and course of the plaintiff's ship, and the evidence upon this point, it is submitted, must be thrown aside.

But we are not obliged to depend upon the testimony of the interested persons in either boat. John Smith, a watchman on Bar Point lightship, who was on watch that night, observed all three of the boats in question, and, having no interest whatever in this matter, we submit with confidence that his statement of the affair should be taken as the correct one. He states in the most positive terms that the steamer *Lilly* was proceeding downward well to the westerly side of the channel of the river, that it passed the unknown steamer to the westward at a safe distance of two or three hundred feet, and that the *Tecumseh* was following in the wake of the unknown steamer and but a short distance behind, and if it had continued in the course which it was pursuing would have passed the *Lilly* at an equally safe if not greater distance.

Can there be any doubt upon this testimony alone that the steamer *Tecumseh* just after passing the lightship for some reason or other not disclosed took a sudden sheer to the westward and before it could be in any way avoided by those in charge of the *Lilly*, caused the collision resulting in the damage complained of.

The very fact that not a single person on the steamer *Tecumseh* observed the unknown vessel which was about two or three lengths ahead, is of itself the strongest evidence that they were keeping a very indifferent watch, and points strongly to negligence in the navigation of the ship.

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

It is submitted, therefore, with confidence that the evidence given on behalf of the plaintiff in this case establishes beyond a doubt that the steamer *Lilly* was well out out of the channel and out of the course of the up bound vessels.

But even if, as the defendants themselves allege, the steamer *Lilly* was coming down the river on the starboard bow of the *Tecumseh* at a distance of a mile away, and did proceed along in that course until within five or six hundred feet of the steamer *Tecumseh*, and then took a very sharp and sudden turn to the westward across the bow of the *Tecumseh*, it seems to me that the captain and others in charge of the *Tecumseh* were guilty of very gross negligence in directing the course of the *Tecumseh* as sharply to the westward in the same direction as the *Lilly*, as it must have been apparent to any reasonable person that a collision in such a case could hardly be avoided.

The evidence of Captain Anderson is that the *Lilly* started to turn when four or five hundred feet away, while that of Decaire and Spencer puts the distance at six hundred feet. Putting the distance between these estimates, say five hundred feet, it seems to me that if instead of turning to the west the captain of the *Tecumseh* had put his wheel hard aport, and sent his ship sharply to starboard, the accident would have been entirely avoided. At any rate the common sense of the matter would justify one saying that such a proceeding was the only one that gave any opportunity of avoiding the collision.

Even though one person is negligent, yet if the other can by the exercise of reasonable care, avoid the accident, then the person so failing to exercise such reasonable care is guilty of negligence and liable for the damages caused (1).

(1) Marsden on Collisions, 4th ed. p. 25.

It is submitted, therefore, upon the evidence, first, that the steamer *Lilly* was proceeding along the extreme westerly side of the channel of the Detroit River and quite clear of all up bound vessels, and that she was struck by reason of the sudden sheering of the ship *Tecumseh*, or secondly, even if the story of the defendants can be accepted, and it cannot be, we argue, the ship *Tecumseh* could have avoided the accident by the exercise of ordinary common sense.

Then as to the damages. In *Marsden on Collisions* (1), it is clearly set forth that the owner of a damaged ship is entitled to have his ship properly repaired, and to be paid the cost of making such repairs, and if in making such repairs her value is in fact increased, he is entitled to the advantage thereof, and no deduction therefor is to be allowed in estimating the damages to be given.

It is pointed out on this page that a deduction of one-third new for old is not allowed in this kind of action, and in that respect differs from an adjustment under a maritime policy. This being so, the plaintiff is entitled to the amount which he proved at the trial to have spent upon making repairs; and this should be ordered to be paid by the owners of the ship, together with the costs of this action.

J. W. Hanna for defendant:

In this action the court can find, first of all, that the ship *Lilly*, owned by the plaintiff, was wholly to blame.

Secondly: That the ship *Tecumseh* was wholly to blame.

Thirdly: That both ships were negligent, and divide the damages.

Of course if I am able to convince the court that the first finding is the correct one, that ends the case;

(1) 4th ed. pp. 121, 122.

1905

TUCKER
v.
THE SHIP
TECUMSEH.

Argument of Counsel.

and I purpose only contending that the first one is the correct one, and failing in that I purpose contending that the final finding would be correct.

The evidence depends entirely upon the sworn statement of the crew of the *Tecumseh* and *Lilly* that were on duty that night with the exception of some evidence given by John M Smith, who claims to have been on the lightship on the night when the accident occurred, which is put in to support the crew of the *Lilly*. The theory of the plaintiff is that the *Lilly* was proceeding in a southerly direction hugging the western channel bank of the Detroit river, and when close to the Bar Point Lightship the *Tecumseh*, which was going up the river, suddenly veered and ran into the *Lilly*. The evidence in support of that contention rests entirely upon that of Clem Dubay, the captain, Frank Thomas, the wheelsman, and John Smith, aboard the lightship. Their evidence is contradicted by Captain Anderson of the *Tecumseh*, his wheelsman, engineer and fireman. It is not pretended that the engineer and fireman of the *Lilly* saw anything of the accident; but the engineer of the *Tecumseh*, as well as the fireman were in a position on the starboard side of their ship, and looking out of a window observed the *Lilly* going down, at first evidently intending to pass between the *Tecumseh* and the Canadian shore. Suddenly she veered, crossing starboard to her right. The captain of the *Tecumseh* in order to keep out of her way put his wheel to starboard going further to port. The *Lilly* still persisted and when too late, the captain of the *Tecumseh* found that the *Lilly* was persisting in crossing upon the American side at a time when it would have been dangerous for him to change his course, as a good seaman he kept on the course he was going with the result that the two boats came together in a slanting position near the western bank

of the channel and some three or four hundred feet north of the lightship. Captain Anderson and the officer in charge of the wheel support that contention. Let us for a moment look at the evidence of Thomas, who was in charge of the *Lilly* up to a few moments before the collision, and it bears out the contention of the *Tecumseh*.

"99. Q. You got more benefit in the centre of the channel than at the sides?—A. Yes.

100. Q. On this occasion you were taking advantage of that?—A. Certainly.

101. Q. Any good sailor coming down the river would take advantage of the current?—A. Certainly.

102. Q. He would be a land-lubber if he crept along the side when he could have the benefit of the current?—A. Yes.

103. Q. When you got down near the lightship you concluded to take a cut across towards Toledo?—A. Yes.

104. Q. When you got in the middle of the course where the big fellows are you concluded you would go over towards Toledo, and the Captain told you to steer across that way?—A. Sure, yes.

105. Q. You didn't notice the *Tecumseh* at all?—A. No."

This is the man that was steering the boat, and this is his evidence. It is exactly in accord with the evidence of the *Tecumseh*.—As against this there is the evidence of Captain Dubay, and this young man Smith, who only saw what occurred immediately before the collision; and who had no reason to expect anything was going to happen until it actually happened, as hundreds of boats pass that point in the evening and it would be unreasonable to expect the mere whistling of two boats passing or approaching one another would have attracted his attention.

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

Let us have regard to the kind of navigators that were in charge of the *Lilly*. Take it from their own evidence; hear what Captain Dubay says:

"29. Q. Where did the accident occur—the collision?—A. I should judge about four or five hundred feet from the lightship.

"30. Q. What lightship is that. What is the name of that ship?—A. I don't know the name of it.

"31. Q. The lightship where?—A. In Lake Erie.

"32. Q. What locality do you call it?—A. I don't know the name of it."

Showing that he did not even know the name of the lightship.

"37. Q. Do you know this part? (Indicates on chart.) —A. I don't read."

Showing that he cannot read and is therefore unable to study up the chart or read the rules and regulations for the governing of pilots. He swore that some unknown vessel first signalled him.

"67. Q. She gave you a signal?—A. Yes."

Thomas, on the other hand:

"22. Q. Who gave the first whistle?—A. The Captain of the *Lilly*."

I have already indicated where Thomas swore the *Lilly* was sailing.

As to Captain Dubay's theory. The lightship marks the west channel bank. Captain Dubay's evidence says:—

"156. Q. How wide is the channel there?—A. Eight hundred feet We were sailing away outside of the lightship.

157. Q. You were sailing away outside of the lightship?—A. On the west side."

If Captain Dubay is right how does he reconcile that with his answer given in the following question:

"325. Q. A boat drawing as much water as the *Tecumseh* did would have to keep to the channel at this point?—A. Yes."

A reference to the chart would show, having regard to the collision occurring three or four hundred feet to the north of the lightship and west of the channel, that it would have been impossible for the *Tecumseh* to have gotten in there, she would have gone around first. Another point, as regards the *Tecumseh's* course Captain Dubay says:

"245. Q. She was on the same tack or line as the unknown?—A. Yes, just about.

246. Q. How far was the unknown boat from the *Tecumseh*, about?—A. About half a mile.

247. Q. You were able to see one boat following the other. They were coming in the same course, is that what you want us to understand?—A. That is when I seen her light.

248. Q. She was going in the same direction northerly?—A. Yes.

250. Q. Then answer the question. You say she was on the same line, and I am asking you how far behind the unknown she was. Was she east or west of the line the unknown had taken?—A. On the same course.

251. Q. Directly in the wake of the unknown?—A. Yes.

253. Q. Half a mile apart?—A. Yes."

The captain further says he passed the unknown three or four hundred feet apart, and further says, that had the *Tecumseh* proceeded on her course she would have passed up about the same distance. Passing signals were exchanged between the *Lilly* and the unknown. The *Tecumseh* was seen one-half mile off in a narrow channel in the same course as the unknown, why was not there a passing signal given by Cap-

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

tain Dubay in accordance with Rule 24 of the White Law adopted for the Pilot Rules, and which has been considered a rule of the road by Captain Anderson and Captain Dubay. The Rule is as follows: "That in all narrow channels where there is a current, and in Rivers Saint Mary, Saint Clair, Detroit, Niagara and Saint Lawrence where two steamers are meeting, the descending steamer shall have the right of way, and shall before the vessels shall have arrived within one half-mile of each other, give the signal necessary to indicate which side she elects to take," and which was recognized as good navigation long before the White Law was enacted.

If it were necessary to signal to the unknown, was it not equally necessary to signal to the *Tecumseh*, both proceeding in the same course? The *Tecumseh* was one-half mile behind the unknown when the steamer first passed the *Lilly*, and was first seen by the Master of the *Lilly* (Dubay).

"84. Q. How far was the *Tecumseh* behind the steamer that passed you when you first saw her?—A. About half a mile, may be closer than that.

193. Q. In what direction were you in reference to the lightship when you first saw the *Tecumseh*?—A. Did'nt I say three hundred feet

194. Q. You said five hundred feet a little while ago. Tell us something that you will stick to. How many feet were you from the lightship, and in what direction were you going?—A. The lightship was about opposite our port rigging.

195. Q. Can you tell the direction?—A. I was heading about south of south-west.

196. Q. On to the lightship?—A. Outside of the lightship, south by south west—on the west side.

197. Q When you first saw the *Tecumseh*?—A. Yes."

1905

TUCKER
v.
THE SHIP
TECUMSEH.

Argument of Counsel.

If when Captain Dubay first saw the *Tecumseh* and the *Lilly* had the lightship opposite her rigging what explanation does he give of his contention that the *Tecumseh* came up the river the distance near one-half mile while he ran down the river and still the collision took place northwest of the lightship. Some minutes afterwards Dubay, the captain, and Thomas, both say there was about one-half mile difference between the unknown and the *Tecumseh*. Smith says two or three hundred feet. Which is correct?

Smith says: "168. Q. There would be about two or three hundred feet between the *Tecumseh* and the unknown?—A. Yes"

Again Smith's evidence, Smith did not see the actual collision.

"194. Q Then after the *Tecumseh* sheered she came between you and the *Lilly*?—A. She went past her bow.

195. Q. She would shut off your view if she did that?—A. Yes.

196. Q. You can't say anything about the actual collision, you couldn't see it because that was on the other side of the *Tecumseh*?—A. Yes."

The collision occurred on November 3rd, 1903, and young Smith claims he has been able to give an account of the collision from the time of the collision up to the present time, and says he made a statement after the collision, but has not seen it since. His evidence:

"208. Q. What you say is that you have not seen the statement you made to that lawyer from the time it was made to this time?—A. No.

209. Q. You never had it read for you?—A. No, sir."

It is passing strange that the statement was not produced.

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

"The testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to a greater weight than that of witnesses on other boats, who judge, or from opinions merely from observation." The *Havana* (1).

The officers of the *Tecumseh* contend that the accident could not have occurred, as claimed by the plaintiff, unless the *Tecumseh* was wilfully steered out of the channel into the *Lilly*. The accident could not have occurred if the *Lilly* was where her witnesses claim she was, as it would be impossible, or extremely unreasonable, for a ship drawing the amount of water the *Tecumseh* draws to have gone there; she would first have gone aground.

It is therefore contended that the judgment should hold the *Lilly* wholly to blame; but should the court not be willing to adopt that view, it is submitted with great respect, that the only other course that could be adopted is that both ships were negligently navigated. As has been pointed out the rule of the road which requires the signal when within one-half mile to an up coming ship, was not observed by the *Lilly*. It was the duty of the *Lilly* to have stopped and backed when she saw a collision was probable. It was the duty of the *Lilly* to have given the warning signal, all of which rules and regulations, which good seamanship demand should be observed, were disregarded.

Reads from the evidence of Captain Dubay:

"223. Q. Do you know of any rules to stop and back when you see a chance of collision?—A. Yes."

Two minutes elapsed between the time the *Lilly* saw the collision was likely to and it did take place.

Thomas' evidence:

"162. Q. You don't seem to understand my question. I didn't ask you the distance. You say you saw that

(1) 54 Fed. Rep. 413.

the collision was likely to occur. How many minutes elapsed between your seeing the collision was about to take place and the collision actually occurring?—A. About two or three minutes, I guess."

The *Tecumseh* was seen to sheer, and a collision was to be expected, when she was four hundred feet from the *Lilly*. I am accepting now the plaintiff's contention. Had the *Lilly* at that moment stopped and backed, would any sane person say that the accident could have occurred? As it was she was struck twenty feet back of the bow. Instead of backing, however, she increased her speed.

"102. Q. (Dubay) What did you do? You didn't give a signal, and she didn't?—A. I thought by increasing my speed and putting the wheel more to port I could get away from her. I did that and he struck me about like that." (Indicates.)

Reads what Thomas, the man at first in charge of the wheel on the *Lilly*, says as to Captain Dubay's conduct:—

"148. Q. If you had stopped your boat and backed up when you first saw the collision was going to occur, you wouldn't have been run into?—A. Probably not.

149. Q. Don't you think that would have been a good precaution to take?—A. Probably.

150. Q. Wouldn't you have taken that precaution if you had been the captain?—A. Sure.

158. Q. Don't you think he lost his head?—A. He was kind of excited. There was something wrong."

Even suppose the contention of the plaintiff is true, was it not the duty of the *Lilly* to stop and back? The rules of division of loss applies where one of the ships is guilty of negligence in fact and the other is deemed to be in fault for the infringement of the regulations, *Voorwaarts and the Khedive* (1).

(1) 7 App. Cas. 795.

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

As to both vessels being at fault see *McCallum* v. *Odette* (*the M. C. Upper*) (1). Captain Dubay did not observe any regulations.

"294. Q. Did you blow any whistle?—A. No sir.

295. Q. Do you know what is the duty of the captain in a case of that kind? Do you know what an alarm signal is?—A. Yes.

298. Q. Will you tell me what an alarm signal is?—A. Three or four whistles.

302. Q. Isn't the alarm signal to be used in cases of emergency like this, to warn other boats to keep off?—A. Yes.

303. Q. Three or four loud blasts?—A. Yes.

304. Q. You are supposed to stop and back up in order to get out of the danger?—A. Well.

305. Q. Didn't you know it was your duty to do one or all of those things?—A. I know those things."

Accepting the worst position that the plaintiff can ask us to be placed in, can there be any doubt that the accident could have been avoided by the observance of the regulations which good navigation calls for the observance of?

The worst that could befall the *Tecumseh* would be a division of the damages. The doctrine of inevitable accident cannot apply where either of the ships had violated the regulations for good navigation.

HODGINS, L. J., now (17th May, 1905), delivered judgment.

This is an action against the defendant steamer by the owner of the steamer *Lilly* for a collision near Bar Pointe light-ship in the Detroit river on the night of the 3rd November, 1903. The pleadings and evidence upon both sides, as not unfrequently happens in

(1) 7 S. C. R. 36.

Admiralty cases, are so conflicting on some material points as to be almost irreconcilable.

The steamer *Lilly* was bound for Toledo, and the *Tecumseh* for Owen Sound. The evidence on the part of the plaintiff is that the *Lilly* had her green, red and head and stern lights all right; and that before the *Tecumseh* came in sight she passed an unknown steamer bound up the river about half a mile on the east side of the light ship, and that the unknown gave one blast of her whistle to which the *Lilly* replied.

This unknown steamer was not seen by any on board the *Tecumseh* nor were the whistles heard by any of the witnesses, although all the plaintiffs' witnesses substantiate the fact of her being about half a mile ahead of the *Tecumseh*. This evidence, therefor, warrants the finding that no proper or efficient look-out had been maintained on the *Tecumseh*.

The evidence of the captain of the *Lilly*—though confused in parts—is that as he steered to pass on the west side of the light-ship he saw the red light of the *Tecumseh* about half a mile behind the unknown steamer, which indicated that the *Tecumseh* was then out of the *Lilly's* way; that when about 400 to 500 feet from the light-ship, the *Tecumseh* suddenly turned in and showed her green light; and that after she thus turned in, the *Lilly* could not see her red light, and the *Tecumseh* then struck the *Lilly* at an angle of 45 degrees. In answer to questions put by me he stated that when about 800 feet from where the collision took place he shifted his course half a point to starboard, and that when about 500 feet from the light-ship and probably about 400 feet from the *Tecumseh*, he put his helm hard aport, which changed his course two points further to the starboard side.

The defendant's evidence as to seeing the lights on the *Lilly* is in part unsatisfactory and in part contra-

1905

TUCKER
v.
THE SHIP TECUMSEH.

Reasons for Judgment.

dictory. The captain of the *Tecumseh* says that he first sighted and could make out both red and green lights of the *Lilly* about half or three eighths of a mile away, up to the time she turned; and that for five minutes he had both in view. That he lost the *Lilly's* green light more than a quarter of a mile away. After that he only saw her red light and the range lights; and he was then abreast of the light-ship. After giving this explanation of his seeing the lights he added: "I made a mistake in lights. I lost the red light a quarter of a mile away." In another part of his evidence he stated that the *Lilly* was about 400 or 500 feet away when she commenced to change her course, which distance he had previously stated (when he lost her green light) to be more than a quarter of a mile, or over 1,320 feet away. In answer to my question he stated that the *Tecumseh* was about 500 or 600 feet beyond the light-ship when he commenced to sheer to the west.

The evidence of George Decaire, a young deck hand, whose first season was in 1903, is as follows:

"Q. You say you could see the *Lilly* when she was 600 feet away?—A. I am just guessing 600 feet or something like that. She was on our starboard side.

Q. What lights did you see?—A. Every one, the green, the red, and the two mast lights." (The evidence in rebuttal proves that one of these (the stern light), could not be seen by any boat approaching the *Lilly*, it being hung under the deck aft).

Q. Did you stand on the starboard side of the boat until they came together?—A. No.

Q. Did you see all the lights up to the colllsion?—A. No, sir.

Q. What lights did you lose?—A. I lost sight of the red light; no, the green light.

1905

TUCKER
v.
THE SHIP
TECUMSEH.

Reasons for Judgment.

Q. When did you lose sight of the green light?—A. When she changed her course."

But I prefer the evidence of Smith, an independent witness, who was on the light-ship, as to the actual facts of this collision. He said that he saw the *Tecumseh* behind the unknown steamer, and that as she came on he lost her green light, and could only see her red light; that the *Tecumseh* took a sudden sheer and came right across the channel, and that she then ran into the *Lilly* on the west side of the channel. He heard two crashes. The *Lilly* was 500 feet north by west of the light-ship, and on the western side of the channel bank going in a westerly direction heading so as to pass downwards on the west side of the light-ship. And he further said that the *Tecumseh* was abreast of the light-ship when she began to sheer to the westward. This light-ship's position was on the western side of the recognized channel. This evidence proves that the *Tecumseh* was crossing to the channel on her port side and that the *Lilly* was heading to pass on the west side of the light-ship and to the westward of the light-ship in the channel on her starboard side.

The channel being about 800 feet wide, must, I think, be held to come within the designation of "narrow channels" mentioned in Art. 21 in R. S. C. c. 79, which Article by s. 9 of that Act applies to foreign as well as British and Canadian ships—especially in view of the length and tonnage of the steamers sailing on our inland waters. This view as to narrow channels is sustained by *The Scotts Greys* v. *The Santiago de Cuba* (1), where the channel was 375 yards wide; and *The City of Springfield* (2), where the channel was 750 feet wide. The rule of the road provides that, "In narrow channels every steamship shall,

(1) 5 Fed. R. 369; 19 Fed R. 213. (2) 26 Fed. R. 158.

1905

TUCKER v. THE SHIP TECUMSEH.

Reasons for Judgment.

when it is safe and practicable, keep to that side of the fairway, or mid-channel, which lies on the starboard side of such ship." This rule of the road was violated by the *Tecumseh*, when she sheered towards the westward, and crossed towards the channel on her port side instead of keeping in the channel on her starboard side.

In *The Clydach* (1), the court held that the larger vessel was in fault for the collision for insisting on keeping on the side of the channel which lay on her port side, instead of keeping on that side which lay on her starboard hand, knowing that another steamer was coming through the channel which lay on the starboard side; that having seen the lights of the smaller steamer more than a point on his starboard bow, and about a mile distant, "his imperative duty was to keep to the starboard side of the channel." In the *Leveringston* (2), this rule of the road was similarly recognized, and the ship which disregarded the rule of the road was held to be blameable for the collision.

And the next rule provides that when by the above rules, one of two ships is to keep out of the way, which was the duty of the *Tecumseh*, the other, which was the right of the *Lilly*, shall keep her course.

There is in the United States Pilot Rules of 1904 the following:

"That in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, where two steamers are meeting, the descending steamer shall have the right of way, and shall before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.'

In *Canfield* v. *F. and P. M.* (3), it was held that the ascending vessel was bound, if necessary, to stop and avoid the descending vessel, as her movements could

(1) 5 Asp. M. C. N. S. 336. (2) 11 P. Div. 117.
(3) 44 Fed. R. 698.

be controlled with less difficulty than those of the descending vessel. See also the *Galatea* (1), and the *Gustafsberg* (2).

Another fact I must hold to have been established by the following evidence of the captain of the *Tecumseh*. In answer to some questions put by me he said:

"Q. You say you put your wheel hard a starboard?—A. Yes.

Q. What was the effect of putting your wheel hard a starboard?—A. It threw us in that position (indicates on exhibit).

Q. Across the bow of the *Lilly*?—A. Yes.

Q. When you saw her heading that way, and you were here (indicated) why didn't you pass her on the port side, because you saw she was turning that way?—A. I didn't think. I thought if we tried to pass her on that side we would run into her. He was too close to us and I was afraid we would run into him.

Q. Surely when he changed his course that way (indicated) why did you not change yours to go the other way?—A. If he had whistled.

Q. When you saw him change his course wouldn't it have been common sense to have changed yours to have avoided him?—A. I didn't consider I could have avoided him that way.

Q.—I want your reason. You say you saw him change his course to come across here (indicating) and you continued as you say. You put your helm hard a starboard and that put you across his bow. When you saw him coming why didn't you put your helm the other way, and you would then have avoided the collision?—A. He was so close that I didn't think we could clear him by putting our helm a port."

(1) 92 U. S. 439.

(2) [1905] P. 10.

1905

TUCKER v. THE SHIP TECUMSEH.

Reasons for Judgment.

Considering the distance between the two vessels—about 400 feet – when the *Lilly's* helm was put hard aport, which placed her two points off, and when the *Tecumseh's* helm was put hard a starboard in her attempt to cross the bow of the *Lilly*—and also the fact that the *Tecumseh* struck the *Lilly* at an angle of 45 degrees, I think that had the *Tecumseh* put her helm hard aport, the collision would not have taken place.

The observations of King, J. in the ship *Cuba* v. *McMillan* (1) a case of some resemblance to this, may be cited: "The course of those in charge of the "*Cuba* in starboarding her helm at this juncture was "wholly wrong, and shows a want of reasonable care "and skill to prevent the ship from doing injury. "And that it was an efficient cause of the collision "that followed cannot be doubted."

And the captain further remarked: Q. "You say "you saw her red and green lights up to half a mile "away, and then you lost the green light more than "a quarter of a mile away?—A. The ship would be "more than a quarter of a mile away when we lost "sight of the green light."

This evidence on the part of the *Tecumseh*, that her captain saw the *Lilly's* red and green lights up to a half a mile away, and her red and not her green light "more than a quarter of a mile away," was sufficient notice to him that the *Lilly* was keeping to the channel on her starboard side and heading south-west to pass on the west side of the lightship; and it was not necessary for the *Lilly* to give a blast signal as to the course she was taking—having indicated it long before there was a possibility of a collision. This view is sustained by the case of *The Mourne*, (2), in which Sir F. H. Jeune, after indicating cases of vessels "meeting

(1) 26 S. C. R., p. 660. (2) (1901) P. 68.

end on;" or of a steamer meeting another under circumstances requiring her to "keep out of the way;" or of a steamer having to "give way to a sailing vessel," said: "These are illustrations of the working of "the rule (as to blast signals); and it would seem to "fellow that the rule does not apply to a case where "as here she is on a (circular) course which she had "adopted before in order to reach the place she desires "to reach and is keeping on that course. Under such "circumstances the state of things does not arise in "which she should give notice to other vessels by "signals." And he therefore held that it did not appear to him that there was any obligation upon the complaining ship to give the blast signal so as to render her liable for not giving it. This is I think in harmony with clause (a) to Art. 16 of the Canadian rules respecting ships "meeting end on," which provides that "the Article does not apply to two ships "which must, if both keep on their respective courses, "pass clear of each other."

There is another rule (Canadian Art. 18) applicable to this case which provides: "Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary." The captain of the *Tecumseh* while acknowledging such to be the rule, and that it was the duty of the *Tecumseh* to stop and reverse, said that the time was short and that he did not think of it. The phrasing of the rule is not a direction to prevent a collision, but to prevent the risk of a collision. And it has been well said that it is no defence to prove that at the moment of the collision it was too late to adopt a precaution, which ought to have been taken earlier, to be of any service to avoid the collision. (The *Johnson* (1), and the *Dexter* (2). The more imminent the risk

(1) 9 Wall. at p. 153. (2) 23 Wall. 69.

1905

TUCKER
v.
THE SHIP
TECUMSEH.

Reasons for Judgment.

the more imperative is the necessity for implicit obedience to the rule. (The *Vanderbilt* (1). See also the observations of Lord Bramwell in *Lebanon* v. *The Ceto* (2). Also *Marsden's Law of Collisions at Sea* (3).

On a review of the facts in this case, and especially of the *Tecumseh* not observing the rule of the road, and also manœuvring to cross the bow of the *Lilly* when the collision was imminent, I find that the *Tecumseh* was to blame for the collision, and is therefore liable for the damages claimed by the *Lilly*.

Reference to the Deputy Registrar at Windsor to assess the damages. Costs of the action and reference to be paid by the *Tecumseh*.

*Judgment accordingly.**

(1) 6 Wall. 225.

(2) 14 App. Cas. 670.

(3) 5th ed. p. 416.

*REPORTER'S NOTE.—On appeal to the Exchequer Court of Canada, this judgment was affirmed. See *post*.

Between

HIS MAJESTY THE KING.....PLAINTIFF; 1905 Dec. 9.

AND

C. A. DUGAS .....DEFENDANT.

Public officer—Judge of Yukon Court—Living expenses—"Appointee of Dominion"—Ratification of payments—Recovery of money paid.

The defendant was appointed a Judge of the Supreme Court of the Yukon Territory on September 12th, 1898. By section 5 of *The Yukon Territorial Act*, 1898 (61 Vict. c. 6, s. 5 (3)) as such Judge he became a member of the council constituted to aid the Commissioner in his aministration of the Territory. An order in council was passed on the 7th October, 1898, appointing him "to aid the Commissioner in the administration of the Territory," and since that time up to action brought he had continued to act as a member of the council. In addition to the salary paid to him as such Judge, certain provision for living expenses was made from time to time by Parliament in his behalf. By orders in council of 7th of July, 1898, and of the 5th of September, 1899, relating to officers for the administration of the Yukon district, it was provided that such officers were, in addition to their salaries, to be furnished with "quarters" and "such living allowance as may from time to time be fixed by the Minister of the Interior," and it was further provided therein that the provision mentioned should apply to "all appointees of the Dominion who had been or might be appointed to the staff for the administration of the Yukon Territory."

From the 19th of October, 1900, until the 30th of June, 1902, the defendant was furnished with a residence at Dawson City, and supplied with light and fuel, the bills for rent and for light and fuel, and for certain other domestic requirements, being paid by or under the authority of the Commissioner of the Yukon Territory. The payments so made were fully reported to the Minister of Public Works, who was responsible for the administration of the appropriation, and vouchers, showing on the face of them the service for which the moneys were expended, and giving full particulars, were forwarded to the Department of Public Works at Ottawa, and no objection was taken thereto at the time by any one in that department. The Commissioner, whose duty it was to administer the government of the Territory under instructions from the Governor in Council or the Minister of

1905

THE KING
v.
DUGAS.

Argument of Counsel.

the Interior, stated he had directions from the latter that in addition to payment for the services of the officers employed in the administration of public affairs "all the public employees were to be sheltered and fed," and that it was in pursuance of these instructions that he made the arrangements and provisions mentioned on behalf of the defendant. Furthermore, a letter was produced in evidence written by the Deputy Minister of Justice to the Deputy Minister of Public Works by which it appeared that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the Judges of the Territory.

Held, that the defendant was an "appointee of the Dominion" on the staff for the administration of the Yukon Territory within the meaning of the order in council of 5th September, 1899, and so entitled to the quarters and a living allowance provided thereunder.

2. That the circumstances disclosed approval and ratification by the Minister of the Interior and the Minister of Public Works of the action of the Commissioner in making the expenditures in question for the benefit of the defendant.

INFORMATION for the recovery of certain moneys paid by the Crown on behalf of one of its officers.

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

May 31st and June 14th, 1905.

D. J. McDougal, for the plaintiff, contended that the defendant was not entitled to have his rent, light and fuel provided by the Crown in addition to his "living allowances." When Parliament made an appropriation for living expenses, it must be assumed that the Crown was not to become liable for such charges as rent and light and fuel. Parliament having once dealt with the matter, there was no room for construction of orders in council and regulations applying to officers not specifically dealt with by Parliament.

As to payment of these charges by the officers of the Crown, their acts do not estop or bind the Crown in any way. *Anson on the Constitution* (1); *Am. & Eng. Ency. of Law* (2); *Throop on Public Officers* (3); *Mechem on Public Officers* (4). It would require direct parlia-

(1) (Crown) p. 335.
(2) 2nd ed. vol. 23, p. 390.
(3) pp. 445-448.
(4) Secs. 855-857, 862.

1905

THE KING v. DUGAS.

Argument of Counsel.

mentary authority to validate such payments by the Minister of Public Works. *A fortiori* would this be true of payments by subordinate officers of the Minister's department. Furthermore, if these moneys were paid under a mistake of law they can be recovered back. *Price* v. *Percival* (1); *Am. & Eng. Ency. of Law* (2).

[BY THE COURT: Is there not a fund provided by Parliament every year out of which these expenses might have been properly paid?]

There is an appropriation for buildings used for *public* purposes, not for private purposes. The defendant's residence was not a public building of the country.

N. A. Belcourt, K. C., for the defendant, argued that defendant was more than a Judge of the Yukon Territorial Court; he was also specifically appointed as an officer to assist in the administration of justice in the territory. Hence he had an undoubted status to rank as an "appointee of the Dominion" within the terms of the order in council of the 5th September, 1899, which made provision for quarters and rations to the officers in whose behalf it was passed.

There was parliamentary sanction for these payments in question, and if there was not in the first instance, there has been ratification by Parliament in not rejecting the accounts showing such payments.

In answer to the argument that the defendant's residence was not a "public building," all that need be pointed out is that Judge Dugas held chambers at his house, and clearly that was a use of the building for public purposes.

Furthermore, no money was paid to Judge Dugas, and the information must fail as a claim for the recovery of money paid to the defendant.

(1) Stu. K. B. 189.

(2) 2nd ed. vol. 23, p. 403.

1905

THE KING v. DUGAS.

Reasons for Judgment.

Finally, these moneys were paid by the Minister of Public Works out of funds within his disposal for public purposes. The court will not interfere with the exercise of discretion by the Minister in a matter of departmental administration.

THE JUDGE OF THE EXCHEQUER COURT (now December 9th, 1905), delivered judgment.

The defendant is a Judge of the Supreme Court of Judicature in and for the Yukon Territory. From the 19th of October, 1900, until the 30th of June, 1902, he was furnished with a residence at Dawson City, in the said Territory, and supplied with fuel and light for such residence. From the date first mentioned to the 19th of February, 1902, he occupied what is spoken of as the Starnes House, and afterwards the Noel House. An officer of the Crown paid the rent of these houses during the defendants occupation thereof, and also paid for the fuel and light used, and for some materials supplied and work done in connection with the defendant's occupation, such as banking the house and putting in electric light fittings. The sums so paid were paid out of public moneys, and according to the particulars in the information amounted to $4,216.38. For the recovery of these sums of money the information is filed.

The plaintiff's case is put in the alternative. In the first place the amount mentioned is claimed as money paid for the defendant at his request, and for materials supplied to, and work and labour done for, him at his request. There is also a claim for the use and occupation of the houses mentioned. Then, in the second place, it is said that the residence, fuel, light and other things mentioned were furnished to the defendant by the officers of the Crown without any lawful or other authority for so doing, and that the defendant with

full knowledge of this fact accepted the benefit of the things so furnished, whereby he became liable to restore the same to the Crown or to make due compensation or payment therefor The substance of the defence is that what was done by the Crown's officers in the premises was done without the defendant's order or request, and with due authority and in accordance with the conditions and arrangements under which he was at the time to perform his duties as such judge.

The defendant was appointed Judge of the Territorial Court of the Yukon Judicial District on the 12th of September, 1898. By the fifth section of *The Yukon Territory Act*, as enacted in 1898, he became *ex officio* a member of the council that was constituted to aid the Commissioner in the administration of the Territory (1). That section was repealed in 1899 (2), and a new section substituted therefor, which did not contain the provision that the judge should be *ex officio* a member of the council, but in the meantime he had by an order in council passed on the 7th of October, 1898, been appointed "to aid the Commissioner in the "administration of the Territory"; and he has since continued to act as a member of the council. By the Act of Parliament, 61 Vict. c. 52, s. 4 a salary of four thousand dollars per annum was provided for the Judge of the Territorial Court of the Yukon Territory. By *The Appropriation Act*, (No. 5) 1900 provision was made for a salary of the same amount for a second Judge of the Territorial Court (3), and the salaries of both judges was increased to five thousand dollars in 1901 (4). And then in 1902 provision was made for the salaries of three judges of the court at the rate of five

(1) 61 Vict. c. 6, s. 5 (3).
(2) 62-63 Vict. c. 11, s. 1.
(3) 63-64 Vict. c. 5, Schedule "B," p. 47.
(4) *The Appropriation Act (No. 2)* 1901; Schedule "B," p. 49, and 1 Edward VII., c. 39, s. 4.

1905

THE KING v. DUGAS.

Reasons for Judgment.

thousand dollars each, per annum. Provision has also been made from time to time for the payment of the travelling expenses of the Judges of the Territorial Court (1). So far there is nothing unusual in the provision made by the judges of this court. But, owing to the exceptional conditions existing in the Yukon Territory, other provision and allowances that are not usual in the case of judges, were made for their maintenance and to enable them to perform the duties attaching to their offices. Some of these allowances were made with the express authority of Parliament. In 1899 Parliament appropriated for the year ending the 30th of June in that year, the sum of $957.35 for "supplies for Judge Dugas," and the sum of $1,500 for the "living expenses of one Judge" in the Yukon Territory (2); and for the year ending the 30th of June, 1900, the sum of $4,000 for the "living expenses of two Judges" in that Territory (3). In 1900 the amount for the living expenses for the two judges for the year ending on the 30th of June, 1901, was increased to $6,000 (4). The same amount was voted in 1901 for the living allowances of the judges for the year ending the 30th of June, 1902 (5). And in 1902 the sum of $5,000 was appriated for the living allowance of each of the three judges of the court for the year ending the 30th of June, 1903 (6). In addition to such allowances the defendant was, prior to June 30th, 1902, furnished, as has been stated, with quarters or a residence, and with fuel and light therefor.

(1) *The Appropriation Act (No. 1)* 1899; Schedule "B". p 35. *The Appropriation Act (No. 5)* 1900; Schedule "B", p. 47. *The Appropriation Act (No. 2)* 1901; Schedule "B". p. 49. *The Appropriation Act* 1902; Schedule "B" p. 21.

(2) *The Appropriation Act (No. 1)* 1899; Schedule "A", p. 11.

(3) *The Appropriation Act (No. 2)* 1899; Schedule "B", p. 28.

(4) *The Appropriation Act (No. 5)* 1900; Schedule "B", p. 47

(5) *The Appropriation Act* 1901; Schedule "B", p. 49.

(6) *The Appropriation Act* 1902; Schedule "B", pp. 21 and 22.

1905

THE KING v. DUGAS.

Reasons for Judgment.

By the fourth section of *The Yukon Territory Act* (1); it was provided that the Commissioner should administer the government of the territory under instructions from time to time given to him by the Governor in Council or the Minister of the Interior. That Act came into force on the 13th of June, 1898. On the 7th of July following an order in council was passed on the recommendation of the Minister of the Interior, making provision for the appointment of a number of officers for the administration of the Yukon District, and prescribing the salaries that were to be paid to such officers. And it was thereby provided that in addition to such salaries all of the officers mentioned should be furnished with quarters and rations. By a further order in council on the same subject, passed on the 5th of September, 1899, the order of the 7th of July, 1898, was amended by substituting for the word "rations" the words "such living allowance as may from time to time be fixed by the Minister of the Interior"; and it was further provided that the provision as amended should apply to "all appointees of the Dominion" who had been or might be "appointed to the staff for the administration of the Yukon Territory." So that under the order of July 7th, 1898, as amended, any person appointed to the staff for the administration of the Territory was entitled to (1) his salary as prescribed; (2) quarters as provided; and (3) such living allowance as the Minister of the Interior might determine. The defendant arrived at Dawson on the 17th of October, 1898. At that time Mr William Ogilvie was Commissioner of the Territory. Thinking that the defendant was to be treated in the same way that other persons appointed to office in the Territory were treated, the Commissioner made provision for the defendant to board and lodge at the Fairview Hotel at

(1) 61 Vict. c. 6.

1905

THE KING v. DUGAS.

Reasons for Judgment.

Dawson. That arrangement continued for two months, after which the defendant was furnished with quarters at the court house. When a second judge was appointed for the Yukon Territory it became necessary to take the judge's quarters in the court house to provide a second court room; and the Commissioner leased the Starnes' house for a residence for the judge. The defendant, as has been seen, occupied this house from the 19th of October, 1900, until the 19th of February 1902, when he moved or was moved, to the Noel house in which he resided until the 30th of June of that year. The rent for both houses was paid out of public moneys by an officer of the Department of Public Works; and while the defendant was in the occupation of these houses the materials and work mentioned in the information were furnished and performed for him in connection with the heating and lighting of these houses. What the Commissioner of the Territory did in this behalf he reported to the Minister of the Interior, and what the officer of the Department of Public Works, who made the payments, did, was fully and duly reported to the Minister of Public Works or to the proper officer of his Department. Regular vouchers, showing on the face of them the service for which the moneys were expended, and giving full particulars, were duly forwarded to the Department of Public Works at Ottawa; and so far as appears, no objection was taken thereto by anyone in the Department, or until a comparatively late date by anyone in the Audit Office. The payments were made in the usual way, and as other like payments were made, out of moneys appropriated by Parliament for rents, fuel, lighting etc., of public buildings, in the Yukon Territory, such appropriations having been duly placed by the Governor in Council at the disposal of the Minister of Public Works for the services mentioned. The resi-

1905

THE KING v. DUGAS.

Reasons for Judgment.

dence with free fuel and light was furnished to the defendant and accepted by him as something for which provision had been made, and to which he was entitled, in addition to his salary and living allowance. It is now contended that that was a mistake, and that there was no lawful authority for furnishing the same, and that is the principal question in issue in this case

The view that there was no lawful authority for the expenditure mentioned in the information is in the main supported by the contention that the expression "living allowance" includes the lodging, quarters, or residence of the person to whom such allowance is made; and that as the defendant had a living allowance he was not entitled to free quarters or a residence. It will of course be conceded that the expression "living allowance" may have the meaning contended for, but it may also be used with propriety in a narrower sense. A living allowance for one who is also provided with free lodging, quarters or a residence will not include his lodging, quarters or residence, while of course it must include these things where no such provision is made. So that the words "living allowance" are not of themselves conclusive of anything. In each case it is a question of intention or agreement to be determined from the terms used, or the arrangements come to. That will be made clear, I think, if we turn to the orders in council of the 7th of July, 1898, and the 5th of September, 1899, to which reference has already been made, where a clear distinction is drawn between quarters and living allowances. As has been seen the persons to whom these orders in council were applicable were entitled to their salaries, to quarters, and to the living allowances provided for them. And that brings us to the question: Did these orders in council apply to the defendant either as a Judge of the Territorial Court,

1905

THE KING v. DUGAS.

Reasons for Judgment.

or as a member of the Territorial Council? Was he an "appointee of the Dominion," and was he "appointed to the staff for the administration of the Yukon Territory?" Having been appointed by the Governor in Council to be a Judge of the Territorial Court and a member of the Territorial Council, there can be no question that he was an "appointee of the Dominion" within the meaning of the order. It is clear also that his duties in respect of both offices had relation to "the administration of the Yukon Territory." Whether anything less or different was intended by the use in the order of the words "to "the staff for the administration of the Yukon Ter- "ritory" is not so clear. There is nothing, however, to lead to the conclusion that the word "staff" was used to limit the operation of the order to any particular class of officers in the Territory; and that being the case no reason suggests itself why any distinction should in respect of quarters be made between the judges and other persons employed in the administration of public affairs in the Territory. As a matter of fact no such distinction was made. The same exceptional conditions applied alike to all, and all were treated alike. Mr. Ogilvie, the Commissioner at the time, says that he had directions from the Minister of the Interior that in addition to payment for their services "all the public employees were to be sheltered and "fed." Acting as he believed in accordance with his instructions, the Commissioner made the arrangements and provision for the defendant that have been mentioned. From a letter of the 12th of December, 1900, from the deputy of the Minister of Justice to the deputy of the Minister of Public Works, it appears that at that time the Minister of Justice considered it desirable and necessary that residences should be provided for the two Judges of the Yukon Territory. So

1905

THE KING v. DUGAS.

Reasons for Judgment.

that whatever question may have arisen subsequently, it seems to me to have been well settled and understood at the time that the defendant was to have quarters or a residence in addition to the living allowance then being made to him.

The arrangements for his residence were made by the Commissioner whose duty and authority it was to administer the government of the Territory under instructions from the Governor in Council or the Minister of the Interior. The arrangements made were in accordance with the general policy indicated in the orders in council that have been mentioned; and though the question is not free from doubt, I incline to the view that these orders were applicable to the defendant's case. But whether they were or not, the Minister of the Interior, from whom the Commissioner was to take instructions as well as from the Governor in Council, must I think, be taken to have approved and ratified what the Commissioner did in the premises. When the matter came under the control of the Minister of Public Works, his officer at Dawson continued the arrangements that had been made and the practice that he found in existence. He made no new departure. The house that was provided for the defendant, having been rented by or with the authority of the Commissioner, for what was deemed to be a public purpose, was treated as a public building; and the rent of it, and the cost of heating and lighting it was, as in other like cases, paid out of a parliamentary appropriation for rents, fuel, and light, etc. of public buildings in the Territory; the administration of the appropriation having been entrusted to the Minister of Public Works by the Governor in Council.

Under all the circumstances I think the issue as to whether there was lawful authority for making the expenditure complained of, must be found for the

1905

THE KING v. DUGAS.

Reasons for Judgment.

defendant. That being so, it is not necessary to consider the further question that would have arisen if the finding had been the other way, namely, whether the defendant would have been liable to make good to the Crown the amounts so expended if such expenses had been incurred by mistake and without lawful authority.

There will be judgment for the defendant.

Judgment accordingly.

Solicitor for the plaintiff: *D. J. MacDougal.*

Solicitors for the defendant: *Belcourt & Ritchie.*

Between

JOHN SPENCER AND SAMUEL SPENCER DOING BUSINESS UNDER THE NAME, STYLE AND FIRM OF SPENCER BROTHERS..... } SUPPLIANTS;

1906
Jany. 9.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Customs Act—Infringement by importation of cattle without payment of duty—Intention to infringe—Exercise of ownership in Canada.

Where cattle are liable to the payment of duty upon importation into Canada, the bringing of such cattle to a point within two or three miles south of the boundary line between Canada and the United States whence they may stray into Canada, constitutes an element in the offence of smuggling.

2. Where cattle are brought into Canada for pasturage, or to a point from which they themselves may stray into Canada for pasturage, if the owner in Canada exercises any control over them, a contravention of *The Customs Act* is complete, more especially where the control exercised is that of putting Canadian brands upon such cattle.

PETITION OF RIGHT for the return of certain moneys deposited with the Crown to obtain the release of a number of cattle alleged to have been smuggled into Canada.

The facts are set out in the reasons for judgment.

December 1st and 2nd, 1904.

The trial of the case was begun at Medicine Hat, N.W.T.

Further evidence was ordered to be taken before the Acting Registrar; and it was further ordered that the arguments of counsel be submitted in writing.

A. E Philps and *J. J. Kilgour*, for the suppliant;

The suppliants seek to recover from the Crown portion of a sum of $10,000 paid to the Customs

1906

SPENCER v. THE KING.

Argument of Counsel.

Department of Canada upon a seizure of 587 head of cattle, the property of the suppliants, for an alleged infraction of the Customs law. The said sum was deposited with the Department under the provisions of *The Customs Act* to procure the release of the cattle seized; the charge being that the cattle had been "clandestinely introduced and unlawfully imported into Canada," and that the suppliants had defrauded the revenue by evading payment of duty thereon. The seizure was made in June 1902, and on the 10th day of November, 1902, the Minister of Customs gave his decision as required by the Act, directing that $6000, part of the sum so deposited, be retained by the Department and that the balance of $4000 be returned to the suppliants. This decision, owing to misdirection in forwarding it to suppliants, did not reach them until the expiration of the statutory period for appealing from the Minister's decision. The Crown, however, has waived this as a matter of defence to these proceedings. The case stands, therefore, as if the suppliants had proceeded regularly to recover back the unpaid balance of the deposit in question; and the only matter to be decided is whether on the evidence the suppliants were guilty or not of the charges made against them by the Crown, and for which the seizure was made. That the action lies in the form in which it is brought is clear from section 187 of *The Customs Act* and from the decision of this court in *Julien* v. *The Queen* (1).

In weighing the evidence it has of course to be admitted by the suppliants that the burden of proof is, in the first instance, upon them of showing that they were not guilty of the offence charged; and that no penalty or forfeiture had accrued by reason of any acts of theirs. As regards this question, it is sub-

(1) 5 Ex. C. R. 238.

1906

SPENCER v. THE KING.

Argument of Counsel.

mitted that the suppliants have at the outset clearly shifted the onus to the Crown. It is enough to point out that the suppliants' foreman, and practically all the employees who were in any way connected with importations of the suppliants' cattle into Canada, unequivocally pledged their oaths that there was no smuggling of any of the suppliants' cattle into Canada, or any attempt to evade the Customs law so far as any of them knew. Without exception, too, they swear that all the cattle of the suppliants brought into Canada by them or to their knowledge were duly entered for duty. Upon this evidence it is submitted that the onus must now rest upon the Crown of proving clearly by the preponderance of evidence, and beyond a reasonable doubt, that the suppliants were guilty of the charges made against them, and that failing this the suppliants are entitled to recover as claimed.

Counsel here reviewed evidence in detail, and submitted that the Crown had not substantiated the charge that the suppliants had smuggled the cattle in question into Canada. At the utmost the Crown has only been able to prove that these cattle found on the ranch at the time of the seizure were cattle that had drifted into Canada; they were not driven in at all.

T. C. Johnstone and *C. R. Mitchell*, for the respondent:

The Crown contends that as these cattle had been driven north by the suppliants in the manner disclosed by the evidence, an infringement of *The Customs Act* had taken place whether the cattle were driven over the International boundary line or had simply drifted across. But it is apparent that it was the intention that the cattle should get into Canada and range in Canada as near the suppliants' ranch as possible without the payment of duty. The evidence of John

1906

SPENCER v. THE KING.

Argument of Counsel.

Spencer, one of the suppliants, proves that they were compelled to drive cattle north in order to secure good feeding ground not exhausted by sheep. The evidence further shows that cattle were not only driven to the boundary line but across, and there is nothing to show that they were afterwards driven back.

As to the suppliants contention that the onus of proving the commission of the offence is upon the Crown, sections 167, 187 (3), and 233, expressly enact that the burden of proof lies upon the suppliants throughout both in respect of negativing any offence against the Act, and in respect of showing that the proper duties were paid upon importation.

By their argument in reply, counsel for the suppliants contended that no evidence of intention to infringe *The Customs Act* had been adduced against the suppliants. The committing of an offence against the Act necessarily implies *mens rea*, that is to say, knowledge of the facts which constitute such an offence. There cannot be an involuntary violation of the law. This proposition is self-evident, but it is also laid down by clear authority. *Attorney-General* v. *Spafford* (1).

THE JUDGE OF THE EXCHEQUER COURT now (January 9th, 1906) delivered judgment.

The suppliants carried on the business of ranching at Milk river, in what is now the Province of Alberta. They bring their petition to recover, with interest and costs, an amount of six thousand dollars, part of a sum of ten thousand dollars deposited with the Crown to secure the release of a number of cattle that were seized for an alleged infraction of the revenue laws of Canada. The seizure was made on the 12th of June, 1902, by Mr. John C. Bourinot, a preventive officer

(1) Dra. 320.

1906

SPENCER v. THE KING.

Reasons for Judgment.

of the Customs, with the assistance of Captain Deane of the North-West Mounted Police Force. The number of cattle seized was five hundred and eighty-seven (587), and their value duty paid was stated in the seizure report to be twenty thousand three hundred and forty-five dollars ($20,345.00). The offence alleged in the report was that the cattle had "been smuggled "and clandestinely introduced into Canada, and had "been imported and kept in Canada without entry at "the Customs House, and without the duties lawfully "payable thereon having been paid." They were released from seizure on the payment of a deposit of ten thousand dollars, subject to the decision of the Minister of Customs. The report of the seizure having been made to the Commissioner of Customs the proceedings followed the usual course in such matters. The suppliants filed statutory declarations in support of their claim that no contravention of the law had occurred, and the Commissioner considered and weighed the circumstances of the case and reported his opinion and recommendation thereon to the Minister of Customs. Then the Minister gave his decision. The Commissioner's report was made on the 31st of October, 1902, and the Minister's decision was given on the 10th of November following. The report and decision were as follows:—

"Commissioner's Report *re* Seizure No. 12737-329.

"This is a seizure of 587 head of cattle for having been smuggled and kept in Canada without the duties lawfully payable thereon having been paid. The cattle have been claimed by Spencer Bros. & Co. and released on deposit of $10,000, pending the Minister's decision.

"The information in this case was obtained from a confidential source, but not from the Conrads or any

1906

SPENCER v. THE KING.

Reasons for Judgment.

of their employees, as claimed erroneously, by the Spencers.

"It is alleged that in April, 1900, a lot of cattle, numbering about 1,000 head, were brought on behalf of Spencer Bros. to the Canadian Boundary at Bone Pile, where the younger cattle were cut out and taken to Writing-on-Stone. Duty was paid on them to Sergeant Brymner, at Pendant d'Oreille. It is claimed that the balance of the herd was driven to Canada. Only 527 young cattle under twelve months old were entered for duty out of the herd brought in on account of the Spencers in April, 1900. The admissions of Arthur Strong tend to support the allegations in this matter.

"It is now admitted that Spencer Bros. & Co. have some hundreds of cattle in Canada upon which duty has not been paid. They claim, however, that they are all 'strays,' but are willing now to pay duty on them. When officer Bourinot visited the Spencers' ranche early in 1902 they would not admit to have any foreign cattle in Canada upon which duty had not been paid.

"The officers, believing their information to be correct, had, therefore, to resort to a "round up" to settle the matter.

"The following is a summary of the cattle entered for duty by Spencer Bros. & Co.:

	Value.	Duty.
Coutts, 224 calves under 6 months old,	$1,120	$224
April 25, 1900, 303 calves over 6 months old and under 12 months old -	3,030	606
Entry 129, 1187.		
	$4,150	$830

Branded J. 7 and ⌶ left hip.		
Coutts, Dec 7, 1900, 189 cows - -	4,725	945
Entry 107, 700, 80 heifers - - -	1,600	320
268 calves about 6 months old -	670	134
	$6,995	$1,399
Brands ⌶ J. 7 F., left ribs and hip.		
Coutts, 5 old bulls and 82 cows - -	2,175	435
April 20, 1901, 20 heifers about 2 years old	400	80
Entry 196, 1182, 59 calves, from under 1 month to 9 months old - -	295	59
	$2,870	$ 574

"At the round up in June, 1902, after allowing for the cattle (450) entered for duty which would be then three years old and upwards, the Customs officers claim to have found the following stock, three years old and upwards, which had not paid duty, viz:

	Value each.
30 steers over 5 years old - - -	$42 50
168 steers 3 to 5 years old - - -	40 50
164 cows (besides their calves) 3 yrs and over.	35 00
225 dry cows - - - - - -	28 00

587 Value, $20,345.

"As to the cattle, which have not paid duty as above, only 79 head out of the lot of 303 (between 6 and 12 months) entered April 25, 1900 are computed as being three years old at the time of the round up in June, 1902. This is probably correct. But if the whole of the 303 be taken as three years old in June, 1902, there would still remain 360 head of Spencers' cattle in Canada, valued at over $10,000, without duty paid thereon.

"That the Spencers had cattle in Canada without duty having been paid thereon must have been well

1906

SPENCER v. THE KING.

Reasons for Judgment.

known to them or their agent from the fact that some of the cows which had not paid duty, bearing only the Montana brand, were followed by calves marked with Spencers' Canadian brand. 169 steers and cows bearing only the Montana brands of Sam Spencer and John Spencer and which had not paid duty in Canada, were rounded up in November, 1901, about ten miles east of Spencers' ranch in Canada and shipped to the United States (*vide* affidavit F. C. Tabor, &c.).

"The cattle seized were all found on the public domain and not on Spencers' ranch.

"The owners of the cattle seized ask for exemption from penalties in view of the leniency extended in respect of duties on stray cattle. Had they paid duties when the charges were first presented they would have had a stronger claim for lenient treatment. Penalties have been heretofore imposed on them for bringing cattle into Canada without payment of duty.

"Since this matter has been taken up large payments have been received for cattle imported into the North-West Territories, and the question as to infractions of the laws by other importers of cattle is now being investigated under the directions of the Chief Inspector of Customs, who is also enquiring as to the improvement of the frontier service.

"The interests of the revenue and a consideration for the rights of those who pay the lawful duties seem to require that this seizure be maintained, without however, imposing extreme penalties in view of the situation on the frontier.

"I am of the opinion that the public interest would be served by retaining, say $6,000, out of the amount deposited. The expenses incurred are about $3,200.

"I would recommend that $6,000 out of the amount deposited be retained and remain forfeited and that the balance of the deposit be returned.

31st October, 1902.

(Sgd.) JOHN McDOUGALD,
Commissioner of Customs.

"Decision of the Minister of Customs in the foregoing matter is in the terms of the above recommendation.

Nov. 10th, 1902.

(Sgd.) WM. PATERSON,
Minister of Customs."

The suppliants were notified of the Minister's decision, but the notice did not reach them in time to enable them to give the Minister notice in writing that his decision would not be accepted as provided in the 181st section of *The Customs Act*, and no further proceedings were taken under that Act. They were however dissatisfied with the decision, and subsequently filed their petition. The Act makes the Minister's decision final where no notice that it will not be accepted is given. But the Crown under the circumstances of this case waives that provision, and the principal issue is as to whether or not such an infraction of *The Customs Act* had occurred in respect of the cattle seized, or any of them, as would justify the decision come to. The burden of proof on that issue is on the suppliants.

By the 192nd section of *The Customs Act* it is, among other things, provided that if anyone smuggles or clandestinely introduces into Canada any goods subject to duty, or makes out or passes, or attempts to pass through the Custom House any false forged or fraudulent invoice, or in any way attempts to defraud the revenue by evading the payment of the duty, or of any part of the duty on any goods, such goods if found,

1906

SPENCER v. THE KING.

Reasons for Judgment

may be seized and forfeited; and every such person, his aiders and abbetters shall, in addition to any other penalty to which he and they are subject for such offence, forfeit a sum equal to the value of such goods, which sum may be recovered in any court of competent jurisdiction. In this case the money deposited stood in the place of the cattle seized, but the Minister did not, as he might have done, decide that the whole amount was forfeited. He exercised a discretion in that respect and refrained from imposing the full penalty that he thought the suppliants liable to. The six thousand dollars declared to be forfeited did not, if one may take averages, represent the value of more than one hundred and seventy or two hundred head of cattle out of the five hundred and eighty-seven seized. In the present proceeding no question as to the double penalty prescribed by the statute arises.

The questions to be determined are, I think, these: First: Has it been shewn that no contravention of the provision cited occurred in respect of any of the cattle seized? If so, the petition should be sustained and judgment entered for the suppliants for the full amount claimed.

Secondly: If that has not been shown, has it been made to appear that the value of the cattle in respect of which such contravention occurred was less than six thousand dollars? If not, then it seems to me that the Minister's decision should stand and the petition be dismissed.

In the year 1899 the suppliants leased from the Government of Canada, for a stock farm or ranch, five townships at Milk River and adjacent to the boundary line between Canada and the United States. Each of them at the time had a ranch in the State of Montana, one about ninety and the other about one hundred and twenty-five miles south of the boundary

1906

SPENCER v. THE KING.

Reasons for Judgment.

line, where they had carried on business for a number of years. Finding that the grazing lands of Montana were becoming exhausted they had determined to transfer their respective businesses to Canada. With that end in view they obtained the lease above mentioned and commenced business in Canada. Mr. William A. Taylor was made manager of the Canadian business and given an interest in the enterprise. They do not seem to have had any definite knowledge as to the number of cattle they had in Montana at the time. Perhaps that is an incident of the business, but the absence of records or of any accurate and reliable information as to the number of cattle owned or collected is one of the difficulties presented by the case. It was their intention, however, as it was in their interest, to dispose of their beef cattle in the United States markets, and to bring their breeding stock and young cattle into Canada. There was no object and nothing to be gained by bringing beef cattle into Canada, except to fatten them and then to collect them and take them out again. With the five hundred and twenty-seven calves included in the entry of April 25th, 1900, mentioned in the Commissioner's report, the suppliants sent north some four or five hundred head of cattle that were not entered at the Customs. They say that their object in doing this was to allow the cattle to run on the sweet grass hills that are situated in Montana near the boundary line, and if the cattle drifted over into Canada that is what happened in the case of hundreds and thousands of other American cattle, and that in this respect they were in the same position as other persons who were in the cattle business in Montana whose cattle were not seized. I am not able, however, in all respects to adopt that view. They were, I think, in the same position, so far as it was an advantage to them to have

1906

SPENCER v. THE KING.

Reasons for Judgment.

their stock range on Canadian public lands, and when the beef cattle were fit for the market to collect them and take them across the line. But there is nothing to suggest that any of the other American stockmen had any Canadian interests, any lands under lease in Canada, any Canadian cattle with which their American cattle could run, or any Canadian branding irons; and there is no evidence that any of them drove their cattle into Canada or to a point two or three miles south of the boundary line and turned them loose there. But one or the other of the things last mentioned is what was done with the cattle driven north with the calves entered in April, 1900. As to that it appears that the instructions as to what was to be done with these cattle were given by Mr. Taylor. He says he sent word to turn them loose. John D. McLaughlin, who carried his instructions to John Rice, the foreman in charge of the herd, says that he told the latter to turn them loose. But Rice says that the cattle which at that time were at a place called Pile-of-Bones, some two or three miles south of the boundary line, were supposed to be taken to a place some eight or nine miles north of the line, called Dry River Bed or Black Horse Coulee, and that he gave instructions to that effect. As he left the men in charge of the cattle to go to the ranch he does not know whether his instructions were carried out or not. The men, of whom there were a number, had however time in which to do what he had instructed them to do. Arthur Strong, one of these men, says that the cattle were turned loose at the Bone Pile. He ought to know, but I am not able to rely upon his testimony with any strong degree of confidence. But in the view I take of the case it does not make any great difference whether the cattle were turned loose a few miles north or a few miles south of the bound-

1906

SPENCER v. THE KING.

Reasons for Judgment.

ary line. In the latter case it was, I think, to be expected that a large number of them, if not all, would find their way into Canada. So far as that constitutes an element in the offence of smuggling, I see no substantial difference between driving cattle into Canada and driving them to a point from which, following their natural bent, they would themselves cross into Canada. There is also some evidence that a good many head of cattle that were never entered for duty were driven north with those entered on December 7th, 1900; but this is denied, and the evidence leaves the matter in great doubt. There is however no question that when in June of 1902 the suppliants' cattle were collected, a considerable number of their cattle bearing American brands only were found in Canada, and that afterwards they sought to enter these cattle at the Customs; from which it is, I think to be inferred that they were cattle which they desired to keep in Canada in connection with their Canadian business. It is true that all of these cattle, or nearly all, were found on public lands and not on lands leased by the suppliants, but nothing turns on that, as it is true also of the other cattle collected at the time. The lands under lease were not fenced and the public lands were open to anyone who wished to let his cattle run on them. The Minister's decision, however, was based, in part at least, upon other grounds than those already mentioned. It was part of the case against the suppliants that a number of their Montana cattle that had not been entered at the Customs had been branded with the suppliants' Canadian brand, and it is admitted that if that happened an offence against the statute was committed.

Mr. Bourinot and Captain Deane, with the outfit they had engaged, collected some 2,000 head of cattle, from which they separated 1,384 head belonging to

1906

SPENCER v. THE KING.

Reasons for Judgment.

the suppliants, and bearing either their American brands only, or both their American and Canadian brands. In this number calves or yearlings that were sucking were not included. Then 398 head of cows with calves and 26 steers, that is 424 head in all, were cut out of the herd and handed over to Mr. Taylor. These were thought to be three years old and upwards at the time, and according to Mr Bourinot's and Captain Deane's view were all that the suppliants were entitled to have of that age, having regard to the entries that had been made. Mr. Taylor took exception to 7 of the 424 head, and then 7 cows with calves were cut out of the herd and handed over to him, and as to that he was it appears satisfied. Then 347 head of cattle that were thought to be under three years of age were cut out of the herd and handed over to him. That left 606 head in the herd. Then Mr. Taylor's men cut out some 100 or 150 head that they claimed to be under three years of age; but the claim was not allowed except in respect of 19 head. The latter were handed over to Mr. Taylor and the balance turned back into the herd. That left in the herd the 587 cattle that were seized. In the receipt that Mr. Taylor gave for them they are described as being "of three years of age and upwards"; and after the nineteen head that have been mentioned had been handed over to him he expressed himself as satisfied with respect to the ages of the rest of the herd, that is of the cattle seized. It appears, however, that in order to determine the ages of cattle accurately their mouths should be examined to see what teeth they have, and that there is always more or less difficulty in ascertaining an animal's age by its horns and general appearance. To men of experience these afford, within limits, a means of ascertaining the ages of cattle, but not such a sure one as the former method. When the

1906

SPENCER v. THE KING.

Reasons for Judgment.

dispute as to the ages arose Mr. Taylor asked Mr. Bourinot to have the cattle seized taken to the suppliants' ranch and put through the "shute", and their mouths examined. This request was refused on the ground of expense, and that it was unnecessary. Of course Mr. Taylor might himself have had an examination of this kind after the cattle were released and handed over to him had he cared to do so. It does not seem to me that it was necessary for the Customs authorities to go to the trouble and expense, especially in view of Mr. Taylor's admissions. He says, and it is not denied, that he told Mr. Bourinot that his saying the cattle were three years old and over would not make them so, and that he made the deposit mentioned to save the cattle from the sale that Mr. Bourinot threatened to make of them. He was no doubt in a difficult position. But if he really thought his admissions to be unfounded, he ought, I think, himself to have taken the necessary steps to ascertain the facts beyond any question. He knew, I think, better than anyone else what had happened, and what the ages of the cattle seized were; and I am not able, in view of the other evidence and of his admissions, to find that any of the 587 head of cattle seized were less than three years old. Then, with regard to the entries at the Customs, they should, I think, be taken to be true. The first one mentioned was made by Mr. Samuel Spencer, and the other two by Mr. Taylor. No doubt there would be some difficulty in giving the exact age of the catttle entered. The descriptions used in the declarations made in the entries show that. In the first entry 224 calves are described as being "under six months old," and 303 as being "over six and under twelve months old." That was Mr. Spencer's declaration made under oath in April, 1900; and the suppliant cannot complain if it be taken to be

1906

SPENCER v. THE KING.

Reasons for Judgment.

true, as indeed I assume it to have been. Of the 303 calves described as being over six and under twelve months old, Mr. Bourinot and Captain Deane estimated that seventy-nine head would in June, 1902, be three years old and upwards. The Commissioner of Customs thought that this estimate was probably correct. "But," he adds, "if the whole of the 303 be "taken as three years old in June, 1902, there would "still remain 360 head of Spencers' cattle in Canada "valued at over $10,000 without duty paid thereon." The exact number in that case would be 363. But of these it appears that 135 head bore American brands only; and that would leave only 228 head of American cattle that had not been entered for duty, but which bore Canadian as well as American brands. It is argued that this number should be further reduced by some allowance for cattle with American brands only that would probably have been found among the 778 head handed over to Mr. Taylor. As to that I would expect to find very few of such cattle among the 347 head of young cattle so handed over, as the suppliants' object had been to enter and brand these young cattle. But among the other 431 head of older cattle handed over there may of course have been instances of this kind. But the number cannot now be ascertained. And when we come to take averages and make estimates we must not overlook the fact that of the 1,230 head of cattle imported into Canada by the suppliants 1,064 head had in June, 1902 been exposed to two winters, and the remaining 166 head to one winter; and it would be an extraordinary thing if there had not been some loss. Again there is the probability that all the cattle on which duty had been paid were not collected. No doubt those engaged in collecting them did their best, but even so the chances, it seems to me, would be that some at least of these cattle would not be found. So in

1906

SPENCER v. THE KING.

Reasons for Judgment.

disposing of the case I do not see that I can do more than set off one of those unknown quantities against the other. And if that is fair, and I think it is fair, it would appear that in June, 1902, there were among the cattle that were seized 135 head bearing American brands only, and at least 228 head bearing both American and Canadian brands. With regard to the latter there is another consideration that ought in fairness to be mentioned. Mr. Taylor and those of his men who were examined deny ever having branded, or exercised any control to their knowledge over, any cattle other than those duly entered at the Customs; and it did appear to be important to enquire and see if there was any occasion on which this branding could have been done either wittingly or unwittingly. From a declaration made by Mr. Taylor on the 25th of June, 1902, and filed with the Commissioner of Customs, it appears that the 537 head of cattle entered on the 7th of December, 1900 were not branded until the spring of 1901, the cattle having been scattered by a storm after entry and before they could be branded. But there is nothing to show what means Mr. Taylor adopted to see that at that time he branded only the cattle that were entered in December, 1900, and no others; or whether it was possible to gather together in the spring the same cattle that had been scattered in December, or whether any of these cattle had died or been lost during the winter. Here, however, was an occasion when without attracting notice a number of the cattle that had been driven north in the previous year and not entered for duty, might have been collected and branded with others on which duty had been paid. Whether that happened or not does not appear. But there was opportunity, and that is all that can be said as to that.

1906

SPENCER v. THE KING.

Reasons for Judgment.

But on the case as a whole it is not, I think, possible to come to the conclusion that no infraction of the revenue laws occurred. If there were nothing more than the facts about the cattle found with American brands only, it would be difficult to acquit the suppliants of a contravention of the statute. The importer cannot excuse himself from a compliance with the Customs Act by saying that he intended to export the goods or cattle brought into Canada. He must comply with the law on that subject. But there is no occasion to base one's opinion on that aspect of the case. There appears to be no reasonable doubt that a number of the suppliants' cattle on which no duty had been paid were found bearing Canadian brands, and making every allowance that seems admissible, I am not able to bring the number under two hundred or the value below the six thousand dollars for which the petition is brought.

There will be judgment for the respondent, and a declaration that the suppliants are not entitled to any part of the relief sought by their petition.

Judgment accordingly.

Solicitors for suppliants: *Philps & Kilgour.*

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

APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

Between

THE ACTIESELSKABET BORGESTAD ..... } PLAINTIFF; 1905 Oct. 23.

AND

THE SHIP *THRIFT* ..... DEFENDANT;

AND ALSO

THE DOMINION COAL COMPANY ..... } PLAINTIFF;

AND

THE SHIP *THRIFT* ..... DEFENDANT.

Shipping—Collision actions—Interlocutory application for consolidation of two actions—Appeal from Local Judge.

An action for damages against the defendant ship for collision was taken in the Nova Scotia Admiralty District by the owner of the injured ship on the 15th of September, 1905. The following day a similar action was taken by the charterer and owner of the cargo of such injured ship. On the 28th of September an application was made by the defendant to the Local Judge for an order to consolidate the two actions, or in the alternative for an order that the defendant ship be released upon tendering bail to the amount of her appraised value, and that a commission of appraisement be issued, to ascertain her value in her then condition. On the 3rd of October the Local Judge made an order that a commission of appraisement issue, and that upon bail being given for the amount of such appraised value in each of the actions, the ship be discharged from arrest, and that the two actions be tried together. An appeal from such order was taken to the Exchequer Court. Upon the appeal no objection was taken to the order, so far as it directed an appraisement, or to the direction that the two actions be tried together, except so far as that direction might be held to effect the question of the amount of bail to be given—it only being necessary to give bail to the amount of her appraised value to secure the release of the ship if the actions were consolidated. It was however urged that the Local Judge should have ordered the

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

consolidation of the two actions, and that the ship should be released in respect of both upon giving bail to the amount of her appraised value.

Held, that it was a matter within the discretion of the Local Judge to grant or refuse an order for consolidation, and, therefore, the decision ought not to be interfered with on appeal.

2. That the order of the Local Judge should be varied to allow in the alternative the ship to be released in respect of both actions and claims made, upon payment into court of her appraised value and the amount of her freight, if any.

3. This relief not having been asked before the Local Judge, the court on appeal declined to allow the costs of appeal to either party.

Argument of Counsel.

APPEAL from the interlocutory order granted by the Local Judge of the Nova Scotia Admiralty District.

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

October 21st, 1905.

The appeal was now argued at Ottawa.

E. L. Newcombe, K.C., for the motion, contended:

1st. That the appeal, although from an interlocutory order, was regularly before the court, under sec. 14 of *The Admiralty Act*, 1891.

2ndly. The actions are based on the same cause of injury, and could with all propriety and convenience be consolidated. (Rule 33 of the Admiralty Rules and Orders.) They ought to be consolidated, and the bail limited to the appraised value of the *res*. (*The William Hutt* (1); *Williams & Bruce's Admiralty Practice* (2).

R. L. Borden, K C., contra: There is no rule limiting the bail to the value of the *res* in such an action as this. It is not a question of the liability of the ship, but of the owner. If there are two distinct causes of action, bail should be given in each. (*The Saracen* (3); *The Clara* (4)).

(1) 1 Lush. 25.
(2) 3rd ed. pp 391, 392 n.
(3) 4 No. of Cas. at pp. 507, 508.
(4) Swab. at p. 3.

1905

THE ACTIESELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Argument of Counsel.

The old Admiralty practice was not to consolidate where the parties were unwilling. As a rule it was only in salvage actions that consolidation was ordered. *The Jacob Landstrom* (1); *Williams & Bruce* (2); *Marsden on Collisions* (3).

The question of consolidation is within the discretion of the court below, and that discretion will not be reviewed on appeal. *Golding* v. *Wharton Saltworks Co.* (4).

Mr. Newcombe replied, citing *Abbott on Shipping* (5); *Roscoe's Admiralty Practice* (6).

THE JUDGE OF THE EXCHEQUER COURT now (October 23rd, 1905,) delivered judgment.

In an action commenced in the Nova Scotia Admiralty District the plaintiff, the Actieselskabet Borgestad, as owner of the ship *Chr. Knudsen* claimed the sum of fifty thousand dollars against the steamship *Thrift* for damages occasioned by a collision which took place at or near Bird Rocks in the Gulf of St. Lawrence on the 12th day of September, 1905; and in another action in the same court the plaintiff the Dominion Coal Company as charterer of the said ship *Chr. Knudsen*, and as owner of her cargo claims the sum of thirty thousand dollars against the said steamship the *Thrift*, for damages occasioned by the same collision. The writ in the action by the Actieselskabet Borgestad was issued on the 15th day of September, 1905; and that in the action by the Dominion Coal Company on the 16th day of the same month; and the first writ issued was also the first to be served.

On the 26th of September an application was made to the learned Judge of the Nova Scotia Admiralty District for an order to consolidate the two actions;

(1) 4 P. D. 191.
(2) 3rd ed. pp. 391, 392 n.
(3) 3rd ed. p. 293.
(4) 1 Q. B. D. 374.
(5) 14th ed. p. 1227 n.
(6) 3rd ed. p. 371.

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

or in the alternative for an order that the *Thrift* be released upon tendering bail to the amount of the appraisement and that a commission of appraisement be issued to the marshal to appraise the *Thrift* in her then condition On that application an order was made on the 3rd of October that a commission of appraisement issue for the appraisement of the *Thrift*, and that upon bail being given for the amount of such appraised value in each of the actions the ship be discharged from arrest; and that the two actions be tried together. From that order an appeal has been taken with a view to having the order reversed and set aside, and an order made that the said actions be consolidated and that the steamship *Thrift* be released upon tendering bail in the consolidated action to the amount of her appraised value.

To that part of the order that directed the appraisement to be made no objection is taken; and it was stated during the argument that such appraisement had been made, and the value of the steamship *Thrift* ascertained to be twenty-four thousand eight hundred dollars Further, no objection is taken to the direction that the two actions be tried together, except so far as that direction may be held to affect the question of the amount of bail to be given. If the actions are consolidated it will only be necessary to give bail to the amount of her appraised value to secure the release of the ship, and this consideration is urged as one of the reasons why the order for consolidation should be made. For the defendants, the owners of the steamship *Thrift*, it is contended that the ship ought to be released in respect of both actions upon giving bail to the amount of such appraised value; and that bail to that amount in each action should not be required.

With reference to the consolidation of the two actions the rules provide that two or more actions in

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

which the questions at issue are substantially the same; or for matters which might properly be combined in an action may be consolidated by order of the judge upon such terms as to him shall seem fit. (Rule 35). And then it is provided that the judge, if he thinks fit, may order several actions to be tried at the same time and on the same evidence, or the evidence in one action to be used as evidence in another; or may order one of several actions to be tried as a test action; and the other actions to be stayed to abide the result (Rule 34). In the third edition of *Roscoe's Admiralty Practice* at page 307 it is stated that "when there is a separate action brought by "cargo owners or shipowners against a vessel it is "usual for the defendants to apply that the cargo "a tion shall be stayed to abide the result of the ship "action and that bail be given in one bond to answer "both claims. If the defendants are successful, the "plaintiffs in the two actions will each pay half of "the costs of giving one bond." And again at page 371 "where more than one action is brought in respect "of a collision, as by owners of ship and owners of "cargo, the so-called order for consolidation is now in "fact an order to stay, under the Judicature Act, 1873, "s. 24 (5). For the practice is to order the stay of one "action to abide the result of the other and if the "defendants ask for this to order that bail be given in "one bond to answer both claims." Such an order as that might have been made, I think, under the rules in force in this court; but the order made that the two actions should be tried together is also within the terms of such rules, and within the discretion of the learned judge who made it. Actions are consolidated for reasons of convenience and economy; but there is some question whether, in such a case as this where the plaintiffs object, such an order as that

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

asked for should be made. But even if it were within the learned judge's power to make such an order, a question that need not be now decided, it was a matter within his discretion to decide whether he would make it or the order that was made, and under the circumstances the latter order ought not, it seems to me, to be interfered with on appeal.

That leaves the question only of the bail to be given on the release of the ship to be dealt with. And as to that it is obvious that the owners of the steamship *Thrift* are in no worse position than they would have been if the owners of the *Chr. Knudsen* had first arrested the *Thrift* and bail had been given, and then the cargo owners had subsequently arrested her. They are probably in no worse position than they would be if one or the other of the two plaintiffs should now discontinue its action, leaving the owners of the defendant ship to put in bail, if they desired the possession of the ship, and then after that was done institute a new action. In either of such cases the court would have to decide whether in case judgment went for the plaintiffs it would allow the bail in the two actions to be held for more than the appraised value of the vessel. And that, under the order that was made, is what the learned judge in giving judgment and disposing of the two actions, will now have to determine. But the defendants wish, and very naturally wish, to avoid having that question raised; and the order ought, it seems to me, to be made in view of the existing conditions and not with reference to other conditions that might have arisen, and did not, or with reference to other conditions that might arise. The rules on the Admiralty side of the court provide for the release of property under arrest on (1st) payment into court of the amount claimed, or of the appraised value of the property arrested or where

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

cargo is arrested for freight only, of the amount of the freight verified by affidavit (1); and (2ndly.) on one or more bail bonds being filed for the amount claimed or for the appraised value of the property and on the allowance of the same if objected to (2). The money paid into court is substituted for the *res*; and bail is the substitution of personal security for the *res*. The amount of money to be paid into court or of the bail to be given in such a case as this is limited by the amount of the claim and by the appraised value of the *res*. In some cases the amount of the statutory liability of the owners may have to be taken into account. But not in a case such as this where the value of the *res* is less than the amount of the statutory liability. The value as appraised in this case is also less than the amount of either of the claims made. Now it seems to me that where, as here, there is at the time when an application is made for the release of property under arrest in the court more than one claim against such property, the amount claimed within the rule is the sum or aggregate of the amounts of such claims; and where such sum exceeds the appraised value of the property the amount of money to be paid into court, or of the bail to be given should be determined by reference to such appraised value. Where that sum or aggregate does not exceed such appraised value of the property no difficulty will arise. Equally it seems to me there is no difficulty where the appraised value is paid into court. In such a case the money paid into court is substituted for and represents the *res* or property, and the court is free to deal with it in any way in which it could deal with such property or the proceeds of it when sold. But when one or more bail bonds are given a difficulty may arise. The interests of the several claimants may be adverse, and the judge may

(1) Rule 54 (*a*). (2) Rule 54 (*b*).

1905

THE ACTIE-SELSKABET BORGESTAD v. THE SHIP THRIFT.

THE DOMINION COAL CO. v. THE SHIP THRIFT.

Reasons for Judgment.

not at the time when bail is tendered be in a position to determine the questions that may be in controversy between them. He might possibly order one bail bond in the appraised value of the property to be given for the benefit of all the claimants, and possibly the form of bail bond in use could be adapted to meet such a case. But that might possibly raise questions that would render the security to each claimant of less value than separate bail bonds. And it does not appear to me to be unreasonable for a judge under such circumstances to say to the defendants: If you wish to secure the release of your property by giving bail bonds, you must give the bail to each plaintiff that you would have to give if his action and claim were the only action and claim before the court; and when the actions come to be tried and to be disposed of, and they will be tried together, I shall decide as to the respective rights of the parties, and if the plaintiffs succeed I shall determine the amount for which the bail in each action will be liable in respect of the property under arrest. But I am not able to determine these questions until the hearing, and in the meantime you must give bail in each action to the amount of such appraised value. That, it seems to me, would not be an unreasonable exercise by the Judge of his discretion in the matter. There is not, however, in my opinion, the same difficulty where the amount at which the property is appraised is paid into court.

I am therefore of opinion not to vary the order that the learned Judge made further than to allow in the alternative the steamship *Thrift* to be released in respect of both the actions and claims made upon payment into court of her appraised value and the amount of her freight (if any). And, as the learned Judge was not asked to make any such order as that, there will be no costs of appeal to either party.

Judgment accordingly.

Between

HERBERT MOLESWORTH PRICE.....PLAINTIFF; 1906 Jan. 25.

AND

HIS MAJESTY THE KING .....RESPONDENT.

Public work—Injury to adjoining property by fire—Liability of Crown under sec. 16 (c) of The Exchequer Court Act—Injury not actually happening on the public work.

It is sufficient to bring a case within the provisions of sec. 16 (*c*) of *The Exchequer Court Act* to show that the injury complained of arose from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment on a public work. It is not necessary to show that the injury was actually done or suffered upon the public work itself. *Letourneux* v. *The Queen* (7 Ex. C. R. 1; 33 S. C. R. 335) followed.

THIS was a claim for the recovery of damages against the Crown for the destruction of property by fire, alleged to be due to the negligence of servants of the Crown on a public work.

The case came on for hearing and was referred to the Registrar as a referee for enquiry and report.

October 25th, 1905.

The Registrar now made his report in the following terms:

WHEREAS by an order made herein on the 12th day of May, A.D. 1905, it was ordered that the matters in question in this case be referred to Louis Arthur Audette, Registrar of the Exchequer Court of Canada, for enquiry and report under the provisions of section 26 of *The Exchequer Court Act*, the rules of court and the amendments thereto in respect of the same;

AND WHEREAS the reference was proceeded with at the City of Quebec, before the undersigned, on the

1906

PRICE v. THE KING.

Referee's Report.

26th and 27th days of May, on the 26th and 27th days of June, and on the 4th day of July, A.D. 1905, in presence of Geo. F. Henderson, Esq., and L. A. Cannon, Esq., of counsel for the plaintiff, and C. E. Dorion, Esq., of counsel for His Majesty the King; and upon hearing the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, the undersigned submits as follows:

The case comes before this court on a reference, from the Department of Railways and Canals, made under the provisions of section 23 of *The Exchequer Court Act*, of the plaintiff's claim by which he seeks to recover the sum of $70,777 for alleged loss and destruction by fire of a large quantity of pulp wood and hemlock bark, and damage to certain timber lands situate in the Township of Blandford, in the Counties of Nicolet and Arthabaska, in the Province of Quebec, which lands are intersected by the line of the Intercolonial Railway of Canada. The amount claimed also includes the wages of a number of men employed by the plaintiff to fight the fire.

It is alleged by the plaintiff that fires occurred during the months of April, May and June, 1903, which were caused by sparks coming from the engines used in the operation of the said railway, or by live coals dumped from such engines along the said line of railway; that the fires originated on the railway track or the right of way, and spread over on to his lands through the negligence of the officers and servants of the Crown while acting within the scope of their duties or employment.

The Crown denies the material allegations of the plaintiff's statement of claim, and pleads, *inter alia*, that all such lumber, pulpwood and other materials deposited on its property were there at the risk of the

owner, and further that the plaintiff's claim is prescribed.

It will be well at the threshold to dispose of this question of prescription. The fires complained of, which are alleged to have caused the damage, the amount of which the plaintiff seeks to recover, occurred during the months of April, May and June, 1903, and the case was referred to this court on the 11th day of October, 1904. Actions of this nature are prescribed by two years under Art. 2261 C C. L. C. Thus, as two years had not run between the periods mentioned, the plea of prescription is declared not founded in law.

Now the plaintiff in a case of this nature, under the provisions of sub-section (c) of section 16 of 50-51 Vict. ch. 16, must, to be entitled to succeed, prove and establish, 1st, that the Intercolonial Railway is a public work of Canada; 2ndly, That the fires were caused by the operation of the said railway; and 3rdly, That the fire was so caused through the negligence of an employee or servant of the Crown while acting within the scope of his duties or employment.

Both under the pleadings, and under the evidence adduced herein, the undersigned finds that the plaintiff's lands in question herein are intersected by a branch of railway which was formerly known under the name of The Drummond County Railway, and which under section 1, ch. 6 of 62-63 Vict., became, and was in the year 1903, part of the Intercolonial Railway, the property of the Government, and a public work of the Dominion of Canada. Section 45 of *The Government Railway Act*, R. S. C. ch 28, sec. 45, reads as follows:—"All Government Railways are, and shall be, public works of Canada" *Leprohon* v. *The Queen* (1).

Passing to the second branch of the case, it is perhaps advisable to preface anything to be said with

(1) 4 Ex. C. R. 100.

1906

PRICE v. THE KING.

Referee's Report.

respect to the question as to whether or not the fire was caused by the railway, by stating that the spring of the year 1903 was extraordinarily dry from April to June, when a serious drought prevailed all through that section of the country.

It appears clearly from the evidence that the right of way and railway track in this section of the country was, in 1903, in a very bad state. Stumps, which were left on the right of way ever since it had been opened about 8 or 10 years ago, had become very dry, and in fact, as one of the witnesses puts it, were like tinder and would be easily ignited by a spark, adding that tinder fire will sometimes lie dormant in a stump for a long time, when a wind will come on and fan it into a flame and blow the sparks from a stump of that kind into the adjacent forest and set fire. Stumps, dry grass, and weeds, dead bodies, pieces of wood and branches were also left on the right of way. Old grass was allowed to remain over from previous years notwithstanding section 45 of *The Government Railway Act*, and that instructions were given to the section men by the road-master to burn that grass every spring and keep the road in good order. This statement with respect to the condition of the right of way applies to all the country adjoining plaintiff's property.

The plaintiff, on the 25th of April, 1903, while riding on the rear platform of the drawing-room car, after leaving Moose Park, saw fires starting in two or three places on the right of way. He then wrote to the superintendent of the road, as will appear by Exhibit No. 2, calling his attention to fires on the line, alleging that they were caused by sparks coming from the locomotives, and that unless great care were taken, as everything was very dry, fires would occur. Mr. Dubé, the Superintendent of the I. C. R. between Montreal and St. Flavie, acknowledged receipt of this letter,

stating that he had taken up the matter with the mechanical department, and instructed them to see that the nettings of the engines be examined and if found to be defective to be put in perfect order at once.

Mr. Joly, whose father is proprietor of lands in the neighbourhood, and who manages the estate, says that he frequently has seen engines throwing sparks from the funnel, and wrote to that effect to Mr. Pottinger. During the spring of 1903 he kept two gangs of men with two railway bicycles protecting his property and patrolling over twelve miles. Following up an engine while so patrolling, he says they might put out behind that engine, five or six fires, originating on the right of way. Before the railway came through their property there was never any question of fire, and from time immemorial there never had been any fires until the railway was put in operation.

Fires were continually and daily occurring upon the railway track, and the witnesses heard herein testify they were caused by the railway.

The section men testified that the locomotives when passing were throwing sparks that were burning their clothes. Some of the sparks were sometimes falling on their necks and burning them.

Now, let us be more precise and deal with the fire of the 9th of May, 1903, at Moose Park, the largest of them all and the one first mentioned in the evidence. The drought had then been prevailing for twenty-five days. On that day, as appears from the evidence of the chief train despatcher, a freight train hauled by engine No. 14, which has a deep ash pan, passed Moose Park at about 1.14, in the afternoon, on its way towards Montreal, travelling west. There is an up grade on leaving Moose Park going in the western direction for about twelve acres, when the grade changes and inclines downwards. At about 1.30 p.m.,

1906

PRICE v. THE KING.

Referee's Report.

about a quarter of an hour after the passing of this special or freight train, the Reverend Mr. Manceau, the parish priest at Moose Park, having noticed smoke rising quite rapidly in the west at about a dozen of acres from Moose Park, and fearing the fire, as he says, on account of the drought then prevailing and the ordinary danger of locomotives setting fire, went with one Xénophen Marier, a section man then on sick leave, to the place where the fire was, and found it at about thirty feet from the rails, but still on the Government property, and testifies that at that very place there was grass (herbage), rotten stumps and pieces of wood on the right of way. There was nobody in the neighbourhood of the fire, no tramp, no shanty, saw nobody, excepting foreman Hilaire Bergevin, Phillipe LeMay and Alphonse Ferland, the three section men whose section began at Moose Park and ran east, and who were then at the station, and Kirouac, who was loading a car near where the section men were working, and they were almost together and at about a dozen of acres from the fire. When father Manceau and Marier arrived they found the fire had covered a space of about four or five feet and had taken at two places, and the former said to Marier, "You notice, don't you, that the fire is on the I. C. R. " land, and that it is the train which has just passed " that has set the fire."

Reverend Mr. Manceau had seen the train leaving the station and was at about five acres from where the fire originated when the train passed him. Asked if he is convinced that the fire in question originated from the train, he answers " Certainly ".

Xénophen Marier corroborates the testimony of Rev. Mr. Manceau and says that both the parish priest and himself left Hamilton's store for the fire, he going first, and the parish priest following up on his bicycle

and going ahead of him, and that on his (Marier's) way to the fire he had to pass by the station, where he met Kirouac who said to him: "How do "you find that, Marier, there is fire there, and I ask "Mr. Bergevin to go and put out the fire and he does "not want to go, he says he has no business to go "there because it is Mr. Taillon's section" Marier then said: "Yes"? and turning toward Bergevin he said: "You should go, Mr. Bergevin. You well un- "derstand, even supposing you as well as another "you should go, because if the fire burns us, it is not "a question,—you should go to the fire at once." Then Bergevin said: "If it were any other but Taillon, "I would go,—you know your Taillon."

Taillon is the foreman of the section beginning at Moose Park and running west and upon whose section the fire had started.

He further says that the track at the place where the fire started is excavated, and the fire was about 25 feet from the side which is about three feet high. The fire had taken in several stumps, and was also running in the dry grass. On his way back from the fire, passing at the station, Bergevin asked him: "How is the fire"?, and he said: "The "fire is on the top of the grade and when we arrived "it was beginning to run towards the woods, I quite "believe you have delayed a little too much, it will "be difficult to stop it." Marier is of opinion the fire should have been taken in hand much sooner than it has been.

Cyriaque Kirouac corroborates the facts respecting the passing of the freight train which in his opinion caused the fire that day in the above mentioned manner, and also the further fact of the refusal of section foreman Bergevin to go and put out the fire on a section which was not his own.

1906

PRICE v. THE KING.

Referee's Report.

Kirouac while loading his car at the station was quite close to Bergevin and his two men who were working at the track, and says that 15 or 20 minutes after the "*special*" had gone towards Montreal, smoke began to rise on the track. Realizing that there was fire on the line, he said to Bergevin: "There is fire "along the line, it would be prudent to see to it, I "suppose." But Bergevin answered it was not upon his section, and that he had no business to go there. ("*Il n'était pas obligé à ça*).

Shortly afterwards the parish priest came and told him, he thinks, there is fire on the line,—let us go. He answered that he had commanded the Government people to go, but they refused, adding that he was not an employee and he was not going. Kirouac was shocked at the employee's refusal. Then the parish priest and Marier proceeded to the fire. It was before Rev. Mr. Manceau went to the fire that Kirouac asked Bergevin to go, and the fire appeared to him to be still on the track. The fire could then have been controlled.

Kirouac's opinion is that if Bergevin had gone to the fire when he commanded him to go, he could have put out the fire. The wind was not extraordinary (to use his own language) at the time, and there were three men. He said he had already been working for the Drummond Lumber Company along the line and they had often put out fires where it had not spread too much. He cannot see that anything else but the train could have set the fire. Before the train left there was no smoke, no fire, and after the train passed the fire started. The track was in a bad condition, it was strewn with stumps, rotten wood, dead trunks of trees, dry hay, hay from previous years which had remained on the track and had dried up, which is inflammable like tinder.

1906.

PRICE.
v.
THE KING.

Referee's Report.

Edward Champoux, section man on Taillon's section, which runs west from Moose Park, testifies that on the 9th of May, 1903, he, with other section men, worked at a fire at the western end of the section and helped to put out fires all day on Lacharité's section, at Route Siding. This would show that it was not only the duty, but even the practice, of section men to put out fires on sections other than their own. George Taillon corroborates witness Champoux and states that ordinarily when they see smoke they go at once to the fire as soon as possible.

Hilaire Bergevin was heard and said it was the women who called, a lady who called him first, and upon being asked if it was not Kirouac who asked him to go to the fire, said: "Beg pardon, it was a "lady who called me first." He does not, however, deny that Kirouac spoke to him about it. He said he could not go to the fire at once as he was placing ties; that he spiked the two ties and went to the fire. If he had only two ties to place, as he says, there was no reason for delay because it should have taken only between three or four minutes to do so according to Houston's testimony, from whose evidence, one would further gather that if there were only a couple of ties out he could have left at once. Two ties out at a station would not make the road-bed dangerous. When Bergevin went to the fire quite a while after it had started, he ascertained the fire had originated on the railway track, and had then reached the plaintiff's property.

Mr. Houston, the road-master, being asked: "What "is the duty of a section man if he sees a fire a mile "away, but not on his section?" Answers: "His duty "is to proceed there at once. Q. And if he waits a con- "siderable length of time before doing so, telling some- "body in the meantime that it is not on his section, or

1906

PRICE v. THE KING.

Referee's Report.

"none of his affairs, do you think he is doing his "duty?"—A. No, he certainly would not."

Mr. Houston, the road-master of No. 9 Division (covering the territory in question) sent and addressed to the section foreman of his division the following circular letter of instructions, dated the 4th April, 1903, and filed herein as Exhibit No. 20, viz:

"Date 6/4/03.

"To all section foremen on No. 9 Division:

"You will please have all the old ties gathered and "put in piles along the track at once and burned as "soon as the weather will permit. Also all the grass "and weeds burned. This must be done before the "weather gets too dry. This is important and must "be attended to without further notice. Every spring "we have some trouble with fire on the line and it is "generally proven that the fire commences on the "company's property, and I want to avoid this trouble "this spring. Some time ago I issued instructions to "have all the large pieces of coal that are scattered "along the track picked up and taken to the station. "I noticed the coal on some sections is all gathered up "and on other sections is not. All sections where the "coal is not picked up must do so at once. It is an "easy matter to take two or three pieces each day on "the pumper when going home at night, and this will "keep the road clean.

"Acknowledge receipt.

"(Sgd.) W. HOUSTON."

Alphonse Ferland, a section man working under Bergevin, when asked if he did not believe it was worth the trouble to leave his work aside and go to the fire, answered: "As a man I was obliged to abide "by the advice of my foreman." In his opinion he does not see any other reason but an engine which could have set the fire.

1906

PRICE v. THE KING.

Referee's Report.

Phillipe Lemay, the other section man working with Bergevin, states that after the train left the station between 1.15 and 1.30 they saw the fire, but they did not go at once, but he thinks he only went at about 3 o'clock in the afternoon, and did not go before because his foreman did not command him to do so. Kirouac said they went later than that. There was nobody there, no camp, and he cannot see that it could be anything else but the cars which would have set the fire which took in the (fardoches) underbrush, bushes and trees.

Then, William Houston, the trackmaster of this division, testifies he gave instructions to all foremen of sections to go and put out fire wherever they see it. Whether the fire is on their own section or the adjoining one, "they have got to go and put out the fire." He further says it is the duty of the foreman of a section as acting within the scope of his duty, to go and put out a fire on any other section than the one over which he is foreman.

There was a great deal of discussion with respect to the construction of the several locomotives in use on the I. C. R. between Levis and Montreal, and we have upon that subject some important evidence.

Francis J. Lozo, residing at Rivière du Loup, master mechanic in charge of the mechanical department of the I. C. R. from Campbellton to Montreal, tells us there are two openings or dampers in the ash-pan; one in front which is kept closed during the winter to prevent snow from coming in; and one to the back which at that season is kept open for draft. In the first part of April, instructions are given to close the back damper, and on or about the 15th of April of each year instructions issue to place a netting at the back damper for the summer. *If the engine left after that date without the back damper fastened down or the netting*

1906

PRICE v. THE KING.

Referee's Report.

in the pan, it would be negligence on the part of the employees of the shops from where it came out.

Engine No. 163 which had a deep ash-pan was without netting at the time. The opening in a deep ash-pan would begin at about eight inches from the bottom of the ash-pan itself. This engine had the reputation of shifting her fire.

The witness contended, differing in opinion with locomotive engineers Harry W. Sharpe and Joseph Ryan, that a netting is not absolutely necessary in the case of a deep ash-pan, because the eight inches underneath are supposed to collect the cinders, preventing them going out through the door; and he is asked:

"Q. But, if that eight inches is allowed to become "choked with ashes there is nothing to prevent the "cinders coming right out through the back damper "that is open?—A. Certainly not."

"Q. If the ash-pan gets filled up to the level there "is always a danger of the cinders, the vibration of "the engine shaking out the cinders on to the track "through the damper?—A. Yes."

George Finley, the locomotive engineer, who drove engine No. 163 on train No. 152, on the 8th of May, 1903, says this locomotive did shift her fire, and when in heavy service she had a tendency of drawing her fire from the back, from the high section of grates where the fire was light, to the fore, and back it up at the front of the fire-box against the tube sheets * *, and that would destroy the draft. He would then work out the moving grates, and the result would be an unusual accumulation in the ash-pan which would fill more quickly than under ordinary circumstances, with a greater tendency of shaking out cinders or live coals. Another way of clearing draft under these circumstances would be by poking down through the fire door,—a very dangerous method.

Moïse Normand, locomotive engineer on engine No. 183, on the 8th May, 1903, says they sometimes take out the clinkers from the fire box with an iron bar from the hind door, and when they throw the clinkers from the fire door, they generally throw water upon them if they are very inflammable, and sometimes they leave them there.

He further says that it happens that engines throw sparks.

Samuel Knowles, the plaintiff's manager or agent, says he has seen large clinkers, from the size of an egg to a good sized turnip, all along the line between the stations in the territory in question. It is, he says, a common thing, when walking along the line, to have our attention attracted to the ties, to the state in which they are, the surface being burned and charred.

Joseph Ryan, a locomotive foreman of I. C. R. at Hadlow, in charge in 1903 of the round-house or shop where the engines simply get running or minor repairs and are inspected, informs us that engine No. 163 used to cause them trouble. She lifted her fire, with the effect as already explained, of filling the ash-pan with live coals and dumping its contents on the track. *On the 9th of May*, 1903, *Ryan says there was no netting on the ashpan door of engine No.* 163, and four or five days, probably seven, afterwards he received a telegram from Lozo to have a netting put on back ash-pan door of engine No. 163, surmising at the time Lozo was out on the road somewhere and had noticed No. 163 without netting. He would indeed be very much surprised if Lozo told the court in this case that there was no necessity to put netting on No. 163. Why, his telegram shows the very reverse, and from the report dated July 16, 1902, which was handed to him on reference it even appears that the ash-pan of engine

1906

PRICE v. THE KING.

Referee's Report.

No. 163 was repaired, and a netting placed over the back damper.

On the 8th of May engine No. 163 came in to the Hadlow shops with the back damper unlocked and open. He says they would send out the locomotives with the back damper door closed, and they would come back unlocked and opened. No doubt the engine drivers would open them to have better draft. When engine No. 163 came in, on the 9th of May, 1903, he remembers that the ash-pan was pretty full of fire, that is ashes and what had fallen down through the grates. it was almost level with the back door. There were in 1903 four other engines like No. 163, with inclined grates, and he had to pay more attention to them than the others because they gave trouble, and he has since changed the grates to overcome that trouble.

This fire on the 9th of May remained in the woods, changing its direction from time to time with the change of wind, and eventually burned the plantiff's lands. Mr. Knowles is quite positive the same fire was burning all the time, and that the fire which burnt some of plaintiff's property on the 3rd of June was a continuation of the fire of the 9th of May.

FIRE OF 8TH OF MAY, 1903.

Elzéar Desjardins, the Chief Train Despatcher, gives us, as follows, some of the trains which passed between Forestdale and Moose Park on the 8th of May, 1903, viz :

Train No.	152,	Eng. No.	163,	Engr.	George Finley.
"	33	"	172	"	J. Fohy.
"	34	"	173	"	R. Mitchell.
"	148	"	188	"	M. Normand.
"	152	"	200	"	Jos. Belleau.

1906

PRICE
v.
THE KING.

Referee's Report.

Now, this is the day on which engine No. 163 came into Ryan's shops with the back damper unlocked and opened and without netting.

Emmanuel Lacharité, foreman of section No. 134, extending about two miles east of Forestdale and three miles west of the same station, and including Route Siding, having a section of about six miles long, has with him to look after it Louis Champoux and David Dureau. He says that train No 33 usually passed at about three o'clock in the afternoon, and added "two o'clock, nine after two". No. 148 passes sometimes before, sometimes after, cannot say whether on that day it was on time or not. Then train No. 34 usually passes at 3.22 P.M., but he cannot say whether it was late on that date. However, after its passage they saw smoke and the fire in the direction of Route Siding when they at once went to the place and endeavoured to put it out. From what he could see, when arriving there, the fire had taken, originated, on the track; there was no more fire on the track when he arrived, but it had spread from the track to the adjoining land and was still on the right of way. On that day some wood piled outside the Government property and belonging to Mr. Price was burned at that fire. When he had passed Route Siding in the morning there was no fire there; it only started after the passing of the trains, and as there was no tramp, nobody camping there and no shanty, he does not see anything else but the train that would have set the fire, although it is pretty hard to say, as he did not actually see it. Asked if the track was clear (clair) he says it is pretty hard to be clear everywhere because it is through the forest. *The track was in a bad condition there, there was some hay, underbrush, stumps, rotten wood. In autumn they cut the underbrush, and burn it in the spring; but sometimes when it is not perfectly dry, it*

1906

PRICE v. THE KING.

Referee's Report.

does not all burn, and some of it was then left on the track.

Alexis Cantin, a witness heard in the case, speaks of fires during the month of May, 1903, but while the date of the 8th is not specifically mentioned the undersigned takes for granted it was the date to which he referred, although his testimony does not offer anything new, but only by way of corroborating what we have already heard. He was engaged by Mr. Knowles to look after the fire between Forestdale and Route Siding and the village, and he says that during April, May and June of 1903 he was putting out fires every day, and is of opinion the locomotives set the fires.

Now, this train No. 34 had engine No. 173, which is mentioned by Ryan as being of the same make and type as No. 163, and was one of those which required looking after and caused trouble, and which was at *that time running without netting, contrary to orders.*

Richard Mitchell, locomotive engineer on that train, at that date, says he has seen fire on the right of way, and that it would be a pretty hard thing for him to swear that he did not leave any fire behind. There is always a chance that a spark may drop from the stack of the engine. He would not swear to any engine not throwing fire, unless he could examine it personally.

FIRE OF 28TH APRIL, 1903.

Elzéar Desjardins, the chief train despatcher, tells us as follows the numbers of the trains which passed at Forestdale on the 28th April, 1903, viz:

Passed 5.20 P.M.—Train No. 148, Engine No. 183, Engineer, M. Normand.

Passed 11.11 P.M.—Train No. 152, Engine No. 200, Engineer, Geo. Finley.

Arr. 11 55. } Train No. 147, Engine No. 182, Engineer
Lv. At noon. } Geo. Cloutier.

Lv. 12.50. } Special, Engine No. 137, Engineer W. Kelly.

Arr. 12.19.
Lv. 1.05 P.M. } Special, Engine No. 208.

No. 149.....

Samuel Knowles was manager of the Drummond Lumber Company up to 1st May, 1903, when he entered the plaintiff's service as his agent. He was, however, looking after Mr. Price's business for a short period previous to that date during the last few weeks of his time with the company, having promised to look after Mr. Price's interests to whatever extent he could, provided it did not clash with that of the Drummond Lumber Company, thus overlapping the last few weeks he served with the company.

He was, at about noon, on the 28th April, 1903, at the Forestdale Station, when he first saw a fire at half a mile east of Forestdale, on the left hand side of the track, on the Government property. When he got to the fire it was still burning on the right of way; it had not yet got into the woods. He says he was sufficiently close to that portion of the right of way to be perfectly satisfied there was no fire there in the forenoon, and the fire only started after the passing of the trains, one was No. 152, a regular passenger train, and the other was either a "special" or No. 148, the two trains passing within a short time of each other, about 20 to 30 minutes, and he says the fire started within half an hour afterwards. There was nothing there to set fire except the trains, and from his experience he has no hesitation whatever in saying that innumerable fires were set by the passing trains in that section about that time, and he has no doubt as to how this particular fire was set.

Now, on that day, the road-bed or Government land was far from being in proper condition. All along the

1906

PRICE v. THE KING.

Referee's Report.

road there were stumps, some of them very old, rotten and inflammable; there were also in some instances brush, grass and weeds. (See sec. 51 of *The Government Railways Act.*) In some places he saw the grass and weeds which had been cut by the officials of the road, or through their orders, and which, more often than not, remain where they are and lie on the ground after being cut. It becomes very much drier than if it had not been cut, and for that reason is more subject to fire if a slight spark happens to fall upon it. And when it takes on fire it spreads so rapidly that if it is not fought at the beginning, it is practicably impossible to stop its progress.

When he arrived at the place where the fire was, the grass, stumps and leaves were burning, and there were some 100 to 125 feet in length by 20 to 30 feet in width that had been burned when he arrived, and the stuff he had been speaking about was burning; and had it not been there and if the right of way had been cleared up as it should have been, it would have been utterly impossible for the fire to spread as fast. He further says that all the fire was, however, still on the right of way at that time, and within an hour after he saw the fire, it had reached the woods. He was then with two men, endeavouring to check the fire with pails of water. They checked it for a while, but it got impossible to stop its progress. This fire burned some of the plaintiff's limits, but no pulp wood or bark on that day.

The law upon the subject now before us, respecting the liability of railway companies setting fire either by sparks escaping from the funnel of the locomotive, or by fire thrown in some other way from the engine, has been elaborately discussed of late in the Province of Quebec. And this has happened more especially in view of the decision of His Majesty's Privy Council

in the case of the *Canadian Pacific Railway Co.* v. *Roy* (1).

At common law the railway company would be liable irrespective of the question of negligence. But the use of locomotives has been made lawful by the statute permitting the same and the operation of the railway; but while it has done so it has not vested the railway with that immunity which will relieve it from any liability for any damage occurring through its negligence.

While, indeed, a number of authorities have been cited in this case; the law which will govern will be no other than sec. 16 of *The Exchequer Court Act*, as the case must be brought within the four corners of that statute; and the authorities so cited can only help in ascertaining the different elements of negligence and what will amount to negligence. (*Letourneux* v. *The Queen* (2).

Now, in view of the overwhelming weight of the evidence adduced, showing a series of negligent acts on the part of the officers of the Crown, the specific testimony of a number of section men whose daily work takes them so often upon the railway track and who testified that their clothes and their skin had been burned by sparks issuing from locomotives, and that in their opinion, as well as that of the other witnesses, the fire was caused by the locomotives, as there was nothing else to do so; the additional fact that some of these locomotives in operation at that time, such as Nos. 163 and 173, and a couple of others, according to Mr. Ryan's testimony, were giving trouble and were travelling without netting contrary to orders: the further fact that the right of way was in a most improper condition; the undersigned must say

(1) [1902] A. C. 220.

(2) 7 Ex. C. R. at p. 7; 33 S. C. R. 335.

1906

PRICE v. THE KING.

Referee's Report

that the common sense conclusion he must necessarily arrive at is that the fire on the several occasions mentioned was set by the locomotives, and originated in all cases on a public work.

Dealing with the fire on the 9th of May, 1903, the undersigned finds, it being unnecessary to mention any other act of negligence in that respect, that section foreman Bergevin was guilty of negligence while acting within the scope of his duties or employment, in refusing to go and put out the fire which had originated on the right of way on a neighbouring section when asked to do so; and that, had he gone at the beginning when he saw the fire, with his two men at his disposal and the necessary appliances in his possession, he could have stamped out the fire which proved so disastrous, and for that act of negligence will hold the Crown liable under sub-sec. (*c*), sec. 16 of ch. 16, 50-51 Vict. (*Letourneux* v. *The King* (1).

Dealing next with the fire of the 8th of May, 1903, which appears to have been set by engine No. 173, the undersigned, in view of what has already been said, must take the common sense view on the question of fact that the locomotive set this fire on the right of way; and further that there was negligence on the part of section men acting within the scope of their duties or employment in keeping the right of way in the above mentioned improper condition covered with dry grass, hay, stumps, etc., contrary to orders given by the proper authority, coupled with the further fact that engine No. 173, similar in make to No. 163, was at the time without nétting at the back damper of the ash-pan, although orders had been given to place same long before, according to Superintendent Lozo's evidence. It was on that day that engine No. 163 came in to Hadlow with the back damper of the ash-pan

(1) 7 Ex. C. R. p. 1; 23 S. C. R. 335.

unlocked and opened, and when front and back dampers of the ash-pan are so opened the draft can easily throw live coals on the track. In view of the above mentioned circumstances showing negligence, the Crown will also be held liable under the same statute. (*C. P. R.* v. *St. Jean*, a case decided during June last by Judge Dunlop, in which he held the company liable for damages because dry grass had been left on the track. A similar case was also decided in the same manner by the Court of Review at Montreal, during October, 1905, as appeared in the "Montreal Star" of the 16th instant; *Grand Trunk Ry.* v. *Rainville* (1); *McMurchy & Denison's Canadian Ry. Cases* (2); *Pigott* v. *Eastern Counties Ry. Co.* (3); *Michigan Central Ry. Co.* v. *Whealleans* (4); *Letourneux* v. *The King* (5)).

Dealing finally with the fire of the 28th of April, 1903, the undersigned also finds under the evidence that the locomotive set the fire on the right of way in the manner mentioned by witness Knowles; and that there was negligence on the part of the section men in allowing inflammable material to remain on the right of way as mentioned *supra*. (Same authorities as above). The Crown is also held liable for the damages resulting from this fire. (*Letourneux* v. *The King* (6).

DAMAGES.

The plaintiff, who was formerly in partnership with Peter P. Hall and carried on business under the name and style of Hall & Price, was prior to the dissolution of the partnership, joint owner of the property in question, which he purchased from the legatees Hall at the time of the dissolution of the partnership in

(1) 29 S. C. R. 201.
(2) Vol. 1, pp. 113, 129, 208, 211.
(3) 3 C. B. 229.
(4) 24 S. C. R. 309.
(5) 7 Ex. C. R. 1; 23 S.C. R. 335.
(6) 7 Ex. C. R. 1; 23 S.C. R. 335.

1906

PRICE v. THE KING.

Referee's Report.

1892, and paid for the same about $1.00 per acre, with, he says, some other consideration made at the time. In September of the same year he sold to the Drummond Lumber Company the exclusive right, for a period of nine years and a half, to cut all the timber of every kind and description on some 38,000 acres thereof for the consideration of $30,000 cash, and the further consideration that the company would build a railway running through the Township of Blandford, and return to him these lands at the rate of 4,000 acres odd, or the ninth part of the 38,000 acres, per annum, whether they had exercised their right of cutting upon them or not, with the view, as he says, of receiving his township developed by a railway at the termination of the contract. The railway was for a while running in a kind of *cul-de-sac*, having no connection with the big lines; but after having obtained Government subsidies, the company built the road as far as Levis, and called it the Drummond County Railway, which was subsequently sold to the I. C. R. and now forms part of same. The effect of all this the plaintiff claims was to enhance materially the value of his property. The value of pulp wood had not at the early period of the lease the value it had at the time of the fire. While wood was not in 1892 cut below six inches in diameter, it is now cut as low as four and five inches.

The plaintiff testified that the Drummond Lumber Co. returned to him the last portion of these lands in 1902, and during the first few years of the lease the company did not cut to the full capacity of the lot; the cutting was so limited in consequence of the price of wood being unfavourable. He reckons there were from two and one half to three cords of wood per acre on the 38,000 acres immediately preceding the fire, expecting to make $2.00 a cord out of

1906

PRICE
v.
THE KING.

Referee's Report.

it. Witness Pennington places a similar value, $2.00 per cord, after the fire upon the same quantity of cords.

According to the evidence, there is a yearly growth of 3 per cent. on such limits, and the estimate is made that cutting as it was cut and returned in the manner above mentioned, the land should, in 1903, carry 2¾ to 3 cords per acre. Mitchell says that the smallest dimension cut in 1900 was five inches, and 14 years ago they were not taking one third of what they are taking to-day,—cutting now down to four inches.

Alfred Langlois, a bush-ranger and explorer, who lived and was brought up in this section of the country and whose reputation as an explorer seems to be quite well established, says he went through Mr. Price's property before the fire. He went through it at Mr. Knowles' request, after the fire, to ascertain the damages, and made his report to him which Mr. Knowles has put in writing and filed as Exhibit No 18. One Evangelist Finlay, a bush-ranger on M. Joly's property, also in this section of the country, appears to have been sent by the Government, after those fires. to ascertain the extent of the damages occasioned by the same; and Langlois, having been asked to take him around, went a third time over this territory with Finlay.

It will be well to note here that there was no evidence adduced on behalf of the Crown with respect to the quantum and extent of damages alleged to have been suffered by the plaintiff. The evidence adduced by the plaintiff on this subject remains uncontroverted. Even Finlay was not called. Would not the necessary conclusion to be derived from this fact be that Langlois' estimate is satisfactory?

It is, indeed, a very difficult thing to ascertain to the acre the very extent burned, according to Langlois himself, but he estimates that there were between 27,000

1906

PRICE v. THE KING.

Referee's Report

and 27,600 acres damages by fire. These figures were not arrived at by actual measurement, but is an estimate after seeing the property. The undersigned will allow, under the circumstances, 27,300 acres. Now Langlois, at p. 198, values the property before the fire at $4.00 per acre, and after the fire at $1.00; at pp. 334, 335, he places the same value of $4.00 per acre before the fire, and at the top of page 335, the value after the fire at $2.00 to $2.50; then in the middle of the same page he says it is only worth $1.50*. Were these lots really worth $4.00 per acre before the fire?

In arriving at the fair market value of these lands one must look at it in the light of all the surrounding circumstances. Indeed this property was acquired in 1892 at $1 per acre, and then the right to cut upon some 38,000 acres thereof was sold for the sum of $30,000, as above mentioned.

One Albert Daigle bought from Mr. Price after the fire, on the 11th of August, 1903, a certain piece of the burned land upon which he says there was only about between one-half to three-quarters burnt, for the sum of $1.15 per acre, and the same property was offered to him by Mr. Price, in the spring of the same year, before the fire, for $3.00 per acre Mr. Price who was called in rebuttal, explains this sale and qualifies it by saying he had been asked by Mr. Manceau to sell lots in that district with the view of starting a parish there, a fact which would give an enhanced price to the balance of the township.

Alphonse Grégoire purchased from Mr. Price, after the fire, on the 2nd December, 1903, for $1.39 an acre. The Moose Park Lumber Company, on 4th December, 1903, at $1.20 per acre. On the 10th of December, 1904, Joseph Savigny paid $4.00 odd per acre for eleven lots, of which two only were burnt; and on the 19th July, 1903, Joseph Charette bought from Mr.

*REPORTER'S NOTE:—The pages here cited refer to the evidence taken before the Referee.

Price seven lots and a half perfectly intact, not one of them burned and paid about $1.10 per acre. The deeds of sale covering these transactions are filed of record as Exhibit No. 17.

Some evidence has also been adduced showing that if these limits when returned to the plaintiff, after the wood had been cut upon them by the Drummond Lumber Company, had been operated upon and worked before the fire, they would have still returned between two and a half to three cords per acre, with a profit of $2.00 a cord, and great stress seems to have been placed upon this estimate of value. While this might be used to some extent in arriving at the value of the property, there are indeed too many contingencies to be reckoned with before the wood is cut and taken out of the forest, to adopt it as a true criterion of value. If that rule were followed in arriving at the value of a farm or other property by taking into consideration its utmost capabilities one could arrive at a fabulous price by devising in that manner. Take for instance a farm of 100 acres, and suppose every acre of it being developed or worked on the basis of a vegetable garden,—why the returns that farm might yield in one year would about equal its market and saleable value.

No, in arriving at the actual value of a property, actual transactions in the neighbourhood or with respect to the same property, if available, will be a better test and a better guidance; and in view of the evidence with respect to the above mentioned sales and the testimony of Langlois who places the value upon this property before the fire at $4.00, and since the fire at $1.00, $1,50, $2.00, $2.50, and in the light of all the surrounding circumstances, the undersigned is of opinion that the fair price of that property after the fire was $2.00 an acre as against $4.00 before the fire.

1906

PRICE v. THE KING.

Referee's Report.

The plaintiff will be allowed 27,300 acres at $2.00 per acre..... $54,600 00

It is further claimed by the plaintiff who has adduced evidence in support thereof, that the fires further destroyed the following quantity of wood, viz:—

70 cords of pulpwood at Forestdale
252 " " Moose Park.
119 " " Route Siding.

441

Less 230 for which he gives credit as having been insured.

211.

Leaving 211. But the plaintiff only claims 208 cords, which he states were worth $5.50 per cord.

It is in evidence that in 1903 $4.50 to $5.25 were the highest prices paid for such wood purchased from farmers. (Knowles evidence, p. 294).

$5.00 per cord will be allowed, viz:..... 1,040 00

Then 4,000 bundles of hemlock bark were destroyed at the same time, for which he claims and proved that the purchase price paid was $6 00 a hundred, the whole amounting to the sum of $240.00.

It appears, however, that about 10 per cent. of this hemlock was piled on the Government property, notwithstanding that notice had been posted up forbidding the same and stating that in such case the wood would be so placed at the owner's risk. Mr. Knowles had seen these notices. Whether or not such notices had been posted up and had been seen by Mr.

Knowles, it does not, in the opinion of the undersigned, make any difference. The owner, in thus placing the wood upon the Government property was a trespasser, and an action for the recovery of the value of such wood that has been destroyed thereon must be denied him.

Then 10 per cent. must be deducted from the sum of $240.00 leaving the net sum of. 216 00

Then the plaintiff claims the sum of $190.50 for amounts paid during the progress of the fire to men working or guarding his property against fire and extinguishing or endeavouring to extinguish the same. He has proved such expenditure. It has not, however, been proved that this expenditure saved any of the plaintiff's property from fire. Quite the contrary, it is in evidence that his men abandoned fighting the fire when it got beyond control. The full amount of the damages suffered by the plaintiff has been allowed. What more can be expected from the one who caused the damage? We are not assessing penal damages, but actual damages, and while perhaps in equity in a case where it would be shown that such expenditure had actually saved some property it might be allowed, the undersigned is of opinion that in a court of law under the present circumstances no more than the actual amount of the damages suffered is recoverable. The plaintiff cannot recover this expenditure.

The general principle which should guide in an enquiry of this kind is whether the damage complained of is the natural and

1906

PRICE v. THE KING.

Referee's Report.

reasonable result of the defendant's act; it must flow from the defendant's act. If this element does not exist, the damage is said to be too remote, as in the present instance. (*Mayne on Damages*, p. 49.)

The total amount which the plaintiff is entitled to recover is then the sum of..... $55,856 00

TITLE.

It may be stated in a general way that the plaintiff has established and proved his title in a satisfactory manner. True, in his chain of title, as will appear by reference to Exhibit No. 11, it appears that the firm of Hall and Price, of which the plaintiff was a partner, acquired from the latter's wife a certain piece of real or immovable property. Contract of sale between husband and wife is prohibited by Art. 1483 C. C. L. C. It is said that the sale was made to the commercial firm of Hall & Price, and not to Mr. Price himself. Could that argument be set up with any avail in view of the fact that the husband was one of the partners; that it took place at the time of the dissolution of the partnership; and further that sales of this nature cannot be made either directly or indirectly by interposed parties?

At the conclusion of the argument, counsel for plaintiff declared that if the latter were found entitled to recover, that he would undertake to have his client's wife give a release to the Crown in any deed or acquittance which it might become necessary to sign.

In view of this undertaking the amount which the plaintiff is entiled to recover will be made payable to him upon his wife's intervening in the execution of the acquittance, and giving a release to the Crown of all claims she may have had or has in respect of the property in question.

1906

PRICE v. THE KING.

Referee's Report.

Therefore the undersigned has the honour humbly to report and find that the plaintiff, under the circumstances, is entitled, under the provisions of sub-section (*c*) sec. 16 of ch. 16, 50-51 Vict., to recover from His Majesty the King the sum of $55,856.00, with interest thereon at the rate of five per centum per annum from the 11th day of October, 1904, (*St. Louis* v. *The Queen* (1); *Lainé* v. *The Queen* (2) for damages suffered by him through the negligence of the servants or officers of the Crown while acting within the scope of their duties or employment, upon giving to the Crown a good and sufficient discharge, acquittance and release both by his wife and himself of all claim or claims they or either of them may have had, or has, in respect of the above mentioned damages to the property in question herein. The plaintiff will also be entitled to his costs.

In witness whereof the undersigned has set his hand at Ottawa, this 25th day of October, A.D. 1905.

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

November 11th, 1905

The case came on for argument upon a motion by the plaintiff to confirm the report, and a motion by the defendant by way of appeal therefrom.

C. E. Dorion, for the defendant, contended that the plaintiff was not entitled to the compensation because he had no title to the property as a whole. Part of the land was conveyed by the wife of the plaintiff to the firm in which the plaintiff was a partner, and this was a nullity under Art. 1483 of C. C. L. C.

[*Mr. Henderson*, of counsel for the plaintiff here asked for leave to add Mrs. Price as a party. Granted.]

On the question of liability, I submit that the case of *Letourneux* v. *The King* (3) does not apply.

(1) 25 S. C. R. 649 (2) 5 Ex. C. R. at pp. 128, 129.
(3) 7 Ex. C. R. 1.

1906

PRICE v. THE KING.

Argument of Counsel.

The damages did not result from anything inherent in a public work. It was at most a matter of personal negligence on the part of the railway officials, and as such not recoverable against the Crown. *Rex non potest peccare.* The Crown neither commits nor sanctions a wrong done as a matter of common law. It is only by statute that you get a remedy against the Crown for negligence.

Again, the plaintiff was guilty of contributory negligence. He knew that brush and inflammable material were on the right of way, and so liable to take fire. More than that, the branches and tops of trees cut on his own land were left there to dry, and so became a source of danger in case of fire getting into his property. (*Am. & Eng. Ency. of Law* (1).

G. F. Henderson, for the plaintiff, contended that the essence of the Crown's liability under the statute was the personal negligence of its officers or servants. The Crown under the statute was not liable for personal negligence, not only on the theory of *respondeat superior.*

The injury need not happen on the public work, but it must be derived from negligence on a public work. That is the case here. (*Letourneux* v. *The King* (2).

As to contributory negligence, there is no evidence showing that the fire could not have destroyed the plaintiff's property if he had not been guilty of negligence himself. It was not the plaintiff but third persons, who left chips and bark near where the wood was corded.

L. A. Cannon, following for the plaintiff, contended that as to the title Mr. Price had conveyed not to the husband but to the firm of Hall & Price under a con-

(1) 2nd ed. vol. vii., p. 371. (2) 7 Ex. C. R. 1.

1906

PRICE v. THE KING.

Argument of Counsel.

tract of sale, which was valid. Art. 1488 of *C. C. L. C.* did not apply to such a case. The suppliant has been in possession for ten years, and, moreover, the provisions of the Article cited could only be set up by the owner. The Crown cannot raise the objection here.

Under *Letourneux* v. *The King* (1), the Crown must be held liable in this case; and the damages for which it is liable must be fixed under the principles of the law of Quebec. (*Pouliot* v. *The Queen* (2).

The Crown was negligent in allowing combustible material to lie on the right of way. (*Grand Trunk Ry. Co.* v. *Rainville* (3); *Canadian Pacific Ry. Co.* v. *Roy* (4).

Mr. *Dorion* replied.

THE JUDGE OF THE EXCHEQUER COURT (now January 25th, 1906) delivered judgment.

The plaintiff in this action claims the sum of $70,777 for loss and damage alleged to have been occasioned by fires that occured in April, May and June, 1903, on the line of the Intercolonial Railway and spread to and over certain timber lands belonging to him situated in the Township of Blandford in the counties of Nicolet and Arthabaska, in the Province of Quebec. The Registrar of the Court, to whom the matter was referred for inquiry and report, has found that he is entitled to succeed for an amount of $55,856 and interest from the 11th day of October, 1904. Against that report the Crown appeals on the following grounds :—

1st. Because the plaintiff has not proved his title to the property alleged to have been injured.

2nd. Because the plaintiff has not proved that the said property was on any public work when injured.

(1) 7 Ex. C. R. 1.
(2) 1 Ex. C. R. 313.
(3) 29 S. C. R. 201.
(4) 1 Can. Ry. Cas. 196 (note, p. 211.)

1906

PRICE v. THE KING.

Reasons for Judgment

3rd. Because the plaintiff has not proved that the said injury did result from the negligence of any officer or servant of the Crown while acting within the scope of his duty or employment.

4th. Because the plaintiff has not proved that he is entitled to recover the sum of $55,856 from His Majesty the King, as stated in the said report.

5th. Because, even if the plaintiff is at all entitled to recover from the Crown, the above mentioned sum is highly in excess of the injury proved to have been suffered by him.

6th. Because the plaintiff's claim is prescribed.

The sixth ground of appeal, namely, that the claim is prescribed, was abandoned at the argument.

With regard to the first ground of appeal it is contended that the plaintiff's title to the timber lands injured is defective because as to a part interest therein the title is derived from his wife (1). The plaintiff, without conceding the validity of the objection, meets it by an application on behalf of Mrs. Price to be made a party to the action, and she agrees to be bound by any judgment rendered therein. I think the application should be granted, and that Mrs. Price should be added as a party to the action.

With respect to the second and third grounds of appeal, it is well settled that the plaintiff's claim cannot be maintained unless it falls within clause (*c*) of the sixteenth section of *The Exchequer Court Act* (2); whereby it is provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of the 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. The objection

(1) Civil Code L. C. Art. 1483. (2) 50-51 Vict. c. 16, s. 16.

1906

PRICE v. THE KING.

Reasons for Judgment.

raised by the second ground of appeal is that the injury complained of did not occur on a public work, and the Crown relies upon the views expressed in the case of *The City of Quebec* v. *The Queen* (1) by Mr. Justice Gwynne and Mr. Justice King as to the construction of these words. But the case of *Letourneux* v. *The King* was also one in which the injury did not occur on the public work, and in that case the suppliant's claim was maintained (2). It was sought to distinguish the present case from that last mentioned, but with regard to the question as to whether it is necessary that the injury should occur upon the public work in order to bring the case within the statute, I am not able to distinguish them. I may, perhaps, add that my own view is, as I have stated elsewhere, that it is sufficient to bring a case within the statute if the cause of the injury is or arises on a public work (3).

The injury complained of here was caused by fires, and there is, I think, no room for doubt that such fires commenced on the line or permanent way of the Intercolonial Railway and spread from there to the plaintiff's lands. But that these fires resulted from the negligence of the Crown's servants who operated the railway is a matter of inference rather than of direct proof. It does appear, however, that there was some neglect and want of care in keeping one at least, if not more, of the engines that ran upon this part of the line in a proper condition and state of repair; and there is also some evidence that the right of way where the fires occured was not kept as clean and free from inflammable materials as it ought to have been. The season was an exceptionally dry one, and fires were very frequent, demanding on the part of everyone great care and watchfulness in order to prevent them from occurring, or to extinguish them when once started. With reference to the duty of the section men and others to

(1) 24 S. C. R. 420.
(2) 33 S. C. R. 335.
(3) *Letourneux* v. *The Queen* 7 Ex. C. R. at p. 7.

1906

PRICE v. THE KING.

Reasons for Judgment.

extinguish fires occuring on the right of way the evidence discloses one instance of a flagrant neglect of that duty, and that happened in respect of the fire that caused the greatest damage to the plaintiff's property. On the whole, I agree with the finding that the injury complained of resulted from the negligence of certain of the Crown's servants while acting within the scope of their duties or employment.

With regard to the amount at which the damages have been assessed, if one were to confine his attention to the price paid for the timber lands in question, and the use that had been made of them since in cutting the wood growing thereon, he would, I think, come to the conclusion that the sum allowed was liberal. But there is no doubt that such lands have of late years been increasing in value, and under all the circumstances I am not prepared to say that the sum of two dollars an acre for the damage done to each acre burnt is excessive. The case, on this branch of it, rests wholly on the evidence adduced by the plaintiff, although it appears that the defendant caused some investigation as to the amount of damage done to be made. And the finding of the Registrar is no doubt supported by the evidence.

There was also a motion on the part of the plaintiff for judgment in accordance with the Registrar's report, and that motion will be granted except as to the interest allowed. No interest was asked for, or claimed, in the amended statement of claim; and in any event the case does not appear to me to be one in which interest should be allowed before judgment.

There will be judgment for the plaintiffs for the sum of fifty-five thousand eight hundred and fifty-six dollars ($55,856.00); and costs, to be taxed.

Judgment accordingly.

Solicitor for the plaintiff: *L. A. Cannon.*

Solicitor for the defendant: *C. E. Dorion.*

Between

THE MINISTER OF RAILWAYS AND CANALS FOR THE DOMINION OF CANADA..... PLAINTIFF;

1905
Nov. 8.

AND

THE QUEBEC SOUTHERN RAILWAY COMPANY AND THE SOUTH SHORE RAILWAY COMPANY, BOTH CORPORATIONS EXISTING UNDER FEDERAL STATUTES, AND HAVING THEIR HEAD OFFICES IN THE CITY AND DISTRICT OF MONTREAL..... RESPONDENTS.

Railways—Sale of—Jurisdiction under special Act—4-5 *Edward VII*, c. 158—*Interpretation.*

By 4-5 Edward VII, c. 158, respecting the South Shore Railway Company and the Quebec Southern Railway Company; the Parliament of Canada, among other things, provided that the Exchequer Court might order the sale of the railways mentioned and their accessories as soon as possible and convenient after the passing of the Act, and that such railways and their accessories, respectively, should be sold separately or together as in the opinion of the Exchequer Court, would be best for the interests of the creditors of the said companies. An order for such sale was made and tenders received in accordance therewith.

Held, that in respect of the tenders so received the statute left it to the Court to determine which of them it was in the best interests of the creditors to accept.

2. That, inasmuch as if the property were sold in part to one purchaser and in part to another, two new and diverse interests would arise, and it would be necessary to divide the property both real and personal and to make two transfers instead of one, it was in the best interests of the creditors, as well as of the public, to accept a tender for the property as a whole, although such tender was for a less sum, by some $3,000, than the aggregate of two separate tenders for distinct portions of the whole property.

THIS was a proceeding under the provisions of a private Act, 4-5 Edw. VII, c. 158, for the sale of the

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Statement of Facts.

South Shore Railway and the Quebec Southern Railway, such railways being in the hands of a Receiver.

An order for the sale of the said railways having been made,

November 3rd, 1905,

The court now sat for the reception of tenders.

The parties interested as creditors and otherwise were represented by counsel, as follows:

A. Geoffrion, K.C., for the Minister of Railways and Canals; *F. L. Beique, K.C.*, for the Bank of St. Hyacinthe; *T. Brosseau, K.C.*, for the Bank of Hochelaga; *J. E. Martin, K.C.*, for the Rutland Railway and the George Hall Coal Company; *E. A. D. Morgan*, for Hon. R. Préfontaine; *F. H. Markey* for Hanson Brothers; *P. H. Roy* for the East Richelieu Valley Railway Company.

The court having directed the tenders received to be opened by the Registar, he declared that he had received the following:

1. P. H. Roy, for the East Richelieu Valley Railway, $105,000.

2. E. A. D. Morgan, for the South Shore Railway, $503,000.

3. George E. Foster, for the Quebec Southern Railway, as comprising the railways heretofore known as the South Shore Railway, the United Counties Railway and the East Richelieu Valley Railway, *en bloc*, $1,006,000.

4. F. L. Beique, for the United Counties Railway and the East Richelieu Valley Railway, $551,000.

5. F. L. Beique, for the Quebec Southern Railway as comprising the railways heretofore known as the South Shore Railway, the United Counties Railway and the East Richelieu Valley Railway, *en bloc*, $1,051,000.

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Reasons for Judgment.

All parties interested having been heard, the court was adjourned after his lordship had announced that when the court met the following morning at nine o'clock he would give his decision as to which of the tenders should be excepted.

November 8th, 1905.

After his lordship had entered upon the pronouncement of his judgment. Mr. George E. Foster, K.C., asked permission, on behalf of certain of the creditors, to make an application to the court to file a notice with the Registrar that he was prepared to give the creditors $31,000 more than they would get by the acceptance of any of the present tenders, but the aplication was refused on the ground that it was made too late, the only matter then before the court being the judgment upon the questions that had been heard.

THE JUDGE OF THE EXCHEQUER COURT delivered judgment as follows :—

By an Act of the Parliament of Canada, 4–5 Edw. VII, ch. 158, respecting the South Shore Railway Company and the Quebec Southern Railway Company, it was, among other things, provided that the Exchequer Court might order the sale of the railways mentioned, and their accessories, as soon as possible and convenient after the passing of the Act, and that such railways and their accessories, respectively, should be sold separately or together as in the opinion of the Exchequer Court would be best for the interests of the creditors of the said companies. The order for such sale has been made and tenders have been received in accordance therewith as follows :

First. A tender for $105,000 for the East Richelieu Valley Railway ;

Secondly. A tender of $503,000 for the South Shore Railway ;

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Reasons for Judgment.

Thirdly. A tender for $1,006,000 for all the said railways together.

Fourthly. A tender for $551,000 for what was formerly known as the United Counties Railway and the East Richelieu Valley Railway together; and

Fifthly. A tender for $1,051,000 for all the said railways together.

The question now is which tender or tenders it is for the best interest of the creditors to accept? That is a question that the statute leaves to the opinion of the court.

In answering that question it is not necessary to consider the first tender or the third tender mentioned. Obviously it would not be in the interests of the creditors to accept either of these. The question lies between the acceptance of the second and fourth tenders, which would give a price of $1,054,000 for the whole property, or of the fifth tender which would give therefor the somewhat smaller sum of $1,051,000. By accepting the second and fourth tenders the property would realize for the creditors $3,000 more than would be realized therefor by accepting the fifth tender. That course would have another advantage. It is easy to foresee that in the distribution of the moneys arising from the sale of the property in question, and probably in other connections, it may be necessary to attribute a portion of such moneys to each railway, and if the second and fourth tender is accepted, that question so far as the South Shore Railway interests are concerned will be eliminated, leaving only the question as to the distribution of the sum of $551,000 between the United Counties Railway interests and the East Richelieu Valley Railway interests. It is suggested that the latter question ought not to present any serious difficulty, seeing that the value of the East Richelieu Valley Railway may be taken to be

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Argument of Counsel.

The tenders having been read, the court directed the hearing to stand over until the 7th November, 1905, when the parties interested would be heard upon the question of which of the tenders should be accepted.

November 7th, 1906.

BY THE COURT: The present sitting of the court is to enable any one to offer suggestions before a decision is given in the matter of the tenders.

F. H. Markey, on behalf of the Great North Western Telegraph Company, filed an opposition asking that the telegraph system upon the Quebec South Shore Railway be exempted from the sale.

The Registrar stated that he had received a letter, protesting against the sale, from E. N. Armstrong, on behalf of the Atlantic and Lake Superior Railway Company.

G. E. Foster, K.C., one of the tenderers as above set forth and solicitor for the Rutland Railway, asked, that in view of the opposition filed by the Great North Western Telegraph Company and the protest of the Atlantic and Lake Superior Railway Company, that the court's decision as to which of the tenders should be accepted should not be made at this date, but that an opportunity be allowed to the parties interested to look into the question of title raised by the protests filed and to afford time to certain people interested in the proceedings to submit a proposition to the court looking to the attainment for the creditors of a larger price for the property than any represented by the tenders before the court.

[BY THE COURT: I do not think I should delay the matter further for the reasons mentioned to me this morning. I shall hear any one who has anything to offer in regard to any of the tenders. If any one has

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Argument of Counsel.

anything to say in the interest of the creditors I shall hear him.]

A. Geoffrion, K.C.: I am instructed by the Minister of Railways to state that in view of what he considers to be the public interest he holds the opinion that the tender which is accepted by the court ought to be that which transfers the whole property to one person, in preference to any tender that would divide the property as a whole among several persons.

T. Brosseau, K.C., objected that the opinion of the Minister of Railways did not appear to be justified, and ought not to be heeded by the court. There was nothing to show that if portions of the property were sold to different persons the road as a whole would not be kept open. This sale is really in the nature of a sheriff's sale for the benefit of the creditors, and the rule is that the highest bid shall be accepted. If you add together the amounts of the several bids for separate portions of the property they will amount to more than one of the consolidated tenders.

F. H. Markey supported Mr. Brosseau's view.

T. Chase Casgrain, K.C., on behalf of the trustees and bondholders of the Atlantic and Lake Superior Railway Company said that he made no objection to the sale of the property in these proceedings.

F. L. Beique, K.C., asked that the property be sold *en bloc*.

E. A. D. Morgan contended that the property should be sold to the highest bidder, as by that means the largest amount of money would be secured to the creditors.

J. E. Martin, K.C. and the *Honourable R. Préfontaine, K.C.* (the latter being a creditor of the South Shore Railway) supported the view expressed by Mr. Brosseau.

determined by the bid of $105,000 made therefor. But if that view is correct, then equally it might be contended that the value of the South Shore Railway is determined by the bid of $503,000 made for that railway and its accessories, and that would leave the balance, whatever it might be, for the United Counties Railway. For example, if the second and fourth tenders were accepted we should have:

The South Shore Railway	$503,000
The United Counties Railway	446,000
The East Richelieu Valley Railway	105,000
Total	$1,054,000

and if the fifth tender were accepted we would have on the basis of division mentioned, for

The South Shore Railway	$503,000
The United Counties Railway	443,000
The East Richelieu Valley Railway	105,000
Total	$1,051,000

In that way the difference of $3,000 would fall upon the United Counties Railway interests.

But whether in case the one tender rather than the two were accepted, the whole difference should fall upon the United Counties Railway or be distributed between the three railways is a question that need not now be determined. The matter may be left for future consideration, but upon the main question I see no reason to doubt that a fair distribution of the total price may be made between the three railways without any considerable expense.

There is, however, another consideration. If the property is sold and part sold to one purchaser and part to another, two new and diverse interests will at once arise, and it will be necessary to divide the property both real and personal and to make two trans-

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Reasons for Judgment.

fers. It is also to be seen that these interests may be adverse and perhaps hostile, and the expense of determining any controversies that may arise between them is likely in the main to fall upon the funds that will be brought into court as the price of the several railways. What the amount of that expense may be it is of course not possible to foresee, but experience suggests that it may very easily exceed a sum of three thousand dollars. I am therefore of opinion that it is better for the creditors of the said companies, and in their best interests, not to create any such diverse interests, but to avoid that difficulty by accepting the single tender of $1,051,000 for the whole property.

So far I have dealt with the matter wholly from what, in my opinion, is the best interests of the creditors of the said companies, as I agree that under the statute that is the proper test to apply.

But we cannot overlook the fact that it is a question in which the public have a large and direct interest. That interest in the present proceedings is represented by the Minister of Railways and Canals, and counsel for the minister has stated that in the Minister's opinion the public interests will be best served by a sale of the whole property to one person or company. The interest of the public is that the several roads be kept open and be duly operated for the public convenience, and it seems reasonable to conclude that that is more likely to happen where the property passes into the hands of one person or company, than where it passes into the hands of two persons or companies. If in this case the public interest and the best interests of the creditors of the several companies were opposed, I should think that in accordance with the statute under which the sale is made the interests of the creditors should prevail; but in my opinion they are not opposed. It appears to me to be both in the

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Reasons for Judgment.

best interests of the creditors and in the public interest, that the highest tender for the property as a whole should be accepted.

That brings me to another matter. There has been filed with the Registrar of this court a letter or notice purporting to come from the Atlantic and Lake Superior Railway Company protesting against the sale of the properties in question here. It purports to be signed by the secretary of the latter company and has been read in open court so that all parties interested may have notice of it. There is also an opposition filed on behalf of the Great North Western Telegraph Company against including in the sale of the property of the several companies mentioned its interest in the equipment of the telegraph system along their said lines. I do not propose at present to deal with the question raised by the letter or notice mentioned, nor with the petition of the Great North Western Telegraph Company; neither do I think that I should delay action with respect to the tenders. I shall leave these matters largely with the purchaser, and he must satisfy himself as to what weight or consideration is to be attached to the communication of the Atlantic and Lake Superior Railway Company. If in that respect there should be any defect in the title that the court can give under the statute, the loss, if any, must fall upon the purchaser and not upon the creditors of the said companies. I shall also expect the purchaser to give a satisfactory undertaking to protect the creditors and the Receiver and Registrar, and those acting under the authority of the court from any just claim of the Telegraph Company mentioned. There was, I am sure, no intention on the part of any one to include in the sale any property of the Great North Western Telegraph Company, nor am I aware that any of its property has been so

1905

THE MINISTER OF RAILWAYS AND CANALS v. THE QUEBEC SOUTHERN RY. CO.

Reasons for Judgment.

included. But there may be some question as to what its real interests and rights are in the matter, and as to that the purchaser must in the first instance satisfy himself. If under these circumstances he wishes to withdraw his tender and deposit rather than go on with the purchase, leave is given him to make an application for such withdrawal. If, however, notwithstanding the notice and petition he is willing to go on with the purchase on the terms and conditions I have mentioned, I ought not, I think, under all the circumstances of the case to defer action.

Subject to the terms and conditions I have mentioned the order and direction of the court will be that Mr. F. L. Beique's tender of $1,051,000 for the property as a whole be accepted, and that the several railways mentioned with their accessories, be sold to him for that price, and that steps be taken to give effect and to carry out such sale.

*Judgment accordingly.**

Solicitors for the plaintiff: *A. Geoffrion and J. L. Perron.*

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

---

*REPORTER'S NOTE.—On appeal, taken by E. A. D. Morgan, the Rutland Railroad Co., and Frank D. White, the Supreme Court of Canada unanimously affirmed this judgment.

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

Between

JOHN M. TUCKER (PLAINTIFF).....APPELLANT; 1906

AND Jany. 9.

THE SHIP *TECUMSEH* (DEFENDANT).....RESPONDENT.

Shipping—Collision—Wrong manœuvre when collision imminent—Lack of signal—Liability.

When the master of a ship, in danger of collision with another ship, instead of porting his helm puts it to starboard and so makes the collision inevitable, the absence of a signal required by a local regulation to be given by the other ship in such circumstances, does not relieve the ship primarily responsible for the collision from full liability if the omission to give such signal did not contribute in any way to the accident.

APPEAL from a judgment of the Local Judge in Admiralty for the Toronto Admiralty District in a case of collision in the Detroit River.

The facts of the case are stated in the reasons for judgment of the trial judge reported *ante* (1).

July 11th, 1905.

J. E. Hanna, for the appellant, contended that the court must be governed by the circumstances surrounding the collision in coming to a conclusion, because it has become the practice of the courts not to implicitly rely upon the oral testimony produced by either side in cases of collision. There is always contradiction between the story of one set of witnesses and that of the other, which of course is not always due to deliberate misstatements of fact.

The whole circumstances of the collision negative the finding that it was due to inevitable accident. If the

(1) See p. 44.

1906

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

Lilly had (1st) kept her course; or (2ndly) had signalled the course she intended to take to the *Tecumseh*; or (3rdly) had stopped and backed when the collision was imminent, the accident would have been averted. (*Marsden on Collisions* (1); the *Cuba* v. *McMillan* (2); the *Khedive* (3); Art. 18 of English Rules for Preventing Collisions (4); the *Marpesia* (5). Furthermore, there was no look-out on the *Lilly*. The worst that can befall the *Tecumseh* on this appeal is a division of damages.

J. H. Rodd, for the respondent, argued that no court of appeal would disturb the findings of the trial judge upon the facts in this case. *Collier* v. *Wright* (6): *Inchmaree Steamship Co.* v. *The Astrid* (7).

The respondent relies on the findings of fact of the learned trial judge, and the cases cited in his reasons.

Mr. *Hanna* replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 9th 1906) delivered judgment.

This is an appeal by the owners of the *Tecumseh* against a judgment of the learned Judge of the Toronto Admiralty District, whereby in an action for damage by collision he pronounced in favour of the plaintiff's claim and condemned (with costs) the said ship and her bail in an amount to be found due on a reference thereby directed.

When the appeal came on for argument it turned out that the record was not complete. At the request of the parties however the argument was proceeded with and concluded, on the understanding that the missing papers would be furnished for the consideration of the court. These papers were filed on the 31st of October last, and I have now had an opportunity to examine carefully the record in the case.

(1) 3rd ed. pp. 144, 496, 499.
(2) 26 S. C. R. 651.
(3) 5 App. Cas. 876.
(4) In Marsden on Collisions, 3rd ed. p. 434.
(5) L. R. 4 P. C. 212.
(6) 24 S. C. R. 714.
(7) 6 Ex. C. R. 218.

1906

TUCKER
v.
THE SHIP
TECUMSEH.

Reasons for Judgment.

The collision took place a little before midnight on the 3rd of November, 1903, near the Bar Point lightship in the Detroit River. Immediately before it occurred the *Lily*, a steamer belonging to the plaintiff, was on her way down the river, and the *Tecumseh* was on her way up. The former was light, the latter loaded. The lights of each vessel were seen from the other; but the evidence as to their relative positions is contradictory. The channel of the river generally used by ships was, at the place where the two vessels met, about eight hundred feet wide. The Bar Point lightship was on the western side or edge of the channel. The *Tecumseh* was near the fairway or middle of the channel. The *Lily* according to the evidence of her master, was on the western side of the channel. Just before sighting the *Tecumseh* she had passed on her port side an unknown steamer going up stream. Then the *Tecumseh* came in sight showing her red light, but not her green light. In that position there was no danger of collision. But a little later the *Tecumseh* took a sheer towards the west side of the channel, shutting out her red light and opening up her green. To avoid the collision the master of the *Lily* ported her helm and changed her course more to the west. But it was not averted. The *Tecumseh* struck the *Lily* on the port bow.

According to the master of the *Tecumseh* the *Lily* when he first sighted her was a little on his starboard bow and east of the centre of the channel, and he expected her to pass on the starboard side. He did not see the unknown steamer that preceded him up the river. All the *Lily's* lights were visible. But soon after she changed her course to the west and shut out her green light. Then he changed the course of the *Tecumseh* by starboarding his helm, with the result that has already been mentioned. The evidence discloses a good deal of confusion about the lights and some manifest errors.

1906

TUCKER v. THE SHIP TECUMSEH.

Reasons for Judgment.

The master of the *Lily* is corroborated by the testimony of an independent witness, who from the lightship saw what took place; and it is probable that his story of what happened is true. But taking the evidence of the master of the *Tecumseh* to be correct there is no excuse for the course he adopted. Being in a position in which he should have ported his helm, he put it to starboard, and it was this wrong manœuvre that caused the collision. It is contended, however, that the master of the *Lily* was also to blame for not complying with a local regulation which requires the vessel descending the river to give a signal to show which side of the channel she elects to take. No such signal was given, but that did not it seems to me, contribute in any way to the accident. If the evidence of the master of the *Lily* is accepted he was on the west side of the channel all the time and out of any danger of a collision, except from some such mistake as that which the master of the *Tecumseh* made. But even if the *Lily* crossed towards the west from a point east of the centre line of the channel, as the master of the *Tecumseh* says she did, the latter could see what she was doing, and was as well aware of it as though the prescribed signal had been given. The absence of the signal affords no excuse for the manœuvre that caused the collision. For that the master of the *Tecumseh* was, it seems to me, alone to blame; and after the latter had committed this error the master of the *Lily* did all that he reasonably could to avert the consequences of it.

The appeal will be dismissed and with costs.

Judgment accordingly.

Solicitor for the appellant: *J. W. Hanna.*

Solicitor for the respondent: *J. H. Rodd.*

THE TORONTO ADMIRALTY DISTRICT.

JOHN M. TUCKER .....PLAINTIFF; 1906 Mar. 8.

AGAINST

THE SHIP *TECUMSEH.*

Practice—Interlocutory motion—Costs reserved to be disposed of at trial—Not considered at trial—Jurisdiction of trial court after appeal taken.

Where on an interlocutory motion costs are reserved to be disposed of at the trial, and the trial is had without any reference to these costs, if an appeal from such judgment be taken and the judgment affirmed, the jurisdiction of the appellate court attaches, and the trial court on the further application has no power to render any further decision unless remanded, and even then the court will deal with such application only under special circumstances.

MOTION in Chambers at Sandwich on 24th January, 1906, by the plaintiff to be allowed costs of an interlocutory motion.

J. H. Rodd for the plaintiff.

J. W. Hanna for the defendant.

HODGINS, L.J., now (March 8th, 1906) delivered judgment.

After my judgment in this case had been appealed to the Exchequer Court of Canada and decided in favour of the plaintiff, the plaintiff makes an application to be allowed the costs of an interlocutory Chamber motion heard on the 15th October last—the costs of which were reserved to be disposed of at the trial of the cause, but which costs were not then brought up for consideration, or disposed of.

1906

TUCKER v. THE SHIP TECUMSEH.

Reasons for Judgment.

In the *Encyclopædia of Pleading and Practice* (1) it is stated "Where an appeal has been perfected, the jurisdiction of the appellate court over the subject-matter and the parties, attaches, and the trial court has no power to render any further decision affecting the rights of the parties in the cause, until it is remanded." The appellate court in this case has affirmed the judgment of the trial court, and there is therefore no remand back.

And in *British Natural Premium Provident Association* v. *Bywater* (2). Byrne, J., while he allowed certain reserved costs of interlocutory motions, there having been no appeal, said: "Where interlocutory applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation without the special directions of the judge. So far as I am personally concerned I shall in future deal with great jealousy with such applications, and shall not after judgment has been passed and entered allow costs reserved and not mentioned at the trial—except under very special circumstances."

On either of the above grounds I think there should be no order on this application.

Motion dismissed.

---

(1) Vol. 2, p. 327.

(2) [1897] 2 Ch. D. 531, at p. 532.

TORONTO ADMIRALTY DISTRICT.

C. W. CADWELL.....PLAINTIFF; 1906 March 8.

AGAINST

THE SHIP *C. F. BIELMAN.*

Shipping—Collision—Negligence.

In a dangerous and crowded channel the captain of a vessel, especially going down stream, must slacken speed, and, if overtaking another vessel, is bound to pass at such a distance that no harm will result to the other vessel from suction or displacement waves.

The lookout man must devote himself solely to that duty, and if engaged at other work so that his attention is divided it is not a proper compliance with the rule as to a proper lookout.

ACTION for collision by the plaintiff, the owner of the ship *G. T. Burroughs*, against the ship *C. F. Bielman.*

The case was tried at the Town of Sandwich on the 24th, 25th, 26th and 27th days of January and the 1st day of February, 1906, and judgment was reserved.

The facts are fully set out in the reasons for judgment.

E. H. Wigle and *J. H. Rodd*, for the plaintiff;

A. R. Bartlett, for the defendant.

HODGINS L. J. now (March 8th, 1906), delivered judgment.

The collision in this case occurred on the night of the 30th May, 1905, in that part of the St. Clair River known as the "Great South Bend," at the locality which the evidence warrants me in finding is called "Joe Beddore's Landing," and where the channel is about 700 feet wide. The collision was between the sand-sucker *G. T. Burroughs*, a steamer 109 feet in length, 27 feet beam, and 9 feet draft, and the *C. F. Bielman*, a freight steamer of 305 feet in length, or 291 feet keel, 42 feet beam, and 18 feet

1906

CADWELL v. THE SHIP C. F. BIELMAN.

Reasons for Judgment.

draft, both heavily laden, the former with sand and the latter with 3,303 tons of iron ore. The river at this place is very winding, and has been designated by witnesses as "dangerous." The captain of the *G. T. Burroughs* described it as "'Collision Bend' because accidents happen there." And the captain of the *C. F. Bielman* said: "You must exercise great care in navigating this bend. The river is dangerous, and so this bend is as dangerous as other places. There are three dangerous places, and this is one of them." And it appears from other evidence given by the defence, that there were seven vessels in the locality about the time of the collision, the plaintiff steamer, the *G. T. Burroughs*, the defendant steamer, *C. F. Bielman*, towing the barge McLaughlin, a passenger side-wheel steamer *Awana*, a steel steamer, and a steam barge towing a lumber barge. Of these the passenger steamer *Awana* was going up the river, and all the others were going down the river. One steamer is said to have passed four seconds before the accident and another three seconds after the accident. It appears therefore that this river bend was a dangerous and crowded channel, yet the captain of the defendant steamer *C. F. Bielman*, after stating that the ordinary speed of his ship was 9 miles an hour, and that he was going down stream, said that he continued at that rate to the time of the collision, and that he did not reduce the speed of the *C. F. Bielman* until the accident was about to happen. This speed in a dangerous channel was condemned in the *Blenheim* (1).

In *Spencer on Collisions*, it is stated (2): "An overtaking and passing vessel is bound not only to avoid colliding with the vessel passed, but is bound to pass at such a distance that no harm will result to the other from the suction produced by her passage through the water, or from her displacement wave; and she is

(1) 14 Fed. R. 797. (2) Sec. 72.

bound to know the effect of her swell, and to pass at a distance sufficient to avoid danger therefrom, or to reduce her speed to such a degree that a displacement wave will be avoided." "In navigating rivers and harbours where small boats are accustomed to ply, and may reasonably be expected, steamers are bound to navigate with the utmost caution, and at a rate of speed sufficiently slow to avoid damage from her attending swell. It is negligence in a large and powerful steamer to work her wheel in a narrow and crowded slip, whereby a current is produced sufficient to injure other craft lawfully there." And the governing rule has been thus stated: "It must be presumed that the master of a large steamer must know the effect of frontal and side waves made by such steamer when going at her ordinary rate of speed in narrow channels, and he should therefore regulate or moderate the rate of speed and keep sufficiently out of the way of an overtaken vessel."

The evidence of the captain of the steamer *G. T. Burroughs* is that he was keeping her to the American side of the river, her proper starboard side of the fairway; and that when he found the *C. F. Bielman* abreast of him, and the suction caused by her speed beginning to operate and swing his vessel to port, he put his wheel hard-a-port and backed, and gave three whistles to the *C. F. Bielman* to check her speed, and also gave several short blasts as a danger signal, none of which were answered by the *C. F. Bielman*. The effect of putting his wheel hard-a-port is described by several witnesses for the defence. The Captain of the *C. F. Bielman* said that after the side wheeler passed, the steamer *G. T. Burroughs* sheered away from the *C. F. Bielman* to starboard about a point, towards the American shore, and that she then sheered round towards the *C. F. Bielman*, and struck her about amidships by her stem at an angle of about 75 degrees. He also stated that after the

1906

CADWELL v. C. F. BIELMAN.

Reasons for Judgment.

steamer *G. T. Burroughs* started to sheer, just appreciably, he heard her engine bells. The mate of the *C. F. Bielman*, who had charge of her navigation at the time of the collision, said: "After the passenger boat passed, the sand-sucker *Burroughs* went over to the American shore." And added that he heard the whistles to the engine room to check down the engine. The engineers of the *C. F. Bielman* confirm this sheering of the steamer *G. T. Burroughs*, and the hearing of the bells in her engine room; and the mate of large *McLaughlin* said that the steamer *G. T. Burroughs* sheered about fifty feet towards the American shore, after passing the side-wheel steamer.

One of the expert witnesses for the defence described the effect of suction and displacement waves caused by a large steamer passing a smaller steamer on the same course. He said that when a large steamer was over-lapping a smaller one the water thrown from the bow of the larger steamer would force the stern of the smaller one way from her, and would bring their bows together; or, as he said later, would bring the bow of the smaller one to impinge on the larger. The evidence for the defence shows that the height of the waves caused by the speed of the *C. F. Bielman* was about one foot and a half at seven miles an hour, that the speed of nine miles an hour would add about three inches more, and he added that waves of about two feet three inches high might have been created by her.

The finding on the evidence must therefore be that the suction and displacement waves caused by the *C. F. Bielman* over-lapping the steamer *G. T. Burroughs*, notwithstanding the effort of the Captain of the *Sand-Sucker Burroughs* to counteract and get away from her displacement waves and suction, by putting his helm hard-a-port and sheering towards the American shore on her starboard side, as proved by the witnesses for the defence,

forced the stern of the steamer *G. T. Burroughs* away from her parallel course, and caused her bow to swing towards the *C. F. Bielman* and to strike her amidships at about an angle of 75 degrees; and that the blow forced the cross beams in the bow of the steamer *G. T. Burroughs* to bulge out at the other side and bend one of the iron plates at her stern backward towards her stem; and thereby opened her seams, and caused her to sink.

There has been in this case the same conflict of evidence as to the estimated distance between the two steamers when the *C. F. Bielman* got abreast of the steamer *G. T. Burroughs*, as there was in the case of The *City of Brockton*, (1). In that case the witnesses varied in estimating the distance between the two vessels at 75 feet, 100 feet, 250 feet, and 300 feet. The steamers in that case were somewhat smaller than the steamers in this case; but the court held that it was something other than the wheel of the smaller vessel which caused her to get off her course; and that a force was present—the force of currents created in the water by the powerful action of the propeller of the larger vessel driving her at such speed. In this case the witnesses similarly vary in their estimates of the distances between the vessels at 75 feet, 100 feet, 200 feet and 250 feet.

The general rule applicable where there is a conflict of evidence in Admiralty cases, is that the court must be governed chiefly by certain undeniable and leading facts, and this especially applies to estimates of distances between vessels. As said in the *Great Republic* (2), "Under the most favourable circumstances it is impossible to measure distances on the water with accuracy, but in time of excitement there is very little reliance to be placed on the opinion of any one on this subject, and especially is this so where the condemnation of a boat may depend upon it."

(1) 37 Fed. R. 897.

(2) 23 Wall. at p. 29.

1906

CADWELL v. C. F. BIELMAN.

Reasons for Judgment.

There is here no evidence to negative Captain Allen's statement that when the displacement waves or suction caused by the *C. F. Bielman* began to operate on his vessel, he put his wheel hard a-port and backed. On the contrary he is confirmed by several of the witnesses for the defence that as soon as the side-wheeler passed the steamer *G. T. Burroughs* sheered away from the *C. F. Bielman* and towards her starboard side of the narrow channel; and the only thing against the Captain's statement is the supposition of Captain Montgomery of the *C. F. Bielman* that he attributed the collision to the steamer *G. T. Burroughs* putting her wheel the wrong way or to her steering gear being disabled. He admitted that he had heard Captain Allen's evidence and that he had no means of showing that he did not do as he said. I must therefore find that Captain Allen's evidence has not been impeached or disproved.

But there is another fact which I must find against the *C. F. Bielman* on the evidence of her captain. He says as to the outlook that at the time of the accident the mate was in charge of the navigation of the ship, that there was no look-out on the deck with him, and that on the night of the collision the mate had charge of the navigation and the look-out. The look-out man was on deck with the pilot, but was on the main deck, and had been sent back to do something about the towing machine, and he was engaged at that up to the time the accident happened. And to this there is proof by six witnesses that when the collision was imminent the captain of the *Burroughs* gave three blast signals by whistle, and also several short blasts as a danger signal, but four of the defendant's witnesses, who were questioned as to these signals, denied, or did not remember, hearing any of these signals from the deck of the steamer *G. T. Burroughs.*

1906

CADWELL v. C. F. BIELMAN.

Reasons for Judgment.

This also affects the question of a proper lookout on the night of the collision. The non-observance of the duty to keep a proper lookout was considered in the case of *The Twenty-one Friends* v. *J. H. May* (1), where in consequence of the mate and lookout man dividing their attention between the lookout and reefing sails, it was held that a proper lookout had not been observed. This was followed in *St. Clair Navigation Company* v. *The D. C. Whitney* (2), where it was held that the mate and the lookout man dividing their attention between the lookout and preparing the ropes for mooring the ship, was not a compliance with the rule as to a proper lookout. And the *City of New York* (3), shows that the non-hearing by the officers of the *C. F. Bielman* of the blast and danger signals given by the steamer *G. T. Burroughs*, must be held to be "conclusive evidence of a defective lookout."

And the same case decided that the duty of a steamer to answer a signal given by an approaching vessel is as imperative as the duty to give one, the court thus defining the duty: "Ordinary prudence demands that an obligated steamer, proposing by whistle to deviate from the customary course, shall receive an immediate reply, so that her wheel may be put to starboard, or port, as the exigiencies of the case may require. A delay of even a few seconds may seriously embarass her as to the intention of the preferred vessel."

To these must be added the duty of the *C. F. Bielman*, as the overtaking steamer, to observe Article 18 of the Act of 1886, R. S. C. c. 79, now amplified in Articles 23 and 24 of 1905, but which in the former Article tersely reads thus: "Every steamship, when approaching another ship, so as to avoid risk of collision, shall slacken her

(1) 33 Fed. R. 190.

(2) 10 Ex. C. R. 1

(3) 175 U. S. 187.

1906

CADWELL v. C. F. BIELMAN.

Reasons for Judgment.

speed and stop and reverse, if necessary." See also Articles 20, 21 and 22.

On this review of the law applicable to the facts which I find to be proved in this case, I must hold that the plaintiff is entitled to the decree moved for and costs. Reference to the Deputy Registrar at Windsor to assess the damages, the District Registar to tax the costs of the action and reference.

Judgment accordingly.

TORONTO ADMIRALTY DISTRICT.

THE CANADIAN LAKE & OCEAN NAVIGATION COMPANY, LIMITED.. } PLAINTIFFS; 1906 April 12.

AGAINST

THE SHIP *DOROTHY.*

Collision— Strict observance of rules of road -Lookout.

In a case of collision, one vessel cannot justify a departure from the rules of navigation by the fact that the other vessel was also disregarding the rules. On the contrary a primary disregard of the rules by one vessel imposes on the other vessel the duty of special care, prompt action and maritime skill, as well as the duty of acting in strict conformity to the rules applicable to the latter in the circumstances.

Collision regulations have been framed for the protection of lives and property in navigation and are so strictly enforced that even where a vessel commits a comparatively venial error it cannot be absolved from the consequences.

The rules of the road must be strictly observed, and when they are violated by both vessels this court will hold them equally liable.

ACTION for collision by the plaintiffs, the owners of the ship *J. H. Plummer* against the ship *Dorothy.*

The case was tried at the City of Toronto on the 13th, 14th, 15th and 16th and 27th days of February, and the 8th, 9th, 12th and 13th days of March, 1906, (some evidence *de bene esse* having been personally taken before the Judge at St. Catharines on the 28th and 29th days of September, 1905), and judgment was reserved.

The facts are set out in the reasons for judgment.

Francis King, for the plaintiffs;

W. D. McPherson, for the defendant.

HODGINS, L. J. now (April 12th, 1906) delivered judgment.

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY

Reasons for Judgment.

This case is an illustration of the experience which Admiralty Courts have had of the conflict of evidence in collision cases. As has been well said by Mr. Justice Davis of the Supreme Court of the United States, "It always almost universally happens in cases of this description [collision] that different accounts are given of the occurrence by those in the employment of the respective vessels; and that the court has difficulty in this conflict of evidence, of deciding to which side a preferable credence should be given. There are generally however, in every case, some undeniable facts which enable the court to determine where the blame lies." *The Great Republic* (1). And a similar experience has been given in the House of Lords by Lord Blackburn in the *Khedive* (2). "The Judge of the Admiralty, in giving the reasons for his judgment, observed that the evidence was, as is not unusual, very conflicting, and that he had not been able to reconcile it with the supposition that both parties intended to speak the truth."

The collision between the steamers in this case took place on the afternoon of the 21st August, 1905, in the Soulanges Canal, in the Province of Quebec, not far from the guard lock at Coteau. The Preliminary Act of each party states that the time of the collision was 3.30 p.m. The engine-room log-book of the *Dorothy* gives the time of the collision as 3.60 (4 o'clock) p.m.—a discrepancy of 30 minutes. Both pleadings say that "the weather was clear and there was practically no wind, and very little current in the canal." The plaintiff's steamer *J. H. Plummer* is of 992 tons register, about 254 feet long, 37 feet beam, and 24 feet deep, and was on a voyage from Fort William on Lake Superior to Montreal. The *Dorothy* is of 287 net tons, 147 feet long, 27 feet beam, and 16 feet deep, and was on a voyage from Wilmington, in the State of Delaware, to Houghton, in the State

(1) 23 Wall. p. 29. (2) 5 App. Cas. p. 880.

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY.

Reasons for Judgment.

of Michigan, United States. While the *J. H. Plummer* was coming out of the lock, passing signals of one blast each were exchanged between the steamers, indicating that they would pass each other port to port.

The Preliminary Act of the *J. H. Plummer* in describing the collision alleges that the *Dorothy* "sheered from her side of the canal across the course of the *J. H. Plummer*," and the answer to question 14 charges that the fault attributed to the *Dorothy* is improper navigation, first in leaving her side of the canal and throwing herself across the course of the *J. H. Plummer*, and then in attempting to straighten up and regain her first course, after the *Plummer's* two whistle signal, instead of either reversing her engines and coming to a stop, or else continuing towards the south bank in the direction of her sheer.

The Preliminary Act of the *Dorothy* alleges that the "*J. H. Plummer* apparently not navigating in accordance with the single blast signal, the engine of the *Dorothy* was stopped and backed. The *J. H. Plummer* then blew a passing signal of two blasts and sheered or steered to port toward and into the *Dorothy's* port bow." And the answer to question 14 charges, that the fault of the *J. H. Plummer* was that (1) "She violated article 28 of the rules of the road in the following particulars; (*a*) In that she did not direct her course to starboard as she agreed by her single blast passing signal. (*b*) In that she blew a passing signal of two blasts, and directed her course to port after agreeing by whistle signal to direct her course to starboard. (*c*) In that she failed to stop and reverse. (2.) That she violated article 29 of the rules of the road. (*a.*) In that she did not maintain a proper lookout. (3.) In that she violated article 25 of the rules of the road, in that she failed to keep to that side of the midchannel which lay on her own starboard side."

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY.

Reasons for Judgment.

The evidence given on this trial is a mass of contradictions, and necessitates such an analysis of the leading facts, and the drawing of such reasonable deductions therefrom, as will enable the court sitting as a jury to decide to which statements a preferable credence should be given.

The witnesses for the *J. H. Plummer* says that the *Dorothy* was improperly navigated, that she sheered across the bow of the *J. H. Plummer*, and that she kept going ahead up to the time of the collision. The *Dorothy's* witnesses say that the *J. H. Plummer* was improperly navigated, that she sheered across the bow of the *Dorothy* and kept going ahead at the time of the collision. Each side further says that its vessel stopped and reversed under the order "full speed astern."

The witnesses for the *J. H. Plummer* further say that the *Dorothy* sheered from one side to the other and that her stern struck the bank of the canal before the collision.

The *Dorothy's* witnesses say that she kept "absolutely parallel to the bank of the canal all the time," and that the force of the collision drove her bow on the bank of the canal.

Taking this latter statement first, which came out in the following answers of the captain of the *Dorothy:* Q. 403. "You were perfectly right in saying that she (the *Dorothy*) remained absolutely parallel to the bank all the time?—A. Yes, I think so." He had previously stated: Q. 247. "What was your position to the bank at the time of the collision?—A. Our bow was inclined towards the bank." Q. 249. "Prior to the striking?—A. Yes." Q. 250. "About how far from the bank?—A. When I started to back she was 30 or 35 feet from the bank, but in backing she would naturally swing a little, her stern would go out, and that would throw our bow towards the bank. I should say our bow

was possibly 25 feet from the bank when the *J. H. Plummer* hit us." Q. 251. "And her stern?—A. Her stern was probably a little towards the middle of the canal."

The evidence shows that instead of being "absolutely parallel to the bank all the time," the *Dorothy* was diagonally or angle-wise across the canal at the time of the collision. And it would seem a reasonable deduction from the backing movement described that the swinging of the *Dorothy's* stern outwards towards the middle of the canal would make her bow follow the track of the stern and move towards that outward course, provided her helm was kept amidships, or so moved as to counteract the outward swing of the stern from the bank—for it could not be presumed that the continuous moving backward would operate so as to cause the *Dorothy* to swing as on a fixed pivot.

This diagonal or angle-wise position of the *Dorothy*, is more fully described by the Captain of the *J. H. Plummer*. Q. 33 "What action did you observe the *Dorothy* to take after the one whistle agreement?—A. The *Dorothy* was making very bad steering; she was first on one bank and then on the other." Q. 54. "What was the first deviation, if any, that you observed after that? (her being on the *J. H. Plummer's* starboard side)—A. She started out for the middle of the canal." Q. 55. "How far did she get?—A. She got out across our bow, past the middle of the canal with her bow." Q. 73 "Where was the *Dorothy's* stern? A. Up against the bank or close against the bank." Q. 74. "Close to which bank was the stern of the *Dorothy*? A. The north bank, and her head heading to the south bank." Q. 89 "Out of her own water?—A. Yes." * * * and further on he said in answer to Q. 429. "She had come over to the north side and when she got to the north side she started out for

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY.

Reasons for Judgment.

the south side, and when she started for the south side I blowed two whistles."

Cinginni, the wheelsman of the *Dorothy* said, Q. 252. "Was she (the *Dorothy*) coming ahead all the time?—A. Yes. Just at the time of the collision we go back a little across towards the bank, she run to the bank." Q. 53 "What direction was she pointing in that way?—A. She was pointing towards the bank." But others of the *Dorothy's* officers swear she was going full speed astern before the collision; while officers of the *J. H. Plummer* swear that she moved forward, and sheered from side to side and that her bow went over the centre line of the canal.

On this point, whether the *Dorothy* was moving forward or reversing, the evidence of Denison, a passenger, is material. Qs. 16 and 17. "Tell us what you noticed with reference to the beginning from the time you first noticed her (the *Dorothy*)?—A. I noticed her coming up the canal, a considerable distance down the canal, and when she got further up the canal she veered from the side she was traveling on to over the centre of the canal." Q. 18 "Towards which bank?—A. Towards the right hand bank which would be the south bank. She passed over the centre line of the canal—I don't know as to the distance, how far over, but she came over towards the south bank a considerable distance, and then gradually straightened herself out, and returned to her course pretty well about the centre of the canal. She came along on that course for some distance, and within a short distance of the *J. H. Plummer*, she swung across the canal in almost an identical manner to the way she had done in the first place." Q. 22. "When she swung across this time what position would her stern occupy with reference to the north bank?—A. Approximately close to it." Q. 23. "And her bow with reference to the centre line of the canal?—A. Past it."

There are some other material facts disclosed in the evidence which have a bearing on the question as to which side a preferable credence shall be given.

(1) The criticism of the wheelsman of the *J. H. Plummer* on the steering of the *Dorothy* when approaching the *J. H. Plummer*, which was brought out on the cross-examination of the Captain of the *J. H. Plummer*. Q. 255. "From the time you left the guard lock up to the time of the collision was any statement made to you, or anything said to you by any man or officer of the *J. H. Plummer*?—A. There was by the wheelsman." Q. 256. "What did he say?—A. He said that this boat here the *Dorothy*, was making awfully bad steering; and I said yes, I am going to go as slow as I can and as careful as I can." (2) The conversation between the Captains as they passed immediately after the collision, which I find to have been as given by the Captain on the *J. H. Plummer*. "When we got abreast of one another, bridge to bridge, or just about, I says to him, "Captain, I done all I could for you." he says, "I know you did, my stern was on the bottom, and I could not help it, or dragged the bottom, or something to that effect." These two facts are more consistent with the evidence given on the part of the *J. H. Plummer* than that given on the part of the *Dorothy*.

Then consideration must also be given to the expert evidence respecting the size of the rudders in ocean and shallow fresh water navigation, and the enlargement of the *Dorothy's* after the collision. Captain McMaugh's evidence is material. Q. 36. "If you observed a vessel taking a devious course from bank to bank, in approaching you, how would you account for that,—what is causing that?—A. She is certainly very erratic in her movement. It might be caused by the officer, or want of proper steering apparatus." Q. 38. "Would the size of the rudder have anything to do with the erratic move-

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY.

Reasons for Judgment.

ment;—A. Yes it has. That has been the trouble with most of these sea-going vessels coming to our fresh water that the rudders have been found too small for canal purposes, and in nearly every instance they have been enlarged." The following month when the *Dorothy* was in the dry dock at Cleveland for repairs, her rudder was enlarged by an extension of about 15 to 18 inches at the top and about 12 inches at the centre.

Another fact brought out in evidence, but not commented on by counsel, is the discrepancy between the time of the collision as stated in the Preliminary Act filed by the *Dorothy*, 3.30 p.m., and the time stated in the engine-room log-book, 3.60 or 4 p.m.,—a difference of half an hour. From an inspection of the engine-room log-book it seemed to have been very carelessly kept; and it certainly does not record a daily or regular statement of the signals given to the engine-room. No amendment to the Preliminary Act is now allowable, as stated by Dr. Lushington in *The Vortigern* (1). "Neither party is allowed to depart from the case he has set up in his Preliminary Act." The same hour, 3.30 p.m. appears in the statement of defence and no application was made to amend, or to state more correctly in the pleadings the alleged log-book time of the collision. See the *Miranda* (2).

After a careful review of the evidence I have come to the conclusion that a preferable credence should be given to the evidence adduced on the part of the *J. H. Plummer*, as to the facts of the collision; and I therefore find that the navigation of the *Dorothy* was faulty, and caused her to sheer from side to side in the canal, and that she is mainly responsible for the collision.

I further find that this sheering of the *Dorothy* from side to side, before meeting the *J. H. Plummer*, being inconsistent with, and a violation of, the mutual agree-

(1) Swab. 518. (2) 7 P. D. 185.

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO v. THE SHIP DOROTHY.

Reasons for Judgment.

ment arrived at by the single blast signal to pass port to port, warranted the *J. H. Plummer* in assuming that such agreement could not be carried out, and that a new agreement was necessary—but what was the appropriate action or agreement will be considered later on. *The Des Moines* (1).

While I find that the chief fault for this collision was the faulty navigation of the *Dorothy* there are some facts affecting the liability of the *J. H. Plummer* which must be considered. The first is respecting her compliance with Article 25a (1904) which provides that "In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway, or mid-channel which lies on the starboard side of such vessel." The evidence given by the officers of the *Plummer* establishes the fact, that after leaving the guard lock, she overlapped the centre line of the canal by about eight or ten feet, or about one fourth of her beam. A similar overlapping by the *Dorothy* is proved by the evidence of Wright, immediately before the collision. He said that the *Dorothy's* nose was about ten feet across the centre line of the canal, and that she then began straightening up. Q. 259. "And what then happened? A. Then she struck us on the port side of the stem and scarred us there."

Both vessels therefore violated the rule of the road, which as stated in *Towboat No. 7, Norfolk and Western* (2), requires that when vessels approach each other in channels, especially narrow ones, each vessel is bound to keep well over to the side of the channel on his starboard hand. See also the *Newport News* (3).

The localities of the wounds caused by the collision, on both steamers are important in determining where in the canal the collision must have taken place. The *J. H.*

(1) 154 U.S. 584.

(2) 74 Fed. R. 906.

(3) 105 Fed. R. 389.

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY.

Reasons for Judgment.

Plummer's beam is about 37 feet; and assuming her being as stated, about 8 or 10 feet over the centre line, her stem would be a little within her starboard side of the canal, and the wound on her being about ten inches from her stem on her port bow; and the *Dorothy's* beam being about 27 feet, and the wound on her being about 6 or 8 inches from her stem or port bow, are facts which justify the conclusion that the collision must have taken place about or on the centre line of the canal, and that neither vessel was keeping wholly within her own water. For it has been well said that "the wound made by a collision is one fact which outweighs all other evidence as to locality or speed,—it cannot be argued or explained away." And I find this conclusion warranted by the evidence, it follows that the *Plummer* was also in fault in not complying with the rule of the road quoted above which requires that "In narrow channels, every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel." The normal width of the canal is 164 feet, and the width at the bottom is said to be about from 100 to 120 feet wide—thus giving a sufficient water space of from 50 to 60 feet to each steamer to pass the other within her own water.

The sailing rule above quoted was considered in *The Unity* (1). The case of a vessel coming midway down the channel of the river rather south inclined to the south. Dr. Lushington quoting the rule of the road, and commenting on the expression "whenever it is safe and practicable," said "What is the meaning of these words? I apprehend it to be where there is no local impediment of any kind, no difficulty arising from the peculiar formation of the channel itself, no storm, no wind, or anything of that kind occurring. Then the obligation continued to keep to the starboard side, and no consider-

(1) Swab. 101.

ation of convenience, no opportunity of accelerating the speed, none whatever, can justify a disobedience of this statute."

And in the *Fanny M. Carvill* (1), the Judicial Committee of the Privy Council held that the infrigement of the rule "must be one having some possible connection with the collision," thus throwing upon the party guilty of the infringement the burden of showing that it could not possibly have contributed to the collision. Proof of that kind has not been given, nor does it seem possible.

I have intimated that the faulty navigation of the *Dorothy* in sheering from side to side in the canal warranted the captain of the *J. H. Plummer* in proposing that a new agreement should be arranged for the steamers passing each other in the canal. The captain under rule 23 proposed by a two blast signal to pass starboard to starboard. This signal was not answered by the *Dorothy* as it should have been, and I must here repeat the rule referred to in *Cadwell* v. *Bielman* (2), that "the duty to answer a signal is as imperative as the duty to give one." But I think that the appropriate signal under the rule when he noticed the faulty navigation of the *Dorothy*, and the warning comment of his wheelsman that "the *Dorothy* was making awfully bad steering" should have been the danger signal indicated in the same rule, as follows: "In every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle, not less than four, and if the vessels shall have approached within half a mile of each other "both shall reduce their speed to bare steerage

(1) 13 A. C. 455*n*. (2) 10 Ex. C. R. 155.

1906

THE CANADIAN LAKE & OCEAN NAVIGATION CO. v. THE SHIP DOROTHY.

Reasons for Judgment.

way and if necessary stop and reverse." When the faulty navigation of the *Dorothy* was noticed I think the *J. H. Plummer* should then have stopped and, if necessary, reverse. See the *Albert Dumois* (1).

Then as to the contention that there was no proper lookout on the *J. H. Plummer*, I cannot, after reading the comments of the captain and wheelsman, find that the absence of a lookout, as required by the rules, contributed to the collision. And in the *Blue Jacket* (2), it was said, "It is well settled that the absence of a lookout is not material when the presence of one would not have availed to prevent a collision (3)."

The *Merchants Shipping Act*, 1894 (Imp.) provides (4) where in the case of a collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulations have been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary.

These collision regulations have been framed for the protection of lives and property in navigating the sea and the inland lakes and rivers, and for the guidance of navigators taking early and prompt measures to avoid "the risk of a collision." And so strictly have the courts enforced them that even when a vessel committed a comparatively venial error it was held that it could not be absolved from the consequences prescribed by law, and must be held liable. The *Aratoon Apcar* (5).

It is therefore no justification for a departure from the rules of navigation that one vessel was disregarding the duty of observing an obligatory rule, that the other is therefore authorized to proceed other that in strict con-

(1) 177 U. S. 240.
(2) 144 U. S. 371.
(3) 144 U. S. 389.
(4) Sec. 419, sub-sec. 8.
(5) 15 A. C. 37.

formity to the rule she is bound to observe, and which she sees the other is disregarding. Instead of affording any right, or discretion, or relaxation of vigilance, it imposes the duty of special care, prompt action and maritime skill. For it has been well said by Sir James W. Colville in the *Frederick William* (1). "To leave to masters of vessels a discretion as to obeying, or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence."

No circumstances have been proved in this case, warranting a departure by either steamer from the collision regulations, and I must therefore find that each of them infringed the regulations as to the rule of the road, and that both of them therefore were in fault for the collision.

The damages caused to both ships will be equally divided, and each party will bear his own costs. Reference to the District Registrar to take the necessary accounts."*

Judgment accordingly.

Plaintiff's Solicitor: *Smythe, King & Smythe.*

Defendant's Solicitor: *W. D. McPherson.*

---

(1) 4 A. C. at p. 672. See R. S. C. c. 79, s. 70. See *Agra and Elizabeth Jenkins* L. R. 1 P. C. 501; and the form of the decree in the *Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Navigation Company*, 7 A. C. 795.

1906
Feby. 24.

TORONTO ADMIRALTY DISTRICT.

THE UPSON WALTON COMPANY.....PLAINTIFFS;

AGAINST

THE SHIPS *BRIAN BORU*, *SHAUGHRAUN*, *MONROE DOCTRINE*, AND *RECIPROCITY*.

Shipping—Maritime lien—Charter-party—Right to pledge credit of ship.

The orders of a foreman of the charterers, not being the captain of the vessel, cannot create a maritime lien against such vessel.

Where a ship is chartered and supplies are furnished to the charterer with a knowledge of his position with regard to the ship, no maritime lien attaches to the ship.

ACTION for supplies furnished to the above named ships.

The cause was tried at the Town of Sandwich on the 26th day of January, 1906, judgment being reserved.

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

E. S. Wigle for the plaintiffs;

F. A. Hough for the defendants.

HODGINS, L. J., now (February 24th, 1906), delivered judgment.

The plaintiff company claims to be allowed the value of certain supplies to the ships mentioned in the statement of claim, alleging that "the said supplies were furnished to the said ships at the request and by the direction of the Donnelly Construction Company at the Port of Cleveland, Ohio, United States of America, which company was in charge and full control of the said ships at the time; and said supplies were furnished upon the credit of the said ships, and not merely on the per-

1906

THE UPSON WALTON CO. v. THE SHIPS BRIAN BORU, SHAUGHRAUN MONROE DOCTRINE, RECIPROCITY.

Reasons for Judgment.

sonal credit of the said company, and the said supplies were for the necessary use of said ships."

The owners of the said ships have intervened and have filed a statement of defence alleging that when the said supplies were furnished, "the said ships were owned by the Dunbar and Sullivan Dredging Company but were under charter to, operated by, in charge and full control of the Donnelly Construction Company to the knowledge of the plaintiffs, and if such supplies were furnished at the request of, and by the direction of the Donnelly Construction Company, as alleged in the said claim, such supplies were so furnished solely upon the personal credit of the said Donnelly Construction Company."

By a charter-party bearing date the 10th March, 1904, reciting that the ships (except one, the *Paddy Miles*) were then in the possession of the Donnelly Contracting (not the Donnelly Construction Company as the pleading of both parties allege)—under a former lease, then expired, the Dunbar Company leased to the Donnelly Company the said ships, and the said Donnelly Company agreed to hire the same at a fixed rental for a specified term. And the charter-party then provided that "during the life of this agreement the Donnelly Company promises to immediately replace parts when broken, and make repairs and do all things necessary to maintain the property in a condition equal to that in which it was actually received by the Donnelly Company." This clause brings the case within *Anglin* v. *Henderson* (1).

A further clause provided that "the Donnelly Company agrees to pay promptly all bills for towing, supplies, wages, dry docking and repairs whatsoever, incidental to the use and maintenance of the property hereby leased, and to do all things necessary to protect this property or any part of it from liens or incumbrances."

(1) 21 U. C. Q. B. 27.

1906

THE UPSON WALTON CO. v. THE SHIPS BRIAN BORU, SHAUGHRAUN MONROE DOCTRINE, RECIPROCITY.

Reasons for Judgment.

The evidence shows that the supplies were furnished to the ships on the order of the foreman of the Donnelly Company; and there is no evidence to show that this foreman was master of any of the ships or in any service or employment which would constitute him the master and agent, or representative of the Dunbar Company, so as to render them or their ships liable for the supplies furnished; and the plaintiffs statement of claim effectually negatives any agency by alleging that "the said supplies were furnished to the said ships at the request and by the direction of the Donnelly Construction Company." The ships appear to have been used by that company in the construction of a breakwater in Cleveland Harbour, Ohio, U.S., and the order for the supplies seems to have been given by the company's foreman of the construction works.

The master of a ship (and in some cases a ship's husband) is the legally recognized agent of the owner, and as such has implied authority to render their ship liable for supplies and subject it to a maritime lien for such supplies. And the tendency of the cases in England is to hold the person furnishing supplies to a ship at the request of a master to strict proof of his agency; *Mitcheson* v. *Oliver* (1). The ordering of supplies by a master on the credit of a ship is however sufficient *primâ facie* proof that such supplies were necessary. The *Grapeshot* (2).

The orders of the company's foreman for ships' supplies cannot give the plaintiffs a maritime lien on the defendant's ships.

But another point was argued which it may be proper to consider. As before stated the defendant's vessels were under a charter-party to the Donnelly Company, and it appears from the accounts put in that the supplies ordered by the company's foreman were charged against

(1) 5 E. & B. 419; 1 Jur. N.S. 900. (2) 9 Wall. 129.

the ships; and the plaintiffs contend that being so charged they have a maritime lien on the defendant's ships.

The decisions of the Admiralty Courts of the United States respecting liabilities of ships under charter-party are not in complete accord with the decisions of the Admiralty Courts in England, and especially a late decision of the House of Lords. The result of their decisions seems to be that where the owner allows the charterer to have the control, management, and possession of the vessel, and thus become the owner, *pro hâc vice*, for the voyage, the owner must be deemed to consent that the vessel shall be answerable for the necessary supplies furnished and repairs made in a foreign port. The *Freeman* (1). And in some of the earlier cases their Admiralty Courts have held that the chartered vessel is liable even although the person furnishing the supplies knew of the charter-party, and that by its terms the charterer was bound to furnish such supplies for the voyage. The *City of New York* (2).

But their Supreme Court, in the *Lulu* (3) appears to have differed with this latter case as to the effect of notice of the charter-party. And in disposing of that case the court held that the fact that repairs and supplies were necessaries would not be sufficient to entitle the furnisher to recover by a suit *in rem* against the vessel, if it appeared that facts and circumstances were known to him sufficient to put him on inquiry, and to show that if he had used due diligence he would have ascertained such facts and circumstances.

It is well settled law that a party to a transaction when his rights are liable to be injuriously affected by notice, cannot wilfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice

(1) 18 How. 182.

(2) 3 Blatch. 187.

(3) 10 Wall. 192.

1906

THE UPSON WALTON CO. v. THE SHIPS BRIAN BORU, SHAUGHRAUN MONROE DOCTRINE, RECIPROCITY.

Reasons for Judgment.

if it had been actually received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence, he would have ascertained the truth of the case, is equivalent to the actual notice of the matter in respect of which the inquiry ought to have been made.

In *Newberry* v. *Colvin* (1) Tindal, C.J., in delivering the judgment of the court, recognized the effect of notice to the shippers that the ship on which they had shipped the goods was under a charter-party, and he intimated that the finding of the jury that the charter-party was known to the shippers "negatived" any inference that would otherwise have arisen that the master by reason of his command of the vessel, was held out by the defendants (owners) as their agent in the conduct and management of the ship, as the shippers knew the real situation and relative rights of the captain and the owners, before they put their goods on board to be carried on that voyage. This was affirmed in the House of Lords. See *post.*

In *Sandeman* v. *Scurr* (2), where there had not been a demise of the ship, the above case was approved, but Sir A. Cockburn, C.J. said "Our judgment proceeds on the ground wholly irrespective of the charterer's liability, and not inconsistent with it, namely, that the plaintiffs having delivered their goods to be carried in ignorance of the vessel being chartered, and having dealt with the master as clothed with the ordinary authority of a master to receive goods and give bills of lading on behalf of his owners, are entitled to look to the owners as responsible for the safe carriage of the goods." And further "we think that until the fact of the master's authority has been put an end to is brought to the knowledge of the shipper of goods, the latter has a right to look to the owner

(1) 7 Bing. at p. 206. (2) L. R. 2 Q. B. 86.

1906

THE UPSON WALTON CO. v. THE SHIPS BRIAN BORU, SHAUGHRAUN MONROE DOCTRINE, RECIPROCITY.

Reasons for Judgment.

as the principal with whom his contract has been made." The pleadings and evidence in this case satisfy me that the plaintiffs had knowledge that these ships were in the possession of the Donnelly Company and under a charter-party, and therefore under the case of the *Lulu* (*supra*), such knowledge is equivalent to actual notice of the terms of the charter-party.

But the case of *Baumvoll Manufactur von Scheibler* v. *Gilchrist* (1), seems to decide that the question of knowledge by the shipper of the charter-party is not now to be considered an element in determining the liability of the owner, for in that case the shipper did not know of the existence of the charter-party.

The House of Lords confirmed the judgment of the Court of Appeal that the intention and effect of the charter-party was that the owner parted with the possession and control of the vessel to the charterer, that consequently the captain was not in fact, nor could he be taken to be the servant of the owner, and that as he was not the agent of the owner the owner could not be held liable, either under the bills of lading, or for any alleged negligence of the captain.

Lord Herschell, L.C., quoting *Fraser* v. *Marsh* (2), "He (Lord Ellenborough) puts the question to be determined this: whether the captain who ordered the stores was or was not the servant of the defendant who was sued as the owner. He makes that the test of the liability, and says that if he has so divested himself of the vessel, and of its use and benefit, so that it is in the possession of another, whose servant the master is, then the owner ceases to be liable in respect of stores ordered by the master." And he adds: "What distinction is there between a case of stores and a case of liability in respect of any other matter which the master has a right to do on behalf of the owner, whoever he may be? I

(1) [1891] 2 Q. B. 310; [1892] 1 Q. B. 253; [1893] A. C. 8.

(2) 13 East 238.

1906

THE UPSON WALTON CO. v. THE SHIPS BRIAN BORU, SHAUGHRAUN MONROE DOCTRINE, RECIPROCITA.

Reasons for Judgment.

am at a loss to see any ground for the distinction. There is no authority for it and I do not see any sound basis for it."

And referring to the case of *Colvin* v. *Newberry* (1), Lord Herschell said: "It is quite true that in that case the shipper had notice of the charter, and therefore knew of the relation which existed between the ship-owner and the charterer. But I do not gather from the judgments either in the Exchequer chamber, or in your Lordship's house, that that was considered an essential part of the defendant's case. It was alluded to rather as meeting an argument which had no doubt been suggested, that the master of the vessel who was in that case the person to whom the vessel had been lent, might have been properly regarded by those who dealt with him, as acting not merely on behalf of himself, or of some owner or other, if they had not had notice that he was in fact at the time being the owner. But certainly it seems to me that it would not be correct to say that the decision in that case, either in the Exchequer chamber or in your Lordship's house, was rested solely or mainly upon the fact that such notice existed." And Lord Watson, in concurring, said, "I know of no principle or authority which requires that notice must be given when an owner parts, even temporarily, with the possession and control of his ship, in order to prevent the servant of the charterer from pledging his credit (2)." See further the *Tasmania* (3).

These authorities require me to hold that the plaintiffs' company are not entitled to the maritime lien claimed, and that this action should be dismissed with costs.

E. S. Wigle, counsel for plaintiffs.

F. A. Hough, counsel for defendants.

Judgment accordingly.

(1) 8 B. & C. 166; 7 Bing. 190; 1 Cl. & F. 283.

(2) [1893] A. C. at pp. 19, 21.

(3) 13 P. D. 110.

Between

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

1906
Jan. 26.

AND

JOHN CONNOR, MICHAEL CONNOLLY, PATRICK L. CONNOR, THOMAS P. CONNOR, KATIE A. CONNOR AND JOHANNA CONNOR, EXECUTRIX OF THE ESTATE OF THE LATE ROBERT W. CONNOR, AND THE CANADIAN BANK OF COMMERCE ..... DEFENDANTS.

Subrogation—Partnership debt—Rights of one partner paying same.

Under the principles of the Common Law as it obtains in England and in Ontario a partner who pays a partnership debt cannot be subrogated to the rights of the creditor against his co-partner. (The law as applied in similar cases by the Courts of Quebec and of the United States discussed.)

INFORMATION filed by His Majesty's Attorney-General for the Dominion of Canada to obtain a declaration of the rights of the several defendants in certain securities held by the Crown under a deed of assignment of the 4th day of March, 1896, made by the defendant John Connor, and others, in favour of the Warden of the Kingston Penitentiary.

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

June 8th, 16th and 17th, 1905.

The case came on for hearing at Ottawa.

F. H. Chrysler, K.C., and *C. J. R. Bethune* for the plaintiff.

1906

THE KING v. CONNOR.

Argument of Counsel

A. B. Aylesworth, *K.C.*, and *C. Murphy* for the defendant Michael Connolly.

W. D. Hogg, *K.C.*, for the defendant John Connor.

T. A. Beament for defendants Katie A. Connor, Johanna Connor and Patrick L. Connor.

Dr. A. A. Stockton, *K.C.*, for the defendant Thomas P. Connor.

J. J. Gormully, *K.C.*, and *J. F. Orde* for the Canadian Bank of Commerce.

Mr. *Aylesworth*, for the defendant Michael Connolly, contended that as Connolly had paid the debt of the partnership to the Crown he was entitled to the securities held by the Crown in respect of that debt. Connolly was in the position of a surety called upon to pay the debt of the principal. Moreover, Connor was a defaulter to the Crown, and in respect of such default the Connollys were sureties and not partners. Had Connolly paid a security held by a bank, the bank would have handed over to him the security. That is the position in equity.

Mr. *Hogg*, for the defendant John Connor, argued that Connolly was not entitled to the securities because he, in fact, had not settled the Crown's claim against the partnership. An action was still pending in the courts between the Crown and the partnership. Connolly and Connor must, therefore, be looked upon as joint-debtors to the Crown, and the relation of principal and surety could not possibly arise.

Mr. *Orde* for the Canadian Bank of Commerce, contended that Connolly, as a partner of the firm, was debarred from enjoying the rights of a surety of the firm, and therefore, could not be subrogated to any of the Crown's rights in respect of the securities in question.

(*Lindley on Partnership* (1); *Averill* v. *Loucks* (2); *Murray* v. *Stair* (3); *Phipson on Evidence* (4); *London Freehold and Leasehold Property Co.* v. *Sheffield* (5)).

1906

THE KING v. CONNOR.

Reasons for Judgment.

Mr. *Beament*, for the defendants Katie A., Johanna and P. L. Connor, contended that the defendant Connolly had no rights as against them in relation to the securities in question.

Mr. *Bethune*, for the plaintiff, asked that the order of the court be so framed as to relieve the Crown of all responsibility in respect of the securities when handed over to the parties found entitled to them. He also asked for costs.

Mr. *Aylesworth* replied for the defendant Connolly, citing *Housinger* v. *Love* (6); *The Mercantile Amendment Act*, R. S. O., 1887, c. 122, secs. 234; *Chitty's Prerogatives* (7).

THE JUDGE OF THE EXCHEQUER COURT now (January 26th, 1906,) delivered judgment.

This information is filed to obtain a declaration of the rights of the several defendants in certain securities held by the Crown under a deed of assignment of the 4th day of March, 1896, made by the defendant John Connor and others in favour of the Warden of the Kingston Penitentiary.

On the 23rd day of January, 1895, at the City of Montreal, the late Nicholas K. Connolly, of the City of Quebec, and the defendant Michael Connolly, of the City of Montreal, and John Connor, of the City of Saint John, entered into articles of co-partnership for the purpose of manufacturing cordage and binder twine and for the purchase and sale of fibre; and it was thereby agreed

(1) 7th ed. p. 128.
(2) 6 Barb. 470.
(3) 2 B. & C. 82.
(4) 3rd ed. p. 521.
(5) [1897] 2 Ch. 608.
(6) 16 Ont. R. 170.
(7) P. 332.

1906

THE KING v. CONNOR.

Reasons for Judgment

that the articles should apply not only to the fibre that might be purchased and manufactured directly by the parties thereto, but also to such transactions as they or any of them might have or conclude with the Dominion Government in respect to the manufacture and sale of binder twine from the Kingston Penitentiary; and also to any business that might result to any of them in respect of the Central Prison output, then controlled by the Government of the Province of Ontario; and that it should also include the output of any factory leased or acquired by them. The partners were to share equally in the profits or losses, as the case might be, resulting from the proposed operations. The firm name was to be "The Continental Binder Twine Co." Each party was to contribute an equal proportion of the capital required; and it was provided that if either of them should contribute a larger amount than his respective proportion interest should be allowed on such excess at the rate of six per centum per annum. Connor had been a manufacturer of twine and cordage. The Connollys were brothers, and at the time were in partnership with each other, as contractors, under the name and style of N. K. and M. Connolly. Subsequently, after the death of Nicholas K. Connolly, Michael Connolly purchased the former's estate, and acquired his interest in the matters now in controversy. During the existence of the partnership between the Connollys and Connor, namely, on the 15th day of April, 1895, Connor entered into an agreement with the Warden of the Kingston Penitentiary with respect to the sale of all the binder twine then on hand at the Penitentiary and all that should be there manufactured between the date of the agreement and the fifteenth day of August then next. By this agreement it was, among other things, provided that Connor should be the agent for the sale of the twine; that the Warden should fix the price at which it was to be sold, but not

1906

THE KING v. CONNOR.

Reasons for Judgment.

to exceed the price at which the same grade of twine manufactured elsewhere in Canada was sold; that the sales by the agent were as regards credit to be upon the usual terms in the trade; that the agent should guarantee the sale of all the twine and be personally responsible to the Warden for the aggregate value thereof at the prices so fixed, less ten per cent; that the Warden was to deliver the twine as the agent might desire; and the latter was to furnish the Warden with collateral security to cover the value at the selling price of each shipment of twine delivered to him or to his order. During the season of 1895 a large quantity of twine was delivered by the Warden to Connor, for which the latter pledged as security a number of bonds of the Baie des Chaleurs Railway Company. These bonds, which were at the time of no commercial value, were the property of N. K. and M. Connolly. The following is Michael Connolly's explanation of how he came to hand them over to Connor for the purpose for which they were used:

"Well, I did give Connor some bonds in Kingston. "He came to me and told me when we were building "the dredge there, if he could get the entire output "from the Department and give the people credit he "could probably make ten per cent. more on the output, "and asked me if we had any bonds lying around we "could deposit with the Government, or with the Warden "rather. At the time I must tell you I had every con- "fidence in Mr. Connor's honesty; and I said, No we have "not anything except some Baie des Chaleurs bonds, but "they are of no commercial value at present; and I do "not think the Warden would take them. Oh, he said, "the Warden will take them all right. I said if you "think he will take them I will send them up to you. "So I telegraphed to Quebec and got the bonds sent up "in a package. I turned them over to Mr. Connor's

1906

THE KING v. CONNOR.

Reasons for Judgment.

"brother who took them out and gave them to the "Warden of the Penitentiary.

"Mr. AYLESWORTH: Your brother?—A. Thomas P. "Connor, and the Warden of the Penitentiary never "looked at them, but threw them in the safe. The "poor old man lost his job over it afterwards.

"Mr. HOGG: These bonds were returned to you?— "A. They were.

"Q. For some reason, either that they were of no "value as a security, or what?—A. Well, I think the "principal reason was that we assumed the debt.

"Q. That you assumed the debt of the firm?—A. "Yes sir, and they were of no commercial value either."

On the 18th day of February, 1896, the Connollys and Connor dissolved the partnership created by the articles of the 23rd of January, 1895. From one of the recitals in the agreement by which the dissolution was affected, it appears that owing to the large sums of money paid into the business and placed to the credit of the copartnership by the Connollys there was at the time due to them a large sum of money, and to meet this all the assets of the co-partnership, including the debts due to it, were assigned to N. K. and M. Connolly, who undertook to account to Connor for any sum realized in excess of what was due to them. At that time nothing had been paid to the Warden of the Kingston Penitentiary on account of the twine delivered to Connor. October was the time of settlement in the trade, and the Warden had rendered an account in November. The amount of Connor's indebtedness was $49,670.18, and he had been pressed for payment. Of this sum he had actually collected about twenty-three thousand dollars, of which he had, he says, paid about nineteen thousand dollars to the Connollys or to their order. Michael Connolly does not deny the receipt of this money, but he says he did not know it

1906

THE KING
v.
CONNOR.

Reasons for Judgment.

was realized from the sale of the Kingston Penitentiary twine.

About the 29th day of January, 1896, the Continental Twine and Cordage Company, under which name, instead of that of "The Continental Binder Twine Co." mentioned in the articles of co-partnership, Connor and the Connollys had carried on the business of manufacturing twine at Brantford, received from the Consumers' Cordage Company a cheque for $22,421.65, which was afterwards endorsed and delivered to Michael Connolly for N. K. and M. Connolly. This amount was paid for stock sold from the Brantford Mill, and according to Connor the sale was effected to provide funds to be applied in payment *pro tanto* of the amount due to the Warden of the Kingston Penitentiary. Michael Connolly denies this. He says that at that time he did not know that anything was due to the Warden on the twine that Connor had sold as the Warden's agent. This is one of a number of instances in which there is a direct conflict of testimony between the two witnesses. Connor says that Connolly did know, and a letter is produced which it is contended supports Connor's statements. The letter is dated at Montreal the 27th day of January, 1896, and is addressed by Michael Connolly to the defendant Connor. The following is an extract therefrom :—

" We got a telegram from Hume this morning saying " sale would take place if not postponed, which has made " us rather anxious, so much so, that N. K. concluded to " go and see you at Brantford so as to get you to with- " hold the payments until after we see what the Govern- " ment is disposed to do. We sent Hume up to get out " a statement of last season's operations while you are " there. I would suggest that you would not part with " any funds until after Saturday next, for if parties have " to buy in the dredge we want to be in a position to " take care of ourselves."

1906

THE KING v. CONNOR.

Reasons for Judgment.

At that time a dredge belonging to the Connollys was under seizure and was about to be sold to satisfy a judgment that the Crown had obtained against them and others, and they wished Connor to keep in hand any moneys that might come in from the Consumers Cordage Company, or otherwise, in order that the same might be available in case they had to buy in the dredge. So far there is no conflict of testimony. And it is also clear from the letter that Michael Connolly anticipated that the money might be paid out by Connor to some one unless he were requested not to do so. Now as to that, Michael Connolly says that there were at the time no outstanding debts of the company (Notes of Evidence, p. 179), and his explanation is that Connor had to pay "for hemp and raw material and what was going on." (Notes of Evidence, p. 56). The substance of Connor's version of the matter is contained in the following extract from his evidence:—

"Q. You received this letter from Mr. Connolly, I "suppose, on the day following? This is dated 27th "January, 1896. This is the letter which we read. "There is one clause in it 'I would suggest that you "'would not part with any funds until after Saturday "'next.' I do not know what day Saturday would be. "'For if parties have to buy in the dredge we want to "'be in a position to take care of ourselves.' What "funds had you on hand?—A. That would be funds "that were in anticipation of coming in, the cheque of "the Consumers' Cordage Company. Mr. Connolly "when he wrote that letter had no advice that the funds "had come to hand. About the 30th January the "cheque came in. About the 29th January. That was "about the date the cheque was due, and Mr. Connolly "from previous understanding with me knew that that "cheque was to be remitted forthwith to the warden to "apply on account. Then Mr. Connolly followed that let-

1906

THE KING v. CONNOR.

Reasons for Judgment.

" ter up to Brantford, and I think he arrived there about " the 30th January, and the first question he inquired " was whether I had received that letter. I said I had. " Then he inquired if there was any word from the " Consumers' Cordage Company in respect of the cheque. " I said, yes, the cheque came in yesterday and I have it " here in my wallet, putting my hand into my inner coat " pocket, opening the wallet and showing it to him. Mr. " Connolly says you notice from the contents of the letter " that we may have to buy in the dredge, and it may " become necessary for us to protect ourselves by having " funds. Now I would like to take this cheque and use " it for a few days, after which time I will be in a " position to make it good. Well, I says, Mr. Connolly, " before doing this you must not forget that the under- " standing was that this amount should be remitted to " the Warden. You know that already $23,000 has been " collected on account of the Continental Twine sales, and " you have already got $19,000 of the $23,000 that has " come in. Now the two notes are past due with the " Warden, the 5-day note for $20,000 and the 15-day " note for $29,600 in favour of the Warden. I said it is " important that a payment equivalent to the amount " collected on the Twine account should be remitted, " and then I could explain delay for the balance, because " it is in the form of uncollected indebtedness. Well, " he says, after a few days I will be able to make a " remittance equivalent to this cheque, you will be safe " in letting me have it, so on those representations I " handed the cheque of the Consumers' Cordage Com- " pany, which was drawn in favor of the Continental " Twine and Cordage Company, and I put the stamp " Continental Twine and Cordage Company then on it, " and endorsed it by John Connor, and handed that " cheque to Mr. Connolly."

1906

THE KING v. CONNOR.

Reasons for Judgment.

Connor being further pressed for payment of the amount due to the Warden disclosed to Mr. Newcombe, the deputy of the Minister of Justice, the fact that the Connollys had been partners with him in the business which he had been carrying on. He also gave such security as he could to cover the amount of his indebtedness. This security consisted of a promissory note dated the 4th day of March, 1896, and made by John Connor, Patrick L. Connor, Thomas P. Connor, Robert W. Connor and Johanna Connor, whereby for value received they promised to pay to the Warden of the Kingston Penitentiary at his office at Kingston thirty thousand dollars, with interest, thirty days after date; and of a deed of assignment also bearing date of the 4th day of March, 1896, whereby John Connor, Patrick L. Connor, Thomas P. Connor, Robert W. Connor and Katie A. Connor transferred to the Warden certain bonds, twine on hand, debts and other property mentioned in the assignment and in the schedules thereto.

Mr. Newcombe, for the Government, sought also to obtain payment from the Connollys of the amount due, on the ground that they were co-partners with Connor, and there was considerable negotiation on the subject. The Connollys did not admit liability; but on the 30th of March, 1896, they transmitted to the Honourable John Costigan a cheque drawn by their brokers, R. Moat & Co. on The Molsons Bank in favour of the Deputy Minister of Justice for twenty two thousand four hundred and sixty one dollars, and this cheque was handed to Mr. Newcombe with a slip attached thereto on which was written "paid on behalf of John Connor." The amount of the cheque which was cashed and credited to Connor's account, represented approximately the difference between Connor's indebtedness and the face value of the debts alleged to be outstanding for twine sold and of the twine said to be on hand.

1906

THE KING v. CONNOR.

Reasons for Judgment.

On the first of April of the same year John Connor assigned by way of mortgage to the Halifax Banking Company all his interest in the securities mentioned in the deed of assignment to the Warden of the 4th day of March, 1896 excepting the real estate and shipping. The second assignment was subject to the first, and was intended to secure an indebtedness of John Connor to the bank of an amount exceeding the sum of twelve thousand dollars. Due notice of this second assignment was given to the Warden of Kingston Penitentiary and to the deputy of the Minister of Justice. The defendant, The Canadian Bank of Commerce, has succeeded to the rights of the Halifax Banking Company, and at the time of the hearing of the information herein Connor owed the bank a sum of $10,714.61 and interest, of which amount it appeared that at least $7000.00 was secured by the mortgage.

On the 8th day of April, 1896, Connor, by a letter addressed to Michael Connolly, in consideration of the latter settling the Government's claim for binder twine, agreed, among other things, "to assign insurance policies "amounting to twelve thousand dollars in addition to all "the security then contained in the schedule annexed to "the agreement by which the Dominion Government "were given collateral security under date March 28th "last past."

There is an error in the latter date but there is no doubt about the agreement intended. At the time the letter was written Connor informed Connolly of the assignment by way of mortgage to The Halifax Banking Company, and because it had been given he agreed to assign and afterwards did assign to Connolly the insurance policies mentioned. That, in substance, is Connor's statement as to that transaction, and it is not denied by Connolly.

1906

THE KING v. CONNOR.

Reasons for Judgment.

Between the date of the assignment of March 4th, 1896 and the 13th of July of the same year there was realized from the securities therein mentioned an amount something in excess of five thousand dollars, so that Connor's indebtedness to the Warden, at the latter date, stood at the sum of $21,649.52. It was then proposed that the Warden should, on payment of this sum by Michael Connolly, assign to him the promissory note for thirty thousand dollars that has been referred to, and also the property, debts and securities mentioned in the deed of assignment of the 4th day of March, 1896. This was to be done in pursuance of a provision contained in that instrument whereby it was in substance provided that in the event of the Warden endorsing or transferring to any person the said note, he was empowered to convey, assign, transfer and hand over to such person the balance of the real and personal property mentioned therein and in the schedules thereto. Accordingly an indenture of assignment was prepared in triplicate to give effect to that proposal. It bore date of the 13th of July, 1896, and was made between the Warden of the Kingston Penitentiary and Michael Connolly. It did not contain any express covenant on the part of the latter to pay the amount mentioned therein as due to the Warden. It did however contain some provisions not now material, which the assignee was to observe for the benefit of John Connor and the other parties who had joined with him in giving the assignment of the 4th day of March, 1896, and who now with him appeared and assented to this assignment of the 13th day of July of the same year.

After execution this deed of assignment in triplicate and an assignment by the Warden to Michael Connolly of the note for thirty thousand dollars mentioned, remained in the hands of the deputy of the Minister of Justice. The following letter discloses his view of the conditions under which he held the same.—

1906

THE KING v. CONNOR.

Reasons for Judgment.

"DEPARTMENT OF JUSTICE,

"OTTAWA, 12th August, 1896.

"GENTLEMEN,—I am directed to inform you that the "Deed of Assignment of 13th ultimo, by which the "Warden of the Kingston Penitentiary transfers to "Michael Connolly the securities held by him under the "Deed of Assignment to him of the 4th of March last, "from John Connor and others, has been duly executed "by the several parties thereto, and is ready for delivery.

"The first mentioned deed has, as you are aware, been "prepared and executed for the purpose of giving effect "to the agreement entered into between Michael Con-"nolly and this Department, whereby, in consideration "of such assignment, and the endorsation to him of the "promissory note of $30,000 therein referred to, he was "to pay the balance of Mr. Connor's indebtedness to the "Department, amounting to $21,649.52.

"I am to inform you that the Assignment will be "delivered and the note endorsed to Michael Connolly "upon payment of the amount mentioned.

"I am further to state that the Department requires "immediate payment from you, or one of you, of the "amount, both because of the obligation under the agree-"ment and deed, to which I have referred, and because "of the liability therefor arising out of the partnership "formerly existing between you and Mr. Connor, on "behalf of which partnership Mr. Connor's agreement "with the Warden of the 15th April, 1895, was made, "and his liability thereunder incurred; and I am to add "that unless immediate payment be made, I am directed "by the Minister to institute legal proceedings against "you for the enforcement thereof.

"I am, Sir,

"MICHAEL CONNOLLY, Esq., "Your obedient servant,

"N. K. CONNOLLY, Esq., (Sgd.) "E. L. NEWCOMBE,

"Montreal, Q." "*Deputy Minister of Justice.*"

1906

THE KING v. CONNOR.

Reasons for Judgment.

Afterwards Mr. Michael Connolly went to Mr. Newcombe and refused to carry out the agreement, or to pay the money. He claimed to have delivery of the assignment and the benefit thereof without paying anything more. He said he would not pay a cent more. Mr. Newcombe regarded the position he took as untenable and ridiculous and retained the assignments. When Connolly refused to pay the amount due to the Warden, he thought the negotiation was off altogether. Subsequently he caused an information to be filed in this court against the Connollys and Connor to recover the amount mentioned. The warden of a penitentiary is a corporation sole and as such may sue and be sued, but he acts for the Crown, and the debt in question was in reality a Crown debt. The information was filed on the 23rd of September, 1896, and by it a claim was made against the defendants upon the ground that they were co-partners in the transaction out of which the liability arose; and also upon the deed of assignment of July 13th, 1896. The statement of the claim set up on this instrument is to be found in the 13th paragraph of the information. Mr. Newcombe appears to have inserted it as a matter of caution, and not, he tells us, because he could support it by his evidence. This deed of assignment in triplicate was afterwards removed from the files of the Department of Justice by some person, but by whom is not known, and it has never been recovered. A copy of it is in evidence.

The information of the 23rd day of September, 1896, did not come on for hearing until the 24th day of April, 1900, and in the meantime the sum due to the Crown had been greatly reduced by amounts realized from the securities that the Crown held. At the latter date the amount due to the Crown was eight thousand eight hundred and twenty dollars, and for that sum, with costs, there was on the 25th day of April, 1900, judgment

1906

THE KING v. CONNOR.

Reasons for Judgment.

against all the defendants, Nicholas K. Connolly and Michael Connolly having consented that such judgment should be entered against them on the condition that the securities which the Crown then held should be retained by the Crown until the accounts should be adjusted between them and the other defendant John Connor. With reference to these securities it also appears that Mr. Barwick, acting for Mr. Michael Connolly, preferred to the Minister of Justice a claim to have them transferred to Michael Connolly, and that the latter under his advice, offered the Minister to pay the balance then due in order to obtain the securities. Mr. Barwick thinks that this occurred sometime in the year 1902. If so, it was subsequent to the date of the judgment mentioned.

On the 7th day of December, 1900, John Connor assigned to the Crown a claim he had against the Hobbs Hardware Company of the City of London, for which an action had then recently been brought in the High Court of Justice of Ontario. The assignment was subject to a prior assignment of the same claim to Robert W. Connor to secure the payment of the sum of eighteen hundred dollars and interest, and any amount recovered by the Crown was to be held in trust to secure the payment *pro tanto* of the judgment of the 25th of April, 1900. Robert W. Connor's claim has, it appears, been satisfied, but no part of the moneys accruing from this assignment has, so far as I understand the matter, been applied on account of the said judgment.

On the 31st day of May, 1901, an information was filed by the Crown against John Connor, P. L. Connor, Thomas P. Connor, Johanna Connor, and Johanna Connor, administratrix of the estate of R. W. Connor, deceased, to recover a balance of $9,002.32 and interest alleged to be due on the note for thirty thousand dollars made in favour of the Warden of Kingston Penitentiary

1906

THE KING v. CONNOR.

Reasons for Judgment.

on the 4th day of March, 1896. That action was not further prosecuted.

Eventually the judgment of the 25th of April, 1900, was satisfied by the amount of it being taken into account in the settlement of a number of matters then outstanding between Mr. Michael Connolly and the Crown. The statement of account in which the amount of the judgment with interest and costs appears as a debit entry against Mr. Connolly was sent by the Auditor-General to the solicitor then acting for Mr. Connolly on the 21st of December, 1903, and the matter was closed on the 8th of January following by the payment to him and his acceptance of a balance of $754.75 which the statement showed to exist in his favour.

Of the securities that the Crown held to secure Connor's indebtedness to the Warden of the Kingston Penitentiary it now has in its possession, or under its control, the following:—

1. Bonds of The Tobique Valley Railway Company, as follows:—
   - 12 1st Mortgage Bonds, Nos. 97 to 108, both inclusive;
   - 70 2nd Mortgage Bonds, Nos. 281 to 350, both inclusive;
   - 16 1st Mortgage Bonds, Nos. 27 to 42 both inclusive;
   - 44 2nd Mortgage Bonds, Nos. 421 to 464, both inclusive;
   - 27 1st Mortgage Bonds, Nos. 43 to 69, both inclusive; and
   - 12 1st Mortgage Bonds, Nos. 15 to 26, both inclusive.
2. A Certificate numbered 235, for 100 shares in the John Good Cordage and Machine Company.
3. The promissory note for thirty thousand dollars that has been mentioned.

4. A promissory note, dated the 16th day of December, 1895, for $5,777.74, made by Frank P. Killeen and John A. Monniger in favour of John Connor.

5. A balance in cash amounting to $1,950.76.

With regard to other property and securities that the Crown held as security for the amount due to it, the twine, or such of it as turned out to have been manufactured at the Kingston Penitentiary, was sold, and the debts due for that which Connor had disposed of were collected as far as that was possible. For the rest it is said that a number of the things mentioned in the schedules to the deed of assignment never came into the possession of the Crown. As to others there were prior charges, and as to some, and that refers especially to the real estate, there is nothing to show what the grantor's title was or whether he had any. It seems to me, therefore, to be convenient to deal at present with those things only that have been enumerated, and to reserve any question that may arise as to any other matter, giving any of the parties interested leave to apply for further directions. I am also compelled from the want of sufficient information as to the source or sources from which the balance of $1950.76, mentioned as being in the hands of the Crown, was derived to reserve the question as to what disposition should be made of it.

The defendants, Patrick L. Connor, Katie A. Connor, the wife of John Connor, and Johanna Connor, the executrix of the estate of the late Robert W. Connor, appear and disclaim any interest in the matters now in controversy. They demur to the information and ask that it be dismissed as against them with costs.

The defendant, Thomas P. Connor, is the owner of twenty-seven first mortgage bonds of the Tobique Valley Railway Company which he and Robert W. Connor assigned to the Warden of the Kingston Penitentiary by

1906

THE KING v. CONNOR.

Reasons for Judgment.

the deed of the 4th day of March, 1896, as security for John Connor's indebtedness to the Warden. He now claims these bonds with all the interest that has been collected upon them. Otherwise he is not interested in any of the questions arising in this matter.

The defendant, The Canadian Bank of Commerce, claims under the indenture of assignment by way of mortgage of the 1st day of April, 1896, to have a transfer and delivery by the Crown of all securities and property (excepting real estate and shipping) still remaining in its hands and comprised in such indenture, and particularly certain items of property enumerated in the statement in defence. This enumeration includes the items of property that have been mentioned as being now in the possession of the Crown, except the promissory note for thirty thousand dollars and the twenty-seven first mortgage bonds of the Tobique Valley Railway Company that Thomas P. Connor claims. It also includes some items as to which there will, for the reasons stated, be no decision at present.

The defendant, Michael Connolly, claims to stand in the position of the Crown in respect to everything remaining of the property assigned by the deed of March 4th, 1896, and to be entitled thereto and to the benefit of the note of that date for thirty thousand dollars, and to have the action brought thereon continued to judgment. This claim is in the statement in defence grounded upon an agreement alleged to have been made in the month of March, 1896, between the Crown, as represented by the Attorney-General of Canada, and himself whereby in consideration of his paying the balance of Connor's indebtedness, all the securities mentioned were to be transferred to him, and he alleges that he paid such balance and is entitled to the securities. The evidence does not in any way support this alleged agreement. There was no doubt negotiation on the subject, but

1906

THE KING v. CONNOR.

Reasons for Judgment.

nothing came of it other than the indenture of the 13th of July, 1896, that was not delivered. Any claim that Michael Connolly now has to such securities depends upon the documents and facts that have been already mentioned.

The defendant, John Connor, admits the claim of the Canadian Bank of Commerce to the securities comprised in the mortgage of the 1st day of April, 1896, but subject thereto claims that he is entitled to a reconveyance of all the property, real and personal, transferred by him under the deed of assignment of the 4th day of March, 1896. He contests Michael Connolly's claim to the securities mentioned, and among other things alleges that if the accounts of the co-partnership were taken it would be found that Michael Conolly individually and as executor for Nicholas K. Connolly, deceased, is indebted to him, Connor, in a large amount.

The first question to be determined is this:—Did the deed of assignment of July 13th, 1896, to which reference has been made ever become operative and effective in favour of Michael Connolly? If it did, then he is entitled to succeed as against all the other defendants claiming any interest in any of the securities mentioned. In the view I take of the evidence that question must be answered in the negative, and if his claim is to be supported it must be on other grounds. And that brings us to a second question? Is he entitled to be subrogated to the rights of the Crown under the deed of the 4th day of March, 1896, by reason of the payment of the sum of $22,461 on the 30th or 31st day of March, 1896, or because he satisfied the judgment of the 25th of April, 1900? As to that, it seems clear that he and his brother Nicholas K. Connolly were co-partners with John Connor in the transactions out of which the latter's indebtedness to the Warden of the Kingston Penitentiary arose; and if what Connor states as to the circumstances under

1906

THE KING v. CONNOR.

Reasons for Judgment.

which Michael Connolly about the last of January, 1896, got the cheque for $22,421.65 made by the Consumers' Cordage Company in favour of the Continental Twine and Cordage Company, is true, it would be difficult to see how any equity would arise in favour of the Connollys by reason of the payment of the sum of $22,461 made to the Crown in March following. But these matters are are in dispute between Mr. Connolly and Mr. Connor, and perhaps it is not necessary to come to a conclusion as to whether credit should be given to one or to the other. It does appear to me however that Mr. Connor's version of the matter fits in with Mr. Connolly's letter of the 27th day of January, 1896, better than Mr. Connolly's does. And then, while of course it may be true that the latter had no information about the state of the account between the Warden and Mr. Connor, it is not what, having regard to the facts about which there is no room for dispute, would be expected of as good a business man as Mr. Connolly. The articles of co-partnership of the 23rd day of January, 1895, contemplated an arrangement by one or more of the co-partners with respect to the binder twine manufactured at the Kingston Penitentiary. Mr. Connolly knew that Mr. Connor had made some arrangement of that kind, and he had provided the bonds that enabled the latter to get possession of the twine. The Connollys were to share in the profits and losses accruing from this transaction. Under such circumstances one would naturally expect them to be interested in knowing what the state of the account between the Warden and Connor was.

But assuming Mr. Connolly's version of the matter to be correct, it appears to me that his claim to be subrogated to the rights of the Crown because of the payment of this sum of $22,461, or of the amount of the judgment of the 25th of April, 1900, cannot be sustained.

1906

THE KING v. CONNOR.

Reasons for Judgment.

The articles of co-partnership, to which reference has been made, were entered into by the Connollys and Connor in the Province of Quebec. The business of the firm or company was for the most part to be carried on in the Province of Ontario; and the transactions, out of which the liability for which the securities were assigned, arose, occurred there. In the Province of Quebec subrogation to the rights of a creditor in favour of a third person who pays him is either conventional or legal (1). Subrogation takes place by the sole operation of law in favour of a party who pays a debt for which he is held with others or for others; and has an interest in paying it (2). The doctrine of subrogation by operation of law has been adopted and acted upon by the courts of the Province of Ontario; and in addition it is in that Province provided by statute that every person who being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, shall be entitled to have assigned to him or a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security be or be not deemed at law to have been satisfied, by the payment of the debt or the performance of the duty (3). This provision was adopted from the 5th section of the English Mercantile Amendment Act, 1856 (19 and 20 Vict. c. 97, s. 5) which was enacted to meet the case of a surety who paid off the bond debt of his principal, for which he was bound; and who as the law then stood could not require the creditor to assign to him such bond debt because it was satisfied and extinguished by the very act of payment by the surety (4).

(1) The Civil Code, Art. 1154.
(2) The Civil Code, Art. 1156 (3).
(3) The Mercantile Amendment Act, R.S.O. 1897, c. 145, ss. 2, 3 and 4.
(4) DeColyar's Law of Guarantee, 3rd ed. p. 326.

1906

THE KING v. CONNOR.

Reasons for Judgment.

No case has been cited, and I am not aware of any, in which in England or in Ontario a partner paying a partnership debt has been subrogated to the rights of the creditor against a co-partner, and in the Province of Quebec it has been held that a partner who has paid the amount of a judgment rendered against him and his co-partner, jointly and severally, is not entitled to be subrogated in the rights of the plaintiff, but has an action *pro socio* only for his recourse (1). In some of the States of the United States, where the doctrine of subrogation has been carried further than it has been in England or in Ontario, there are cases in which a partner paying a partnership debt has been subrogated to the rights of the creditor against a co-partner. But that has happened in cases in which there had been a settlement of the affairs of the co-partnership; or where something had occurred to place one partner in the position of a surety for his co-partner (2).

And it is on the latter ground, that in this aspect of the case, it was argued that Michael Connolly's claim to the securities in question should be supported. It is alleged that Connor was, in fact, a defaulter to the Crown; and it was contended that in respect of such default the Connollys were sureties and not partners. The facts have been stated. Connor obtained possession of the twine mentioned by depositing with the Warden of Kingston Penitentiary bonds of no commercial value provided for that purpose by the Connollys. Connor collected some twenty-three thousand dollars from the purchasers of the twine and paid nothing to the Warden. Something over nineteen thousand dollars of the amount so collected was paid over to the Connollys by Connor. Michael Connolly

(1) Leduc v. Turcot, 5 L.C.J. 96.

(2) *LePage* v. *McCrea*, 1 Wend. 164; *Baily* v. *Brownfield*, 20 Penn. 41; *Shattuck* v. *Lawson*, 10 Gray 140; *Field* v. *Hamilton*, 45 Vermont, 35; *Fessler* v. *Hickernell*, 82 Penn. 150; *In re Smith* 16 Nat. Bank. Reg. R. 113; *Bittner* v. *Hartman*, 139 Penn. 632; and *McDonald* v. *Holmes* 29 Pac. R. 735.

knew that the bonds were of no commercial value and of the use that was to be made of them. He denies having any knowledge as to where the nineteen thousand dollars came from. But even so, the important thing and that which made all the rest possible was the advantage taken of the Warden in depositing with him worthless securities, and as to that Michael Connolly's position is little, if any better, than Connor's. In respect of the matters in issue here the Connollys were, I think, co-partners with John Connor, and not sureties for him.

But assuming even that by reason of the premises some equity has arisen against John Connor in Michael Connolly's favour, no effect ought to be given to it against the parties to the note for thirty thousand dollars, who joined in making it to secure a debt for which the Connollys as well as John Connor was liable. Their equity in the matter would be greater than Connolly's. And as between Michael Connolly and the defendant Thomas P. Connor the same would be true in respect of the twenty-seven first mortgage bonds of The Tobique Valley Railway Company that he and Robert W. Connor assigned to the warden.

The answers that have been given to the questions stated, and the considerations that have been mentioned dispose, I think, of all the grounds upon which Michael Connolly's claim to the securities in question could be sustained as against any of the defendants other than John Connor. But as between Michael Connolly and John Connor there still remains the letter of the 8th day of April, 1896, and the condition contained in the judgment of the 25th day of April, 1900; and as to these matters the result appears to be that neither of them is as yet in a position to claim an assignment or reconveyance of anything comprised in the schedules of the deed of assignment of the 4th day of March, 1896. Their accounts have not been adjusted or settled. In this

1906

THE KING v. CONNOR.

Reasons for Judgment.

aspect of the case, and in the condition recited in the judgment mentioned that the Crown was to retain these securities until such accounts were adjusted, I have found some difficulty in making any disposition of the matters in controversy. But as more than five years have elapsed since that judgment was entered, it seems reasonable that in favour of other parties having superior rights to such securities the Crown should not be held to the terms of the condition, and that a declaration should be made in favour of such parties.

There will be a declaration:

1 That the makers of the promissory note of the 4th day of March, 1896, for thirty thousand dollars, are discharged from any liability thereon and are entitled to have the same delivered to them or to their order.

2. That the defendant Thomas P. Connor is the owner of and entitled to the twenty-seven first mortgage bonds of The Tobique Valley Railway Company that he and Robert W. Connor assigned to the Warden of the Kingston Penitentiary by the deed of assignment of the 4th day of March, 1896, and that he is entitled to have the same transferred and delivered to him.

3. That the defendant the Canadian Bank of Commerce is entitled to a transfer and delivery to it (to be held under and for the purposes mentioned in the indenture of assignment by way of mortgage of the 1st day of April, 1896):

(*a*) Of the other first mortgage bonds of The Tobique Valley Railway Company, hereinbefore mentioned;

(*b*) Of the second mortgage bonds of that company hereinbefore mentioned;

(*c*) Of the stock certificate No. 235 of The John Good Cordage and Machine Company; and

(*d*) Of the note of Killeen & Monniger of the 16th December, 1895, in favour of John Connor.

1906

THE KING v. CONNOR.

Reasons for Judgment.

And I reserve all other questions arising in the premises, including the question of costs, and give leave to any party hereto to apply for further directions.

Judgment accordingly.

Solicitors for the plaintiff: *Chrysler & Bethune.*

Solicitor for the defendant John Connor: *T. A. Beament.*

Solicitors for the defendant M. Connolly: *Murphy & Fisher.*

Solicitor for the defendants P. L. Connor, Katie Connor and Johanna Connor: *W. J. Code.*

Solicitor for the defendant T. P. Connor: *A. A. Stockton.*

Solicitors for the defendant, the Canadian Bank of Commerce: *Gormully & Orde.*

Between

1906
March 29.

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

AND

B. H. DODGE AND JOHN H. BOWLES..DEFENDANTS.

Expropriation—Rifle range—Compensation—Witnesses led into error in their valuation—Report of referee—Appeal from—Smaller assessment on appeal.

Where the witnesses, on whose evidence the Referee seemed to rely, were in the opinion of the court led into the error of applying to a large number of acres (in all 623 acres) a value which appeared to represent the value of a portion of the property, but not the whole, the amount of compensation recommended by the Referee was reduced.

2. Where average values are applied to ascertain the value per acre of land taken by the Government, such average values should be applied with great care and moderation.

THIS was an information filed by His Majesty's Attorney-General of the Dominion of Canada to obtain certain lands, alleged to be in the possession of the defendants, for the purposes of a rifle range.

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

May 2nd, 1904.

Ordered, that the case be referred to E. S. Crawley, Esquire, Barrister, of Wolfville, N.S., for enquiry and report.

October, 18th, 1904.

The Referee filed his report herein.

December 13th, 1904.

A motion by the plaintiff by way of appeal from the Referee's report was now heard.

March 14th, 1905

1906

THE KING v. DODGE.

Statement of Facts.

THE JUDGE OF THE EXCHEQUER COURT referred the case back to the Referee for the following reasons:

This matter comes before the court on appeal by the plaintiff against the report of the learned Referee, by which he finds that the defendant, Brenton H. Dodge, is entitled to be paid by the plaintiff the sum of thirty-eight thousand dollars and interest as compensation for lands taken for military purposes near the Town of Kentville, in the County of Kings and Province of Nova Scotia; and I am asked on the evidence before the court to reduce that amount to a sum of twelve thousand four hundred and sixty dollars and interest or to refer the matter back to the learned Referee for further enquiry and report.

I am not able on the evidence to make any such reduction as that asked for, though I am equally unable to confirm the report and enter judgment for the sum which the learned Referee has found the defendant Dodge entitled to. I think he has not attached sufficient importance to the actual transactions that have within a few years occurred in respect of the lands in question, and that in consequence he has been led to give too little weight to the opinions of the witnesses called for the Crown and to the lower and more moderate estimates of value given by some of the defendant's witnesses. I agree that so far as the defendant, Brenton H. Dodge, made good bargains in the purchase of the different parcels that go to make up the property he and not the Crown is entitled to the benefit thereof; and I also agree that, if the effect of purchasing a number of parcels of land and combining them in one property has been to increase the value of the property as a whole, the defendant and not the Crown is entitled to any advantage arising therefrom. But before coming to the conclusion

1906

THE KING v. DODGE.

Statement of Facts.

that a considerable number of vendors had within a short time before the expropriation proceedings were taken concurred in sacrificing their properties and in selling them to the defendant, Brenton H. Dodge, for sums greatly less than their real value, I should desire to have more evidence than the record in this case discloses. Neither am I satisfied that in this case the value of the property as a whole was very considerably in excess of the sum of the values of the different properties or lots of which it was made up

The matter will be referred back to the learned Referee for further enquiry and report, as follows:

1. As of the state of the title to the lands on the 5th day of September, 1903. All conveyances in respect of the property made to the defendant Brenton H. Dodge after that date will be excluded from the Referee's consideration.

2. As to the purchases by the defendant Brenton H. Dodge of the several lots and parcels comprising the lands taken, ascertaining and reporting in each case the name or names of the vendors, the date of sale, the price paid, the number of acres sold, the value of improvements, if any, and the conditions under which such sale was in each case made, with a view to determining whether or not the vendors received a fair price, or whether they sold their respective properties for less than a fair price, and if so, the reasons therefor.

3. So far as the enquiry rests upon opinion evidence it will not be opened up or added to. Neither party was entitled without special leave to examine more than five witnesses as to their opinions of the value of the lands taken, and that number has already been greatly exceeded by the defendant Dodge, but it is fair to the learned Referee to add without any objection on the part of the Crown.

1906

THE KING v. DODGE.

Argument of Counsel.

Upon the further enquiry hereby directed being concluded and the further report being filed, either party may move the court to enter such judgment as upon the whole case may appear to be fair and just, and the costs of the present appeal and application will be reserved to to be disposed of at that time.

February 20th, 1906.

The case came up for argument on a motion by the plaintiff by way of appeal from the further report of the Referee, and a counter motion by the defendants for judgment thereon.

R. T. MacIlreith, for the plaintiff, contended that the Referee had erred in applying a special valuation of certain lots to the whole property. The property was not suitable for orchard purposes as a whole, but only certain parts of it. The sales of similar lots are to be taken as the best evidence of value. *Falconer* v. *The Queen* (1). The land is not worth more than $20 an acre as a whole. The defendant Dodge amended his defence so as to claim $45,000, and as he claims a far greater amount than he can recover on the evidence, he is not entitled to his costs.

W. E. Roscoe, K.C., for the defendants, argued that as the defendant Bowles disclaimed any title in the lands, he was entitled to his costs on the issue of title.

The selling prices of the lots in question are no criterion of the value of lands as a whole. Because the defendant Dodge got the lots cheaply he is not to be deprived of their value in the market at the time of the expropriation.

The court will not disturb the finding of the Referee as to value if there is evidence to support it. There is evidence to support it from the expert witnesses called by the Crown; and the defendants' witnesses entirely

(1) 2 Ex. C. R. 82.

1906

THE KING v. DODGE.

Reasons for Judgment.

justify the finding of the Referee. In the case of findings by a Referee they will receive the most favourable construction of which they are capable for the purpose of sustaining the valuation. (*Hill* v. *Grant* (1); *Caswell* v. *Davis* (2): *Grassett* v. *Carter* (3); *Gray* v. *Turnbull* (4); *Village of Granby* v. *Ménard* (5); Schooner *Reliance* v. *Conwell* (6); *In re Pearl Street* (7); *In re John and Cherry Streets* (8); *Burton* v. *the Queen* (9).

The defendant Dodge is entitled to his costs, because he has been awarded a larger sum by the Referee than the amount offered by the Crown as compensation. (*Browne and Allan on Compensation* (10).

Mr. *MacIlreith* replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 29th, 1906) delivered judgment.

In this matter an information has been filed to obtain a declaration that certain lands situated in the County of Kings and Province of Nova Scotia, taken for the purposes of a Camp and Rifle Range, are vested in the Crown, and to ascertain the amount of compensation that should be paid therefor and the persons to whom the same should be paid.

There was some question about the title to the lands taken, but that matter has been disposed of and is of no importance now, except as it affects the question of costs. It will be mentioned again in that connection. The important question has to do with the amount of compensation to which the defendant B. H. Dodge is entitled.

The lands expropriated were situated near the town of Kentville and contained in all six hundred and twenty-

(1) 46 N. Y. at p. 499.
(2) 58 N. Y. at at p. 229.
(3) 10 S. C. R. at p. 125.
(4) L. R. 2 Sc. App 53.
(5) 31 S. C. R. at p. 21.
(6) 31 S. C. R. at p. 657.
(7) 19 Wend. 651.
(8) 19 Wend. at p. 671.
(9) 1 Ex. C. R. at p. 97.
(10) Pp. 101, 102.

1906

THE KING v. DODGE.

Reasons for Judgment.

three (623) acres. On these lands there were, when taken, some timber and some buildings. The plan and description, by the filing of which the lands were expropriated, were filed with the Registrar of Deeds of Kings County on the 5th day of September, 1903. The title to all these lands had been acquired by the defendant Dodge either in that year or in the year 1902. The information herein was filed on the 23rd of April, 1904, and the statement in defence on the 2nd day of May following. By the information the Crown offered to pay to the defendants, or to the persons who might prove to be entitled thereto, a sum equivalent to twenty dollars an acre for the lands taken, and for all damages consequent upon such taking for the purposes aforesaid. There was in fact no severance, and consequently no question of damages. The Crown expropriated all the land that the defendant held at this place. The sum tendered, which amounted to $12,460, included however the timber on the land and the buildings. By his statement in defence the defendant Dodge claimed to have had at the date of expropriation a good title to all the lands taken excepting an undivided two-sevenths interest in one parcel thereof, containing thirty-one acres; and in respect of the amount of compensation tendered he alleged that twenty dollars per acre was not a sufficient and just compensation to him for and in respect of the lands so expropriated and for his loss and damage, and he asked that it might be adjudged and declared that he was entitled to the sum or forty dollars per acre, and in all to the sum of $23,680. That amount is obviously computed on the 592 acres that would be left after deducting the 31 acres mentioned. The same rate for the 623 acres would give $24,920.

Issue was joined on the statement of defence on the 5th day of May, 1904, and on the next day a motion was made before the court then sitting at Halifax that the

1906

THE KING v. DODGE.

Reasons for Judgment.

matters and questions in issue be referred to E. S. Crawley, Esquire, of the Town of Wolfville, Barrister-at-Law, for enquiry and report under the provisions of section 26 of *The Exchequer Court Act* and the Rules of Court and amendments thereto. The motion was made on behalf of the Crown, and it appearing that the defendants consented thereto, the order was made as asked for.

The matter came on for hearing and enquiry before the learned Referee at Wolfville on the 13th day of June, 1904, and on a number of days subsequent to that date. Since the amendment of *The Canada Evidence Act, 1893*, made in 1902 by the Act of 2nd Edward VII, chapter 9, it has been the practice in this court in matters of this kind not to permit more that five witnesses to be called on each side to give their opinions as to the value of lands taken by the Crown or the damages suffered by the claimant. The parties are not limited in any way to the number of witnesses that may be called to speak to facts. But in the matter of opinion as experts the number of witnesses on each side is, unless some good reason is shown therefor before the examination commences, limited to the number mentioned in the statute. That practice was not observed in the present case. For the defendant Dodge some twenty witnesses were examined. Of these the learned Referee reports that most of them were shown to have a special qualification for valuing such lands and an intimate knowledge of the tract in question, some of them having made a careful examination of the same for the special purpose of estimating the value. He adds that the estimates made by these witnesses of the value of said lands per acre when fit for ploughing varied from $50.00 to $100.00, and that the cost of clearing was stated to be from $5.00 to $10.00 per acre. The Crown called some seven witnesses of whom three only, I think, expressed opinions as to the value of these lands per acre. One put the value at $20.00 an acre

1906

THE KING v. DODGE.

Reasons for Judgment.

and the other two at $25.00 an acre. Of these witnesses the learned Refereee in his first report says that they gave much lower estimates than the defendant's witnesses, but it did not appear that they were qualified to give an opinion as to the value of these lands, their knowledge of them being very slight. In a second report, made under circumstances to which reference will be made, he explains that he did not intend to report that the witnesses for the Crown were not qualified in the sense that they were incompetent, but that they were not shown by the evidence to have sufficient knowledge of the lands in question to enable them to form a fair opinion of value, or at any rate, to form an opinion that could have much weight as against the opinions of the many witnesses for the defence who were shown to have an intimate knowledge of the lands and in several instances to have made personal, extended and careful examinations of the tract and of the soil of which it is composed in many places. Among the witnesses called by the Crown was the defendant Brenton H. Dodge himself, from whose evidence it appeared that he had purchased all the lands expropriated within a period of less than two years before they were taken by the Crown. There were a number of transactions, but the sum of the amounts paid by him did not, as it now appears, exceed $7,000.00. Of these transactions the learned Referee reported that it was true the lands had been purchased by the defendant Dodge for a comparatively small sum, but had been bought in small parcels and at different times, and at the time of the expropriation they comprised a large compact tract bounded on three sides by roads and on the fourth side by a railway, the value of such tract being thereby largely enhanced for purposes of fruit growing and farming; and that the fact that the defendant purchased low and made a shrewd speculation should not prevent his recovering the full value when the

1906

THE KING v. DODGE.

Reasons for Judgment.

lands were taken from him. While the matter was before the learned Referee and prior to his first report, an application was made to him on behalf of the defendant Dodge to allow the statement of defence to be amended by substituting for the figures "$23,680.00" where they occur in the third paragraph of the same, the figures "$45,000.00," and also by striking out the words that stood in his way of claiming the whole of the compensation money. This amendment was opposed by the Crown and after argument was allowed.

The learned Referee found that the defendant Dodge was entitled to compensation in the premises in the amount of $38,000.00 with interest at the rate of five per centum per annum from the 5th day of September, 1903, and also to his costs.

The amount was arrived at in the following way:—

196 acres at $60.00 per acre...	$11,760 00
427 acres at $50.00 per acre....	21,350 00
Value of the wood and timber on the land	2,275 00
Value of the buildings, &c.....	2,740 00
Total.....	$38,125 00

The Referee's report having been filed the plaintiff appealed therefrom and asked that the amount be reduced to twelve thousand four hundred and sixty dollars and interest; or that the matter be referred back to the Referee for further enquiry and report. For reasons then given the latter course was adopted. The order was made on the 14th March, 1905, and with reference to the question of compensation the learned Referee was directed with respect to the purchases by the defendant Dodge of the several lots and parcels comprising the lands taken, to ascertain and report in each case the name or names of the vendors, the date of sale, the price paid, the number of acres sold, the value of the improve-

ments, if any, and the conditions under which such sale was made, with a view to determining whether or not the vendors received a fair price, or whether they sold their respective properties for less than a fair price, and if so, the reasons therefor. That enquiry has been concluded, and a second report has been filed. The following is a summary of the particulars of the purchases made by the defendant Dodge of those lands, showing the date or purchase, the number of acres purchased, and the amount paid in each case:—

Lot "A"—The Robinson land (May 5th, 1902)....	208	acres	$218 40
" "B"—The Sheriff lot (July 21st, 1902)	30	"	110 00
" "C"—Storrs lot (The Lord Bishop) (Feb. 13th, '03)	25	"	100 00
" "D"—Walter Reid lot (Oct. 18th, 1902).....	3	"	200 00
" "E"—Carter lot, (Oct. 13th, 1902).....	1	"	120 00
" "F"—Wilson Youngs (Nov. 24th, 1902).....	12	"	120 00
" "G"—Scott or Saml. Chipman (Nov. 7th, 1902)	1	"	20 00
" "H"—Fanning lot (Dec. 30th. 1902).....	31	"	400 00
" "I"—The Hamilton lot (Oct. 20th, 1902).....	10	"	20 00
" "J"—The Burgess lot (Oct. 17th, 1902).....	33	"	750 00
" "K"—The Beckwith lot (Nov. 5th, 1902.....	30	"	400 00
" "L"—The Norman Robinson lot (Feb. 2nd, '03)	2	"	75 00
" "M"—The Rafuse lot (Feb. 1st, '03 & Aug. 3rd, '03)	7	"	315 00
" "N"—The Driving Park (May 1st, 1903).....	26	"	3,000 00
" "O"—The Sweet lot (May 2nd, 1903).....	204	"	1,130 00
	623	acres	$6,978 40

The defendant Dodge had not at the date of the expropriation made any improvements on the land. The learned Referee finds that in a number of instances the owners, at the time they sold to Dodge, were unaware of the real quality and value of the lands, and that this may be said of lots "A", "C", "L" and "O". With regard to the matter in general his report contains the following findings.—

"I find generally that a large part of these lands were "so situated that they were inaccessible and for that "reason were of small value until they had been pur- "chased and blocked together by defendant Dodge

1906

THE KING v. DODGE.

Reasons for Judgment.

"so as to give the whole tract frontage on roads and "railway. This feature applies particularly, I think to "lots "B", "C", "E", "M" and "O", containing in "all about 267 acres. It is worthy of note too that some "of these lands, the Robinson lands, lot "A," 208 acres, "had no water and was therefore practically valueless "for farming purposes until blocked with other well "watered lands. I find also that at the time of the "purchase by Dodge the boundaries of a number of these "lots were in dispute, in some case admittedly unknown, "and in at least one case, the Storrs lot, the location of "the lot was unknown to the owners. These I think "were conditions that would render such lots practically "unsaleable to the ordinary purchaser, but which were "wiped out when the whole was purchased by Dodge, "thus forming a compact tract with well defined bounds "and accessible on all sides. I also gather from the "evidence that a portion of these lands had, prior to and "up to the time of purchase by Dodge, been used as a "trotting park or race track and as a place for the train-"ing of horses, and the existence of this place for such "purposes I find was a condition that to some extent "depreciated the value of the adjoining lands until the "objectionable conditions were removed by purchase of "the whole by Dodge."

And he adds that after a careful review of the evidence taken before him, and basing his opinion upon the evidence only, he is unable to come to any conclusions different from those contained in his former report.

Now in general I agree with the observations that I have quoted from the report, and I think it would be an injustice to the defendant Dodge to limit the amount of the compensation to be made to him to the sum that he paid for the lands. He, and not the Crown, is entitled to any advantages that accrue from the good bargains that he made and from the increased values that have

1906

THE KING v. DODGE.

Reasons for Judgment.

been given to the lands by bringing them all under one owner. But when one has said that, he ought not in my opinion to dismiss all further consideration of these transactions. They furnish after all the best and safest criterion by which to test the opinion evidence. There was at the time no general advance in the value of neighbouring lands. The value that these lands had in the defendant's hands over that which they had in the hands of the vendors arose wholly from the considerations that have been mentioned.

The value of the timber and buildings on the lands taken is reported by the learned referee to amount to a sum of a little more than $5,000, and the fairness of his valuation has not in that respect been challenged by either party. I accept it as correct, and that leaves only the value of the lands themselves apart from the timber and buildings to be ascertained. Deducting the $5,000 from the amount paid by the defendant for the whole we have a balance of less than $2,000 attributable to the value of the lands alone. That gives for the 623 acres an average value per acre of a little more than $3. The $20 an acre that the Crown offered to pay included the value of the timber and buildings. Excluding the latter the Crown's offer was equivalent to about $12 an acre. In general I understand the witnesses that expressed opinions as to the values of the land to have given estimates therefor per acre, without the timber or buildings. The three witnesses for the Crown put that value, as has been seen, at $20 to $25 an acre. The considerable n mber of witnesses called for the defendant placed thereon an average value per acre of $50 and upwards. I agree, as I have intimated, that the $3 per acre which would represent the cost to the defendant of these lands would not under the circumstances of this case constitute with the value of the timber and buildings a fair and just compensation in the premises. Any assess-

1906

THE KING v. DODGE.

Reasons for Judgment.

ment of the compensation on that basis would exclude from consideration matters to which the Referee has very properly attached a good deal of weight. But it is argued that if the price paid is not to be taken as a measure of the compensation to be allowed it is not more unreasonable or difficult to adopt the opinions of the many who made the higher estimates of value, than that of the few who took more moderate views of the question. It seems to me, however, to be much more improbable that the lands taken were really worth from seventeen to twenty times what was paid for them than that their real value was seven or eight times the amount so paid, and especially in a case where as here the lands were situated in a part of the country that has been long and well settled. There is a much greater probability in this case that the defendant's witnesses in giving a very high average value per acre for the lands taken have fallen into some error or mistake than that the Crown's witnesses have in the more moderate estimates given by them.

Then a somewhat long experience in these matters has taught me that averages have to be made with great good judgment and moderation. In the present case I have not the least doubt that there were parts of the land in question that were worth fifty or sixty dollars an acre, but that it was all worth the one sum or the other per acre seems to be altogether improbable in view of the actual transactions. Again, it is I think to be conceded that a claimant in such a case as this, has no great difficulty in getting numbers of respectable witnesses to come forward and make very liberal and sometimes exaggerated estimates of the value of lands that the Crown has taken, or of the damages that the claimant has suffered. On the other hand I find that men in general do not come forward very willingly for the Crown to give evidence, the effect of which is to cut down a

1906

THE KING v. DODGE.

Reasons for Judgment.

claimant's compensation to what they think is a close or illiberal figure. The Crown has to be fairly liberal in its offers and tenders, or it will fail to support them by evidence when the case comes down for trial. The present case illustrates that fact. Apart from the evidence of the actual transactions in these lands the evidence of the Crown does not support the reasonableness of the offer made by it.

Then again, where there is a large number of acres to deal with there is a danger in applying averages, that does not exist in the same degree where only a few acres are taken by the Crown. In the latter case the error into which one falls by adding without reason or justification ten, twenty or even thirty dollars an acre to the value of the land taken is not a considerable matter, but where one is dealing as here, with more than six hundred acres the question becomes a serious one. In such a case one needs to be sure of his averages and to apply them with moderation and in reason.

Mr. Roscoe, for the defendant Dodge, contended that under the rules applicable to such a case as this there are a number of reasons why the Referee's report should be confirmed and judgment entered in accordance therewith. I agree with him that there are such reasons and that they are entitled to serious consideration. But taking the case as a whole, I am unable to adopt that course. It seems to me that a mistake has been made and that the amount allowed is largely in excess of the true value of the lands and premises taken. I am not able to come to the conclusion that in their then state any large number of acres thereof were worth fifty or sixty dollars an acre; and it seems to me most improbable that if all the land in question had really been of that value the defendant would have been able a short time before the expropriation, to have bought it with the timber and buildings thereon for less

1906

THE KING v. DODGE.

Reasons for Judgment.

than seven thousand dollars. The error which, in my view, underlies the opinion evidence given by the defendant's witnesses is that a price of fifty or sixty dollars an acre, which would have been reasonable enough no doubt for some parts of the land, was applicable to the whole. I think that the actual transactions proved show that that was not so. The learned referee felt himself bound to give effect to what in his opinion was the weight of evidence. There is of course a great disparity in the number of witnesses called on the one side and on the other; but after all it is only a matter of opinion and mere numbers are not conclusive. And the defendant was in this respect allowed to avail himself of greater latitude than he was entitled to.

It seems to me that if in addition to the value of the timber and buildings the defendant is allowed an average value of twenty-five dollars per acre for the lands taken, the allowance will at least be fair; and that it will be liberal if a further allowance of ten per centum is added in respect of the compulsory taking. In that way I make up the amount of compensation to be paid to the defendant B. H. Dodge as follows:

623 acres of land taken at $25 an acre, without the timber or buildings	$15,575 00
Value of the wood and timber thereon...	2,275 00
Value of the buildings, &c., thereon.....	2,740 00
	$20,590 00
Add ten per centum thereon for compulsory taking	2,059 00
Total	$22,649 00

On that sum the defendant Dodge will be allowed interest at the rate of five per centum per annum from the 5th day of September, 1903, and he will have his costs, except the costs of the appeals from the referee's reports, which will be taxed and allowed to the plaintiff.

1906

THE KING v. GE.

Reasons for Judgment.

There was at one time a question of title, and it was claimed by the Crown that the defendant John H. Bowles had an interest in part of the lands in question. Bowles himself, by his statement in defence disclaimed any such interest, and issue was joined thereon. It is now conceded that at the date of the expropriation he had no such interest, and he will be allowed his costs of that issue.

There will also be a declaration that the lands and real property described in the information are vested in His Majesty the King.

Judgment accordingly.

Solicitor for the plaintiff: *R. J. MacIlreith.*

Solicitor for the defendant Dodge: *W. E. Roscoe.*

Solicitor for the defendant Bowles: *H. H. Wickwire.*

Between :—

1906
March 5.

THE COPELAND-CHATTERSON COMPANY, LIMITED ..... } PLAINTIFFS;

AND

DANIEL HATTON (TRADING UNDER THE NAME D. HATTON & CO.) AND VICTOR GUERTIN AND HENRY GUERTIN) TRADING UNDER THE NAME GUERTIN PRINTING CO..... } DEFENDANTS.

Patent for invention—The Patent Act, sec. 37—"Reasonable price"—Infringement resulting from breach of agreement—Infringement by inducing others to infringe.

Section 37 of the Patent Act (R. S. C. c. 61) provides, among other things, that the patentee must, within a certain time after the date of his patent, commence and continuously carry on the manufacture of the invention patented in such manner that any person desiring to use it may obtain it, or cause it to be made for him, at a reasonable price. For the plaintiffs it was contended that such price need not be a money price but that conditions may be imposed, the value of which may constitute part or the whole of the price for which the thing covered by the invention is sold.

Held, that while there is nothing in the Act to prevent parties from entering into a binding agreement embodying such conditions, the patentee cannot prescribe his own conditions as part of such price and impose them upon all persons who may desire to use the invention. The "reasonable price" mentioned in the statute means a reasonable price in money; and for such a price the purchaser is entitled in Canada to acquire the complete ownership of the thing that the patentee is bound to manufacture or permit to be manufactured in Canada.

2. The defendant H., having purchased a binder from the plaintiffs on the condition that it was to be used only with sheets sold by or under the plaintiffs' authority, contrary to such condition used in the binder sheets supplied by the defendants G.

Held, that H. had not only broken his contract, but had also infringed the patent.

3. One who knowingly and for his own ends and benefit and to the damage of the patentee induces, or procures, another to infringe a patent is himself guilty of infringement.

4. The defendants G., being aware of the terms upon which the defendant H. had purchased a binder from the plaintiffs, viz.,—that only sheets that were supplied by or under the authority of the plaintiffs were to be used in it, furnished H. with sheets prepared and adapted by them for use in such binder, and to induce him to buy sheets from them they undertook to indemnify him against any action the plaintiffs might bring against him in that behalf.

Held, that the defendants G. had thereby infringed the patent.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Argument of Counsel.

THIS was an action for infringement of a patent for alleged new and useful improvements in binders and sheets to make a book or ledger.

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

September 11, 12, 13 and 14th, 1905.

The case was tried at Montreal. Argument postponed.

October 17th and 18th, 1905.

The case came for argument at Montreal.

W. Cassels, K.C., and *W. E. Raney for the plaintiff; P. B. Mignault, K. C.*, and *J. L. Perron, K. C.*, for the defendants.

Mr. *Cassels* contended that the fact that the invention had become the subject of a great commercial enterprise in a few years was an argument in favour of its novelty and utility.

The case involves, in one aspect of it, something which, so far as I know, has not yet been determined in this country. The defendant Hatton is an infringer of the binder itself; but bo h Hatton and Guertin, the former as a principal infringer and the latter as a contributory, have infringed patents Nos. 51,242, 66,998, and 70,655. Hatton has become an infringer of the basic patent because he has broken the condition upon which the plaintiffs granted him the right to use it, and Guertin is also an infringer because he has induced and contributed to Hatton's infringment. The defendant Guertin not only

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Argument of Counsel.

solicited the defendant Hatton to infringe but gave him an undertaking to indemnify him in case of action brought.

It would appear to be settled law in England as well as in the United States that one who invites another to infringe and contributes to an infringement is himself liable as an infringer. In England the leading case on the point is *Dunlop Pneumatic Tire Co.* v. *Moseley* (1).

In that case, it is true, the defendant was not found guilty of an infringement, but an examination of the judgments will show that stress was laid on the fact that the defendant had not invited another to infringe. In *Innes* v. *Short* (2) Bigham, J. expressly decided that where a defendant had invited another to infringe a patent he was guilty of infringement himself. See also *Incandescent Gas Light Co.* v. *Cantelo.* (3) in which from the report it is clear that it was by the absence of notice that the defendants escaped liability for infringement. But the only inference to be drawn from the judgment is that if they had notice they would have been held liable. See also the following English authorities: *Incandescent Gas Light Company* v. *Brogden* (4); *Incandescent Gas Light Company* v. *New Incandescent Mantle Co.* (5) *Lawson's Patent Design and Trade-marks Acts* (6).

So much for the English cases; but the American cases are very numerous and clear on the doctrine of contributory infringement. For instance, there is the case of *Heaton-Peninsular Button Fastener Co.* v. *Eureka Specialty Co.* (7) in which it is explicity laid down that intentionally persuading or inducing another to infringe, or furnishing him with the means of infringment, is an act of infringement in itself. To the same effect are *Vic-*

(1) [1904] 1 Ch. 164, 612; 21 Cutl. R. P. C. 274.
(2) 15 Cutl. R. P. C. 449.
(3) 12 Cutl. R. P. C. 262.
(4) 16 Cutl. R. P. C. 179.
(5) 15 Cutl. R. P. C. 81.
(6) 3 rd. ed. p. 467.
(7) 47 U. S. App. 146; 77 Fed. Rep. 288.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Argument of Counsel.

tor Talking Machine Co. v. *The Fair* (1); *Edison Company* v. *Kaufmann* (2); *Edison Phonograph Co.* v. *Pike* (3); *Tubular Rivet Co.* v. *OBrien* (4); *Rupp & Wittgenfeld Co.* v. *Elliott* (5); *Cortelyou* v. *Johnson & Co.* (6).

I submit on the foregoing authorities that both in England and the United States if a man with knowledge of the condition upon which a patented machine is sold becomes an active participator in the breach of that condition he becomes a joint wrong-doer with the principal infringer, in other words he is a contributory infringer.

Then with regard to the point of invention in the plaintiff's patent, we have to ascertain, in the first place, if the invention which is claimed and patented has been received by the public. If it has been received by the public and has become largely used as a commercial article, then the doubt is solved in favour of the patentee. The evidence is overwhelming in support of this feature of the patent here. *Vickers* v. *Siddall* (7); *Hayward* v. *Hamilton* (8); *Hincks* v. *Safety Lighting Co.* (9).

On the question of utility, there is a very good definition of what patentable utility means in *Welsbach Company* v. *New Incandescent Company.* (10)

As to the right of the patentee to claim a principal combination and a subordinate one in the same patent, I rely on *Clark* v. *Adie* (11); *Sirdar Rubber Co.* v. *Wallington* (12); *Grip P. & P. Co.* v. *Butterfield* (13).

Mr. *Raney* followed for the plaintiffs, citing upon the question of anticipation the case of *Topliff* v. *Topliff* (14).

Mr. *Mignault* for the defendant, contended that the cases from the American reports cited by counsel for the

(1) 123 Fed. Rep. 424.
(2) 105 Fed. Rep. 960.
(3) 116 Fed. Rep. 863.
(4) 93 Fed. Rep. 200.
(5) 131 Fed. Rep. 730.
(6) 138 Fed. Rep. 110.
(7) 15 App. Cas. 496.
(8) Griffin's Pat. Cas. 115.
(9) L. R. 4 Ch. D. 615.
(10) [1900] 1 Ch. 843.
(11) L. R. 2 A. C. 315.
(12) [1905]1 Ch. 451.
(13) 11 S. C. R. 291.
(14) 145 U. S. 156.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Argument of Counsel.

plaintiffs were not applicable to cases originating under the Canadian Act, because the two systems of law were quite different in their provisions. In the United States the patentee is not obliged to license his invention, but can suppress it if he thinks proper. Until the year 1883, the law of England was to the same effect. In that year the English Parliament empowered the Board of Trade to compel the issue of licenses to persons desiring to use the invention. Then it may very well be conceded that under the United States law the patentee has a right to impose conditions under which the invention shall be used; but in Canada the law is to too plain for construction—the patentee must *sell* at a reasonable price in this country. I suppose that if the law does not compel a man to sell, and he imposes conditions upon a grant of the right to use his invention and such conditions are broken, there is an infringement. But such a state of things could never arise in this country. Here the patentee must sell unconditionally.

The case may be put in this way. The plaintiffs, being unable to impose a valid condition upon the sale of their invention, yet do sell to me with a condition imposed. Now if I break the condition, while I may be liable for a breach of contract, I am not liable in this court to an action for infringement. Possibly I am liable to a civil action for breach of contract, but I am not liable for infringement in such a case.

But I am also in a position to argue that a condition imposed under such a state of the law is a void condition under the law of Quebec, where the contract was made. (Cites Art. 406 C. C. L. C., also Arts. 970, 1025, and 1472.) Even by the English law, if A sells to B the requisite articles to constitute an infringement of C's patent under a contract by which A guaranteed B against litigation in respect of the patent, those facts do not constitute an infringement by A. *Townsend* v.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Argument of Counsel.

Haworth (1); *Dunlop Pneumatic Tire Co.* v. *Moseley* (2)). In every English case cited by counsel for the plaintiffs it was a question of a breach of the license which the law authorizes there, and so the case becomes inapplicable to Canada.

A "sale" of the patented invention is what the Canadian statute contemplates, and sale in the law of Quebec corresponds to sale as it is understood in the law of England. Granting that, it seems to me that a conditional disposition of the invention is no compliance with the requirements of the statute. The simple question under our statute is, has the patentee refused to sell his invention, or has he not?

Furthermore, I submit that the claims of the patent are too wide and invalidate it. The law is that if a patent includes more than one head of invention, the want of novelty in any one of these heads will invalidate it. The plaintiff's patent contains a specific claim for sheets to be used with the binder. No valid patent could be issued for the sheets, and as there is no disclaimer the patent is invalidated. (*Morgan Envelope Co.* v. *Albany Perforated Paper Co.* (3).

With regard to the point of contributory infringement, I submit that there are no facts present here which would make the case of *Dunlop Pneumatic Tire Co.* v. *Moseley* (4) apply to the prejudice of the defendants Guertin. On the other hand, the case is a direct authority in support of the Guertins' position. I am quite prepared to concede that if the person with whom I deal is my agent and I sell him one element of a combination in order for him to place that element in connection with other elements of a combination and so infringe a patent, I am an infringer—*qui facit per alium facit per se.* But clearly that is not the case before the court.

(1) 48 L. J. Ch. 770.
(2) 21 Cutl. R. P. C. 274.
(3) 152 U. S. 425.
(4) 21 Cutl. R. P. C. 274.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

Mr. *Perron*, followed for defendants, contending that upon the facts the defendant Hatton had no intention of buying upon any condition, and that the plaintiffs had no right to impose it. Under such circumstances Hatton should not be held to be an infringer. He paid the price demanded, and he ought to be allowed to use it as he sees fit in his business.

As to the alleged infringement by the Guertins, as their binder was made upon the principle of binders made prior to the date of the plaintiff's patent, it is no infringement of that of the plaintiffs. *Dredge* v. *Parnell* (1); *Carter* v. *Leyson* (2).

Mr. *Cassels* replied, citing *American Graphophone Co.* v. *Leeds* (3); *Robinson on Patents* (4); *Wilkins Shoe Button Fastener Co.* v. *Webb* (5); *Beach* v. *Hobbs* (6); *Deere & Co.* v. *Rock Island Plow Co.* (7); *Vickers* v. *Siddall* (8); *Cannington* v. *Nuttall* (9).

THE JUDGE OF THE EXCHEQUER COURT now (March 5th, 1906), delivered judgment.

The plaintiffs are the present owners of Canadian letters-patent numbered 51,242, 66,998 and 70,655, respectively, which they say the defendants have infringed. In disposing of the questions at present in issue it will be sufficient to deal with letters-patent numbered 51,242. It will not be necessary to consider the other two patents mentioned. In the specification attached to letters-patent numbered 51,242, which were granted on the sixth day of February, 1896, for alleged new and useful improvements in binders and sheets therefor, the invention is described as relating to binders adapted to securely hold a plurality of sheets or leaves in place, and to the sheets

(1) 16 Cutl. R. P. C. at p. 629.
(2) 19 Cutl. R. P. C. 473.
(3) 87 Fed. Rep. 873.
(4) Vol. I, § 155.
(5) 89 Fed. Rep. at p. 996.
(6) 82 Fed. Rep. 916.
(7) 84 Fed. Rep. 171.
(8) 15 App. Cas. 496.
(9) L. R. 5 H. L. at p. 216.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

or leaves adapted to be secured in the binder; and it is stated that the invention consists of the peculiar features of the binders and of the sheets or leaves thereinafter set forth. Reference is then made to the drawings attached to the specification and to the particular embodiment of the invention shown in the drawings. The object aimed at was the production of a binder from which leaves or sheets could be removed, or in which they could be inserted with great facility and convenience and in which the sheets would, when the binder was in use, be safely secured in due arrangement or registration with each other. The specification concludes with fifteen claims. Of these, the first, second, third, fourth, fifth, thirteenth, fourteenth and fifteenth relate to the binder; the sixth and seventh to the sheets; and the eighth, ninth, tenth, eleventh and twelfth to a combination of the binder and sheets.

The distinguishing feature of the binder is the use therein of one or more fixed posts in conjunction with one or more removable posts. These posts pass through holes punched in the sheets, such holes in the case of the fixed posts being open to the back of the sheet to enable the sheet to be removed or inserted, when the removable post is withdrawn from the binder. These posts may for convenience be made extensible, and a back or covers or means for locking the binder may be added. Any or all of these features may be combined to make a serviceable binder; but the essential elements of the invention are the fixed posts and the removable posts. These used in conjunction with each other constitute the substance of the invention.

With regard to the sheets, their distinguishing feature is to be found in their being made or adapted for use in the plaintiffs' binder.

And with regard to the combination claimed of the binder with the sheets, to make a book or ledger, the substance of the invention lies in the combination.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment

Now with regard to the binder it is contended that there is no true combination, but only an aggregation of elements. I am not able, however, to accept that view with respect to the fixed posts and the removable posts. Each, no doubt, has a separate function or office; but each contributes to obtaining the object the inventor had in view; and it seems to me their use in conjunction with each other to obtain that object constitutes a good combination of such elements.

Then it is said that there is no novelty in the invention claimed. Binders are not new; binders in which there are fixed posts are not new; binders from which such posts may be removed in whole or in part are not new. Extensible posts are not new. And it is contended that binders in which fixed posts were used in conjunction with removable posts are not new. I have in this connection very carefully considered (as it deserved to be) Mr. Nathan's evidence; but I have not been able to come to the conclusion that in any of the patents to which he referred or in the Belgian patent since filed, is to be found fixed posts and removable posts used in conjunction with each other in the manner and for the purposes for which they are used in the plaintiffs' binder. I do not think that any anticipation of the combination claimed in the binder now in question has been proved. I am also of opinion that the combination is useful and that there is in this respect proper subject-matter for a patent.

With regard to the sheets it appears that when the statement of claim was first filed the plaintiffs relied upon the sixth and seventh claims of the specification which relate to these sheets and alleged that the defendants had infringed them. Subsequently the statement of claim was amended and this part of the claim withdrawn. The defendants however have set up as a defence that the patent is void because material allegations in the petition or declaration on which it was obtained were

untrue, and because for the purpose of misleading the public the inventors wilfully inserted in the specifications and drawings more than was necessary for obtaining the end for which they purport to be made.

The specification attached to the letters-patent bears date of the 12th of November, 1895, and the drawings of the 16th day of that month. The patent was issued, as stated, on the 6th day of February, 1896. The application for the United States Patent for the same invention was filed in the United States Patent Office on the 30th of October, 1895. On the 26th of November of that year the examiner who had the matter in charge objected to the claims made for the sheets. Then an attempt was made to get over his objection by amending the claims. But the examiner maintained his decision, and on the 24th of January, 1896, the inventors acquiesced therein and asked to have these claims cancelled. That was done and they do not appear in the United States patent, which was issued on the 10th day of March, 1896. No objection was taken in the Canadian Patent Office to the claims made for these sheets, and the patent as issued contains them; and there has been no disclaimer since. On these facts it is argued that I should find that the Canadian specification and drawings contain more than is necessary for obtaining the end for which they purport to be made; that the addition was wilfully made for the purpose of misleading; and that the letters-patent are void. By the twenty-eighth section of *The Patent Act* it is provided that a patent shall be void, if any material allegation in the petition or declaration of the applicant in respect of such patent is untrue, or if the specifications and drawings contain more or less than is necessary for obtaining the end for which they purport to be made, when such omission or addition is wilfully made for the purpose of misleading; but if it appears to the court that

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

such omission or addition was an involuntary error, and if it is proved that the patentee is entitled to the remainder of his patent *pro tanto*, the court shall render a judgment in accordance with the facts, and shall determine as to costs; and the patent shall be held valid for such part of the invention described as the patentee is so found entitled to. Now as to that I see no reason to doubt that the claims made in respect of these sheets both in Canada and in the United States were in the first instance honestly made in the belief, mistaken it may be, that the claims were good. And I do not think one is bound to infer that the applicants changed their minds, as to that, because they acquiesced in an adverse decision of the examiner at Washington. The examiner may have been right, and yet they may honestly have thought him to be wrong and for other reasons have acquiesced in his decision. Assuming that claims six and seven with respect to the sheets are bad and cannot be sustained, and I am inclined to think that that is the case, I see no reason to conclude that they were wilfully included for the purpose of misleading or that the patent must be held to be void because the owners of it have not since disclaimed; though that perhaps would be a prudent course for them to adopt.

Coming now to the combination claimed of the binder and the sheets, such combination constituting a book or ledger, the principal question is as to whether or not there is any new combination. That question arises in this way: The grant made by a Canadian patent is subject to the conditions contained in *The Patent Act* and the Acts amending the same. One of these conditions is that the patent shall be void unless the owner within a prescribed period commences, and after such commencement, continuously carries 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

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

cause it to be made for him at a reasonable price, at some manufactory or establishment for making or constructing it in Canada. (*The Patent Act*, s. 37). The defendants allege that the plaintiffs' binder is in itself a patented invention, and that any person who desires to use it is entitled to obtain it at a fair price; and that the patent is void because of the plaintiffs' refusal to sell their binder without these sheets. The plaintiffs on the other hand say that the binder is a subsidiary combination which they are not bound to manufacture and sell without the sheets, though it is protected by the patent, and that they comply with the condition contained in the statute if they manufacture and sell for a reasonable price the book or ledger that is made by the association or combination of the binder with the sheets.

This question would be of little or no importance in this case if the patent were held good both in respect of the binder and of the sheets therefor. Both being protected, no one could make, use or vend either without the owners' permission, and the book or ledger made by adding sheets to the binder would be doubly protected. It is only in the view that the claims for sheets by themselves are not good that it becomes important to decide whether in the book that is made by inserting sheets in the binder there is a true combination between the binder or its elements and the sheets. That they are brought into contact with each other is obvious. That together they constitute a book, and that after all it is a book that is wanted, is also clear. The binder is of no use without the sheets; and the latter will not make a book without being in some way bound together. If the union of the binder and the sheets were permanent there would I think be little or no difficulty. But the object and merit of the invention is opposed to any permanency in the union mentioned. It is intended that from time to time some of the sheets will be removed and other sheets

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

substituted at the will and for the convenience of the owner of the binder. How often that may occur will depend on the extent of his business and the manner in which it is carried on. But it is not intended that there shall be any permanent union or connection between the binder and the sheets used therein. One binder during the time it is in existence may be refilled with sheets a great many times. The office of the binder is to hold the sheets in position and bind them together. The sheets are the things acted upon. In the case of *The Morgan Envelope Company* v. *Albany Perforated Paper Company* (1) Mr. Justice Brown in delivering the opinion of the court refers to the question as to whether an article upon which a machine or device is intended to act can be said to be part of the combination of which the machine itself is another part; and without expressing any opinion he refers in illustration to the relation between a saw and the log that is being sawn and to rollers and the wheat that is being ground; and to a folding machine or printing press and the paper that is folded or printed. These illustrations could be multiplied indefinitely. And in general it would not, it seems to me, occur to anyone to think that there was any combination in the sense in which that term is used in patent law between the thing acted upon or affected by the machine or device and the latter where such thing is a natural product or an ordinary article of commerce, especially where the time during which they are in contact or association is short. For instance, I do not think anyone would be listened to who claimed a combination between a seeder and the grain that was being sown; or between a machine for grinding coffee and the coffee that was being ground; or between an egg-beater and the egg that was being beaten. There would appear to be greater difficulty in cases where the time during which the machine or device and the article

(1) 152 U. S. 425.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

dealt with are in association, is considerable ; but in such cases it is possible that the difficulty is apparent rather than real. The cases it seems to me which present the greatest difficulty are those in which the thing acted upon has itself to be prepared or adapted for use in the patented machine. If in that preparation or adaption there were novelty, utility and invention then the thing itself might be covered by the patent, and both being protected it would be immaterial whether there was a true combination between them or not. But there may be cases, of which the present is I think an illustration, where the adaptation of the thing to be dealt with or acted upon falls short of presenting proper subject-matter for the patent, and in all such cases the question as to whether or not the combination is good may assume considerable importance. But for the provision of *The Patent Act* to which reference has been made the owner of a Canadian patent might in Canada do what he liked with it. As against everyone except the Crown (1) his right is exclusive. He might use it or not, as he saw fit. Equally he could fix the terms on which he would sell the invention or the product of it, or license others to make use of it, and it would make no difference how unreasonable any such terms were. The person who wished to obtain it would be obliged to take it or leave it on the terms proposed by the owner of the patent. Assuming in such a case as this that the patent was good for the binder only, a condition that the binder should not be used except with sheets provided by the owner would be a good condition. That would be the position of affairs but for the provision of the Act to which reference has been made (2). The statute however makes a great difference in the position and rights of a patentee. He must carry on the manufacture of the invention patented in such a manner that any person desiring to use it may

(1). See *The Patent Act*, s. 44. (2). *The Patent Act*, s. 37.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

obtain it, or cause it to be made for him at a reasonable price. For the plaintiffs it is contended that such price need not be a money price but that conditions may be imposed, the value of which may constitute part or the whole of the price for which the thing covered by the invention is sold. Where they are agreed there can be no objection to the parties making their own terms. There is nothing in the Act to prevent that being done; or to interfere in any way with such contracts as persons choose to make respecting the use of anything protected by a patent. But that is not the case now under consideration. The question is whether the patentee may as part of the price prescribe his own conditions and impose them upon all persons who may desire to use the invention. I do not think he can. In my opinion the "reasonable price" mentioned in the statue means a reasonable price in money; and I think that for such a price the purchaser is entitled in Canada to acquire the complete ownership of the thing whatever it is that the owner of the patent if he wishes to retain his patent, is bound to manufacture or permit to be manufactured so that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price. No doubt cases may arise, or be suggested, in which there may be difficulty in determining what the thing is that must be manufactured so that anyone desiring to use it may obtain it. In the present case, as has been seen, the parties are as to that at issue with each other. The solution of that issue depends I think upon the question as to whether or not there is any true combination between the binder and the sheets that are used with it. If the combination is good then there could be no lawful use of the binder without the sheets; and the plaintiffs would not be under any obligation to sell the binder to be used unlawfully. No one who sought to obtain the binder without the sheets could fairly be said to be a person desiring to use

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

it; for no lawful use of it would be open to him and the case would not be within the statue. But if there is no true combination between the binder and the sheets, and the sheets are not themselves protected by the patent, anyone may use the binders with any sheets adapted for use therein and may procure such sheets where he pleases. Any such person desiring so to use the binder has a right under the statue to obtain it at a reasonable price. I am inclined to the opinion that there is no true combination between the binder and the sheets, but it is better to leave that question open for further consideration if it should arise in some other case. It is not absolutely necessary to decide it now. For assuming that the defendants are right in their contention that anyone desiring to use the binder without the sheets is entitled to obtain it at a reasonable price without any conditions as to the use therein of the plaintiffs' sheets, I am not satisfied that they have made out a case that would justify me in declaring the patent void. The general tenor of the evidence goes to show that while the plaintiffs have sought in selling their binders to impose upon the purchasers the condition that the binders should be used only with sheets sold by or under their authority, they have not, when pressed to sell without any such condition, absolutely refused to sell. In such cases they have in general offered to sell and at the same time have warned the purchasers that in selling they waived none of their rights under the patent. The evidence discloses however one case in which a person whose name is not known but who professed to be acting for the plaintiffs refused to sell a binder to Mr. Huysman, of Montreal, unless he would agree to use in it the plaintiffs' sheets only. This however is an isolated case, and one in which the course adopted by the agent was contrary to the general policy that the plaintiffs appear to have adopted; and on the whole my conclusion is that the refusal to sell uncon-

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

ditionally has not been brought home to the plaintiffs with sufficient directness and clearness to justify so great a penalty as the declaration that their patent is void.

We now come to the questions as to infringement. And first it will, I think, be convenient to deal with the binder manufactured by the Guertins. Is it an infringement of the plaintiffs' patent? I think that question should be answered in the affirmative. There is in this binder a combination of one removable post with two fixed posts. All the posts are extensible, that is, each post is made of two parts, one part of which may be removed from the other part, but that is not objectionable. The infringement arises from the fact that both parts of one of the posts are removable and may be wholly withdrawn or removed from the binder. But for that feature of the Guertin binder I should not think there was any infringement.

Then, with regard to the defendant, Daniel Hatton, what the plaintiffs complain of is that, having purchased a binder from them on the condition that it was for use only with sheets sold by or under the plaintiffs' authority, he has, contrary to such condition, used in it sheets supplied by the defendants, the Guertins.

Now, as to that, I have already stated my opinion that under the Canadian Patent Act it is not open to the owner of a patent, against the will of the person desiring to use and obtain the invention patented, to impose any such condition. In that I agree with Mr. Mignault, but I also agree with Mr. Cassels that there is nothing in the Act to prevent anyone from agreeing to such a condition if he sees fit to do so, and if he does so agree he is bound by the condition, and any use of the invention in excess thereof would be unauthorized and constitute an infringement. In using the binder contrary to the condition Hatton not only broke his contract but he infringed the patent. For he had not acquired the right

so to use it, and the use of it in that way was an infringement of the plaintiffs' exclusive right to the use of his invention.

Then, as to the Guertins. They were aware, I think, of the terms upon which Hatton had purchased a binder from the plaintiffs. They furnished Hatton with sheets prepared and adapted for use in that binder, and to induce him to buy such sheets from them they undertook to indemnify him against any action the plaintiffs might bring against him in that behalf. Under these circumstances the plaintiffs contend that the Guertins are contributory infringers; and if the decisions of the courts in the United States that have been cited were to be followed there is no doubt that the contention would be sustained (1). But it is not at all clear that in this court there can be any question of contributory infringement. It depends perhaps on what is meant by that expression. The jurisdiction of the court is statutory. It has no common law authority to grant a remedy to anyone for the invasion of his rights. And with respect to the infringement of a patent of invention the jurisdiction is given in cases in which a remedy is sought respecting such infringement (2). If the act complained of as a contributory infringement is in fact an infringement, well and good. The court has jurisdiction. But if it is not an infringemet the court has no jurisdiction, and it will not acquire jurisdiction by introducing a term that is not to be found in the statute. The question is: Did the Guertins, in what they did, infringe the plaintiffs' patent? It is a question of infringement, not a question of contributing to an

(1) See amongst others *Heaton-Peninsular Button Fastener Company* v. *Eureka Specialty Company*, 47 U. S. App. 146; 77 Fed. R., 288; *American Graphophone Company* v. *Leeds*, 87 Fed. R., 873; *Tubular Rivet and Stud Company* v. *O'Brien*, 93 Fed. R., 200; *Edison Phonograph Company* v. *Kaufmann*, 105 Fed. R., 960; *Rupp and Whittgenfeld Company* v. *Elliott*, 131 Fed. R., 730; and *Cortelyou* v. *Johnson*, 138 Fed. R., 110.

(2) 54-55 Vict., c. 26, s. 4 [c].

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

infringement by some act that falls short of being an infringement. And in considering that question it will, I think, be convenient to divide it into two questions and enquire (1st.) whether what they did was actionable or not, and, if so, then (2ndly.) whether that actionable wrong may with propriety be termed an infringement of the plaintiff's patent?

It is clear, of course, that it is not an infringement of a patent to sell an article which in itself does not infringe, although it may be so used as to infringe such patent (1). Going a step further, it is, I think, well settled in England that such a sale is not of itself an infringement although the seller knows at the time of the sale that such article is intended to be used by the purchaser in the infringement of the patent (2). In the case of *Townsend* v. *Haworth* (3), which came before Sir George Jessel, the Master of the Rolls, in 1875, and which afterwards went to the Court of Appeal, where his judgment was affirmed, Lord Justice Mellish is reported to have said that "selling materials for the purpose of infringing "a patent to a man who is going to infringe it, even "although the party who sells them knows that he is "going to infringe it and indemnifies him, does not by "itself make the person who sells an infringer. He "must be a party with the man who so infringes and "actually infringe." And Lord Justice James said: "It "is clear there is no case for an injunction. Upon this "bill there is no allegation that the demurring defend-"ants are in any sense of the word infringers. It is "true they may be having a privity in the sale of the "articles and may indemnify the other defendant, the "infringer. But it is impossible in my mind to con-

(1) *Savage* v. *Brindle*, 13 R. P. C. 266.

(2) *Townsend* v. *Haworth*, 48 L. J. Ch. 770; *Innes* v. *Short*, 15 R. P. C. 449; *Dunlop Pneumatic Tire Co. Ld.* v. *Cresswell*, 18 R. P. C. 473; and *Dunlop Pneumatic Tire Co. Ld.* v. *Moseley*, [1904] 1 Ch. D. 164 and 612.

(3) 48 L. J. Ch. 770.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

"ceive a declaration at law which would meet the "case and make them liable, and if they are not liable "at law they are not liable in equity." That so far as I know is the strongest authority in favour of the defendants and against the plaintiffs that is to be found. There are however a few English cases in which the person who was not the actual infringer has been held liable for the infringement or restrained from aiding in it. In *Sykes* v. *Haworth* (1), it appeared that the defendant, a cardmaker, supplied cards that were used in a way that infringed the plaintiffs' patent. The infringement occurred when these cards were nailed on to certain rollers that he had agreed "to clothe" in that way. The nailer was nominated and selected by the manufacturer but was paid by the defendant. It was held by Mr. Justice Fry that the nailer was the defendants' agent for the purpose of the nailing and that the defendant had infringed. In *Innes* v *Short* (2), the facts were that the defendant sold zinc powder with directions for its use in a way that would constitute an infringement of the plaintiff's patent, and Mr. Justice Bigham held that while the defendant had a right to sell the powder he had no right with the sale to give such directions; that they constituted an invitation to infringe. And an injunction was granted to restrain the defendant from selling powdered zinc with an invitation to his purchasers to use it in such a way as to infringe the plaintiff's patent. In *The Incandescent Gas Light Company, Ld.* v. *The New Incandescent Mantle Company* and others (3), one of the defendants sold fittings down stairs, and another upstairs in the same building sold the mantles to go with the fittings. The fittings were not an infringement of the plaintiffs' patent but the mantles were. Mr. Justice Matthew found on the evidence that the defendants were acting in

(1) L. R. 12 Ch. D. 826. (2) 15 R. P. C. 449.
(3) 15 R. P. C. 81.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

concert and held that the defendant who sold the fittings was also an infringer. In his reasons for his judgment he said that "in the most restricted sense to aid and "abet may not constitute infringement; but if a business "of infringing is carried on the aiding and abetting in "that sense is sufficient." And in *The Incandescent Gas Light Company, Ld.* v. *Brogden* (1), Mr. Justice Kennedy held that a person infringes a patent who passes on to another to be filled an order for infringing articles (in that case mantles) and takes a commission upon the transaction.

In *The Mogul Steamship Company* v. *McGregor* (2) Lord Justice Bowen said that the intentional procurement of a violation of individual rights contractual or otherwise is forbidden by law. And in *Allen* v. *Flood* (3) Lord Watson stated that any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad or indifferent. And again, in the same case he stated his view of the law in this way: "There are, in my opinion, two grounds upon which a "person who procures the act of another can be made le-"gally responsible for its consequences. In the first "place he will incur liability if he knowingly and for his "own ends induces that other person to commit an ac-"tionable wrong. In the second place when the act in-"duced is within the right of the immediate actor, and "is therefore not wrongful in so far as he is concerned, it "may yet be to the detriment of a third party; and in "that case according to the law laid down by the major-"ity in *Lumley* v. *Gye* (4) the inducer may be held liable if "he can be shewn to have procured his object by the use

(1) 16 R. P. C. 179.
(2) 23 Q. B. D. at p. 614.
(3) [1898] A. C. at pp. 92, 96.
(4) 2 E. & B. 216.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

"of illegal means directed against that third party." With regard to the case of *Lumley* v. *Gye* (1) Lord Macnaghten in *Quinn* v. *Leathem* (2) stated that speaking for himself he had no hesitation in saying that he thought the decision in that case was right, not on the ground of malicious intention—that was not he thought the gist of the action—but on the ground that a violation of a legal right committed knowingly is a cause of action; and that it is a violation of legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for such interference. And Lord Lindley in *Quinn v. Leathem* (3) after expressing his opinion that *Lumley v. Gye* (4) was rightly decided, proceeded as follows: "Further the prin-"ciple involved in it cannot be confined to inducements "to break contracts of service; nor indeed to inducements "to break any contracts. The principle which underlies "the decision reaches all wrongful acts done intentionally "to damage a particular person and actually damaging "him." These expressions of general principles of the law go far I think to remove the difficulty with which Lord Justice James felt himself confronted in *Townsend v. Haworth* (5) and show, it seems to me, that a declaration at law might be framed to meet the case of one who provided the materials for the infringement, and for his own ends and benefit procured or induced another to infringe a patent and indemnified him against the consequence of such infringement. I do not see that infringements of patents can in this respect be distinguished from other wrongs; and if not the acts of the Guertins of which the plaintiffs complain fall within the first of the two propositions laid down by Lord Watson in *Allen v. Flood* (6) It may be said that they did not actually know that Hatton would commit an actionable wrong and become an in-

(1) 2 E. & B. 216.
(2) [1901] A. C. 495.
(3) [1901] A. C. at p. 535.
(4) E. & B. 216.
(5) 48 L. J. Ch. 770.
(6) [1898] A. C. 96.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

fringer by using their sheets in the binder purchased from the plaintiffs. They may have thought that the claims the plaintiffs were setting up could not be sustained, and if so they had a right to resist them and to indemnify Hatton. *Townsend v. Haworth* (1) and *Plating Company v. Farquharson* (2). But they knew of the patent and of the plaintiffs' claims and they took their chances. If it had turned out that Hatton had not infringed the patent by using their sheets no wrong would have been done to anyone, and they would not have been liable. But we have seen that what Hatton did was actionable, and it seems very clear that he was induced to commit the wrong by the defendants Guertins, and that they did this for their own ends and benefit and to the detriment of the plaintiffs, knowing very well at the same time what they were doing and the chances they were taking. That, it seems to me is sufficient in respect to knowledge. I think the first of the two questions proposed, namely, whether or not what the defendants the Guertins did, in inducing or procuring Hatton to infringe the plaintiffs' patent, is actionable or not should be answered in the affirmative.

But it does not follow of course that the actionable wrong that the Guertins in that way committed was an infringement of the patent. One who without justification or excuse induces another to break a contract may commit a wrong but he does not break the contract. One may commit a wrong by knowingly and for his own ends inducing another person to commit an actionable wrong, but the two wrongs may not always be the same.

Under the grant made by Canadian letters patent the patentee and his legal representatives and assigns acquire during the prescribed term the exclusive right privilege and liberty of making, constructing and using and vending to others to be used, in Canada, the invention covered by the patent. And it does not appear to me to be going too far to hold that any invasion or violation of that

(1) 48 L. J. Ch. 770. (2) L.R. 17 Ch. D. 49.

1906

THE COPELAND-CHATTERSON CO. v. HATTON.

Reasons for Judgment.

right is an infringement of the patent. But is not that the right which one invades who knowingly and for his own ends induces or procures another to violate or infringe it? And if so, may not the act of the procurer or inducer be with propriety termed an infringement of the patent? In short does not one who knowingly and for his own ends and benefit and to the damage of the patentee induces or procures another to infringe a patent himself infringe the patent? It seems to me on principle that it comes to that.

There will be judgment for the plaintiffs, and the general costs of the cause will follow the event, but the defendants will have their costs incident to the issues raised in respect of the sixth and seventh claims of the specifications prior to the amendment of the pleadings and also the costs incident to such amendment.

There will be the usual reference to take an account of profits or damages; and with respect to the injunction the defendant Hatton and his servants and agents will be restrained from using in any binders purchased from the plaintiffs, on the conditions mentioned, sheets other than those sold by or under the plaintiff's authority. The defendants (the Guertins) and their servants and agents will be restrained from making, using or vending to others to be used binders in which there is a combination of one or more fixed posts with one or more removable posts; and with respect to sheets adapted for use in the plaintiff's binders they will not be restrained from making or selling them, but from procuring or inducing persons whom they know to have purchased one or more of the plaintiff's binders on the conditions mentioned to purchase such sheets from themselves and to use them in such binders.

Judgment accordingly.

Solicitors for plaintiff: *Mills, Raney, Anderson & Hales.*
Solicitors for defendants: *Archer, Perron & Taschereau.*

IN THE MATTER of the Petition of Right of

1906
April 9.

M. A. PIGOTT AND J. C. INGLES DOING BUSINESS UNDER THE NAME, STYLE AND FIRM OF PIGOTT & INGLES..... } SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Contract for widening canal—Change of plans—Extra work—Recovery for—Quantum meruit—Waiver.

The suppliants were contractors for widening and deepening the lower part of the Grenville Canal. Some portions of the work described in the specifications could not be done without unwatering the canal; other portions of it could not be very well done in the winter season; and nearly all of it could have been done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal, by making the best use possible of the time in the spring after the frost was out of the ground and before the water was let into the canal for the purposes of navigation, and also by using in the same way any time that might be available after the water was let out of the canal in the autumn and before the severe weather set in, and with regard to the rest, by work done in the winter season. It was also a term of the specifications that "parties tendering should consider in submitting their prices for the various items of work; that they must include the cost of removing snow and ice, off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during the progress of the work, and that navigation should not be interfered with."

A large part of the work was done either in the winter season or with the water in the canal.

Held: That there was no such change in the conditions under which the contract was to be performed as to make its provisions inapplicable to the work that was done, and that the case was not one in which the contractors were entitled to treat the contract as at an end and to recover upon a quantum meruit, as was done in the case of *Bush v. Trustees of the Port and Town of Whitehaven.* (See Hudson on Building Contracts, 2nd ed., vol. 11, p. 121.)

1906

PIGOTT & INGLES v. THE KING.

Argument of Counsel.

2. By the 33rd section of *The Exchequer Court Act* it is provided that "In adjudicating upon any claim arising out of any contract in writing, the court shall decide in accordance with the stipulations in such contract, and shall not allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the amount stipulated for therein, nor shall it allow interest on any sum of money which it considers to be due to such claimant, in the absence of any contract in writing stipulating for payment of such interest or of a statute providing in such a case for the payment of interest by the Crown."

In this case an order in council was passed waving certain clauses of the contract,

Held, that the words in the first clause of the above section "the court "shall decide in accordance with the stipulations in such contract" may be treated as directory only, and that effect might be given to the waiver so far as it afforded relief from the clauses of the contract which would constitute a defence to the action if pleaded by the Crown, such as the absence of any written direction or certificate by the engineer with respect to the work done; but that the remaining clauses of the section were imperative, and that there could be no valid waiver which would enable a contractor to obtain compensation for a larger sum than the amount stipulated for in his contract, i.e., the contract prices for the different classes of work done must be applied to such work.

3. Where a contract has been entered into for the construction of certain works at schedule rates, and the work has been completed in accordance with the contract, the contract prices cannot be increased so as to give the contractor a legal claim for higher prices without a new agreement, made with authority, for a good consideration.

PETITION of Right to recover a sum of money from the Crown alleged to be due to the suppliants for works done in the improvement of the Grenville Canal.

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

May 19th, 1905.

The argument of the case was now heard at Ottawa.

G. H. Watson, K.C., for the suppliants.

F. H. Chrysler, K.C., and *W. Johnston*, for the respondent.

Mr. *Watson* contended that what the suppliants were claiming in this action were things done and provided

1906

PIGOTT & INGLES v. THE KING.

Argument of Counsel.

extra and in excess of their original contract in deepening and widening the Grenville Canal. The conditions and circumstances under which the works here claimed for were executed were so changed from those contemplated by the parties to the contract at the time it was made that the contractors are entitled to treat the contract as at an end and to sue upon a *quantum meruit*. The plans were changed by the Crown, and the delays arising from such changes were prejudicial to the execution of the works by the defendants. Instead of the work being done in the open season and with the canal unwatered, the bulk of it was done either in winter or with the water in the canal. This was because of the changes in the plans made by the engineer, and for the acts of the engineer within his powers the Crown is responsible.

The order in council passed with reference to these particular proceedings waives any technical defences to the action "in so far as they would prevent a consideration of any claim on its merits." The Crown got the benefit of the work done, and is obliged in law to pay for it.

Mr. *Chrysler*, for the respondent, argued that the suppliants were confronted by a dilemma in prosecuting their claim here. If they relied on the contract, the evidence plainly shows that it was contemplated that the work should be done in the winter season, or after the close of navigation, and further, they were met with the schedule of prices; while if they rely on the order in council, that does not purport to waive the prices at all.

The case of *Henderson* v. *The Queen* (1) does not apply here, because it is a question of improvements upon land and not of obtaining the benefit of goods sold. *Munro* v. *Butt* (2).

(1) 28 S. C. R. 425. (2) 8 El. & B. 738.

Furthermore, the evidence does not show that the suppliants lost money on their contract.

Mr. *Watson*, in reply, cited *The Queen* v. *St. John Water Commissioners* (1); *Weddell Dredging Co.* v. *The Queen* (2); *Jackson* v. *Union Marine Insurance Co.* (3); *Ross* v. *Barry* (4); *Hall* v. *The Queen* (5); *Starrs* v. *The Queen* (6); *Wallis* v. *Robinson* (7).

THE JUDGE OF THE EXCHEQUER COURT now (April 9th, 1906), delivered judgment.

The petition is brought by the suppliants to recover from the respondent the sum of $154,244.93, with interest, for work done by them in widening and deepening the lower part of the Grenville canal, and for damages sustained by them in doing that work. For the execution of this work the suppliants, on the 9th day of April, 1897, entered into a written contract with the Crown, whereby it was, among other things, provided that they should, in the manner therein set out, be paid for the works contracted for at certain prescribed prices. By a final estimate signed by Mr. Lynch, as resident engineer, by Mr. Marceau, as superintending engineer, and by Mr. Schreiber, as Chief Engineer, the suppliants were, on the 19th day of April, 1901, allowed in respect of such works the sum of $95,323.10, and that amount has been paid.

In the month of November, prior to the date last mentioned, the suppliants had made a claim against the Crown in respect of this work and for damages and interest, amounting in all to the sum of $191,360.16, against which they gave credit for $92,675.57 for cash received; leaving a balance as then claimed by them of $99,684.59. This claim was substantially that which is

(1) 19 S. C. R. 125.
(2) 7 Ex. C. R. 323.
(3) L. R. 8 C. P. 572.
(4) 19 S. C. R. 360.
(5) 3 Ex. C. R. 373.
(6) 1 Ex. C. R. 301.
(7) 3 F. & F. 307.

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

now before the court with this difference, that the prices have since been increased to include a general average profit of about twenty-five per cent. That in the main accounts for the difference in the amount of the claim then made and that now in question here. The claim was considered before the final estimate of April, 1901, was given, with the result that by the latter the suppliants were allowed a sum of $3,647.53 in addition to the amount for which they had given credit in November, 1900. Of the latter amount the sum of $1,016.45 was allowed in respect of matters not included in the schedule of prices. The large difference between the amount which the Government engineers have allowed and that which the suppliants claim is principally due to the fact that the former in making their returns and estimates have adhered to the prices prescribed in the contract, while the latter have made up their claim at larger prices, which they say are fair and reasonable and such as they are entitled to under all the circumstances of the case. In short, the suppliants make their claim upon the *quantum meruit* and not upon the contract, and they contend that they are entitled to do that on two grounds, one of which existed at the time the final estimate was made, while the other has arisen since.

In the first place it is said that the circumstances under which the works in question were executed were so changed from those contemplated by the parties to the contract that the special conditions of the contract are inapplicable, and that the contractors are entitled to treat the contract as at an end and to recover upon a *quantum meruit*. It is contended that it was in the contemplation of the parties to the contract that the work should be done in the open season and with the canal unwatered, whereas with the exception of short periods in the spring after the frost was out of the ground and before the canal was opened to navigation, and shorter

periods in the autumn after navigation closed and before winter set in, the work was done either in winter or with the water in the canal. In support of that contention the suppliants rely upon certain provisions of the specification attached to the contract, which they allege show in the strongest possible way that the whole of the work was to be done in the open season. The provisions relied upon are as follows:—

"The works comprised under this specification will be divided in two sections A and B.

Section A extends from Lock No. 4 to No. 5, and is about 4,750 feet in length.

Section B extends from immediately above Lock No. 5 to Station 95.20 and is about the same length as Section A.

The works to be executed on Sections A and B will be chiefly widening and deepening the prism of the present canal and of the tail-race of the waste weir; lining the slopes of the enlarged canal with dry masonry retaining walls wherever ordered; constructing embankments with the excavated materials at such places as may be directed, and grading the new tow-paths at such places where the old ones shall have been removed; building small wooden or stone culverts and a waste weir in the position shown on the plan; also in general, performing all the works necessary to complete both sections in accordance with the plans and specification."

* * * *

The price tendered for "earth excavation" shall cover the entire cost of excavating, hauling and forming into towing paths, embaukments and spoil banks, all the various kinds of materials found in the prism of the canal, towing-path, roads, tail-race, off-take drains, and in the site of the various structures. This price shall include the cost of unwatering the canal or the pits of any structure and completing all the excavation required

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

on the entire work to the satisfaction and approval of the Engineer.

"The price tendered for rock shall cover the entire cost of excavating, hauling and forming into embankments and spoil banks all rock found in the prism of the canal, towing-paths, roads, tail-race, off-take drains and in the site of the various structures. This price shall include the cost of unwatering the canal or the pits of any structure and completing all the rock excavation required in the entire work to the satisfaction and approval of the Engineer.

"The final measurements of all excavation shall be based on levels and measurements taken before the works have commenced and during their progress. The whole of the earth and rock excavation shall be computed from these data and paid for in the solid. The Contractor, where rock underlies clay, must entirely strip the earth from over it, before its excavation is commenced. All rock removed before the necessary levels and measurements have been taken shall be returned and paid for at the price of earth. It must be distinctly understood and agreed upon that no excavation below the specified grade line or outside the line or lines of slopes shall be paid for.

"Where the present embankments of the canal are cut into or entirely cut away by the widening at places where the adjoining ground is below the level of the water, a new embankment must be formed or the present one widened as the Engineer may direct.

"At all places where any part of the present towing-path and the road on the south side of the canal require to be partially or totally removed in widening the canal they shall be replaced by a new towing-path and road of the same width and height. The surface of the new towing-path and road shall be made level, even and hard with the best of material to be found in the excavation,

and shall have an outward inclination of twelve inches. If any material is required to form the towing-path or road, other than that taken from the excavation of the canal, it shall be paid for at the price in tender of the class to which it belongs.

"The new embankment shall be water-tight and made with the best material found in the excavation. The material shall be hauled on to the bank in carts or waggons and deposited in layers not exceeding nine inches in depth, if the Engineer considers it necessary each layer shall be well watered and then well rammed."

* * * * * *

"The prism or channel of the canal shall be enlarged to a bottom width of forty-five feet. The bottom shall be excavated for its entire width, to a uniform depth of ten feet below the low water mark, which is on Section A, nine feet above the lower mitre sill of lock No. 5 and in Section B, nine feet above the top of breast wall of the same lock."

* * * * * *

"The coping stones shall be the full width of the top of wall, twelve inches in thickness and not less than three feet long; their joints shall not be more than one-half an inch, and shall be kept full the entire with of the wall. For the seat of the side walls, the surface of the rock shall be stripped and cleaned off for the full width required and the material removed to the spoil bank. If the engineer so directs one or more of the top beds of the rock shall be removed, for which removal the price in contract of rock excavation shall be paid. The space in rear of the walls is to be filled with the best clay available in the excavation which shall be put in place as the wall is carried up, well rammed and watered if so directed."

* * * * * *

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

"In the rear of the wing walls of the weir a puddle bed three feet in thickness shall be carried up to the level of the coping; it shall be made of the best description of clay for the purposes that can be found within ten miles of the site of weir; it shall be laid in layers not exceeding eight inches in thickness, each of which shall be watered, pounded and rammed; it shall be carried up at the same time as the masonry. The space between it and the slopes shall be filled with the best material that can be found in the excavation and in the manner described under the head of embankments and tow-paths. If directed by the Engineer, for one foot in height around the foot of the walls, the filling shall be concrete instead of the puddle designated on the plans."

Now it cannot be doubted that some portions of the work described in these provisions could not be done without unwatering the canal; that other portions of it could not very well be done in the winter season; and that all or nearly all of it could be done more cheaply and conveniently during the open season. There was, however, nothing to prevent the work being done in the way the contractors did it, that is, by doing during the season of navigation such work as they could do with the water in the canal; by making the best use possible of the time in the spring after the frost was out of the ground and before the water was let into the canal for the purposes of navigation; and also by using in the same way any time that might be available after the water was let out of the canal in the autumn and before the severe weather set in; and for the rest it would of course be necessary to do the work in the winter season.

The contract, as has been seen, bears date of the 9th day of April, 1897, and the work was to be completed on or before the 1st day of May, 1899; and but for some delays of which they complain, the contractors doing the work in the way mentioned would in all probability have

finished it within the prescribed time. In any event there was nothing, I think, to prevent that being done. There are, however, other provisions of the specifications which appear to me to present an answer to the suppliants' contention. Under the marginal notes "unwatering" on the fifth page of the specification, and "navigation not to be interfered with" on the sixth page will be found the following:—

"Parties tendering should consider in submitting their prices for the various items of work, that they must include the cost of removing snow and ice, off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during the progress of the work.

"In all matters connected with the prosecution of the works, or in the transportation, delivery, storage, or preparation of materials of any kind required for them, as well as in the course of carrying on the operations of forming and deepening the channel, or in the disposal of the rock or other material excavated, or in proceeding with any part whatever of the operations connected with the undertaking, the Contractor must be governed by the regulations of the navigation, and the interpretation put on them by the officer entrusted with that duty; he must further use every precaution to guard against interrupting, impeding, or in any way interfering with the passage of vessels, as he will be held strictly and legally liable for any damage, loss or detention that any vessel, when passing through the present locks or approaches to them, may sustain from any of his acts, whether such result from a desire to prosecute the works, inattention or any other cause."

This question of the right of the suppliants under the contract to have the water let out of the canal during the season of navigation was raised by the suppliants in a letter of the 5th day of October, 1897, addressed to Mr. Schreiber, the Chief Engineer. At that time they were

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

doing some excavation by means of a steam shovel placed on a scow; and this work had been carried on in that way for some months before that date. The suppliants' letter and Mr. Schreiber's answer are as follows:—

"STONEFIELD, Oct. 5th, '97.

"COLLINGWOOD SCHREIBER, ESQ.,

"Chief Engr. Rys. & Canals,

"Ottawa.

"DEAR SIR,—We beg to ask you what arrangements have been or are being made by your department to enable us to prosecute the work on our contract here on Grenville Canal. The Canal up to the present time has been entirely monopolized in the interests of navigation, and to carry out our contract here, we should have such control of at least a section at a time and for a sufficient length of time to enable us to do this work. Therefore will you please advise us when you can have the water let out of that portion of canal comprising Section A of our contract, as the work there to do cannot well be done while navigation continues, and in order to complete our contract in the time specified this section should be completed by next spring, and as the time between now and then is short an early reply advising us of a reasonable arrangement will oblige.

"Yours truly,

"(Sgd.) PIGOTT & INGLES."

"OTTAWA, 12th October, 1897.

"DEAR SIRS,—I am in receipt of your letter of the 5th instant, asking what arrangements have been made or are being made by this Department to enable you to prosecute the work on your contract in connection with the Grenville Canal.

"In reply, I desire to say that all the facilities called for by your contract for prosecuting the work have been given you.

"Yours truly,

"(Sgd.) COLLINGWOOD SCHREIBER,

"Deputy Minister & Chief Engineer.

"MESSRS. PIGOTT & INGLES,

"Contractors, Stonefield, P. Q."

On this branch of the case it seems to me that there was no such change in the conditions under which the contract was to be performed as to make its provisions inapplicable to the work that was done, and that the case is not one in which the contractors are entitled to treat the contract as at an end and to recover upon a *quantum meruit*, as was done in the case of *Bush v. Trustees of the Port and Town of Whitehaven* (Hudson on Building Contracts, Vol. 2, p.121).

The second ground on which the suppliants contend that this matter is at large and that they are entitled to recover upon the *quantum meruit* is based upon an order in council that was passed in respect of the claim on the 27th of July 1903, and which is in these terms:—

"EXTRACT from a Report of the Committee of the Honourable the Privy Council, approved by His Excellency on the 27th July, 1903.

"On a Memorandum dated 4th June, 1903, from the Minister of Railways and Canals, representing that on the 9th of April, 1897, a schedule rate contract was entered into with Messrs. Pigott and Ingles for certain work of deepening and widening the lower part of the Grenville Canal, together with certain dry masonry walling, the works to be completed by the 1st of May, 1899.

"The Minister observes that towards the close of the year 1900 the final estimate was in the course of preparation, and under date the 3rd of November of that year, the contractors sent in to the Superintending Engineer a

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

statement of claims itemized, amounting to $191,226.66, against which they credited the sum of $91,675.57 paid them, leaving the balance of claim $99,551.05 to which they added two additional items aggregating $135.50, making the total claim $99,684.71. This claim the Superintending Engineer reported on in detail on the 11th of March 1901, practically negativing the whole claim.

"Under date of the 15th of March 1901, he sent in his final estimate amounting to $95,323.10, which includes allowances for certain items of the said claim to the extent of $1,016.45. On the 19th of the same month the Chief Engineer signed the said final estimate. This estimate the contractors declined to accept as final.

"That under date the 18th January, 1902, they preferred claims for extras and otherwise, to the extent of $154,244.93 and have asked that they may be permitted to substantiate the same in the Exchequer Court, and that certain provisions of their contract which would act as a bar to the adoption of this course, be waived.

"The Minister further represents that the claims of the contractors are classified according to the grounds upon which they are based. These are as follows :—

"1. The contract and specifications contemplated that the work should be done in open season and unwatered, and require performance in such a way as could be done only during the summer season and could not properly be done during the season of frost. The contractors allege that they were nevertheless required to carry out the work in the winter season, and they claim that they should be allowed for the increased cost of its execution.

"2. The contractors claim that there was mutual error and misunderstanding in respect of a part of the material to be excavated, much of which was what is known as 'hard pan.' Had this been known they say a special price ought to have been and would have been fixed for

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

the excavation of this material, and the contractors claim that the contract ought to be reformed in this respect, or that they should have other relief so as to allow them such price.

"3. The specifications provide for a higher quality of stone and masonry in the walls of the weir than is required by them for side walls, the prices allowed by the contract for these respectively being $10 per yard and $4.37 per yard. The contractors allege that the engineer required them to furnish the higher quality of stone for the side walls and to execute that work in the same manner as the weir walls, and that they were allowed only $4.37 for this work instead of the higher prices which they claim they should have been paid.

"4. The contractors claim for delays and damages caused by reason of the fact that work had to be done during the season of frost and during winter, and by reason of mistakes, alterations and erroneous directions of the resident engineers.

"The Minister further represents that the Department of Railways and Canals does not consider that the contractors are entitled to any further payment than the amount contemplated in the final estimates, but is willing that no technical barrier should stand in the way of their obtaining a legal decision on this point.

"The Minister accordingly recommends that in the event of a petition of right being preferred and of a fiat being granted on the petition, authority be granted for the waiving of the provisions of the contract and specifications which would or might bar any of the claims aforesaid in so far, and in so far only, as they would prevent a consideration of any such claim on its merits aside from such provisions.

"The provisions of such waiver are as follows:—

"1. Clause 16 of the contract and so much of clause 31 as precludes any claim in respect of delays.

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

"2. Any provisions prescribing limitations of time.

"3. Clauses 27 and 28 of the contract.

"4. Clause 35 of the contract.

"5. So much of the paragraph at the foot of page 5 of the specifications and of the next following paragraph as is inconsistent with the claim of the contractors that the work was to be done in the open season and unwatered.

"6. All provisions and conditions in respect of the fixing of prices by the engineer, the requirement of directions in writing and certificates from him and the finality of his decisions contained in clauses 5, 8, 9 and 26 of the contract and the 7th paragraph on page 3 of the specifications, and similar provisions and conditions, if any, in other clauses.

"The Committee submit the same for approval."

It is perhaps not quite clear how far this order in council was intended to go. The Minister of Railways and Canals, speaking for his Department, represents that it does not consider that the contractors are entitled to any further payment than the amount contemplated in the final estimates, but is willing that no technical barrier should stand in the way of obtaining a legal decision on this point. For instance, the fifth clause of the contract provides that the engineer may order extra work to be done and may make changes in the dimensions, character, nature, location and position of the works, but that the contractors shall not make any such change, and shall not be entitled to any payment therefor, or for any extra work, unless the same shall have been first directed in writing by the engineer, and notified to the contractors in writing, nor unless the price to be paid therefor shall have been previously fixed by the engineer in writing. Under that provision the contractors might, by the direction of the engineer, do extra work of which the Crown had the benefit, yet their claim or action might be barred because the direction was not

in writing, or because the price had not been fixed in writing. The absence of the writing would in such a case constitute what with propriety might be called a technical bar to the action. The same thing is true of the certificates in writing that the work has been executed to the satisfaction of the engineer which by the eighth and twenty sixth clauses of the contract are made conditions precedent to the contractors' right to be paid for his work. In the same way the provisions of the twenty-seventh and twenty-eighth clauses of the contract, whereby the contractors are required to make and repeat in the manner therein prescribed any claims that they consider they have and which have not been included in the progress estimates, do not go to the actual merits of such claims, but constitute what may well be described as technical barriers thereto. All of the provisions mentioned are in this case waived by the order in council cited. Such matters may, if the Crown sees fit, be set up as defences to any action the contractors may bring on the contract, but I do not see that the Crown is bound to set them up. It is true of course that they are stipulations in the contract, and the thirty-third section of *The Exchequer Court Act* provides that in adjudicating upon any claim arising out of any contract in writing the court shall decide in accordance with the stipulations in such contract. But that general provision may perhaps be treated as directory only and not as one that imposes on the court the obligation of giving effect to a defence disclosed by the contract which the Crown has not pleaded. That at least has been the practice that has hitherto prevailed in such cases both in this court and in the Supreme Court of Canada. The section, however, goes further and provides that the court shall not in adjudicating upon any such claim allow compensation to any claimant on the ground that he expended a larger sum of money in the performance of his contract than the

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

amount stipulated for therein ; nor shall it allow interest on any sum of money which it considers to be due to such claimant in the absence of any contract in writing stipulating for payment of such interest, or of a statute providing in such a case for the payment of interest by the Crown. These negative enactments limiting, as they do, the power and authority of the Court, must be construed not as directory merely, but as imperative. And that consideration has, I think, an important bearing upon the question as to what effect should be given to some of the other waivers contained in the order in council and upon which the suppliants rely. By the operative part of the order authority was "granted for the waiving of the "provisions of the contract and specifications which "would or might be a bar of any of the suppliants claims' "in so far, and in so far only, as they would prevent a "consideration of any such claim on its merits aside from "such provisions;" and with reference to the provisions so waived we find in paragraph five the following :—"so "much of the paragraph at the foot of page 5 of the "specifications and of the next following paragraph as is "inconsistent with the claim of the contractors that the "work was to be done in the open season and unwat-"ered." These are the provisions that have already been set out in discussing the first ground on which the suppliants rely, and which are to the effect that parties tendering should consider in submitting their prices for the various items of work that they must include the cost of removing snow and ice off dams, troughs, &c., and everything necessary to unwater the canal and weir pit during the progress of the work; and that navigation should not be interfered with. The twenty-fifth clause of the contract by which the prices to be paid for the works contracted for are fixed, is not waived; but the suppliants contend that the provisions mentioned being waived the matter of price is at large; that the schedule

of prices contained in the contract is not binding; and that they are entitled to recover upon the *quantum meruit*. Any waiver having that effect could not, of course, be said to be a waiver of a technical bar or defence to the suppliants' action. It would go to the merits of the principal controversy existing between the parties, and it would constitute a substantial alteration in the existing contract. The reference in the order in council to the Minister's willingness "that no technical barrier should "stand in the way" of the suppliants' obtaining a legal "decision on the point" in issue would indicate that nothing of that kind was really intended, but even if it were, I should doubt if it could be so done. And then so far as the court is concerned it would not be possible for it to give effect to any such contention even if it were thought to be well founded. The provision of *The Exchequer Court Act* that has been cited would stand in the way of that being done. I think similar considerations apply to the waiver of clause 35 of the contract respecting implied contracts, and of clauses 16 and 31 respecting delays.

The conclusion to which I have come is that the suppliants are not entitled to recover upon a *quantum meruit* for the work in question, and that the schedule of prices contained in the contract is, so far as it is applicable, binding on both parties. With regard to quantities there is not in respect of the work for which an allowance is made by the Government engineers any considerable difference between the quantities allowed and that claimed. There are, of course, some differences, but nothing has occurred to impugn in any way the accuracy and fairness of the final returns of quantities as made by the Government engineers; and as I think they had a better opportunity of ascertaining what such quantities were, I accept them as correct.

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

That brings us to a consideration of the details of the suppliants' claim.

The first item of the claim has to do with "clearing, "grubbing and mucking" for which a bulk sum of $900.00 is fixed in the schedule of prices. That amount has been allowed and paid. The suppliants claim $1501.34 in addition for extra work of this class alleged to have been done by them. The claim as put forward cannot, I think, be supported. All of the work for which they claim was not extra work. Part of it they had contracted to do at their own expense. For example, a strip of land adjacent to the canal was during the progress of the work acquired at the contractors' expense for a spoil bank. From this piece of land they were required by the contract to remove at their own expense all standing and fallen trees, brushwood, etc.,—that is, they were to clear it. They were required by the resident engineer by verbal orders to grub and muck it as well, in order to reinforce the bank of the canal. The grubbing and mucking in this case was, I think, extra work, the clearing was not. Again with regard to the land along the tail-race from the weir it was necessary for the contractors to clear and grub for any excavation that had to be made, and for the rest it was sufficient to clear only. The resident engineer, by an order in writing, required the contractors to clear and grub this piece of land. That is the clearing and part of the grubbing was within the contract and had to be done at the contractors' expense, while part of the grubbing was extra work. I do not think that there is anything in the evidence to enable anyone to determine with accuracy the value of the work so done by the contractors in excess of that which they were bound to do. At best I can only make an estimate, and doing that I put the amount at four hundred dollars; but if there is a reference, as hereinafter mentioned, the question of what such amount

should be may also be referred at the instance of either party.

By items numbered 2, 3, 4, 5, 6, 7 and 8, the suppliants make the following claim for earth excavation :—

Item 2—5368 cubic yards at 27 cents per cubic yard	$ 1,449 36
Item 3—17,439 cubic yards at 50 cents	8,719 50
Item 4— 4,000 cubic yards at $2.50	10,000 00
Item 5— 3,670 cubic yards at 2.50	9,175 00
Item 6— 2,301 cubic yards at 2.50	5,752 50
Item 7— 4,450 cubic yards at 2.50	11,125 00
Item 8—15,370 cubic yards at 1.00	15,370 00
52598 cubic yards	$61,591 36
By the final estimate the suppliants have been allowed for 52,676 cubic yards of earth excavation at 27 cents per cubic yard, amounting to	14,222 52
The difference between the amount allowed and that claimed in respect of the items is	$47,368 84

It will be observed that the amount of earth excavation returned by the Government engineers exceeds the amount for which the claim is made in these items by 78 yards; but the difference is really greater than that, because the suppliants have included in their computation of earth excavation certain boulder walls and cement masonry that have been returned in the final estimate as rock excavation.

With regard to the classification of materials excavated during the progress of the work the specification provided that there should be recognized under the denomination of excavation only two classes of material, namely, earth and rock; and that earth should embrace material of every description and character except solid rock *in situ* and boulders measuring more than one-third of a cubic

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

yard. The contract price for earth excavation was 27 cents per cubic yard.

The increased price for the 17,439 cubic yards mentioned in item 3 is claimed on the grounds that part of the work was done out of season, that is, that it was done in the winter season, and part by dredging, and the whole at an increased cost. But that can make no difference if the contract prices apply to this work, and for the reasons that have been given, I think, that they do apply.

The same grounds and others are relied upon for the increased price claimed in item 4 for the 4,000 cubic yards therein mentioned. The material excavated was hard pan or cemented gravel, and it is well known that it is difficult and expensive to remove such material. There can be no doubt however that its proper classification under such a contract as this is that of earth. Then some of this material is said to have been excavated below grade lines and beyond slope lines, as shown on the plans exhibited when tenders were asked for the work, and that raises the question as to whether the prices fixed by the contract are applicable to work so done. By the twenty-fifth clause of the contract the prices therein mentioned are to be paid for the works contracted for. By the first clause of the contract it is provided that the word "work" or "works" occurring therein, shall, unless the contract require a different meaning, mean the whole of the work and materials, matters and things required to be done, furnished and performed by the contractor under the contract. By the third clause of the contract the contractors agreed at their own expense to provide all and every kind of labour, machinery, and other plant, materials, articles and things whatsoever necessary for the due execution and completion of all and every the works set out or referred to in the specifications thereunto annexed, and set out or referred to in the plans and drawings prepared and to be prepared for the purposes of the work; that

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

the said works were to be constructed of t' e best materials of their several kinds and finished in the best and most workmanlike manner, in the manner required by and in strict conformity with the said specifications and the drawings relating thereto, and the working or detail drawings which might from time to time be furnished (which said specifications and drawings were thereby declared to be part of the contract), and to the complete satisfaction of the Chief Engineer for the time being having control over the work. By the fourth clause of the contract it was provided that its several parts should be taken together to explain each other and to make the whole consistent, and that if it were found that anything had been omitted or mis-stated which was necessary for the proper performance and completion of any part of the work contemplated, the contractors would at their own expense execute the same as though it had been properly described, and that the decision of the engineer should be final as to any such error or omission, and that the correction of any such error or omission should not be deemed to be an addition to or deviation from the works thereby contracted for. By the fifth clause of the contract the engineer was given power and authority at any time to order extra work to be done and to make any change which he might deem expedient in the dimensions, 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 engineer was in such case to decide whether any such change or deviation increased or diminished the cost of the work and the amount to be paid or deducted, as the case might be, and his decision in respect thereof was to be final. By the sixth clause of the contract it was provided that all the clauses of the contract should apply to any changes, additions, deviations or extra work in

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

like manner, and to the same extent as to the works contracted for, and that no changes, additions, deviations or extra work should annul or invalidate the contract. By the eighth clause of the contract it was provided that the engineer should be the sole judge of the work and materials in respect of both quantity and quality, and that his decision on all questions in dispute with regard to work or material should be final. By the ninth clause of the contract it was distinctly understood and agreed that the respective portions of the works set out or referred to in the list of schedule of prices (among which is earth excavation) should include not merely the particular kind of work or materials mentioned in said list or schedule, but also all and every kind of work, labour, tools and plant, materials, articles and things whatsoever necessary for the full execution and completing ready for use, of the respective portions of the works to the satisfaction of the engineer. And that in case of dispute as to what work, labour, material, tools and plant are or are not so included, the decision of the engineer should be final and conclusive. In the fifth paragraph on the first page of the specification the following provision occurs: "The Department of Railways and Canals reserves to "itself the right to change, either before the works are "commenced or during their progress, the position or "site of any or all of the various structures, also to "change the proposed lines of excavation both to such "an extent and direction as the engineer may deem "necessary, and such change shall not give cause for "any increase or decrease in the prices tendered for the "various items of the work." And at the end of the second paragraph on the second page of the specification will be found the following.—"It must be distinctly "understood and agreed upon that no excavation below "the specified grade line or outside the line or lines of "slopes shall be allowed for." Then by the first clause

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

of the contract the word "Engineer" was defined to mean the Chief Engineer for the time being having control over the work, and to extend to and include any of his assistants acting under his instructions, and it was also provided that all instructions and directions or certificates given, or decisions made by any one acting for the Chief Engineer, should be subject to his approval, and might be cancelled, altered, modified and changed as to him might seem fit. By the order in council of the 27th of July, 1903, hereinbefore set out, the finality of the engineer's decisions is waived.

The provision of the specification that no allowance would be made for excavation down below the specified grade line, or outside the line or lines of the slopes, has reference, obviously, to cases where such excavation occurs below or beyond such lines by necessity or accident, or by choice of the contractor. In such cases there is no question of price. Nothing can be allowed. The case is different, however, where the lines are changed by the engineer, or the work is done beyond or below such lines by his order and direction. There, subject to certain provisions of the contract, which in this case have been waived, the contractors are entitled to be paid for their work. And with regard to the question of price, I think the proper construction to be put upon the provisions of the contract and specification cited is that the contract price is applicable to such work. I am also of opinion that any waiver, after the completion of the contract, of the finalty of the engineer's decision would not make any difference or effect in any way the application of the schedule rates to this work.

Then it is said that this hard pan or cemented gravel was found at a place in the works where the plans exhibited showed rock. But as to that it was provided in the specifications that any party tendering must satisfy himself by personal examination of the ground as

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

to the character and kind of material to be excavated. No doubt the plans of the works exhibited were intended to give persons who proposed to tender for such works the best information that the Minister and engineers of his department had at their disposal. But there was no warranty that such information was correct. On the contrary, the tenderer was to examine the ground and satisfy himself, and if he did not do so he took his chances. The fact that the contractors found at any place where excavation was done material different from that shown on the plans exhibited when tenders were invited would not justify the court in allowing them a price for excavating the same greater than that stipulated for in the contract.

It does not appear to me that the grounds on which an increased price is claimed for the 3,670 cubic yards of earth excavation raises any question that has not already been considered and disposed of. It is a question of changed lines and winter work. With regard to the lines to be worked to, that was a matter within the judgment of and subject to the decision of the engineer. The parties had so agreed. The earth excavation that was done under his direction was the earth excavation for which a price per cubic yard had been agreed upon. It was work contracted for, and the schedule of prices applies to it.

The claim made in respect of item 6 raises a new question. The increased price for the 2,301 cubic yards of waste weir excavation therein mentioned, including masonry and cement structures, is demanded on the ground, among others, that the Resident Engineer made the work more difficult and expensive by refusing to allow the contractors to cut down certain trees that in their opinion stood in the way of the proper setting up and working of their derricks. The Resident Engineer at the time was Mr. Stanton, and his competency and

fairness are strongly impugned. And perhaps, as this is the first time that I have had occasion to refer to this aspect of the case, it may be well to deal with it more at large than would be necessary for the disposition of the item now in question. Over Mr. Stanton was Mr. Marceau, the Superintending Engineer of the work, and Mr. Schreiber, the Chief Engineer, and, as has been seen by the reference that has been made to the first clause of the contract, both Mr. Stanton's and Mr. Marceau's directions and decisions were made subject to the approval of the Chief Engineer, and might be cancelled or modified by him. And, as a matter of fact and practice, Mr. Stanton's directions and decisions were subject to review by Mr. Marceau. Great complaint is made by the suppliants that Mr. Stanton by improper and unreasonable exactions made the whole work much more expensive than it otherwise would have been. He was in charge of the work from the commencement until some time in April, 1899. He was then succeeded for a short time by Mr. Pariseau, and subsequently Mr. Lynch was appointed and continued to act as resident engineer until the completion of the work. Mr. Stanton was not in Canada at the time this case was being heard. It is perfectly clear that he and the contractors did not get on well with each other. He was not accommodating, to say the least of it. He has not been before the court to give his version of the difficulties and differences that arose between him and the contractors. For that we have nothing but the correspondence that is in evidence. Parts of that were read to me as the case proceeded, but since then I have had an opportunity of reading it all carefully, and I think fair to add that this correspondence so far from strengthening any unfavourable impression derived from the evidence with respect to Mr. Stanton's fairness and capacity as an engineer, has in some measure removed any such impression. I think it is perfectly clear that he was

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

not always the one that was in the wrong. That he made some mistakes in judgment, and that he looked more to the Crown's interests than to the contractors' may, I think, be conceded. But then none of his directions or decisions were final, and there was always an appeal to Mr. Marceau and to Mr. Schreiber. That perhaps would not afford a remedy altogether satisfactory in small matters occurring from day to day; but it would in respect of any matter of importance. And that in general was the course adopted.

With reference to the trees that the contractors wished to cut down, Mr. Marceau says that Mr. Stanton wrote to him, and that he answered him to the effect that he must not cut the trees unnecessarily; but that if any trees were in the way they must be cut, and that he insisted that they were not in the way. When Mr. Stanton was replaced by Mr. Pariseau, Mr. Pigott called the attention of the latter to these trees, and he allowed them to be cut down; and he thinks that if "Mr. Stanton had been nice he would have had them cut down at once," although he is "not prepared to say that Mr. Stanton did not act strictly within his right." The trees he says were more or less of an ornament, but he would have exercised his discretion differently had he been in Mr. Stanton's place. Mr. Pariseau was under the impression that the suppliants were allowed $50.00 for the inconvenience caused by these trees. I do not think it is clear that any allowance was made in that respect, but if the sum of $50.00 would cover any damage that they suffered on that account the question is not one of any considerable importance, and it would be very easy to make too much of it. It seems to me, however, to be very clear that the earth excavation that was then being taken out did not cease to be earth excavation for which the suppliants were to be paid at the contract price because permission was not given to cut down these trees. The suppli-

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

ants' claim in that respect would be for damages for delays and extra expense incurred through the unwarranted, if it were unwarranted, action of the Resident Engineer. But that is another aspect of the case to which reference will be made later. Dealing with item numbered 6, I do not find in this dispute about cutting down the trees any reason for not applying the contract price to the work. But there are other grounds on which it is claimed that this price should be increased. It appears that there was some masonry and cement structures in this excavation But Mr. Stanton was directed that this should be returned as rock, and though it is not absolutely certain that that was done it is altogether probable that it was so returned. Part of the old masonry Mr. Pariseau says was not removed at all, and as to that the suppliants had, as I understand it, the double advantage of being paid for it both as excavation and as masonry, although they did not as to that particular quantity have either to excavate the foundation or to build up the masonry wall. And as to other parts of it Mr. Pariseau says that he would have returned as clay all of it that was loose, because it was small stones and small masonry, but that he returned it as rock as he was trying to help the contractors as well as he could, and he thought he was justified in returning it as rock. This is a question of classification and as this excavation appears to have been returned at the higher price of rock excavation I see no reason for increasing the price allowed. It had under the contract to be returned either as earth excavation or as rock excavation. Then there is a complaint that the contractors were not permitted to do this excavation in the summer time, and that they had to do it when the frost was in the ground. So far as that is the general question of summer work as against winter work, it has already been dealt with. But the question as to this particular piece of dredging goes

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

beyond that. It was work that might have been done in the open season of 1898, without interfering with navigation, by building a dam either in front of or behind the site of the weir. If a dam had been built outside the weir across the tail-race the work could have been done by dredging, and if it had been built inside the weir site the material to be excavated could have been taken out dry. The water at the place was about ten feet deep and a dam of some considerable strength would have been necessary. However that was the contractors' affair, as the temporary dam would have had to be constructed at their expense. Mr. Pigott says that they proposed to put in a dam and to do this excavation by dredging during the summer of 1898, but that the engineer would not stake out the work and kept putting it off until the season ended. I suppose that Mr. Stanton is meant when he speaks of the engineer, but if so, it is a case, I think, in which Mr. Stanton was not, so far as appears, at fault. For the excavation of this work it was necessary for the Crown to acquire additional land and that was not done until the 8th day of September, 1898. The plan, by the filing of which this piece of land was acquired, was signed by Mr. Marceau on the 31st day of August 1898, and was registered in the proper registry office on the 8th day of the following month. Mr. Pariseau's view of this matter is that a temporary dam could not have been put in front of the weir site because the dam would have obstructed the canal; that a dam could have been put back of it, but that the cost would have been altogether prohibitive, as the ground there was a spoil bank and one could not know how far in the bank he would have to go before making it water tight, and that the most practical way of doing the thing was to do it the way Mr. Pigott did it, wait until the winter. I mention Mr. Pariseau's views of this matter without either adopting or rejecting them, but for this reason. The evidence as a whole leaves on my mind the impression that this

matter was not really pressed by the contractors, that they did not urge upon Mr. Marceau or Mr. Schreiber as they ought to have done if they had really been in earnest, the advantage and desirability of doing the work in the way proposed, and that the acquisition of the additional land was a matter of urgency, and Mr. Pariseau's views, if they are correct, show how that might happen. The difference in cost in doing the work in the one way and in the other was not such as to make the matter one of any considerable importance. Assuming, however, for the moment that suppliants' contention on this point is in whole or in part well founded, their claim would rest either upon a breach of an implied contract on the part of the Crown to put them in possession, when required, of the land necessary for the execution of the work and to lay out the same, or upon the right to damages for the delays arising therefrom. But clauses thirty-five and sixteen of the contract would, except for the order in council waiving them, have stood in the way of the maintenance of any such claim, and the only amount to which the suppliants would have been entitled would have been the sum allowed at the contract prices. But how is that position altered by the passing of the order in council? Before it was passed the Crown was not liable. How does it become liable because the order is passed? Does the passing of the order in council create a new contract, and, if so, where is the consideration or the parliamentary authority to support it? And, apart from that, is it not a case in which the court is asked to allow the suppliants compensation on the ground that they expended a larger sum of money in the performance of their contract than the amount stipulated for therein? It seems to me that it is such a case, and that it is within the prohibition contained in the thirty-third section of *The Exchequer Court Act* referred to.

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

Items numbered 7 and 8 raise, I think, no question that has not already been dealt with. The result is that in my opinion there is no ground in law for allowing any part of the claim mentioned in items numbered 2, 3, 4, 5, 6, 7 and 8 beyond the amount already allowed and paid to the suppliants.

In items 9 and 10 a claim is made for excavating silt that has not been included in the final returns of earth excavation. The claim and the grounds on which it is put forward are as follows:—

Item No. 9. Silt excavation on section "A" for three years, 5,475 cubic yards at 40 cents per cubic yard.....$2,190 00

Item No. 10. Silt excavation on section "B" for five years, 9,200 cubic yards at 40 cents per cubic yard..... 3,680 00

$5,870 00

The claim is made upon the hypothesis that the average width of the canal through these two sections is 40 feet; that the annual accumulation of silt would average four inches in depth over the entire surface; that this silt accumulated in section A for three years from 1895, when the cross-sections were made, until 1898, when the work on this section was completed; and in section B for five years, from 1895 to 1900. By special agreement the contractors were allowed in the final estimate for 261·60 cubic yards of silt removed. But otherwise there has been no allowance made therefor. There are in respect of these items two questions as to which the parties are at issue: first, as to the contractors' legal right to recover anything; and, secondly, as to the quantity for which the claim is made. As to the latter question, it is denied that there is in fact any such annual deposit of silt in the prism of the canal as the suppliants contend for. It is admitted that the streams

that flow into sections A and B of the canal bring in some material each spring and that this is deposited at the mouths of the streams. But this it is said is removed each spring by the men employed on the canal, and that this course was followed in the present instance, until the contractors were put in possession of the work, after which and during its progress it was for them to remove such deposits. Is was also conceded that while the work was going on there might be some deposit of silt in the channel of the canal caused by the dredging operations and the falling of the banks that were being excavated. But this too, it is contended, is something that the contractors were bound under the contract to remove without any special allowance therefor. But apart from what has been mentioned the Crown's contention, supported by the evidence of its engineers, is that there is no considerable deposit of silt in the channel of the canal. With respect to the question of the right of the contractor, under the contract, to recover for removing silt deposited in the channel of the canal after the cross-sections for the plans were made and before the work was commenced, and also for silt so deposited during the progress of the work, it is provided in the specification that the final measurements of all excavation should be based on levels and measurements taken before the works were commenced and during their progress, and that the whole of the earth and rock excavation should be computed from those data and paid for in the solid. And by the fifteenth clause of the contract it was provided that the contractors should be at the risk of, and should bear all loss or damage whatsoever, from whatsoever cause arising, which might occur to the works or any of them until they were fully and finally completed and delivered up to and accepted by the Minister. By the contract the contractors were to be paid for the number of cubic yards excavated, as shown

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

by the cross-sections. The space actually excavated was to be measured and allowed, and if by some accident, or from natural causes, it became necessary to excavate the same space more than once the cost of that fell, it seems to me, upon the contractors. The risk of that contingency was upon them. I make no allowance as to these items.

I think item numbered 11 for filling roadways and back filling tow-path should be allowed. The contractors were required by the Resident Engineer to excavate below grade, and the space excavated had to be filled in, and they have had no allowance either for the excavation or the filling. It was a mistake, but it is one that should be paid for as an extra. The contract price for excavation is charged, and the price of twenty-five cents per cubic yard for filling is reasonable. The claim is made for 600 cubic yards of excavation at 27 cents per cubic yard, and then 25 cents per cubic yard for filling up the space so excavated, making in all $312. That amount will be allowed.

With regard to the 12th, 13th, 14th, 15th, 16th and 18th items of the claim, I think that some allowance should be made, but I shall not attempt at present to fix the amount of such allowance. I shall try and settle the principle to be applied, and then perhaps the parties may be able to agree upon the quantities.

The claim, so far as I think it can be sustained, arises in this way. The contract price for earth excavation was, as has been seen, twenty-seven cents per cubic yard, and it was agreed that the price mentioned should cover the entire cost of excavating, hauling and forming into tow-paths, embankments and spoil banks, all the various kinds of material found in the prism of the canal, towing-path, roads, tail-race, off-take drains and in the site of the various structures. Where the excavated material was used to make tow-paths and embankments, without any-

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

thing more being done than to excavate it and put it in the tow-path or embankment, the contractors were not entitled to more than the price agreed upon for excavation; and they were also entitled to that price where such material was deposited in a spoil bank or wasted. With reference to any new embankment it was further provided that it should be water tight and made with the best material found in the excavation; that such material should be hauled on the bank in carts or wagons and deposited in layers not exceeding nine inches in depth; and if the engineer considered it necessary, each layer should be well watered and then well rammed. For work of this kind a price was fixed by the contract, namely:—"Rammed filling behind side walls and in "embankments, per cubic yard 25 cents." As a large part of the excavation was done in the winter season the material excavated being frozen was not in a condition suitable for use in making tow-paths and embankments, and it had to be put in a spoil bank or wasted. Afterwards, when the frost was out of it, and the material fit to be used, some of it was taken from the spoil banks and formed into tow-paths and embankments. Where it was so used for rammed filling the contractors have had an allowance at the price agreed upon; but otherwise no allowance has been made to them for the rehandling of this material. I think some allowance should be made. They earned the contract price of twenty-seven cents per cubic yard when they put the material excavated in a spoil bank; and if that prevented the Crown from using it to make tow-paths or embankments without additional expense, it was a necessary incident of the work being done in winter. To take this material from the place where it had been deposited and to use it in making tow-paths and embankments was the same as taking it from any other place from which it was necessary to borrow material. It was not, it seems, contemplated that it

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

would be necessary to borrow material. It was, no doubt, thought that the excavation would afford all the material required for these purposes, and it did ; but the material as excavated was not fit to use, and had to be wasted instead of being used to form tow-paths and embankments. The suppliants contend in respect of these items that they are entitled in addition to the price of excavation to a price for re-excavating the material, and also to a price for forming it into two-paths and embankments. That contention cannot, it seems to me, be sustained. Where it was used for rammed filling they are entitled to a price for it as rammed filling and nothing more. Where it was used otherwise for making tow-paths and embankments they are entitled to be paid for it as an extra. There is no contract price for work of that kind ; but it appears that twenty-five cents per cubic yard for any part of the tow-paths or embankments that were made with this material in the manner mentioned would be a fair price; and it will be allowed for at that rate. I hope the parties may be able to come to an agreement as to quantity in respect of which such an allowance ought to be made, or if not, that they may agree upon a special referee to whom the question may be referred. If they fail to come to any agreement, I will, on the application of either party, name a special referee to whom the question of quantity will be referred for enquiry and report.

By item numbered 17 a claim is made for additional filling behind walls. The water was in the canal when this work was going on and it flowed back of the wall where the filling was done. And it is alleged that for this reason a considerable proportion of the material was wasted, that is, that it took more material to fill the space than would have been the case if the canal had been unwatered at the time. The allegation is disputed and is in issue. But apart from that it was, I think, an incident

of the work, done as it was under this contract. By the terms of the contract the filling had to be measured in the work. The extra cost arising from any sinking or shrinkage or waste of the materials used fell upon the contractors. I do not allow anything in respect of this item.

In the items of the claim numbered 19, 20 and 21, a price for rock excavation higher than the contract price therefor is demanded by the suppliants. The contract price was 55 cents per cubic yard. The prices demanded are for part 80 cents per cubic yard, and for the remainder $1.55 per cubic yard. With regard to the season when, and the general conditions under which, the work was done, the demand raises questions similar to those that have been disposed of in dealing with earth excavation; and there is no need to go over them again. The same is true with respect to work done below or beyond the lines shown on the plans exhibited when tenders were asked for. There is however a question that arises in this connection which has not as yet been discussed. It was provided in the specification that for the seat of the side walls the surface of the rock should be stripped and cleaned off for the full width required and the material removed to the spoil bank; and that if the engineer so directed, one or more of the top beds of the rock should be removed, for which removal the price in the contract for rock excavation should be paid. Where that happened there is no ground for complaint or reason for allowing any rock excavation as an extra. But it appears that in approaching the seats for the wall it was necessary to proceed with the work carefully so as not to shatter or destroy the rock on which it was proposed to build the wall; and that the care and precautions taken increased the cost of the work. Of that, too, the contractors had, it seems, no good reason to complain in working to the lines first given for the wall seats. But it happened

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

in some cases that after using the necessary precautions in excavating to the lines given, it was found that the rock was unfit for a wall seat; and then a new line was given which had to be worked to with the same care and precaution, and with the same increase of expense as had been used or incurred in the first place. It is not denied —I think I may add that it is conceded—that the working to a second line in this way was extra work for which the contractors ought to be paid a fair price. If the parties can agree as to the quantity of work so done, and the price therefor, the amount so agreed upon will be allowed. If not, the question of what would be a fair allowance therefor will be referred as hereinbefore mentioned with respect to items 12, 13, 14, 15, 16 and 18.

In item numbered 22 of the claim the suppliants ask to be allowed for 12,191·87 cubic yards of dry masonry walling at $8.50 per cubic yard, amounting in all to $103,630.89. For this they have been allowed in the final estimate for 11,857 cubic yards at the contract price of $4.37 per cubic yard, amounting to $51,815.09, leaving the large difference between the amount claimed and that allowed of 51,815.80. This difference arises principally from a higher price being demanded than the price agreed upon for this class of work. A number of the grounds on which that higher price is asked are similar to those which have already been discussed in dealing with the other items of the claim, and which have not been thought to justify any increase of the contract price. There are, however, two grounds that are applicable to this item only. It was provided in the specification that the dry masonry walls should be built of approved sound and durable gray limestone The requirements respecting the stone to be used for the masonry of the waste weir were that the walls of the weir should consist throughout of a sound durable gray limestone, free from seams and other defects and laid in

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

full mortar on their natural beds. As a matter of fact the dry masonry wall was in the main built of stone taken from the same quarry as that from which the stone for the masonry of the waste weir was procured. Not that stone from this quarry free from seams and other defects was insisted upon, but this stone was approved while other stone that the contractors wished to use, and which could be procured nearer to the works, was not approved, but was rejected, except as to a small part of the wall. This question was settled by Mr. Marceau, the Superintendent Engineer, not by Mr. Stanton, the Resident Engineer. For the suppliants it is said that the local stone was good enough for work of this class. That is denied, and the matter is still in dispute. But I do not find it necessary to determine the question either way. There is no doubt that it was one of the matters as to which the contractors had agreed that the engineer should be the judge, and that his decision should be final. The finality of his decision is now waived by the Crown, but I am not able to see that the waiver makes any difference so far as the question is one of law; and I have nothing to do with any other aspect of the case. The decision of the engineer has, according to the agreement of the parties, found expression in the work that has been finished. What is meant by now waiving the finality of that decision? What effect can any such waiver have? After all is said and done the dry masonry wall that is to be paid for is the dry masonry wall that the suppliants agreed to build for a given contract price. And it seems to me that the price agreed upon cannot now be increased without a new contract made with authority for a good consideration. As I have already intimated the order in council upon which the suppliants rely falls short in my opinion of constituting such a new contract. In other particulars the question as to whether this dry masonry wall is better or

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

worse than the specification called for is in controversy between the parties. That raises again the question that has just been discussed. It is said that Mr. Stanton required the suppliants to make better joints and otherwise do better work than was required by the specification. That is disputed. But subject to review by Mr. Marceau, the Superintendent Engineer, or by Mr. Schreiber, the Chief Engineer, the matter was within the judgment of the Resident Engineer, Mr. Stanton. The parties had so agreed, and even if his exactions were severe (which was denied), that fact would not give the suppliants a legal right to a higher price for the work than that agreed upon. If the contractors thought that the resident engineer was requiring better work to be done than the specifications called for they should have appealed to Mr. Marceau or to Mr. Schreiber. If doing that they failed to get relief, I do not see that under a contract such as that in question here there was any other remedy for the situation. In my opinion the court has no authority to increase the price stipulated for by the parties for these dry masonry walls.

With regard to the quantity of dry masonry wall built, there is a difference of 331.87 cubic yards between the contractors' measurement or estimate and the quantity returned in the final estimate; and as to that the further quantity, if any, to be allowed, may be settled by agreement, if the parties can agree, or if not it may be referred with the other matters mentioned for a reference.

In item numbered 23, a claim for the sum of $66.00 for stone quarried for two culverts as ordered but not used and left in the quarry, is made. It is conceded that this should be paid for if it has not already been included in the amount returned. That question as to whether it has not been so included will, if the parties cannot agree, be referred in connection with the last item.

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

In item numbered 24 a claim for $150.00 is made for "walling recut to wind and splay and different batter to "that specified, 150 cubic yards at $1.00 per cubic yard." And in the final returns an allowance of $75.00 has been made for "walling recut 150 yards at 50 cents." I find the allowance made to be sufficient.

Item numbered 25 of the claim has reference to the masonry in the waste weirs. There is no dispute as to the quantity of this masonry. The quantity is 233 cubic yards. The contract price was $10.00 per cubic yard, and that has been allowed and the amount paid. An allowance has also been made in this connection for margin drafts. Apart from this a larger price than that stipulated for is demanded because of the greater expense of doing the work at the season when it was done, and the difficulties from the presence of water. The latter element is in reality a claim for damages and similar to other claims of like character that will be referred to. There are, I think, no good legal grounds for increasing the price agreed upon for the waste weir masonry.

The contract price for concrete was $4.50 per cubic yard. In item numbered 26 the suppliants ask to be paid for 22 cubic yards at a price of $6.50 per cubic yard. There is no good ground for allowing any such increase.

The contract price for clay puddle was $1.45 per cubic yard. The quantity returned in the final estimates is 643 cubic yards, making $932.35. The suppliants, for reasons that appear to have been satisfactory to the Superintending Engineer, claimed an additional 20 cents per cubic yard, and that has been allowed and paid. It is not in question here.

In items numbered 28 and 29 the sums of $73.50 and $60.00 respectively, are claimed for puddle because there was some settlement and some wasting of the materials used. It was provided by the agreement made between the parties that all material should be measured in the

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment

work, and that the work should, until completed, be at the risk of the contractors. It is also urged that this work was done in a narrow trench with insufficient room. But I see in none of these grounds any good reason for departing from the price agreed upon.

In items number 30, 31, 32, 33 and 34, various sums are demanded in the nature of damages for the changing of labour and plant to suit changed lines given by the engineer, for breakages and for delays consequent upon such changes. I have already in another connection discussed this question of changing lines and the right that was reserved in the specification to make them. But apart from that such claims must be sustained, if sustained at all, on the grounds that some actionable wrong had been committed, or that there had been some breach of the contract. Now as to the first, it is clear of course that even if the Resident Engineer had committed some wrong for which he personally would be liable, the Crown would not be answerable for the wrong unless it were made liable by some statute, and there is no such statute. Then with regard to any question of a breach of contract, it is clear that in that connection there has been no breach of any express term of the contract. On the contrary, there was, as has been seen, an express provision in the contract that the Crown should not be liable for any damage the contractors might sustain by reason of any delay arising from any acts of any of the Crown's agents. The breach then, if any, would of necessity be of some implied contract. But it was an express term of the contract that no implied contract should arise or be implied from anything therein contained, or from any position or situation of the parties at the time. The clause of the contract negativing liability on the part of the Crown for delays caused by its agents, and the provision that nothing should be implied has, as we have seen, been waived under the authority of the

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

order in council hereinbefore set out. But that waiver, for reasons that have been stated, does not in my opinion create a liability on the part of the Crown enforceable in this court, there being at the time the order was passed no such liability.

Then there are a number of items in the claims respecting damages and losses alleged to have been sustained by the suppliants because of hindrance and delays in prosecuting the work arising from the acts of the engineer, from flooding, and from having to unwater the works and to remove ice and snow. Some of these items have been allowed in whole or in part, and the amount allowed has been paid. That applies to items numbered 35, 38, 48, 49 and 50. The claim made in items numbered 36, 37, 39, 40, 41 and 52 (in part) are in the main based on some act or omission of the resident engineer that the suppliants complain of, but for reasons already given these considerations, even if founded on fact (and as to that I express no opinion one way or the other) do not give rise to claims that can as a matter of law be sustained against the Crown under the contract now in question.

Items numbered 42, 43, 44, 45, 46, 47, 51 and 52 (in part) relate to hindrances, difficulties and delays arising from the presence of water and snow and ice while the work was going on. But as we have seen it was provided in the specification that parties tendering should consider in submitting their prices for the various items of work that they must include the cost of removing snow and ice, off dams, troughs, etc., and everything necessary to unwater the canal and weir pit during the progress of the work. And although authority has also been given to waive this provision, and it has been waived so far as that is now possible, the legal effect of the waiver is not to relieve the suppliants from the cost or expense of the work arising from such causes and to throw such expense

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

or cost on the Crown. As has been said that could not, in my opinion, be done, except by a new contract made with authority for a good consideration.

The following items of the claims for material supplied and work done have been allowed in whole or in part, and the several amounts so allowed have been returned in the final estimate and paid, that is to say, items numbered 53, 54, 55, 56, 57, 58, 60, 61 and 62. With regard to some of these items there is a question as to whether or not the allowance made was sufficient, and with regard to item 59 whether anything has been allowed or not. The amounts in difference are small, and possibly the parties can agree whether anything additional should be allowed or not. There ought, I think, to be no difficulty in coming to an agreement, but, if that is not possible, any reference that is made will include an enquiry as to what additional allowance, if any, should be made in respect of these items, namely, items numbered from 53 to 62, both inclusive, and also with respect to the claim that there was no good grounds for the deduction in the final estimates of the sum of $24.13 for materials supplied and work done.

The remaining items of the claim, that is to say, items numbered 63 to 65 inclusive, are for interest on amounts alleged to have been due to the contractors and not paid when due, or in the nature of damages for delays. The small amount of $76 has been allowed in the final estimates under this head and has been paid. The court, however, is precluded from allowing interest in such a case. The Crown is not liable for interest, except where it is payable by contract or by statute. The provision respecting interest in the thirty-third section of *The Exchequer Court Act*, to which reference has been made, is also to the same effect.

The allowances to be made to the suppliants are as follows:—

1906

PIGOTT & INGLES v. THE KING.

Reasons for Judgment.

With respect to item numbered 1, a sum of $400, or, in case of a reference at the request of either party, such sum as may be ascertained to be just.

With respect to item numbered 11, the sum of $312.

With respect to items numbered 12, 13, 14, 15, 16 and 18, twenty-five cents per cubic yard for making embankments (not already returned as rammed filling behind side walls and in embankments) and tow-paths with material hauled from the spoil banks, after having been first deposited there, the quantity to be ascertained by agreement or by a reference, as hereinbefore mentioned.

With respect to items numbered 20 and 21, such an allowance above the contract price already allowed as may be fair and just for excavating rock to a second line for the seat of walls, as heinbefore mentioned, the amount to be determined by agreement or reference.

With respect to item numbered 22, an allowance for any quantity of dry masonry walls at $4.37 per cubic yard may be ascertained by agreement, or reference, to have been built in excess of the quantity already allowed for.

With respect to item 23, a fair allowance (if it appears that none has been made,) to be ascertained in the manner mentioned.

With respect to items numbered 53 to 62, both inclusive, and the claim that the deduction of $24.13 for materials and work made in the final estimates ought not to have been made, such further allowances as may be ascertained by agreement or reference, to be fair and just.

And otherwise the suppliants' claims are dismissed.

The question of costs will be reserved, and may be spoken to if either party so wishes.

Judgment accordingly.

Solicitors for suppliants: *Chrysler & Bethune.*

Solicitors for the respondent: *Watson, Smoke & Smith.*

THE PROVINCE OF ONTARIO.....CLAIMANT;

AND

THE DOMINION OF CANADA.....RESPONDENT.

1906
April 9.

Funds held in trust by Dominion for Ontario—Rate of Interest—Right to pay over funds and extinguish liability—Tender—Sufficiency of.

Held, that the Dominion of Canada, prior to the 31st December, 1904, was under an obligation to pay to the Province of Ontario interest at the rate of 5 per cent. per annum on the capital of certain trust funds held by the Dominion and bolonging to the Province, viz. :—The Upper Canada Grammer School Fund, the Upper Canada Building Fund and the Upper Canada Improvement Fund.

2. That the Dominion at the date mentioned had no right, without the assent of the Province, to reduce the rate of interest from 5 per cent. to 4 per cent. per annum.

3. That the Dominion has the right at any time to pay or hand over to the Province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof both as to the principal and the interest.

4. On the 29th of December, 1903, the Minister of Finance for the Dominion of Canada wrote to the Premier of Ontario respecting the payment of interest on the above funds as follows :—"It has been "decided, to pay on the 1st of January, 1904, the interest on these "funds at the rate heretofore paid, namely, 5 per cent. After that "date, interest at the rate of 4 per cent. will be paid until further "notice, or until the principal of the funds is paid to Ontario in full. "If this arrangement is not satisfactory to your Government I shall "be pleased to receive notice to that effect, whereupon arrangements "will be made to pay off the principal sum at an early date."

On the 6th January, 1904, the Premier of Ontario replied that such proposal was not satisfactory to his Government ; and intimated that the rate of interest, 5 per cent., was not susceptible of modification without the consent of the Province.

Held, that the terms of the letter of the Finance Minister did not constitute a good tender of the amount of the said funds. To make it effective for such purpose, the letter should have been followed or supplemented by an unconditional offer and tender of the money by Dominion to the Province.

THIS was an action by the Province of Ontario against the Dominion of Canada to recover certain moneys.

The facts are stated in the reasons for judgment.

October 5th and 6th, 1905.

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Argument of Counsel

The case was heard at Toronto.

Æmilius Irving, *K.C.*, and *G. F. Shepley*, *K.C.*, for the claimant.

W. D. Hogg, *K.C.*, for the respondent.

Mr. *Irving*, in opening for the claimant, made an exhaustive review of the documentary evidence bearing upon the issues raised. He contended that the whole trend of the evidence negatived the right of the Dominion either to relieve itself of the burden of the funds in question, or to reduce the rate of interest without the consent of Ontario.

Mr. *Shepley* followed for the claimant. He contended that under the award of the Dominion and Provincial Arbitrators of the 2nd of November, 1893, the trust funds in question were to be preserved intact and unimpaired by the Dominion of Canada as an obligation imposed upon it by the terms of *The British North America Act*, bearing interest at the rate of 5 per cent. The Award says explicitly that "the trust funds shall "be treated as intact and unimpaired, and interest thereon "at the rate of five per centum per annum shall be carried "half-yearly into the separate accounts of Ontario and "Quebec." I contend that we are entitled to rely upon that Award as an adjudication by a competent authority of the question we are arguing here. The Award embodies the view of the law held by the Arbitrators as to the rights of the parties in respect of the funds in question.

Mr. *Hogg*, for the respondent, argued that upon the face of the documents in evidence there was no obligation to pay interest at the rate of five per centum; nor was there anything to show a disability on the part of the Dominion to at any time pay over the trust funds to the Province

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

and discharge all its obligations thereunder. Furthermore, the Dominion of Canada had through the Hon. Mr. Fielding, Finance Minister, made a good and sufficient tender of the amount of these funds to the Province in April, 1903. This not having been accepted by the Province, the Dominion had the right to reduce the interest.

Mr. *Shepley* replied.

THE JUDGE OF THE EXCHEQUER COURT, now (April 9th, 1906) delivered judgment.

The action is now brought on behalf the Province of Ontario to recover from the Dominion of Canada the sum of $9,549.23 alleged to be payable to the Province on the 31st of December, 1904; such sum being—one half of one per centum interest on the capital of certain Trust Funds held by the Dominion and belonging to the Province, such Trust Funds being known as

The Upper Canada Grammar School Fund..	$ 312,769 04
The Upper Canada Building Fund.....	1,472,391 41
The Upper Canada Improvement Fund....	124,685 18
Total.....	$1,909,845 63

The Province also asks for a declaration that the Dominion of Canada is not entitled, without the assent of the Province of Ontario, to make any alteration in or reduction from the rate of interest of five per centum per annum alleged to be payable upon such Trust Funds.

The Dominion of Canada by its answer denies its liability to pay the sum demanded and asks for a declaration,

1. That the Dominion is under no obligation to pay interest at the rate of five per centum per annum upon the said funds, but may reduce the interest to a lower rate; and

2. That the said trust funds may at the option of the Dominion be paid over to the Province.

A third declaration was asked for, namely, that the Dominion may set off *pro tanto* the said trust funds against the indebtedness of the Province to the Dominion. That question, however, was not pressed at the hearing, and has been withdrawn from consideration.

By an amendment to the statement of defence it is alleged on behalf of the Dominion that on the 29th day of December, 1903, the Minister of Finance of Canada, being the proper Minister of the Crown in that behalf, duly made a tender in writing to the Treasurer of Ontario to pay the amount of the indebtedness due by the Dominion to the Province of Ontario in respect of the said Trust Funds; that the said tender was not accepted by the Government of the Province of Ontario, whereby the Dominion became and was discharged from further payment of interest upon the said indebtedness.

The parties regard the amount in controversy in the present action as a matter of minor importance. The main object is to obtain a declaration as to their respective obligations towards, and rights in, the funds mentioned.

The questions that are presented for solution may, I think, be stated as follows :—

1. Was the Dominion of Canada, prior to the 31st day of December, 1904, under an obligation to pay to the Province of Ontario interest on the funds mentioned at the rate of five per centum per annum ?

2. Had the Dominion the right, at the date mentioned without the assent of the Province, to reduce the rate of interest from five to four per centum per annum ?

3. Has the Dominion the right at any time to pay or hand over to the Province the amount of such trust funds, with interest accrued thereon, in discharge of its obligations in respect thereof, both as to principal and interest?

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

4. Was a good tender made to the Province on behalf of the Dominion, before this action was brought, of the amount of such funds, so as to discharge the Dominion of any obligation theretofore existing to pay interest on such funds?

The first question is of no importance, except in respect of its bearing upon the second. Upon the 30th of June, 1904, the Dominion paid the Province interest on the funds mentioned at the rate of five per centum per annum, and such payments are not in question now in any sense other than this: that for the Province of Ontario it is contended that the Dominion of Canada was under an obligation to pay such interest at the rate mentioned, and being under such an obligation, could not, without the assent of the Province, reduce such a rate to four per centum per annum, while on the other hand the centention made on behalf of the Dominion is that such payments of interest were voluntary, that there was no obligation to pay interest, and that being the case, the Dominion authorities could fix the rate to be paid. Of the four questions the third is the most important. But before attempting to answer any of them it will be necessary to go back to the 1st of July, 1867, when the old Province of Canada became a part of the Dominion and see how these funds then stood and what has since happened in respect thereof.

At the date of the Union the Province of Canada held, among others, the following funds:—The Upper Canada Building Fund, the Upper Canada Grammar School Fund, and the Common School Fund. These funds have been raised under certain statutes of the Province for the purposes therein mentioned. A small part of each of the funds consisted of investments that had been made of moneys belonging to the fund, but in the main they were represented by amounts standing to the credit of such funds in the books of account of the

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

Province, such amounts forming part of the public debt of the Province, on which it was at the time paying interest at the rate of five per centum per annum. On the one hand such funds were assets of the Province of Canada to be held and administered for the purposes for which they were respectively established. On the other hand the Province was a debtor in respect of such funds and liable therefor and for the interest payable thereon. To this liability of the Province the Dominion of Canada succeeded by virtue of the 111th section of *The British North America Act*, 1867, which provided that Canada should be liable for the debts and liabilities of each Province existing at the Union. With respect to the other aspect of the matter, namely, that these funds were assets, the 142nd section of the Act last cited provided that the division and adjustment of the debts, credits, liabilities, properties and assets of Upper Canada and Lower Canada should be referred to the arbitrament of three arbitrators chosen as therein mentioned. These arbitrators having been appointed, and the matter having been proceeded with, two of them made their award in the premises on the 3rd day of September, 1870, and thereby, among other things, ordered and adjudged that certain special or trust funds, among which were the Upper Canada Grammar School Fund, the Upper Canada Building Fund, and the Upper Canada Improvement Fund, and the moneys thereby payable including the several investments in respect of the same or any of them, were and should be, and the same were thereby declared to be, the property of and to belong to the Province of Ontario, for the purposes for which they were established, and further that from the Common School Fund the sum of $124,685.18 should be, and the same was thereby, taken and deducted and placed to the credit of the Upper Canada Improvement Fund. This award was questioned, and its validity was not determined

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

until the 26th day of March, 1878. During the intervening time it was necessary, of course, for the Dominion to hold these funds; but after the validity of the award had been sustained it seems to me to be clear that the Province of Ontario had a right to demand payment of them, both as to principal and interest; and that equally the Dominion had a right to pay or hand over these funds, with any interest accrued thereon, to the Province of Ontario in discharge of its liability under *The British North America Act*, 1867. These funds were assets of the old Province of Canada, held for the purposes for which they were established, and by the award of 1870 they became the property of the Province of Ontario for the purposes for which they were so established, and that gave the Province the right to have the possession and administration, not merely of the income arising from such funds, but of the several funds themselves. That seems to be clear from the language used in the award in dealing with these funds. They are declared to be the property of and to belong to the Province of Ontario for the purposes for which they were established. And it will be observed that when the arbitrators came to deal with the residue of the Common School Fund and to place it in a position similar to that in which the funds now in question would be if all the contentions made on behalf of the Province of Ontario were upheld, they used apt terms to give effect to their intention. They declared in express terms that such residue should continue to be held by the Dominion of Canada, and that the income therefrom should be apportioned between and paid over to the respective Provinces of Ontario and Quebec.

I know that a view different from that which I have expressed as to these funds has at times been taken, more especially before the award of September, 1870, was made; but since then I do not see what doubt there

can be about the matter, and it is not pretended that any of the opinions that have been expressed or discussions that have taken place have amounted to an agreement by the parties to deal with these funds differently from the way in which they stand to be dealt with under *The British North America Act*, 1867, and the award of the 3rd day of September, 1870.

It is, however, suggested—perhaps I should say contended—that the relations of the Dominion of Canada and the Province of Ontario to these funds have been altered by the fifth clause of the award of the Dominion and Provincial arbitrators of the 2nd day of November, 1893, by which it was ordered that the trust funds, of which the three funds in question here were part, should be treated as intact and unimpaired, and interest thereon at the rate of five per centum per annum should be carried half-yearly into the separate accounts of Ontario and Quebec. But that direction must be read in connection with the matters with which the arbitrators were dealing. Assuming the view to be correct that under the Act and award referred to these funds at the time belonged to the Province of Ontario and were its property, both principal and interest, and that it was entitled to the actual possession and administration of such funds if it so desired, the arbitrators last mentioned would have had no authority or power to change that condition of things and to declare that the Dominion should hold such funds in perpetuity, paying the interest thereon only to the Province. And I think it quite clear that they made no attempt to do anything of the kind. They were giving directions as to how certain accounts should be made up. It had been agreed between the parties that these accounts should be brought down and extended to the 31st day of December, 1892, inclusive. The funds in question had up to that time remained in the possession of the

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

Dominion, and for the purposes of making up the accounts a direction was given that up to that date these funds should be treated as intact and unimpaired, and that the interest thereon should be credited half-yearly in the accounts. Later, in August, 1901, counsel for the Dominion made an application to the Board of Arbitrators for a direction that the amounts of the several special or trust funds should, in the final closing and disposition of the disputed accounts between the Dominion and the Provinces of Ontario and Quebec, respectively, be brought into account and credited to the Province to which they respectively belonged. But as it appeared that the parties had themselves come to an understanding and agreement as to the manner in which the special and trust funds, and any amounts found to be due on the 31st of December, 1892, by the Province of Ontario and Quebec, respectively, to the Dominion, should be dealt with after that date and during the pendency of proceedings to determine such amounts, and having acted upon such agreement, the arbitrators were of opinion that it would not be proper for them to give any direction or to make any award that would be inconsistent with such understanding and agreement, and that the direction asked for on behalf of the Dominion would be inconsistent therewith. But the arbitrators carefully refrained from expressing any opinion as to their powers to give the direction asked for, or whether or not, but for the agreement come to by the parties, such a direction would have been proper. It is obvious, of course, that such a direction would not have been proper in respect of any particular fund unless that fund belonged to and was the absolute property of the Province to which it was proposed to credit it. But as stated, the question was not dealt with, and its solution is, I think, in no way affected by anything that occurred in the proceedings that were had

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

for the settlement of the accounts of the Dominion and of the Province of Ontario and Quebec respectively.

Of the three questions that I have stated, I would answer the first and the third in the affirmative, and the second in the negative.

And that brings us to the fourth question, namely:—Whether there has been by the Dominion such an offer or tender of payment of these funds to the Province of Ontario as would discharge the Dominion from the payment of the sum of $9,549.23 of interest claimed by the Province in this action.

On the 28th day of April, 1903, in a letter from Mr. Fielding, the Minister of Finance for the Dominion of Canada, to M. Ross, the Premier of Ontario, Mr. Fielding promised to pay interest on these funds on the 1st of July then next at the rate of five per cent.; but pointed out that the Dominion was under no obligation to pay that rate of interest and could not consent to pay it thereafter. "The position of the accounts" he adds, "between the Dominion and the Province at present is, "that there is a certain sum due by the Province to the "Dominion, on which you are paying four per cent., and a "certain sum a little larger due by the Dominion to the "Province upon which you have been claiming five per "cent. Both these sums stand in the position of ordinary "debts which may be paid off at any time. Pending a "mutual arrangement for such payment I would suggest "that the most convenient way to deal with the matter "would be to treat these sums as cross-entries. There "would be a balance in your favour upon which we "would be willing, temporarily, to allow you four per "cent. If this arrangement is not satisfactory we shall "be prepared to pay off the amount of our indebtedness "to your Government before the 1st of January next." That arrangement was not satisfactory to the Ontario Government. The following extract from a letter of the

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment.

8th of May, 1903, from Mr. Ross to Mr. Fielding, will show the position taken by that Government:—"It was "a well settled contract between the Dominion and "Provincial authorities, that in the division and adjustment of the debts, credits, liabilities, properties and "assets of Upper Canada and Lower Canada that the "Dominion was to hold the trust funds at five per cent. "interest, payable semi-annually, the amount of such "funds being included in the debt of the late Province "of Canada."

"I have therefore respectfully to inform you that the "Government of Ontario will not agree to any change "by the Dominion in reduction of the five per cent payable on the trust funds; nor will we acknowledge the "right of the Dominion at its option to pay off the said "trust funds, or any part thereof." Mr. Fielding returned to the subject in a letter to Mr. Ross of the 29th of December, 1903. This is the letter on which Counsel for the Dominion rely as showing an offer or tender by the Dominion to the Province of the amount of these funds. The following is an extract from the letter:—"It has been "decided to pay on the 1st of January, 1904, the interest "on these funds at the rate heretofore paid, namely 5 per "cent. After that date, interest at the rate of 4 per cent. "will be paid until further notice, or until the principal "of the funds is paid to Ontario in full. If this arrangement is not satisfactory to your Government I shall be "pleased to receive notice to that effect, whereupon arrangements will be made to pay off the principal sum "at an early date."

Mr. Ross, on the 6th of January, 1904, replied to Mr. Fielding's letter stating that the proposal was not satisfactory to his Government, and that they firmly maintained two positions, namely:—

"1. That the Dominion is not in a position to terminate its trusteeship by payment over to Ontario of "the Trust Funds in question.

" 2. That the rate of interest, 5%, is not susceptible of " modification without the consent of Ontario."

And he suggested that in advance of the action proposed some method of securing a judicial determination of these questions might be found.

On the 2nd of July, 1904, interest on these trust funds at the rate of five per centum per annum was paid " without prejudice and subject to re-adjustment in a fut- " ure account."

On the 3rd day of January a half-year's interest on these funds at the rate of four per centum per annum was paid by the Dominion to the Province. The sum of $9,549.23 represents the difference in interest, at the rates, respectively of five and four per centum, on these funds for the half-year ending December 31st, 1904.

Now, if Mr. Fielding's letter of the 29th of December, 1903, constitutes a good offer and tender of the amount of the funds in question, then in the view that I have taken of the other questions the Dominion was under no obligation thereafter to pay any interest thereon ; and having for the period mentioned voluntarily paid interest at the rate of four per centum is not now liable to pay the sum claimed. On the contrary, if that letter did not constitute a good offer and tender of such funds, then it seems to me that the Dominion retaining the funds is under an obligation to pay interest thereon at the rate of five per centum. While it may pay off the amount of such funds, and discharge itself from liability therefor, it cannot retain the funds and reduce the interest without the assent of the Province. Of course if the Province refuses to accept the amount of the several funds when actually tendered the Dominion will be relieved from any further liability to pay interest thereon. In my opinion the letter referred to and relied upon by counsel for the Dominion as constituting a good tender of the amount of these funds does not go that far. It states that if the pro-

1906

THE PROVINCE OF ONTARIO v. THE DOMINION OF CANADA.

Reasons for Judgment

posal made by the Minister was not satisfactory to the Government of Ontario, arrangements would be made to pay off the principal sum at an early date. It was not satisfactory to them, and no such arrangements were made, and nothing further was done in that direction. To make a good offer and tender the letter should, I think, have been followed or supplemented by an unconditional offer and tender of the money. For that reason I am of opinion that the Province of Ontario is entitled to recover from the Dominion the sum of $9,549.23 mentioned.

There will be a declaration,

1. That the rate of interest payable on the funds in question is five per centum per annum, and that the Dominion of Canada cannot retain such funds and reduce such rate of interest, without the assent of the province of Ontario; but

2. That the Dominion of Canada has a right at any time to pay or hand over to the Province of Ontario the amount of any of the trust funds in question in this proceeding, with any interest then accrued thereon, in discharge of its obligations in respect of such fund.

3. That the letter from Mr. Fielding to Mr. Ross of the 29th day of December, 1903, did not constitute a good and sufficient tender and offer by the Dominion of Canada to the Province of Ontario of the funds in question, and that the Province is entitled to recover from the Dominion the sum of $9,549.23 claimed in this proceeding.

Each party will bear its own costs.

Judgment accordingly.

Solicitor for Claimant: *Æmilius Irving.*

Solicitors for Respondent: *Hogg & Magee.*

QUEBEC ADMIRALTY DISTRICT.

1906

April 26.

THE HARBOUR COMMISSIONERS OF MONTREAL ..... } PLAINTIFFS;

AND

THE S.S. "*UNIVERSE*", THE S.S. "*BAY STATE*", THE BARGE "*BERKSHIRE*", THE BARGE "*BATH.*" ..... } DEFENDANTS.

THE BOUTELL STEEL BARGE COMPANY ..... } PLAINTIFF;

v.

THE OWNERS OF THE S.S. "*UNIVERSE.*" ..... } DEFENDANTS.

THE UNIVERSE JOINT STOCK COMPANY ..... } PLAINTIFF;

v.

THE OWNERS OF THE S.S. "*BAY STATE*", THE BARGE "*BERKSHIRE*", THE BARGE "*BATH.*" } DEFENDANTS.

Admiralty law—Nautical assessors—Expert testimony as to the management of ships—Practice.

Where the court at the trial of a collision action has the assistance of a Nautical Assessor to advise on all matters requiring nautical or other professional knowledge, the evidence of experts as to the management of the ships shortly previous to the collision is inadmissible.

ACTIONS for collision in the Harbour of Montreal.

During the examination of a witness before Mr. Justice Dunlop, Deputy Local Judge for the Quebec Admiralty District, objection was taken to the admissibility of his evidence in so far as it related to matters coming within

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

the competence of the Nautical Assessor to advise upon at the trial.

A. Geoffrion, K.C., for the Harbour Commissioners.

F. E. Meredith, K.C., for the *Universe*.

C. Pentland, K.C., and *M. Goldstein, K.C.*, for the *Bay State*, the *Berkshire* and the *Bath*.

DUNLOP, D.L.J., now (April 26th, 1906) delivered judgment.

The question involved in these cases is to fix the responsibility for heavy damages caused by the collision between the S.S. *Universe* and the barge *Bath*, which took place in the Harbour of Montreal on the 29th September, 1905. As a result of this collision, the S.S. *Universe* and the barge *Bath* were seriously damaged, and two dredges, the property of the Harbour Commissioners of Montreal, were much damaged, one having been sunk and the other injured to a large extent. Damages to a considerable amount resulting from said collision are claimed, first, by the owners of the S.S. *Universe;* second, by the owners of the S.S. *Bay State*, the barge *Berkshire* and the barge *Bath*. It may be stated that the barge *Bath* was in tow of the S.S. *Bay State* when the collision took place.

The owners of each of the said steamers claimed that the other was in fault and responsible for the collision.

Four actions are also taken by the Harbour Commissioners, to wit:

Case 157 against the S.S. *Universe*;

Case 158 against the S.S. *Bay State*;

Case 159 against the barge *Berkshire*;

Case 160 against the barge *Bath*.

Captain Louis Robert Demers, master mariner, and branch pilot, master of the S.S. *Campana*, was being examined as a witness. In the course of his examination the following question was put to him:

"Q. Supposing you were coming up in charge of an ocean steamer bound for the harbour of Montreal, and you had arrived at a point about opposite to the lower end of those dredges, between two and three hundred feet to the south of them, and you perceived a steam-vessel coming down the river somewhere between the Victoria Pier and the dredges, having astern of her two barges in tow, what steps would you take to avoid a collision with those vessels?"

As appears by the deposition, Mr. Meredith, K.C. stated:

"I object to this evidence on the ground that the case is one in Admiralty, where the learned judge is to be assisted by an assessor or assessors, and that such evidence should not be allowed, as it is a question for an assessor to determine, being one of seamanship; and I further object to the question as being illegal inasmuch as it is, in effect, asking the witness to decide as to one of the main points in the case, which is a question for the court and assessors to determine."

This objection was taken *en deliberé*; and the further question was put to the witness:

"Q. What steps if any should be taken by those in charge of a steamship bound into the harbour of Montreal (when opposite to the lower end of the two harbour dredges which were anchored opposite sections 25 and 26) to avoid a collision with a steamship and her tow of two barges coming down the river, the said steamship and tow being, when first seen by the upward boat, some little distance below the Victoria pier?"

The same objection was made to this question, and the objection was taken *en deliberé*.

The question to be decided now is, as to whether the above-quoted questions were admissible under the circumstances of these cases?

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

In these cases it has been submitted by the solicitors of the S.S. *Universe* and the Universe Joint Stock Company, Limited, that evidence is not competent upon any matters requiring nautical knowledge, as it is the province of the assessor or assessors to advise the court thereon. Taking into consideration this pretension, I might refer to Article 112 of the General Rules and Orders regulating the Admiralty practice in the Exchequer Court of Canada which reads as follows:

"The Judge on the application of any party, or without any such application, if he considers that the nature of the case requires it, may appoint one or more assessors to advise the court upon any matters requiring nautical or other professional knowledge."

It is submitted that this provision alone renders expert evidence unnecessary and illegal, as the court will take the advice of the assessor and assessors upon all matters requiring nautical or other professional knowledge.

If it be contended, however, that the provisions of Article 112 of the Rules are not sufficient, reference should be made to Article 228, which reads as follows:

"In all cases not provided for by these Rules the practice for the time being in force in respect of Admiralty proceedings in the High Court of Justice in England shall be followed."

A consideration of the practice in respect of proceedings in the High Court of Justice in England will make abundantly clear the fact that expert evidence cannot be admitted.

In *Roscoe on Admiralty Jurisdiction and Practice of the High Court of Justice* (3rd edition, 1903), the best authority upon this subject, we find at page 352:

"The assessors of the judge are two of the Elder Brethern of the Trinity House. Trinity Masters are summoned as a matter of course in collision and salvage

actions. The function of the Elder Brethren is to advise the court upon matters of nautical skill; the responsibility of the decision and the weight to be attached to evidence rests on the Judge. When Trinity Masters are present, evidence as to matters of nautical skill and practice and as to the deductions to be drawn from nautical facts is inadmissible, and will not be allowed to be given."

There is very little jurisprudence on this point in the reported cases in the Admiralty Courts of Canada, but there is none in any sense contrary to our rules and the English practice as above explained.

The only reported Canadian cases bearing upon the point are apparently the following:

The *Attila* and *Pomona* (1). G. Okill Stuart, J. at p. 198, said:

"No less than nine persons, masters of vessels have been examined to prove that six or seven knots an hour for sailing before the wind in the locality where the collision occurred was right and proper in fog and was customary. These persons have no personal knowledge of the collision, and an hypothetical case is put to them so as to cover this. The objections to this evidence now come before me for the first time, and I cannot do better than apply to it the language used by the Judge of the High Court of Admiralty in a case wherein an attempt was made to introduce similar testimony:—

"The inevitable consequence would be, if received, that the Court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other to the great expense of suitors, and a great delay in the hearing of the cause and with no benefit whatever. Therefore I disclaim paying any attention whatever to the opinions which have been referred to and maintain the objections to them."

In that case Commander Ashe, R.N., and Mr. Gourdeau sat as assessors.

(1) [1879] Cook, 196.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

The *Cumberland* (1). Hon. Henry Black, at p. 78 said :—

"If there was no want of proper nautical skill and discretion in so anchoring this vessel, the collision must be considered as having arisen from a *vis major* for which the *Cumberland* is not answerable. To enable the court to come to a decision upon the case it is necessary that a correct opinion should be formed upon the following questions which are of nautical character :

" 1. Whether previous to and at the time of the occurrence of the accident the *Cumberland* was properly moored and anchored, relation being had to the situation of the *Cornwallis* and the state of the wind and tide at the time when the *Cumberland* was so moored and anchored :

" 2. Whether the accident arose from unavoidable circumstances without fault being attributable to either of the ships or their masters, or whether it proceeded from the fault of either of the said ships or their masters, and if so from which of them :

" Availing myself of the power which this court has, to refer to some gentleman conversant in nautical affairs, I have obtained the assistance of a captain in the Royal Navy, now engaged in important public service here, upon whose judgment and opinion I shall feel it my duty to rely."

The English authorities and jurisprudence are of course directly applicable to our practice, as is clear not only from the *Colonial Courts of Admiralty Act* 1890 (Imperial Statutes 53–54 Vict. chap. 27) and the Canadian Admiralty Act 1891, passed there under (54–55 Vic. Cap. 29) but also by the definite provisions of the Admiralty Rules as above quoted.

In *Marsden on Collisions*, it is said (2) :—

(1) [1836] 1 Stuart, 75.

(2) 4th edn. 1897, p. 338, also in 5th edn. 1904, p. 291.

"In the Queen's Bench Division, matters of seamanship may be proved by experts. In Admiralty and it seems in any court where assessors are present to advise the court, such evidence is not admissible. In a recent case evidence directed to shew what the usual mode of navigating ships in the entrance to the Mersey was held to be inadmissible in the Admiralty Division. (The *Kirby Hall*: 8 P. D. 71). The function of the assessors is not to decide questions of fact arising in the case, but to advise the court upon nautical matters. The decision of the case rests entirely with the Judge."

In the *Assyrian* (1): "Sir Walter Phillimore, for appellants asked leave to call evidence to shew that this particular screw alley did not emit any smell. The mind of the judge was influenced by this advice of the Elder Brethren.

[Esher, M. R.—This is a matter depending on a nautical knowledge of ships and when the court has skilled advice you cannot give such evidence.]

"The assessors have never seen this particular ship and however valuable their advice they cannot speak with certainty as to the ship.

"[Esher, M. R. It seems to us that this advice which was given by the Masters to Butt, J. was founded upon a nautical knowledge of ships. That is a matter about which evidence cannot be admitted at all, and therefore we cannot admit any evidence on this appeal"].

In the *Kirby Hall* (2) the Plaintiffs proposed to examine witnesses as to what was usually done as a custom of navigation by pilots and masters in charge of large steamships. They submitted that though where Brethern of the Trinity House were present to assist the court the evidence of expert witnesses on questions of general seamanship was inadmissible, yet that evidence of the customary mode of navigating vessels in a particular

(1) [1890] 63 L. T., N.S. 91. (2) [1883] 8 P. D. 71.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

locality might by the practice of the court be proved by witnesses examined in court. Sir Robert Phillimore (p. 75), said :

"I think on the whole I ought not to admit the evidence in question. I think it is evidence on a point on which it is the province of the Trinity Masters to advise the court and I do not think I ought to do anything which will go any way towards allowing the examination of expert witnesses on questions of nautical skill and seamanship in cases where the court is assisted by the Trinity Masters."

In the *Sir Robert Peel*, James, L.J. (p. 365). said (1) :

"As to the alleged improper rejection of evidence, the evidence tendered was that of alleged experts on a matter of nautical skill. It is very important to adhere to the rule laid down by Dr. Lushington in the case of the *Anna and Mary*. (2 W. Rob. 189)." At the hearing in the court below the defendants tendered evidence of experts in the river navigation to shew that there was a certain draught or suction between a large or small vessel, but the court ruled the evidence to be inadmissible on the ground that it was an invasion of the province of the Trinity Masters assisting the court. See p. 364.

Brett, L. J. (p. 365) said :

"The practice of the Court of Admiralty with respect to evidence on points of nautical science is different from that of other courts. In other courts, questions of nautical skill and science as to the management and movement of ships may be proved by the evidence of experts. But that is not the way in which the Court of Admiralty is instructed in these matters. It has other means of instruction through the presence of nautical assessors.

"If the judge of that court were sitting by himself without the assistance of assessors the case might be

(1) (1880) 43 L. T., N.S., 364.

different; but when he is assisted by assessors he is instructed by them on such matters. The assessors are not part of the tribunal it is true, but the judge acts on their opinion and advice with regard to technical questions of nautical skill. The evidence therefore tendered in this case was properly rejected. I wish however to limit my observations as to the evidence of experts to questions concerning the manœuvres of ships. The Court of Admiralty would of course rightly receive evidence of experts on other subjects, such for example as the loading of ships, a matter not strictly within the prevision of the nautical assessors."

Cotton L. J. (p. 365) said:

"I concur. The presence of nautical assessors is intended to dispense with nautical evidence as to the management of ships."

In the *Ann and Mary* (1) counsel proposed to read affidavits of two Trinity Masters who were not those sitting as assessors. Dr. Lushington (p. 196) ruled as follows:

"The opinions of nautical men on a question of seamanship, indeed of men of science on points of science generally when a clear statement of the whole of the facts has been laid before them, is admissible evidence in this as well as other courts; but in this case I am assisted by gentlemen of great skill and experience in nautical matters, and it would be most inconvenient and injurious to the ends of justice if in cases where the court always has the benefit of and derives the greatest assistance from the opinions on nautical points of the Trinity Masters the proceedings were allowed to be encumbered by any evidence by way of opinion on such points. These affidavits must be rejected."

In the *Gazelle* (2) Dr. Lushington, addressing the Trinity Masters, (p. 474) said:

(1) (1843) 2 W. Rob. 195. (2) (1842) 1 W. Rob. 471.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

"Gentleman, in directing your attention to those facts of the case which are material to the question which you will have to determine I must in so doing notice an observation which has been much pressed in the argument by the counsel for the *Gazelle*, viz.: That the decision in this case must be strictly founded upon the evidence in the cause, and that you are not at liberty to travel out of that evidence in forming your opinion upon the points which will be submitted to your consideration in the present instance.

"Now I entirely concur in the propriety of this observation so far as it is confined to the evidence upon the facts of the case; at the same time I utterly deny the applicability of the argument if it is intended to control your judgment by the affidavits of witnesses in the cause with respect to matters of mere nautical practice and experience. Upon these points it is my duty to inform you that you must be guided solely and entirely by your own science and knowledge and not by the opinion of other nautical persons, however respectable or numerous such witnesses may be, swearing to a belief that this or that particular course was the proper course to have been adopted. If this were not so your attendance in this court would be almost nugatory and in the majority of cases that might occur it would be impossible for the court to arrive at any certain or satisfactory determination."

The counsel for the S.S. *Bay State*, the barge *Berkshire* and the barge *Bath*, and for the Boutelle Steel Barge Company contend that the evidence of experts is admissible in the present case, and cite the case of the *Polynesian* and *Cynthia* heard before the late Mr. Justice Irvine, assisted by Commander Hire as Nautical Assessor (1), and also the case of the *Loyal* and *Challenger* (2) where the judge was assisted by the late Captain

(1) 15 Q. L. R. 341; sub nom. Allan *v.* Reford.

(2) 14 Q. L. R. p. 135.

Smith, R. N. R., as Nautical Assessor, as cases where expert testimony was allowed. It will be seen by the report of the first case referred to that whatever witnesses were examined by the parties, the court relied upon the opinion of the Nautical Assessor as to all points necessitating expert evidence. The questions submitted to the Nautical Assessor by the court are found at pages 351, 352 and 353, and are in effect as follows:

1. Did the *Polynesian* manœuvre properly in starboarding?

2. Was it prudent for the *Polynesian's* pilot to put his wheel hard to starboard, then reverse his engines and immediately afterwards steady his ship?

3. Were the ships under the operation of the rule as to ships meeting end on so as to involve risk of collision?

4. Did the *Cynthia's* pilot act prudently and properly in porting?

5. Should the *Cynthia* have ported earlier?

6. After the *Polynesian* starboarded and the *Cynthia* ported, was it possible to avoid the accident?

I have no means at present of ascertaining exactly the nature of the evidence given by the witnesses referred to by the learned counsel in his memorandum; but judging by the report of the judgment there was no objection taken to any of such evidence by either of the parties, so that the court was not called upon to decide the question formally.

The other case referred to is that of the *Loyal* and the *Challenger* (1), and precisely the same remarks might be made with regard to the judgment in this case. It will be seen (pages 137 and 138) that Mr. Justice Irvine asked the Assessor precisely those questions which would have been covered by expert evidence if any such had been relied upon by the court.

As to the last statement made by the learned counsel in his memorandum, it is of too general a nature to admit

(1) 14 Q. L. R. 135.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

of a specific answer, but it is submitted that there is nothing to show its correctness and the only cases quoted show that whatever evidence had got into some of the records either through want of formal objection or on account of the court having sat without assessors or for any other reason, the court has always relied upon the expert opinion of its assessors or assessor when it has availed itself of their services.

I have been informed that the practice of this court has been not to allow the opinions of experts to be given in cases where nautical assessors sit. It seems to me the sole object of the questions objected to is to elicit the opinion of the witness as to the management of the ships. The presence of a nautical assessor is, as has been well said by Cotton, L. J. (1), to dispense with nautical evidence as to the management of ships. If such evidence were admitted, the inevitable consequence would be, as has been well stated in one of the cases cited, that the court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other, to the great expense of suitors and a great delay in the hearing of the cause and with no benefit whatever.

The evidence tendered is as to the management of ships; and the objections in my opinion made to such evidence should be and are maintained; and I declare all such evidence inadmissible in the present cases.

I have also been referred to the case of the *Cape Breton* and the *Canada* (2) and certain rulings as to the admissibility of evidence have been pointed out to me as there made, which simply confirm the correctness of the conclusions I have arrived at as to the inadmissibility of expert evidence in these particular cases.

Order accordingly.

(1) The *Sir Robert Peel*, 43 L. T. N. S. at p. 365.

(2) 36 S. C. R 564.

IN THE MATTER of the Petition of Right of

THE CANADIAN PACIFIC RAILWAY COMPANY..... } SUPPLIANTS; 1906 June 30.

AND

HIS MAJESTY THE KING.. .....RESPONDENT.

Canal bridge—Agreement between Crown and company as to construction—Liability for maintenance and operation of bridge.

In 1882 the O. & Q. Ry. Co., the suppliants' predecessor in title, applied to the Minister of Railways and Canals for leave to construct a railway bridge across the Otonabee River, in the Town of Peterborough, undertaking at the same time to construct a draw in such bridge in case the Crown should at any time thereafter determine it to be necessary for the purposes of navigation. By order in council of 23rd October, 1882, and an agreement made in pursuance thereof on the 23rd of December, 1882, between the said company and the Crown, permission was given to the former to construct a bridge across the said river, on their undertaking to construct at their own cost a swing in the bridge, should the Government at any time thereafter consider that to be necessary, or in case of the carrying out of the proposed canal for the improvement of the Trent River navigation, and a swing in the said bridge not being necessary, that there should in that case be a new swing-bridge over the said canal, the cost of the swing and the necessary pivot therefor to be borne by the said company. The canal having been constructed, it became necessary to have a new swing-bridge over the canal on the company's line of railway. This bridge was built, and the suppliant company discharged the obligation to which it suceeded to pay the cost of the pivot pier and of the swing or superstructure of the bridge. The cost of the maintenance and operation of the bridge being in dispute between the parties, the petition herein was filed to determine the question of liability therefor.

Held, that in the absence of any stipulation in the agreement between the parties as to which should bear the cost of such maintenance and operation, the suppliants having built the pivot pier and swing as part of their railway and property should maintain and operate them at their own cost.

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Argument of Counsel

PETITION OF RIGHT for the recovery of money alleged to have been expended on behalf of the Crown.

A Special Case was also filed herein under Rule 111.

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

March 5th, 1906.

The case now came on for argument.

F. H. Chrysler, K.C. (with whom was *D'Arcy Scott*) for the suppliants, contended that while the rights of the company were acquired subject to the prior right of navigation and in such a case it might be successfully argued that an obligation to construct a swing in the bridge over the river carried with it a corresponding obligation to operate and maintain the swing, yet the case was different as to the canal. The railway was built before the canal was constructed, and apart from any agreement such as has been entered into here, the company would be entitled to damages for interference with its property; and such damages would be assessed at a sum sufficient to compensate the company for the maintenance and operation of the bridge. This position is altered by the agreement only to this extent, viz., that the company in the event that happened became liable for the cost of constructing the pivot pier and swing, but not for their maintenance and operation. (Citing *Saunby* v. *London Water Commissioners* (1); *Parkdale* v. *West* (2); *Pion* v. *North Shore Ry. Company* (3).

E. L. Newcombe, K.C., for the respondent, submitted that the suppliants were impliedly obliged to operate and maintain what they expressly obliged themselves to construct. That was the fair interpretation of the agreement between the company and the Crown. Their rights were subject to the paramount public right of

(1) [1906] A. C. 110. (2) [1887] 12 A. C. 602.
(3) [1889] 14 A. C. 612.

navigation. They could not have interfered with the navigation of the river, as they plainly recognized in their original application for authority to erect a bridge; and, without considering the agreement at all, they were in no better position with regard to obstructing the canal.

Mr. *Chrysler*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (June 30th, 1906) delivered judgment.

This matter comes before the court upon a case stated by the parties. The suppliant company by its petition alleges that they own and operate a railway between the City of Toronto in the Province of Ontario and the City of Montreal in the Province of Quebec, and that they did so own and operate the said railway during the year 1896; that in that year the Government of the Dominion of Canada excavated a cutting for the construction of the Trent Valley Canal across the right of way of the said railway at a point about a mile east of the Town of Peterborough in the Province of Ontario; that such cutting was subsequently filled with water and a swing bridge was built, partly at the expense of the Government and partly at the expense of the company, to carry the railway over the canal; that on or about the 1st day of July, 1904, the canal was opened for traffic, and since that time has remained open for traffic during the season of canal navigation; that the traffic of the canal necessitates the employment of a staff of men for the opening and shutting of the swing in the bridge; that the Government of Canada has refused to pay to the suppliants any of the expense of the operation and maintenance of the bridge, although demand therefor has been duly made; and that from the 1st day of July, 1904, up to the 31st day of October, 1905, they have expended the

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

sum of $2,795.34 in the maintenance and operation of the said bridge.

And in conclusion the suppliants ask for a direction or declaration that the amount mentioned should be paid to them and that the expense of operating and maintaining the said bridge for all time from and after the 31st day of October, 1905, should be borne by the Government of Canada; or else that the bridge should be removed and the right of way of the suppliants' railway should, at the expense of the Government, be restored to the condition it was in prior to the construction of the canal.

The rights of the suppliants in the railway mentioned were acquired under a lease in perpetuity from The Ontario and Quebec Railway Company, to whose obligations they have in this matter succeeded.

In the statement in defence, the Attorney-General of Canada, on behalf of the respondent, alleges that on or about the 31st day of October, 1882, the Ontario and Quebec Railway Company, the predecessors in title of the suppliant company, made an application to the Minister of Railways and Canals for leave to construct a bridge for their railway across the Otonabee River, at the Town of Peterborough, and at the same time stated that they would undertake to construct a draw in such bridge in case the Government should at any time thereafter determine the same to be necessary for the purposes of navigation. It is also alleged that by an order of the Governor-General in Council, dated the 23rd day of October, 1882, and an agreement executed in pursuance thereof dated the 22nd day of December, 1882, and made between The Ontario and Quebec Railway Company of the first part and Her late Majesty Queen Victoria of the second part, permission was given to the company to construct a bridge to carry their railway across the Otonabee River, on their undertaking to construct at their own cost a swing in the bridge, should the Govern-

ment at any time thereafter consider that to be necessary, or in case of the carrying out of the then proposed canal for the improvement of the Trent River navigation, and a swing in the said bridge not being necessary, that there should in that case be a new swing-bridge over the said canal, the cost of the swing and the necessary pivot-pier therefor to be borne by The Ontario and Quebec Railway Company.

The Government constructed the proposed canal for the improvement of the Trent River navigation, and it was not necessary to have any swing in the bridge that the railway company had built across the Otonabee River. On the other hand it became necessary to have a new swing-bridge over the canal on the line of the railway. That bridge has been built, and the suppliant company has discharged the obligation to which it succeeded to pay the cost of the pivot pier and of the swing and superstructure of the bridge. The bridge having been built, it has to be maintained and operated, and the main question to be determined is whether the expense of such maintenance and operation should be borne by the suppliant company or by the Crown.

The first clause of the agreement of the 22nd day of December, 1882, to which reference is made in the statement of defence is as follows :—

"If at any time hereafter the Minister of Railways "and Canals for the time being shall by notice in writ- "ing require that the said company, its successors or "assigns so to do, then the said company, its successors "or assigns, shall or will within two months thereafter "construct either a swing in the said proposed bridge, *or* "*a new swing-bridge over the said proposed canal*, in "either case upon plans to be approved by the Chief "Engineer of Canada, the cost in the case of a swing in "the said proposed bridge to be borne by the said com- "pany, its successors or assigns, *and in case of a new*

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

"*swing-bridge over the said canal the cost of the swing* "*itself and the necessary pivot pier to be borne by the said* "*company*, its successors or assigns and the balance by "Her Majesty or Her successors."

Now it will be seen that the agreement makes provision only for the cost in each case of the structure to be built, and is silent as to the cost of its maintenance and operation. It is conceded, however, that if the company had been required, in the interests of navigati n, to put a swing in the bridge over the Otonabee River, the expense or burden of operating and maintaining the swing would have fallen on the company. The rights of the company were acquired subject to the prior right of navigation, and the obligation to construct the swing in the bridge over the river carried with it as an incident the obligation to operate and maintain the swing. But with reference to the canal and the railway it is said that the case is different; that as the railway was first built and operated the company would, apart from any agreement, have been entitled to damages for any interference, in the construction of the canal, with their rights, and that such damages would have included a sum sufficient to compensate the company for the operation and maintenance of the swing-bridge in case the company had operated and maintained it. And that seems to me to be a fair statement of the position that the parties would have occupied except for the agreement referred to. Then it is said that the position mentioned is altered by the agreement to this extent only that the company in the event that happened became liable for the "cost of the swing itself and the necessary pivot pier" while the balance of the cost was to be borne by the Crown. And it is contended that the result is that the expense of operating and maintaining this swing bridge over the canal falls upon the Crown and that the suppliant company is entitled to compensation for the expenses it has incurred in that behalf.

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

The word "balance" used in the clause of the agreement that has been cited refers to the balance of the cost of construction, and does not include the cost of operating or maintaining the swing-bridge. In addition to constructing "a swing" and the "necessary pivot pier" which, as I understand the matter, constitute the swing-bridge in question, it was necessary to excavate the prism of the canal and no doubt to do other work incident thereto. It would not have been fair or reasonable that any part of the cost of such excavation or other work should fall on the railway company; and against that the agreement provides by limiting their liability to the cost of the swing and of the pivot pier and by throwing the balance of the cost, whatever it might be, on the Crown. But that balance, as stated, was the balance of the cost of construction only. Nothing is mentioned in the agreement as to the expense of maintaining and operating either the swing over the canal or over the river. It is clear, however, that the public right of navigation existed long before the railway was built. In giving the company authority to carry their railway across the Otonabee River provision was made to protect that public right of navigation as it then was and as it might be when certain proposed works were carried out. But as it was uncertain at the time whether the river would be used or a new canal or channel constructed the condition on which the company were given leave to construct their bridge over the river was put in the alternative in the terms that have already been cited. If it became necessary to put a swing in the bridge the company were to bear the cost thereof. If on the other hand it became necessary to put a swing-bridge over the proposed canal the company were to bear the cost of the swing itself and of the necessary pivot pier. In neither case is any provision made as to the cost of operating the swing or maintaining the bridge. It seems to me, how-

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

ever, that in each case equally the expense of operating and maintaining the thing that the company was under an obligation to build was something that the company had to bear. If a swing had been put in the company's bridge over the river it would have become a part of the bridge that the company were bound to maintain and operate. But how does that case differ from the other so far as the pivot pier and the swing are concerned? These are the property of the company; they form part of their railway. The company has paid for them. They have been constructed in pursuance of an obligation undertaken in recognition of a public right of navigation either by the river or by the canal mentioned. And that right was anterior to any right that the suppliant company or their predecessors acquired in the railway. In my opinion the suppliant company are liable to bear the expense of maintaining the pivot pier and swing mentioned and of operating the swing.

The first question submitted in the stated case for the opinion of the court is as follows:—"Is the Canadian "Pacific Railway Company liable to bear the expense of "maintenance and operation of the said bridge?"

Limiting my answer and the word "bridge" to the swing and pivot pier mentioned, I answer that question in the affirmative; and having done so, it becomes unnecessary to answer any of the other questions submitted.

If the expense mentioned should, as it seems to me it should, be borne by the suppliant company, they are not entitled to any portion of the relief sought by the petition

There will be judgment for the respondent, and the costs as usual will follow the event.

*Judgment accordingly.**

Solicitors for the suppliants: *Scott & Curle.*

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

*Affirmed on appeal, see 38 S. C. R. 211.

BETWEEN

THE CANADIAN PACIFIC RAILWAY COMPANY ..... } PLAINTIFF;

AND

HIS MAJESTY THE KING ..... DEFENDANT.

1907
June 30.

Canadian Pacific Railway Co.—Construction of branch line—Subsidy—Agreement to pay—Ascertainment of amount—"Cost"—"Equipment."

By 3 Edw. VII, chap. 57, sec. 2, it was provided that the Governor in Council might grant to the Canadian Pacific Railway Company in aid of the construction of a certain branch line, a subsidy of $3,200 per mile, where the line did not cost more on the average than $15,000 per mile, and that where such cost was exceeded, a further subsidy might be given of 50 per cent. on so much of the average cost of the mileage subsidized as was in excess of $15,000 per mile, such subsidy not exceeding in the whole the sum of $6,400 per mile. By the 1st section of the Act the expression "cost" was defined to mean the "actual necessary and reasonable cost", to be determined by the Governor in Council upon the recommendation of the Minister of Railways and Canals and upon the report of the Chief Engineer of Government Railways. The Minister of Railways and Canals under authority of the Governor in Council entered into a contract with the plaintiff respecting the construction of the said branch line and the subsidy therefor, by which it was agreed that the Crown would "in "accordance with and subject to the provisions of secs. 1, 2 and 4 of "the Subsidy Act pay to the company so much of the subsidies or "subsidy hereinbefore set forth or referred to, as the Governor in "Council, having regard to the cost of the work performed, shall "consider the company to be entitled to in pursuance of the said "Act."

Held, that inasmuch as the Act and the agreement made thereunder for the payment of subsidy left the amount thereof to be determined by the Governor in Council, the plaintiff company was not entitled to any relief in this proceeding, and that the decision of the Governor in Council was not open to review by the court.

THIS was a claim for a railway subsidy.

The matter came before the court in the form of a Special Case, stated between the parties pursuant to Rule 111.

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Argument of Counsel.

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

March 5th, 1906.

The special case was now argued.

Dr. Travers Lewis, for the plaintiff, contended that the course of federal legislation with reference to railway subsidies indicated that it was the intention of Parliament to include the cost of equipment in the computation of "necessary and reasonable" cost unless it was expressly excluded by the terms of such legislation. From 1882 down to 1894 the phraseology of the Acts remained the same. In 1894 provision was made for computation of cost by the Engineer, and in 1897 provision for the first time was made that "equipment" should be excluded from the computation. This provision occurs also in the Act of 1899. But in 1901 and 1903 Parliament omits the latter provision entirely. It is under the Act of 1903 that the plaintiff company claim that it was the duty of the Chief Engineer to include the cost of the rolling stock and other equipment of the branch line from Moosomin to Elkhorn in the neighbourhood of the Pheasant Hills. If that is done the cost of construction will be established to exceed the sum of $15,000 per mile, and the additional subsidy should be allowed as provided in the Act. He cited *Farmer's Loan Company* v. *St. Jo. and Denver City Ry. Co.* (1); *Jones on Railroad Securities* (2); *Titus* v. *Mabee* (3); *Williamson* v. *New Jersey Southern Ry. Co.* (4); *R.* v. *Great Bolton* (5); *Hyde* v. *Johnson* (6); *Rickett* v. *Metropolitan Railway Co.* (7); *Potter's Dwarris on Statutes* (8); *Hardcastle on Statutes* (9); *Lehman* v. *Robinson* (10).

(1) 3 Dillon C. C. 412.
(2) Sec. 154
(3) 25 Ill. 257.
(4) 28 N. J. Eq. 280.
(5) 8 B. & C. 74.
(6) 2 Bing. N. C. 776.
(7) L. R. 2 H. L. at p. 207.
(8) P. 189.
(9) 1901 ed. pp. 142, 143, 146.
(10) 59 Ala. 219.

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Argument of Counsel.

The contention of the plaintiff company is that the rolling stock was part of the railway as a concrete whole. That is the meaning of the word "railway" in *The Railway Act*, 1903, secs. 117, 118 (*g*).

E. L. Newcombe, K.C., for the defendant, argued that the subsidy to be paid under the Act was for the "construction" of the branch railway in question, and if "construction" is distinct from "equipment" then the latter cannot be considered in determining the right to further subsidy. The definition of a "railway" in *The Railway Act*, 1903, does not apply here.

The Chief Engineer could not see his way to include the equipment, nor did the Minister, hence the Governor in Council did not grant the additional subsidy. Without an order in council the subsidy cannot be recovered.

As to distinction between "railway" and "rolling stock" see discussion of the same in *Toronto Street Railway's Case* (1).

Since 1903 the practice has been uniform not to include "rolling stock" in subsidies for railway construction.

Dr. Travers Lewis, in reply, submitted that the Act was in effect a bounty Act, and should receive a benevolent construction.

THE JUDGE OF THE EXCHEQUER COURT, now (June 30th 1906) delivered judgment.

The plaintiff company, having been paid the sum of $435,200.00 as a subsidy towards the construction of a branch line of railway 136 miles in length from its main line to a point in the neighbourhood of the Pheasant Hills, claims that it is entitled by way of subsidy therefor to a further sum of $64,088.00. The statement of that claim, with the grounds upon which it is made having been referred to the court by the Minister of Railways and Canals, pursuant to the provisions of the

(1) 1904] A. C at p. 809.

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

twenty-third section of *The Exchequer Court Act*, the parties have concurred in stating a special case for the opinion of the court. The question for its decision as therein stated is whether or not the cost of "sufficient "rolling stock necessary to accommodate and conduct "properly and efficiently the traffic and business of the "line" should be included by the Chief Engineer of Railways and Canals in estimating the amount payable to the plaintiff company in respect of its said subsidy?

The authority for the granting of the subsidy in question is contained in the Act of Parliament 3 Edward 7th, chapter 57, by the second section of which it was, among other things, provided that the Governor in Council might grant to the plaintiff company a subsidy towards the construction of a branch line from a point on the main line between Moosomin and Elkhorn northwesterly to a point in the neighbourhood of the Pheasant Hills, not exceeding 136 miles. With reference to the amount of the subsidy it was provided that a grant of $3,200 per mile might be made where the line did not cost more on the average than $15,000 per mile, and that where such cost exceeded on the average $15,000 per mile a further subsidy might be given "of fifty per cent. on so much "of the average cost of the mileage subsidized as was in "excess of $15,000 per mile, such subsidy not exceeding "in the whole the sum of $6,400 per mile." By the first section of the Act the expression "cost" was defined to mean "the actual, necessary and reasonable cost" including "the amount expended upon any bridge up to "and not exceeding $25,000 forming part of the line of "railway subsidized not otherwise receiving any bonus" but not to include "the cost of terminals and right of "way of the railway in any city or incorporated town". And it was therein further provided as follows: "And "such actual, necessary and reasonable cost shall be de-"termined by the Governor in Council upon the recom-

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

"mendation of the Minister of Railways and Canals; "and upon the report of the Chief Engineer of Govern- "ment Railways certifying that he has made or caused "to be made an inspection of the line of railway for "which payment of subsidy is asked, and careful inquiry "into the cost thereof and that in his opinion the amount "upon which the subsidy is claimed is reasonable and "does not exceed the true actual and proper cost of the "construction of the railway."

By orders in council of the 17th day of November, 1903, and the 12th day of January, 1904, the Minister of Railways and Canals was given authority to enter into a contract with the plaintiff company respecting the subsidy mentioned and the construction of the branch line of railway referred to, and in pursuance of such authority an agreement was entered into on the 14th day of January, 1904. The ninth clause of that agreement was expressed in the following terms :

"That upon the performance and observance by the "company to the satisfaction of the Governor in Council "of the foregoing clause of this agreement, His Majesty "will, in accordance with and subject to the provisions "of sections one, two and four of the Subsidy Act, pay to "the company so much of the subsidies or subsidy herein- "before set forth or referred to as the Governor in Coun- "cil having regard to the cost of the work performed, "shall consider the company to be entitled to in pur- "suance of the said Act." By the nineteenth paragraph of a schedule of specifications attached to the agreement it was provided that sufficient rolling stock necessary to accommodate and conduct properly and efficiently the traffic and business of the line should be provided by the company, of which the Minister of Railways and Canals should be the judge.

By the second section of *The Railway Act*, 1888, clause lettered (*q*) it was provided that the expression "rail-

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

way" should include all sections, depots, wharves, property, and works connected therewith; and by an amendment to that clause made by the first section of the Act 55-56 Victoria, chapter 27, the definition was enlarged to cover in express terms the company's rolling stock and equipment; and these words also occur in the definition of the expression "railway" as given in *The Railway Act of* 1903.

As pointed out in the plaintiff company's statement of claim section one of the Subsidy Act of 190: defining the expression "cost" is identical with section one of the Subsidy Act of 1901, but in prior Subsidy Acts (See for example 63-64 Vict. c. 8, s 1, and 62-63 Vict. c. 7, s. 1) there was an express provision that such "cost" should not include "the cost of equipping the railway." It is upon the omission of this provision from the Subsidy Act of 1903, that the plaintiff company, in the main, bases its claim to the further subsidy mentioned in the Act. If the cost of rolling stock and other equipment for the branch line of railway mentioned is included as part of the cost of construction of the line, such cost will exceed on the average $15,000 per mile; but if the cost of these things is not included such cost will not on the average exceed that amount. The company's contention is that in ascertaining the cost of the line of railway for the purpose of computing the amount of subsidy payable to it the cost of the necessary rolling stock and other equipment should be taken into account. In making his report in the present matter the Chief Engineer of Railways and Canals has not done that. His report and the recommendation of the Minister in respect of the subsidy was dealt with by an order in council of the 17th day of February, 1905, whereby authority was given for the payment to the company of a balance of $56,576. This sum, with previous payments, amounted to $435,200, or an amount which is equal to $3,200 per mile for the

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

136 miles mentioned in the Subsidy Act. In estimating the amount payable to the plaintiff company in respect of the subsidy in question the cost of "sufficient rolling "stock necessary to accommodate and conduct properly "and efficiently the traffic and business of the line" which the company agreed to provide has not been taken into account, and the question submitted in the case stated is, as has been seen, whether or not such cost should have been taken into account in computing the subsidy payable to the company.

Now the court has, I think, nothing to do with the question as to whether or not the Governor in Council in determining the amount of subsidy payable to the company might under the provisions of the Subsidy Act of 1903, have taken into account the cost of necessary rolling stock if he had seen fit so to do. That has not been done, and unless there were a binding obligation on His Excellency in Council to take that matter into account the plaintiff company would have no legal claim and would not be entitled to relief in this proceeding.

And first it will be seen that the Governor in Council was not bound by the statute to grant the subsidy mentioned The Act gave authority for granting it, but did not in that respect go further. It provided also that the Governor in Council should determine what the actual, necessary and reasonable cost of the line was. And then when we come to the agreement of the 14th day of January, 1904, to which reference has been made, the obligation that was entered into on behalf of the Crown was not to pay the subsidy provided by the Subsidy Act, but to pay so much of such subsidy as the Governor in Council having regard to the cost of the work performed should consider the company to be entitled to in pursuance of the Act. That leaves the question as the Subsidy Act leaves it, for the decision of the Governor in Council. An order in council has been

1906

THE CANADIAN PACIFIC RWAY. CO. v. THE KING.

Reasons for Judgment.

passed dealing with the matter. The company has been paid so much of the subsidy in question as the Governor in Council having regard to the cost of the work performed considered it to be entitled to in pursuance of the Subsidy Act. And that is all that the Crown became bound to pay. The question, if it is to be opened up and reconsidered is, it seems to me, one for the consideration of the Governor in Council, and I do not think that under the facts of this case his decision of the matter is open to review in this court. There is no relief to which as a matter of law the plaintiff company is entitled, and there is, it seems to me, no ground on which any judgment could be entered in its favour.

The judgment will be entered for the defendant, but there will be no costs to either party.

*Judgment accordingly.**

Solicitor for the plaintiff: *J. Travers Lewis.*

Solicitor for the defendant: *E. L. Newcombe.*

*Affirmed on appeal, see 38 S. C. R. 137.

(ON APPEAL FROM BRITISH COLUMBIA ADMIRALTY DISTRICT.)

Between

BOW McLACHLAN & COMPANY, LIMITED (PLAINTIFFS) ..... } APPELLANTS; 1906 Sept. 19.

AND

THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED (DEFENDANTS) ..... } RESPONDENTS.

Shipping — Appeal — Interlocutory order — Different motion on appeal — Re-hearing.

Where a motion made on appeal was a different one from that made to the court below, and the matter was one in which relief could still be given in the court below, the court on appeal refused to entertain the motion although in such cases the appeal is by way of re-hearing.

APPEAL from an order of the Deputy Local Judge of the British Columbia Admiralty District refusing an interlocutory motion to strike out portion of the defence to an action *in rem*.

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

September 11th, 1906.

The appeal came on for argument at Ottawa.

R. Cassidy, K.C., for the appellants, cited *Annual Practice* (1); English Order 25, r. 4; Order 19, r. 4; *Metropolitan Bank* v. *Pooley* (2); *Reichel* v. *Magrath* (4).

W. D. Hogg, K.C., for the respondents, contended that steps had been taken since the filing of the defence which made this application to strike out too late. A

(1) [1906] p. 306. (2) 10 App. Cas. 210.
(3) 14 App. Cas. 665.

1906

BOW McLACHLAN & Co. v. THE UNION STEAMSHIP Co. OF BRITISH COLUMBIA.

Reasons for Judgment.

commission to take evidence had been issued among other things. (Cited English Order 70).

Mr. *Cassidy*, in reply, cited *Thorpe* v. *Holdsworth* (1); *Tildesley* v. *Harper* (2).

THE JUDGE OF THE EXCHEQUER COURT now (September 19th, 1906) delivered judgment.

This is an appeal by the plaintiffs against an order made on the 22nd day of August last in a proceeding in the British Columbia Admiralty District whereby a motion to strike out certain parts of the statement in defence was dismissed with costs.

The action is brought to enforce a mortgage on the said ship. The defendants allege, among other things, that this mortgage was given as an "interim security," and that a subsequent agreement which is set out in full was entered into. The plaintiffs say that this subsequent agreement shows that the mortgage is subsisting and in force, and that it is inconsistent with the agreement and embarrasing to the plaintiffs for the defendants to allege that the mortgage was given "for interim security," and it is sought to have these words struck out. The learned judge who heard the motion refused to strike them out, and I think he was right. It does not follow that because the mortgage was given as an interim security that it is not now subsisting and in force; and an allegation that it was given as an interim security is not in itself an allegation that it is not now in force. Whether it is or not depends upon the subsequent agreement. But there is nothing inconsistent or embarrassing, so far as I can see in the allegation that the first of the two instruments mentioned was given "for interim security." By the terms of the mortgage mentioned the sum of twenty-three thousand two hundred and forty-eight pounds sterling thereby secured

(1) 3 Ch. D. 637. (2) 7 Ch. D. 403.

became payable on the ninth day of May, 1905. The agreement referred to provided for the repayment of that sum with interest by instalments, that is to say, an instalment of five thousand two hundred and forty-eight pounds was to be paid on or before the ninth day of February, 1906, and other instalments at later periods. The defendants thereby also agreed to give additional security by way of mortgage to keep the ship insured to the amount due from time to time and to hand over and endorse the policies to the plaintiff company. And then it was among other things provided that in the event of the bankruptcy or declared insolvency of the defendants, or of their going into liquidation, or of their failure to pay any of the instalments, or the half-yearly balance of interest when due, or of their failing to carry out any of the obligations undertaken by them under the agreement the plaintiff company should be entitled to enforce the said mortgages or any of them. The agreement is set out in the fourth paragraph of the statement of defence, which paragraph concludes with these words:—

"That the said owners have given to the plaintiffs "the charge or security referred to in the second para- "graph of the said agreement and have paid or tendered "to the plaintiffs all sums due to the plaintiffs under "the said agreement and mortgage for principal and "interest."

The plaintiffs also moved to strike out or amend this allegation as being framed to prejudice, embarrass, and delay the fair trial of the action. That part of the motion was also dismissed by the learned judge who heard it. It does not appear that any reasons were given for dismissing the motion, and I am not aware on what grounds his decision was rested. The objection now taken to the clause cited is that it does not, with what precedes it, disclose a sufficient answer to the statement of claim, that it alleges that the defendants carried

1906

BOW McLACHLAN & CO. v. THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.

Reasons for Judgment.

out two of a number of obligations undertaken by them by virtue of the agreement set up; but that it does not allege that they have carried out all of such obligations, or that none of the contingencies have arisen under which the plaintiffs would become entitled to enforce the mortgages mentioned in the agreement; in short that all that is alleged in the fourth paragraph of the statement of defence might be true and yet the plaintiffs might have a right to enforce the mortgage sued on. I think that is so. In such a case the plaintiffs might raise the question of the sufficiency of the pleading as a point of law, or they might move to strike it out (1). In this case neither course was followed. The motion made was directed to particular words in the pleading, and not to the pleading as a whole. And upon the motion as made the order appealed from was I think a proper order for the learned judge to make. To strike out of the pleading the words cited would not have made matters better but worse. And it was not these words but the pleading as a whole that required amendment. The motion should I think have been made in another form, or at least the learned judge should have been asked to allow it to be amended and the matter presented to him in the way it has been presented here. Nothing of that kind appears to have been done.

There is another objection to the fourth paragraph of the statement of defence, namely, that it is not clear what mortgage is referred to in the concluding words of the paragraph which have been cited. The allegation is that the defendants have paid or tendered to the plaintiffs all sums due to the plaintiffs "under the said agreement "and mortgage, etc." But in the agreement set out in the pleading there is a reference to "the said mortgages" and the plaintiffs say that they are embarrassed as they

(1) Admiralty Rules, No. 66; Williams & Bruce Ad. Prac. 3rd ed. pp. 355, 357.

do not know to which mortgage the defendants allude in the words "under the said agreement and mortgage." Mr. Hogg, for the defendants, argued that it was clear that these have reference to the mortgage sued upon, and while perhaps it is not as clear as it ought to be I agree that that is the fair construction to be put upon the pleading.

On the whole I am of opinion to dismiss the appeal. It is argued that instead of doing that I should, as the appeal is a re-hearing, permit the plaintiffs to make here an application different from that made in the court below, and that I should give them upon terms such relief as I might have done if the motion had come before me in the first instance. But I do not think that would be convenient or tend to the orderly administration of justice. There is no relief to which the plaintiffs are entitled that may not be obtained in the court from which this appeal comes. The question of the sufficiency of the pleading in question may, at or before the hearing, be raised there as a question of law, and disposed of as conveniently as upon a motion to strike it out.

The appeal is dismissed and with costs.

Judgment accordingly.

Solicitor for appellants : *R. Cassidy.*

Solicitor for respondents : *Davis, Marshall & McNeill.*

IN THE MATTER of the Petition of Right of

1906
June 30.

THE REV. DONALD R. McDONALD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Patent for invention—Crown's right to use—Compensation—Condition precedent to right of action.

1. Apart from statute the Crown has power, if it sees fit to do so, to use a patented invention without the assent of the patentee and without making any compensation to him therefor.
2. By the 44th section of *The Patent Act* the Government of Canada may at any time use the patented invention, paying to the patentee such sum as the Commissioner of Patents reports to be a reasonable compensation therefor.

Held, that a report by the Commissioner is a condition precedent to any right of action for such compensation.

DEMURRER to a petition of right seeking compensation against the Crown for the alleged use of a patented invention.

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

February 5th, 1906.

The demurrer was now argued.

F. R. Latchford, K.C., in support of the demurrer, argued that under the provisions of sec. 44 of *The Patent Act*, the patentee has a clear right to be compensated when the Crown undertakes to use his patent. The Canadian law is different from the English law in respect of the patentee's right to compensation in such a case. *Feather* v. *The Queen* (1), and *Dixon* v. *London Small Arms Co.* (2), do not apply to cases arising under section 44 of our Act. The patentee under the Canadian Act

(1) (1865) 6 B. & S. 257. (2) (1876) 1 App. Cas. 632.

1906

McDONALD v. THE KING.

Reasons for Judgment.

has an exclusive right to make and license the use of his invention. The English patent is not given as a matter of right. The form of the patent in England shows the right to be conditional. The Crown here is obliged to make compensation, and the suppliant has a right to come to the court and ask for the compensation to be determined.

E. L. Newcombe, K.C., contra, contended that the two English cases cited by the suppliant applied. The cause of action is a statutory one, and the remedy depends wholly upon the provisions of section 44. That section makes it obligatory upon the suppliant to show that the Commissioner has fixed the amount of compensation. The suppliant must first go to the Commissioner and have him determine the amount of the compensation. The court cannot supply what the Commissioner has omitted to do. (Citing *Elliott* v. *Royal Exchange Assurance Co.* (1).

Mr. *Latchford* replied, citing *Royal Trust Co.* v. *Mulligan* (2).

THE JUDGE OF THE EXCHEQUER COURT now (June 30th, 1906) delivered judgment.

To the suppliant's petition, by which he claims compensation from the Government of Canada for the use of a patented invention, the Crown sets up, among others, the following defence :—

"7. It is provided by section 44 of Ch. 61 of the "Revised Statutes of Canada that the Government of "Canada may use any patented invention, paying to the "patentee such sum as the Commissioner reports to be a "reasonable compensation for the use thereof.

"The Commissioner has not reported that the sum "claimed by the suppliant, or any sum, is due to him as

(1) (1867) L. R. 2 Ex. 237. (2) (1905) 6 Ont. W. R. 476.

1906

McDONALD v. THE KING.

Reasons for Judgment

"a reasonable compensation for the use of his invention "or at all."

To this paragraph of the statement of defence the suppliant demurs upon the following grounds :—

"(*a*) That the ascertainment by the Commissioner of "Patents of the amount properly payable to the sup- "pliant is not a condition precedent to the bringing of "this action by the suppliant as is in effect claimed in "the said paragraph.

"(*b*) That the said seventh paragraph of the state- "ment of defence herein does not set forth any ground "of defence to this action."

Subject to the provisions of *The Patent Act*, Canadian letters-patent give to the patentee and his legal representatives for the prescribed term the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used the invention for which they are granted. By the forty-fourth section of the Act it is provided, as set out in the statement of defence, that the Government of Canada may at any time use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof ; and if the decision of the Commissioner as to what is in any such case a reasonable compensation is a condition precedent to the maintenance of a petition of right, then the defence set up by the Crown is a good defence, and there should be judgment for the respondent, on the suppliant's demurrer.

Apart from statute, the Crown has the power, if it sees fit so to do, to use a patented invention without the assent of the patentee and without making any compensation to him. The right granted to the patentee is not exclusive of the Crown, but of its subjects and others. That is the law as settled in England, and I think the same rule would apply in Canada. By the twenty-seventh section of *The Patents, Designs and Trade*

1906

McDONALD v. THE KING.

Reasons for Judgment.

Marks Act, 1883, (1) it was provided that a patent should have to all intents the like effect as against Her Majesty the Queen, her heirs and successors, as it had against a subject; but that the officers or authorities administering any department of the service of the Crown might by themselves, their agents, contractors or others, use the invention for the services of the Crown on terms to be before or after the use thereof agreed on with the approval of the Treasury, between those officers or authorities and the patentee, or in default of such agreement, on such terms as might be settled by the Treasury after hearing all the parties interested. In *Frost on Patents* (2), the opinion is expressed that the settlement of the terms on which such officers or authorities may use a patent is not a condition precedent to bringing an action, and that the proper procedure at the present time in such cases in England is by a petition of right. At the conclusion of the paragraph in which the opinion referred to is expressed two cases are cited *Feather* v. *The Queen* (3) and *Walker* v. *Congreve* (4), but neither are, as I understand it, cited in support of the view that the settlement of the terms referred to is not a condition precedent to the right to maintain a petition of right, and they certainly afford no support for that view. And I do not see any good answer to the contention that where in such a case a patentee cannot recover against the Crown for the use of his invention by the Crown or its officer, except under the provisions of the statute, that then he must recover in accordance with the provisions of the statute. At least that seems to me to be the proper construction to put upon the provision of the Canadian Act cited. But for a provision of that kind a patentee would not in Canada be entitled as a matter of right to any compensation where the Government of Canada made

(1) 46 & 47 Vict. (Imp.) c. 57.
(2) 2nd ed. p. 378.
(3) (1865) 6 B. & S. 257.
(4) (1816) 1 Carp. Pat. Cas. 356.

1906

McDONALD v. THE KING.

Reasons for Judgment.

use of his invention. By reason of that provision he becomes entitled in such a case to such compensation as the Commissioner reports to be reasonable. His right to compensation depends in law upon the decision of the Commissioner, and without such a decision and report a petition of right will not lie.

There will be judgment for the respondent upon the suppliant's demurrer to the seventh paragraph of the statement of defence.

Demurrer overruled.

Solicitors for suppliant: *Latchford, McDougall & Daly.*

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

IN THE MATTER of the Petition of Right of

GUNN & COMPANY, LIMITED.....SUPPLIANTS; 1906 Oct. 1.

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Intercolonial railway—Freight rates—Regular and special rate—Agent's mistake—Estoppel.

A freight agent on the Intercolonial Railway, without authority therefor and by error and mistake, quoted to a shipper a special rate for hay between a certain point on another railway and one on the Intercolonial, the rate being lower than the regular tariff rate between the two places. The shipper accepted the special rate and shipped a considerable quantity of hay. Being compelled to pay freight thereon at the regular rate he filed a petition of right to recover the difference between the amount paid and that due under the special rate.

Held, that as the claim was based upon the negligence or laches of an officer or servant of the Crown, for which there was no statutory remedy, the petition must be dismissed.

PETITION OF RIGHT for the recovery of a sum of money alleged to be due to the suppliants from the Crown, representing an excess of money paid for the transportation of certain freight over the Intercolonial Railway.

The facts are stated in the reasons for judgment.

May 22nd, 1906.

The case came on for trial at Halifax.

H. A. Lovett for the suppliants;

H. Mellish, K.C., for the respondent.

Mr. *Lovett* contended that the Crown was responsible for the error or mistake of its officers in a matter of contract. The suppliants acted in good faith, shipped the hay under the special rate, and ought not to be made to suffer the loss arising by reason of the mistake. (He cited *ex parte Dixon* (1).

(1) L. R. 4 Ch. D. 133.

1906

GUNN & CO. v. THE KING.

Reasons for Judgment.

Mr. *Mellish* contended that the freight agent had no authority to make any special rate, nor did he attempt to do so. He merely gave information to the suppliants as to a rate, and his mistake was not an official act. There is no action against the Crown for damages for the mistake or misrepresentation of its agents. Such an action would not lie under similar circumstances against a private corporation. He cites *Lees* v. *The Ottawa and New York Railway Company* (1).

THE JUDGE OF THE EXCHEQUER COURT now (October 1st 1906) delivered judgment.

The petition is brought to recover the sum of nine hundred and sixty four dollars and five cents for alleged overcharges on the freight of a number of carloads of hay shipped from St. Simon, in the County of Bagot and Province of Quebec; and from St. Hyacinthe and St. Eugène, in that Province, to Sydney and to North Sydney, in the Province of Nova Scotia.

The claim arises in this way. The suppliants before shipping the hay mentioned made enquiries at the office of the Division Freight Agent of the Intercolonial Railway at Halifax as to what the rates of freight would be, and were given a rate of twenty cents per hundred pounds from St. Hyacinthe to Sydney and a rate of eighteen cents per hundred pounds from St. Simon Station (Bagot) to Sydney. The first of these rates applied also to shipment from St. Eugène, and both to shipments to North Sydney as well as to Sydney. Mr. Story, the Division Freight Agent of the Intercolonial Railway at Halifax had authority and it was his duty to quote freight rates over the Intercolonial, but he had no authority to make a special rate or to quote a rate that had not been authorized. In all the cases mentioned the rate quoted was less than the regular tariff

(1) 31 Ont. R. 567.

1906

GUNN & CO. v. THE KING.

Reasons for Judgment.

rates for hay between the respective places named, and it seems to have been the practice where the special rate was duly authorized to collect the regular tariff rate and then to make a retund to the shipper or person to whom the special rate was given. For instance, in this case the tariff rate on hay from St. Hyacinthe and St. Eugène to Sydney and to North Sydney appears to have been twenty three cents per hundred pounds, or in any event freight at that rate was collected from the consignees on hay shipped by or on behalf of the suppliants between these points. But there was at the time a duly authorized special rate of twenty cents per hundred pounds applicable to these shipments, and Mr. Story had authority to quote this rate. To this extent the respondent admits the validity of the suppliants' claim and offers to repay the amounts collected in excess of the special rate quoted by Mr. Story. That disposes of one hundred and thirty seven dollars and twenty six cents, parcel of the amount claimed, leaving the sum of eight hundred and twenty six dollars and seventy nine cents in controversy. The latter amount represents the alleged overcharges on hay shipped by or on behalf of the suppliants from St. Simon, Bagot County, a station on the Canadian Pacific Railway, to Sydney and to North Sydney on the Intercolonial Railway. The regular tariff rate on hay between these places was at the time twenty three cents per hundred pounds. The rate quoted by a clerk in Mr. Story's office, and confirmed by a note or letter signed by Mr. Story, was eighteen cents per hundred pounds. Mr. Story, however, had no authority to quote that rate and it was given through a mistake made by his clerk in not distinguishing between St. Simon in Rimouski County, a station on the Intercolonial Railway, and St. Simon, Bagot County, a station on the Canadian Pacific Railway. The rate of eighteen cents per hundred pounds quoted was the regular tariff rate at the time from St.

1906

GUNN & CO v. THE KING.

Reasons for Judgment.

Simon, Rimouski, to Sydney, and was given in error and by mistake as the rate from St. Simon, Bagot County. There was no intention of quoting a special rate from the latter place, and as stated Mr. Story had no authority to give a special rate therefrom.

It appears from the correspondence in evidence that the Minister of Railways and Canals at one time during the negotiations that preceded the filing of the petition was disposed to give effect to the rate erroneously quoted by his officer in case the suppliants supplied him with certain evidence that he deemed material from his standpoint. But nothing came of these negotiations, and at present both parties are standing on their strict legal rights, and the question to be decided is whether the Crown is answerable in such a case for the mistake made by its officer, and it seems clear that this question must be answered in the negative. It has been frequently held in this court that the Crown is not bound by estoppels; and that it is not responsible for the negligence or laches of its servants, except in cases where it has been expressly made liable by statute.

This principle is stated by Ritchie, C. J. in the case of *The Queen* v. *The Bank of Nova Scotia* (1), where, citing a passage which will be found in *Chitty's Prerogatives* of the Crown, page, 379, he is reported as follows:

" It is unquestionable t at no laches can be imputed " to the Crown, the interests of the Crown are certain " and permanent, and, it is said 'it must not suffer by the " 'negligence of its servants or by their compacts or com- " 'binations with the opposite party.' There is no pre- " tence for saying that there ever was any waiver of the " prerogative rights of the Crown by the Deputy-Receiver " General, nor that he had any power or authority to " waive them, and if the officers of the Crown, in receiv- " ing the dividends, should have insisted on payment in

(1) 11 Can. S. C. R. p. 10.

1906

GUNN & CO. v. THE KING.

Reasons for Judgment.

"full, and did not do so, this could not enure to the "detriment of the Crown. As the Crown cannot be "prejudiced by the misconduct and negligence of any of "its officers, so neither can an officer give consent that "shall prejudice the rights of the Crown. He could not "give an express consent that could prejudice the rights "of the Crown, still less, impliedly waive the Crown's "rights."

See also *Rex* v. *The Bank of Montreal* (1).

There will be judgment for the suppliants for one hundred and thirty-seven dollars and twenty-six cents, and costs incurred prior to May 10th, 1906, when the offer by the respondent to pay that amount was made.

The respondent will have the costs subsequent to the date last mentioned.

Judgment accordingly.

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

Solicitor for the respondent: *R. T. MacIlreith.*

(1) 10 Ont. L. R. 117; and on appeal 11 Ont. L. R. 595.

(ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY DISTRICT.)

Between

1906
Sept. 19.

THE UNION STEAMSHIP COMPANY OF BRITISH COLUMBIA, LIMITED (DEFENDANTS)..... } APPELLANTS;

AND

BOW McLACHLAN AND COMPANY, LIMITED (PLAINTIFFS) ... } RESPONDENTS.

THE SHIP *CAMOSUN.*

Shipping—Counter-claim—Appeal from order striking out—Jurisdiction.

The jurisdiction which the Exchequer Court of Canada may exercise under *The Colonial Courts of Admiralty Act*, 1890, and *The Admiralty Act*, 1891, is the admiralty jurisdiction and not the general or common law jurisdiction of the High Court in England. *The Cheapside* [1904] P. 339, referred to.

2. In an action *in rem* for a claim arising upon a mortgage of a ship, the court has no jurisdiction to entertain a counter-claim for breach of contract to build the ship in accordance with certain specifications.

APPEAL from an order of the Deputy Local Judge of the British Columbia Admiralty District dismissing a counter-claim to an action in *rem.*

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

September 11th, 1906.

The appeal came on for argument at Ottawa.

W. D. Hogg, K.C., for the appellants, contended that the trial judge erred in granting an order to strike out the counter-claim of the appellants. There is jurisdiction in the court to entertain such a counter-claim. (He cited Admiralty Rule 63). The learned trial judge

1906

THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA. v. BOW MCLACHLAN & CO.

Argument of Counsel.

dismissed the counter-claim on the ground that he had no jurisdiction to hear it, not under the second clause of the rule because it was inconvenient to dispose of it in the action brought by the respondents. The Exchequer Court on its Admiralty side has all the jurisdiction of the High Court in England in Admiralty matters. (*The Colonial Courts of Admiralty Act*, 1890, sec. 2, sub-sec. 2; *The Admiralty Act*, 1891, (Dom.) secs. 3 and 4). There is no doubt that in such a case in England the court has jurisdiction. (*The Cheapside* (1).

R. Cassidy, K.C., for the respondents, argued that the Exchequer Court on its Admiralty side could not entertain an action for damages for breach of contract to construct a ship, and that was the subject of the counter-claim. Neither here nor in England would the Admiralty courts assume to entertain jurisdiction in such a case. But the Canadian court has really a narrower jurisdiction than the High Court in England in the exercise of its Admiralty jurisdiction. The case of the *Cheapside* (*supra*) cited by the counsel for appellants is an authority for this. This arises out of the different constitution of the two courts, the English court exercising the Admiralty jurisdiction in addition to its common law jurisdiction, while the Admiralty side of the Exchequer Court of Canada is distinct from the Exchequer jurisdiction. The rule cited by my learned friend is for carrying out the jurisdiction of the court in a proper case, not for supplementing it. (The *James Westoll* (2).

Mr. *Hogg* replied, citing *Williams and Bruce's Admiralty Practice* (3).

THE JUDGE OF THE EXCHEQUER COURT now (September 19th) delivered Judgment.

(1) [1904] P. at p. 343.
(2) [1905] P. 47.
(3) 3rd ed. p. 351.

1906

THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA. v. BOW MCLACHLAN & CO.

Reasons for Judgment.

This is an appeal on behalf of the Union Steamship Company of British Columbia, Limited, the owners of the above named ship the *Camosun* against an order made on the 7th day of July last in a proceeding in the British Columbia Admiralty District, whereby it was directed that the defendants' counter-claim should be struck out.

The plaintiffs having brought an action to enforce a mortgage upon the said ship the defendants set up a counter-claim for damages for an alleged breach of an agreement on the part of the plaintiffs to build the ship in accordance with the terms of a certain contract, letters, plans and specifications referred to. A motion was made to strike out this counter-claim on the grounds that the court had no jurisdiction to entertain it, and that it could not in any event be conveniently disposed of in the present action. Mr. Justice Morrison, who heard the motion, disposed of it on the first of the two grounds mentioned. He was, for reasons stated by him, of the opinion that the court had no jurisdiction in respect of the counter-claim, and he ordered it to be struck out. I agree with the views expressed by him and think that his order was right. The question turns, it seems to me upon the proper construction of the second clause of the second section of *The Colonial Courts of Admiralty Act*, 1890. The Exchequer Court of Canada is a Colonial Court of Admiralty and by virtue of the Act mentioned and of the *Admiralty Act*, 1891, its jurisdiction within Canada is over the like places, persons, matters and things as the Admiralty jurisdiction of the High Court in England. It is not contended that the Admiralty jurisdiction of the High Court in England includes jurisdiction to hear a claim for the breach of a contract to build a ship in accordance with certain specifications, but it is argued that because a judge of the High Court in England has otherwise authority to hear

1906

THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA. v. BOW MCLACHLAN & CO.

Reasons for Judgment.

and decide such a claim, and might, if he saw fit, dispose of it as a counter-claim in an action in Admiralty (1), this court has a like jurisdiction and authority. That, it seems to me, is not the effect of the statutes referred to. The jurisdiction which this court may exercise under the statutes mentioned is the Admiralty jurisdiction and not the general or common law jurisdiction of the High Court in England.

The appeal will be dismissed with costs to the respondents.

Judgment accordingly.

Solicitors for appellants: *Davis, Marshall & McNeill.*

Solicitor for respondent: *R. Cassidy.*

(1) The *Cheapside*, [1904] P. 339.

THE QUEBEC ADMIRALTY DISTRICT (MONTREAL).

1906
Dec. 1.

THE HARBOUR COMMISSIONERS OF MONTREAL ..... } PLAINTIFF;

v.

THE S.S. "*UNIVERSE*," THE SS "*BAY STATE*," THE BARGE "*BERKSHIRE*," THE BARGE "*BATH*" ..... } DEFENDANTS.

THE BOUTELL STEEL BARGE COMPANY ..... } PLAINTIFF;

v.

THE OWNERS OF THE S.S. "*UNIVERSE*" ..... } DEFENDANTS.

THE UNIVERSE JOINT STOCK COMPANY (LIMITED) ..... } PLAINTIFFS.

v.

THE OWNERS THE STEAMSHIP "*BAY STATE*," THE BARGE "*BERKSHIRE*," AND THE BARGE "*BATH*" ..... } DEFENDANTS.

Shipping—Collision—Tug and tow—Lookout—Absence of proper signals.

Held, under the circumstances of this case that the *Bay State* and tow were in fault upon the following grounds: (1st) Because the barge *Bath* had no pilot, and no proper look-out was kept on the *Bay State* or her tow; (2ndly) Those in charge of the *Bay State* and her tow neglected to take the precautions required under the special circumstances of the case, the tow ropes being too long, and no attempt having been made to shorten them. The *Bay State* had no look-out, and she made no signals to the tow

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

or to the SS. *Universe* which she appears to have sighted before the *Universe* saw her; (3rdly) There was no additional tug to control the tow, more particularly the last barge, the *Bath*; (4thly) Neither the steam barge *Bay State* nor the barges in tow exhibited proper regulation lights, though they had got under way and the collision occurred before sunrise; (5thly) The steam barge *Bay State* and tow should not have taken the St. Mary's current, as they did, with the tow in such condition as it was proved to be, more particularly in view of the position of the dredges of the Harbour Commissioners, and the place where they were moored, of which the pilots on board the *Bay State* and *Berkshire* were well aware; (6thly) After the collision occurred the steam barge *Bay State* and her tow continued down to Quebec without stopping to enquire what damage had been done.

Held, further, that the screw steamer *Universe* and the dredges of the Harbour Commissioners were not at fault, and that the Boutell Steel Barge Company, the owners of the steam barge *Bay State*, and of the barges *Berkshire* and *Bath*, and the said steam barges *Bay State* and *Bath* are liable for all the damages resulting from the collision.

ACTIONS for damages arising from a collision.

May 21st, 22nd, 23rd, 25th, and 28th, 1906.

The cases were now heard.

A. Geoffrion, K.C., and *V. Cusson* for the Harbour Commissioners;

C. A. Pentland, K.C., for S.S. *Bay State*, the barge *Berkshire* and the barge *Bath* and the Boutell Steel Barge Company;

F. E. Meredith, K.C., and *A. C. Holden*, for the Universe Joint Stock Company.

DUNLOP, D. L. J., now (December 1st, 1906) delivered judgment.

The question involved in these cases, which have been consolidated, is to fix the responsibility for heavy damages caused by the collision between the S.S. *Universe* and the barge *Bath*, which took place in the harbour of Montreal on the 29th of September, 1905, before sunrise. As a result of this collision the steamship *Universe*, and the barge *Bath* were seriously damaged,

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

and two dredges, the property of the Harbour Commissioners of Montreal, were much damaged, one having been sunk and the other having been injured to a large amount.

Damages to a large amount resulting from the said collision are claimed :

(1st) By the Harbour Commissioners of Montreal, who have taken four actions *in rem*, to wit case No. 157 against the steamship *Universe*, case No. 158 against the steam barge *Bay State*, case No. 159 against the barge *Berkshire* and case No. 160 against the barge *Bath* ;

(2ndly) An action *in personam* in warranty case No. 165 taken by The Boutell Steel Barge Company against the owners of the steamship *Universe* ;

(3rdly) Another action *in personam* in warranty under No. 166 taken by The Universe Joint Stock Company against the owners of the steamship *Bay State*, the barge *Berkshire* and the barge *Bath*.

It may be stated that the barges *Berkshire* and *Bath* were in tow of the steam barge *Bay State* when the collision took place.

The Harbour Commissioners of Montreal, in their actions, allege in effect, that on the 29th of September, 1905, between 5 and 6 in the morning, two dredges belonging to plaintiffs, numbers 2 and 3, were at anchor near each other in the harbour of Montreal, to the north of the main channel, about opposite the division line between sections 25 and 26 of the city wharves, at a distance of between 200 and 250 feet from the edge of such wharves ; that they had been there for some days previously, and had been at work for the improvement of the harbour of Montreal, under the control of plaintiffs, and were about, on the date of the collision, to resume the same work for which they were making the necessary preparations ; that the dredges were at the time each in

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

charge of one watchman, and were carrying the regulation anchor lights; that it was daylight at the time; that the weather was clear, and that the current at the place and in the vicinity had a speed varying between four and six miles an hour.

That at the time in question the steamer *Universe* was seen proceeding up stream, and the steam barge *Bay State*, towing the barges *Berkshire* and *Bath*, all three in line, were proceeding down stream; that the *Universe* gave one blast of her whistle, to which the *Bay State* answered by one blast. Shortly afterwards, a collision took place between the *Universe* and the *Bath*, and the *Universe* as a result of this collision, and of its own improper manoeuvring subsequent thereto, collided with the dredges, striking one, and damaging the other considerably; that the said collision, and the damage and losses to plaintiff consequent thereon, were occasioned by the negligent and improper navigation of those on board the *Universe*.

That the faults attributed to the *Universe* are the following: She had no proper lookout; she violated rule 29 of the regulations preventing collisions, and rule 81 of the regulations for the Port of Montreal; she should have reversed, stopped or slackened her speed sooner; she should have recognized the right of way of the down-coming ships; she should have signalled and ported sooner, and she should have ported more than she did; she improperly manoeuvred after the collision with the barge *Bath*; she did not give any assistance to the plaintiffs' dredges.

The plaintiffs claim:

1. A declaration that they are entitled to the damage proceeded for;

2. The condemnation of the defendant and its bail, in such damage and in costs;

3. To have an account taken of such damage with the assistance of merchants;

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment

4. Such further and other relief as the nature of the case may require.

The steamer *Universe* pleads to action No. 157 taken by the Harbour Commissioners against her in effect, as follows :

They admit that before sunrise on the 29th September, 1905, two dredges were near each other in the ship channel on the north side of St. Mary's current about opposite the end of Papineau avenue in the City of Montreal, being held in position by means of their spuds, and that the captain and crew of the said dredges were absent, and that there was nobody but a watchman on board.

That the weather was cloudy at the time, with very little, if any, wind.

That the current ran at about six knots per hour in a north-westerly direction ; that the steamship *Universe* was coming up on her starboard side of the channel in the St. Lawrence river, at a speed of about eight and a half knots per hour when she first saw the two dredges in question, which were in the St. Mary's current on the north side ; that when the *Universe* got about opposite the dredges she first saw the steam barge *Bay State*. The *Universe* was on her starboard side of the mid-channel, but allowing a safe distance between her and the dredges. She was carrying the regulation mast-head light, and green and red side-lights. As soon as the steam barge *Bay State* was seen, a one blast signal was given from the *Universe* with her whistle, and her helm ported. This signal was immediately answered by a consenting signal of one blast from the steam barge *Bay State*, which also ported, and bore to her starboard, disclosing first the barge *Berkshire*, which followed the *Bay State* to starboard at the same time moving somewhat to the north, and then disclosing the barge *Bath*, which moved or drifted quickly towards the north and crossed the course of the *Universe*. From that time on,

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

the *Universe* kept her helm to port, and bore to her starboard as much as was possible under the circumstances, in view of the position of the dredges in the channel and the neighbourhood of the wharves and shoals, as well as the speed of the currents. Immediately after the barge *Bath* struck the *Universe* the ship let go both anchors, but owing to the strength of the current and the additional sheer to starboard that had been given to the *Universe* by the barge *Bath* coming into collision with her, the *Universe* was driven against the wharf, and struck one of the dredges. The defendant admits that as a result of the said collision with the barge *Bath*, and as a result of the improper position of the said dredges in the ship channel at the place in question, the *Universe* collided with one of the dredges; but the defendant denies that the said collision was in any way due to any improper manoeuvring on the part of those in charge of the *Universe* at any time; and the defendant alleges that as soon as the steam barge *Bath* came into view for those on board the *Universe*, everything possible was done by the *Universe* to avoid a collision with the dredges, or with any of the barges, and that those in charge of the *Universe* did everything possible for the protection and assistance of the dredges, under the circumstances; that said steamship *Universe* had passed through the greater and the swifter part of that portion of the channel known as St. Mary's current when she approached and commenced to pass the dredges, and the steam barge *Bay State* came into view, and owing to the position of the dredges in the channel, the direction and force of the current, and the neighbourhood of the wharves and shoals, she could not go any slower, or bear any further to her starboard side than she did; that she had a good and sufficient lookout, and those in charge of her complied with all the requirements and regulations, and navigated and manoeuvred the *Universe* properly in every respect.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

That the dredges in question were improperly left in the channel near the head of St. Mary's current; that the dredges in question were improperly held in position by means of their spuds, and were not in charge of any competent person, and did not exhibit the proper lights and had no lookouts; that the said dredges had not a sufficient number of men on board or on watch, and were not provided with means of any kind to enable them to avoid a collision; that the said dredges failed to loose their anchor chains or to do anything to remove the spuds.

The steam barge *Bay State*, in case No. 158 taken by the Harbour Commissioners of Montreal against her, pleads in effect as follows:

That between 5.30 a m., and 6 a.m., on the 29th of September, 1905, the steam barge *Bay State* of which The Boutell Steel Barge Company are owners, of 1,245 gross tonnage, 1,200 horse-power, and manned by 20 hands, left Windmill Point in the harbour of Montreal, with the whaleback barges *Berkshire* and *Bath* in tow, bound to Newport News. The *Berkshire* was fastened to the *Bay State* by a hawser 400 feet long, and the *Bath* to the *Berkshire* by a hawser 300 feet long.

That on said date, about six in the morning, the *Bay State* was passing the eastern end of Victoria Pier; the weather was then fine, with very little wind; it was broad daylight. A four to six mile current was running down the river. A good lookout was being kept on board the *Bay State*, and the two barges were being navigated with great care. Those on board the *Bay State* saw a steamship which proved to be the Norwegian steamship *Universe*, coming up the river between three quarters of a mile and a mile off, ahead and a little off the starboard bow. Shortly after she came into sight, the *Universe* sounded one blast of her whistle, indicating to the *Bay State* that she was directing her course to starboard.

The *Bay State* immediately answered this signal by one blast of her whistle, and ported her helm to direct her course as dictated to her by the *Universe*, the two barges following her on that course as closely as was possible, which was directed to the south side of the river so as to cross the current at an angle. The *Universe* was seen to come up rapidly and pass the *Bay State* and *Berkshire*, port side to port side, but when opposite the *Bath*, she was observed by those on board of that vessel to be coming off towards her as if under a starboard helm, and continuing to do so, struck the *Bath* with the bluff of her port bow on her port quarter, doing great damage. The *Universe* then sheered off to starboard and ran foul of the plaintiffs' dredges which were improperly and carelessly anchored by spuds in the ship channel, without any watch on board to adopt the necessary steps to avoid a collision with a passing vessel.

That the said barge *Bay State* by its plea denies that their vessel caused or contributed to the collision in question, and they say that it was caused by the *Universe* and the plaintiffs' dredges, that the *Universe* improperly neglected to keep clear of the *Bath*, that she improperly attempted to pass the *Bay State* and her tows, when she could have stopped very easily below the dredges until the *Bay State* and her tow had passed. The *Universe* could also have avoided the said steamer and her tow, by passing up inside the dredges of the plaintiffs. The *Universe* was on the south side of the mid-channel when she should have been on the north side. That said collision was occasioned by the improper and careless navigation of the *Universe*, as well as by the plaintiffs' dredges, which were anchored in mid-channel by spuds, in consequence of which it was impossible to move or sheer them so as to avoid collision with passing vessels.

That the *Universe* should have stopped below the plaintiffs' dredges, and reversed if necessary instead of con-

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

tinuing to proceed up the river with undiminished speed from the time she had the *Bay State* and her tow in sight.

That the *Universe* broke the 81st regulation of the port of Montreal; that the collision was caused by some or all of the matters and things alleged in the defence of the *Bay State* to the present action, or otherwise by the default of the *Universe* or those on board of her, as well as by the dredges of the plaintiffs, as stated in this defence.

That the defence in case No. 159 wherein The Harbour Commissioners of Montreal are plaintiffs against the barge *Berkshire*, and in case No. 160 wherein the said Harbour Commissioners are plaintiffs and the barge *Bath* defendant, is virtually the same as the defence filed in case No. 158.

In case No. 165 wherein The Boutell Steel Barge Company is plaintiff against the owners of the steamship *Universe*, the plaintiffs by their statement of claim allege in effect as follows:

That on the morning of the accident in question between 5.30 a.m., and 6 a.m., the steamer *Bay State* left Windmill Point in the harbour of Montreal with the whaleback barges *Berkshire* and *Bath* in tow, and stating the tonnage and other particulars of the said steamship *Bay State*, and of the said barges, and that the barges were without motive power, and were of about 1,192 gross tonnage, each manned by eight men. The *Berkshire* was fastened to the *Bay State* by a hawser of about 400 feet and the *Bath* to the *Berkshire* by a hawser of about 300 feet, and that all three vessels were the property of the plaintiff.

That about 6 a.m., on the morning in question, the *Berkshire* with her tow was passing the eastern end of the Victoria Pier in the harbour of Montreal; the weather was fine with very little wind; it was broad daylight. The current was running down between four and six

knots an hour. A good lookout was being kept on the *Bay State* and on each one of the barges, and all were being navigated with great care and skill. That those on board the *Bay State* and barges saw a steamship which proved to be the *Universe* coming up the river, between three-quarters of a mile and a mile off. Shortly after she came in sight, she sounded one blast of her whistle indicating to the *Bay State* that she was directing her course to starboard. The *Bay State* immediately answered this signal by one blast of her whistle, and ported her helm to direct her course, as dictated to her by the *Universe*, the two barges following her on that course as closely as possible, which was directed to the south side of the river, so as to cross the current at an angle.

The *Universe* was seen to come up rapidly and passed the *Bay State* and *Berkshire* port side to port side, but when opposite the *Bath* was observed by those on board that vessel to be coming off towards her as if under a starboard helm, and continuing to do so, struck the *Bath* with the bluff of her port bow on her port quarter, doing her great damage.

That the *Universe* then sheered off to the starboard and ran foul of two dredges belonging to the Harbour Commissioners of Montreal, which were at the time anchored in the ship channel. The *Bay State* and her tow proceeded down the river.

That the said collision was caused by the fault, neglect and bad navigation of the *Universe* and those in charge of her. She neglected to keep a proper look-out; she did not keep to that side of the fairway of mid-channel lying on her starboard side, but was improperly on the other side of mid-channel or fairway, although she directed the course to the *Bay State* which this vessel was following with her tow, at the time of the collision. She did not slacken her speed or stop or reverse when

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

she saw that the *Bay State* had the barges in tow, and that it was impossible for the *Bay State* to do so, that she did not stop and reverse when risk of collision was imminent; that the *Universe* acted improperly in view of the currents of the river in not recognizing the *Bay State's* right of way under the circumstances, more particularly when she must have perceived that the *Bay State* had adopted the course which she had dictated by her one blast of the whistle, and was coming off under that course, to her starboard side of the channel. The *Universe* instead of following the course indicated by her signal, failed and neglected to do so, and failed and neglected to make way for the *Bay State* and her tow, as provided for by the 81st regulation of the port of Montreal, and thereby the *Universe* broke the said regulation.

That the plaintiffs, as the owners of the said steamer *Bay State* and barges *Berkshire* and *Bath* claim:

1st. The sum of $60,000 against the owners of the said steamship for damages occasioned by the said collision, and for warranty; to wit, $10,000 for damages to said barges, and the plaintiffs, and $50,000 by way of warranty in the event of the said steamship *Bay State* and barges *Berkshire* and *Bath*, or the plaintiffs, to wit, the owners of the said vessels and any of them, being held liable to the Harbour Commissioners of Montreal under the actions instituted in the present court against the said vessels in respect to the said collision;

2nd. And declare that they are entitled to damages proceeded for, and the condemnation of the defendants and their bail in such damages, with costs;

3rd. To have an account taken of such damage with the assistance of merchants;

4th. Such further and other relief as the nature of the case may require.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

That whereas the Universe Joint Stock Company, Limited, plaintiffs in the case No. 166 instituted by them against the owners of the steam barge *Bay State*, the barges *Berkshire* and *Bath*, by their statement of claim in this action in person and warranty practically allege the same faults against the defendants as alleged in their defence in case No. 165, and allege that the Harbour Commissioners of Montreal have instituted actions at law in connection with said collision against the present plaintiffs and defendants for damages alleged to have been caused to the dredges of the Harbour Commissioners, one of which had been struck by the *Universe* after the barge *Bath* had run into the *Universe;* that the action so taken against the *Universe* was taken by the Harbour Commissioners of Montreal for $50,000 for damages to the dredges, said suit bearing No 157, and that if the Harbour Commissioners' dredges, or either of them, suffered damage as the result of said collision, such damage was caused solely by reason of the fault, negligence and improper navigation of those on board the steam barge *Bay State* and her tow; and that if the said *Universe* or the present plaintiffs, its owners, be condemned to pay to the Harbour Commissioners of Montreal any amount of damages or costs in connection with the said action No. 157, the present plaintiffs are entitled to have and recover the same from the present defendants who are responsible in warranty therefor, and that the plaintiffs claim, first, a declaration that they are entitled to the damages proceeded for, including the warranty by defendants, covering any condemnation against plaintiffs in favour of the Harbour Commissioners of Montreal as aforesaid; (2nd) the condemnation of the defendants and their bail in such damages and in costs; (3rd) to have an account taken of such damages with the assistance of merchants; (4th) such further and other relief as the nature of the case might require.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

The defendants in this case plead in effect the same facts as they have pleaded in the other cases respecting said collision, and in effect allege, that no blame in respect of the collision was attributable to the barge *Bay State*, the barges *Bath* and *Berkshire* or any of them, for the reasons in their pleadings at length recited.

On the 17th March, 1906, the parties to the six pending cases respecting said collision agreed to and consented that the six actions should be tried at the same time and on the same evidence.

It is agreed and consented to by the parties to the present causes, that the evidence adduced at the investigation held by the Wreck Commissioner, Commander O. G. V. Spain, assisted by Captain Reid and Pilot Gauthier, as taken down and transcribed by official stenographers Alexandre Bélinge and J. Tierney, should be accepted by this court as the sworn evidence of the several witnesses then and there examined, the whole as detailed in said consent of date 23rd March, 1906.

The evidence discloses that the steamer *Bay State*, with the barges *Berkshire* and *Bath*, left Windmill Point in the Harbour of Montreal at about 5.15 a.m., on the morning of Friday, the 29th of September, 1905, with Pilot N. Belisle in charge of the steamer *Bay State*, and Pilot J. S. Labranche in charge of the barge *Berkshire*, but no pilot on the barge *Bath*. There were no regulation lights on the *Bay State* or its tow, although the sun had not risen. The steamship *Bay State* and tow continued down the harbour and passed very close to the east end of the Victoria Pier. Certain witnesses examined testify that they feared that the *Bay State* and its tow would collide with the Harbour Commissioners dredges stationed for work north of the main ship channel near sections numbers 25 and 26 of the Harbour of Montreal.

The steamship *Bay State* endeavoured to haul over to the south of the channel, her tow following, but she does

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

not appear to have succeeded very well, as, from the evidence adduced by eye witnesses who gave an intelligent description of what they saw, the last barge of the tow was drifting broadside down the river up to and at the time of the collision which occurred about three hundred feet to the west of dredge number two, which was moored midway between sections 25 and 26, nearly 200 feet from the northern edge of the ship channel.

After the collision occurred, the steamship *Bay State*, with barges in tow, continued on to Quebec without stopping to enquire what damage had been done.

The steamship *Universe* was at anchor at Longueuil on the night of Thursday the 28th of September, 1905. At daybreak on Friday morning the 29th of September, she got under way to proceed to the harbour of Montreal to go to her usual berth at Windmill Point. She had proper regulation lights burning, and a seaman was on the look-out. She proceeded on her usual course, passing the Longueuil ferry boat with all her lights burning bright, and kept to the north side of the main channel, to pass the dredges which were moored for work at sections 25 and 26 at a safe distance on her starboard hand. All went well till they were passing the dredges. A vessel was then sighted coming down the river, and just emerging from behind the Victoria Pier. She had no lights burning to indicate that she had a tow, and appeared to those on board the *Universe* to be a steam barge coming down the harbour. Shortly afterwards, first one barge was sighted, and then a second barge, in tow of the steamer. One blast of the whistle was blown from the *Universe* to indicate her course was being directed to starboard, which was answered by the steam barge *Bay State* also by one blast. The *Universe* then ported her helm and slowed her engines as much as it was considered safe to do in the current..

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

The last barge of the tow was so far to the north side of the chanel, and drifted down so quickly that the *Universe* came into collision with her, striking the barge *Bath* a glancing blow just aft the midships on the port side with her port bow. The combined force of the collision with the *Bath* and the current striking the *Universe* on her port bow, forced her over to starboard and across the current, notwithstanding that every effort was made to hold her up by letting go both anchors and going ahead full speed with the helm hard to starboard, striking the Harbour Commissioners dredges numbers 2 and 3 with her starboard quarter. The steamer *Universe* tore them from their moorings and drifted with them down stream, her bow striking the wharf. Dredge number 2 was badly damaged, and dredge number 3 was capsized and sunk near section 27. The anchors of the steamship *Universe* became entangled with the moorings of the dredges.

The Harbour Commissioners' dredges were moored in the usual way at the place where it was intended they should continue to work. They had the usual moorings, viz., anchors with wire cables, three spuds 60 feet long; the proper lights were burning, and a tug was in attendance. The dredges were moored sufficiently far from the main ship channel on the north side to enable vessels to pass in safety.

The question in the present cases is to determine the responsibility for the heavy damages caused by the collision. It has been well said that in case of a collision "the circumstances of confusion, darkness and danger under which such disasters commonly happen, and the strong feelings of the witnesses, all tend to place cases of collision among the most difficult which can be brought before a judicial tribunal. It is a great relief therefore to the court to be assisted by an able gentleman whose professional experience and skill enable him to draw con-

clusions from facts and evidence which unprofessional persons would but imperfectly appreciate." The *Leonidas* (1).

It is also a relief to the court in the present case to be assisted by a nautical gentleman whose professional experience and skill must be of material assistance to the court in determining the present case.

Availing myself of the power which this court has to refer to some gentleman conversant with nautical affairs, I have obtained the assistance of Captain James J. Riley, a mariner of experience, holding a certificate of competency as Master from the British Board of Trade, number 82599, now engaged in important public service, namely, Superintendent of Pilots, and Examiner of Masters and Mates, and a director of the Nautical College, upon whose judgment and opinion I shall find it my duty to rely, and to whom I have submitted the following questions, and whose answers are appended thereto.

"Q.—Do you consider that under the facts of this case as disclosed in the evidence the S.S. *Universe* was properly navigated and that all possible precautions were taken by its Master and crew to avoid this collision?"

"A. I consider that the evidence discloses the *Universe* to have been properly navigated, and that every precaution was taken by the Master and crew to avoid a collision, and that she had entered and was well up into St. Mary's current before the barge *Bay State* was seen, and that she had her regulation lights exhibited as required by law."

"Q.—If not, state in what particulars the navigation of the *Universe* was faulty, and what precautions should have been taken to avoid a collision that were not taken?

"A. Every precaution seems to have been taken in this case, and in my opinion the *Universe* was not in fault."

(1) 1 Stuart's Adm. R. at p. 230.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

"Q.—State if, in your opinion, the barge *Bay State* and its tow were properly manned, equipped and navigated, considering the locality and the circumstances of the present case, and were all due precautions taken to avoid a collision; if not, state in what respects, if any, the tow was improperly manned and equipped, and what precautions should have been taken to avoid a collision, that were ommitted?

"A. The steam barge *Bay State* was, in my opinion, responsible for the safe conduct of herself and tow. The length, 1,405 feet, between the bow of the towing barge and the stern of the last barge in the tow was altogether too long in the St. Mary's current.

"No allowance seems to have been made for the set and strength of the current, as is evidenced by the fact that the *Bay State* first saw the starboard side of the *Universe* indicating that the *Bay State* was too far to the north of the deep water channel, and that the barge *Bath* was practically going down nearly broadside to the current, and was considered by some reliable witnesses to have been in danger of striking the dredges, and I calculate that the barge *Bath* would have struck one of the dredges if the steamer *Universe* had not intervened.

"No attempt seems to have made to shorten up the hawsers of the tow, notwithstanding the fact that they had automatic apparatus, when it was seen that a collision was imminent, nor was the helm of the *Bath*, the last barge of the tow, ported with sufficient promptness.

"A pilot would have been of more service on the last barge of the tow than on the *Berkshire* which was the middle barge.

"I am of opinion that if there had been a tug to the last barge, the collision in all probability would have been averted.

There were no regulation lights on the *Bay State* to indicate that she had barges in tow although the sun had

not yet risen. The presence of the lights required by law up to sunrise would have indicated to the *Universe* that there was a tow of unusual length coming down the river, and the *Universe* would then have been enabled to take the out-of-the-ordinary measure of starboarding, and thus in all probablity have avoided the collision.

"It is my opinion that the evidence discloses the fact that there was not a proper lookout man on the barge *Bath* or the steamer *Bay State.*"

"Q. Were the dredges where they had a right to be and were they properly moored, and manned for the purpose for which they were engaged, and were they properly managed at and previous to the collision?

"A. The dredges numbers 2 and 3 belonging to the Harbour Commissioners of Montreal were engaged at that time in digging out a new deep water cut in the St. Mary's current, and the outer side; that is to say, the southern side of the southernmost dredge was about 175 feet to the north of the line then known to navigators as the deep water cut through the St. Mary's current, so that both dredges were practically out of the deep water cut, and were moored as had been the custom for years—a custom well known to all pilots and ship masters frequenting the port."

"Q. Did the collision in question arise from unavoidable circumstances, without fault being attributable to the S.S. *Universe*, the steam barge *Bay State* or its tow, or without fault being attributable to the dredges or their respective masters and crew, or was it caused from the fault of the said ships, barges, dredges, or their masters, crews or persons in charge? If so, from which of them?

"A. In my opinion, the *Universe* was not in any wise to blame. The barge *Bath* although actually in collision with the *Universe* was technically and actually under the command of the master of the steam barge *Bay State.* It is therefore my opinion that the fault of the collision

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

entirely lay with the steam barge *Bay State* and its tow, and not with the *Universe* nor with the dredges."

It is satisfactory to notice that the questions submitted to the nautical assessor were answered by him on the 30th of October, 1906, and virtually agreed with the finding of the Wreck Commissioner as set forth in his judgment rendered on the 6th day of November, 1906.

After carefully considering the evidence and the answer to the Nautical Assessor to the questions submitted to him I have arrived at the following conclusions:

The *Bay State* and tow were in fault (*a*) because the barge *Bath* had no pilot, and no proper look-out was kept on the *Bay State* or her tow; (*b*) Those in charge of the *Bay State* and her tow neglected to take the precautions required under the special circumstances of the case, tow ropes being too long, and no attempt having been made to shorten them; The *Bay State* had no look-out, and she made no signals to the tow or to the SS. *Universe* which she appears to have sighted before the *Universe* saw her; (*c*) There was no additional tug to control the tow, more particularly the last barge, the *Bath*; (*d*) Neither the steam barge *Bay State*, nor the barges in tow exhibited proper regulation lights, though they had got under way and the collision occurred before sunrise; (*e*) The steam barge *Bay State* and tow should not have taken the St. Mary's current as they did with the tow in such condition as it was proved to be, more particularly in view of the position of the dredges of the Harbour Commissioners, and the places where they were moored, and of which the pilots on board the *Bay State* and *Berkshire* were well aware; (*f*) After the collision occurred the steam barge *Bay State* and her tow continued down to Quebec without stopping to enquire what damage had been done.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

The nautical assessor in his answers to the questions submitted to him has explained fully the faults committed by the *Bay State* and her tow, and his answers, as I view the case, are fully supported by the evidence taken.

The evidence of independent and disinterested witnesses, more particularly those on board the steamer *Quebec*, who had every opportunity of seeing the position of the vessels and of judging, say that the *Universe* was properly navigated, that the tow ropes of the tow were too long, that the barges in tow were across the channel, that the three barges were coming down crosswise, and that the steam barge trying to draw them to the south, blocked the *Universe's* channel. Bedard, a watchman, who happened to be on the middle of Victoria Pier, at page 3 of his deposition, states in effect that he saw that the barges were coming in towards the city side, with the current, going crosswise, the last barge on the bias. Altimus, a policeman, who was opposite Panet street, between Victoria Pier and the place where the collision took place, states at page 3 of his deposition, in effect, that the steam barge passed towards the south, and then the next one cleared all right, but the third swung right around, side on to the current, and came straight up against the bow of the *Universe*. A. Belisle, pilot of the *Universe*, at pages 4 and 5 of his deposition, in effect, states, that the barges made a curve, and the last was thrown across the stream towards the north. The Captain of the *Universe* says: "The last barge went towards the north. I was afraid of a collision." The first mate of the *Universe* states at page 5 of his deposition, that the last barge was going across the current, going broadside down, at an angle to the rest of the tow. And at page 18 he states: "If both had followed the *Bay State* it would have been all right." The second mate of the *Universe* states that the last barge blocked the channel.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

I think it is fully made out that the *Bay State* and her tow were on the wrong side of the channel and were not steered sufficiently towards the south side of the river, and that under the circumstances with the *Universe* in view, the *Bay State* and her tow should not have taken the current. The evidence of N. Belisle, pilot of the steam barge *Bay State*, is important. Reference might be made to pages 18, 19 and 20 of his deposition wherein in effect he states that he was in charge of the *Bay State*, that there was another pilot for the barges, S. Labranche, who was on the first barge, the *Berkshire*, and that he did not know who was in charge of the second. He states that he would not have taken them down (referring to the *Bay State* and her tow) and been responsible for all three. It would be dangerous to go down without pilots to each vessel and that it would have been better to get another tug, which would have prevented the accident.

It will be seen in the present case that the tow was under the control of the steam barge *Bay State*. Brown, captain of the *Bay State*, at page 47 of his deposition, states, "There is a captain in each barge. I am in charge of the whole outfit. The captains of the barges get their orders from me; that is, they are subject to my order when I am towing them." And further on in his deposition he states that he had not made enquiries as to the current, and as to bringing her tow down in it. He says, "I left it to the pilot, but did not consult him in making up the tow."

"The doctrine that the tug is servant of the tow is inapplicable when not only the motive power, but also the command is with the tug."(1)

This doctrine is inapplicable in the present case, as not only the motive power, but the command, lay with the *Bay State*. In the present case it was the duty of those

(1) *Marsden on Collisions*, 4th ed. p. 176.

on board the *Bay State* to keep both tug and tow clear of other ships, without waiting for orders from the tow.

Mr. Pentland, K.C., one of the counsel for the *Bay State* and her tow, at page 9 of his written argument states: "As this is a case in which two vessels in tow of a steamer is in question, it might be as well to allude also to the principles which govern vessels under those circumstances. In England and on this side, a distinction has always been made between a vessel in tow of a tug, and having on board of her a pilot, that is to say on deep water ships particularly, the pilot is as a rule on board the ship, and he controls the movements of the tug; that is to say the motive power is on the tug, and the governing power is on the ship; but where the vessels are vessels of the same description as these whaleback barges, and which correspond to all intents and purposes with the dumb barges of the Thames, which are boats without any motive power at all, boats that simply drift when they cannot do anything else, that is to say, when they are not at anchor, and without a tug—in cases of that kind, the principle of law is, and particularly where there is a pilot on board the tug, that not only is the motive power on the tug, but the controlling power as well."

I concur in this view of the case.

Marsden on Collisions at Sea (1), says "Where both tug and tow are in fault for a collision with a third ship, judgment goes against both ships in admiralty, as it would at law go against the owners, for the whole of the damage, jointly and severally."

This, I think, should be the rule in the present case. In any event I am of opinion that judgment should go against the barge *Bay State* and the barge *Bath*, and the owners, the Boutell Steel Barge Company.

The question of lights is important, because if the *Bay State* had had the regulation lights, the *Universe* would

(1) 4th ed. at p. 178.

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

have been warned that she had a tow of more than ordinary length, and it is possible that the accident might not have occurred. As to the necessity of lights and their usefulness on the morning in question, it may be mentioned that it is proved that the Longueuil ferry boat, when she passed, had all her lights burning.

I do not find the S.S. *Universe* in fault. Those in charge of the S.S. *Universe*, of which the Universe Joint Stock Company, Limited, is owner, committed no faults which, in my opinion, contributed in any way to the cause of the accident, more particularly as far as the collision in question is concerned. The *Universe* (a) had a proper lookout; (b) carried the proper lights, and gave proper signals; (c) was on the proper side or the fairway; (d) did not violate by-law number 81 of the by-laws of the Harbour Commissioners of Montreal; (e) did not neglect any precaution required by the ordinary practice of seamen under the special circumstances, and was properly navigated throughout.

By-law 81 of the Harbour Commissioners of Montreal reads as follows:

"81. All upcoming vessels on each occasion, before meeting downward bound vessels at sharp turns, narrow passages, or where the navigation is intricate, shall stop, and, if necessary, come to a position of safety, below the point of danger, and there remain until the channel is clear. These directions shall apply to the following points * * * St. Mary's current."

The evidence shows that when the *Universe* entered the St. Mary's current, the channel was clear, and that the *Bay State* and tow were not observed until the *Universe* was well up the current.

I do not find the dredges at fault. They were moored as had been the custom for years and as was well known to the mariners frequenting the port of Montreal. They were engaged in carrying out necessary improve-

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

ments of the harbour in a proper and workmanlike manner, and I would not think of in any way interfering with such works unless it had been clearly demonstrated that they had violated the law, or some regulation of the harbour which tended in any way to cause the collision in question, and which, as I view the case, has not been shown. I am therefore of opinion that the dredges were not in any way to blame for the collision.

The barge *Bath*, though actually in collision with the SS. *Universe* was technically and actually under the command and control of the master of the *Bay State*. In my opinion the collision was occasioned entirely by the fault of the steam barge *Bay State* and her tow, and not by any fault of the SS. *Universe* or of the dredges, and that therefore the Boutell Steel Barge Company, the owners of the steam barge *Bay State* and of the barges *Berkshire* and *Bath*, and the said steam barge *Bay State* and barge *Bath* are liable for all damages resulting from this unfortunate collision.

I am much indebted to the counsel for the able manner in which their respective contentions were presented to the court, and for the elaborate memoranda of authorities cited in support of such contentions, and which are of record in the present case. It is unnecessary for me to refer at greater length to these authorities beyond saying that the conclusions arrived at by the court in this important case appear to be amply sustained by the authorities submitted by counsel for the S.S. *Universe*.

The nautical assessor has rendered me every assistance, and I am fortunate in having been able to avail myself of his nautical knowledge and experience in the present case.

Judgment consequently is rendered in favour of the Harbour Commissioners of Montreal in the actions *in rem*, numbers 158 and 160, taken by them against the steam barge *Bay State* and barge *Bath*, with all costs except

1906

HARBOUR COMMISSIONERS OF MONTREAL v. THE S.S. UNIVERSE.

Reasons for Judgment.

one half the costs of *enquête*, which are ordered to be paid by the said Harbour Commissioners of Montreal.

The action *in rem*, number 159, taken by the Harbour Commissioners of Montreal against the barge *Berkshire* is dismissed without costs, because, as I view the case, the liability was reasonably in doubt when this action was instituted.

The action taken by the Harbour Commissioners against the S.S. *Universe*, number 157, is dismissed with costs, with the exception of half the costs of *enquête* which are ordered to be paid by the Boutell Steel Barge Company, as hereinafter mentioned.

The action number 165, taken by the Boutell Steel Barge Company against the owners of the S.S. *Universe* is dismissed with costs, save one half the costs of *enquête* which have been ordered to be paid by the Harbour Commissioners as hereinbefore mentioned.

Action number 166, wherein the Universe Joint Stock Company Limited is plaintiff, and the owners of the S.S. *Bay State* and the barge *Berkshire* and the barge *Bath* are defendants, is sustained, in so far only as damages are claimed, and the conclusions in warranty are dismissed with costs against defendants, save one-half of the costs of *enquête* which are ordered to be paid by the Harbour Commissioners of Montreal as hereinabove mentioned.

As only one *enquête* has been taken, applicable to all the cases, I have ordered that the costs of *enquête* should be paid half by the Harbour Commissioners of Montreal, as they failed in their action against the steamship *Universe*, and the other half by the Boutell Steel Barge Company, as they have failed in their action against the owners of the S.S. *Universe*.

I order that an account should be taken in the actions maintained by the present judgment, and refer the same to the Deputy Registrar, assisted by merchants, to report the amounts due, and that all accounts and vouchers

with the proof in support thereof be filed within six months.

Judgment accordingly.

Geoffrion, Geoffrion & Cusson, solicitors for Harbour Commissioners.

Campbell, Meredith, Macpherson & Hague, solicitors for S.S. *Universe.*

Carter, Goldstein & Beullac, solicitors for S.S. *Bay State*, barge *Berkshire* and barge *Bath*, and the Boutell Steel Barge Company.

Between

1906
Nov. 12.

ROBERT LEWIS HILDRETH.....PLAINTIFF;

AND

THE McCORMICK MANUFACTURING COMPANY, LIMITED. .... } DEFENDANTS.

Patent for invention—Manufacture and sale—The Patent Act, sec. 37—Unconditional sale—License.

The condition in sec. 37 of *The Patent Act* [now sec. 38 of R. S. C. 1906, c. 69] that a patent shall become void if the patentee does not within two years of the date of the patent, or any authorized extension of such period, commence and after such commencement 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 manufactury or establishment for making or constructing it in Canada should be construed to mean that the patentee must not only manufacture his invention in Canada but manufacture it in such a manner that any person who desires to use it may buy or obtain an unconditional title to it at a reasonable price.

2. It is not a compliance with the above condition that a person who desires to buy or obtain an unconditional title to the patented invention is put in a position to obtain the use of it at a reasonable rental.

ACTION for the infringement of a patent for invention.

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

May 15th, 1906.

The case came on for trial at Toronto.

W. Cassels, K.C. and *A. W. Anglin* for the plaintiff;

G. C. Gibbons, K.C., J. Haverson and *G. S. Gibbons* for the defendants.

Mr. *Cassels* contended that the plaintiff's patent was a primary one, and entitled to protection to the utmost extent. The specification will receive a liberal construction in favour of the patentee. He cited *Re Anderson and*

Anderson's Patent (1); *Morley Sewing Machine Co. v. Lancaster* (2); *Proctor v. Bennis* (3); *Badische Anilin v. Levinstein* (4).

On the point as to whether the patentee was bound to sell, he contended that there was nothing in the 37th section of *The Patent Act* compelling the patentee to give an unconditional title to his invention. The condition of the section is complied with if he puts it in the power of a person desiring to use it to obtain such use upon a reasonable rental.

Mr. *Anglin* submitted that there was no proof of a definite and formal demand by the defendants for the sale to them of the invention. Under such circumstances there could be no forfeiture for refusal to sell. "Price," as used in the statute, moreover, does not necessarily mean a price in money. (Cf. *London, &c. Bank v. Belton*) (5). The term "price" does not mean more than compensation to the patentee; nor does it mean that the price paid shall be for an unconditional grant of title. (Cf. *Hudson Iron Co. v. Alger* (6).

Mr. *Gibbons*, for the defendants, contended that the patent was void for want of subject-matter. The patented article was in public use before the Canadian patent was obtained. There was disclosure of the invention to the public in the United States in the process of perfecting it, which exceeded the privilege of experimentation.

Again, there was no manufacture in Canada so that it could be procured here for a reasonable price.

As to formality of demand for a sale at a reasonable price, when a person informs me that his policy is to rent and not to sell, there is no occasion for a formal demand. The circumstances imply a formal demand of which the announcement of the policy is an implied refusal.

(1) 7 Cutl. R. P. C. 325.
(2) 129 U. S. R. 263.
(3) 36 Ch. D. 740.
(4) 12 App. Cas. at p. 717.
(5) 15 Q. B. D. 457.
(6) 54 N. Y. 173.

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

Mr. *Haverson*, following on the same side, contended that by the amendment of 1903 (3 Edw. VII, c. 46, s. 7) Parliament establishes a distinction between "sales" and "licenses."

Mr. *Cassels*, in reply, cited *Smith v. Goldie* (1); *Patterson v. Gas Light and Coke Co.* (2); *Bingham v. McMurray* (3).

THE JUDGE OF THE EXCHEQUER COURT now (November 12th, 1906) delivered judgment.

The plaintiff brings his action for an infringement by by the defendant company of letters patent numbered 79,392, bearing date the 17th day of February, 1903, and granted to the plaintiff for alleged new and useful improvements in candy pulling machines. The claim made by the inventor in the specification attached to the letters patent is one for "a candy pulling machine com-"prising a plurality of oppositely disposed candy hooks or "supports, a candy puller, and means for producing the "specified relative in and out motion of these parts for the "purpose set forth." It is an incident of this machine that the candy hooks or supports, and the candy puller, hold the mass of candy in suspension while it is being pulled. This, it appears is an important feature, though no stress is laid upon it in the specification, and it is not claimed as a novel feature though it was in fact new. In this respect the plaintiff's machine is clearly distinguishable from a candy pulling machine that had been previously constructed by one Dickenson; and it is a feature that it has in common with a machine subsequently made by one Charles Thibodeau, a skilled mechanic employed by the plaintiff under a contract by which the plaintiff was entitled to the benefit of his improvements. The plaintiff asks for an injunction, for

(1) 7 Ont. A. R. 628, 9 S. C. R. 46. (2) 3 App. Cas. 239.
(3) 30 S. C. R. 215.

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

damages and for such other relief as he may be found entitled to.

In the statement of defence there is in the first place a general denial of the allegations contained in the statement of claim. Then follow a number of defences, in two of which allegations of prior public user or sale are made in respect of a similar machine to that for which the plaintiff obtained his patent. The question, however, is not whether the machines were similar, for they might in some respects be so and yet one not be an anticipation of the other; but the real question is whether they were the same, or so like or similar to each other that the one would be an anticipation of the other. Accepting the use of the word "similar" in that sense the defences may be concisely stated as follows :—

1. That the plaintiff's alleged invention was not new;

2. That a similar machine was in public use in the United States of America long before the plaintiff's alleged invention thereof;

3. That the plaintiff placed on sale and in public use similar machines at Detroit and other places in the United States more than a year previous to his application for his said patent in Canada;

4. That the plaintiff, in the year 1900, obtained a patent in the United States for his alleged invention and did not make application for letters patent therefor in Canada within one year from the date of the issue of such patent.

5. That the specifications in the plaintiff's Canadian application are insufficient;

6. That the plaintiff did not manufacture his invention in Canada in accordance with the statute;

7. That the plaintiff imported the invention into Canada contrary to the statute.

Of these issues I find the first, second, third, fourth and fifth in the plaintiff's favour. There is no direct allegation in the statement of defence that the defendants did

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

not infringe. Whether they did or not is involved in the question as to whether an unauthorized use in Canada of the Thibodeau machine referred to is an infringement of the plaintiff's patent. That question I answer in the affirmative.

With regard to the defence that the letters patent sued on have become null and void because the patentee has failed to comply with the condition as to manufacture of the invention on which they were granted, it will be observed that the letters patent were issued on the seventeenth day of February, 1903, and were made subject, among others, to a condition that will be found in the thirty-seventh section of *The Patent Act* as that section is enacted in the sixth section of the Act 55-56 Victoria, Chapter 24, and which is as follows:—

"37. Every patent granted under this Act shall be "subject and be expressed to be subject to the following "conditions:—

"(a) That such patent and all the rights and privileges "thereby granted shall cease and determine, and that "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 his assignee, within that period, "or any authorized extension thereof, commence, and "after such commencement continuously carry on in "Canada the construction or manufacture of the inven-"tion patented, in such a manner that any person desir-"ing to use it may obtain it or cause it to be made for "him at a reasonable price at some manufactory or es-"tablishment for making or constructing it in Canada."

Upon that provision two questions, one of law and the other of fact, arise in this case: First, does a patentee comply with this condition when he makes arrangements for the manufacture of his patented invention in such a manner that any person desiring to use it may obtain the use of it on a lease thereof at a reasonable

rental, but makes no arrangement to sell it, or refuses to sell it, unconditionally, at a reasonable price to any one desiring to use it and wishing to buy it?

In *Barter* v. *Smith* (1), Dr Taché, then the Deputy Minister of Agriculture, discussing a similar question expressed his view that "the real meaning of the law "is that the patentee must be ready either to furnish "the article himself or to license the right of using, on "reasonable terms to any person desiring to use it." But in the *Toronto Telephone Manufacturing Co.* v. *The Bell Telephone Company of Canada* (2), Mr. Pope, the Minister of Agriculture, explained that there was some misapprehension about the signification of the words "license the right of using on re. ionable terms" used by Dr. Taché, and what he really eant was not "a lease "upon payment of a rental, bu the absolute transfer of "a property." And in the la er case it was held that a refusal to sell a patented invention to a person desiring to use it, accompanied by an offer to rent it to him, afforded a good ground for the forfeiture of the patent. In *Power* v. *Griffin* (3) Mr. Justice Armour, referring to Dr. Taché's decision in *Barter* v. *Smith*, said there was nothing in the words in the condition to warrant the view "that the condition would be sufficiently "satisfied by the patentee granting to any person "desiring to use the invention patented a license to use "it upon applying to him for it and upon payment of a fair royalty." As stated in the *Copeland-Chatterson Co.* v. *Hatton* (4), it seems to me that any person desiring to use an invention for which a patent has been granted subject to the condition mentioned is entitled in Canada to acquire for a reasonable price the complete ownership of the thing, whatever it is that the owner of the patent is bound to manufacture or permit to be manufactured.

(1) 2 Ex. C. R. 484.
(2) 2 Ex. C. R. 519.
(3) 33 S. C. R. at p. 48.
(4) 10 Ex. C. R. at p. 238.

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

so that any person desiring to use it may obtain it or cause it to be made for him at a reasonable price. I think that the question of law that has been referred to as arising in this case upon the condition as to manufacture should be answered in the negative.

That brings us to the question of fact as to what the plaintiff in this case did. There was no extension of the time within which he was under obligation to commence the manufacture of his invention in the manner and for the purposes mentioned in the statute. The two years during which he was at liberty to do in Canada what he saw fit with his invention, except to import it contrary to the statute, expired on the 17th day of February, 1905. Prior to that date he had made arrangements with the Fletcher Manufacturing Company of Toronto to manufacture in Canada his candy pulling machine as improved by Thibodeau. He also made arrangements to lease the machine so that anyone desiring to use it could obtain it on a lease at a rental. He refused to sell the machine. In that he was, during the two years from the date of his patent, entirely within his rights. But at the expiry of the two years, he made no change whatever in his arrangement with the Fletcher Manufacturing Company. He did not give them authority to sell a machine to any person who desired to use it and wished to buy it, or in any way enlarge their powers in that respect. The former course of business of offering to lease the machines for a rental was continued. Mr. Fletcher says that some persons wanted to buy the machine from his travellers and had found fault, that is as I understand it, because they could not buy instead of renting a machine; and he adds that he had spoken to the plaintiff on the subject. Mr. Fletcher was in this matter speaking of what he had learned from the travellers. He was not speaking from his own knowledge; and there is no direct proof of any

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

request by any one to buy a machine from his travellers and a refusal by the latter to sell. The matter is of importance only so far as it shows what the course of business was. In that respect there was no change until nearly a year after the present action was commenced. The statement of claim herein bears date of the 22nd day of April, 1905, and it was not until the 31st of March, 1906, that the plaintiff gave his Canadian agents authority to sell as well as to lease his candy pulling machines.

On or about the first day of September, 1903, the defendants leased from the plaintiff one of his machines of the Thibodeau form. Such a machine costs to construct from one hundred and fifty to two hundred dollars. But with one man it will do the work of at least ten men in pulling candy. The rental was three hundred dollars a year, and persons who are in business in a large way are willing to pay that amount of yearly rent. The officers of the defendant company thought they could not afford to pay such a sum, and Thomas P. McCormick, the general superintendent of the company, in May, 1904, went to Boston and endeavoured to buy a machine from the plaintiff. The latter refused to sell or to set a price. That, as has been observed, he had a right at the time to do. At the end of the year for which the defendants had leased the plaintiff's machine, that is, on or about the first day of September, 1904, it was returned to the plaintiff, and then the defendant company had a similar machine, that is, one of the Thibodeau type, made for their use, and the same has since been used in their business without the plaintiff's license, permission or assent. The fact that the defendants had made and were using this machine having come to the plaintiff's knowledge, the latter sent an employee of his to see Mr. McCormick and to find out the facts. The person so sent was a Mr. Hooten who had been in the plaintiff's employ for a long time, and

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

who was then his representative in the United States. He had done some business for the plaintiff in Canada, and had at different times represented him here. Hooten was at London between the 20th and 25th days of February, 1905, and saw Mr. George G. McCormick, the Vice-President and Manager of the defendant company there.

During the discussion that took place between Hooten and McCormick the latter offered, instead of defending the suit with which the defendants were threatened, to buy one of the plaintiff's machines, but Hooten said that the plaintiff would not sell a machine on any account. When this evidence was tendered it was objected that it was not covered by the particulars that the defendants had given. Hooten, had, it appeared, been in court earlier in the day, but was not there at that particular time. I allowed the evidence to be given subject to objection, and on the understanding that it would be struck out if no amendment of the particulars were allowed. As to that I allowed the motion to amend to stand until after the noon-day recess to see if the plaintiff could find Hooten. After recess, it appearing that Hooten was present, I allowed the amendment. In the shorthand writer's notes it appears that the amendment was allowed to enable the defendants to prove the application made at Boston to purchase the machine. But that is a mistake. The amendment, as the general context will show, was allowed to enable the defendants to prove the offer to purchase made to Hooten as the plaintiff's agent and representative at London in February, 1906. That was after the two years, during which the plaintiff had a right to sell or refuse to sell as he saw fit. Hooten was not called as a witness, and it is fair and reasonable to infer from that fact that he could not put the matter in any better light for the plaintiff than that in which Mr. George G. McCormick's evidence had left it. The plaintiff's answer to this part of the defendant's case is that Hooten had no authority to

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

make the statement attributed to him by McCormick. But whatever his authority may have been as the plaintiff's representative at the time his answer to the defendants' request truly represented the plaintiff's attitude and position in the matter at that time, and it seems to me that under the circumstances disclosed notice to him that the defendants wished to obtain one of the plaintiff's machines by purchase was good notice to the plaintiff of that fact. I do not think that the defendants were bound to send again to Boston to make the offer to the plaintiff, or even to write him to renew the offer, or to go to Toronto to make it to the Fletcher Manufacturing Company which had no authority to accede to the request. The offer and request to purchase a machine made at the time to Hooten was not acceded to, and shortly afterwards this action was brought.

To say that Hooten had no authority, that is no express authority, to give McCormick the answer that he gave, does not, it seems to me, meet the case presented. It must, I think, be looked at as a whole, and briefly, it is this: On the 17th day of February, 1905, the plaintiff was the owner of a patent for a candy pulling machine that then became subject to the condition that the patent should become void if the plaintiff did not thereafter continuously carry on in Canada the construction or manufacture of the machine in such a manner that any person desiring to use it might obtain it, or cause it to be made for him, at a reasonable price at some manufactory or establishment for making it or constructing it in Canada. Taking that condition, as I do, to mean that the patentee must make arrangements, not only to manufacture his patented invention, but to manufacture it in such a manner that a person who desires to use it may buy it or obtain an unconditional title to it, at a reasonable price, it is clear that so far from complying with the condition the plaintiff made arrangements to manufacture the

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment.

machine in a manner and under such conditions that no one in Canada could buy the machine or obtain the absolute property therein at any price. He was well aware, too, that persons in Canada had at a time when he was not bound to sell desired to buy and use the machine. Then when he learned that the defendant company was infringing he sent his agent to see about such infringement. The manager of the company on that occasion, to avoid litigation and to put an end to their differences renewed the offer to purchase one of the plaintiff's machines. The defendants desired to use the patented invention and wished to buy it At that time the plaintiff was, as I construe the statute, bound to sell it to the defendants at a reasonable price. The offer was not accepted and the threatened action was brought. And for nearly a year thereafter the plaintiff made no arrangement for selling the patented machine in Canada; but continued his former course of business of manufacturing machines for lease only, a course of business that was lawful enough in its inception; but which was, I think, contrary to the condition to manufacture after that condition attached to the patent and became operative. The case is one, I think, in which the patent ought to be declared void, and there will be a declaration to that effect.

The finding on this issue makes it unnecessary to discuss the issue relating to alleged importations contrary to the statute. It is to be observed however that there were no importations of the completed machine after the expiry of the year during which such importation was lawful. The castings for one machine were imported as late as January or February of 1906, but whether that constituted a contravention of the statute need not, for the reason given, be now determined.

From September, 1904, until towards the end of February, 1905, the defendants were infringing the plaintiff's patent, and in respect of that infringement I assess the

1906

HILDRETH v. MCCORMICK.

Reasons for Judgment

plaintiff's damages at one hundred and twenty-five dollars. For that amount and for the costs of an action for that amount there will be judgment for the plaintiff.

But there will be no injunction order or other relief. And there will be a declaration that the plaintiff's letters patent numbered 79,392, granted to him on the 17th day of February one thousand nine hundred and three for improvements in candy pulling machines have ceased and determined, and have become null and void, by reason of his failure to comply with the condition as to manufacture on which they were granted.

Judgment accordingly.

Solicitors for the plaintiff: *Blake, Lash & Cassels.*

Solicitors for the defendants: *Gibbons & Harper.*

1906
Oct. 1.

IN THE MATTER of the Petition of Right of

NORMAN McLEAN.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Lease of Mining rights—Subaqueous mining—Grant of same area for Placer Mining—Damages—Liability of Crown.

The suppliant claimed damages against the Crown, alleging that while on the 23rd day of March, 1898, he had been granted, by indenture of lease, the exclusive right and privilege of taking and extracting by subaqueous mining and dredging all royal and base metals, other than coal, from certain lands covered with water in the Provisional District of Yukon and mentioned and described in the said lease, he had been unable to obtain possession thereof because the Crown subsequent to the said lease had granted to certain free miners the area covered by the suppliant's said lease as placer mining claims and had placed the said miners in possession thereof.

Held, dismissing the petition on demurrer, that inasmuch as under the Regulations of 18th January, 1898, in force at the time the said lease to the suppliant was made, and which were appended to and formed part of the said lease, it was provided that such leases should be subject to the rights of all persons who had received or who might receive entries for claims under the Placer Mining Regulations, the suppliant had no right of action upon the facts alleged.

DEMURRER to a petition of right claiming damages against the Crown for breach of a lease of subaqueous mining rights in the Provincial District of Yukon.

The grounds of the demurrer are set out in the reasons for judgment.

June 11th, 1906.

C. J. R. Bethune, in support of the demurrer, contended that upon the face of the lease the answer to the suppliants' petition was plainly to be found. The demise was expressly upon the condition that placer mining rights might be subsequently granted in the same area.

1906

McLEAN v. THE KING

Argument of Counsel.

F. R. Latchford, K.C., contra, contended that the fact of the breach of the covenant for peaceable enjoyment, implied in the lease, was admitted by the demurrer. The Crown upon its defence shows that it was impossible, through the acts of the Crown, for the suppliant to obtain possession.

Mr. *Bethune*, in reply, cited *Brigham v. The Queen* (1).

THE JUDGE OF THE EXCHEQUER COURT now (October 1st, 1906) delivered judgment.

This case comes before the court on a demurrer to the petition of right, the ground of demurrer alleged being that the petition does not disclose any cause of action against the respondent.

The petition sets out a lease made on the 23rd day of March, 1898, by Her late Majesty Queen Victoria, as represented by the Minister of the Interior, whereby Her Majesty, subject to certain rents and conditions, granted, demised and leased to the suppliant for a term of twenty years the exclusive right and privilege of taking and extracting by subaqueous mining and dredging all royal and base metals, other than coal, from certain lands covered by water therein mentioned. The demise was made subject to the regulations of the 18th day of January, 1898, respecting the issue of leases for minerals in the beds of rivers in the Provisional District of Yukon, a copy of which was appended to the lease, and the terms of which are set out in the petition of right filed. From these it appears, among other things, that the lease in question was granted subject to the rights of all persons who had received or who might receive entries for claims under the Placer Mining Regulations. The suppliant's complaint is that he has never been put in possession of the lands leased to him, and this complaint he states in this way :—

(1) 6 Ex. C. R. 414.

1906

McLEAN v. THE KING

Reasons for Judgment.

"2. That subsequent to the granting of the said lease, "and while the same was in full force, the Crown, through "the Gold Commissioner at Dawson, granted to free "miners the said area covered by said suppliant's lease "as placer mining claims, and had placed in possession of "same the said placer miners.

"3. Although your suppliant paid a yearly rental as "mentioned in the said lease, at the dates and times "mentioned, and has demanded possession of said areas "mentioned in the said lease, and was entitled to the "same, yet Her Majesty, represented by the Minister of "the Interior of Canada, refused to give up the same to "your suppliant, whereby your suppliant was deprived "of the same by the granting of the same to placer "miners and has sustained damages thereby."

And then the petition concludes with a prayer that the suppliant "recover such damages as were sustained "by reason of the lands mentioned in the said lease being "granted to free miners as above mentioned."

The substance of the complaint, as I understand it, is that the suppliant has been unable to get possession of the lands in question because entries for claims therefor have been allowed to be made under the Placer Mining Regulations. But that, as has been seen, was provided for in the lease and one of the conditions on which it was granted. Therefore it seems to me that the demurrer to the petition should be sustained. In that view of the case it is unnecessary to consider the further question as to whether the petition could have been maintained if there had been no express stipulation that the lease was to be subject to the rights of persons who might thereafter receive entries for claims under the Placer Mining Regulations.

There is another provision of the lease to which reference ought perhaps to be made, by which it was provided as follows:—

1906

McLEAN
v.
THE KING.

Reasons for Judgment.

"Her Majesty does not in any way warrant that there "shall be a sufficient quantity of water in the said portion "of the said river to admit of operations under this lease, "and that the lessee, his executors, administrators and "assigns shall have no right to compensation should it "be found impossible for that or for any other reason to "carry on such operations, it being hereby declared and "agreed that this lease is taken by the lessee entirely at "his own risk."

The petition shows that the reason the suppliant did not get possession of the lands leased to him, and in consequence was prevented from carrying on operations under the lease, was that the areas covered thereby were granted to placer miners under the Placer Mining Regulations. But that contingency was provided for by the express terms of the lease, and having happened the suppliant is not entitled to any compensation by reason thereof.

There will be judgment for the respondent upon the demurrer to the petition of right, and the costs will follow the event.

Mr. Latchford asked that in case the demurrer was sustained the suppliant should have leave to amend his petition of right, and such leave is given upon the usual terms.

Judgment accordingly.

Solicitors for suppliant: *Latchford & Daly.*

Solicitors for respondent: *Chrysler, Bethune & Larmonth.*

IN THE MATTER of the Petition of Right of

1906
Oct. 29.

RANDOLPH MACDONALD.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Negligence—Canals—Natural channels of rivers—Distinction between public property and public works.

The natural channels of the St. Lawrence River, which lie between the canals, are not public works unless made so by statute, or unless something has been done to give them the character of public works.

2. By the 1st clause of the 3rd Schedule of *The British North America Act, 1867*, "Canals with land and water power connected therewith" (of which the Cornwall Canal is one) are enumerated as part of the "Provincial Public Works and Property," that in virtue of the 108th section of the Act became "the property of Canada."

Held, that this does not give the Dominion any proprietary rights in the River St. Lawrence from which the water is taken for the Cornwall Canal, beyond the right to take the water, nor make the river itself a public work of Canada.

3. By an Order of His Excellency in Council of the 22nd March, 1870, the St. Lawrence River to the head of Lake Superior, the Ottawa River, the St. Croix River, the Restigouche River, the St. John River and Lake Champlain are declared to be under the control of the Dominion Government.

Held, that this Order in Council did not have the effect of altering in any way the proprietary rights, if any, that the Government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them public works of Canada.

PETITION OF RIGHT for damages arising from alleged negligence of the servants of the Crown on a public work.

The facts are stated in the reasons for judgment.

March 19th, 1906.

The case was heard at Ottawa.

N. A. Belcourt, K.C. and *J. A. Ritchie* for the suppliant, contended that there was negligence on the part

1906

MACDONALD v. THE KING.

Argument of Counsel.

of the Crown's servants in charge of the channel in not removing the buoys in the autumn, or in not discovering missing buoys in the spring. The *locus in quo* was part of the canal system above Montreal, which must be held to include the river channels or reaches. The development of the water power makes the channel a public work, if the channel was not so otherwise. (Citing 31 Vict. c. 12, secs. 10, 24, 65; R. S. C. c. 37 s. 2 (c); 3 and 4 Vict. (Imp.) c. 35; 4 and 5 Vict. (P. Can.) c. 28; 8 Vict. (P. Can.) c. 30; 9 Vict. (P. Can.) c. 37; 13 and 14 Vict. (P. Can.) c. 14; 22 Vict. (P. Can.) c. 3 (1859); 33 Vict. c. 24; *Mersey Docks v. Gibbs* (1); *The Queen v. Williams* (2); *McKays Sons v. The Queen* (3).

F. R. Latchford (with whom was *E. J. Daly*) contended that the case of *McKays Sons v. The Queen* (*supra*) supported the case of the respondent here. If the *locus in quo* was not a public work, the case falls whether there was negligence or not. *Leprohon v. The Queen* (4).

THE JUDGE OF THE EXCHEQUER COURT now (October 29th, 1906) delivered judgment.

The suppliant brings his petition to recover damages for injuries occasioned to a dredge which struck a submerged spar buoy near Maxwell's Shoal in the River St. Lawrence. His contention is that the case is within the terms of clause (c) of the sixteenth section of *The Exchequer Court Act*, it being conceded that apart from the provisions of that section the petition cannot be sustained. That raises two questions :—

First: Did the injury complained of result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment? and

(1) 11 H. L. C. 686.
(2) 9 App. Cas. 418.
(3) 6 Ex. C. R. 1.
(4) 4 Ex. C. R. 100.

1906

MACDONALD v. THE KING

Reasons for Judgment.

Secondly: Did such injury occur on a "public work" within the meaning of that expression as used in the clause referred to?

To sustain the petition, both of these questions must be answered in the affirmative. If either is answered in the negative the suppliant is not entitled to any portion of the relief sought by his petition. The second question should, it seems to me, be answered in the negative, and that renders it unnecessary in the present disposition of the case to express any opinion as to the first of the two questions mentioned. If it were necessary to answer that question I should on the evidence before me, answer it in the affirmative.

The subject was in Canada first given relief against the Crown, in a judicial proceeding, for damages arising out of any death or any injury to person or property on a public work under the control and management of the Government of Canada by the Act 33rd Victoria, chapter 23. That Act provided for the recovery of such damages in a proceeding before the Official Arbitrators, and this Court has succeeded to the jurisdiction given to them by that Act and by subsequent Acts. The Act mentioned provided, among other things, for a reference to the Official Arbitrators of a claim for damages "arising out of any death or any injury to person or "property on any railway, canal or public work under "the control and management of the Government of "Canada." *The Public Works Act* in force at that time (1) made a distinction between public works and public property. The former were no doubt public property; but all public property did not fall within the meaning of the expression "public works" as then used. That is clear, I think, from the provisions of the tenth and fifty-eighth sections of the Act. By the latter section it was provided that the Governor in Council might,

(1) 31 Vict. c. 12, ss. 10 and 58.

1906

MACDONALD v. THE THE KING.

Reasons for Judgment.

by order in Council, to be issued and published as there inafter provided, impose and authorize the collection of tolls and dues upon any canal, railway, harbour, road, bridge, ferry, slide, or other public work vested in Her Majesty and under the control or management of the Minister of Public Works. And if at the time when the Act 33 Victoria, chapter 23, came into force, the question had been asked as to what was included in the expression "public works" as used in that Act, the fair and reasonable answer would have been, it seems to me, that in addition to canals and railways were included works of the class mentioned in the fifty-eighth section of *The Public Works Act* (1). But in 1872 by the Act 37th Victoria, chapter 24 *The Public Works Act* (2) was further amended, and the term "public work" extended to include in a general way all property vested in the Crown in the right of the Dominion of Canada. This Act, with some additions and enlargements, constitutes the basis of the definition of a public work to be found in several statutes now in force. (R. S. C. c. 36; 52 Vict. c. 13). So far, however, the expression "public work" occurring in clause (c) of the sixteenth section of *The Exchequer Court Act* (3) has not been held to include all property vested in the Crown, and through a Minister, under the control and management of the Government of Canada. In the case of *The City of Quebec v. The Queen* (4). Mr. Justice Taschereau expressed the opinion that the rock on which the citadel of Quebec rests is not a public work, or a work at all within the meaning of the statute, though it was undoubtedly at the time public property vested in the Crown in the right of the Dominion. And in the case of *Larose v. The Queen* (5) it was held both in

(1) 31 Vict. c. 12, s. 58.
(2) 31 Vict. c. 12.
(3) 50-51 Vict. c. 16, s. 16 (c).
(4) 24 S. C. R. at p. 448.
(5) 6 Ex. C. R. at p. 429, and 31 S. C. R. at p. 208.

1906

MACDONALD v. THE KING.

Reasons for Judgment.

this court and on appeal in the Supreme Court of Canada that a rifle range, though the property of the Crown, is not a "public work" within the meaning of that expression as used in the provision now under discussion. The fact that certain property is vested in the Crown in the right of the Dominion is not, it appears, conclusive of the question as to whether such property is a public work or not within the meaning of the statute. It constitutes, however, in each case an important consideration and a matter always to be borne in mind.

Maxwell's Shoal, near which the accident complained of happened, is situated in the St. Lawrence River between Farran's Point and the Cornwall Canal, and about one and a half miles west of the upper entrance to that canal. As the channel at that place is a natural one, neither it nor the river, nor the bed thereof at that point, can be deemed a public work of Canada, unless something has been done there, or in respect thereof, or some statute has been passed, to make it a public work.

In the statutes of the old Province of Canada respecting public works in a schedule of "public works "vested in the Crown" and under the words "navi- "gations, canals and slides" we find the following: "All those portions of the St. Lawrence navigation, "from Kingston to the Port of Montreal improved "at the expense of Canada" (1). By the one hundred and eighth section of *The British North America Act*, 1867, it is provided that "the public works "and property of each province enumerated in the "third schedule to this Act shall be the property "of Canada," and among those so enumerated we find in the fifth clause of the schedule "Rivers and Lake "Improvements." The case of *The Attorney-General for the Dominion of Canada* v. *The Attorneys-General for*

(1) 9 Vict. c. 37, Schedule A; 22 Vict. c. 3, Schedule A. and C. S. C. c. 28, Schedule A.

1906

MACDONALD v. THE KING.

Reasons for Judgment.

the Provinces of Ontario, Quebec and Nova Scotia (1), shows that under the section and clauses cited only the improvements on rivers and lakes, and not the entire rivers passed to the Dominion; and that whatever proprietary rights were at the time of the passing of the Act last mentioned possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada.

Now it does not appear that any improvements had, before the Union of the Provinces, been made in the bed or channel of the St. Lawrence River at or near Maxwell's Shoal. It is clear therefore that the Dominion acquired no proprietary rights in that part of the river, and that the same did not become a public work of Canada by virtue of the statutes of the old Province of Canada or of *The British North America Act*, 1867. It appears further that up to the time of the accident complained of no public money had been expended by the Dominion in the improvement of the channel of the river at or near Maxwell's Shoal. Since the accident some work has been done there at the public expense in dredging the shoal and in deepening the channel of the river at this point. That of course has no bearing upon this case. The fact is that there is no ground for any contention that the place where the accident happened was a public work within the meaning of the statute because public money had been there expended in deepening and improving the channel of the river. In that respect this case is not so strong a one as that of the *Hamburg American Packet Company* v. *The King* (2), where it was held that the channel of the River St. Lawrence near Cap à La Roche, between Montreal and Quebec, was not a public work after the deepening of the channel was finished.

(1) [1898] App. Cas. 700. (2) 7 Ex. C. R. 150; 33 S. C. R. 252.

1906

MACDONALD v. THE KING.

Reasons for Judgment.

At the time of the accident the Minister of Public Works had buoys placed in the stretch of water between the Cornwall Canal and Farran's Point, and from time to time the channel of the river was swept to see if there were any obstructions to navigation. Both of these things were done in aid of the navigation of this part of the river; but they did not in my view make it a public work.

Some stress was in argument laid on the fact that the River St. Lawrence and the several canals by which the navigation of the river is improved form one system of navigation. That is true, but it is also true, as was pointed out, of Lake Ontario and the other great lakes that form part of Canada's inland waters. And anyway it does not follow that because the several canals are public works that the portions of the St. Lawrence River which lie between such canals are also public works. As has been stated, the natural channels of the river are not public works unless some statute has declared them to be so, or something has been done to make them public works. Some reliance was in this connection placed on the provision of the fourth paragraph of the thirteenth section of Chapter 37 of the Revised Statutes of Canada, whereby it is provided that the same tolls shall be payable on steamboats and vessels of any kind, and passengers taken down the River St. Lawrence past any of the canals between Montreal and Kingston as would be payable on such steamboats, vessels or passengers if the same had been taken through the canal or canals past which they are so taken down. But that does not affect this case, as there is no canal opposite to the stretch of water between Farran's Point and the upper entrance to the Cornwall canal. And in any event the toll is not really imposed for the use of the river; but to prevent persons from avoiding payment of the toll on the canal.

It was also argued that because the Cornwall Canal,

1906

MACDONALD v. THE KING.

Reasons for Judgment.

which undoubtedly is a public work, is operated by water drawn from the St. Lawrence River, and that the water is there used not only for the purposes of navigation but also for the development of power from which a revenue is derived, that the whole, including the portion of the river from which the water is taken becomes a public work. By the first clause of the third schedule of *The British North America Act*, 1867, "canals with lands and water "power connected therewith" (of which the Cornwall Canal was one) are enumerated as part of the "Provin- "cial Public Works and Property" that by virtue of the one hundred and eighth section of the Act became "the "property of Canada." But there is nothing in that I think to give the Dominion any proprietary rights in the river from which the water is taken, beyond the right to take the water; or to make the river itself a public work of Canada.

By an order of His Excellency in Council of the 22nd of March, 1870, the St. Lawrence River to the head of Lake Superior, the Ottawa River, the St. Croix River, the Restigouche River, the St. John River and Lake Champlain were declared to be under the control of the Dominion Government. And it was argued, perhaps not very strongly, that this made the rivers and lakes mentioned public works of Canada. But it does not appear to me that this order could have any such effect, or that it was so intended. As pointed out in the case referred to of *The Attorney-General for the Dominion of Canada v. The Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1) there is a broad distinction between proprietary rights and legislative jurisdiction. The Parliament of Canada has within Canada exclusive legislative authority in respect, among other things, of "navi- "gation and shipping" and also of "ferries between a "Province and any British or Foreign Country or

(1) (1898) App. Cas. 709.

1906

MACDONALD v. THE KING.

Reasons for Judgment.

"between two Provinces" (1). And in those subjects we find space and room for the exercise by the Government of Canada of such control over the waters mentioned as Parliament had conferred or might confer upon it. There is no occasion to put any strained construction upon the order in council. It could not have the effect of altering in any way the proprietary rights (if any) that the Government of Canada then had in the rivers and lakes mentioned, or of making them or any parts of them, public works of Canada.

There will be judgment for the respondent, and a declaration that the suppliant is not entitled to any portion of the relief sought by his petition. The costs, as usual, will follow the event.

Judgment accordingly.

Solicitors for Suppliant : *Belcourt & Ritchie.*

Solicitors for Respondent : *Latchford & Daly.*

(1) *The British North America Act*, 1867, s. 91, clauses (10) and (13).

BRITISH COLUMBIA ADMIRALTY DISTRICT.

BOW McLACHLAN & CO.....PLAINTIFFS; 1906 Jan. 9.

vs.

THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.....} DEFENDANTS.

THE CAMOSUN.

Action in rem—Mortgage—Set off—Practice.

In an action in rem to enforce the payment of money due upon a mortgage given to the builders to secure the purchase price of a ship, defendants were allowed to plead a set-off for the amount of moneys expended by them to replace defective work and materials in order to bring the ship up to the requirements of Lloyds A1 Class and Board of Trade.

MOTION to amend Statement of Defence.

November 26th, 1906.

E. P. Davis, K.C., in support of the motion: The seventh paragraph of the defence is the one in question. It alleges alternatively, and by way of equitable defence to claim on mortgage of ship for balance of price, in case it shall be held that owners have made default under mortgage and agreement, that plaintiffs in breach of the contract negligently and defectively constructed ship so that the sum of £3,638 was incurred by defendants for repairs, and asks to set off and deduct that sum from the amount due on the mortgage.

Though it has been decided by this court and the Exchequer Court on appeal that this cannot be set up as a counterclaim, nevertheless we can plead it as a defence. See Rule 63; *Padwick v. Scott* (1); *Howell's Adm. Prac.* (2); *Wms. & Bruce Adm. Prac.* (3).

(1) 2 Ch. D. 736.
(2) P. 36.
(3) 2nd ed. p. 346.

1906

McLACHLAN v. THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.

Argument of Counsel.

This mortgage now depends entirely upon amount due for building of ship, and if the amount depends on good workmanship the court will look behind the mortgage. *The Innisfallen* (1); *The Minerva* (2); *The Trident* (3); *The Harriett* (4); *The Juliana* (5). But apart from all this Rule 63 is enough—this is really a set-off arising out of same cause or matter; it reduces the claim to that amount, and does not ask for a cross judgment as counterclaim does.

L. Bond, contra: The mortgage dated 9th February was given to secure the balance due on the ship, but the subsequent agreement made before the mortgage was due explains the true status, i.e. so long as terms of agreement were performed the mortgage would not be called in.

We do not object to the new defence (subject to costs) except par. 7. Refers to judgment of Mr. Justice Morrison on ground of jurisdiction. If it cannot go in as a counterclaim it would be wrong to allow it as a set-off as it would be getting round the decision in a round about way. But this cannot be a set-off for it is not a liquidated claim. *Annual Practice* (6).

A set-off can never sound for damages; and also the ground the Exchequer Court took in dismissing the appeal was that these claims were not an Admiralty matter at all therefore cannot be tried as a counterclaim or set-off.

Cases cited do not assist though they show that the Court of Admiralty may entertain all equitable defences on a mortgage. But this is not an equitable defence; no total failure of consideration, or non-acceptance, i.e. refusal to take. But here, they have taken and paid for the ship partly in cash and partly by mortgage. *Chitty on Con-*

(1) L. R. 1 A. & E., 72.
(2) 1 Hagg. Adm. 347.
(3) 1 Wm. Rob.. 29.
(4) 1 Wm. Rob., 182.
(5) 2 Dodson at p. 521.
(6) 1907, pp. 273-4.

1906

McLACHLAN v. THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.

Reasons for Judgment.

tracts (1). So all that is left at common law is to bring an action for damages for wrongful construction. But such a thing never framed an equitable defence to a mortgage. And as it is a matter of discretion in view of the judgment of the Exchequer Court it should not be raised here.

And further as to convenient trial, it is agreed that the ship was built in Scotland, and it would be practically impossible to bring this action here; the balance of convenience is clearly in our favour.

Mr. *Davis* in reply: Decision in counterclaim goes no further than that an action could not be entertained in Admiralty for defects in construction of ship.

This is a set-off. *Young v. Kitchin* (2); *Goverment of Newfoundland v. Newfoundland Ry. Co.* (3). We have both things here (a) the damages and (b) the original parties. As to question of convenience—that means not so much local convenience as the nature of the issues, and not so much objectional in set-off as in the counterclaim. The real position is set up in the 4th par. of defence. The original mortgage making the payment for three months was intended only as an interim arrangement.

After steamer got out here we presented a bill for repairs, and paid the balance of mortgage in cash; we say we are not in default under the mortgage and agreement.

MARTIN, L. J. now (January 9th, 1907) delivered judgment.

The nature of and the proceedings in this action are set out in the judgment of Mr. Justice Morrison (4), which was affirmed on appeal to the Exchequer Court with another decision on the same application (5). In this relation it may not be out of place to refer to a cognate decision on the

(1) 13th ed. p. 698.
(2) 3 Ex. D., 127.
(3) 13 A. C. 199.
(4) [1906] 12 B.C. 283.
(5) *Ante*, p. 333.

1906

McLACHLAN v. THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.

Reasons for Judgment.

jurisdiction of this Court, *Cope v. S.S. "Raven,"* (1) and see also *Vermont S.S. Co. v. Abby Palmer* (2).

This is a motion in consequence of the former decision to deliver an amended statement of defence, and the objection arises from the following proposed paragraph thereof:

"7. Alternatively and by way of equitable defence to the plaintiff's action, in the event of it being held that the said owners have made default under the said agreement and mortgages, and that the plaintiffs are entitled to recover from the defendants in this action the said owners say that the plaintiffs did not build the said ship *Camosun* in accordance with the terms of the contract, letters, plans and specifications set out in paragraph 4 hereof, but on the contrary the said ship *Camosun* was built by the plaintiffs negligently and with defective work and materials, and not in accordance with the requirements of Lloyd's 100 A1 Class and Board of Trade, nor in accordance with the plans and specification of the same, with the result that the said owners were forced to spend in repairing and replacing defective materials and bad workmanship, and in making the said ship comply with the requirements of Lloyd's 100 A1 Class and Board of Trade, and in repairing and renewing fittings, decorations, furniture and stores damaged through leaking decks and hull, and other defective materials and workmanship and other incidental expenses, the sum of £3,638, particulars whereof have already been delivered to the plaintiffs, and the defendants, the owners of the said ship *Camosun* claim they are in equity entitled to, and in justice should be permitted to set off and deduct from any and all sums of money which may be payable by the said owners to the plaintiffs, the said sum of £3,638 so expended by them as aforesaid, with interest and costs."

While Mr. Bond concedes that this Court will entertain equitable defences to a mortgage, he contends, first,

(1) [1905] 11 B.C. 486. (2) [1904] 10 B.C. 383; 8 Ex., 462.

that to allow this defence to be set up would be really evading or getting round said decision that it cannot be set up as a counterclaim. As to that, all I need say is that if Rule 63 is broad enough to include it as a set-off, it is my duty to give effect thereto. It is not a sufficient ground to reject it that if alleged in one way it is objectionable, though if set up in a different way it may be permissible. In pleading, much depends on how defences are put forward, and their character may be changed or obscured by the manner of allegation.

Secondly, it is urged that this not a set-off in the true sense, but a counter-claim disguised, because it arises from an alleged breach of contract for negligent and defective construction and can only ask for unliquidated damages, and as there is not a total failure of consideration it is not an equitable defence to the mortgage; nor is there non-acceptance here, for the owners have taken the ship and paid for her, part in cash and part by the mortgage, and therefore all that is left them is to sue as at common law on the said breach.

In reply, it is urged that this defence differs essentially from a counterclaim for no cross judgment is asked for, but merely the right to deduct from the balance of the purchase price represented by the mortgage the loss the owners have had to bear occasioned directly by the defective construction, which is simply reducing their claim *pro tanto*, and as the matter is all one between the same parties directly arising out of the same transaction, it is manifestly a case for the consideration of an equitable set off, and *Young v. Kitchin* (1) and *Government of Newfoundland v. Newfoundland Ry. Co.* (2), are relied upon as shewing that an equitable set-off can be founded on damages for breach of contract. At p. 213 of the latter case their Lordships of the Privy Council say :—

(1) [1878] L.R. 3 Ex. D. 127. (2) [1888] 13 A.C. 199.

1906

McLACHLAN v. THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.

Reasons for Judgment.

"That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment.

"It appears to their Lordships that in the cited case of *Young v. Kitchin* the decision to allow the counter-claim was rested entirely on this principle."

On considering the whole matter I cannot see that I would be justified in excluding this proposed set-off in circumstances such as these at bar, for they seem to me equitably to clearly entitle the defendants to a reduction of the mortgage, if they can be substantiated, and therefore an opportunity should be given them to do so.

Thirdly, I am asked to say in the language of said rule that this set-off in my opinion "cannot be conveniently "disposed of in the action." No evidence is before me on this point other than is contained in the pleadings and the judgments which have been referred to. It is stated in that of my brother Morrison that the repairs in question were made at Montevideo and San Francisco while the *Camosun* was on her way out to this Province where she now is, and probably the greater part of them were made at San Francisco towards the close of the voyage. It certainly would be more convenient to dispose of the questions arising out of these repairs here, where the ship is and can be inspected, than in Scotland, and witnesses who would for example, testify regarding her condition on arriving at San Francisco could be examined with greater facility and less expense on this coast, either orally or by commission, than in Scotland. Of course as regards the original construction of the ship, there is much to be said in favour of Mr. Bond's contention that

1906

McLACHLAN v. THE UNION STEAMSHIP CO. OF BRITISH COLUMBIA.

Reasons for Judgment.

seeing she was built in Scotland the evidence must be got there; but on the other hand, the ship is here and the actual inspection of her by skilled persons in the light of the evidence will be of much importance in determining any alleged defects. The truth is it will doubtless be a difficult matter to dispose of anywhere satisfactorily, but I am unable to say that it will be more inconvenient here than in the only other place suggested, and therefore I should not refuse to entertain it. This is apart from Mr. Davis' submission that "convenience" means not so much locality as the nature of the issues and the facility for their disposition, in regard to which all I need say is that I think the matter should be additionally considered in that light; but it is not suggested by Mr. Bond that in this sense there is any lack of convenience here.

The result is that the motion will be allowed, with costs thereof, and of those occasioned by the amendment, to the plaintiff in any event. The reply to be delivered in six weeks as requested by Mr. Bond.

Judgment accordingly.

L. Bond, solicitor for plaintiffs.

Davis, Marshall & Macneill, solicitors for defendants.

BETWEEN

1906
May 14.

THE COPELAND-CHATTERSON COMPANY, LIMITED..... } PLAINTIFFS;

AND

JEAN PAQUETTE (ALSO TRADING UNDER THE NAME MONTREAL PLUMBERS' SUPPLIES) AND VICTOR GUERTIN AND HENRY GUERTIN (TRADING UNDER THE NAME GUERTIN PRINTING CO.) ..... } DEFENDANTS.

Patent for invention — Infringement — Manifold sheets—Canadian patent No. 66843—Disclaimer after action—Validity of remaining claims.

The first claim in the specification in patent sued on was disclaimed after action brought. It was as follows:—"1. A manifold sheet having an original leaf and a duplicate leaf connected at a score line and folded together, the duplicate leaf having an apertured binding margin which makes it of greater actual area than the original leaf whereby when detached the duplicate leaf may be filled by means of its apertured margin." The second claim, the validity of which was in issue, was in these terms:—"2. A manifold sheet having an original leaf and a duplicate leaf connected at a score line and folded together, the duplicate leaf having an apertured binding margin which makes it of greater actual area than the original leaf, the duplicate leaf having its binding margin folded over, whereby when the duplicate leaf is detached its margin may unfolded for filing."

Held, that there was no difference in fact between the sheet described in the first claim, which was disclaimed, and that described in the second claim.

2. In view of the disclaimer of the first claim above mentioned, there is no novelty or invention in placing the score line in one particular place in the plane of the original leaf so that one half of the binding margin of the duplicate leaf will, before the leaves are separated from each other, lie in such plane.

THIS was an action for the infringement of a patent for invention.

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

September 14th and 15th, 1905.

The case was tried at Montreal.

October 19th, 1905.

The case was argued at Montreal.

W. Cassels, K.C., and *W. E. Raney*, for the plaintiffs, contended that the invention, looked at as a whole, was an arrangement of leaves on a sheet of paper so folded as to accomplish with facility and economy the purpose of furnishing several invoices, the duplicates of which will all appear on one charge sheet of paper to be kept for filing purposes. The transverse score lines enable this to be done with facility and despatch and the greatest possible economy of labour. Such a device or invention is patentable, and its utility is demonstrated in the fact that it has gone into very general commercial use in this country. They cited *Hoe* v. *Cottrell* (1); *Magowan* v. *New York B. & P. Co.* (2); *Potts* v. *Creager* (3); *Union Sugar Refinery* v. *Mathieson* (4).

P. B. Mignault, K.C. (with whom was *J. L. Perron, K.C.*) for the defendants, contended that there was no subject-matter. Utility is no test of patentability. If I fold a sheet of paper in two or three folds and then put a score line, or line of perforations, at a short distance from the line of fold so that the sheet can be detached, surely there is no invention in that. The whole thing is so perfectly obvious that it is not a matter of new invention in the sense of the Statute of Monopolies. Then what is the effect of the disclaimer herein made pending the action. Clearly that no damages can be claimed for anything done prior to the filing of the disclaimer. (*Frost on Patents* (5); *Walker on Patents* (6); *Office Specialty Co.* v. *Globe Company* (7).

(1) 1 Fed. R. 597.
(2) 141 U. S. R. 332.
(3) 155 U. S. R. 597.
(4) 3 Cliff 639.
(5) 2nd ed. pp. 271 *et seq.*
(6) 4th ed. pp. 186, *et seq.*
(7) 65 Fed. Rep. 599.

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Mr. *Cassels* replied. In *Smith* v. *Goldie* (1), there was a disclaimer during the pending of the suit, and damages were given.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (May 14th, 1906) delivered judgment.

This action was originally brought to obtain relief for an alleged infringement of letters patent numbered 66,843 for an improvement in manifold sheets issued on the 31st day of March, 1900, to Robert James Copeland, and subsequently assigned to the plaintiff company; and also for an alleged infringement of a certain industrial design mentioned in the statement of claim filed in this case. The specification attached to the letters patent concludes with sixteen claims, and it was alleged that all these claims had been infringed. The statement of claim was filed in this court on the 3rd day of November, 1904. On the 4th day of January, 1905, the defendants filed their statement in defence, by which on the grounds stated therein they denied the validity of the patent and of the industrial design mentioned. Thereupon on the 23rd day of February, 1905, the plaintiff company, with the concurrence of Robert James Copeland, the inventor, and on the ground that through mistake, accident or inadvertence, and without any wilful intent to defraud or mislead the public, he had made his specification too broad, filed in the office of the Minister of Agriculture, a disclaimer of the first claim set up in such specification. Then on the 14th day of April following the statement of claim was amended by striking out the allegations on which relief was asked for the infringement of the industrial design mentioned; and of the first, third, fifth, seventh, ninth, tenth, eleventh and thirteenth claims of the specification. An amended statement of defence has been filed, by which the defendants, among other

(1) 9 S. C. R. 46.

defences, set up that the alleged invention was not new and that it was not the proper subject matter of letters patent.

The following extract from the specification gives in the inventor's own terms a general description of the invention that he claims to have made:—

"This invention relates to manifold sheets and more particulary to such as are designed for use in rendering accounts or bills. It seeks to provide such sheets in convenient and compact size and form, so that they may be used in a typewriter of ordinary size without unduly diminishing the size of the bill heads; also to provide binding margins in duplicate or triplicate leaves of manifold sheets, such binding margins preferably having apertures whereby they may be secured in place of a loose leaf binder when detached from the original leaf or bill head, such margin being of sufficient width to prevent any of the matter written on the duplicate leaf from being covered up in the binder.

"In the sheets embodying the invention the original and duplicate leaves are connected together along a line of separation at which the leaves are intended to be detached. This line of separation will be herein termed a score line. The original and duplicate leaves are folded one upon another so that when a carbon sheet is slipped in between the two, matter written on the original leaf will be duplicated on the duplicate leaf. In order that the manifold sheet may be sufficiently narrow to pass through typewriters of ordinary width and at the same time wide enough not to require the original leaf to be narrower than the bill heads in general use, the binding margin is generally folded along a line running mediately through it. By this arrangement the sheet is gotten into the most convenient and compact size and form. When the sheet has been filled out and the original leaf detached from the duplicate leaf, the latter is

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

filed in the binder. For this purpose the binding margin of the duplicate leaf is provided with apertures so that it may be filed on a loose leaf binder having posts to engage the apertures. In some cases the manifold sheet has two duplicates, each duplicate having a binding margin provided with apertures and in some cases the third leaf may be used as an original leaf or bill head whose matter will be duplicated on the back of the middle or duplicate leaf. In this last case the binding margin will be omitted from the third leaf. In all cases the binding margin of the duplicate or duplicates is so disposed as not to cover any of the writing space of such duplicate or duplicates."

Then follow references to the drawings in which by twenty figures the inventor shows various forms of sheets that he says are covered by his invention.

The first claim in the specification which, as has been seen, has been disclaimed as being too broad, was made in these terms :—

" 1. A manifold sheet having an original leaf and a duplicate leaf connected at a score line and folded together, the duplicate leaf having an apertured binding margin which makes it of greater actual area than the original leaf whereby when detached the duplicate leaf may be filed by means of its apertured margin."

The second claim, the validity of which is in issue in this case, is made in these terms :—

" 2. A manifold sheet having an original leaf and a duplicate leaf connected at a score line and folded together, the duplicate leaf having an apertured binding margin which makes it of greater actual area than the original leaf, *the duplicate leaf having its binding margin folded over*, whereby when the duplicate leaf is detached *its margin may be unfolded for filing*."

Now the first question to be determined is whether there is in fact any difference between the sheet described

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

in the first claim, which it is admitted cannot be supported, and the sheet described in the second claim. In the latter the duplicate leaf is said to have "its binding margin folded over," and there is that verbal difference. But that is a matter of words and not of substance; for it is not possible, it seems to me, to make a sheet in accordance with the first claim without folding over the binding margin of the duplicate leaf. It will be seen by reference thereto that what is called the original leaf of the sheet is connected with what is called the duplicate leaf, by a score line; that the two leaves are folded together; and that the duplicate leaf with its apertured binding margin has a greater actual area than the original leaf has.

Now it is obvious that the score line that connects the two leaves of the sheet and permits them to be separated from each other must be placed either in the line on which the sheet is folded or on one side or the other of that line. If it is placed on the line of fold the two leaves will be equal in area, and if it is placed on that side of the line of fold that adjoins the duplicate leaf, the latter will, when the leaves are separated, be smaller than the original leaf. In order that the duplicate leaf with its margin may be larger in area than the original leaf it is necessary to place the score line on that side of the line of fold that adjoins the original leaf. That is, a portion of the margin of the duplicate leaf must be folded over. That follows from the language used in the first claim. It is expressly mentioned in the second claim. But in substance there is in this respect no difference between the two claims. Neither is there any difference of language with which the two claims conclude. In the first claim it is stated that when the original leaf is detached the duplicate leaf may be filed by means of its apertured margin; while in the second claim it is stated that when the duplicate leaf is detached

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

the margin may be unfolded for filing. But in each case equally, when the two leaves are detached the one from the other "the margin of the duplicate leaf may be "unfolded for filing," and it "may also be filed by "means of the apertured margin." And it being admitted that the first claim cannot be supported the second claim fails.

The fourth claim, the validity of which is also in issue, is made in the following terms :—

"4. A manifold sheet having an original leaf, and a "duplicate leaf connected together at a score line, and "folded together, the duplicate leaf having a binding "margin on the side next the original leaf, which makes "it of greater actual area than the original leaf, *the line* "*of fold for the sheet running medially across the margin* "*of the duplicate leaf*, whereby when detached said "margin of the duplicate leaf may be unfolded for "filing."

Now as to this claim, it will in the first place be seen that the binding margin is not described as it is in the first and second claims as "an apertured binding margin." But nothing turns upon either the omission or inclusion of the word "apertured." It is no new thing to have apertures in sheets or leaves to enable them to be placed with ease and facility on files or in binders; and in the present case it makes no difference in the validity of the claim whether the binding margin is described as "apertured" or not. Then in the second place it will be seen that the expression "the duplicate leaf having a binding "margin on the side next the original 'leaf,'" is not an accurate or apt description of what is obviously intended, unless we are to distinguish between a margin and a binding margin; and I do not understand that any such distinction is to be made. The greater the number of leaves to be bound together the larger the margin required; but the whole margin may with propriety be re-

garded as something needed for the purpose of binding the leaves together. That is, the margin as a whole is a binding margin. But if, as stated in the fourth claim, "the line of fold for the sheet runs medially across the margin of the duplicate leaf," then one half of the margin must be on that side of the line of fold, that is, next to the duplicate leaf, as distinguished from its margin, and the other half of such margin must be on the side next to the original leaf. That is, a part of the binding margin only, and not the whole of it, is on the side of the line of fold which is next to the original leaf. But that was equally the case with respect to the sheets described in the first or second claims, the only difference being that in the fourth claim the part of the margin of the duplicate leaf that is on the side of the line of fold next to the original leaf constitutes exactly one half of such margin. Otherwise there is no substantial difference. If the fourth claim is to be supported, it is on the ground alone that "the line of fold for the sheet" is described as "running medially across the margin of the duplicate leaf." That question will be discussed later. In the meantime it will, I think, be convenient to go through the other claims of the specification in question in this action, and see if there is in the sheets described any other element or feature to support the plaintiff's patent.

The sixth claim is made in these terms:—

"6. A manifold sheet having an original leaf and a "duplicate leaf connected together at a score line and "folded together, the duplicate leaf having an apertured "binding margin, which makes it of greater actual area "than the original leaf, the line of fold for the sheet "running medially across the margin of the duplicate leaf "and so *that part of said binding margin lies in the plane "of the original leaf and part in the plane of the duplicate "leaf*, whereby when detached said margin of the dupli- "cate leaf may be unfolded for filing."

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

In this claim we have in express terms what of necessity happens in the case of the sheet described in the fourth claim, that is, unless, as before mentioned, some distinction is to be drawn between a "margin" and a "binding margin." But if not, then part of the binding margin mentioned in the fourth claim must of necessity lie "in the plane of the original leaf and part in the plane of the duplicate leaf." So that the only difference in this respect between the fourth claim and the sixth is one of words only and not one of substance. In the sixth claim the binding margin is described as being "apertured," but, as has been seen, that is not material. In the result the sixth claim, like the fourth, is to be supported, if at all, because the "line of fold for the sheet" is described as "running medially across the margin of the duplicate "leaf." The same is true also of the eighth claim, which differs from the fourth claim in this only, that the binding margin is described as being "apertured" and it is stated that a part of the binding margin lies in the plane of the original leaf and part in the plane of the duplicate leaf. But as that is true also of the sheet described in the fourth claim, although not so stated in express terms, there is no material difference between the fourth claim and the eighth.

The twelfth claim is the same as the first claim, with the addition of the following words: "the manifold sheet "having also a third leaf folded under the other two "leaves and which may be used as a triplicate leaf, or as "an original leaf whose matter may be duplicated on the "under side of the duplicate leaf." That is, by making a second fold in the sheet and in that way obtaining a third leaf, one may by the use of carbon leaves, get two invoices and one record or copy to be kept or bound; or, one invoice and two records or copies to be kept or bound, or he may get two different invoices with copies thereof on the opposite sides of the duplicate leaf. But there is

nothing really new or patentable in the matter of this third leaf. All that is done is accomplished by a well known and understood use of carbon leaves. And surely no one can hope to get a patent for his sheet because he folds it twice instead of once. In my view the twelfth claim is no better than the first which has been abandoned.

The fourteenth claim is the same as the first claim, with the addition of these words: "one of the leaves being "divided by a transverse score line." But dividing leaves by score lines was not a new thing, nor one that involved any invention. Admitting, as it must be admitted, that it is open to anyone to make and use the sheets described in the first claim of the specification, it is perfectly clear that it is also open to him to divide the leaves composing such sheets, or either of them, by as many or as few "transverse score lines" as he sees fit to use. I see no grounds on which the fourteenth claim can be supported.

The fifteenth claim is the same as the fourth, with the addition, as in the last claim mentioned, of the words "one "of the leaves being divided by a transverse score line." But, as we have seen, that feature affords no additional support to the claim. Like the fourth claim, it must stand or fall according as to whether that part of the claim in which "the line of fold for the sheet" is described as "running medially across the margin of the duplicate "leaf" is held to be new and to involve invention or not.

The sixteenth claim is the same as the first claim, with the addition of a third leaf folded under and with one or more of the leaves divided by transverse score lines. As neither of these features or additions are new or involve invention, or afford subject matter for a patent, this claim is, in my opinion, no better than the first claim and cannot be supported.

That leaves the following question to be considered and answered: Are the fourth, sixth, eighth and fifteenth claims good because "the line of fold for the sheet" is

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

described as "running medially across the margin of the "duplicate leaf?" For unless they can be upheld on that ground, I do not see any other upon which they may be supported. We have seen that in making a manifold sheet in accordance with the abandoned first claim of the patent so that the duplicate leaf with its binding margin may be of a greater actual area than the original leaf, the score line by which the leaves are connected and which enables them to be detached from each other, must be placed on that side of the line of fold which adjoins or is next to the original leaf. To use other words found in the claims to express the same thing, the score line must lie in the plane of the original leaf, if the duplicate leaf with its apertured binding margin is to be greater in area than the original leaf. If the score line lies in the plane of the duplicate leaf the original leaf will be the larger in area. For both leaves form part of one sheet, and there is nothing to separate or distinguish them excepting the score line. And if, as has been stated, the sheet is so folded as to form in the first instance two leaves of equal size, and the score line is placed in the line of fold the two leaves will of course be equal in area. Therefore the first claim really differs in this respect from the others now in question in this: that according to the first claim the score line that divides the two leaves may be made at any place in the plane of the original leaf; and being so placed the half of the folded sheet from which it is taken will contribute more or less, according to the position of the score line, to the binding margin of the duplicate leaf. While according to the fourth, sixth, eighth and fifteenth claims the score line must be so placed in the plane of the original leaf that the half of the folded sheet from which it is taken will contribute to the duplicate leaf just one half of the binding margin of the latter leaf. And that, it will be seen, is to use the sheet to the greatest advantage. For

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

taking a sheet of a given size you will in that way make the most of the sheet and get your leaves and the binding margin of the duplicate leaf as wide as it is possible to make them with a sheet of that size. Or to put the same thing in another way, if one wishes to use leaves and a binding margin of given widths he can in that way get them with a sheet of the least possible width. One need only take a sheet of paper and fold it for himself to see that the fact is as stated. You make the most of your sheet by placing the score line that divides the original leaf from the duplicate leaf immediately over the imaginary line that divides the latter from its binding margin and when you do that "the line of fold" of the sheet runs "medially across the margin of the duplicate leaf." Of course the gain is very little and the difference trifling where the line of fold of the sheet divides the binding margin in such a way that the two parts thereof are nearly, though not quite, equal in width. And that of course is open to anyone under the abandoned first claim of the specification. Let me by way of illustration attempt to put the question in another way. In all the claims now under consideration "the line of fold for the sheet" is described, as has been seen, as "running medially across the margin of the duplicate leaf." That is what happens when the score line is put in one particular place in the plane of the original leaf. It does not happen when such score line is placed in any other position in such plane. And after all it is a question of where the score line is put and not primarily a question of how or where the sheet is folded. As I understand it the sheet is in such a case always folded so that if it were divided at the line of fold one would have two leaves of equal size. And that is the natural and ordinary way of folding the sheet to obtain two leaves, whether one or both of such leaves are to have margins or binding margins or not. But if, as in the present case, the object is to get two leaves, one for

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

an original and the other for a duplicate, the latter being of the larger area so that it will have a binding margin, while the other leaf has no such margin, the score line that separates the two leaves must be placed somewhere in the plane of what is called the original leaf. That position of the question is represented by the first claim made in the specification; and that claim being abandoned as being too broad, it is open to anyone to make and use manifold sheets made in that way. But having got that far is the claim good, is there any novelty or invention in placing the score line in one particular place in the plane of the original leaf, as distinguished from placing it in any other of the number of positions in which it may be placed in such plane? Is there novelty or invention when the score line is so placed in that claim that one half of the binding margin of the duplicate leaf will, before the leaves are separated from each other, lie in such plane? At first I was inclined to think that there was in this feature of the alleged invention some novelty and sufficient invention to support the claims now under discussion. Mr. Mignault contended that there was not, and he supported his argument by showing that the natural and ordinary way of folding the sheet is to fold it in the way mentioned; and that having done that it is clear to anyone of ordinary intelligence that if he wishes to have a binding margin for one only of the two leaves made by folding the sheet he will use his sheet with the greatest economy and advantage by so placing the score line that one half of such margin will be obtained from each leaf of the folded sheet. And that when explained and illustrated by folding a sheet of paper and placing score lines in the plane of what in the specification is called the original leaf does appear simple and obvious. But in such cases as this one has to guard against assuming that to be obvious which appears to be so when explained, but which without explanation or instruction may not be

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

obvious. On further consideration I have however come to the conclusion that Mr. Mignault is right. It appears to me that there is nothing abstruse or obscure, nothing that involves discovery or invention in seeing that if a binding margin is needed for one of the two leaves obtained by folding a sheet of paper so that one half of the sheet lies in one plane and the other half lies in another plane the most economical use that may be made of the sheet is to so place the score line that one half of such binding margin is obtained from each half of the folded sheet.

It is said however that the plaintiffs have established a large and profitable business in the manufacture and sale of manifold leaves such as are described in the specification of their patent, and the success of their enterprise is invoked in support of the claims made therein. I agree that that is something to which all due consideration must in cases of this kind be given. But such considerations are not conclusive, as every one knows. And in the present case there is no reason to think that the plaintiffs' success in the sale of their manifold sheets depends in any way on the narrow question that has been discussed of the difference that is to be found between the first claim and these now in question here; or that such success would have been any less had such sheets been manufactured in accordance with the first claim that has been abandoned, and with the second, twelfth, fourteenth and sixteenth claims which cannot, it seems to me, be supported. And the same observation is to be made with respect to the advantages and utility claimed for the alleged invention. There is nothing that has in that respect been urged in support of the fourth, sixth, eighth and fifteenth claims that may not with equal force, or almost equal force, be urged in favour of the first, second, twelfth, fourteenth and sixteenth claims. It is said that the patentee conceived the notion that it

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

would be possible to effect a great economy in time, labour and material by reducing into one operation what had theretofore been two or several operations, namely, the making of an invoice, and the making of a day book or journal entry of the transaction represented by the invoice. That could be accomplished, it is stated, by means of a carbon process, coupled with a typewriter on the one hand and on the other hand by means of binders. And they devised sheets which were intended it is said to accomplish the purpose of combining these two operations into one operation. But none of these things were new, and all that was said in this behalf is as true of the manifold sheets described in the first claim as it is of the sheets described in the claims now under consideration. And the plaintiff company and the patentee concur in the admission that the sheets described in the first claim are not the proper subject-matter of a patent, but are open and free to the public generally. There is nothing new in making an invoice by means of a typewriter, or in making by the use of carbon leaves one or more duplicates of the invoice to be retained or to be bound up with other duplicates, if one wished to do that. Neither is there anything new or patentable in having margins for the purpose of binding such duplicate leaves. Such margins are necessary where the leaves are to be bound. Stated broadly, the claims put forward on behalf of the plaintiff company cannot, it is clear, be sustained and the company was, it seems to me, well advised in disclaiming the first claim of the specification. Then as to the feature that distinguishes that claim from the fourth, sixth, eighth and fifteenth claims, I have given my reasons for thinking that it does not afford a sufficient ground for supporting the latter claims.

The action will be dismissed with costs to the defendants.

*Judgment accordingly.**

Solicitors for plaintiffs: *Mills, Raney, Anderson & Hales.*

Solicitors for defendants: *Archer, Perron & Taschereau.*

*June 11th, 1906.

An application on behalf of the plaintiffs to vary the above judgement was now made, the grounds of such application appearing in the reasons for judgment thereon.

W. E. Raney, in support of the motion;

J. L. Perron, K.C., contra.

November 12th, 1906.

Judgment on the motion was now given by the JUDGE OF THE EXCHEQUER COURT:—

This case comes before the court at the present time on a motion to vary the judgment given on the 14th day of May, 1906, and to extend the time for appealing therefrom to the Supreme Court of Canada. The latter part of the motion is granted, and the plaintiffs given thirty days in which to take the appeal mentioned.

The ground on which the court is asked to vary its judgment is that the reasons given show that it had fallen into an error as to the scope of the first claim made in the specification attached to the letters patent in question in this case.

This claim, which the plaintiffs had disclaimed as being too broad, was made in these terms:—

"1. A manifold sheet having an "original leaf and a duplicate leaf "connected at a score line and "folded together, the duplicate "leaf having an apertured binding "margin which makes it of greater "actual area than the original leaf "whereby when detached the dupli-"cate leaf may be filed by means of "its apertured margin."

Reasons for Judgment.

In discussing that claim and comparing it with other claims made I had in mind a sheet folded from left to right to make an original leaf and a duplicate leaf, the score line being so placed in the plane of the original leaf that the duplicate leaf with its binding margin would be of greater area than the original leaf, and it was stated in the reasons for judgment that "in order that "the duplicate leaf with its margin "may be larger in area than the "original leaf it is necessary to "place the score line on that side of "the line of fold that adjoins the "original leaf." That is a mistake. The proposition is true only where the sheet out of which the two leaves, the original leaf and the duplicate leaf, are made, is folded from right to left. If the sheet be folded from left to right, the leaves being unequal, and the score line placed in the line of fold, the same result may be obtained.

I am very glad to have had an opportunity of making this correction, and I have considered the matter very carefully to see if by reason thereof the judgment rendered should be varied, or any material alteration made in the form of the argument by which it was supported. For obviously the reasons given might be insufficient and the judgment be right. As to the general form of the argument I do not see that it makes any material difference whether the second and other like claims are in substance the same as the first claim in one only or in both of the forms in which the manifold leaf may ac-

1906

THE COPELAND-CHATTERSON CO. v. PAQUETTE.

Reasons for Judgment.

cording to the latter claim be dealt with. If the first claim is open and free to the public, and if in one form in which the sheet may be folded and the leaves made in accordance with that claim the same result is obtained as that claimed in the second and other like claims, then it seems to me that the latter cannot be supported.

But apart altogether from the form of the argument and from any comparison of the first claim with the second claim and other claims embodying the like feature, it seems to me that there is nothing at all new in folding a sheet of paper to make two or more leaves. There is nothing new in folding it either from left to right or from right to left. There is nothing new in having score lines to separate the leaves from each other. There is nothing new in placing that score line so that one leaf may be larger than the other, or that one of them may have a binding margin. It is, after all is said and done, a question of where to put the score line in a sheet that has been folded to make two leaves. It does not appear to me that there is any invention in placing that score line in the plane of what is called the original leaf, the sheet being folded from left to right; and for the reasons that were given in delivering the judgment of the 14th day of May, 1906, I am of opinion that the patent cannot be supported because according to certain claims the score line is so placed in the plane of the original leaf that half the binding margin is taken therefrom, as happens where the score line is so placed in reference to the line of fold that the latter runs "medially across the mar-"gin of the duplicate leaf."

The motion to vary the judgment is dismissed.

REPORTER'S NOTE: On appeal to the Supreme Court from the judgment of May 14th, 1906, the same was affirmed, and the appeal dismissed with costs (April 2nd, 1907).

IN THE MATTER of the Petition of Right of

JOSEPH GENELLE.....SUPPLIANT; 1907 Jan. 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Dominion lands—License to cut timber—Royalties—Burnt timber—Payment by mistake—Rectification—Lapse of time—Counter-claim for damages for trespass—Estoppel.

The suppliant held certain licenses from the Crown to cut timber on Dominion lands. Three of such licenses were issued on the 28th of January, 1892, and each provided for a royalty of 5 p.c. on the timber cut thereunder. Another license was issued on the 8th of August in the same year, and contained a provision that "if the timber be burnt then the royalty shall be 2½ p.c. instead of 5 p.c." The suppliant obtained other licenses containing similar provisions as to "burnt timber." The suppliant cut timber under such licenses, but owing, as he alleged, to mistake and inadvertence, the returns furnished by him did not show that a portion of the material cut was "burnt timber." Royalties having been paid upon the basis of there being no burned timber cut; the suppliant claimed in these proceedings a refund of one half of such royalties as a fair deduction for burnt timber. During the time that the timber was cut and returns made the suppliant was unable to read or write, and he claimed that he had not seen or been made aware of the provisions as to the royalty on burnt timber. His book-keeper and business manager testified that he had not seen any timber regulations, and that he had never taken the trouble to read the suppliant's licenses. At the trial it appeared that no person's attention, either on behalf of the Crown or the suppliant, had been directed to the matter with a view of ascertaining or even estimating the quantity of burnt timber. Furthermore, at the time of the trial, there was no opportunity for scaling the quantity of burnt timber.

Held, that it was too late to open up the matter after action brought, and that the suppliant had not shown circumstances that would make it inequitable for the Crown to retain the dues which the suppliant himself had returned as due and payable on the timber cut.

2. The Crown counterclaimed in the action for damages for timber cut by the suppliant in trespass on vacant Dominion lands, in effect claiming the difference between the royalty for which he was liable under his licenses and the dues he would have been liable for had the timber in

1907

GENELLE
v.
THE KING.

Argument of Counsel

question been cut under a permit to cut the same on Dominion lands. To this suppliant answered that the timber alleged to have been cut in trespass, if any, was included in the whole quantity of timber which the suppliant had returned as cut under his licenses, and that a royalty of 5 p.c. having been paid thereon to the Crown officers and accepted by them, the Crown was estopped from setting up a larger claim.

Held, that the Crown was not estopped by the laches of its officers from claiming as damages a larger sum than that already paid as royalties.

PETITION OF RIGHT for the return of moneys in the hands of the Crown.

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

October 12th, 1906.

The case came on for trial at Vancouver, and was referred to the Local Registrar at that place to take evidence. That was done, and the evidence reported to the court.

March 6th, 7th and 8th, 1906.

The case was now argued at Ottawa.

W. Martin Griffin (with whom was *J. F. Smellie*) for the suppliant, contended that the excess of royalties paid over the sum actually due on "burnt timber" was paid under a mistake of law by the suppliant. The court will rectify such a mistake.

As to counter-claim for damages for timber alleged to be cut in trespass by the suppliant, the Crown is estopped from claiming such damages. The Crown's officers made an inspection of the timber, and the only question then raised was: Had Genelle paid royalties on the timber he got from other parties? They accepted Genelle's statement of the royalties due, and they were paid. It is to late now for the Crown to claim these damages.

E. P. Davis, K.C., for the respondent, argued that the burden was on the suppliant to show the amount of "burnt timber" cut. He had failed to discharge that burden.

1907

GENELLE v. THE KING.

Reasons for Judgment.

Accepting the suppliants' case that it was a mistake of law that induced the suppliant to pay a higher royalty than was actually due on the burnt timber, still he has no right to relief. *Rogers* v. *Ingham* (1). The suppliant made the return himself, and put the Crown Timber Agent off his guard irretrievably.

As to the counter-claim, the Crown cannot be estopped by the improper act or negligence of its servant. There was no consideration for accepting a less sum than was due, nothing arose upon the transaction which would bar the Crown's claim for the proper amount of damages due in respect of the trespass. However, the Crown is content to treat the matter as if the timber cut in trespass was cut under permit. *Wells* v. *Nickles* (2).

Mr. *Griffin*, in reply, cited *Snell's Equity* (3); *Daniell* v. *Sinclair* (4).

THE JUDGE OF THE EXCHEQUER COURT now (January 7th, 1907) delivered judgment.

The suppliant filed his petition in this case to recover from the Crown a sum of $9,766.85, made up as follows:—

(1). The sum of $7,700 paid by the suppliant to the Crown as security for and to meet certain dues then claimed to be owing by the suppliant to the Crown in respect of timber, logs and other products of the forest cut on Crown lands This payment or deposit was made on the occasion of the transfer by the suppliant to a purchaser of the timber licenses that he held from the Crown and in order to obtain the Crown's assent to such transfer.

(2). The sum of $1,464.54 alleged to have been paid by mistake in excess of dues payable on burnt timber.

(3). The sum of $230.92 alleged to have been paid in mistake in excess of the actual dues upon 5,773 cords of wood mentioned in the petition.

(1) 3 Ch. D. 351.
(2) 104 U. S. R. 444.
(3) 14th ed. p. 459.
(4) 6 App. Cas. 181.

1907

GENELLE v. THE KING.

Reasons for Judgment.

(4). A sum of $168.25 alleged to be due in excess of the sum of $618.75 allowed as a refund of dues on 4,500 cords of wood mentioned in the petition of right.

(5). A sum of $42 alleged to have been paid as dues on certain ties on which dues were also collected from other parties; and

(6). The sum of $161.14 alleged to have been paid in mistake as dues on lumber manufactured from certain logs bought from settlers.

On the argument of the case the third item was not pressed, and in respect of the fourth item a sum of $78.75 was claimed, leaving the amount of the suppliant's claim as finally presented to the court at the sum of $9,446.43.

The Crown by its statement in defence denied its liability for the several amounts so claimed, and it also claimed by way of counterclaim a much larger amount than that for which the suppliant's petition was brought.

The following, stated briefly, were the items of the counterclaim:—

(1) Royalty dues alleged to be due on products of the forest cut by the suppliant as shown by his books ...	$ 3,354	84
(2) Dues on 269,182 feet of lumber used in the building of the suppliant's mill	123	02
(3) Dues on lumber and other products of the forest cut on permit No. 20565..	4,750	00
(4) Damages for timber, logs, ties and cordwood cut in trespass on Crown lands ..... (This amount is increased by the particulars subsequently given).	7,031	21
(5) Balance of Royalty dues as shown by return of 31st December, 1898.....	30	63

(6) Balance due for the rent of timber berth No. 139 and interest on such balance 61 40

$15,351 10

The damages claimed for timber and other products of the forest alleged to have been cut in trespass on Crown lands were set up both as an answer to the demand for the return of the $7,700 deposited with the Crown as mentioned, and as part of the counterclaim. That will appear by reference to the fourth paragraphs respectively of the statement in defence and of the counterclaim, which were filed on the 13th day of September, 1900. Particulars of these alleged trespasses were given in pursuance of an order of court. In these particulars the amount of damages claimed for lumber cut in trespass was fifty cents per thousand feet board measure. That did not differ greatly from the five per cent. on the amount of the sales of the product of his berths, which was payable under the licenses held by the suppliant. But where timber was cut under a permit from the Crown the dues payable on square timber and saw logs of pine, cedar, spruce, tamarac and other woods unenumerated, were at the time two dollars and fifty cents per thousand feet, board measure. On the 12th day of October, 1903, at the City of Vancouver, Mr. Davis, for the Crown, applied for and obtained an order to so amend the fourth paragraph of the counterclaim as to enable the Crown to claim two dollars and fifty cents per thousand, board measure, for timber cut in trespass, instead of thefifty cents per thousand at which the amount claimed in that paragraph for timber had been computed. That amendment as applied to the particulars given increased the Crown's claim by a large amount. It has however become unnecessary to consider the Crown's claim in the largest form in which it has been put forward. At the

1907

GENELLE v. THE KING.

Reasons for Judgment.

argument of the case Mr. Davis, for the Crown, did not press the smaller items; and as to the other items he put the claim in this form :—

(1) Dues shown by the suppliant's books to be due from him to the Crown..	$ 2,605	00
(2) Dues on lumber used in construction of mill.....	500	00
(3) Dues on timber and other products of the forest cut under permit No. 20,565	3,400	00
(4) Damages on at least five million feet of timber, &c., cut in trespass.....	10,000	00
	$16,505	00

But as to this amount he did not ask for any judgment for the Crown for any excess over and above whatever amount was found to be due to the suppliant upon his claim. The Crown is content, he said, if in the result no judgment goes against it.

It will be convenient, I think, to take the first item of the suppliant's claim for money deposited with the Crown, and the first item of the counterclaim for royalties shown by the suppliant's books to be due the Crown, and to strike a balance between these two amounts; and then to consider first the other items of the claim, and secondly, the other items of the counterclaim.

With respect to the sum of $7,700.00 deposited by the suppliant with the Crown there is no material controversy between the parties. And with reference to the dues that are shown by the suppliant's books to be due to the Crown it appears that on the 1st day of August, 1901, the parties by consent referred the following questions of fact to John F. Helliwell, of the City of Vancouver, accountant, and to Arthur Malins, of the City of New Westminster, estate agent, for inquiry and report :—

1907

GENELLE v. THE KING.

Reasons for Judgment.

"1. The amount of the following products of the forest "cut and sold by Joseph Genelle, the suppliant herein, "during the years 1892 to 1898 both inclusive, according "to the entries made in his books, showing in tabulated "form the amount of dressed lumber, rough lumber, ties, "piling, cribbing, telegraph poles, posts and cordwood, "respectively.

"2. The total amount of money received by the said "Joseph Genelle for the sale of products of the forest "mentioned in paragraph 1.

"3. The amount shown by the suppliant's books to "have been paid for freight and labour respectively on "such products of the forest.

"4. The amount of money shown by the said books to "have been paid for royalty dues on the products of the "forest mentioned in paragraph 1.

"5. The amounts found by the said referees shall be "binding on both parties hereto and shall be admitted "in evidence at the trial of this action without any further "proof to be a correct statement of the fact and facts."

The referees in answering the first inquiry did not include cordwood, as to which they made a separate report. They found the gross receipts arising from the sale of products of the forest mentioned in paragraph one of the submission to be $372,847.29, including $7,234.67 paid for freight and $26,591.31 paid for labour thereon.

They found the records in the suppliant's books of amounts paid for royalties incomplete, but from these and certain vouchers and endorsed cheques submitted to them they found that during the years 1892 to 1898, both inclusive, a sum of $15,056.86 was paid upon the products of the forest enumerated in their answer to paragraph one. Cordwood is included in the enumeration contained in paragraph one of the reference, but it is not included in the enumeration in the answer to the question submitted by that paragraph. Then there was a refund of dues

1907

GENELLE v. THE KING.

Reasons for Judgment.

amounting to $618.75, to which the suppliant was entitled and which was not in dispute. Coming to the matter of cordwood it will be seen that with the exception of certain transactions at Kamloops, which are not now in question, the suppliant's books did not show any transactions; but from copies of Government returns the referees found the suppliant sold 12,722 cords of wood of the value of $27,978.00, on which he paid royalties amounting to $1,398.93.

At this point a question of construction of the referees' report arises, as to which the parties are at difference. For the suppliant it is contended that the sum of $372,847.29 at which the referees placed the gross receipts of the products of the forest mentioned in paragraph one, includes the $27,978 which they found from the Government returns to be the value of the cordwood with which they dealt separately in their report. For the respondent it is contended that the latter amount is not included in the former. And though the matter is not as clear as it might be, I think that the construction that counsel for the respondent put upon the report is the correct one. By the second paragraph of the reference the referees were asked to find the total amount of money received by the suppliant for the sale of products of the forest mentioned in paragraph one. That included cordwood "according to entries made in the suppliant's books." The referees' report, however, that with respect to the cordwood, the value of which they otherwise found to be $27,978, the books contained no entries. They expressly exclude this cordwood from their answer to the first paragraph of the reference, and so far as I can see they have not included its value in their answer to the second paragraph. The referees were not to find the amount received by the suppliant for all products of the forest sold by him during the years mentioned; but the value of such products "according the entries made in

his books;" and of the cordwood now in question there was no such entry.

Taking that to be the true construction of the referees' report, the computation of the amount of dues owing to the Crown may be shown in either of two ways. Either the sum of $27,975, the value of the cordwood, may be added to the amount of $372,847.29, which was found to be the proceeds of other products of the forest sold by the suppliant as shown by his books, and the royalty of five per centum payable by him computed on the sum of the two amounts, less the amount paid out for freight, in which case the suppliant would be entitled to a credit of $1,398.93 for the royalties paid on such cordwood; or the computation may be made omitting any reference to such cordword. For convenience I adopt the latter method, the result in each case being the same.

The gross receipts from products of the forest for the years 1892 to 1898, both inclusive, were, according to entries made in the suppliant's books		$372,847 29
Deduct amount paid in freight		7,234 67
Balance		$365,612 62
Royalty thereon at five per centum		18,280 63
Dues paid thereon	$ 15,056 86	
Refund allowed	618 75	
		15,675 61
Balance due the Crown as shown by the suppliant's books		$2,605 02

Dealing then with the first items of the claim and of the counterclaim respectively, we arrive at the following balance in the suppliant's favour:—

Amound paid to the Crown conditionally out of which the dues payable to the Crown were to be satisfied	$ 7,700 00
Dues found to be due to the Crown according to the suppliant's books	2,605 02
Balance in favour of the suppliant	$ 5,094 98

1907

GENELLE v. THE KING.

Reasons for Judgment.

With reference to the suppliant's claim for a refund of part of the dues paid on lumber alleged to have been manufactured from "burnt timber" during the year 1892 and subsequent years, down to and including the year 1898, it will be seen by reference to the Regulations which governed the granting of yearly licenses and permits to cut timber on Dominion Lands that it was therein provided that on all timber cut under license the licensee was required to pay, in addition to the ground rent, a royalty of five per cent. on his monthly account of sales, or if he so desired it on the value of the lumber in the log, unless the lumber or other material sold was manufactured from burnt timber, in which case the royalty was to be two and one half per cent. These regulations were made by His Excellency in Council under the provisions of Chapters 54 and 56 of the Revised Statutes of Canada intituled respectively "The Dominion Lands Act" and "An Act respecting certain Public Lands in British Columbia." The provision mentioned occurs in clause (c) of the second section, and in the sixth clause of the Form of License given in the tenth section of such regulations as approved by an order in council dated the 17th day of September, 1889, and amended by orders in council of the 18th day of December, 1890, and of the 20th day of July, 1891. During the years 1892 and 1893 Genelle Brothers, of which firm the suppliant was a partner, and to whose interest in the matter he succeeded, and in the subsequent years mentioned the suppliant himself held certain timber berths in the railway belt in British Columbia under licenses issued pursuant to these regulations. There are in evidence four licenses to cut timber granted to Genelle Brothers in the year 1892 Of these three were issued on the 28th day of January of that year, and provide for a royalty of five per cent. on the timber cut thereunder. The fourth was issued on the 8th day of August, 1892, and contains a provision that "if the tim-

"ber be burnt then the royalty shall be two and one half "per cent. instead of five." The same provision occurs in the licenses issued in the year 1893, and in other later licenses put in evidence by the suppliant. It appears that the suppliant, although a man of intelligence with the capacity to carry on the considerable business in which he was engaged, was not able to read or write. He says that during the years mentioned he did not know of the lower rate of royalty on lumber manufactured from burnt timber; that he had never seen the regulations mentioned; and that the provision in his licenses respecting the royalty on burnt timber had never been brought to his attention. The returns on which the royalty on lumber sold by Genelle Brothers and by the suppliant was computed and paid were made by them and his bookeepers. In these returns no claim was made that any of the lumber or other material sold was manufactured from burnt timber; and the full royalty of five per cent. was returned as due and was paid. The suppliant now says that a proportion of the lumber sold by him was manufactured from burnt timber and as to that he claims a refund of one half of the royalty paid thereon. During the years mentioned there were several bookkeepers in the employ of Genelle Brothers and of the suppliant. Of these one at least is dead; and one, a man named Robert Stewart, was called as a witness by the suppliant. He was in charge of the books, and in the suppliant's absence of his business, during the years 1894, 1895 and 1896. During his time he made the returns on which the royalty was paid. There was, he says, no copy of the regulations at the suppliant's place of business, and he never took the trouble to read the licenses which were in the suppliant's possession and his. He says that some lumber was manufactured from burnt timber and sold, and he gives his estimate of the quantity. It is of course impossible to ascertain with any reasonable degree of certainty what the amount of such lumber

1907

GENELLE v. THE KING.

Reasons for Judgment.

was. No person's attention was at the time directed to the matter with a view of ascertaining or even estimating the proportion or quantity of such timber, and the evidence in that respect is of a general and unsatisfactory character. There is nothing to go upon that is really trustworthy. If the claim had been made as the lumber was being cut and the sales made the logs could have been examined to see if any of them really fell within the meaning of the expression "burnt timber" as used in the regulations; and if so the quantity could have been scaled or otherwise definitely determined. But all that is impossible now. The Crown has no opportunity to have an impartial examination or investigation made, and is in that way prejudiced by the neglect and laches that the suppliant and Stewart respectively attribute to themselves. It is difficult to understand how it could happen that a man as capable and as conversant with the lumber business as the suppliant was, could carry on the lumber business for six years under the licenses that he had in his possession and never find out until afterwards that the royalty on lumber manufactured from burnt timber was two and one half per cent. In the same way it is hard to give credit to the witness Stewart when he says that for three seasons he made out the returns that the licenses called for, and never took the trouble to read over any of the licenses or to make himself acquainted with their provisions. The whole story is improbable. But experience teaches us that improbable things happen sometimes, and when the suppliant and Stewart say that they were ignorant of the provision respecting the royalty on lumber manufactured from burnt timber, there is nothing to discredit their statements except the improbability of the statements being true. But if such statements are accepted as true, and for the purposes of this case I accept them, their ignorance was the result of their own laches and neglect, and by reason thereof the

1907

GENELLE v. THE KING.

Reasons for Judgment.

position of the parties has been altered to the prejudice of the Crown. Under the circumstances there is nothing inequitable, it seems to me, in the Crown retaining the dues that the suppliant returned as due and paid; while on the other hand to open up the matter now and to attempt to dispose of it on general and unsatisfactory evidence would, I think, be inequitable and to the prejudice of the Crown and of the public interest. This item of the suppliant's claim is not allowed. In this connection, it ought, perhaps, to be mentioned that counsel for the Crown on the argument of this case moved to amend the statement in defence and to set up the statute of limitations, which would in any event be a bar to part of this item of the claim. In a case like this such a plea is not unreasonable, and the amendment on fair terms might very properly be made. But as no part of the item is allowed there is no occasion for the amendment.

With reference to the claim made for an additional refund in respect of the 4,500 cords of wood mentioned in the seventeenth paragraph of the petition, it appears that the Canadian Pacific Railway Company paid a royalty of twenty-five cents a cord thereon, amounting to $1,125; and as it turned out that the wood had been cut on one of the suppliant's berths, the Crown retained as dues properly payable on such wood the sum of $506.25, and gave the suppliant credit for the balance, namely, the sum of $618.75, mentioned in dealing with the amount of dues shown by the suppliant's books to be due the Crown. The sum of $506.25 retained by the Crown represents five per cent royalty on 4,500 cords of wood at $2.25 per cord. The suppliant contends that the price should have been stated at a lower figure in making the computation, and if that were done the amount of the refund would have been larger. The Crown would have got less and he would have got more. In the petition an amount of $168.25 is claimed. On the argument that was reduced

1907

GENELLE v. THE KING.

Reasons for Judgment.

to $78.75, the contention being that the value of this wood should be put at $1.90 a cord instead of $2.25 per cord. It will be seen by reference to the referee's report, which has been discussed, that the value of 12,722 cords of wood, on which the suppliant paid royalty was $27,978, or approximately $2.20 a cord, and that the prices of such wood varied from $1.50 a cord to $2.25 a cord. There is no reason to think that $2.25 a cord was not a fair price on which to compute the royalty payable on this particular lot of wood. This item of the claim is not allowed.

The item of $42 paid as royalty by the suppliant on 4,000 ties cut in trespass by one Smith is allowed. The Crown collected double dues on these ties at six cents per tie, as they had been cut in trespass on Crown lands, and the $42 paid thereon by the suppliant as royalty, should be refunded.

I pass over for the present the item of the suppliant's claim for the sum of $161.14 alleged to have been paid in mistake as dues on lumber manufactured from certain logs purchased from settlers; and coming to the counterclaim I allow the second item of $123.02, being the amount claimed in the particulars as delivered. I also pass over for the present the third item of the counterclaim for dues on lumber and other products of the forest alleged to have been cut by or on behalf of the suppliant on permit No. 20,565. That brings us to a consideration of the fourth and most important item of the counterclaim, namely, the claim made by the Crown for damages for timber and other products of the forest cut in trespass on vacant Crown lands, or on Crown lands on which settlers or homesteaders had entered. The evidence on this branch of the case is voluminous, but a careful reading of it will show that a large part of the lumber and other products of the forest manufactured by Genelle Brothers and the suppliant during the year 1892

1907

GENELLE v. THE KING.

Reasons for Judgment.

and subsequent years down to and including the year 1898, was made from timber cut in trespass. It is admitted that to a limited extent these trespasses were committed with the suppliant's knowledge and consent, if not by his direction. It is argued, however, that the amount of lumber so cut in trespass with his knowledge and participation did not exceed one million two hundred thousand feet board measure. I have not been able to adopt that view. On the contrary I am inclined to the view (if that should be thought to be material) that his personal knowledge of the trespassing that was done was greater and more definite than he is willing to concede. During the years in which his brother, Peter Genelle, was his partner, there was considerable trespassing of which the latter must, I think, have had direct and personal knowledge. Then it is shown that a large quantity of timber for the suppliant's mill was cut in trespass by one Sullivan (since deceased) either as foreman for Genelle Brothers or the suppliant or as a jobber getting out logs for the suppliant. It also appears that a considerable portion of the timber and other products of the forest manufactured by the suppliant was cut in trespass on Crown lands on which homesteaders or settlers had entered.

Now the balance of $5,094.98 that has been found to result in the suppliant's favour after dealing with the first items of the claim, and of the counterclaim, respectively, is arrived at by debiting the suppliant with five per cent. royalty on the value of all timber cut, including that cut in trespass, and that, approximately, was all that the Crown's officers were claiming on lumber when the amount of $7,700 hereinbefore mentioned was paid to the Crown conditionally. That, too was approximately all that was claimed on lumber when the particulars were delivered, though a higher rate was therein charged on ties. The royalty of five per cent on ties amounts to

1907

GENELLE v. THE KING.

Reasons for Judgment.

about one cent per tie; the dues payable thereon when cut under a permit to cut timber on Dominion Lands is three cents per tie, and that was the amount demanded in the particulars delivered. But on lumber the royalty of five per cent. amounted to forty or forty-five cents per thousand feet board measure. In the particulars as delivered a rate of fifty cents per thousand feet board measure was demanded, while the rate on similar lumber cut under a permit was two dollars and fifty cents per thousand feet board measure. Under the amendment the Crown claims as damages on the timber cut in trespass and manufactured at the suppliant's mill, or sold by him, the difference between the royalty for which he was liable under his licenses and the dues that he would have been liable for had the timber in question been cut under a permit to cut the same on Dominion Lands. In other words the Crown now claims two dollars per thousand feet board measure on the lumber manufactured at the suppliant's mill from timber cut in trespass, and an additional two cents per tie for all the ties that were cut in trespass by or for the suppliant; and so of other products of the forest.

And first for the suppliant it is contended in answer to the claim so made that the payment of the royalty of five per cent. concludes the matter, and that the Crown is estopped by the laches and actions of the Crown timber agent and other Crown officers from now setting up the larger claim. With that contention I am not able to agree. It is well settled that the Crown is not bound by the laches of its officers, and there is, in my opinion, nothing to prevent it from recovering in this action such damages as it may be entitled to as against the suppliant for the trespasses complained of.

Then with regard to the measure of damages, I see no good objection to the course proposed, namely: to allow the difference between the dues payable under licenses

1907

GENELLE v. THE KING.

Reasons for Judgment.

and those payable under permits to cut timber on Dominion lands. There is nothing in that to which the suppliant can, it seems to me, reasonably object.

That leaves for determination only the question of the quantity of lumber and other materials on which the additional dues are to be allowed by way of damages. And as to that the position taken for the Crown at the argument of this case, namely, that it did not ask for any judgment for any balance found in its favour against the suppliant has rendered any close estimate or calculation of quantity unnecessary.

If the item of the claim for $161.14, which was passed over, were allowed (I do not wish to be understood as expressing any opinion that it should be allowed, but if it were) the balance in the suppliant's favour, apart from the damages in question and the dues payable in respect of permit No. 20,565 would be something less than five thousand two hundred dollars; and that sum would only be equal to the damages recoverable on two million six hundred thousand feet board measure of lumber manufactured from timber cut in trespass by or for Genelle Brothers and the suppliant. In the view that I have formed from reading the evidence, there was with respect to lumber alone, more than that quantity manufactured from timber cut in trespass to the knowledge of the suppliant, or of his partner, or of his foreman or other person left in charge of his business. In that view of the case it is not necessary to pursue the enquiry further either as to this item of the counterclaim or as to the item respecting the dues payable on permit No. 20,565 that was passed over. If anything were allowed as to the latter item or for other trespasses the amount would only add to a balance in the Crown's favour for which no judgment is asked.

On the whole case, that is on the claim and counterclaim, there will be judgment for the respondent.

1907

GENELLE v. THE KING.

Reasons for Judgment.

With regard to costs, the principal question is as to whether the Crown's claim for damages on the timber cut in trespass is of the nature of a cross-action, or only a set off. In the former case the suppliant would be entitled to the costs of the claim and the respondent to the costs of the counterclaim, having regard of course to the issues raised by the claim and counterclaim respectively, as to which each party succeeded, in which case a balance should be struck between the respective amounts taxed, and judgment for costs entered for such balance in favour of the party entitled thereto. But possibly in this case expense would be saved and the equities of the case met by not giving costs to either party. And for the present the question of costs will be disposed of in that way, with leave to either party to move to vary the judgment in that respect.

Judgment accordingly.

Solicitors for suppliant: *Tupper & Griffin.*

Solicitor for respondent: *F. W. Howay.*

BETWEEN

THE DOMINION OF CANADA. .....CLAIMANT; 1907

March 18.

AND

THE PROVINCE OF ONTARIO.....RESPONDENT.

Dominion and Ontario—Disputed territory—Indian title—Moneys paid by Dominion for surrender of—Contribution by Ontario.

The jurisdiction that the Court has of controversies between the Dominion of Canada and a Province of Canada, or between two provinces, does not authorize the court to decide the issues in accordance only with what may to it seem fair and without regard to the principle of law applicable to the case.

2. At the time when the North West Angle Treaty No. 3 between Her late Majesty the Queen and the Saulteaux Tribe of the Ojibeway Indians was entered into, the boundaries of the Province of Ontario were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union, the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed, but which was in fact within the Province of Ontario, the Dominion Government occupied a position analagous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in those lands could not with prudence be deferred until such boundaries were determined. It was necessary for the peace, order and good government of the country that the question should be settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiations of the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiation. By this treaty the burden

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Statement of Facts.

of the Indian title was extinguished. In the case of *The St. Catherine's Milling and Lumber Company* v. *The Queen* (14 App. Cas. 60), in which it was decided that the ceded territory within the Province of Ontario belonged to the province subject to the burden of the Indian title therein, Lord Watson, delivering the judgment of the Judicial Committee of the Privy Council and dealing with the question of the liability of the province to contribute to the Dominion in respect of the obligations incurred by the Dominion in obtaining the surrender of the Indian title, expressed the following opinion:—"Seeing that the benefit accrues to her, Ontario must, of course, relieve the Crown and the Dominion of all obligations involving the payment of money which were undertaken by Her Majesty and which are said to have been in part fulfilled by the Dominion Government."

Held, following that expression of opinion, that the Province of Ontario is, in respect of the obligations incurred by the Crown and the Dominion under the said treaty, which involve the payment of moneys and which are referable to the extinguishment of the Indian title in the lands described therein, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the province bears to the whole area covered by the treaty.

3. While the question of the true boundaries of the Province of Ontario was in course of determination, the Dominion authorities, under an agreement for a conventional boundary, administered a part of the territory in dispute and derived revenues therefrom, for which the Province in this action set up a counterclaim.

Held, that the Province could not maintain its counterclaim for the moneys so collected by the Dominion without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the obligations incurred in obtaining a surrender of the Indian title.

4. *Semble:* The fact that a part of the benefit arising from the surrender of the lands mentioned in the treaty accrued to the Province of Ontario is not of itself, and without other considerations, sufficient to make the Province liable to contribute to the Dominion a proportionate part of the payments made in pursuance of the obligations incurred by the Crown under the treaty.

If the Parliament of Canada should appropriate, and the Government of Canada should expend, public moneys of the Dominion for either Dominion or Provincial purposes, with the result that a Province was benefited, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute to such expenditure. The principle stated would apply as well to expenditures made by a province with the result that the Dominion as a whole was benefited. In all such cases the appro-

priation and expenditure would be voluntary and no obligation to contribute would arise.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel

THIS was a proceeding by way of statement of claim wherein the Dominion of Canada sought to recover from the Province of Ontario a certain sum of money alleged to have been expended by the Dominion on behalf of the Province.

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

April 23rd, 24th and 25th, 1906.

The case was heard at Toronto.

E.L. Newcombe, K.C., W.D. Hogg, K.C., and *C.E. Roy* for the Dominion of Canada;

Sir Æmilius Irving, K.C., G. F. Shepley, K.C., C. Ritchie, K.C., and *H. S. White* for the Province of Ontario.

Mr. *Newcombe:* Referring, first, to the surrender of the Hudson's Bay Company, it will be found that clause 14 provides that any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian government in communication with the Imperial government, and the company shall be relieved of all responsibility in respect of them.

Now the Charter of the Hudson's Bay Company may be referred to in any book of public documents. It is recited somewhat briefly in the Deed of Surrender, on page 77 of the Appendix to the Dominion Statutes of 1872. It recites the grant by King Charles II in the 22nd Year of his reign to the Governor and Company of Adventurers of England trading into Hudson's Bay, whereby his Majesty granted unto said company and their successors the sole trade and commerce of all those shores in whatsoever latitude they should be that lay within the entrance of the Straits commonly called Hudson's Straits, together with all the lands and countries that were not

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

actually possessed by or granted to any of His Majesty's subjects or possessed by the subjects of any other Christian Prince or State. Your lordship will see that this grant, whatever it conveyed in the nature of property, was limited in extent by the territories possessed by any other Christian Prince or State. Namely, of course, by the territories of France. And it granted the largest possible powers of government. That is, this company were made the absolute lords and proprietors of the territory, "saving the faith, allegiance, sovereignty and dominion due to His Majesty, his heirs and successors for the same." Therefore the grant which was in existence at Confederation to the Hudson's Bay Company conferred upon that company powers of government quite inconsistent with the exercise of the powers of government conferred upon Ontario by *The British North America Act.* Ontario existed at the Union as it now exists; its boundaries existed, although not known exactly, or defined; and Ontario certainly could not extend so far as to cover or include any part of the grant to Prince Rupert, because the two things were inconsistent with each other. So far as Ontario was concerned there were powers of legislation, powers of government, ample and comprehensive, vested either in the Dominion or in Ontario and those powers were inconsistent with the exercise of the authority which had been conferred by the Charter upon the Hudson's Bay Company. Therefore, I submit, that no part of Rupert's Land was ever in the Province of Ontario. Therefore, Rupert's Land did not actually cover any of the ceded territory in this case. Of course I understand that in ascertaining the boundaries of Ontario, the Commissioners or Arbitrators, who enquired into that, would have to ascertain the limits of the French possessions at the time of the grant to the Hudson's Bay Company, and that they did determine; the effect of their Award, confirmed as it afterwards was, was really to find that the French

possessions at the time extended as far west as the boundary fixed by Ontario. So that Prince Rupert never got this ceded territory by his grant because he only went to the boundary of the French possessions, and it is too late now, having regard to what has taken place, to raise any question about Rupert's Land being within this territory. If, on the other hand, my learned friends can make out that Rupert's Land extended into this ceded territory, that the ceded territory includes part of Rupert's Land, then our alternative is that it be declared that that belongs to us, because by a grant Rupert's Land was ceded to the Dominion and the Dominion paid for it. Rupert's Land is a part of, and belongs to, the Dominion of Canada. If this is Rupert's Land then we take it under our alternative claim. If the title is not in Ontario our main claim fails, but our alternative claim comes in and must succeed, I submit, if this territory be held to be Rupert's Land.

Now so much with regard to the actual facts; but I understand my learned friends to say, although this was not Rupert's Land, it was claimed to be Rupert's Land, the Hudson's Bay Company claimed it to be Rupert's Land, and therefore the obligation of Section 14 arises with regard to it. Now in the history of the Hudson's Bay Company it is well known that the company were preferring large claims, and had been for many years previous to this surrender. It was doubtful as to whether they had any sort of title to the soil at all or what their title was, and when arrangements were being made for the taking over of this great territory by the Dominion it was, of course, thought expedient and desirable that all claims should be set at rest, and whatever the nature of the title of the Hudson's Bay Company was, whatever their territories might be or were claimed to be, that all these should be transferred so that there could be no question about it afterwards. Therefore in the Imperial

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

Act of 1868, with regard to Rupert's Land, it is said that Rupert's Land for the purpose of that Act is to include everything which is within Rupert's Land or claimed to be within Rupert's Land, and that was the Act which authorized the company to make the surrender, and also authorized the acceptance of it. In other words, it was an ordinary transaction of a quit claim. But now we know that so far as this territory is concerned, upon the one branch of my argument, that it was not Rupert's Land and did not belong to the company. Therefore, so far as this territory is concerned, its surrender carried nothing; and although it may be, as my learned friend suggests, that they made certain reservations in Rupert's Land of places which were then in the occupation of the company, they did not get any title to that because the Dominion by accepting this grant with a reservation in it did not thereby confer any title upon the Hudson's Bay Company, as they might have perhaps by such a transaction if they had been the proprietor of the soil, because Ontario was the proprietor, and so we have in evidence the transaction which my learned friend has proved this morning, of Ontario making good to the Hudson's Bay Company the title to these posts or some of them, which they never had before.

Then if we take nothing under the surrender with respect to this territory, how does Clause No 14 apply so as to impose any obligation upon us? "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government, and the Company shall be relieved of all responsibility in respect of them."

Now that was obviously a clause to indemnify the company in respect of claims which the Indians might have, having regard to the transactions with the Hudson's Bay Company. I suppose if lands had been taken over

or opened up for the purpose of settlement by the Hudson's Bay Company in respect of which the Hudson's Bay Company had not compensated the Indians, that clause would apply. It may have applied in some other case, but certainly I submit it can have no application in respect to the territory which was not covered by this surrender at all, and we, of course, were under no obligation, even if the clause applied. It is suggested that such clause was the motive, that it was the reason, that we made the Treaty. That, I suppose, although I have not heard my learned friend's argument, is the ground upon which they put it. But that imposed no obligation upon us. The Indians were in possession; according to the evidence, in 1869, they had never been disturbed in their possession and were quite satisfied apparently. We were under no obligation to open up that country for settlement or to buy out the Indian title. The Indians might have remained there and roamed over the country and hunted and fished and kept possession to this day so far as anything in this surrender was concerned. It was a purely voluntary matter as to the Hudson's Bay Company. They were in no sort of position to compel us or ask us to make such a Treaty, and I submit that even upon the ground upon which my learned friends would probably put it, that this Clause 14 does not even suggest motives for the Treaty which the Dominion made.

Now, my lord, what was the state of the title with regard to this ceded territory at Confederation? Fortunately, I think, that point has been cleared up, so that there can be no discussion about it, by the judgments of the Judicial Committee. First, there is the decision of the *St Catherine's Milling and Lumber's Co's* case, which is reported in 4 *Cartwright's B. N. A. Cases* at p. 116, and that is a convenient place to look at it because you get all the judgments below grouped under the judgment of the Judicial Committee. Lord Watson, in delivering

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

the judgment of the Committee, refers there to the capture of Quebec in 1759 and the Proclamation which followed in 1763. He says that whilst there have been changes in the administration, there has been no change since the year 1763 in the character of the interest which these Indian inhabitants had in the lands surrendered in the Treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. "There was no transfer to the Province of any legal estate in the Crown lands, which continued to be vested in the Sovereign, but all moneys realized by sales or in any other manner, became the property of the Province; in other words, all beneficial interests in such land within the provincial boundaries belonging to the Queen and either producing or capable of producing revenue, passed to the Province, the title still remaining in the Crown."

Now, in reading the various judgments in the above case, your lordship will find that while in the result the Judicial Committee supported the judgment of the court below, it did so for quite different reasons, and that Chief Justice Strong, who dissented in the Supreme Court, and would have held the title in the Dominion, came much nearer in accord with the Judicial Committee than any of the other judges who expressed opinions in the courts below. The only substantial difference is that he said that the Indian interest is an interest existing, it is a title which can be disposed of only to the Crown; it cannot be assigned to a third party, but it can be disposed of to the Crown and it may be disposed of to the Dominion Crown, and by virtue of this surrender it passed to the Dominion Crown. As I understand Lord Watson, he goes with Chief Justice Strong, except to this extent, that it cannot be assigned to the Dominion Crown but it can

be assigned or ceded to the Provincial Crown, and that the effect of the transaction—having regard to the evidence which was before their lordships in that case—was that this title which had all along been in the Indians, passed not to the Dominion but to the Province. That was a very substantial title. "The ceded territory was at the time of the Union vested in the Crown, subject to an interest other than that of the Province in the same within the meaning of Section 109." Now that section was the subject of further consideration in the case of the *Robinson Treaties* before the Judicial Committee (1). This decision is also given by Lord Watson, the same learned lord who delivered the judgment in the Judicial Committee in the *St. Catherine's Case.* That part of the decision was on another point, but is important in this regard only, that until the Indian title is disposed of by them in a constitutional way, Ontario has no right to put her hand on one dollar of income coming from that property or administer the property so as to produce it.

[BY THE COURT: That decision was in respect of territory that had already been ceded before the Union and the rights of the Indians were the rights they had under the Treaty.]

Yes, my lord, but we have it established that the Indian title existing originally, or as confirmed or arising under the Royal Proclamation of 1763, is an interest other than that of the Province in the lands within the meaning of Section 109. Now an interest other than that of the Province in the lands is some right or interest in a third party independent of and capable of being vindicated in competition with the beneficial interest of the old Province. The Indians were in possession of these lands. They had an interest or right recognized by the statute, capable of being set up and vindicated in compe-

(1) *Atty.-Gen. for Canada* v. *Atty.-Gen. for Ontario* [1897] App. Cas. at pp. 210, 211.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

tition with the interest of Ontario, which was the right to take and have the revenues of the lands whenever those lands were freed from the Indian title. Those are the words of Lord Watson in the *St. Catherine's Milling Case*. Therefore Ontario had no sort of interest of which it could avail itself in these lands previous to the surrender of the Indian title. The Indians had an interest; they were in possession. No grants could be made. The benefit which Ontario might otherwise derive and have from this territory could not arise, could not be taken, until after the Indians had ceded their interest. The plain effect of that decision is that these lands were lands reserved for Indians There is an interest existing with which Ontario's title is burdened and the Province cannot free itself of that interest by its own act. Therefore, my lord, they were in a position where they never could have the enjoyment of the interest such as it was and which they took under *The British North America Act* until the Indian title was extinguished.

Chief Justice Strong's judgment in the *St. Catherine's Milling Case* (1) collects the authorities with regard to the Indian title and shows what the policy of the Crown had been in dealing with it. That judgment is very important, every word of it, and full of information with regard to the subject. No legislature in Canada has ever undertaken to deal with Indian lands in the way of making grants or getting revenues from them until after the extinction of the Indian title, and could not do so because that Proclamation of 1763 forbids that to be done; it says it cannot be done, and that has the effect of a legislative Act.

Now that being the situation at the Union, t ere were, as appears by the correspondence and documents put in, differences between the Dominion and Ontario as to the western and northern boundary, and correspondence

(1) 4 Cart. Cas. at p. 128.

took place leading up to a conventional agreement in 1874. It appears that the existence of this Indian title there naturally led to some difficulty and postponement with regard to those negotiations, and so we find it in a report of Mr. Laird, of the 2nd June, 1874, which was approved by Council and communicated to Ontario. "That as the Indian title of a considerable part of the territory in dispute had not then been extinguished, it was thought desirable to postpone the negotiations for a conventional arrangement under which the territory might be opened for sale or settlement, until a treaty was concluded with the Indians." Now the time had arrived when it was necessary or expedient to enter and take possession and have this territory opened for settlement or for the progress of civilization, and the Indian title, the Indian right to possession, the interest which could be vindicated in competition with any other interest, stood in the way; and so, while both Ontario and the Dominion were anxious that this territory should be administered, there was a stumbling block in the way which had to be removed, so the negotiations were postponed, deferred, and this treaty was accomplished.

Then having made the treaty in 1873, in October, in the following spring they signed the conventional boundary agreement on the 26th June, 1874, and by that they drew a line which passed through this ceded territory somewhere about the middle of it; it was divided by the conventional boundary and on the west side of that the Dominion was to administer and on the eastern side Ontario. "That all patents for lands in the disputed territory to the east and south of the said conventional boundaries, until the true boundaries can be adjusted, shall be issued by Ontario." And by the Dominion on the other side. So they went on and issued patents and administered the land, and what transpired in the end was that the whole territory fell into Ontario. Having

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel

regard to the ultimate outcome Ontario was administering the eastern part of the ceded territory herself, the Dominion the western part of it as the agent of Ontario, and the income which we received from that goes to Ontario, and the whole administration of that territory from 1874, when it first began to be administered, was Ontario administration in the result; because it must be held, I submit, under this agreement, that our administration was that of an agent. It was under this agreement with Ontario and with the consent of Ontario. It was her property, vested in the Crown, the beneficial interest going to Ontario.

Then, my lord, there is an agreement of 1894 which is an agreement ratified by statute on behalf both of the Province and Dominion, which is in force, by which Ontario agreed with the Dominion that she would in so far as possible, confirm these reserves which the Dominion had laid out, and that, in so far as she was unable to confirm the reserves, there should be a Commission appointed which would absolutely confirm them or establish others to deal with the subject; the idea, of course, being that the Indians were entitled to the reserves which were promised them, and which had been laid out by the Dominion. Ontario would not acquiesce in certain reserves and means were found for making substitution.

[BY THE COURT: That is if Ontario could not confirm a reserve they would consent to some other reserve being selected in its place.]

Not quite that, because it was put in the hands of a Commission who might say, although Ontario will not consent to it, we will confirm this very reserve. Then there was an agreement made between Mr. Blake and myself in London in connection with the *Seybold Case* (1) which is really a supplement to this agreement of 1894.

(1) *Ontario Mining Co.* v. *Seybold* [1903] A. C. 73.

Therefore, my lord, no doubt Ontario was fully aware of the project of negotiating the treaty and if not actively promoting it, as it seems to me she was, she at least sat by without any objection and after the treaty was accomplished came in and took possession of the lands subject to these special reserves which the treaty provided for and which Ontario has never had the possession of.

Now, we fall into the way of speaking of the Dominion and Ontario as separate governments, distinct political entities, from rather too easy analogy to the governments existing in the United States, which, of course, are separate and independent governments. The real fact is that there is only one government in Canada, there is only one Crown and one government, that is the sovereign government in Canada. There are different departments of the same government, but there are not two Crowns, or two governments, or seven governments in Canada, there is only one.

There is a case which illustrates that somewhat, *Williams v. Howarth*, (1) where a Colonial government had entered into a contract with the respondent for military services in South Africa; and it was held that it did so on behalf of the Crown. That was held by the Judicial Committee, over-ruling the court below, and it proceeded simply upon the principal that there was only one Crown, and that although the government of New South Wales had made a contract with a man who was to serve as corporal at 10 shillings a day during his service from that time in South Africa and return, and although he went to South Africa under that contract and there incidentally came under the British regulations with regard to pay and was entitled to 4 shillings a day from the Imperial Treasury, it was held that to that extent New South Wales was relieved and that they might apply that, although if you regard them as independent they were not

(1) [1905] A. C. 551.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

privy to that contract at all, but they could not set that out as part payment.

Now, in these circumstances we claim that to the extent to which Ontario took the benefits of the treaty she should indemnify the Dominion in respect of its obligations; and this, I submit, should follow as a matter of common sense, and, if I may say so, of common fairness and honesty.

There is no other case like this, in a sense. Your lordship has not actually got two parties before you; you have got one party; you have got the Crown, and you have got the question arising as it were, largely as a matter of book-keeping or collection of revenue as between two departments of one government. The one has inadvertently or otherwise, in fact made a payment which accrues to the benefit of the other. It comes before your lordship under a statute giving your lordship authority to determine all controversies between these two branches of government. Now, is there any reason in those circumstances why an order should not be made that these moneys of Ontario should be applied in discharge of the benefit which Ontario has taken and is enjoying? It would not be contrary to any decision or principle of the common law to hold that Ontario is liable, while to hold the contrary would be certainly in conflict with the opinion of Lord Watson and with the opinion of Mr. Justice Strong in the *St. Catherine's Milling Case* (*supra*).

The cases between subject and subject, applicable or not applicable, really do not apply. Even if they did apply, the principles of the civil law would hold Ontario liable in the position of a subject.

If you take the cases with regard to subjects, I do not say that cases with regard to subjects, having regard to the statutory modification of the common law, would not hold Ontario liable. Certainly they would, so far as

the civil law is concerned, and who says that in a case like this, coming up for the first time, that there is not a principle to be enunciated, and who says that we should not look to the jurisprudence of the civil law on a subject of this kind? There is no doubt that if you go to the civil authorities, this action would lie if it were a case between subjects.

Having brought about this release of surrender upon considerations involving money payments, which the Dominion undertook to execute, the lands were relieved of the Indian title, for the benefit of the Province, as determined in the *St. Catherine's Milling Case*. Now, as between the two governments, both representing the same Crown, is there any constitutional heresy in holding that whether Ontario were a party to the surrender or not, and irrespective of the benefit, if benefit there were, in the discharge of these lands from the Indian title, the payment of the consideration should fall upon Ontario as a department of the King's government, in aid of her title? As I have said, this is only an alternative branch, because I am going to submit a different view in a moment, but I want to submit this in the alternative. It is not competent for a provincial government to make a treaty with the Indians or obtain any transfer from them. The provincial government has no right to require the Dominion government to obtain a surrender. The entire subject of the Indian title is administered by the Dominion and when the Dominion, in the exercise of its power, treats with the Indians and obtains a surrender, that enures to the benefit of the Province. The Province, therefore, held those lands at the Union subject to the Indian interests as defined. The Province could not consistently with the past practice in this country with regard to lands subject to Indian title, dispose of the lands or put settlers in possession or otherwise administer the lands as ordinary Crown lands of the Province

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

until the extinguishment of the Indian title. The constitution gives the Province no voice in the extinguishment of the Indian title, but the extinguishment of the Indian title is obviously a matter of advantage to the Province Hence, the expense of the extinguishment of the title ought to be a matter to be provided for by the provincial territory. The Dominion Crown was a Crown to which the title could not be surrendered, because it was incompetent to take it. But the Ontario Crown was competent and did take it, and how did Ontario acquire the title under this contract which was made, to the Indian interest? By becoming a party, by accepting the benefit, by taking the territory, by becoming the party of the second part to the contract, the Indians being the party of the first part and the Dominion acquiescing, as the Dominion certainly did acquiesce by being actively engaged in bringing this about. It is a clear case, I submit, of ratification and adoption by which Ontario becomes charged with all the obligations of this treaty. Suppose, my lord, the case of an Indian title overlapping two provinces; a large area; one band of Indians; they must be dealt with as a whole. Are there no means provided, if it becomes necessary in the public interest, that it should be converted and the Indian title relinquished; must there be the consent of both provinces before that could be done, in order that they should discharge their liability in respect of the benefit?

Mr. Hogg, followed for the claimant: My learned friend, Mr. Newcombe, in addressing your lordship did not dwell upon any of what might be termed the subsidiary questions of liability. I understood from your lordship yesterday that they would stand in the meantime, and I think we all approved of that suggestion. The only question now before your lordship is the question of liability. That being the case and those questions being the questions to which I have, to some

extent, directed my attention, in the event of its being necessary to discuss them, my remarks to your lordship in connection with the general question of liability will be confined to one or two observations which have already been suggested by my learned friend in his very able argument before you this morning.

Let me say a word with reference to the consideration which went to Ontario by reason of this cession. It has been apparently considered that the lands reserved for Indians, to which the words of *The British North America Act*, section 91, sub-section 24, had reference, were the special reserves which were the result of the treaty; but I think it is now sufficiently and fully demonstrated by the decision of the Privy Council in *The St. Catherines Milling Case* (1), that the interest in the lands were the general reserves under the Proclamation of 1763.

[BY THE COURT: Even if it had said "lands unsurrendered or reserved for Indians" I do not know that that would have affected the case in any way, because it is only a question of legislative authority.]

Quite so, my lord, but my learned friend in discussing the question this morning, read—

[BY THE COURT: He did not read anything that seemed to go to the extent of the proposition with which he started.]

At page 117 of *Cartwright's Cases*, vol. iv, we find Lord Watson speaking as follows: "The territory in dispute has been in Indian occupation from the date of the Proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments and, since the passing of the *B. N. A. Act*, 1867, by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a sub-

(1) 4 Cart. B. N. A. 107.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

ject for the sale or transfer of their interest in the land and have only been permitted to surrender their rights to the Crown by a formal contract duly ratified in a meeting of their chiefs or headmen. * * * Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indians tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never been ceded to or purchased by the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent on the good will of the sovereign."

What we say is this, that the interest which the 109th section of the *B. N. A. Act* speaks of, is that the lands coming to Ontario charged with an interest other than that of the Province, is a necessity of this reservation. That is that these lands, or an interest in these lands, have been reserved to the Indians, and that the lands then fall into the Province of Ontario charged with this interest.

Mr. *Shepley*, for the defendant: I suppose the best way to get at the question which your lordship has to decide is to ascertain in the first place just what was done by the Crown when effecting this treaty. Once the exact boundaries of the thing actually done are ascertained it will be a comparatively simple matter to determine what obligations, if any, have arisen as between the Dominion and the Province with respect to that Act.

Now, with a good deal of what my learned friends have argued I have very little fault to find. I think most of the argument—with very much respect to them—is beside the question which your lordship will have to determine. It is useful, perhaps, indeed I think it is very useful, of vital importance, to ascertain just what the Crown did, because whatever was done it was the act of the Crown. And just a word with regard to the distribution of the administrative powers, under sections 12 and 65 of the *B. N. A. Act.*

Now, 65 vests in the Lieut.-Governor in Council all the executive powers which are appropriate or necessary in respect of matters which are assigned to the Province. That must be so. That only needs to be stated. It is the general effect of the passage. Then if any executive power is incident to the ownership of the public lands, that executive power, of course, passes; it is conferred by section 65 upon the Lieut.-Governor in Council. It does not assist us to refer to sections 12 and 65 unless first we ascertain what the subject-matter is in respect of which the administrative power is required.

I do not myself see any difficulty—I never have seen any difficulty—in holding the view that in respect of lands which were public lands, whether they were charged with or not charged with, whether they were subject to or not subject to an interest in some other entity than the Crown, they fell within the legislative, the administrative powers, as well as the clause relating to property. If, in other words, public lands, that is unsold lands, unoccupied lands, were Crown lands of the Province, then in respect of those lands there was first the property, secondly the legislative authority to deal with them, and thirdly, the executive power to deal with them, so far as dealing with them was a matter of executive. That this property was subject to an interest other than the interest of the Crown could make no difference in that

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

view so long as the interest is not attempted to be dealt with by a legislative body, by an executive body which has no proper function to deal in that way with that subject-matter. If the subject-matter of the interest is within the legislative competence of another tribunal only, then, of course, the Province cannot deal with it. Unless that is so the Province can deal with the interest as well as with the property which is subject to that interest. Now it is I think manifest that, as my learned friends have said, there is only one Crown. This treaty, from whatever standpoint it is viewed, was the act of the Crown. It was not the act of the Dominion or of the Province; it was the act of the Crown, and it was the same Crown which, in right of the Dominion, my learned friends represent, and which, in right of the Province, we represent. There is only one Crown and it was the Crown which extinguished the title, the Crown that negotiated the treaty. Now, what were the circumstances? Because, as I said to your lordship a moment ago, it is most useful to inquire what were the circumstances that led up to the negotiating of this treaty. I do not at all agree with my learned friends that the Crown was under any obligations in respect to this treaty; that there was an obligation resting on the Crown either as represented by the Dominion or the Province.

I do not see how you can argue from an exclusive legislative power to a duty. Assuming that the legislative power was exclusively in the Dominion—which I do not concede at all—it does not necessarily follow that there must be legislation or executive action for the purpose of performing what there was power to perform. A power and a duty are two separate and distinct things, and I suppose the whole field of legislation which the Dominion is competent to occupy, or a great portion of it, may in the will of the Dominion legislature be left unoccupied. There is no duty in the sense that there is

a legal obligation resting upon anybody in respect of the exercise of a power of this sort.

I think my learned friend, Mr. Newcombe, is quite right that we must first inquire what the title was at the time of Confederation. At the time of Confederation—as indeed *The St. Catherines Milling Case* decides—the property in this territory was vested in Ontario. It was subject, as the Privy Council declared in that case, to an interest other than that of the Crown, that interest being the burden—I use that word because it has been used and not because it, perhaps, is altogether an appropriate word—resulting from the Indian occupation. The property was that of the Province. Why could not the Province, owning the property subject to the other interest, compound with the other interest and get it out of the way? My learned friends both seem to think the Province could not have done that. Why not? If the property was in the Province, if an interest was outstanding in someone else, why could not the Province go to that someone else and get rid of the interest, make a bargain with regard to it, sweep it out of the way and make what is called a *plenum dominium* of the property which *The British North America Act* vested in the Province? If the Province could do it—and I am arguing as strenuously as I can that the power was in the Province—that disposes altogether of any legal obligation resting on the Dominion. If the Province, being the owners of the property subject to the interest, could compound for the interest and get it out of the way, of its own motion and without reference to any agency or exercise of power on the part of the Dominion, either executive or legislative, if the Province could do that, of course the Dominion could not have been under any obligation to perform a function which the Province could well and satisfactorily perform for itself. It seems to me that is an answer if it is well founded, and I have not seen

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

a word to the contrary of that in any of the judgments I have seen. I will point your lordship in a moment to words which bear that view out. Let me cite the language of Lord Watson again. He says: "The Crown has all along had a present proprietary estate in the land." (1) He is speaking, of course, of the Crown in the Province, being beneficially entitled to the revenue. "The Crown has all along had a present proprietary estate in the land upon which the Indian title was a mere burden. The ceded territory was at the time of the Union vested in the Crown subject to an interest other than that of the Province." If then, instead of being an interest vested in or enjoyed by the Indians this had been an interest on behalf of the Dominion, an interest in the Dominion for some purpose, one can suppose such a case, could not the Province have bargained with the Dominion to get rid of that interest so as to make the title perfect? And if with the Dominion why not with the Indians? There is nothing in *The British North America Act* to forbid the Province to make a bargain with the Indians. Or if it was the Canada Company, would the Dominion have had to extinguish that interest in order to give Ontario the benefit of her full title? I am utterly unable to appreciate the argument. It does not seem to me to be consistent with either logic or good sense that Ontario should be given by competent legislation a present proprietary interest in a thing, subject to an interest in some one else vested at the same time, with administrative and legislative powers over the property, and then to be told you cannot go to the person that has that interest and bargain for its extinguishment. That seems to me to answer the whole of the argument founded upon the alleged legal duty on the part of the Dominion.

(1) 4 Cart. Cas. at p. 123.

Now, this is what is said in one of the judgments of the Court of Appeal in the *St. Catherine's Case*; at page 205 of the 4th volume of *Cartwright*, Mr. Justice Burton says: "The main feature of the scheme of division being to give to the Dominion power to legislate upon subjects of national interest, or matters common to all the Provinces, and to the Provinces power to deal with matters of a local or private nature. It was reasonable, therefore, that the power to legislate for Indians generally throughout the Dominion should be vested in the central authority and that the same power should deal with the lands which the Provinces had reserved or set apart for them, but this power was specially limited to such subjects. It would have been very unlikely that the delegates would have consented to place the power of legislation in reference to the large unorganized tracts of public lands like that in question in the hands of the Dominion. If then, the lands in question passed, or to speak more accurately, remained part of the Province of Ontario, it would seem to follow almost as a matter of course that the Provincial and not the Dominion authorities were the parties, and the only parties, who could extinguish the so-called Indian title in the absence of any express power to the Dominion to deal with it."

Now, what is the thing that the Dominion here has done? Your lordship cannot have heard the documentary evidence without having been impressed with this notion, that whatever incidentally may have been the result of this treaty as extinguishing the Indian title to these lands, that was neither the first nor the paramount consideration which led to the making of the treaty. I do not want to worry your lordship with references, but your lordship will remember that in the first place there was difficulty about the Dawson route. That was a Dominion object and not a provincial object at all. The Dominion was desirous of conducting a highway into the great

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

northwest, which it had then acquired from the Hudson's Bay Company.

[BY THE COURT: It was a public work that fell without the limits of one Province.]

Quite. It was passing from one Province to another. Your lordship must have observed this, that the Dominion was not, at that time of the view that any of this territory was within the Province of Ontario. The Dominion authorities were of the view, which they were actively putting forward in the proceedings towards ascertainment of the boundary, they were stoutly maintaining the view that the whole of this territory fell outside the bounds of the Province of Ontario. While my learned friend Mr. Newcombe points to the Dominion as the agent doing this for the benefit of the Province, as a matter of fact there was nothing of the kind. Even in respect of the extinguishment of the Indian title the Dominion was acting with a view to the advancement of its own supposed interest and not with a view to any interest on the part of the Province. Then the Dawson route was a Dominion object and it had become manifest that in the course of the construction of that highway the Indians had become irritated. There were other sources of irritation, or apprehended irritation. There had been an insurrection in the Red River country among friends and relatives of these Indians, half-breeds, and the discontent which had caused that insurrection it was apprehended might spread to these untamed and savage bands of Saulteaux. These were all matters of public concern from the Dominion standpoint. Matters that in acting for the peace and good government of Canada it was desirable the Dominion should take up. The Dominion was charged legislatively by *The British North America Act* with the care of these Indians, and as a matter of practice had assumed that control over the Indians which the statute contemplated and had

legislated itself into a certain position of trustee or guardian for the Indians. They had passed the Act with regard to education, which your lordship has heard of. The very next section is the one which provides for the prohibition of the liquor traffic. The Dominion had charged itself as public guardian of the Indians with certain duties and relationships towards the Indians, and all those were circumstances which made it eminently proper from the Dominion standpoint that the Indians should be pacified by the making of a treaty. Your lordship will remember that at first the view was, "there is not the value of a Manitoba farm in the whole of this country." That was expressed in the language of some of the special ambassadors employed by the Dominion to deal with this matter. What they wanted to do was to provide for a right of way through the Indian lands for the Dawson route. That was the way the matter came about first. Incidentally, possibly, to keep the Indians in good temper so that they would not join in the insurrection in the Red River country. Then, after a while, they introduce—no doubt it was present all the time—into the necessity for this pacification of the Indians, the subject of the Canadian Pacific Railway. That was a subject as to which by the terms of the Union with British Columbia, the Dominion had bound itself to construct a railway, and it is made manifest in the course of these negotiations that that also was a matter which the Dominion was anxious to provide for. They had bound themselves to British Columbia to build a railway. The railway, as your lordship knows, does pass through this very territory. They could not build that railway and carry out their obligations with British Columbia without providing for the pacification of the Indians.

Then, thirdly there was the Hudson's Bay surrender. What had the Dominion undertaken to do? The Hudson's

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

Bay Company had this great tract of country subject to its government under the charter granted by Charles II. The Dominion desired to add to the country this territory. It was quite manifest that the claim of the Hudson's Bay Company overlapped Ontario territory. Of course it did not in point of strict geography upon the ground; there could not have been an overlapping; but as a matter of practice, as a matter of fact, as a matter of claim the Hudson's Bay Company had overlapped; they had got into this territory; they were occupying it by their posts and were trading there and they claimed, as your lordship must find, upon this evidence, that this territory was part of Rupert's Land.

The Rupert's Land Act (31-32 Vict. c. 105) says almost in so many words that wherever the word Rupert's Land occurs in that Act it is to be read as including, not only what is properly Rupert's Land, but what the Company has been claiming to be Rupert's Land as well. With all that behind them the Government of Canada approached the making of this treaty. Not with any view of benefiting Ontario; not with any view of freeing Ontario land from the burden of the Indian title; that is an after thought; but with a view in so far as they were acquiring any benefit or in so far as any benefit was to flow from the extinction of the Indian title, intending that the Dominion itself should be the beneficiary.

I will give your lordship a few of the authorities which I submit point the way the decision in this case ought to go. (Cites *Leigh* v. *Dickeson* (1); *Bonner* v. *Tottenham Investment Building Society* (2); *Rhabon S.S Co.* v. *London Assurance Co.* (3); *Falcke* v. *Scottish Imperial Insurance Co.* (4).

It is very true that if a man who has a title to property sees another expending money upon it in the erroneous

(1) 12 Q. B. D. 194; 15 Q. B. D. 60.
(2) [1899] 1 Q. B. 161.
(3) [1900] A. C. 6.
(4) 34 Ch. D. 234.

belief that he has a title to it when in fact he has no title, there is an important doctrine of equity which will prevent the real owner from insisting on his title so as to deprive the person who was acting on the supposition of his own title, of the benefit of his expenditure. But, in order to make this doctrine applicable, there must be not only knowledge on the part of the person having the real title that the man whom he sees so acting believes he has a title and acts in consequence of that belief, but also a knowledge that the title on the faith of which he is acting is a bad one.

Now is there anything in the *St. Catherine's Milling Case* to lay down a different principle of law for this case from the principles laid down in the cases to which I have referred? Your lordship asked that, and I venture to think, in view of the authorities I have given your lordship, that such is the inquiry which your lordship will have to make. My learned friends are quite right in saying that we do treat the observations made by Lord Watson as being purely dicta. It is manifest, as I shall show your lordship in a moment, that the questions which have troubled your lordship the last three days, were not before the court there in any shape or form. The court was not told anything that your lordship has heard about the Hudson's Bay surrender, about the agreement with British Columbia, about the Dawson route or any of the circumstances accompanying the making of this treaty and throwing light upon its purposes. Nothing of the sort was before the court.

Then let us look at the language of Lord Watson himself, because that is the last thing I have to say about it. I think it is made very clear by his own language that he did not consider that he was offering any more than a mere dictum, and was not intending to indicate what the rights of the parties were in that respect. At the top of page 126 of the report in the fourth volume of *Cart-*

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

wright (1) after dealing with the considerations which my learned friends do not rely on, he says: "these considerations appear to their lordships to be sufficient for the disposal of this appeal." He might have stopped there, and the judgment would have been complete. Then follows the language which my learned friends have read. Let me just finish the quotation, because the rest of it is what my learned friends have taken as the foundation of their action and the language in which they have crystalized the claim that they lay before this court. "There may be other questions behind," * * * "but none of these questions are raised for decision in the present suit." If language could be more apt to indicate that that question was not before them, I cannot imagine it. "But none of these questions are raised for decision in the present suit." In *Ontario Mining Co. v. Seybold* (2), the Judicial Committee decided that Ontario cannot be bound by anything done by the Dominion in dealing with these Indian lands without its consent.

Then Mr. Newcombe has pointed to the bargain between himself and Mr. Blake, made I think in the summer of 1902. A bargain it was eminently proper to make, but how can my learned friends say that something that Ontario and Dominion counsel agreed to in 1902 can possibly throw any light whatever upon facts and circumstances which preceded 1873, as indicating that what was done in 1873 was done with the authority and at the instance of the Province of Ontario? My learned friend became bolder as his argument proceeded; my learned friend pictured Ontario as authorizing, requesting, demanding of the Dominion that the Dominion should go and extinguish the Indian title in this tract of territory for the benefit of Ontario. Ontario really was getting the Dominion to do this, my learned friend puts it. I ask, in all sincerity, where is the evidence that anything of the

(1) 4 Cart. Cas. at p. 126. (2) [1903] A. C. 73.

sort was going on? What had Ontario to do with this treaty? What mandate did Ontario ever give the Dominion to negotiate this treaty? And if there was no mandate for what the Dominion was doing was not being professed to be done as an agent for Ontario, then there could be no ratification, because Ontario remained the owner of the property of which she was the owner, but freed of a claim which had been removed by the Dominion for the Dominion's own purposes altogether, apart from any question of this title. Why should Ontario be prevented from saying, I have no option but to take the lands as I find them. They were mine before, subject to an interest. Somebody has extinguished that interest. You, the Dominion, claim to have done it. Perhaps you did. If you did, it does not give you any claim against us, we remain in possession of our rights.

I can quite understand the Dominion coming into the Court of Exchequer and saying to the Province, we implead you for the purpose of being indemnified against an obligation which you have undertaken; but I cannot understand the Dominion coming into the court and saying, we do not make any such claim as that but we make a claim that because by some act of ours you have got a vast tract of rich territory, you should pay us some proportion of the value of what you have got.

There is a case which I think emphasizes the difference between the law of the Province of Quebec and the law of Ontario upon the principal question in controversy here. The case of *Hyde* v. *Lindsay* (1). That was a case which fell to be determined by the courts of this Province but upon an application of the law of the Province of Quebec, and our Court of Appeal held absolutely, without any doubt whatever, that no such principle, even in the law of the Province of Quebec, existed as is being contended for here; that is that by a

(1) 29 S. C. R. 595.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

volunteer taking care of another person's property he could put him under any liability. The action was dismissed and the Court of Appeal unanimously affirmed the decision, dismissing the action. The plaintiff was not satified with that but went to the Supreme Court, and the Supreme Court held—which had been conceded in Ontario—that the law of Quebec applied; they held that the law of Quebec did permit a recovery in such a case but the decision of the Supreme Court makes it very clear that according to the law of this Province there is no such right. These are the considerations which I urge upon your lordship as involving the decision by your lordship that this action cannot be maintained and that the liabilities sought to be placed upon the Province, cannot be so placed.

Sir Æmilius Irving, K.C.: Neither my learned friend, Mr. Ritchie, nor myself think it necessary, after the exhaustive argument and statements that have been made by my learned friend Mr. Shepley, to add anything. We think your lordship will be seized of our opinions by the attention you have given to him.

Mr. *Newcombe* in reply: In regard to the *Seybold Case* (1), I think this is the first time I have looked at this case since the argument; this is a somewhat misleading report of the case, because it is stated here that my late learned friend Mr. Loehnis and I argued this case on behalf of the Attorney-General for the Dominion, that Mr. Blake was heard and that I replied. Now the fact is, my lord, that we were intervening parties there. The case was between the Ontario Mining Company and Seybold. Ontario intervened and the Dominion intervened, and during the argument we settled the case as far as the contention that Ontario and the Dominion would otherwise have raised by the agreement which is in evidence. The reporter evidently was not there during the argu-

(1) [1903] A. C. 73.

ment and he has put down what he assumes took place from the cases filed, I suppose. The fact is that neither Mr. Loehnis nor I, nor Mr. Blake addressed the court at all, except to say that as far as we were concerned we had made this agreement and our differences were settled and it was left a matter as between the parties, and of course their lordships did not determine the point which the Chancellor had determined. What they said was, "it is unnecessary for their lordships, taking the view of the rights of the two governments which have been expressed, to discuss the effect of the surrender of 1886. Their lordships however, do not dissent from the opinion expressed by the Chancellor of Ontario on that question." They said they did not dissent from it, but they did not decide it. That was a point that we were prepared to argue, namely that the Indians held by reason of their special reserve under a very different sort of title from that which they had under their original title. Now the Privy Council have not yet discovered a distinction between those two interests, how the one is granted by the Act of the Crown as a consideration for the surrender of the original title and how the Indians hold that title confirmed and strengthened by the special contract and the statute conferring the title upon them.

That brings me back to this, that there can be no doubt, these lands, the subject of the Proclamation of 1763, were lands reserved for Indians within the meaning of that term. In section 91 of *The British North America Act* the words actually used are, according to their natural meaning, sufficient to include all lands reserved upon any terms or conditions for Indian occupation. It appears to be the plain policy of the Act, in order to insure uniformity of administration that all such lands and administration generally shall be under the legislative control of one central authority. Now, my lord, I have not contended and I do not contend that

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Argument of Counsel.

the legislative authority necessary gives adminstrative control but the execution of legislative authority may confer executive control. Therefore you have to look to the Dominion Legislation, the Indian Acts to which I referred in my opening. I did cite the present Indian Act, but going back to 1868, by the legislation which was in force when this treaty was negotiated, the Secretary of State was to be the Superintendent of Indian Affairs. (Cap. 42 of the Dominion Acts of 1868, sections 5 and 6.) The Secretary of State shall be the Superintendent General of Indian Affairs and shall have, as such, the control and management of the lands and property of the Indians in Canada. Now these were the lands of the Indians within the meaning of that Act. These lands subject to the Proclamation of 1763; all lands reserved for Indians. The very words of *The British North America Act* are:—"All lands reserved for Indians or held in trust for their benefit shall be deemed to be reserved or held in trust for the same purposes as before the passing of this Act, and no such lands shall be alienated, sold or leased until they have been released to the Crown for the purposes of this Act." The Indian lands and the management thereof are placed under the administration of the Secretary of State, and there are provisions here about surrender which carried on substantially the provisions of the Act which my learned friend referred to of 1860, whereby it is provided that no release shall be valid or binding except under the following conditions. Then various conditions are set out. That continues to the present day, modified to some extent but still containing the main point that these surrenders must be ratified and approved by the Governor in Council or by the Dominion Government. Therefore, while there may be some things debateable about this case there is one thing that I submit is conspicuously clear, that Ontario could never have got the benefit of

these lands without the sanction and intervention of the Dominion Government. Let that cut which way it will in the argument, that is the situation and it has always been the situation from the earliest times.

Now my learned friend refers to various considerations on account of which he says it was in the interest of the Dominion to have this thing done. There was the Dawson route, the recent insurrection, the Hudson's Bay Company, and that the Dominion itself claimed to be entitled to the lands. Those are motives no doubt which may or may not have actuated the Dominion. Suppose they did; it does not matter. The fact is that the Indians had just one asset, and it was a very valuable asset; their title to this land.

Then what the Indians do is: "the Saulteaux tribe of the Ojibeway Indians and all other Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for Her Majesty the Queen and her successors for ever, all their rights, titles and privileges whatsoever to the lands included within the following limits." Then follows the description, and the rest of the document consists of the covenants which in consideration of that surrender Her Majesty made with the Indians, to make payments, provide materials and so on, and finally the chiefs in the ordinary stereotyped form of these treaties, in their own behalf and on behalf of all their people, engaged to be made subjects and remain in peace and so on with the Crown. So that really if you are looking at the face of the treaty to see what it was that they were dealing with, you find that they were dealing with an asset which was of value only to Ontario and from which Ontario would derive all the revenues, and it was incidental only, if at all, that the Dominion takes any benefit. Incidentally no doubt I suppose it facilitated the construction of this so-called

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

Dawson route. I do not know what that was. A means of communication, I suppose, from this country to the western countries. And very likely it allayed any discontent of the Indians; but the Indians were putting their own value on the property, and they were entitled to put any value; they could set up past claims or damage claims; nobody knows what motive is in a man's mind when he puts a price on his property, and if the object is to acquire the property, you cannot deal with that afterwards; the value of the property is what it can be bought for; if it cannot be bought for less than a sum which seems to be large, then the value of the property must be considered as large. In the present case it does not seem to me that these Indians received an exorbitant consideration for what they gave up.

THE JUDGE OF THE EXCHEQUER COURT now (March 18th, 1907) delivered judgment.

The principal controversy between the parties to this action is as to whether or not the Province of Ontario is liable to repay to the Dominion of Canada any portion of the moneys that have been expended by the Dominion in fulfilment of the obligations created by a treaty which is known as the North West Angle Treaty No. 3; and which was made and concluded on the third day of October in the year one thousand eight hundred and seventy-three between Her late Majesty the Queen and the Saulteaux tribe of the Ojibeway Indians respecting a tract of land, the boundaries of which are given in the treaty, and which may in general terms be described as covering the area from the watershed of Lake Superior to the north-west angle of the Lake of the Woods and from the boundary of the United States of America to the height of land from which the streams flow towards Hudson's Bay, and containing about fifty-five thousand square miles. There is also a counterclaim to which

reference will be made later; but the main question at issue between the parties is that which has been stated.

By the 146th section of *The British North America Act*, 1867, provision was made for the admission into the Union of the Provinces thereby united of Newfoundland, Prince Edward Island and British Columbia, and also of Rupert's Land and the North West Territory; and it was thereby enacted that the provisions of any order in council in that behalf should have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland. By the Act of that Parliament known as the "Rupert's Land Act, 1868" (31-32 Vict. c 105), provision was made for the surrender to the Crown, and for the extinguishment thereby of the Hudson's Bay Company's rights in Rupert's Land which for the purposes of this Act was defined to include the whole of the lands and territories held, or claimed to be held, by that company. That Act also gave Her late Majesty authority to declare that Rupert's Land should be admitted into and become part of the Dominion of Canada. In 1869 the Parliament of Canada, in view of the probability that Her Majesty the Queen might, pursuant to *The British North America Act*, 1867, be pleased to admit Rupert's Land and the North Western Territory into the Union or Dominion of Canada, before the then next session of the Parliament of Canada, passed an Act to make temporary provision for the civil government of such territories until more permanent arrangements could be made by the Government and Parliament of Canada. That Act was amended and continued by an Act of the Parliament of Canada, 33 Victoria, chapter 3, which was assented to on the 12th day of May, 1870, and which, among other things, provided that on, from and after the day upon which the Queen should by order in council in that behalf admit Rupert's Land and the North Western Territory into the Union or Dominion of Canada,

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

there should be formed out of the same a province, which should be one of the Provinces of the Dominion of Canada, and which should be called the Province of Manitoba, and should be bounded as therein described (1). The two Acts mentioned, that is, the Act 32–33 Victoria, chapter 3, and the Act 33 Vict. c. 3, were by an Act of the Parliament of the United Kingdom, passed in the year 1871, respecting the establishment of Provinces in the Dominion of Canada, declared to have been valid and effectual for all purposes whatever from the date at which they respectively received the assent in the Queen's name of the Governor General of the Dominion of Canada (2). The order in council admitting Rupert's Land and the North West Territory into the Union was passed on the 23rd of June, 1870, and they thereby from the 15th day of July in that year became a part of the Dominion. That extended the boundaries of the Dominion westerly and northerly from the boundaries of the old Province of Canada. But at that time the boundaries of the old Province of Canada had not been definitely determined, and a dispute arose between the Province of Ontario on the one hand and the Dominion on the other as to what the true boundaries were.

With respect to the Indian title to the territories which were united to the Dominion by the Queen's Order of the 23rd of June, 1870, it was provided in the 14th paragraph of the terms of Union that any claims of Indians to compensation for lands required for purposes of settlement should be disposed of by the Canadian Government in connection with the Imperial Government, and that the Hudson's Bay Company should be relieved of all responsibility in respect thereof. By the Lake Superior Treaty, 1850, made on the seventh day of September of that year, the Ojibeway Indians inhabiting

1 33 Vict. c. 3, s. 1.

(2) *The British North America Act*, 1871, s. 5.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

the northern shore of Lake Superior, in the Province of Canada, from Batchewanaung Bay to Pigeon River at the western extremity of the said lake and inland throughout that extent to the height of land which separates the territory covered by the charter of the Hudson's Bay Company from the said tract, had surrendered to Her late Majesty their title and interest in the tract of land described in the treaty. The Indian title in the territories to the west and north of this tract of land had never been surrendered. So far as such territories were within the true boundaries of the old Province of Canada, all the lands, mines, minerals, and royalties therein which belonged to such Province at the date of the Union of the Provinces of Canada, Nova Scotia and New Brunswick, became the property of the Province of Ontario by virtue of the 109th section of the *British North America Act*, 1867, subject however to any interest other than that of the Province in the same. There was, however, no change of title in respect of these lands. Both before and after the Union the Crown had a "present proprietary estate in the land upon which the Indian title was a mere burden." By the 109th section of the Act of Union the Province of Ontario acquired the right, subject to that burden, to administer these lands and to take the revenues arising therefrom. That was determined in *The St. Catherines Milling and Lumber Company* v. *The Queen* (1). In that case, Lord Watson, delivering the judgment of their Lordships of the Judicial Committee of the Privy Council, and dealing with the territory in respect of which the questions to be determined in this case arise, put the matter in this way:—

"Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario* v. *Mercer* (2), might have been an authority for holding that the Pro-

(1) 14 App. Cas. 46. (2) 8 App. Cas. 767.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

vince of Ontario "could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the Union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land upon which the Indian title was a mere burden. The ceded territory was, at the time of the Union, land vested in the Crown subject to 'an interest other than that of the Pro-'vince in the same' within the meaning of sec. 109, and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.'"(1)

It is also to be observed that the admission in 1870 of Rupert's Land and the North Western Territory into the Union did not work any change in the title to the public lands therein. These remained in the Crown, but the Dominion of Canada thereby acquired the right to administer such lands and to take the revenues which accrued therefrom. It has been seen that it was one of the terms of that Union that the Canadian Government should in communication with the Imperial Government dispose of any claims of Indians to compensation for lands required for the purposes of settlement. But that equally would have been necessary as an act of administration on the part of the Canadian Government if there had been no express stipulation. It had been the well settled policy of the Crown in the administration of lands inhabited by Indians, not to open up such lands to settlement without first obtaining a surrender of the Indian title.

The question of obtaining the surrender of the Indian title in the lands described in the North West Angle Treaty No. 3, was in 1870, when Rupert's Land and the North Western Territory were admitted to the Union, a very urgent and pressing one, not because such lands were at that time required or deemed to be desirable or avail-

(1) 14 App. Cas. at pp. 58, 59.

able for settlement, but because it was necessary for the good government of the country to open up and maintain through such lands a line or way of communication between the eastern and settled portions of Canada and the great and fertile western territory that was added to the Dominion. At that time a line of communication, known as the Dawson route, was being opened up through such lands. During the summer of that year it became necessary to send through this territory a military force to maintain the Queen's authority and establish order in the country about the Red River. Early in the year the Government of Canada had sent an agent to Fort Frances "to keep up a friendly intercourse" with the chiefs and Indians who assembled there and to "disabuse their "minds of any idle reports they might hear as to the "views and intentions of the Government of Canada in "reference to them." In May the Government sent Mr. Simpson to the same place to secure from the Saulteaux Indians a right of way for the troops and to prevent any interruption of surveying parties during the summer. The demands that the Indians made were considered so excessive that Mr. Simpson did not come to any agreement with them. They, however, stated that it was not their intention to try and stop the troops from passing through their lands on their way to the Red River, but that if Mr. Dawson was to make roads through their country they expected to be paid for the right of way. In the next year another attempt was made to arrive at a settlement with these Indians. But on this occasion it was not a question of obtaining merely a right of way through their lands, but of acquiring a surrender of the Indian title therein so that such lands would be open for settlement. By a commission issued under the Great Seal of Canada, and bearing date of the 27th of April, 1871, and in which it was recited that the Indian title to the lands therein mentioned had not been extinguished

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

and that such lands were required for settlement, Her late Majesty appointed Mr. Simpson, Mr. Dawson and Mr. Pitcher commissioners to make a treaty with several bands of the Ojibeway tribe of Indians occupying and claiming the lands in that portion of the North Western Territory lying and being between Lake Shebandowan and the north-west angle of the Lake of the Woods. The commissioners, as appears from their report of the 11th day of July, 1871, entered into negotiations with the Indians and settled, as they thought, "all past "claims" that the Indians had, but, "various causes "prevented them from entering into a formal and per- "manent arrangement" with the Indians at the time. On the 20th day of July, 1871, by an order in council passed on the 16th day of May in that year, British Columbia was admitted into the Union. By the terms of the Union the Government of Canada, among other things, undertook to construct a railway "to connect the "seaboard of British Columbia with the railway system "of Canada." That involved the construction of a railway through the lands for the surrender of the Indian title in which the Government of Canada was in that year negotiating. It afforded another reason, if another were needed, for an early extinguishment of such title. It is put forward on behalf of Ontario that the conclusion of a treaty with these Indians was a prime necessity in the carrying out of the railway policy necessary to implement the agreement of the Dominion with the Province of British Columbia. That the construction of the Canadian Pacific Railway would in the course of time have made it necessary to extinguish the Indian title in these lands, or at least in so much thereof as was needed for a right of way through the same, cannot admit of doubt. But it is not at all clear that this matter was in 1871 pressing or urgent if anything were thought to turn upon that point. But it is, it seems to me, clear that for a

number of reasons either relating, or deemed by the Government of Canada to relate to, the administration of the affairs of the Dominion, it was at the time necessary that the Indian title in these lands should be extinguished. Those whose duty it was at the time to advise Her Majesty and His Excellency the Governor General in relation to the Government of the Dominion, held the view that the Dominion had the right to administer the lands mentioned and to take any revenue to be derived therefrom. There was no question of extinguishing the Indian title in the lands belonging to the Province of Ontario. The lands were thought by the Dominion authorities to belong to the Dominion. So it happened that those whose duty it was to advise the Lieutenant-Governor of the Province of Ontario in respect of the Government and affairs of the Province were not consulted, and had no part in the negotiations that resulted in the treaty that was concluded in 1873.

It is not necessary for the moment to consider in detail the terms of the treaty. That may more conveniently be done on another branch of the case. By the treaty the Saulteaux tribe of the Ojibeway Indians surrendered their title in a tract of land embracing, as therein stated, an area of fifty-five thousand square miles, more or less. Mr. Bray, the Chief Surveyor of the Department of Indian Affairs, who was examined as a witness, gives the total area covered by the treaty as forty-nine thousand three hundred square miles. And of this area, having regard to the boundaries of the Province of Ontario as they were ultimately determined to be, thirty thousand five hundred square miles are in the Province of Ontario, thirteen thousand six hundred square miles in the District of Keewatin, and five thousand two hundred square miles in the Province of Manitoba. The charges arising from the obligations incurred by the Crown under this treaty have been defrayed out of

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

moneys appropriated by the Parliament of Canada and expended by or on behalf of the Dominion Government. Particulars of such expenditure up to the year 1902, amounting, without interest, to something over eight hundred thousand dollars, are given. On the other hand the Province of Ontario for the years 1874 to 1894, both inclusive, received from the sale of lands, minerals and timber in that part of the province which was in the disputed territory, a sum exceeding one million dollars. A part of the disputed territory was, however, for a number of years administered by the Dominion Government in pursuance of an agreement for a conventional boundary for the Province of Ontario, made on the 26th day of June, 1874, between the Minister of the Interior of the Dominion and the Commissioner of Crown Lands of the Province on Ontario, on behalf of the Governments of the Dominion and of Ontario, respectively. In that connection the Dominion authorities collected an amount which may approximately be stated at one hundred and fifty thousand dollars. The sum, the exact amount of which has not been ascertained, the Province of Ontario claims from the Dominion by way of counterclaim in this action. The Dominion admits its liability to account for this amount, and by consent, a reference was made to Mr. Cameron, the Registrar of the Supreme Court of Canada, to make an enquiry and to report as to the amount of the Dominion's liability in that behalf. The amounts collected by the Dominion, and the sums received by the Province of Ontario, from the administration of the lands in which the Indian title was extinguished by the North West Angle Treaty No. 3, represent the revenues that have been derived therefrom. The Dominion, on the one hand, has discharged the burden of the Indian title in such lands. The Province of Ontario, on the other hand, has received or is entitled to an account for the revenues that have accrued from the administration of

the larger portion of such lands. And the Dominion now asks that it be declared that the Province of Ontario is liable to repay to the Dominion a proper proportion of the annuities and other moneys paid by the Dominion to and for the Indians under the terms and stipulations of the treaty. To that demand the Province of Ontario answers in the first place that it was no party to the treaty; that the Dominion of Canada for its own purposes negotiated and entered into the same without any authority or mandate from the Province, and is not entitled to claim any indemnity from the Province in respect of the obligations thereby assumed.

The jurisdiction of this court to hear and determine the question at issue is derived from statutes passed by the Parliament of Canada, and by the Legislature of the Province of Ontario (R. S. C. c. 135, s. 72, now R. S C. 1906, c. 140, s. 32; and R. S. O. 1897, c. 49), which gives the court jurisdiction of controversies between the Dominion of Canada and the Province. And as to that I agree with Mr. Shepley that the mere fact that there is a controversy does not give the court authority to decide against the Province simply because it should think that, as a matter of good conscience and honourable dealing, the Province, having derived a benefit from the treaty, should relieve the Dominion from a proportionate part of the burden arising therefrom; that it is not simply a question of what the court might think to be fair in the premises without regard to the principles of law applicable to the case. At the same time, as Mr. Newcombe pointed out, the question arises between governments, each of which within its own sphere exercises the authority of one and the same Crown. For that reason one cannot expect the analogies of the law as applied between subject and subject to be perfect or in every way adequate to the just determination of the case. Such distinctions must of course be kept in mind; and perhaps

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

for that reason it may be convenient to refer to a few of the provisions of the *British North America Act*, 1867, which are so well known that otherwise it would be wholly unnecessary to make any reference to them. The executive government and authority of and over Canada is vested in the King of the United Kingdom of Great Britain and Ireland (1). The Governor General is His Majesty's chief executive officer for carrying on the government of Canada in his name (2). In general he acts in respect of the government of Canada upon the advice of his ministers, being members of the King's Privy Council for Canada (3). The executive authority of the Crown in respect to the government or affairs of a Province is vested in the Lieutenant-Governor or administrator of the Province acting with the advice or consent or in conjunction with the Executive Council of the Province (4). In such case it is the King's or the Crown's authority that is exercised. But in respect of the government of Canada the King's representative acts upon the advice of the Dominion ministers; while in respect of provincial matters the Lieutenant-Governor acts upon the advice of the Executive Council of the Province. With regard to the distribution of executive authority between the Governor General of the Dominion and the Lieutenant-Governors of the several Provinces, it will, I think, in general be found that the former has executive authority in respect of matters over which the Parliament of Canada has legislative authority; while the latter have executive authority over matters which are within the legislative control of the legislatures of the several Provinces. In construing the *British North America Act*, 1867, it is necessary, as has often been pointed out by the highest authority, to distinguish

(1) *The British North America Act*, 1867, ss. 9 and 2.
(2) Id. s. 10.
(3) Id. s. 12.
(4) Id. ss. 58-67.

between proprietary rights and legislative authority. The former does not follow the latter. But under that Act executive authority does, I think, in general follow legislative authority. There may be some exceptions, but I am not aware of any that in any measure affect this case. But as it happens that a subject or matter which, in one aspect of a case, is within the legislative authority of the Parliament of Canada may in another aspect of the case be within the legislative authority of a provincial legislature; so it may happen that while in one aspect of a matter, executive authority in respect thereof may be vested in the Governor General, in some other aspect of the same matter it may fall within the executive authority and action of a Lieutenant-Governor of a Province. By the 91st section of *The British North America Act*, 1867, class of subject No. 24, the Parliament of Canada has exclusive legislative authority to make laws for the peace, order and good government of Canada in relation to Indians and lands reserved for Indians; and it cannot, I think, be doubted that, unless the Parliament of Canada otherwise declares, the executive authority of the Governor General of Canada extends to all matters of administration relating to Indians and to their lands and affairs. By the 92nd section of the same Act, class of subject No. 5, the legislature of each Province may exclusively make laws in relation to the management and sale of the public lands belonging to the Province and of the timber and wood thereon; and the executive authority exercisable in the administration of such lands is, unless the legislature otherwise enacts, vested in the Lieutenant-Governor acting by and with the advice of the Executive Council of the Province.

The treaty out of which the question in issue here arises was concluded by commissioners appointed by the Queen acting on the advice of Her ministers for the Dominion. There is no question as to its validity. In *The*

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment

St. Catherine's Milling and Lumber Company v. *The Queen* (1), Lord Watson stated that they had full authority to accept a surrender to the Crown; but that they had no authority or power to take away from Ontario the interest which had been assigned to that Province by the Imperial Statute of 1867. There can, I think, be no doubt of their authority to bind the Crown to make the payments stipulated for in the treaty. The case cited shows that the lands thereby surrendered were or might fall within the true construction of the words of section 91 (24) of the Act of 1867 "lands reserved for the Indians" (2). And that being the case, there can I think be no doubt as to the authority of the Crown at the instance of the Dominion ministers and upon their advice to enter into this treaty. The difficulty is that in one aspect of the matter they were, although it was not known at the time, dealing with the public lands belonging to the Province of Ontario, and removing a burden therefrom. It is argued for the Dominion that Ontario must be taken to have acquiesced in what the Dominion authorities did in negotiating this treaty, and that the Province is bound by such acquiescence. I am not able to accede to that contention or to rest my judgment on that ground. The most that can be said on that branch of the case is, it seems to me, that while on the one hand the Government of Canada holding, in good faith, but erroneously as it turned out, the view that all the lands to be surrendered belonged to the Dominion, did not consult the Government of Ontario in respect of the negotiations with the Indians for the surrender of their title in such lands; on the other hand the government of the Province did not raise any objection to the matter so proceeding and did not prefer any request to be represented in the negotiation of the treaty.

(1) 14 App. Cas. 60.

(2) 14 App. Cas. 59.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

Now, with regard to the contention that inasmuch as a part of the benefit arising from the surrender of the lands mentioned in the treaty accrues to Ontario, that Province should relieve the Dominion from a proportionate part of the obligations thereby created, it appears to me that that consideration is not of itself sufficient to make the Province liable. If the Province had had any option in the matter, if it had been open to it to accept or decline such benefit, and it had accepted it, then the Province would have been liable for its fair proportion (1). But that is not the case. The burden of the Indian title was removed from these lands before it was determined whether any part of them was within the Province or not. When it was decided that a large portion of such lands was within the Province of Ontario there was nothing the Province could do but accept the lands and administer them free from such burden. In the *Ruabon Steamship Company, Lt*, v. *The London Assurance* (2), one of the cases on which Mr. Shepley relied, it was held that there is no principle of law which requires a person to contribute to an outlay merely because he has derived a material benefit therefrom. And that principle is, I think, as clearly applicable to the transactions of the Dominion and Provincial Governments as it is to those which occur between individuals. If the Parliament of Canada should appropriate, and the Government of Canada should expend public moneys of the Dominion for Dominion purposes, with the result that a Province was benefited, and there was no agreement with the Province or request from it, then it would be clear that the Province was under no obligation to contribute to such expenditure, or to indemnify the Dominion against any part thereof. According to the contention of the Province of Ontario, as I understand it, the present case falls within that proposition.

(1) *Leigh* v. *Dickeson*, L. R. 15 Q. B. D. 60.

(2) [1900] App. Cas. 6.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

Equally it seems clear that if the Parliament of Canada should appropriate and the Government of Canada should expend the public moneys of the Dominion for a provincial purpose to the benefit of a Province, there being no agreement with the Province or request from it, no obligation would arise on the part of the Province to contribute towards such expenditure or to reimburse the Dominion for any part thereof. The principle would apply as well to expenditures made by a Province with the result that the Dominion as a whole was benefited. In all such cases the appropriation and expenditure would be voluntary and no obligation to contribute would arise. But the present case appears to me to differ from those stated in some material respects.

At the time when the treaty was negotiated the boundaries of the Province were unsettled and uncertain. The lands described in the treaty formed part of the territory that the Hudson's Bay Company had claimed and had surrendered to the Crown. The surrender embraced all lands belonging to the company or claimed by it. That of course did not affect Ontario's title to such part of the lands claimed by the company as we were actually within the Province. But on the admission of Rupert's Land and the North Western Territory into the Union the Government of Canada acquired the right to administer all the lands that the company had a right to administer. And with respect to that portion of the territory which the company had claimed but which was in fact within the Province of Ontario, the Dominion Government occupied a position analogous to that of a *bonâ fide* possessor or purchaser of lands of which the actual title was in another person. The question of the extinguishment of the Indian title in these lands could not with prudence be deferred until such boundaries were determined. It was necessary to the peace, order and good government of the country that the question should be

settled at the earliest possible time. The Dominion authorities held the view that the lands belonged to the Dominion and that they had a right to administer the same. In this they were in a large measure mistaken, but no doubt the view was held in good faith. They proceeded with the negotiation for the treaty without consulting the Province. The latter, although it claimed the lands to be surrendered, or the greater part thereof, raised no objection and did not ask to be represented in such negotiation. The case bears some analogy to one in which a person in consequence of unskilful survey, or in the belief that the land is his own, makes improvements on lands that are not his own. In such a case the statutes of the old Province of Canada made, and those of the Province of Ontario make, provision to protect him from loss in respect of such improvements, or to give him a lien therefor (1). The case, however, appears to me to bear a closer analogy to one in which a *bonâ fide* possessor or purchaser of real estate pays money to discharge an existing incumbrance or charge upon the estate having no notice of any infirmity in his title. In such a case, as stated by Mr. Justice Story in *Bright* v. *Boyd* (2) the possessor or purchaser was according to the principles of the Roman law entitled to be repaid the amount of such payment by the true owner seeking to recover the estate from him. And again, in the same case (3) Story, J., is reported as follows:—

"I wish in coming to this conclusion to be distinctly understood as affirming and maintaining the broad

(1) 59 Geo. 3, c. 14, s. 12; 12 Vict. c. 35, s. 49; C. S. U. C. c. 93, s. 53; R. S. O. (1877) c. 51, ss. 29 and 30; (1887) c. 100, ss. 31, 32; (1897) c. 119, ss. 31 and 32; 36 Vict. (Ontario) c. 22, s. 1; 40 Vict. (Ont.) c. 7, Schedule No. 114; R. S. O. (1877) c. 95, s. 4; (1887) c. 100, s. 30; (1897) c. 119, s. 30; *Gummerson* v. *Banting*, 18 Grant, 516; *Carrick* v. *Smith*, 34 U. C. Q. B. 399; *O'Connor* v. *Dunn*, 37 U. C. Q. B. 430; *Fawcett* v. *Burwell*, 27 Grant, 445; *Beaty* v. *Shaw*, 14 O. A. R. 600.

(2) 1 Story, 497, 498.

(3) 2 Story, 607.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

doctrine, as a doctrine of equity, that, so far as an innocent purchaser for a valuable consideration without notice of any infirmity in his title has, by his improvements and meliorations, added to the permanent value of the estate, he is entitled to a full remuneration, and that such increase of value is a lien and charge on the estate, which the absolute owner is bound to discharge before he is to be restored to his original rights in the land. This is the clear result of the Roman law, and it has the most persuasive equity, and I may add common sense and common justice, for its foundation. *The Betterment Acts* (as they are commonly called) of the States of Massachusetts and Maine, and of some other States, are founded upon the like equity, and were manifestly intended to support it even in suits of law for the recovery of the estate."

In *Gummerson* v. *Banting* (1) Mr. Chancellor Spragge stated that he entirely agreed with Mr. Justice Story that the principle cited from the Roman law had the most persuasive equity and common sense and justice for its foundation. In the latter case the learned Chancellor held that the rule that a party in good faith making improvements on property which he has purchased, will not be disturbed in his possession, even if the title prove bad, without payment for his improvements, will be enforced as well where the purchaser is plaintiff as where he is defendant, and that although no action has been brought to dispossess him. This decision was the subject of some comment in *Beaty* v. *Shaw* (2) in the Court of Appeal for Ontario, where Burton, J.A., stated that he could find no case in Ontario before *Gummerson* v. *Banting*, and no case at all in England, where a stranger who has entered upon land, even under colour of title, can, as against the true owner, claim to be paid for his improvements. He states his view of the law in the following terms (3):

(1) 18 Grant 522.

(2) 14 O. A. R. 600.

(3) Id. p. 609.

"No doubt by the rules of the civil law, the possessor of the property of another who has made improvements in good faith, believing himself to be the owner, was entitled to be paid for such improvements; and this law has been adopted by many countries whose laws are based upon the civil law; thus it has been acted upon in Scotland, and in some instances, but not universally, in America; but we do not derive our laws from that source; and I know of no instance in which by the law of England the principle has been adopted except in the action for mesne profits, where the party has been sometimes allowed to recoup himself by setting off the value of the improvements, and in cases where the legal title has been in the person making the improvements and the equitable title in another, who is obliged to resort to a court of equity for relief; and where the court then acts upon the principle that the party who comes to court to seek equity must himself be willing to do what is equitable." It appears therefore that if the question in issue were to be determined by analogy to the law of the Province of Ontario applicable to individuals, the Province could not maintain its counterclaim for the moneys which the Dominion collected as revenue from the disputed territory without submitting to the enforcement of the equity existing in favour of the Dominion in respect of the charges incurred in extinguishing the burden of the Indian title; but that it is, to say the least, extremely doubtful if this equity could be enforced in an action by the Dominion against the Province.

The question, however, does not rest there. In *The St. Catherine's Milling and Lumber Company* v. *The Queen* (1), Lord Watson, dealing with this very question of the liability of the Province to contribute to the Dominion in respect of the charges mentioned, said:— "Seeing that the benefit of the surrender accrues to her,

(1) 14 App. Cas. 60.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

"Ontario must of course relieve the Crown and the "Dominion of all obligations involving the payment of "money which were undertaken by Her Majesty, and "which are said to have been in part fulfilled by the "Dominion Government." The Dominion relies strongly upon this expression of their lordships' views as conclusive of the question at issue. On the other hand, for the Province it is argued that the opinion expressed is obiter, that it formed no part of the judgment in that case, and that the facts proved in this case differ materially from those that were before their lordships in the case referred to So far as the questions in this case relate to the extent to which the Province is liable to contribute to the expenses incurred by the Crown in fulfilment of the obligations created by the treaty, this case no doubt differs materially from *The St. Catherine's Milling and Lumber Company's* case. But with respect to the principal question at issue, namely, whether the Province is liable to contribute anything, this case presents, I think, no new fact or aspect. The Province's main defence here is that it was not a party to the treaty. In the case for the appellants in *The St. Catherine's Milling and Lumber Company's* case, paragraph 6, it was stated that neither the Lieutenant-Governor of Ontario, nor the Province of Ontario, were parties to the treaty. And in the 21st paragraph of the case of the respondent the ground was taken that the Province, not having been a party to the treaty, was not bound by it. With regard to the formal judgment in the case last referred to, it is to be observed that it was entered up between the original parties to the action on consideration of the question as to whether the judgment of the Supreme Court of Canada ought to be affirmed or not. By the order which gave the appellants leave to bring the judgment of that court under review, Her Majesty was pleased to direct that the Government of the Dominion should be at liberty to intervene in the

appeal, or to argue the same upon a special case raising the legal question in dispute. The Dominion Government elected to take the first of these courses (1), with the result that between the Dominion and the Province there was no formal judgment of the questions at issue between them. It was, however, determined that the ceded territory within the Province of Ontario belonged to the Province subject to "an interest other than that of the Province in the same"; that is, that it was subject to the burden of the Indian title that the Crown upon the advice of its Dominion ministers extinguished; and that as the benefit of that surrender accrued to the Province it must relieve the Crown and the Dominion of the obligations involving the payment of money which were undertaken by Her Majesty and fulfilled by the Dominion Government. In *The St. Catherine's Milling and Lumber Company's* case the Province of Ontario stood in the position of a plaintiff; and as between the Province and the Dominion the views of their lordships as to the Province's liability to indemnify the Dominion may, I think, with fairness be taken as a part or condition of the judgment in favour of the Province, although such views found no place in the formal judgment pronounced. But however that may be, it is, I think, proper that this court should give effect to the view that their lordships expressed. I therefore answer in the affirmative the question as to whether the Province of Ontario is liable to indemnify the Dominion against any portion of the expenditure incurred in discharge of the obligations created by the North West Angle Treaty No. 3.

The obligations involving the payment of money which the Crown incurred by this treaty, and which have been discharged by the Government of Canada, are as follows:—

(1) 14 App. Cas. 53.

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

First, with a view of showing her satisfaction with the behaviour and good conduct of Her Indians, and in extinguishment of all claims theretofore preferred, Her Majesty, through Her Commissioners, made them a present of twelve dollars for each man, woman and child belonging to the bands represented.

Secondly. Her Majesty agreed to maintain schools for instruction in such reserves as to the Government of Canada might seem advisable, whenever the Indians of the reserves should desire it.

Thirdly. Her Majesty agreed that no intoxicating liquor should be sold on any reserve, until otherwise determined by the Government of Canada; and that laws to protect the Indians from the evil influence of the use of intoxicating liquors should be strictly enforced.

Fourthly. That each Indian person inhabiting the tract surrendered should be paid by Her Majesty the sum of five dollars yearly.

Fifthly. That the sum of fifteen hundred dollars per annum should be expended yearly by Her Majesty in the purchase of ammunition and twine for nets for the use of the said Indians.

Sixthly. Her Majesty agreed to supply to the Indians certain articles and animals to assist them in their work, and for the encouragement of the practice of agriculture among them; and

Seventhly. Her Majesty agreed that each duly recognized chief should be paid a salary of twenty-five dollars per annum, and each subordinate officer, not exceeding three for each band, should be paid fifteen dollars per annum, and that each chief and subordinate officer should also receive once in every three years a suitable suit of clothing; also that each chief should receive in recognition of the closing of the treaty a suitable flag and medal.

Omitting interest, the following is a brief summary of the claim made by the Dominion against the Province

for moneys expended under the treaty down to the year 1902:—

For annuities paid	$ 465,376 00
For cattle	17,344 08
For farming implements	6,724 53
For tools	3,301 99
For ammunition and twine	43,500 00
For clothing	23,285 37
For schools	84,221 64
For seeds	8,616 06
For provisions and presents supplied at the treaty negotiations and at the first payment of annuities	21,296 96
For surveys	25,242 53
For salaries to agents	78,886 10
For agents' travelling expenses	35,409 62
For office rent	9,984 99
For suppression of the liquor traffic	6,206 96
	$ 829,396 83

Now it is to be observed that whatever moneys have been expended under this treaty by the Dominion Government have been expended in respect of the Indians inhabiting a tract of land part of which only is within the Province of Ontario, and it is suggested by Mr. Newcombe for the Dominion that the Province should contribute to such expenditure in the proportion that the area of the surrendered territory within the Province bears to the whole area surrendered by the treaty. There is no other suggestion on that branch of the case, and I do not see that any fairer or better rule could be adopted.

Then in regard to the claim made by the Dominion, the Province, as an alternative defence, alleges that if it

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment.

should be held that the Province is under any liability to indemnify the Dominion it is not liable except where there has been a money payment, undertaken by the Dominion under the terms of the treaty, made to the Indians wholly as a consideration for the ceding of their claims to the territory covered by the treaty. In a general way, with some slight modification, that proposition may, I think, be accepted. It seems equitable that the Dominion should recover from the Province a proportionate part only of such expenditure under the treaty as is fairly referable and attributable to the discharge of the burden of the Indian title in the lands described in the treaty; and that the Dominion should not recover from the Province any portion of the moneys expended in the extinction of prior claims of the Indians, or in respect of obligations resting upon the Crown and the Dominion in relation to the administration of Indian affairs. It is argued for the Province that the question of determining what part of the expenditure made by the Dominion and now claimed from the Province is referable to the extinguishment of the Indian title, is so difficult and the matter so indefinite and uncertain that the Dominion cannot, or ought not, to recover anything. I agree that the question presents difficulties, and that it is one which would be more easily dealt with by reasonable negotiation and agreement between those who represent the parties than by a judicial determination. But the fact that the enquiry is difficult affords no reason for the court refusing to attempt its solution if the parties cannot themselves agree. The enquiry on this branch of the case was not concluded. It is open for further evidence, and of course for further argument. The enquiry will be continued before the court itself or by a reference, as may be subsequently determined. In the meantime it may be taken for granted that the amount to which the Dominion will be entitled as against the Province

1907

THE DOMINION OF CANADA v. THE PROVINCE OF ONTARIO.

Reasons for Judgment

will exceed greatly the sum necessary to allow an appeal from the decision upon the main question discussed.

On the claim of the Dominion of Canada against the Province of Ontario, there will be judgment for the Dominion, and a declaration that the Province is, in respect of the obligations incurred by the Crown and the Dominion under the North West Angle Treaty No. 3, which involve the payment of money, and which are referable to the extinguishment of the Indian title in the lands described in the treaty, liable to contribute to the payments of money made by the Dominion thereunder in the proportion that the area of such lands within the Province bears to the whole area covered by the treaty.

Judgment accordingly.

Solicitor for the claimant: *E. L. Newcombe.*

Solicitor for the respondent: *Sir Æmilius Irving.*

INDEX.