REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

CHARLES MORSE, K.C.

REPORTER.

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

During the period of these Reports :

THE HONOURABLE GEO. W. BURBIDGE.

(Died on the 18th day of February, 1908.)

THE HONOURABLE SIR THOMAS W. TAYLOR.

(Appointed Juge pro tempore, *under Commission dated 21st January, 1908.)*

THE HONOURABLE WALTER G. P. CASSELS.

Appointed 2nd March, 1908.

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

The Honourable	A. B. ROUTHIER, - - - - -	Quebec	District.
do	JOHN DUNLOP, Deputy Local Judge - - - - -	do	do
do	THOMAS HODGINS - - - - -	Toronto	do
do	JAMES McDONALD, - - - -	N. S.	do
do	ARTHUR DRYSDALE, Deputy Local Judge - - - - - - - - -	do	do
do	EZEKIEL McLEOD, - - - - -	N. B.	do
do	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do
do	Archer Martin - - - - - -	B. C.	do
do	JAMES CRAIG, - - -	Yukon Territory	District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports :

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

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE JACQUES BUREAU, K.C.

MEMORANDUM.

The Honourable GEORGE WHEELOCK BURBIDGE departed this life on the 18th day of February, 1908, having held the position of Judge of the Exchequer Court of Canada since its establishment in the year 1887, under the provisions of 50-51 Vict., c. 16, as a federal tribunal separate and apart from the Supreme Court of Canada. His decisions, which are looked upon by the profession as models of judicial literary expression and of high authority as precedents, are to be found in the Exchequer Court Reports, volumes 2 to XI inclusive. During the short but fatal illness of Mr. Justice Burbidge, the Honourable Sir THOMAS W. TAYLOR was appointed Judge *pro tempore* of the Court, his commission terminating with the decease of Mr. Justice Burbidge on the date above mentioned.

On the 2nd day of March, 1908, The Honourable WALTER G. P. CASSELS was appointed Judge of the Exchequer Court of Canada.

NOTE.

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

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OF THE

NAMES OF THE CASES REPORTED

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

BENJAMIN HATFIELD .....PLAINTIFF; 1906 Oct. 29

AND

THE SHIP "WANDRIAN"..... .....DEFENDANT.

Maritime law—Shipping—Collision—Tug and Tow—Ship at anchor—Negligence—"Inevitable accident"—Burden of proof.

Held, that where a collision occurs between a ship in motion and one at anchor, the burden of proof is upon the moving ship to show that the cause of such collision, so far as she was concerned, was an inevitable accident not arising from negligent navigation. This burden is not discharged by mere proof that the moving ship was navigated with ordinary care and skill. The *Schwan* v. The *Albano*, ([1892] P. D., at p. 428) referred to.

2. The Schooner *Helen M.* was lawfully lying at anchor in the stream of the Parrsboro River. The ship *Wandrian*, in tow of a tug, left her wharf with the purpose of proceeding to sea, those on board the tow as well as those on the tug knowing the position of the *Helen M.* before they left the wharf. The tug and tow started to go through the eastern, or port, channel of the river and proceeded along the same to a certain point when they turned into the western, or starboard, channel. Thinking, however, that they could not keep that channel and safely pass the *Helen M.* and another schooner that was partly beached for repairs on the western side of the river a little below the point where the *Helen M.* was anchored, the helm of the

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tug as well as that of the *Wandrian* was put to starboard, and an attempt was made to cross in front of the *Helen M.* so as to go down on the eastern side of the river, between the *Helen M.* and the eastern bank. In doing so the *Wandrian* struck the *Helen M.* and caused her serious injury.. No signal was given by the tug of her intention to cross in front of the *Helen M.*

Held, that the *Wandrian* was responsible for the collision; and that no negligence was attributable to the *Helen M.*, under the circumstances, in failing to slacken her anchor chain, or to take any other precaution to avert the collision.

ACTION for damages for collision that took place beween two ships in the river at Parrsboro, N.S.

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

December 8th, 9th, 11th, 29th, and 30th, 1905.

February 27th and March the 1st and 2nd, 1906.

The case was tried and argued before Mr. Justice McLeod, Local Judge of the New Brunswick Admiralty District.

C. J. Coster, *K.C.*, and *F. J. G. Knowlton* for the plaintiff; *H. H. McLean*, *K.C.*, *F. R. Taylor* and *C. F. Inches* for defendant.

McLEOD, L. J. now (October 29th, 1906) delivered judgment.

This is an action in rem brought by the owners of the Schooner *Helen M.*, registered at Parrsboro, Nova Scotia, of about sixty-six tons burthen, against the Ship *Wandrian*, for damages done by a collision in the Parrsboro River, Parrsboro, N.S., on the 28th day of November, A.D., 1904, at about three o'clock in the afternoon and at about half an hour before high water.

As to the facts of the collision and the time of the collision, the state of the weather and the conditions of the tide, there is not much, if any, difference between the parties. The principal difference is as to where the

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Helen M. was anchored, that is, whether she was anchored in a proper or an improper place, and as to whether those on board her took the proper precautions to avoid the collision, and whether the *Wandrian* took the proper course in going down the river, or practically, whether the collision was an inevitable accident.

The *Wandrian* was in tow of the tug *Flushing*, and it is further claimed that if there is any liability it is the tug's liability and not that of the tow. That is, that there was no fault at all events with the *Wandrian* or those on board of her, and therefore she cannot be held liable.

It is perhaps better for me to state shortly the facts as I have found them by the evidence. The Parrsboro River at or about the place of the collision is about four hundred feet wide from the western to the eastern bank of the channel. On the western side is a wharf called the Newville wharf, but sometimes in the evidence spoken of as "Black's" wharf, and sometimes "Young's" wharf. Just below this wharf is a beach, I think, called "The Hospital Beach," and below that again is the Cumberland Railway and Coal Company's wharf.

At low tide the water is nearly all out of the river, but at high tide the flats on the eastern side of the river are overflowed for about 400 feet. On Plan "A," which is in evidence and which was made by Mr. Scammell, who made a survey of the river and those flats between October 27th and November 2nd, 1905, it is stated at that date the water on the flats would range from somewhere about 20 feet to 14 feet in depth; but Mr. Scammell says that there would be a difference in the depth of the water at the time he made the survey between the 27th of October and the 2nd of November, 1905, and the depth at the time of the collision on the 28th of November, 1904, and the difference he estimates at about 3 feet. In other words, he says that the water would be about three

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feet lower at the time of the collision on November 28th, 1904, than it was at the time the survey was made in 1905, which would make it from fifteen to ten or eleven feet in depth on the flats at the time of the collision.

The course of the river at the place of collision is about or almost north and south. At the upper end of Newville wharf it takes the course more to the east. Huntley's wharf, spoken of in the evidence, is above the Newville wharf in a direct line eleven hundred and fifty feet, but by the course of the river twelve or thirteen hundred feet.

I gather from the evidence that at the time of the collision the tide was nearly slack, probably running up about half a mile an hour, and the wind was blowing north northeast, or nearly down the river, at about four or five miles an hour.

The *Helen M.* came up the river in the afternoon of the 28th of November and anchored, as the plaintiff claims, on the eastern side of the river, in a range of about forty or fifty feet below the Newville wharf, and I gather from the evidence that she was anchored about three quarters or half an hour before the collision occurred. The claim of the defendant is that she was anchored in the middle of the stream. I will consider that fact later.

A schooner called The *Roberts* was on the beach spoken of, below the Newville wharf, being repaired; and about the time the *Helen M.* came up the river, or possibly shortly after, the parties repairing her began to kedge her off into the stream in order to turn her around. Her stern, I think, was never really off the beach, but her bow was swung out into the stream, with a view of turning her towards the Newville wharf. The *Wandrian* was lying at Huntley's wharf, loaded with piling, and when loaded she drew between sixteen and seventeen feet of water. The tug *Flushing* had come up to Huntley's wharf about an hour before to take the *Wandrian*

to sea, the captain of the *Wandrian* at that time or some time previously having made arrangements with him to tow her to sea.

I should say that the *Helen M.* drew about six or seven feet of water; the tug drew a little over nine feet of water. The *Wandrian*, as I said, when loaded drew between 16 and 17 feet of water. I think it is important to notice at this point that both the *Helen M.* and the *Roberts* could be seen from the *Wandrian* while she was lying at Huntley's wharf. Both Isaac Crowell and Knowlton, who were on the *Helen M.* say that they saw the *Wandrian* at the wharf. J. H. Crowell, witness for the defendant, says that just after they left Huntley's wharf he saw the *Helen M.* lying in the channel. Captain Ferris, captain of the *Flushing*, says he saw the *Roberts* when he got the *Wandrian* turned around from the wharf.

As this collision happened in daylight I think it important that these vessels could be seen from each other; that is, those on board the *Wandrian*, if they looked, could see the *Helen M.* while at anchor, and could see the *Roberts* swinging around, and those on board the *Helen M.* could see the *Wandrian*.

The *Wandrian* in tow of the *Flushing*, left her wharf about, or a few minutes before, three o'clock and came down on the eastern side of what is called "The Middle Grounds," in the river. That is, what I presume is a high ground in the river above Newville Wharf, and just below Huntley's wharf. There was a channel both on the eastern and western sides of these Middle Grounds. It is said in the evidence that the western channel was never used, that the eastern channel was the proper channel for the tow and the tug to come down. They did in fact come through the eastern channel and then in consequence of a point that made out from the eastern side of the Parrsboro River they turned westerly towards

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the Newville Wharf. Then having gone over there and coming pretty well down, the captain of the tug—and in this he is supported also by some of the men on board and also by the Captain of the *Wandrian*—thought they could not pass between the *Helen M.* and the *Roberts*, and accordingly the helm of the tug was put to starboard and he turned to pass to the east of the *Helen M.*, or between her and the eastern bank of the river.

I should have said that the *Roberts* was on the western side of the channel and some little distance below the *Helen M.*, and I find from the evidence that there was a distance between them of at least two hundred or two hundred and fifty feet.

The captain of the tug and the captain of the *Wandrian* say they were afraid to go down the western or starboard side of the channel through fear of colliding either with the *Roberts* or with the *Helen M.* Accordingly the helm of the tug and also the helm of the *Wandrian* were starboarded, and an attempt was made to cross in front of the *Helen M.* so as to go down on the eastern side of the river, between the *Helen M.* and the eastern bank. No signal whatever was given, and it was in making this movement to go down the eastern channel past the *Helen M.* that the collision occurred.

I heard the evidence given and I have since examined it carefully and I think there is no witness, except perhaps one, who says it was safe for the tug and *Wandrian* to attempt to cross the bow of the *Helen M.* and pass between her and the eastern side of the channel. The one exception is Elliott. He, however, was standing on the *Roberts*, on the western side of the river, and as the water was over the flats on the eastern side of the river he could not possibly tell what the distance was between the *Helen M.* and the eastern bank. The other witnesses simply say it was safe to try the eastern channel.

The captain of the tug himself says, using his own words:

"Well, the western channel was closed to me, and I didn't see any other place to go only down the eastern side."

Those on board the *Helen M.* say she could not go safely between the *Helen M.* and the bank. There was about twenty-five to thirty fathoms of hawser between the tug and the *Wandrian*; Captain Ferris puts it at thirty fathoms; some of the others state that it was less. When the tug was turning the *Wandrian* did not answer the helm as quickly, and did not turn as quickly, as the tug to the eastward. In Captain Ferris' evidence, in giving his reasons for going down on the eastern side, he says as follows:

"Q. Have you any further reason to state why you "could not get down on the starboard side of the chan- "nel that day? A. No, that was about the only reason "I had. The channel was closed, there was no chance "for me to go down on that side because of the position "of the vessel.

"Q. Then what course did you go? A. I starboarded "the helm to go to the eastern side of the *Helen M.*

"Q. What course did your tug take then? A. Went "down to the eastward, towards the eastern bank.

"Q. Then when you passed the *Helen M.* how far was "the tug above the bow of the *Helen M.* when you passed "her? A. Away from the bow of the *Helen M.*; I should "judge it would be 80 or 90 feet.

"Q. And at that time what helm were you under? "A. Starboard helm, when we passed her, hard a-star- "board.

Q. "Why did you take that course with the tug? A. "Well, when I got pretty well down to the *Helen M.* I "saw the *Wandrian* wasn't following, hadn't sheered as "quickly as we wanted, and I put my helm hard a-star- "board and tried to pull her over to the eastward.

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Q. "The *Wandrian* was loaded, was she? A. Loaded.
Q. "Do you know how much she drew? A. No, sir, only "what they told me.
"Q. Would she answer her helm as quickly as the tug?
"A. No, sir, she wouldn't.
"Q. In order to assist the boat away from the *Helen* "*M.* you took a course further up? A. Right close."

So that he attempted to carry her across the bows of the *Helen M.* The tug ran clear but the *Wandrian*, being deeply loaded and being in such a depth of water that as she was drawing sixteen or seventeen feet there would not be very much water under her, did not answer her helm so quickly as the tug. I think it will appear reasonable to any man, even if he is not a nautical man, that a heavily loaded vessel, such as the *Wandrian*, drawing 16 to 17 feet, with not very much water under her, would not answer her helm so quickly as the tug, drawing only nine feet.

In addition to this, I gather from the evidence that the *Wandrian* had her head sails up, and with the wind blowing practically down the river those sails would tend to make it more difficult for her to answer her helm and turn to the eastward. Those on board the tug and on board the *Wandrian* both say that when they passed the *Helen M.* they called out to those on board the *Helen M.* to let go their chains, in which case they said she would have dropped back; but they claim that that was not done. I will refer to that again.

The tug crossed safely, being as Captain Ferris says about 80 or 90 feet above the bow of the *Helen M.*, but the *Wandrian* following down, not fully answering her helm, struck the *Helen M.* pretty nearly bow on, glanced and struck on the starboard side of the bow, and, taking her course down, turned the *Helen M.* exactly around, with the bow down stream.

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I should say that the hawser from the tug was cut at or about the time of the collision. No doubt there appears to be some little difference between the parties; some say it was cut at the time of the collision and some a minute or a minute and a half after the collision took place. Of course it is difficult for men in an emergency like that to measure time by the minute or half minute; but I judge, taking all the evidence together and taking the circumstances of the case, that as soon as the captain of the tug saw that the *Wandrian* struck the *Helen M.* he at once cut the hawser, and the *Wandrian* coming down stream, heading a little to the east, with the wind blowing down stream and as I have said, her head sails being up, went down, struck the *Helen M.* and glanced to the starboard side, turned her completely around in the stream, her stern going to the eastward to the bank, and her bow out west, she turned right down stream, the *Wandrian* passing down on her western side and going out to sea.

The first question I will consider is as to the position of the *Helen M.*, in the river. It is said that she should not have anchored there at all, she should have anchored on the flats. There was no rule binding her to go on the flats to anchor. I think she had a legal right to anchor in the stream as long as she anchored judiciously and properly. It is claimed that she was anchored in mid-channel. I think all the evidence shows that she was not anchored in mid-channel and I have gone over the evidence very carefully and weighed it in its different parts and have come strongly to that conclusion. In the first place, the anchor of the *Helen M.* was found on the next morning within ten feet of the eastern bank.

As to the evidence of the different witnesses that she was in mid-stream, or about mid-stream, I may say the evidence of the two men who were on board the *Helen M.* was that she was anchored over towards the eastern shore.

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Captain Roberts who was on the schooner *Roberts*, which was being turned around, in his evidence says she was anchored from the western shore two hundred feet, or two thirds of the way across the stream. Now I take that to mean that she was anchored more than half way across the stream. Whilst he says 200 feet he is giving his estimate of the distance, but when he says two-thirds he is giving his idea that she was anchored more than half way across the stream.

I cannot agree with the argument, and the very strong argument made by the counsel for the defendants, that in the course of the collision the anchor of the *Helen M.* was dragged to the eastward; if their contention is right it must have been dragged from 100 to 150 feet. I think that looking at it it was impossible that that should be so. We will bear in mind that the *Wandrian* was going down stream, her helm had been put hard a-starboard and the tug was drawing her towards the east, her head sails were up. He had not turned her towards the east. It is admitted she did not answer her helm well, and while going in an easterly course she was at the same time going down stream and striking the *Helen M.* and glancing and striking the starboard bow, her course was not direct east, possibly and likely a little in towards the east, so that the anchor may have been dragged a little, but certainly not dragged to the distance claimed by the defendant. The great force of the *Wandrian* was down stream and not to the east.

Taking the statement of Captain Ferris, the captain of the tug, it seems to me almost impossible that the *Wandrian* could cross the river to go down the eastern bank without coming in collision with the *Helen M.* He says that when he crossed above the bow of the *Helen M.* the tug was about 80 or 90 feet from the bow of the *Helen M.* There was about 30 fathoms of hawser between the tug and the *Wandrian.* The *Wandrian* had her head

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sails up, and she did not quickly answer her helm so having her head sails up made it still more difficult. Under those circumstances I do not see how it could ever have been supposed that she could be brought around to go down the starboard side of the *Helen M.*, without coming in collision with her.

My own opinion is that the *Helen M.* was anchored on the eastern side of the river. It has been said that she had no right to anchor in the river. There is no rule, as I have said, that prevents a vessel from anchoring in the river. The captain of the *Wandrian* says that he never anchored in the river and never saw a vessel anchored in the river; but Roberts, called by the defendants, says he had at different times anchored in the river, and no rule was produced before me and nothing to show me that the *Helen M.* did not have a right to anchor in the river as she did anchor.

I should probably have said that the *Helen M.* was going up the river for the purpose of seeing whether she could get a load of coal at the Cumberland Railway & Coal Company's wharf, and it was said she came up that far above that wharf with a view of turning and going down by the wharf.

Then I have these facts, that the *Helen M.* was at anchor before the *Wandrian* left her wharf, that the *Wandrian* came down and ran into her while she was at anchor. Now, the rule is well known that a ship under way running into a vessel at anchor, whether anchored in a proper or improper place, is to blame and can only relieve herself by saying that the accident was practically inevitable.

I first refer to :

The *Batavier* (1), Dr. Lushington says as follows :

" The presumption at law where a vessel at anchor is " run down by another, I take to be is this : That the

(1) 10 Jur. at p. 19.

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"vessel running down the other must show that the "accident did not arise from any fault or negligence on "on her own part, and, for this reason, that the vessel "at anchor has no means of shifting her position, or "avoiding the collision; and it is the duty of every "vessel seeing another at anchor, whether in a proper or "improper place and whether properly or improperly "anchored, to avoid, if it be practicable and consistent "with her own safety, any collision. This is the doctrine "not merely of Maritime Law, but of common sense, it "is the doctrine which prevails on roads, where, sup-"posing a carriage to be standing still on the wrong "side, it is no justification for another running against "it, though the latter be on the right side. It is always "incumbent on the person doing the damage, to show "that he could not avoid it, without risk to himself."

So far as I have been able to find, and I have looked at a number of cases, that has always been the rule, I will just refer to the remarks of Lord Watson in the *City of Peking* (1).

"When a vessel under steam runs down a ship at her "moorings in broad daylight, that fact is by itself *prima* "*facie* evidence of fault; and she cannot escape liability "for the consequences of her act, except by proving that "a competent seaman could not have averted or mitigated "the disaster by the exercise of ordinary care and skill."

The defendants on their part say they could not have helped this collision, that they were coming down the stream and if they went on the western side of the channel they were sure to run into either the *Helen M.* or the *Roberts*.

I may say that it is a well known rule that vessels in narrow channels must keep to the starboard side. The western channel was the starboard side for the *Wandrian* and she was obliged to keep it unless she can show a

(1) 14 App. Cas. p. 43.

good reason for not keeping it. Her reason for not keeping it is that she could not go down between the *Helen M.* and the *Roberts*, and therefore, as I take it from the evidence, that she had a right to attempt to go down the eastern side of the channel, as they thought they had a better chance, at all events, of avoiding a collision.

In my opinion, from the evidence, there was a better chance to go down the western, or defendant's starboard side of the river, than there was to go down the eastern side. I think from the evidence the captain thought his greatest danger was colliding with the *Roberts*, but he had no right in order to avoid that danger to take a wrong course and without any signal attempt to go down past the *Helen M.*, or between her and the eastern side of the channel, when as I think there was no evidence to show that it was safe, and in fact it was not safe as the collision occurred in consequence of that manœuvre.

When they turned to go towards the eastern side they gave, as I have said, no signal whatever, and in that I think they were wrong. When the vessel changed her course and proposed to go to the other side, to the port, and proposed to meet the *Helen M.* and pass her starboard to starboard, I think it was her duty to give some signal in order that those on board the *Helen M.* might be prepared to take some steps to avoid danger; but no signal was given, she followed no rule in regard to it; the captain of the tug when he got in a certain position, feeling he could not go down on the western side safely, thought he would go to the eastern shore.

To begin with, the parties in the tug and the *Wandrian* could see before they left Huntley's wharf both the *Helen M.* and the *Roberts*, and should have been able then to come to some conclusion as to whether they could get down or not, and if there was danger, as they thought there was danger, they should not have left the wharf.

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Second, I think it is not a good answer for them to say that the *Wandrian* being so deeply laden did not answer her helm so quickly as the tug. Any seaman should know that in going down a river such as that a vessel drawing 16 or 17 feet of water would not answer her helm so quickly, laden as she was, as a vessel of lighter draught, and they did or should have known that keeping her head sails up would make it still more difficult.

Furthermore, the captain of the *Wandrian* says he was not looking ahead and did not see the *Roberts* till he got nearly down. All that I think was wrong. I think they should have watched and when they saw the danger then it was their duty to bring their vessel into the Newville wharf and anchor and wait. The only reason I find for them leaving Huntley's wharf and proceeding as they did, or practically the only reason, is that given by Mr. Paterson, the captain of the *Wandrian*, and is as follows:

"Q. You stated that the *Roberts* had not begun to "pull around until you were half the way down? A. No, "sir, that is the first I noticed her.

"Q. Could you see her all the way? A. I didn't "happen to be looking that way until I got about half "way down. If I had been looking I could have seen "her."

Stopping right there, it seems to me when the captain of the vessel was coming down the river and through a narrow channel it was his duty to be on the lookout to see if there were any vessels coming or going, because it was a river that vessels were in the habit of frequenting, indeed it was his duty, before he left Huntley's, where, of course, he could see both these vessels, to make sure there was no chance of collision before leaving. He further says:

"Q. You knew she was there? A. Yes.

"Did you know she was going to come out that "morning? A. No, sir, I didn't know it.

"Q. Had you waited until a little later the *Roberts* "wouldn't have been in your way at all, would she? A. "Well, I don't know. We couldn't wait any longer.

"Q. Why? A. On account of the tide.

"Q. How long does it take you to get down out the "river? A. We were about forty minutes from the time "we left the wharf till we were out to sea.

"Q. So you would just get to sea at the same time "after high tide as if you started before, wouldn't you, "had you waited the forty minutes? A. It would be a "little after high water."

"Q. In time so you couldn't get out? A. It wouldn't "be safe to try it.

"Q. Why wouldn't it be safe with the same tide? "A. You are liable to get ashore and damage the vessel.

"Q. Why are you more liable to get ashore with "water at the same height? A. I don't know as you "are any more liable, but you are liable to do most any-"thing in those rivers.

"Q. That is your explanation for not waiting till the "*Roberts* got out of the way?"

If it was simply for the purpose of gaining time, as it would appear from his evidence that it was, it was not a good reason or any reason at all for taking a risk to his own vessel and much less for taking the risk of damaging any other vessel, especially one at anchor.

The best that can be said, I think, for the defendants, is that they were anxious to get to sea and anxious to get to sea at that tide. When they started out and got partly down seeing the *Roberts* they feared they could not pass between the *Helen M.* and the *Roberts* and they thought there would be a better chance to pass on the eastern side of the *Helen M.*, and therefore went across her bows with that view.

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I think the reasons given for taking the course they did are not good reasons and are reasons that cannot prevail. It was claimed on the argument that it was an inevitable accident. I will refer to a few cases on that point. In the *Annot Lyle* (1) Lord Chancellor Herschell, says :

"In this case the *Neuphar* was at anchor in the downs "when the collision, the subject of this action, occurred. "No blame could, therefore, be attributed to her. Under "these circumstances the burden is on the defendants to "discharge themselves from the liability which arises "from the fact that the *Annot Lyle* came into collision "with and damaged a ship at anchor. The cause of the "collision in such a case may be an inevitable accident "not arising from negligent navigation, but unless the "defendants can prove this the law is clear and they are "liable for the damage caused by their ship. I advert to "this point although the arguments addressed to the "Court today were in regard to the conduct of the *An-*"*not Lyle* there are expressions in the judgment of the "learned Judge which seem to indicate that the plaintiff "must prove that those on board the *Annot Lyle* were "negligent and that unless they do show that the defen-"dants are entitled to judgment. I do not think that "this could have been the intention of the learned Judge "but the expressions are somewhat unguarded in their "form and therefore it is desirable that the Court should "not allow any misapprehension to exist in regard to "this point."

In the *Indus* (2) the same principle is laid down.

I may say here that the defendants claim, in addition to the fact that the *Helen M.* was at anchor in an improper anchoring place, that all due precautions were not taken to avoid the collision. The defendants claim that if the *Helen M.*'s anchor chains had been let out she

(1) 11 P. D. at p. 114. (2) 12 P. D. at p. 46.

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would have dropped down sufficiently to have cleared the *Wandrian*. As it is claimed that if she had been two or three feet further down the *Wandrian* would have passed her, and those on board the tug and those on board the *Wandrian* say that they called out to those on board the *Helen M.* to let go their chain. The two men on board the *Helen M.*, however, say they did not hear that call, but they both say that they went forward with a view of letting out the chain so that she might drop back; but they could not do it as the *Wandrian* was so close to them that they had not time to do it but had to leave. It is true that in the preliminary act the plaintiffs say that the chains were let go, but they say in their evidence that they went forward for the purpose of doing that and endeavored to do it, but the collision was then imminent and the *Wandrian* so far down on them that they were obliged to fall back as the *Wandrian* was striking and their own masts were falling and they went back to save their lives; and, therefore, they did the best they could, but they had not time to let go their chains.

Some of the witnesses (I think Roberts is one) say that they do not know that letting go the chains would have done very much good as at that time of the tide she would not fall back much, if any.

Some of the witnesses suggested that the *Helen M.*'s head sails should have been put up, which would have thrown her off. This was not done, and I cannot on the evidence say that it would have assisted in any way to prevent the collision. It is, however, a rule that where one ship puts another in extreme danger, where that vessel is in what may be called the very agony of a collision, then if such vessel does fail to do what is best and makes a movement which may be wrong she cannot be held responsible. (1)

(1) See the *Bywell Castle* 4 P.D. 221, 222 and 226

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Dealing further with the question of inevitable accident I will refer to the *Schwan* and the *Albano*, (1892) P. D. 419, and I will read shortly from Lord Esher's judgment on page 428. In referring to the *Annot Lyle* he says: "It was a judgment given by Lord Herschell "in the presence of myself and Fry L. J., who agreed, "therefore, according to the report that the definition of "the law with regard to this matter was as laid down by "Lord Herschell and agreed with him in the deliberate "terms which he used and these terms were, 'Under "these circumstances the burden is on the defendants "to discharge themselves from the liability which "arises from the fact that the *Annot Lyle* came into "collision with and damaged a ship at anchor. The "cause of the collision in such a case may be an inevitable "accident not arising from negligent navigation, but un-"less the defendants can prove this the law is clear and "they are liable for the damage caused by their ship.'"

He then refers to the *Indus* and approves of the judgment as there given and referring to the words, "inevitable accident," there used, he says as follows: "Now "these words were used with reference to what is taken "to be a well known phrase, inevitable accident and "which is a head of law well known and distinguished "by the Courts from mere negligence. The ship in "motion is not allowed in such a case to say merely, 'I "was not guilty of an ordinary want of care or skill.' It "must be shown that it was an inevitable accident. This "is the law laid down by the Court and that only leaves "open this, what is the proper definition of inevitable "accident? To my mind these cases show clearly what "is the proper definition of inevitable accident as distin-"guished from mere negligence, that is a mere want of "reasonable care and skill. In my opinion a person "relying on inevitable accident must show that some-"thing happened over which he had no control and the

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"effect of which could not have been avoided with the "greatest care and skill. That seems to me to be the "very distinction which was taken and which was meant "to be taken between an inevitable accident and a mere "want of care and skill."

I read this to call attention to the fact that in cases like this Lord Esher makes a distinction between ordinary want of care and skill and inevitable accident. It must be shown to be an inevitable accident and the words, "inevitable accident," are rather broader and cover more than simply ordinary care and skill.

This extract from the judgment of a very eminent Judge seems to me to explain very clearly and plainly what is the proper definition of "inevitable accident."

In my opinion the defendants have not shown in any way that this collision was the result of an inevitable accident. Those in charge of the tug and the *Wandrian* knew that the *Helen M.* was at anchor before they left Huntley's wharf, and they could also see the *Roberts* and they could and should have remained at that wharf until all cause of danger was past. As to the Captain of the *Wandrian* he did not take the trouble to look ahead to see what, if any, vessels were before him until they were fully half-way down to the *Helen M.* Under these circumstances it is not open to the defendants to say that the collision was caused by an inevitable accident. They took the course they did of their own motion. There is no evidence, in my opinion, to show they were justified in believing they could get safely down on the eastern side of the *Helen M.* I gather from all of the evidence that the tug, at the time of the collision, was up on the flats. Captain Ferris said in his direct examination and on his cross-examination that she was up on the flats. On his re-examination he says he had just come to the flats at the time of the collision, but having examined carefully all the evidence I have con-

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cluded that on his re-examination he is wrong and that he is right on his direct examination, and that when the collision occurred the tug was up on the flats and that she backed off and came down to the *Wandrian*.

It was further contended by Mr. Inches on behalf of the defendant that if there was a liability at all it was a liability of the tug and not of the *Wandrian*. I think this contention cannot be maintained. The *Wandrian*, or rather the master of the *Wandrian*, hired the tug to tow his vessel to sea. The tug was, therefore, the servant of the *Wandrian* and the *Wandrian* was liable. It is a well known rule of law that in cases of towage, especially in matters of collision, the tug and the tow are one vessel; and in cases towed as the *Wandrian* was the motive power is in the tug and the govering power in the ship. Without discussing this matter at full length I think the tug was but the servant of the tow and that the tow, that is the *Wandrian*, is liable.

A number of cases may be cited but I will refer only to the *Cleadon* (1); also the *African* v. *The Union Ship Company* (2); the *Devonian* (3); the *Niobe* (4).

Under these circumstances I think the *Wandrian* has not relieved herself of the responsibility placed upon her, that is to show that this accident was an inevitable accident. I think she must be held to be entirely in fault.

The decree will be that the *Wandrain* be condemned in damages and costs.

There is no evidence as to the damages, and if the parties cannot agree as to them I will order a reference.

*Judgment accordingly.**

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(1) 14 Moo. P. C. 92.
(2) L. R. 6 P. C. 127.
(3) [1901] P. D. 221.
(4) 13 P. D. 55.

* Affirmed on appeal to the Supreme Court of Canada. See 38 S. C. R. 431.

NOVA SCOTIA ADMIRALTY DISTRICT.

ALEXANDER RUDOLPH, FREDERICK W. RUDOLPH, JACOB RUDOLPH, JAMES C. RUDOLPH, WELSFORD P. RUDOLPH, GEORGE E. FRANCKLYN AND JAMES MORROW.....PLAINTIFFS;

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May 16.

AGAINST

THE STEAMSHIP *ARRANMORE*.....DEFENDANT.

Maritime law—Shipping—Collision—Vessel changing course in order to avoid collision—Liability.

When a collision is inevitable, the vessel not in fault is justified in changing her proper course with the object of avoiding, or lessening the effect of, the collision.

ACTION for damages for collision in Halifax Harbour.

The facts of the case are sufficiently stated in the report of the nautical assessor and the reasons for judgment.

April 10th and 24th, 1906.

The case was heard before the Local Judge for the Nova Scotia Admiralty District.

W. B. A. Ritchie, K.C., for plaintiffs;

A. Drysdale, K.C. and *H. McInnes* for defendant.

At the trial the Local Judge was assisted by Commander E. B. Tingling, Nautical Assessor.

The nautical assessor's report to the court is as follows:—

"After carefully considering the evidence given by various witnesses, also the arguments used by counsel relating to the collision between S. S. *Arranmore* and the schooner *Alexander Rudolph* in Halifax Harbour, on April 2nd, 1906, I beg to state that in my opinion the loss of

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schooner and cargo rests entirely on the *Arranmore*. The reasons for this finding are based on the fact that the *Arranmore*, by the evidence of Captain Couillard, (which is very plain and straightforward) saw a green light about three points on the port bow (exonerating the schooner from not complying with Article 10 as the *Arranmore* was not an overtaking vessel). On seeing the light, although the *Arranmore's* helm was starboarded to allow her to pass astern of the schooner, thereby bringing her a little on the *Arranmore's* starboard bow, yet by meeting her with port helm and then giving her port helm he acted unwisely, thus bringing about the collision. Stopping the *Arranmore's* engines to prevent going too far to westward when he altered his course was correct, but the fact of his placing the engines full speed astern within such a short period of stopping shows that he found himself so close to the schooner that he apprehended danger of a collision. Doubtless, by rule 21, the nongiving-away-vessel has to keep her course, yet there are occasions when a vessel finding herself in imminent danger has to depart from this rule. (See Article 27). In this case the schooner cannot be held in default for putting her helm down and coming into the wind, as although she did not escape the collision, yet the fact of her receiving the blow on the port side of her stern shows that had she kept her course the blow would have been delivered on her starboard side—a point entailing greater danger for the saving of the crew.

One part of the evidence endeavours to show that the *Alexander Rudolph* was filling on the starboard tack and had acquired stern way. The evidence to the contrary of this must be accepted, as a heavenly laden vessel would carry headway for a considerable distance whilst in stays, and if on starboard tack would be headed somewhere W. by N., bringing her port side to the *Arranmore's* bow.

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Previous to the new edition of the rules and regulations for the prevention of collisions it was optional for vessels to use sound signals when in sight of one another, but the amendment of 1896 makes this rule compulsory. The *Arranmore* ought to have sounded two (2) blasts of her whistle and then abided by the same. Halifax does not come under the heading of a narrow water. Nowhere, except passing George's Island, is the channel less than half a mile wide.

Not seeing the *Arranmore* reflects on the lookout kept on board the *Joseph Rudolph*, but does not materially bear on this case, as the sole cause of this disaster was the improper use of port helm on board the *Arranmore*."

MACDONALD, L. J. now (May 16, 1906) delivered judgment.

This is an action tried before me in the Admiralty Court at Halifax, in April last, in which the plaintiff seeks to recover compensation from the steamer *Arranmore*, and owners, for damages and loss by collision alleged to be caused by the negligence and default of the master and crew of the *Arranmore*. The collision took place in the Harbour of Halifax on the night of the first of April, 1906, when the plaintiff's schooner *Alexander Rudolph* was sunk by the *Arranmore*. The night, according to the evidence, was clear and fine, and the respective vessels were in sight of each other while going up the harbour, and until the time of the collision. I had the benefit of the assistance of Captain Tingling, R.N., on the trial, as an assessor, and he has returned his report to me in the case to be filed with the minutes. It will be seen from the assessor's statement, and it appears clearly from the evidence in the cause, that the question turns entirely on the propriety of the handling of the respective vessels, immediately before and resulting in the collision. Captain Tingling, on these purely technical

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points, gives the reasons for the conclusion at which he has arrived, that the *Arranmore* is solely to blame for the collision. In the opinion arrived at by the assessor I concur, and there will be judgment for the plaintiff with costs. The damages will be assessed by the registrar and merchants.

*Judgment accordingly.**

Solicitor for plaintiff: *W. H. Fulton.*

Solicitor for defendant: *H. C. Borden.*

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* Affirmed on appeal to the Supreme Court of Canada. See 38, S. C. R. 176.

QUEBEC ADMIRALTY DISTRICT.

Between

THE NORTHERN ELEVATOR COMPANY, LIMITED..... } PLAINTIFFS;

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VS.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY..... } DEFENDANTS;

THE CANADIAN ATLANTIC RAILWAY COMPANY..... } PLAINTIFFS;

VS.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY..... } DEFENDANTS;

THE OGILVIE FLOUR MILLS COMPANY..... } PLAINTIFFS;

VS.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY ..... } DEFENDANTS;

Maritime law—Shipping—Tug and tow—Damage by overtaking ship—Displacement wave—Right of action—Pleadings—Amendment.

These were actions arising out of the sinking of the barge *Huron* in the Soulanges Canal on the night of the 8th May, 1905, such accident being charged by the plaintiffs to be due to the negligence of the defendants, owners of the steamer *Hamilton*, which overtook and passed the *Huron* while being towed through the said Canal laden with wheat on the said date. The plaintiffs alleged that the *Hamilton* passed the tug and tow at such an excessive rate of speed that owing to the suction produced by the passage of the *Hamilton* through the water, and to her displacement wave, the *Huron* was driven against the bank of the canal and subsequently sank.

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Held that as the plaintiffs had failed to show that the accident to the *Huron* was the result of negligence of those on board the *Hamilton*, and that as the evidence supported the allegation of defendant that the accident was due to the improper and unskilful navigation of the *Huron*, the actions must be dismissed.

ACTIONS for damages alleged to have arisen from careless navigation in the Soulanges Canal.

The cases were consolidated for the purposes of trial. The facts are stated in the reasons for judgment.

C. A. Pope for plaintiffs;

A. R. Angers, K. C. and *A. E. deLorimier* for defendants.

Reasons for Judgment.

DUNLOP, L. J., now (May 31st, 1907) delivered judgment.

The plaintiffs, in the respective cases, as owners of the barge *Huron* and the cargo with which she was laden, are suing the defendants for damages sustained by the vessel, claiming $3,551.46; and for the loss of the cargo caused by the defendants steamer *Hamilton* claiming $35,884.64.

A long and voluminous *enquête* has been taken, and the evidence discloses that about 11.23 p.m., on the 8th of May, 1905, the barge *Huron* referred to in the pleadings, in the service of The Canada Atlantic Railway Company, in tow of the tug *Ida*, of the Canadian Towage & Transportation Company, whilst on a voyage from Coteau Landing to Montreal, was about one and a quarter miles below the head lock in the long level of the Soulanges Canal; that the barge *Huron* was laden with a cargo of 37,500 bushels of wheat, of which 24,000 bushels were consigned to the plaintiffs, the Northern Elevator Company, Limited, the owners thereof, at Montreal, the balance being consigned to the Ogilvie Flour Mills Company at Montreal; that at such time there was no wind; the weather was clear, and the canal lighted by electricity.

The *Ida*, with the *Huron* in tow, was proceeding downwards at the rate of about a mile and a half per hour. Some short time previous the lights of the *Hamilton* were seen at a distance of about a mile from the stern of the *Huron*. The *Hamilton* approached the tug and her tow at a moderate rate of speed, the tug and her tow having been previously sighted by the *Hamilton* shortly after she left the lock. The *Hamilton* overhauled and passed the said vessels on their port side.

It appears to be conceded generally that the tow at the time the *Hamilton* passed was a mile and a quarter from the foot of lock No. 5. Cherry, the first officer of the *Hamilton*, says that it took him 15 or 20 minutes from the foot of the lock No. 5 to the time of his passing the tow. Allowing that the *Hamilton* did not gather way fully immediately, and that she slowed down some considerable distance astern of the tow, and that the engines were put dead slow when the *Hamilton* began to overlap, I am satisfied that the *Hamilton* did not make a speed greater than four miles an hour from the time she began to overlap the tow, slowing to about three miles an hour when she was passing the tow.

Unbiassed witnesses state that it takes thirty minutes to prepare lock No. 5 for a vessel, and five to six minutes to lock through. Therefore, the tow would have a start of about 35½ minutes of the *Hamilton*. Estimating the speed of the *Hamilton* at four miles an hour, which would be a liberal estimate, it would take her 18½ minutes to go a mile and a quarter and reach the tow. Eighteen and a half minutes added to 35½ make 54 minutes. If the tow will go a mile and a quarter in 54 minutes she will go about a mile and a half an hour. Therefore, the speed of the tow is estimated at about a mile and a half an hour. The entire length of the canal was stated by witnesses to be 14 miles. The *Hamilton* had already passed the upper approach and lock No. 5, and found herself at

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the foot of lock No. 5 at about 11.05 p.m. It is stated that she passed out of the last lock at 2.10 a.m., thus giving her three hours and five minutes to make under 13½ miles from foot of lock No. 5 to foot of lock No. 1. Witnesses say that it takes, on an average, 7½ minutes to lock through each of the four locks through which the *Hamilton* had to pass after leaving the foot of lock No. 5. Therefore, we deduct 30 minutes from the three hours and five minutes, as the time occupied in passing the locks, and we deduct from the distance the length of the four locks, and calculation shows that the *Hamilton* went about five miles an hour through the unimpeded waters of the canal from the foot of lock No. 5 to the foot of lock No. 1. Taking into consideration the calculated speed, it seems an impossibility for the *Hamilton* to have created a displacement wave of the size that was asserted by Hebert (the only witness who made a positive statement to that effect), drawing, as he states, three feet of water from under the bottom of the barge, which was drawing twelve feet six.

The evidence shows that neither the course nor motion of the tug was materially affected by the passing of the *Hamilton*, which certainly would have been so had there been a displacement wave of the size contended for, as the tug was so much smaller, and her draught so much lighter than the barge *Huron*.

In addition to the evidence of the officer and crew of the *Hamilton* as to the speed of the *Hamilton* reference might be made to the evidence of Marchand, the engineer of the tug, who states that the *Hamilton* passed the tug and its tow at what he termed "easy way," meaning that the *Hamilton* had been eased off as she was passing the tow.

It might be remarked that the tow after the *Hamilton* had passed gave no distress signals, and consequently the *Hamilton* was perfectly justified in continuing her

course; and, as a matter of fact, the master and crew of the *Hamilton* did not know that any accident had occurred until they passed the stranded barge the next day on their return trip from Montreal.

The *Hamilton* received no notice whatsoever of the accident, nor did she get any notice of the survey on the cargo or its sale. The first notice of any claim being made upon the Richelieu Company, the defendants in this case, was made on the 8th of January, 1906, eight months after the accident occurred. In reference to the delay in giving notice, reference might be made to Pritchard's Admiralty Dig. (1) as follows: "It is always to be lamented when suits for damages or actions of any other description are not brought until a considerable length of time after the occurrence of the accident, as the memory of the witnesses cannot be so accurate as when deposing to a recent occurrence. The crew, also, being dispersed, renders the evidence more difficult to procure. If, therefore, the evidence is not so ample or precise as it ought to be, the complainant must take all the consequences arising from his own delay."

The defendant by its counsel strongly commented upon this, stating that no notice of the claim was given before the 8th of January, 1906, when all the crew was dispersed, and that some of the most important witnesses that should have been produced before the court, amongst others, the man at the wheel, could not be found.

Although the vessel was stranded on the 8th of May, she was brought to Montreal on the 13th of May. The cargo, which was a total loss, was sold about that time. All the damage had occurred and was known on the fifteenth of May. That was the day the master made his protest. In his protest he attributes no fault whatever to the defendants. He knew all the damage that had been incurred, and he simply entered his protest

(1) Practice in Cases of Damages, Vol. 1, No. 285, p. 448.

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accordingly. That was the protest of the 15th of May, 1905. The protest of the 2nd of June charged for the first time the defendant with responsibility.

The court, availing itself of the valuable services of Captain James J. Riley, nautical assessor, in this matter, submitted the following questions to him, which, with his answers, are hereinafter referred to :—

"1. Do you consider that under the facts of this case the steamer *Hamilton* was properly navigated and that all possible precautions were taken by the master and crew to avoid the accident which resulted in the stranding of the barge *Huron* on the north side of the canal, when the *Hamilton* overhauled and passed the tug *Ida* and her tow on the evening of the 8th of May about one and a quarter miles below lock number 5 in the long level of the Soulanges canal at about 11.23 p.m.; if not, state in what particulars the navigation of the *Hamilton* was faulty, and what precautions should have been taken to avoid the accident in question, that were not taken?

"A. I consider that all reasonable precautions were taken by the master and crew of the *Hamilton* to avoid accident in approaching and passing the tug *Ida* and its tow, the barge *Huron*, and that the steamer *Hamilton* was properly navigated and proceeding at an ordinary, moderate and prudent rate of speed on approaching and passing the tug *Ida* and its tow, the barge *Huron*, and at the time of the passing of these vessels I calculate the speed of the *Ida* and its tow to be about one and a half miles an hour, and the speed of the *Hamilton* to be about three miles an hour. Furthermore, in my opinion, it seem impossible that the *Hamilton*, with her draught and at the rate of speed established, could have made a displacement wave of a size sufficient to draw three feet of water from under the bottom of the *Huron*, which was drawing twelve feet six without affecting course or motion of the tug boat, which according to the evidence

was not materially effected by the passing of the *Hamilton*.

"2. State if, in your opinion, the tug *Ida* and her tow, the barge *Huron*, were properly navigated on the occation above referred to considering the locality and the circumstances of the present case, and were all precautions taken by the master and crew of the said tug and tow to avoid an accident, when said tug and her tow were overhauled and passed by the steamer *Hamilton* in said canal; if not, state in what respects, if any, the tug and its tow were improperly navigated and what precautions should have been taken to avoid an accident that were omitted?

"A. In my opinion the navigation of the tug *Ida* and barge *Huron* was faulty in the following respects: The barge *Huron* at the time in question was navigated too close to the south bank of the canal, and the tug *Ida* does not seem to have had sufficient power to keep the tow lines taut, and thus, control its tow when the *Hamilton* was passing her. The wheelsmen were young and comparatively inexperienced, and the evidence shows that the captain of the barge left the steering of the *Huron* entirely to his discretion instead of giving them specific orders and seeing that such orders were carried out or else taking the wheel himself if he apprehended danger.

"In my opinion the tow should have been kept further away from the south bank, as it had the option of position when it departed from a mid-channel course to allow the *Hamilton* to pass, and the *Hamilton* would, doubtless, have kept out of the way of the tug *Ida* and its tow in any safe course that the tug *Ida* and its tow had chosen.

"3. Did the accident in question, which resulted in the stranding of the barge *Huron* in the Soulanges Canal, on the evening of the 8th of May, 1905, arise from unavoidable circumstances without fault being attributable to the steamship *Hamilton*, the tug *Ida* or its tow, the barge

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Huron, or was it caused from the fault of the said steamship, tug, barge, or their master, crew, or persons in charge, and if so, from which of them?

"A. In my opinion the accident in question was caused solely by the fault of the tug *Ida*, and her tow, and the persons in charge thereof; without fault being in any way attributable to the steamship *Hamilton*, her master or crew."

Regarding the evidence of the masters of the tug *Ida* and the barge *Huron* as to the speed of the steamer *Hamilton* being about ten miles an hour, I have to say that a skilful and prudent navigator who was being overtaken in the canal by a steamer, the speed of which he estimated at ten miles an hour, and who commanded a vessel that was likely to be affected by the wave that would be caused by such a speed would know that the first effect his vessel would feel would be the bow wave that would raise the water under her, impel her and throw her stern off, or, in the case under consideration, towards the south bank. If from any cause he wished to remain in the course he had chosen he should have put his wheel a, port until the influence of the bow wave was nearly expended, and then have reversed his wheel to counteract the effect of the recoil or backflow of that wave that would have effect as the overtaking vessel sped on, and that would draw the water from under the slower vessel into the space that had to be filled by the displacement of the steamer. The few spokes of the wheel to starboard, as the steamer was approaching the barge, acted with the onward or bow wave of the steamer and helped to throw the barge toward the south bank instead of keeping her off it. In this respect the barge was improperly and unskillfully navigated. There is no evidence to show that the tug put on an extra spurt of speed to compensate for the impulsion, nor to use her rudder to offset the influence of the wave on the bow of the barge

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Huron. In which respect the tug was in fault. Though the speed of the *Hamilton* was three miles, need for the same operation of the rudder existed, in lesser degree, so long as there was any displacement wave that would affect the *Huron*.

It was for the plaintiff to point out any neglect on the part of the *Hamilton*. There can be no question but that she had a right to pass the *Ida* and *Huron*. She was in position where she could overtake them, and had a perfect right to overtake them. Now, was their negligence on the part of the *Hamilton ?*. None can be shown. She slackened speed when she saw the other vessels ahead. She blew two blasts of her whistle to warn those vessels that she was going to pass them, and when she approached these vessels she slackened speed again down to about three miles an hour, which was as slow as it is possible for her to go without stopping completely ; and by putting the helm to starboard, the *Hamilton* was directed to a position within about 12 feet from the north bank of the canal, and passed the tow at a prudent rate of speed.

It may be noticed that at page 2 of the evidence of Lasalle, he states that about three minutes after the *Hamilton* passed the barge *Huron*, the captain of the *Huron* cried out she was sinking. Now, it is said that at time she had three feet of water in her hold. It seems impossible that she could have filled to the extent of three feet in three minutes, and Herbert says that she had about three and a half feet in her when she reached the north bank of the canal, about 30 minutes after the accident.

If Lasalle's statement is correct, she must have been damaged before the *Hamilton* reached her. She could not have taken so much water in that short space of time.

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Again, at page 5, Lasalle says in answer to the question: "Did you notice at what rate of speed the *Hamilton* was coming?" He says: "Well, she was coming down in my opinion between ten and ten and a half miles an hour." Again, he says the *Huron* was astern of the tug when the *Hamilton* passed, straight with the course of the *Ida*." If that is so, it was not the overtaking of the *Hamilton* that caused the damage at all. It had no influence according to Lasalle, since the *Huron* kept on her course straight with the course of the *Ida*.

It may be stated that, according to my view, the withdrawing of three feet of water by the *Hamilton* passing the barge was an impossibility, and that when a witness swears to a thing which is impossible or incredible, no weight is to be attached to his evidence. Upon this point I might refer to the American and English Encyclopedia of law (1.)

"Where the facts are not credible, or are improbable in view of the circumstances, no superior credit is given to the testimony of the vessel's own witnesses."

This is exactly in point here, and as I view the case, no superior credit is to be given to Herbert's evidence when he says that three feet of water was withdrawn from under the barge *Huron* and that she struck the bottom of the canal. The evidence of Lasalle and the evidence of Hebert are fully contradicted by Leboeuf and Mire.

And again at p. 76 Leboeuf contradicts himself by saying that the barge touched at the bow.

The accident appears to me to be attributable to the plaintiff. There were two youths at the wheel, Lebou 17 years of age, and Mire 19 years of age, when the accident occurred. They were without much experience. They were on their first trip that season and yet we find that they were left at the wheel to use their own

(1) Vol. 25, p. 1020.

discretion in the event of any contingency arising. They received no steering orders from the master of the barge, or the officer in charge of the tow, and very properly the nautical assessor put the following questions to Hebert at page 90:—

Q. I would like to ask the witness a question. In all these movements of the wheel—this starboarding a little, and the other movements—were they all ordered by you."

A. I told him to take care of the wheel.

Q. I want to know if the various movements of the wheel referred to by the witness Mire were each of them special orders by you?

A. No, what I told him was to be careful, and he knew his work. He told me he could do his work. All I told him was to pay attention.

Is that the duty of an officer in command of a vessel at night, to rely upon the discretion of two youths of 17 and 19 respectively, when he should have stood by them and given the proper orders and seen that they were executed?

In their pleadings the defendants set up in paragraph 21 of their defence, that the plaintiffs have no interest to bring the present action, having been paid and indemnified for the said accident by the underwriters of the insurance company. As regards the owners of the barge, this has no application. The barge as proved by the evidence, was not insured. The question therefore is pertinent only as regards the owners of the cargo. It has been held in many Admiralty cases, and I think it has been almost the universal practice in Admiralty that defendants cannot set up by way of defence the fact that plaintiffs have been indemnified for their loss by the insurance company.

In this connection, the case of *Simpson* v. *Thompson*, (1) might be referred to, where it was held as follows:

(1) 3 App. Cas. 279.

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"There is no independent right in underwriters to maintain in their own name and without reference to the person insured, an action for damages to the thing insured."

And again (1) "They can assert any right which the owners of a ship might have asserted against a wrong doer for damages, for the act which has caused the loss, but this right of action for damages they must assert not in their own name, but in the name of the person insured."

Reference might also be made to the case of *Mason* v. *Sainsbury*, (2) *Darrell* v. *Tibbits* (3).

Arnould on Marine Insurance, (4) says: "The underwriter has no independent rights of his own, and cannot even sue in his own name."

Porter on Insurance, (5) says it is no defence to an action by the assured against the party causing the damage that the insured has been paid by the insurers.

Our own Court of Appeal has held in the same sense in the case of the *Richelieu and Ontario Navigation Co.* v. *Lafreniere* (6). The circumstances in that case were almost identical with those in this case. The same ground of defence in law was raised, and the plaintiff's action was maintained.

I am of opinion therefore that the actions were properly brought in the names of the respective plaintiffs.

At the trial application was made by plaintiffs to amend their statement of claim and also their preliminary act by striking out in paragraph 3 of plaintiff's statement of claim the word "two" in the fourth line thereof, and substituting therefor the word "three," so as to agree with the evidence, and also to amend article 7 of the preliminary act by striking out the word "two" in the

(1) See 3 App. Cas. at p. 284.
(2) Dougl. 61.
(3) 5 Q. B. D. 560.
(4) 7 ed. sec. 1231.
(5) 4th ed. p. 256.
(6) 2 L. N., 204.

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fourth line thereof, and substituting therefor the word "three," so as to agree with the evidence, the whole in accordance with rule 67, their object being to plead that the speed of the tug *Ida* and its tow, the barge *Huron*, was three miles an hour instead of two miles an hour, as originally alleged by them.

This application was strenuously opposed by counsel for defendant, on the ground that the plaintiffs cannot be permitted to amend their preliminary act, and contending that the motion so made should be rejected. Amongst other authorities, *Williams and Bruce's Admiralty Practice* ed. p. 369, was cited, as follows :

"The object of the rule requiring preliminary acts is to obtain a statement *recenti facto* of the leading circumstances of the case, and to prevent either party varying his version of facts so as to meet the allegation of his opponent. The court will never allow a party to contradict his own preliminary act at the hearing, and an application on behalf of a party to amend a mistake in his preliminary acts will not, if opposed, be entertained by the court. The preliminary acts are not allowed to be opened without an order of the judge or the registrar."

I am of opinion that neither the statement of claim nor the preliminary act, whether it is looked at as a pleading or not, can be amended under the circumstances of this case, because the evidence does not show that the tug *Ida* and the barge *Huron* were proceeding at the rate of three miles or more per hour, but at a much less speed. The motion is therefore dismissed with costs.

Numerous authorities have been cited by the respective counsel, and amongst others two recent cases decided in the United States. The first is the case of the *Kaiser Wilhelm der Grosse* (1) decided in the District Court, S.D., New York, on the tenth of February, 1905, and the other is the case of the *Ashbury Park*, (2) decided in the District

(1) 134 Fed. R. 1012. (2) 136 Fed. R. 269.

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Court, E.D., New York, June 7th, 1905. In both these cases decrees were granted against the steamships, very properly, as I view it, on the ground that the said steamships had been proceeding at too great a rate of speed, and that the damage complained of was caused by the displacement waves. Both steamers were large ships, of high power, propelled by twin screws, and owing to their great speed and power their displacement waves were distinctly proved to have caused the damage complained of. These cases are scarcely applicable to the present case, the steamer *Hamilton* being a paddle-wheel steamer of moderate power and light draught, but little more than half the draught of the barge *Huron*, and no proof having been adduced showing that the damage complained of was caused by her displacement wave. It seems to me inevitable that if there had been a displacement wave made by her of the size contended for by the witness Hebert, the course of the *Ida* must have been materially affected, which has not been proved, and, moreover, both the *Huron* and the tug *Ida* would have shipped water, which has not been proved.

It may be observed that the voyage in question was the first voyage of the *Huron*, and that she wintered at Collins Bay in the ice, and no satisfactory proof has been adduced that she had been properly caulked previous to the voyage in question.

On the whole case, I am therefore of opinion that plaintiffs have totally failed to prove the material allegations of their statement of claim, reading as follows, to wit: "That the *Hamilton* overhauled and passed the tug *Ida* and her tow, the barge *Huron*, at such an excessive and dangerous rate of speed that owing to the suction produced by the passage of the *Hamilton* through the water, and to her displacement wave, the *Huron* was driven against the bank of the canal and suffered severe damage." And I am further of the opinion that all reasonable pre-

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cautions were taken by the master and crew of the *Hamilton* to avoid accident in approaching and passing the the tug *Ida* and her tow, the barge *Huron*, and that the steamer *Hamilton* was properly navigated and proceeding at an ordinary, moderate and prudent rate of speed in passing the tug *Ida* and her tow, the barge *Huron*.

Consequently, I dismiss the actions of plaintiffs with costs.

Judgment accordingly.

Lafleur, MacDougall & Macfarlane, solicitors for the plaintiffs.

Angers, DeLorimier & Godin, solicitors for defendants.

PRINCE EDWARD ISLAND ADMIRALTY DISTRICT.

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April 18.

MAGDALEN ISLANDS STEAMSHIP COMPANY, LIMITED..... } PLAINTIFF;

AGAINST

THE SHIP *DIANA*.

Maritime law—Shipping—Collision—Vessel "hove-to"—Lookout—Manœuvre to avoid collision—Pleading—Preliminary Act—Evidence—Salvage.

A schooner "hove-to," with her wheel made fast by a becket which could be removed instantly, her lookout and wheelsman properly stationed, and maintaining a steady course, is not, with reference to such circumstances, open to the charge of being negligently navigated.

2. A vessel without a sufficient lookout has the burden cast upon her of proving that such fact did not contribute to the collision.

3. Apart from the regulations, in a case of impending collision it is negligence for a steamship to fail to slacken speed, or to stop, or reverse, if such manœuvre is necessary to avoid collision.

4. Where defendant's preliminary act alleged that at a certain point the bearing of the ship at fault was "a little abaft the starboard beam" of the injured ship, evidence was admitted to show that the line of approach was not more than two points abaft, or was forward of the beam of the injured vessel.

5. The wrong-doer cannot recover salvage remuneration for services rendered to the ship with which he has been in collision.

ACTIONS for damages for collision and for salvage.

The facts are stated in the reasons for judgment.

W. S. Stewart, K.C., and *R. E. Harris, K.C.*, (of the Nova Scotia Bar) for plaintiffs;

F. R. Taylor (of the New Brunswick Bar) *Edward S. Dodge* (of the Massachusetts Bar) for defendants.

SULLIVAN, (C.J.) L.J. now (April 18th, 1907) delivered judgment.

These actions are brought by the Magdalen Islands Steamship Company, Limited, as owners of a steamship

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called the *Amelia*, against a sailing vessel called the *Diana*. One action is for the recovery of damages in respect of a collision which took place between the *Amelia* and the *Diana* on the 26th September, 1906, in the Gulf of St. Lawrence, and the other action is on a claim for salvage remuneration for towing the *Diana* from the place of collision to Souris, in Prince Edward Island. There is a counterclaim in each case on behalf of the *Diana*, for damages occasioned to her in the collision by the *Amelia*. By consent of the parties, the actions were consolidated under an order of the court and were tried as one cause.

The *Amelia* was of the burden of 357 tons gross and 103 tons net, her length over all was 145 feet. She was employed in carrying mails, passengers and freight between Pictou, Nova Scotia, and the Magdalen Islands, calling at Souris in Prince Edward Island. At the time of the collision she had on board as master, Captain Burns, a first mate, Pride, a second mate, two engineers, three firemen, four sailors and a winchman, besides a purser, steward and cook; and she carried five or six passengers. She was at the time a light ship, her whole cargo consisting of a couple of hundred bags of salt.

The *Diana* was a fishing schooner, hailing from Gloucester, Massachusetts. Her burden was 123 tons gross and 89 tons net register. Her length over all was 103 feet 9 inches. Her crew all told comprised 18 men and she was in charge of Captain James McLean. At the time of the collision she was engaged in seining mackerel off the coast of Prince Edward Island.

According to the preliminary act of the plaintiff the collision took place at 2.55 o'clock in the morning, "about 6 miles west, south-west from East Point Light," and according to the preliminary act of the defendant, it took place at 2.45 o'clock in the morning "about 7 miles south, south-west from East Point Light." In support

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of the plaintiff's view as to the place of the collision witnesses from the *Amelia* testified that the course of that steamer from Entry Island Light in the Magdalen Islands, was south west half south until East Point Light bore north west between two or three miles distant; that the course was then changed to west half south and that the pursuance of these courses brought the *Amelia* to the place in which it is alleged for the plaintiffs the collision occurred. The witnesses in support of the view put forward on behalf of the *Diana* as to the place of collision testified partly from bearings alleged to have been taken at the time, and partly from observation and their knowledge of the locality in which they had been fishing. There are elements of uncertainty in the statements of both parties; but a consideration of the courses alleged to have been taken by the *Amelia* and of all the evidence adduced on the point leads me to the conclusion that the collision took place about 5 miles south-west from East Point Light, and about 3 miles from the nearest land. But in the view I take of the case it is not material, even if it were practicable, to arrive at a closer approximation as to the place in which the vessels came in contact.

The parties practically agreed as to the direction and force of the wind, both alleging that it was west, north-west, the plaintiffs stating that it was a moderate breeze, and the defendants that it was about 4 knots an hour. They also substantially agreed that there was no sea. As to the state of the weather it is alleged in the plaintiffs' preliminary act that it was "dark but fine" and in the defendants' preliminary act that it was "clear but slightly overcast, no mist or fog." There was some discrepancy among the plaintiffs' witnesses on this head. Painchaud, a passenger on the *Amelia*, said it was "a little dark," but that he saw the loom of the land, and saw the sails of the *Diana* 50 yards away. All the crew of the *Amelia* said they could not see the land. Theriault,

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the look-out, said he saw the sails of the *Diana* about a minute or a minute and a half before the collision, which according to the rate of speed of the *Amelia* would give the distance as about 900 feet to 1,350 feet, at which he had seen them, while McLean, the wheelman, said it was so dark he could not see from the pilot-house the man on the lookout, a distance of 50 feet.

The witnesses from the *Diana* said that the weather was clear, at times starlight, with some clouds, and that a vessel even without lights could be seen from half a mile to a mile and a half distant. In this they were supported by Captain Gallant and his first officer Skerry of the schooner *James A. Gray*, both of whom testified that they saw the sails of the *Diana* at a distance which they estimated at from a quarter of a mile to a mile. The weight of the evidence on this point satisfies me that it was at least, as some of thewitnesses described it, "a good night for seeing lights."

The course of the *Amelia* was west half south and her speed was between nine and ten knots an hour. The *Diana's* course was north, north-west, and from the time she ceased fishing in the evening until 12 o'clock midnight she was hove-to on the starboard tack, under mainsail, fore-sail, jumbo, and jib, with the jib amidships, the jumbo to windward, the wheel hard down on the starboard tack with a becket on one of its spokes to keep it from moving. From 12 o'clock to the time of the collision she was on the port tack with the same sail, the jumbo on the port side and the helm hard down. The wind moderated about 12 o'clock, and from that hour to the time of the collision the speed of the *Diana* was from half a knot to one knot an hour.

The vessels came in contact by the stem of the *Amelia* striking the *Diana* on her starboard bow forward of the forerigging opposite the windlass. As a result of the impact a hole was broken in the bow of the

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Diana, her starboard light was crushed in, the glass broken and, according to the evidence for the *Diana*, the light extinguished. The stem of the *Amelia* was also broken and other damage was done to both vessels.

The fault or default attributed to the *Diana* is set forth in the plaintiffs' preliminary act in these words: "That the schooner had no lights, and no attempt was made to make any signal or draw the attention of the steamer *Amelia* to her position, and no attempt was made to avoid the collision; and the said schooner violated the rules and regulations as to her proper navigation."

In opening the case the plaintiffs' counsel specified no fault or default against the *Diana*, and at first the controversy appeared to be whether the side lights, and more especially the starboard light, of the *Diana* were properly placed, and were burning at the time of and immediately prior to the collision. But towards the conclusion of the case, Mr. Harris, the plaintiffs' counsel, stated that his contention was that "in approaching the *Diana* there was no light visible to those on board the *Amelia*, and that that might have been due to the fact that there was no starboard light burning, or to the fact that the *Amelia* was approaching the *Diana* upon such a course—more than two points abaft the beam—as to preclude the *Amelia* from seeing the starboard light, if burning on board the *Diana*." As to the port light, Pride, the mate of the *Amelia*, who examined it after their arrival in Souris, admitted that he saw nothing wrong with it, and it was seen from the *Amelia* burning while the *Diana* was being towed.

Mr. Dodge argued in his closing address for the defendants that the plaintiffs were precluded from setting up the case that the *Diana* was an overtaken vessel because that was not specifically alleged in the plaintiffs' opening nor in any of the proceedings; that the point should have been taken at the earliest possible stage of the case, and

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that the general allegation in the plaintiffs' preliminary act that the *Diana* had no lights was not sufficiently specific to embrace the plaintiffs' contention. But inasmuch as it does not appear that the defendants were in any way mislead by the statement in the plaintiffs' preliminary act, nor by the subsequent proceedings, and as it does not appear that the allegation in the plaintiffs' preliminary act, giving it a reasonable construction, was calculated to mislead, I will not give effect to the defendants' objection, but will proceed to consider the plaintiffs' contention upon its merits. That contention is resolved into two questions:

First. Was the starboard light of the *Diana* burning?

Secondly. If it was burning, was the *Amelia* in the position of an overtaking ship?

It appears by uncontradicted evidence that the *Diana* was sufficiently manned for a vessel of her class; that she had the full watch that is usually carried by Gloucester fishing vessels; that her side lights were in dimensions the largest, and in quality of the best, carried by vessels of her size; that they were properly set in the forerigging, and so fixed as to throw the light from right ahead to two points abaft the beam on either side, and of such a character as to be visible at a distance of at least two miles, thus meeting in all respects the requirements of the rules concerning lights. They were never known to have gone out, nor to have given any trouble in keeping them burning. Blondin, the cook, whose duty it was to attend to the lights, testified that he cleaned, trimmed and filled the lamps on the day preceding the collision, and that they were placed in their proper positions at the usual time that evening; that at 12 o'clock that night he saw them in their proper places, the green light on the starboard side, and the red light on the port side, burning brightly.

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McRae and Steele, who formed the watch on the *Diana* from 2 o'clock in the morning until the time of the collision the former aft at the wheel and the latter on look-out forward of the foremast and aft of the windlass, both testified that they looked at the lights when they went on watch and that they were then burning brightly, unobstructed in any way. When they first saw the light of the *Amelia* at from 15 to 30 minutes after 2 o'clock, they looked at their lights and found them still burning brightly, and again within a few minutes of the collision or as McRae expressed it, "about a minute before the collision, just before she (the *Amelia*) swung down on top of us," they could see by the reflection of the green light on the bulge of the jib that the starboard light of the *Diana* was then burning. The starboard lantern, crushed in, with the glass broken, and containing some oil, was exhibited in court, and according to the evidence it was then in the condition in which it was when taken from its proper position in the rigging of the *Diana* at Souris, after the collision. Some pieces of the broken glass of the lamp were found on the well deck of the *Amelia*. In addition to this testimony there is the corroborative evidence of Captain Gallant of the schooner *James R. Gray*, which was sailing in the vicinity on her way to Pictou, and of Skerry the mate of that schooner, both apparently independent and disinterested witnesses. Shortly after 2 o'clock on the morning of the collision they saw the green side light of a schooner, which the evidence shews was the *Diana*, on their starboard or lee bow and about 2 miles distant. Afterwards they saw the schooner's sails at a distance of from a quarter mile to a mile. They recognized her as an American fishing schooner. Then they saw the mast-head light of a steamer which the evidence proves was the *Amelia*. The steamer was heading upon the schooner, and as their vessel was tacking they continued to see both side lights

of the schooner until they became obstructed from view by the steamer, which was, Captain Gallant said, about 20 minutes to 3 o'clock. Shortly afterwards they saw a search light at the place where apparently the steamer and the schooner came in contact. The evidence shews that a search light was used by the steamer just after the collision. From all this evidence I must take it to be established as an undoubted fact that the *Diana* carried the proper side lights, and that they were burning properly. That fact is proved by affirmative evidence, and negatived by no evidence whatever, except by that of witnesses who only say that they did not see them.

The next question is whether the *Diana* was an overtaken vessel under article 24 of the regulations for preventing collisions at sea, and which under article 10 would be required to shew from her stern a white light, or a flare-up light.

The counsel on both sides were agreed that, taking the course of the steamer as west half-south and the course of the schooner as north north-west, as the evidence shews that it was, with the steamer heading directly for the schooner, the *Amelia* would be approaching the *Diana* at an angle of 1½ points abaft the beam of the *Diana*. But as it appears that the *Amelia* was passing ahead across the course of the *Diana*, the *Diana* being on her port bow, the *Amelia* would necessarily approach nearer abeam than 1½ points. The contention for the defendants is that the *Amelia* approached the *Diana* about abeam, or forward of abeam, and that that is in substantial agreement with the allegation in the plaintiffs' preliminary act that the *Diana* "would be bearing about between west and west south-west from the steamer." The evidence of the *Diana's* watch is in accordance with this view. McRea and Steele said that after viewing and considering the course of the steamer they concluded she would cross the bow of the *Diana*,

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and Steele said he "saw the steamer's light 3 miles away bearing ½ point forward of our beam."

The evidence of Painchaud, Pride, Theriault and Captain Burns for the plaintiffs tends to shew that the *Amelia* was approaching the *Diana* at about a right angle, which would indicate that the *Amelia* was approaching the *Diana* little, if any, abaft the latter's beam.

Mr. Hyndman, the nautical assessor, has been good enough to furnish me with two diagrams exibiting the position of the *Amelia* and the *Diana* according to their courses as proved, and the rate of speed of the *Amelia*, at a qurter of an hour before the collision, and at one minute before the collision respectively. At a quarter of an hour before the collision the two vessels were about two and a quarter miles apart The *Diana* was half a point on the port bow of the *Amelia* and the *Amelia* was one point abaft the beam of the *Diana*. At one minute before the collision the *Amelia* was about 900 feet from the *Diana* and the *Diana* was two degrees on the *Amelia's* port bow. The *Amelia* was then half a point abaft the beam of the *Diana*.

It was argued for the plaintiffs that the defendants were precluded from showing at the trial that the *Amelia* approached the *Diana* forward of the *Diana's* beam, as in the defendants' preliminary act it is alleged that the bearing of the *Amelia* was "a little abaft the starboard beam" of the *Diana*. I do not agree with that view. The evidence on this point on behalf of the defendants was not offered in contradiction of the defendants' preliminary act, but was intended to show that the *Amelia* did not approach the *Diana* at more than two points abaft the latter's starboard beam, which was the question raised on behalf of the plaintiffs, and any evidence tending to show that the line of approach of the *Amelia* was either not more than two points abaft the *Diana's* beam,

or was forward of her beam, was admissible for such purpose.

In connection with this branch of the case the plaintiffs' counsel argued that a vessel "hove-to" with her helm lashed down is liable to fall off until her sails fill and then come up to the wind until her sails empty, and that she may thus pursue an unsteady course, zig-zagging from one side to the other over a range of four or five points. That, taking the course of the *Amelia* to be west half south and the course of the *Diana* to be north, north-west, that would place the *Amelia* 1½ points abaft the beam of the *Diana*. That proceeding on these courses, if the *Diana* came up more than half a point the *Amelia* would lose her side light, and for at least some period of time the *Diana* would be in the position of an overtaken vessel. Speaking of the occasion in question and of the conditions then existing, the evidence as given by McRae and Steele, who formed the watch of the *Diana*, from 2 o'clock to the time of the collision, is that the *Diana* was pursuing a steady course without any noticeable variation, McRae stating that she might vary a quarter of a point each way. Captain McLean said that when he had occasion to observe the conduct of the *Diana* shortly after 12 o'clock, she was not coming up and falling off that he could notice, and that when he was on deck again about five minutes after 2 o'clock, he looked a couple of minutes and did not see any variation. On the latter occasion he looked at the *Diana's* compass, and saw that her course was north, north-west.

This positive and uncontradicted testimony as to the manner in which the *Diana* was actually proceeding on that occasion, considered apart from answers to que tions based upon theories as to what vessels "hove-to" might generally do, or be expected to do, or even as to what the *Diana* might do in conceivably different circumstances, does not enable me to come to the conclusion

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suggested by Mr. Harris, that the *Amelia* was approaching the *Diana* on a course of more than two points abaft the latter's beam; and that the *Amelia* not being so approaching, the *Diana* was not an overtaken vessel under article 24, and not being an overtaken vessel the *Diana* was not required to show from her stern a light under article 10, nor was she under any obligation to show a torch or make any other signal (1).

Mr. Harris further contended that the mere fact of being "hove-to" as the *Diana* was, and continuing in that condition, in the circumstances, constituted negligence on her part. He relied chiefly in support of his argument on the case of *The Transit* (2), decided by a Judge of a district court of the United States, in which a pilot boat which was "hove-to" with her helm lashed, and a schooner with which she collided, were held to be in fault, the pilot boat because she did not keep a steady course. Mr. Harris also sought support from the case of *The Haverton* (3), decided by a judge of the Circuit Court of the Eastern District of the State of Louisiana, in which a pilot boat was held at fault among other things in not taking precautions "by way of unlashing her helm and calling the watch below when it became apparent that the collision was imminent." Even if those cases were binding on this court, which of course they are not, they are distinguishable from the case at bar.

In the *Transit*, as stated by the court, "the pilot-boat was luffing up and then keeping off, her luffing up being to such an extent as to cause her sails to shake, and her falling off being to the extent of two points, and when she fell off and went ahead her course would be for the port quarter of the *Transit*, and when she luffed up she would shoot across the bows of the *Transit*, and this luff-

(1) *The Robert Graham Dun*, 102 Fed. Rep. 652, S. C. on appeal, 107 Fed. Rep. 994; *The Martha E. Wallace*, 148 Fed. Rep. 94.

(2) 3 Benedict, 192.

(3) 31 Fed. Rep. 563.

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ing up and falling off by the pilot-boat was repeated several times and noticed from the *Transit* while the two vessels were approaching each other. Finally when the two vessels were about 80 yards apart the pilot-boat took another luff sharp across the bows of the *Transit*. The Court said: "It was the duty of the pilot-boat to keep her course, but she kept no course whatever."

In the *Haverton*, the pilot-boat had her helm lashed; all hands were below asleep except a boy who was on the watch, and she was proceeding, as the Court said, in "a happy go lucky manner."

The uncontradicted evidence in the case at bar is that the *Diana* was not "coming-to" and "falling-off;" but on the contrary that she maintained a steady course, not varying at any time more than half a point, and that her wheel was made fast by a becket, which could be removed instantly, and that besides the lookout there was a man at the wheel ready to act in any emergency. Moreover, in this case, according to the evidence, it never became apparent that the *Diana* was not observed by the *Amelia*, nor did it become apparent to those on board the *Diana* that a collision was imminent until the vessels were almost in the very act of contact, as the schooner's watch concluded that the steamer would pass clear of the schooner until she suddenly veered down upon her. I have been referred to no case which decides that navigating a vessel "hove-to" with her wheel in a becket, as the *Diana* was, unaccompanied by other conduct or conditions, establishes seamanship of so faulty a character that a vessel so situated, in the event of her collision with another vessel shall be *ipso facto* held to blame. In the cases of the *Transit*, and the *Haverton*, it was held that the conduct of the pilot-boats, which were "hove-to," contributed to the collisions; in the former, because of what the judge designated "wild manœuvring," and in the latter on account of what the court called "the happy go lucky

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manner" in which the pilot-boat was proceeding. No such misconduct has been proved against the *Diana*.

In the case of the Barque *Birgitte v. Forward* (1) it was contended, as in this case, that a vessel "hove-to" with her helm lashed hard down, as she was continually "coming-to" and "falling-off" the wind, and changing the position of her lights, should be held at fault; but the Court decided that as her conduct did not contribute to the collision, she was not to blame simply because she was "hove-to" with her helm lashed down. The alleged fault of being "hove-to," as the Diana was, does not relate to a statutory rule. It concerns only the ordinary rules of navigation, as to which it must appear not only that there was a fault, but that such fault did in fact contribute to the collision (2).

On this point I submitted to the nautical assessor, as a question of seamanship, whether in his opinion, in the circumstances of this case, the fact that the *Diana* was "hove-to" as described in the evidence, contributed to the collision, and his answer, with which I agree, is in the negative.

A further contention on behalf of the plaintiffs was that in the circumstances the *Diana* should have done something to avert the collision, as provided by the note to article 21, and that she did nothing. Article 21 and the note are as follows:

"When by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note.—When in consequence of thick weather, or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert the collision."

(1) 9 E. C. R. 339.

(2) See the *Emily B Maxwell*, 96 Fed. Rep. 999; the *Columbian* 100 Fed. Rep. 991; the *Nacoochee*, 137 U. S. 330.

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The note is, it appears to me, wholly inapplicable in view of the facts of this case. There were no causes here indicating that the *Amelia* could not have avoided the schooner until she and the *Diana* were in the very agony of collision. It is in evidence that the watch on board the *Diana* had carefully viewed the approach of the *Amelia*, and had concluded that she would pass clear across the bow of the *Diana*, about the length of the steamer ahead of the schooner, until the last moment, when the *Amelia* veered down upon the *Diana*. I am also of opinion that there were no special circumstances existing which, under article 27 or article 29, made a departure from the usual rule necessary. In the case at bar a change of course or other action by the *Diana* would have been of no avail, and might have caused a worse disaster than that which occurred. This is also the opinion of the nautical assessor.

The reason and necessity for adhering to the rule that in such circumstances a sailing vessel should keep her course are thus laid down by Sir James Hannen (afterwards Lord Hannen) in the *Highgate* (1): "A clear rule that a sailing vessel is to keep her course has been laid down and enforced very strictly, it being thought necessary in the interest of life and property to do so. It is therefore only where a clear case of necessity for departing from the rule is made out that the captain of a vessel can excuse himself for not following the rule. * * A steamer is able to manœuvre so as to keep out of the way of another vessel even when very close to her. * * How is a sailing vessel to know that a steamer is not going to cut it fine, or to know in what particular direction she will move at the last moment? The guide of the steamer's action is the presumption that the sailing vessel will keep her course."

(1) 62 L. T. 841.

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The duty of the *Diana* was to keep her course and speed, and the evidence shews that she did so. But her action, even if her course was unsteady, had no influence whatever upon the conduct of the *Amelia* and could have had no tendency to "mislead" or embarrass her, because, according to the evidence of the witnesses on behalf of the plaintiffs, the persons on board the *Amelia* did not see the *Diana* at all until the two vessels were so close together that effective measures to avoid the collision could not be taken. The course of action or the *Diana* did not therefore in any sense contribute to the collision.

Reverting now for a moment to the manner in which the *Amelia* was navigated, the defendants' preliminary act charges the fault or default attributed to her as follows: (1) that she did not keep out of the way of the *Diana;* and (2) that she had no sufficient look out.

The excuse alleged on behalf of the *Amelia* for not keeping out of the way of the *Diana* is that the schooner was not seen by the *Amelia* until it was too late to avert the collision. This excuse involves the sufficiency of the *Amelia's* lookout and necessitates a consideration of the conduct and action of those in charge of the *Amelia* prior to and about the time of the collision.

On the night preceding the collision the captain of the *Amelia* was ill, and for some time until just prior to the collision had been in his stateroom. From two o'clock in the morning until the time of the collision, Pride, the the first mate, was in charge of the watch. McLean, a sailor, was at the wheel, and Theriault, another sailor, was the lookout. Up to the time the sails of the *Diana* were seen, Pride, according to the evidence, "was in and out" of the pilot-house, and it does not appear that he exercised any supervision whatever over the lookout. McLean said that a sufficient lookout could not be kept from the pilot-house where he was at the wheel, so that the whole duty of lookout devolved upon Theriault.

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The conditions for keeping a good lookout on the *Amelia* were not favourable unless the persons forming the look out were placed very near the stem. Owing to the construction and trimming of the steamer there were many obstacles, as detailed in the evidence, calculated to obstruct the view of even a careful and vigilant lookout. The steamer was at the time practically in ballast, and the nose or top of the stem projected high in the air, owing to the weight of the engines and boiler at the stern. The top of the stem was 14½ feet above the water. The starboard light of the *Diana* was only 13 feet above the water, so that the steamer, even if trimmed on an even keel, would have the top of her stem one and a half or two feet higher than the side light of the *Diana*. Around the whole of the top-gallant forecastle deck there was a rail about 2½ feet high, supported by stanchions, with rods, filling in the intervening space. On the top of this deck was the windlass, which was alleged to be about 2½ feet high, about the same number of feet in diameter, and it was about six feet from the stem. Theriault said that while he was lookout he remained abaft the windlass, and that some time after he went on lookout he left the top gallant forecastle deck without the knowledge of the officer of the watch, and went to the well deck, 10 feet below, where he engaged in coiling a hawser. He estimated that he was occupied in coiling the hawser about two minutes. When questioned on cross-examination whether he left the top gallant forecastle deck again after he had coiled the hawser, and before he saw the *Diana's* sails, his first answer was that he had not done so, but he concluded by saying, "I don't remember," and "I think I didn't." Painchaud, the passenger who was moving about the deck, did not know that any one was on the top gallant forecastle deck on look-out until Theriault went aft "to show the sails to the mate;" neither did McLean at the wheel see Theriault

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until the latter went aft. When Theriault reported "sails ahead," Pride at the pilot house asked him which way the vessel was going. He answered that he did not know, he could see no lights. Theriault then went aft over the flying bridge on the starboard side, crossed over the deck in front of the pilot-house from starboard to port, and found Pride outside the pilot-house, on, as he said, the port side. Pride and McLean, however, said that Pride was on the starboard side. Theriault said he went aft "to show the mate where the sails were." Pride then started to go forward, to see for himself. Theriault proceeded ahead of him, crossed the deck again in front of pilot-house from port to starboard and passed forward over the flying bridge. He went forward to a place on the rail on the port side of the steamer, and on reaching that place he saw the cabin lights of the *Diana* shewing out through the skylight, or through the after companion-way, and he stated that the schooner was then "not more than a length off." He then shouted to Pride that he saw a white light and that he thought the vessel was at anchor. In the meantime Pride had gone forward over the flying bridge to the after part of the top gallant forecastle deck, from which place he saw the jib and foresail of the *Diana*, but he did not see the lights from her cabin. He then, and not till then, shouted to McLean to "starboard the wheel," thinking that he could go under the stern of the schooner, and then he went aft to the pilot-house. On reaching the pilot-house he turned round and saw the lights from the cabin of the *Diana*; then he and the wheelman began to turn the wheel down to "port." Soon after the lookout had first reported sails, Painchaud saw them and called out: "It is a vessel, I see the sails." He was standing on the port side of the steamer, and he said she was then pointing between the *Diana's* foremast and mainmast. About this time Captain Burns came up from his stateroom, which was on the deck, 10 feet below the pilot-house deck. He came up a stairway

which contained many steps, and went on deck on the port side, went forward to the port door of the pilot-house, asked the mate about the position of the wheel, was told that it was "port," ordered "it hard aport," went up the steps to the bridge on top of the pilot-house, crossed over to the telegraph and rang it to the engine room to reverse the engine "full speed astern." He stood there ringing the order repeatedly. It does not appear that the engines moved astern before the blow of the collision was felt in the engine room by the engineer.

I have recited this evidence in detail, somewhat tedious detail, because it is the account as given by themselves of the conduct of the lookout, and of the other persons who acted on board the *Amelia*, on the occasion in question. I will now consider it with regard to the law bearing upon the questions raised; and, first, respecting the look-out. Several cases have been cited to me on the question of look-out, and both sides have referred to and relied upon the case of the *Ottawa* (1). That case is typical of the other cases on the subject and I accept it as containing a concise yet comprehensive statement of the law. In it the law is thus laid down by the Supreme Court of the United States: "Steamers are required to have constant and vigilant lookouts stationed in proper places on the vessel and charged with the duty for which lookouts are required. They must be actually employed in the performance of the duty to which they are assigned. They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons, other than the master and helmsman, properly stationed for that purpose on the forward part of the vessel; and the pilot-house in the night-time, especially if it is very dark, and the view is obstructed, is not the proper place. Look-outs stationed in position where the view

(1) 3 Wall. 268.

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forward or on the side to which they are assigned, is obstructed, either by the lights, sails, rigging or spars of the vessel, do not constitute a compliance with the requirements of the law; and in general, elevated positions such as hurricane decks, are not so favourable situations as those more usually selected on the forward part of the vessel near the stem. Persons stationed on the forward deck are nearer the water line and consequently are less likely to overlook small vessels deeply laden, and more readily ascertain their exact course and movement."

The evidence that I have recited shews that Theriault was not stationed as near the stem of the steamer as he might have been, and that there were obstructions in the way, and other difficulties owing to the construction and trimming of the vessel that might well have prevented his seeing the *Diana's* lights. Besides, it appears from his own evidence that he did not give his constant and undivided attention to his duties as lookout. He admitted that he was absent for some time, during which period there was no look-out; and when asked whether he had been absent again before he saw the *Diana's* sails, the final result of his evidence was, as he expressed it himself, "I don't remember," and "I think I didn't." Although in his direct examination he said he kept a good lookout, he appeared in cross-examination to be somewhat in doubt as to whether or not he was absent again between the occasion of his coiling the hawser and his seeing the *Diana's* sails. His evidence therefore falls short of distinct and positive testimony that he kept a good lookout. If he had kept a good lookout, even if the *Diana* had no lights, he ought to have seen her sails, light coloured as they were, at a distance of from a quarter of a mile to a mile off, as did Captain Gallant and Skerry; and if he had seen the sails at that distance there need not have been a collision. The plaintiffs counsel admitted that even if the *Diana* had been "coming-up" and "falling-off" to an extent that

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would place the steamer occasionally more than two points abaft the *Diana's* beam, if would be only at intermittent periods that her lights would be shut out from the steamer's view; and it is evident that even in that event they would be visible at intervals, constituting about half the time. The diagram drawn by the nautical assessor shews that a quarter of an hour before the collision, when the vessels were two and a quarter miles apart, the *Amelia* was only one point abaft the *Diana's* beam, and that one minute before the collision, when about 900 feet apart, the *Amelia* was only half a point abaft the *Diana's* beam. Yet the evidence for the plaintiffs is that at no time were the side lights of the *Diana* seen by those on board the steamer. The *Amelia* struck the *Diana* well forward of the *Diana's* starboard light, and even then, according to the evidence, those on board the steamer did not see the starboard light of the schooner. There is evidence that there were night-glasses on the steamer, but it does not appear to have occurred to the mind of anyone on board her to use them, although the steamer was going at her full speed over a locality which the evidence shews was much frequented by fishing craft.

It appears to me that the *Amelia* was inadequately manned. McLean, who was at the wheel, was in my opinion too young and inexperienced for his task. He gave his age as nineteen years, and in appearance he was a mere lad. Theriault was, it appears to me, also too young and inexperienced for the duty which he was supposed to perform as lookout. It is true that he gave his age as twenty-one years, but he presented a much more boyish appearance than that age would indicate. His experience on a steamer was of less than one month's duration, and in that period he seems to have been employed at various duties from which he would derive no knowledge tending to qualify him as an efficient lookout. Applying the reasonable rules stated in the *Ottawa* (1)

(1) 3 Wall. 268.

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to the present case, it appears to me that the allegation contained in the defendants' preliminary act, namely that the *Amelia* had no sufficient lookout, is fully established.

The absence of an efficient lookout has been held to be *prima facie* fault on the part of a steamer in collision; *Genessee Chief* v. *Fitzhugh* (1); Steamboat *New York* v. *Rea* (2); *Cape Breton* v. *Richelieu and Ontario Navigation Co.* (3).

A vessel without a sufficient lookout has the burden cast upon her of proving that the absence of such lookout did not contribute to the collision (4).

"Every doubt as to the performance of the duty (of lookout), and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary," per Swayne J., in *The Ariadne* (5); See also *The Oregon* (6); *The Lyndhurst* (7).

In this case under the law as thus stated, the burden was cast upon the plaintiffs of proving that the absence of a sufficient look-out did not contribute to the collision: that burden has not been removed by any evidence adduced on behalf of the *Amelia*: I must therefore hold that the absence of such lookout did contribute to the collision.

It was contended on behalf of the defendants that besides violating article 20, which required the steamer to keep out of the way of the sailing vessel, the *Amelia* also violated article 23, which is that "every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse."

(1) 12 Howard 443.
(2) 18 Howard 223.
(3) 36 S. C. R. 564.
(4) The *Great Republic* 23 Wallace 20; the *Pilot Boy*, 115 Fed. Rep. 873.
(5) 13 Wall. 475.
(6) 158 U. S. 186.
(7) 92 Fed. R. 681.

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When Theriault saw and reported the *Diana's* sails he and Pride should have remained at their posts, each attending to his own duties, instead of losing precious time in conversing and in traversing the steamer backwards and forwards over a distance of from 50 to 60 feet, looking for lights. If they had remained at their posts, and if Pride had acted promptly even from the inside of the pilot-house the collision might have been avoided In the pilot-house there were no means of communicating with the engineer, nor of operating the steam steering gear, there was only the hand wheel. The *Amelia* was constructed with an upper bridge on top of the pilot-house, and upon that bridge were the engine telegraph and the steam steering wheel. It can hardly be doubted that the *Amelia* was designed to be commanded from the bridge on top of the pilot-house and not from the inside of the pilot-house. If Pride had been upon the upper bridge and had acted quickly, it is hardly open to doubt that he could with the aid of the steam steering gear have steered the *Amelia* clear of the *Diana* by going either to starboard or to port. As it was, notwithstanding the inexcusable delay and confusion which occurred before any decisive action was taken, and then by changing from "hard a starboard" to "hard a port," and ultimately, after Captain Burns had reached the upper bridge and had taken charge of the steamsteering gear, to "full speed astern," the *Amelia*, according to evidence given in her behalf, was brought from a position heading for a place between the masts to a position in which she struck the *Diana* well forward of the foremast on the starboard bow. Had she swung a few feet further she would have avoided the schooner altogether.

When the sails of the *Diana* were first seen from the *Amelia* it was evident that there was "risk of collision." The "necessity" defined by Lord Watson in *The Ceto* (1),

(1) 14 App. Cas. at p. 686,

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then existed. It had then, or should have then, "become apparent to the eye that if they continued to approach they would in all likelihood either shave close or collide."

Theriault said that about a minute or a minute and a half elapsed from the time he reported the sails of the *Diana* until the collision, but judging from what took place on board the steamer as detailed in evidence, I should conclude that the time was longer than a minute and a half. The steamer was passing through the water at a speed of about 900 feet a minute, and even if the time was only a minute and a half the vessels would be between 1,300 and 1,400 feet apart when the Diana's sails were first observed. In the *Emmy Haase* (1), where somewhat similar evidence regarding time was given, Butt, J., in giving judgment, said: "we are unable to accept the story that half a minute only elapsed between the time when the red light of the *Mulgrave* was seen and the time of the collision. We think the time must have been longer, and therefore the *Emmy Haase* is to blame for not stopping and reversing before she did." And then he said, "I may add that compliance with the rule at the very moment when danger becomes apparent is not necessary, for a man must have time to consider whether he should reverse or not. The Court is not bound to hold that a man should exercise his judgment instantaneously; a short, but a very short, time must be allowed for this purpose."

Now, allowing "a short, but a very short, time," to the officer in charge of the *Amelia* to consider whether he should reverse or not—although in his case it does not appear that any of the time consumed was devoted to that purpose—it seems to me that there were both time and space sufficient to have enabled the officer in charge of the steamer, by promptly and properly acting, so to manoeuvre his ship as to avoid the collision.

(1) 9 P. D. 81.

Instead of that he did what Lord Bramwell condemned in *The Ceto*, (1) "he speculated instead of making sure by stopping and reversing." See also *The State of California*. (2)

The nautical assessor whose opinion, as a question of seamanship, I asked as to what could have been accomplished in the circumstances by a competent seaman in command of the *Amelia* to avert the collision, assures me that he is convinced that had Pride, the mate of the *Amelia*, been in his proper place as officer of the watch, on the bridge near the telegraph, when the report "sails ahead" was made by Theriault, the lookout, and had then telegraphed to reverse the engines, no collision would have taken place. The nautical assessor further says that the report "sails ahead" and not "lights ahead" should have shewn the mate, and ought to have shewn any competent seaman, that his position was one of great peril, which necessitated the immediate reversing of the engines.

I further asked the nautical assessor whether in his opinion there was anything, other than stopping and reversing his engines, that the officer in command of the *Amelia* could have done to avoid the collision, and he confidently tells me that he is firmly of opinion that had the mate of the *Amelia* kept his helm "hard a starboard," the steamer would have gone astern of the *Diana*, and there would have been no collision, and he further says that his opinion is that if the helm of the *Amelia* had been properly put "hard a port" and kept there, there would have been no collision. I entirely agree with the answers of the nautical assessor to the questions submitted to him, and in so far as these answers are based upon elements of fact they are fully warranted by the evidence adduced.

(1) 14 App. Cas. 689. (2) 49 Fed. Rep. 172.

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But Mr. Harris argued on behalf of the plaintiffs that the provisions of article 23 were not available to the defendants because the breach of that article is not specially charged as such in the defendants' preliminary act. It is charged in the defendants' preliminary act in general terms, that the *Amelia* did not keep out of the way of the *Diana*, and article 23 only directs how that shall be done on approaching the other vessel, namely, if necessary, by slackening her speed, or by stopping or reversing. It is simply a mode of keeping out of the way, and is, it appears to me, included in the allegation in the defendants' preliminary act. In *The Bougainville* (1), keeping out of the way is thus defined by the court: "What getting out of the way is must depend, of course, on the circumstances of each particular case. It may be by porting, it may be by starboarding, it may be by stopping."

Apart, however, from the regulations, it would be negligence in a steamship which failed to slacken her speed, or to stop, or reverse, if such manoeuvre were "necessary" to avoid collision; and article 23 appears to be little more than a declaration of the law in this respect (2).

The plaintiffs can only be relieved from liability under article 20, and under the law as declared in article 23, by showing that the collision was caused by inevitable accident or by the culpable negligence of the *Diana*, neither of which propositions has the plaintiffs proved. The law on this point is thus stated by the court in the case of *The Carroll* (3): "The steamer was required to keep out of the way, slack her speed, or if necessary, stop or reverse * * * As the steamer did not keep out of the way, and as the collision did occur, the steamer is

(1) L. R. 5 P. C. 316.

(2) Marsden on Collisions at Sea, 5th ed. p. 416; and see *The Birkenhead*, 3 W. Rob. 75. See also, per Lord Halsbury, L.C., in *The Ceto*, 14 App. Cas. at p. 673; and per Lord Bramwell, *ibid*, p. 689.

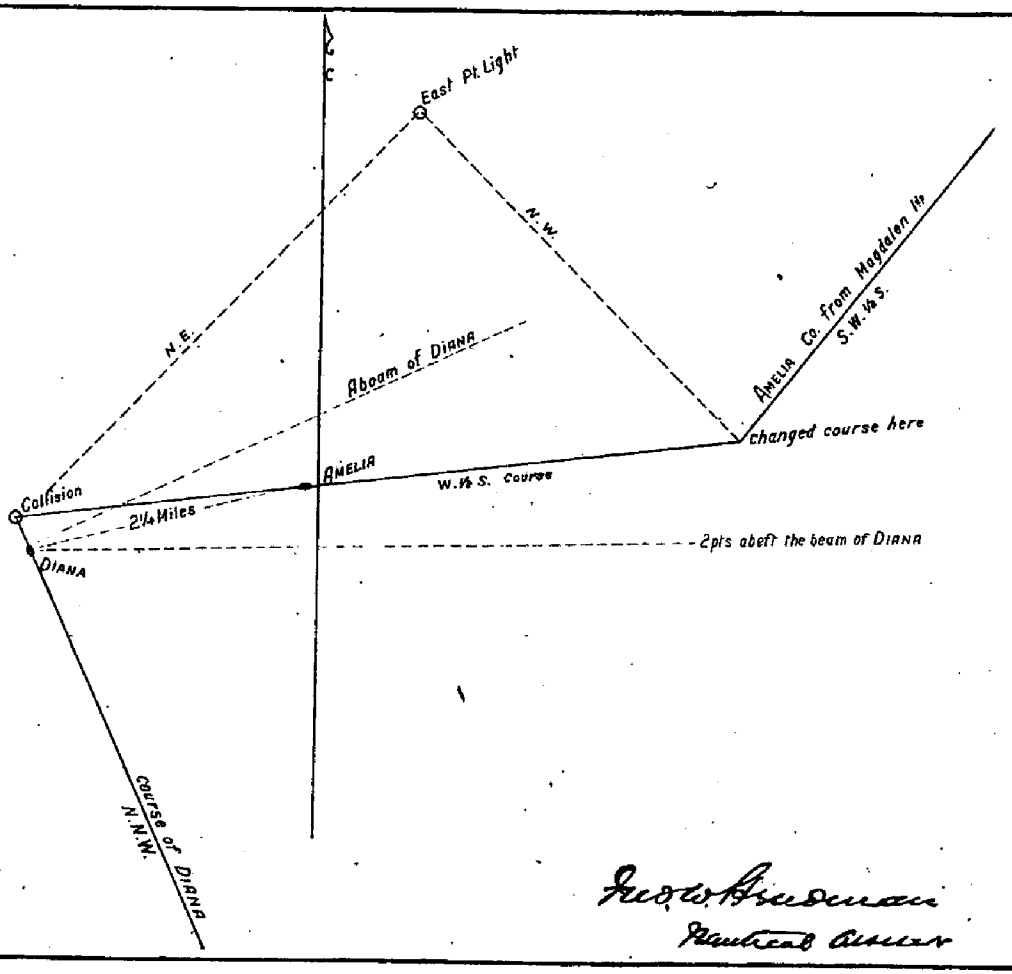
(3) 8 Wallace, 302.

AMELIA AND DIANA

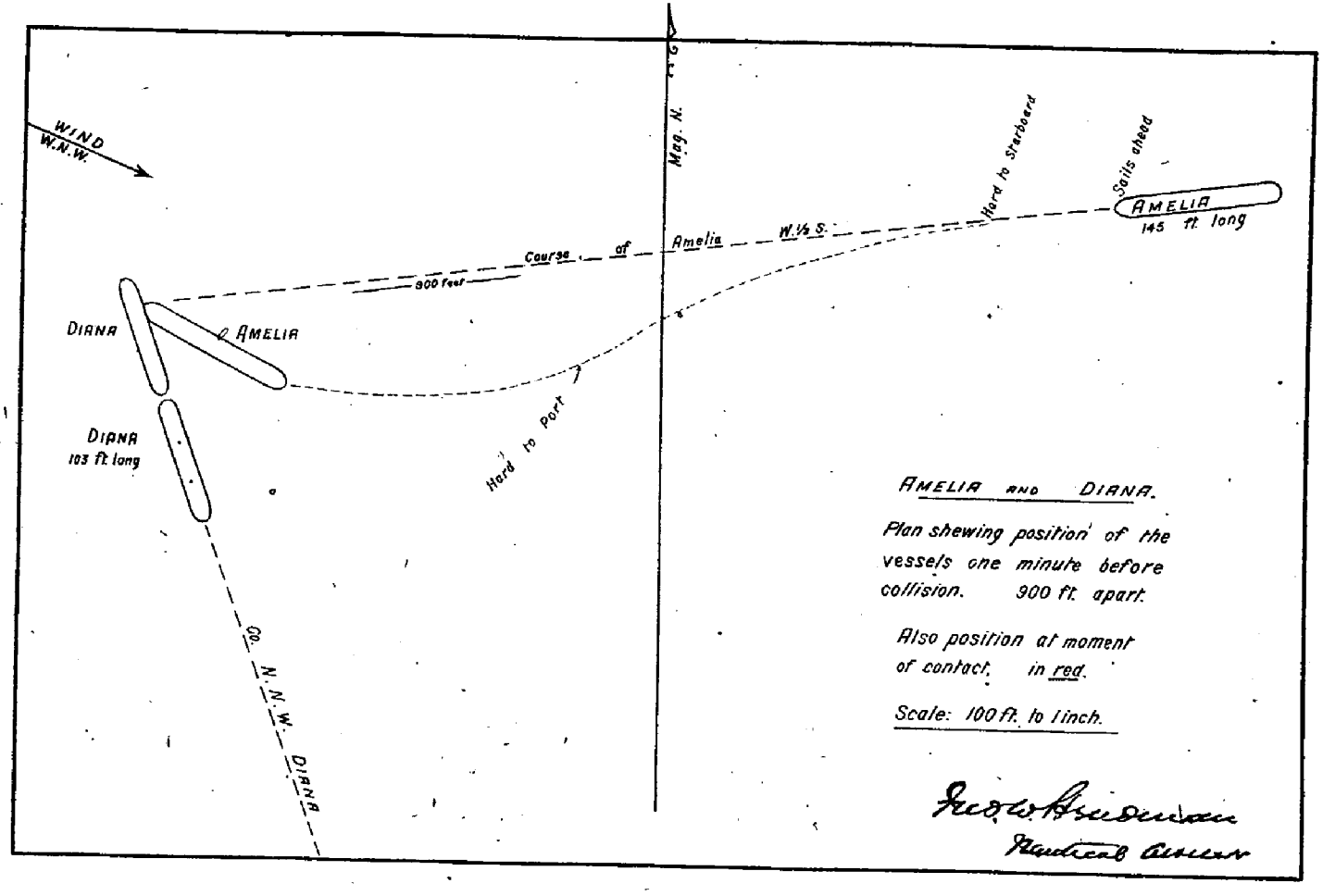
Plan shewing the positions of the two vessels one quarter of an hour before collision.

AMELIA speed 9 Kn.
DIANA " 1 Kn.

Scale 1 inch to the mile.



Geo. W. Buchanan
Montreal Aug 20


WIND
W.N.W.
Mag. N.
Hard to Starboard
Sails ahead
AMELIA
145 ft. long
Course of Amelia W.½S.
900 feet
DIANA
AMELIA
DIANA
103 ft. long
Hard to Port
Co. N.N.W. DIANA
AMELIA AND DIANA.
Plan shewing position of the vessels one minute before collision. 900 ft. apart.
Also position at moment of contact. in red.
Scale: 100 ft. to 1 inch.
Rear Admiral

primâ facie liable, and can only relieve herself by showing that the accident was inevitable, or was caused by the culpable negligence of the schooner." See also *The Nacoochee* (1); *The Oregon* (2.)

The *Amelia* did not keep out of the way of the *Diana*, and as the collision occurred through the negligence of those in charge of the *Amelia* in failing to take the necessary measures to avoid it, the plaintiffs are liable for the steamer's non-compliance with article 20, and with the law as declared in article 23.

It was finally contended by Mr. Dodge that in any event the faults of the steamer *Amelia* were so gross that the rule adopted by the Supreme Court of the United States should be followed and applied to her. That rule is thus stated in *The City of New York* (3): "Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favour."

Again in *The Umbria* (4), the rule is thus set forth: "Indeed so gross was the fault of the *Umbria* in this connection, that we should unhesitatingly apply the rule laid down in *The City of New York* (5), and *The Ludvig Holberg* (6), that any doubt regarding the management of the other vessel, or the contribution of her faults, if any, to the collision should be resolved in her favour."

And later in *The Victory and the Plymothian* (7), Chief Justice Fuller propounds the rule thus: "As between the vessels, the fault of the *Victory* being obvious

(1) 137 U. S. 330.
(2) 18 Howard, 570.
(3) 147 U. S. 72.
(4) 166 U. S. 404.
(5) 147 U. S. 72.
(6) 157 U. S. 60.
(7) 168 U. S. 410.

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and inexcusable, the evidence to establish fault on the part of the *Plymothian* must be clear and convincing in order to make a case for apportionment."

As I have already fully reviewed and considered the faults and defaults of the steamer *Amelia*, it is unnecessary to recur to them under this head.

I have given to this case the fullest possible consideration, and the conclusion at which I have arrived is that the steamship *Amelia* is alone to blame for the collision.

The only remaining question is concerning the plaintiffs' claim for salvage remuneration. One of the consequences of negligence causing collision is that the wrongdoer cannot recover salvage remuneration for services rendered to the ship with which he has been in collision. (1) I, therefore, allow no salvage remuneration.

The result is that finding as I do the steamship *Amelia* alone to blame for the collision, I condemn the plaintiffs in damages to the defendants with costs, and decree accordingly. The amount of such damages will be assessed in the usual way by the Registrar, assisted by one or two merchants.

Judgment accordingly.

(1) Cargo ex *Capella* L. R. 1 A. & E. 356; the *Ettrick*, 6 P. D. 127; the *Glenaber* L. R. 3 A. & E. 534; Marsden on Collisions at Sea, 5th ed. p. 280.

QUEBEC ADMIRALTY DISTRICT.

THE CANADA ATLANTIC RAILWAY COMPANY ..... } PLAINTIFF;

AND

S.S. NICARAGUA AND THE OGDENSBURG COAL AND TOWING COMPANY..... } DEFENDANT.

1907
June 1.

Maritime law—Shipping—Canal bridge — Collision—Rule 5 of Dominion Canals Regulations—Liability.

The defendant steamer was using the waters of the Soulanges Canal at night. On approaching the plaintiff's bridge over the Canal at or near Coteau Landing, and, when about one mile distant, the steamer gave the proper signal that she intended to pass through the bridge. When she came within view of the bridge, a green light was displayed on the northern abutment, which, according to established custom and usage, indicated that the bridge was open for the passage of ships. Then the steamer repeated the signal that she intended to pass through the bridge; but before she reached the bridge those on board discovered that the bridge was not open. Everything was done by those on board to avert a collision as soon as they became aware that the bridge was not open, but such measures failed to wholly prevent a collision, although largely mitigating the force of the impact. It was proved that the bridge-keeper was asleep when the defendant steamer was approaching the bridge.

Held, that, upon the facts, the defendant steamer had not infringed rule 5 of the Dominion Canals Regulations or any rule of law, and was in no way at fault for the collision.

ACTION for damages for collision.

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

E. Lafleur, K.C., for plaintiff,

A. Geoffrion, K. C., for the defendant.

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DUNLOP, L.J. now (June 1st, 1907), delivered judgment.

[After stating the allegations in the pleadings, the learned judge proceeded as follows:]

The evidence discloses that on the night in question, the 12th of September, 1905, at about 1.40 a.m, the steamer *Nicaragua* was approaching the bridge in question, and the weight of evidence shows that the lights were placed on the northern abutment or approach to the bridge, in the place where it is proved they were usually placed, and indicated that the bridge was open. The indication of this was a green light placed against the canal. The master of the *Nicaragua* swears positively to this and he is corroborated by all the other witnesses examined upon this point on behalf of the defendants.

The master, taking it for granted that the channel was clear, approached at a moderate and prudent rate of speed, and finally stopped and reversed on finding the bridge was closed.

It is shown that the following signals were given by him and carried out,–first, three blasts of the big whistle for the bridge, when about a mile off, after rounding the bend. A little while afterwards he saw the green light on the northern abutment of the bridge, and then he gave the signal for the engines of his vessel to check down; after which three blasts of the big whistle were again given for the bridge. A second check signal was then given to the engine room, and a little while afterwards Thibault, the second officer, reported that the bridge was not open. The signal was then given to the engine room to stop, then to reverse. This signal was repeated, and immediately afterwards, the reverse full speed signal was given. The whole time occupied from the "stop" signal to the signal "full speed astern" is sworn to as being from ten to fifteen seconds, or, as they say, as fast as the signals could be pulled.

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Unfortunately the bridge was closed, and it is proved that the way of the vessel was so deadened that when the collision took place the shock was hardly felt by the people on the vessel; and the evidence further shows that had the *Nicaragua* been proceeding at anything like the speed contended for by plaintiff, she would have gone right through the bridge into the Lock. No damage was done even to the paint on the vessel's stem.

Plaintiffs contend that the lights indicated that the bridge was closed. I am of opinion however, that the weight of evidence does not support this contention.

The question of lights is important. It is proved that the lights consisted of a lamp placed in a socket on a platform on the northern abutment or approach to the bridge, and that it was the duty of the watchman to place a green light against the canal when the canal was open, and a red light when the canal was closed. It is proved that the bridge in question was taken over by the railway company about eight or ten years ago, and this was just about the time of the opening of the canal, and that the Canada Atlantic Railway Company after that time took charge of the bridge, and appointed the men to look after it, light, maintain and repair it. Donaldson, a witness examined on the part of the Plaintiff, was asked if the acquiring by the Canada Atlantic Railway Company was made under written instrument, and he testified that he could not tell that; it being a matter between the manager and the government, and one that he had no knowledge of at all. At page 93 of his deposition he was interrogated as follows:

Q. But you have no knowledge of this, that under the arrangement, whether it was verbal or in writing by which the Canada Atlantic Railway Company took over that bridge, it was the duty of the railway company to maintain the lights on that bridge? A. Yes, certainly.

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Q. For the safety of navigators and for their own railway trains? A. Yes sir, that is right"

This shows conclusively that it was the duty of the railway company to attend to the lights, and to see that at all times they were properly placed. It may be observed that, unfortunately the lights did not work automatically, but had to be changed by the watchman, whose duty it was to attend to them. Everything, therefore would depend on his vigilance, and it is in evidence that he was anything but vigilant, as it is proved that he was asleep when the *Nicaragua* approached the bridge. He says that he did not hear any of the signals, but that when he heard the *Nicaragua* approaching, he ran to change the light, and could not get back to open the bridge on account of the collision which he saw was inevitable. He also states that the lights were properly placed, and that the red light was against the canal previous to his changing the lamp. As I said before, however, the weight of evidence shows conclusively that the green light was against the canal.

Although the plaintiffs invoke the lights in their favour, they now contend that the *Nicaragua* had no right to rely on the lights alone as indicating that the bridge was open when it unfortunately turned out that it was closed, and that the ship was in default in not stopping in accordance with the rules on which the plaintiffs rely. The captain after careful observation, and satisfying himself that the light indicated that the bridge was open, in my opinion, navigated the *Nicaragua* in a prudent and seamanlike manner.

The question seems to be, was the captain of the *Nicaragua* under the circumstances of this case justified in taking it for granted that the bridge was open? I think that the captain was justified in assuming that the bridge was open, as he relied on the green light which he had seen for a considerable distance, otherwise the

lights would be but a trap to delude and mislead navigators. The duty of the watchman, the employe of the plaintiffs, was to show proper lights, and, if he failed to do so, surely his employers must be liable.

When the captain satisfied himself by careful observation that the green light was against the canal, I do not see that the steamer was bound to stop.

Counsel for plaintiff in his argument relied strongly on the judgments rendered in the case of *Gilmour* v. *The Bay of Quinte Bridge Company*(1) and the case of the *St. Nicholas* (2). I have carefully examined the report of both cases, and in my opinion they are not applicable to the present case, for the reasons given by Mr. Geoffrion, K.C., in his argument for the defendant. If the green light was shown, as is conclusively proved, in my opinion, in the present case, the two cases cited by plaintiffs counsel are absolutely inapplicable. It will be seen that in the case of *Gilmour* v. *The Bay of Quinte Bridge Company*, the Honourable Mr. Justice Burton based his decision entirely upon this, that there was no evidence proper to submit to a jury of any negligence on the part of the defendants directly causing the accident or approximately contributing to it. (See 284 of the report). Can this be said in the present case, where it is proved that an employee of the plaintiff, whose duty it was to attend to the lights, was asleep when the *Nicaragua* was approaching the bridge. If he had not been asleep he would have heard the signals given by the *Nicaragua* and would have had plenty of time after hearing them to have attended to the lights and to have opened the bridge.

Availing myself of the valuable assistance of Captain James J. Riley, nautical assessor, in the present case, I have submitted the following questions to him, which with his answers are here given:

1. Do you consider that under the facts of this case as disclosed in the evidence, the steamship *Nicaragua* early

(1) 20 Ont, A. R. 281. (2) 49 Fed R. 671.

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in the morning of the 12th September, 1905, was properly navigated while proceeding west in the Soulanges Canal and approaching the Railway Swing Bridge over the said canal at or near Coteau Landing, and that all possible precautions were taken by its master and crew to avoid the collision which took place with said bridge If not state fully in what particulars the navigation of the said steamship was faulty, and what precautions might have been taken to avoid the collision with said bridge, which is proved to have taken place, which were omitted?

A. After careful consideration of the testimony in this case, I am of opinion that the steamer *Nicaragua* was properly navigated on the morning of the 12th of September, 1905, when approaching the Canada Atlantic swing bridge over the Soulanges canal on her way to Oswego; and that every possible precaution was taken to avoid the collision which unfortunately took place with said bridge. I find no fault in the navigation of the steamship *Nicaragua*; on the contrary it appears from the evidence that every precaution was taken that could have been taken to avoid the collision.

2. Did the collision between the said steamship and said bridge, on said occasion, arise from unavoidable circumstances, without fault being attributable to the said steamship, or was said collision caused by the fault of said steamship, its master or crew?

A.—I am of opinion that the collision between the said steamship *Nicaragua* and said bridge on the occasion in question did not arise from unavoidable circumstances, and I am further of opinion that no fault can be attributed to the said steamship, its master or crew, on that occasion."

With regard to section 5 of the Rules and Regulations of the Dominion Canals quoted by counsel for plaintiff, which reads as follows: "It shall be the duty of all "masters or persons in charge of any steam boat or other

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"vessel on approaching any lock or bridge to ascertain "for themselves by careful observation whether the lock "or bridge is prepared and ready to receive them, or "allow them to pass through; and to be careful to stop "the speed of any such steamboat or any such vessel "with lines and not with the engine and wheel, in suffi- "cient time to avoid a collision with the lock or its gates, "or the bridges, or other works of the canal and har- "bours etc", it was the duty of the master to ascertain by careful observation whether the lock or the bridge was prepared to receive his vessel, and having ascertained by observing the green light over half a mile off that the bridge was open, the master naturally concluded that he had no need to stop his boat with lines. The stopping with lines is only used as a means to help him to make careful observation.

If a green light is seen indicating that the bridge is open, it surely cannot be contended that the master is to ignore that light and not to rely on it at all. If so, what is the use of the light? The light is of no use whatever, if it cannot be relied on; but on the contrary, as I have already said, it would be a trap to the experienced navigator, and in fact submit him to positive danger. The theory advanced by the plaintiff is unsustainable, because it would render the lights absolutely useless and make them a positive danger. All that the master had to do, in my opinion, was to verify as he did by careful observation what light was shown on the bridge.

I am therefore of opinion that no fault can be attributed to the steamship *Nicaragua*, its master or crew or to its owners with respect to the collision in question in this cause; and consequently, for the reasons given in the present judgment, I dismiss plaintiff's action with costs.

Judgment accordingly.

A. E. Beckett, Solicitor for Plaintiff.

R. A. E. Greenshields, Solicitor for Defendant

BETWEEN

1907
April 2.

LORENZO G. CROSBY.....CLAIMANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Revenue—Customs law—Importation in original packages—False entry—Burden of proof.

Where a seizure is made of goods imported into Canada, on the ground that while the goods were stated in the entry papers to be imported in the original packages, they were not so imported in fact, if the claimant declines to accept the Minister's decision confirming the seizure and obtains a reference of his claim to the court, the burden of proof is upon the claimant to show the *bona fides* of the entry in dispute.

THIS was a claim for the return of moneys deposited with the Department of Customs for Canada to obtain the release of certain packages of molasses seized for an alleged infraction of the Customs laws.

The facts are stated in the reasons for judgment.

January 15th, 1907.

The case was heard at St. John, N.B.

Dr. Pugsley, K.C. (Attorney-General of New Brunswick) and *Trueman, K.C.*, for the claimant;

E. H. McAlpine, K.C., for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1907) delivered judgment.

On the 19th day of May, 1904, the claimant entered for warehouse at the Port of St. John, New Brunswick, 221 puncheons of molasses alleged to have been purchased in Porto Rico and imported *via* New York. This consignment was entered for consumption ex-warehouse as

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follows: 100 puncheons on May 31st, 100 puncheons on June 2nd, and the balance of 21 puncheons on the 15th day of June following. In all the entries the molasses was described as being produced in the process of the manufacture of cane sugar from the juice of the cane without any admixture with any other ingredient, and as being imported in the original packages in which it was placed at the point of production, and that it had not thereafter been subjected to any process of treating or mixing. Molasses of that description imported in that way, which tested by polariscope forty degrees or over, was, under item 441 of the Customs tariff, dutiable at the rate of one and three-fourth cents per gallon. If it tested less than forty per cent by polariscope a higher duty was exacted, while other molasses was, under item 440 of the said tariff, liable to duty at the rate of three-fourths of one cent per pound. This molasses was entered for duty under item 441 of the Customs tariff, and as it tested more than forty degrees by polariscope the duty as stated was one and three-fourth cents per gallon. Owing to representations emanating from a rival firm the entry as made by the claimant fell under suspicion, and on the 7th day of June following 116 puncheons of this molasses was seized on the ground that the statements made in the entry papers that the molasses was in the original packages in which it was placed at the point of production, and that it had not been mixed, were not true. The molasses, pending the decision of the Minister of Customs, was released upon a deposit of $1,308.44 being made. That sum represents, it is said, the duty at the rate of three-fourths of one cent per pound on the molasses contained in the 116 puncheons. The facts applicable to the other 105 puncheons were exactly the same, but no deposit was exacted as to the latter and no higher duty collected thereon than that at which the claimant entered them. On the 5th day of

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September, 1901, the Minister of Customs by his decision made on the report of the Commissioner of Customs maintained the seizure and declared that the deposit mentioned should be retained and the case closed. The claimant having declined to accept the Minister's decision the matter has been referred to this court.

The case turns upon two questions of fact, namely:

First, was the molasses that the claimant entered for duty on the 19th day of May, 1904, contained in the original packages in which it was placed at Porto Rico, the place of production? and

Secondly, had this molasses, after being placed in such packages at the place of production, been treated or mixed?

The burden of proof is on the claimant. Unless the court can answer the first question in the affirmative and the second in the negative, its judgment should be entered for the respondent.

A large part of the evidence was given under commission and it has taken a wide range dealing with a number of matters and questions that are not in any way relevant to the two issues that have to be decided. All the evidence that really bears on such issues is contained within a narrow compass.

The claimant was not the real owner of the molasses. It was owned by the N. W. Taussig Company of New York, who in respect of this transaction used the name of a company they controlled known as the Porto Rico Commercial Company. Under that name they exported the molasses to St. John, N.B., consigned to the claimant, who sold it for them on commission. On May 4th, 1904, the Taussigs purchased from L. W. & P. Armstrong, the New York agents of Bird & Son, of Fajardo, Porto Rico, 200 puncheons and 21 casks of molasses then lately shipped by Bird & Son from Porto Rico to New York. The bill of lading of the 200 puncheons bears

date of the 15th day of April, 1904, and gives the following as the marks upon the packages: "Arkadia Molasses, Porto Rico, Extra Choice." The bill of lading of the 21 casks is dated the 19th day of April, 1904. It describes the packages as puncheons and gives the marks thereon as "Arkadia Pto. Rico." As nothing turns on the use of the terms puncheons or casks it will be convenient to refer to them all as puncheons. On the 6th of May, that is two days after the purchase, the 221 puncheons were placed in the Atlantic Warehouse at Brooklyn. This warehouse is controlled by the Taussigs, and immediately adjacent thereto is a Refining or Sugar House belonging to them where molasses is mixed or treated. On the 10th day of May the Taussigs under the name of the Porto Rico Commercial Company shipped from New York to St. John, N.B., by the Metropolitan Steamship Company, 130 puncheons of molasses, the packages, according to the bill of lading bearing on one head the mark "Arkadia Pto. Rico, Molasses," and on the other head the mark "Extra Choice." And on the 11th of May there was a similar shipment of 91 puncheons, the packages bearing, according to the bill of lading, the marks "Arkadia Pto. Rico Molasses" and "Extra Choice."

In May, 1904, Maxwell T. Crompton was the receiving and delivery clerk at the Atlantic Warehouse, Brooklyn. He was employed by the Taussigs and paid by them, and had at the time exclusive charge of all goods in the warehouse. On or about the 6th of May he received into the warehouse the 221 puncheons purchased from the Armstrongs. On the 9th, 10th or 11th of May he delivered from the warehouse to lighters the 221 puncheons that were shipped to the claimant at St. John. On the 27th of June, 1904, he made an affidavit in which he states that the 200 puncheons and 21 casks received by him on the 6th of May were delivered to the lighters

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for shipment on the 10th or 11th of May. This affidavit was before the Minister of Customs when he gave his decision. In June, 1905, Crompton was examined at New York under a commission issued out of this court at the instance of the respondent. He produced his memorandum book in which he made his entries. From that he made some correction of the dates given in his affidavit. The goods, he said, were received on the 5th and 6th of May and delivered ex-warehouse on the 9th and 10th of May. He did not say directly that the packages he delivered on the latter dates were the identical packages received on the 5th or 6th, but that is, I think, the fair inference to be drawn from his evidence. He stated that he remembered the 221 puncheons particularly, that he saw them from day to day, and that they were never removed from the warehouse to the refinery. He states that the packages were branded "Arkadia." Now, if Crompton on the 9th, or 10th or 11th of May delivered from the Atlantic warehouse to lighters to be shipped the indentical 221 packages that he had received on the 5th and 6th for the Taussigs from the Armstrongs, the contents being in the same condition as when received, there would be, I think, an end of the question, and the claim should be maintained. If there was any change or substitution of packages, any treating or mixing, it was done during the four or five days that the goods were in the Atlantic warehouse. Both Mr. Noah W. Taussig and Mr. Isaac W. Taussig deny that anything of the kind happened, but both speak from what they know of the course of business and not from personal knowledge of what actually took place. Their evidence also goes to show that there was nothing to be gained by treating or mixing this particular molasses or by changing the packages in which it was received. Mr. I. W. Taussig states in his evidence that instructions were given to

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have the wine guage that the Armstrongs had put on the puncheons obliterated and to substitute an Imperial guage. This Imperial guage was found on one head of the puncheons that arrived at St. John. These instructions it was said were given to the superintendent of the sugar house, who would in the course of business communicate them to Mr. Crompton. The changes would be made by one or more of the three gaugers employed by the Taussigs. Of two samples of the molasses that the Armstrongs sold to the Taussigs, one sample tested by polariscope 48-8/10 degrees and the other 49-2/10 degrees. The record of the test made in Canada of the molasses entered by the claimant is not before the court. But it was stated, and not denied, that it tested 48 degrees.

With regard to the first question stated, namely, whether the molasses in question was delivered at St. John in the packages in which it was shipped at Fajardo, Mr. Samuel Robinson, the chief gauger at St. John, on the 27th day of June, 1904, made a report to the collector of that port respecting the 221 puncheons mentioned, that "the packages were all old, second hand packages" and that the "custom at Fajardo is to export molasses in "new packages." That report is attached to the file of the Customs Department relating to this matter, and constituted, so far as I can see, the principal evidence on which the Commissioner and Minister of Customs came to the conclusion that the molasses was not delivered at St. John in the original packages in which it was placed at Fajardo. The evidence before the court on that point is much stronger against the claimant. While the molasses that the Armstrongs sold to the Taussigs was in the former's possession and before it was delivered to the latter it was guaged on behalf of the former by James F. Johnston, their gauger, and he was in June, 1905, examined as a witness under the commission issued

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on behalf of the respondent. He states that he commenced the guaging of this molasses on the 6th of May and finished it on the 7th. If he is right as to this, some of the puncheons must have been delivered at the Atlantic Warehouse on a day later than that given by Crompton. But nothing, so far as I can see, turns on that. He states further that all the packages were new, that he did not see any guage marks on them before he put his marks thereon; that his guage was made in wine measure and that he inscribed the guage on the chime or quarter of the puncheons. The packages which contained the molasses that the claimant entered at St. John on the 19th day of May, some twelve days later, were old and weather worn. Samuel Robinson, the chief guager at St. John, and his assistant guagers Frank R. Connor and Henry P. Allingham, all agree as to that. Their evidence is in this respect, in part corroborated by that of Frank Trainor, a cooper, who was employed by the claimant to do some work on the puncheons mentioned. He says they were rather old and weather beaten on top where they were exposed to the weather; but that when they were rolled over they were bright and new underneath. He also adds that the puncheons showed no signs of recooperage, from which fact the inference is to be drawn that they had not been used for molasses before. I am, however, quite unable to accept the suggestion that the re-shipment of these packages from New York to St. John can account for such a marked change in their appearance as that described. For a part of the twelve or thirteen days that intervened between the time that Johnson guaged the molasses and the claimant entered it at St. John, the puncheons were in the Atlantic Warehouse where there would be no exposure to the weather. If Johnston is right about the packages being "new" or "brand new" as he states, the conclusion is, I think, a fair one that those which

were delivered at St. John were not the packages that contained the molasses which the Armstrongs sold to the Taussigs. But that is not all. Johnston says that he put his guage marks on the chime or quarter of the puncheons. Those which contained the molasses entered for duty by the claimant, as mentioned, had no signs or indications of any such marks on the quarters or chimes of the puncheons. There were indications, however, of guage marks having been placed on the bilge of such puncheons and afterwards obliterated. At first I thought that perhaps Johnston had through some inadvertence used the term "chime" when he really meant "bilge." But later in his evidence in explaining how he made his measurements he again used the word "chime" in a way that showed that he understood the proper use of the term and knew what he was speaking about. Of course it is possible that Johnston may be mistaken both as to the appearance of the packages he guaged, and as to where on the puncheons he placed his guage marks. If he is mistaken Crompton may on the 9th, 10th or 11th of May, have delivered ex-warehouse for shipment to St. John the identical packages that had been received into warehouse from the Armstrongs on the 5th or 6th of May. But if Johnston is right Crompton must be mistaken. Neither witness was examined before me. The evidence of both was taken in June, 1905, under the commission issued at the instance of the respondent. I had of course no opportunity of observing the demeanour of either witness. Crompton is in the employ of the Taussigs, the parties really interested in maintaining this claim. Johnston is in every way a disinterested witness. There was a later commission issued at the instance of the claimant and executed at New York in October, 1905. The case did not come on for trial until January of this year. If Johnston was in error in his evidence as to the packages being new when he guaged them, or as

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to the marks he put thereon, and the position of such marks, the claimant had ample time and opportunity to show it. With regard to the obliteration of the wine gallon guage marks and the substitution of the Imperial gallon guage marks which has been mentioned, that was done while the puncheons were in the Atlantic Warehouse It appears that the change would not be made without the superintendent of the sugar house and Crompton knowing of it. But the latter makes no mention of the change, and the former was not called as a witness. Neither was the guager or guagers who made the changes called. All of those might, and some of them would, no doubt, have known where on the puncheons these wine gallon guage marks were placed, and whether the puncheons were new or old at the time. But no attempt has been made to show by their evidence or otherwise that Johnston was mistaken in what he stated, and I see no good reason for disregarding his testimony. The claimant's case is not, I think, strong enough to justify me in doing that, and in coming to a conclusion opposite to that to which the Commissioner and Minister of Customs came. As has been shown, the evidence before me relating to the question of original packages is stronger against the claimant than that with which they dealt in arriving at the decision to which the Minister came.

The burden of proof as stated, is on the claimant. That burden, as it affects the question as to whether the molasses in question as entered for duty at St. John, N.B., was in the original packages in which it was placed at Fajardo, Porto Rico, has not, I think, been discharged. To answer the question in the affirmative is to disregard Johnston's evidence, and I do not think that I would, on the case presented, be justified in doing that. As the affirmative is not established the question must be answered in the negative. In that view of the

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case it is unnecessary to discuss the other question as to treating and mixing. The claimant's case fails if either of the two questions is answered adversely to him.

There will be judgment for the respondent, and the costs will, as usual, follow the event.

Judgment accordingly.

Solicitor for the claimant: *A. J. Trueman.*

Solicitor for the respondent: *E. H. McAlpine.*

IN THE MATTER OF THE

1907
June 10.

PETITION OF RIGHT OF ANNIE SEDGEWICK..... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public work—Government railway—Injury to the person—Negligence of Crown's servant—Liability.

The suppliant, while waiting on the platform of the Intercolonial Railway Station at Stellarton, N.S., to board a train, was knocked down by a baggage truck and injured. The truck was being moved by the baggage-master. The evidence shewed that the accident could have been prevented by the exercise of ordinary care on the part of the baggage-master.

Held, that as the injuries of which the suppliant complained were received on a public work, and resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment, the Crown was liable therefor.

PETITION OF RIGHT for damages arising from negligence on a Government railway in the Province of Nova Scotia.

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

January 23rd, 1907.

The case was heard at Halifax.

A. Drysdale, K.C., (Attorney-General of Nova Scotia), *H. Mellish, K.C.*, and *J. A. Sedgewick* for the suppliant;

R. T. McIlreith and *C. F. Tremaine* for the respondent.

Mr. *Mellish* contended that there was a clear case of negligence under the statute proved against the Crown. The suppliant had a perfect right to be where she was when knocked down. If the railway official had been propelling the baggage truck with proper care he could

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not have failed to see the suppliant standing on the platform. The truck was being moved with too great speed consistent with the number of people on the station platform, and those in charge of it failed to take any measures to warn people of their approach. (*Shepperd* v. *Midland Ry. Co.* (1); *Snow* v. *Fitchburg Railroad Co.* (2).

Mr. *MacIlreith* contended that upon the evidence there was no negligence on the part of the station-master; but if there was any negligence on his part, the real cause of the accident was contributory negligence on the part of the suppliant. Cited *Cornman* v. *Eastern Counties Ry. Co.* (3); *Powers* v. *New York, &c. Ry. Co.* (4).

Mr. *Mellish* in reply cited *Byrne* v. *Boadle* (5).

THE JUDGE OF THE EXCHEQUER COURT now (June 10th, 1907,) delivered judgment.

The petition is brought by Annie Sedgewick, wife of William W. Sedgewick, of Middle Musquodoboit, in the County of Halifax, and Province of Nova Scotia, to recover damages for injuries to the person, which she sustained on the 26th day of September, 1905, by being struck and thrown down by a loaded truck which Warren Johnson, the baggage-master at Stellarton Station, on the Intercolonial Railway, was moving from one end of the station platform to the other end thereof. The suppliant and her husband were at the time standing at the edge of the platform next to the railway track intending, as passengers, to go on board of a train that was then being backed in. The baggage-master was at the same time moving a truck loaded or partly loaded with luggage intended for the same train. He had ample room to pass on the platform between the suppliant and her husband and the station house. They, on the other

(1) 20 W. R. 705.
(2) 136 Mass. 552.
(3) 4 H. & N. 781.
(4) 98 N. Y. 274.
(5) 2 H. & C. 722.

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hand, were as close to the edge of the platform as it was safe for them to be. They had seen the truck approaching in a direction which if it had been continued parallel to the edge of the platform would have allowed the truck to pass them safely. However, as the baggage man approached them the direction of the truck was converging toward the edge of the platform, and this brought the suppliant and her husband into a danger of which they were not aware. For, having observed the truck, and come to the conclusion, rightly, I think, that it would pass them without danger, they fixed their attention on the train that was being backed in close to where they were standing. The truck passed the suppliant's husband who was standing on the left, but it, or some part of the load thereon, struck the suppliant and threw her down. There was not the slightest reason for the accident. It could have been prevented by the exercise of ordinary care on the part of the baggage man. The fact is that he did not see either the suppliant or her husband, and he did not observe that by moving his truck in the direction he was going he was bringing them into danger between the truck on one side and a moving train on the other. He ought, I think, to have seen them, and to have avoided striking them either with the truck or its load. There is, it seems to me, no doubt, that the injuries to the person of which the suppliant complains, and which were received on a public work, resulted from the negligence of a servant of the Crown while acting within the scope of his duties and employment.

I do not think there was any contributory negligence on the suppliant's part. There will be judgment for her for six hundred dollars and costs, to be taxed.

Judgment accordingly.

Solicitors for the suppliant: *Drysdale & McInnes.*

Solicitor for the suppliant: *R. T. MacIlreith.*

APPEAL FROM NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

THE SHIP "*LADY EILEEN*" (Defendant)..... } APPELLANT;

1907
April 8.

AND

LEANDER JOSEPH POULIOT (Plaintiff)..... } RESPONDENT.

Shipping—Master's wages—Action for wrongful dismissal.

On the 27th of January, 1905, the respondent entered into an agreement in writing with the appellants to proceed to Glasgow, Scotland, and take command of the steamer *Lady Eileen* and bring her to the port of Sydney, C.B. Thereafter he was, in the language of the agreement, "subject and obedient to the orders of the managers of said company to continue in command of the said steamship until the first day of January, A.D. 1906, or until such earlier time as may be ordered by the said managers." By another clause of the agreement it was provided that "notwithstanding anything herein contained it is the clear intention and meaning of these presents that for his services during the season of A.D. 1905, he, the said L. J. P. shall be paid at least the sum of $1,050, irrespective of the length of the season, unless for neglect or breach of duty he be sooner dismissed, or the Company have a proper right of set-off against the same." The respondent brought the *Lady Eileen* to Canada, and the appellants placed her on the route between Campbellton, N.B., and Gaspé, P.Q., under the command of the respondent as master. A subsidy was obtained for carrying His Majesty's mails between the said ports twice a week, and the ship made her first regular trip on the 13th May, 1905. On the 29th June, the ship left Gaspé for Campbellton, reaching Dalhousie about 9 p.m. After landing his freight at that place, the respondent thought it was not safe to proceed to Campbellton on account of the darkness and certain obstacles then in the channel. His view of the danger of proceeding in the darkness was shared by the pilot. At about 10.30 o'clock he received the following telegram from the appellant's manager: "Leave Dalhousie at once. Do not lay in Dalhousie. See that you follow these orders." To which he replied: "Will leave Dalhousie daylight to-morrow, or whenever I think proper." The ship arrived at Campbellton early the

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next morning, but too late to deliver the mails to the morning train. The respondent was then immediately dismissed from their service by the appellants.

Held, affirming the judgment appealed from, that the respondent's disobedience of the order given to him was, under the circumstances of the case, justified, and that his dismissal was wrongful.

APPEAL from a judgment of the Local Judge of the New Brunswick Admiralty District.

The facts of the case are stated in the reasons for judgment of the learned trial judge, which are as follows:

McLEOD, L.J.: "The plaintiff in this case was for a time in 1905 master of the steamship *Lady Eileen* plying between Campbellton, N.B., and Gaspé, Quebec. He was dismissed by the owners, or by Mr. Franklin S. Blair on behalf of the owners, on the 30th of June, 1905, and it is for this dismissal that this action is brought.

"The agreement as to the hiring and the facts leading up to the dismissal may be shortly stated as follows:—

"The *Lady Eileen* is a steamer built for and owned by the Interprovincial Navigation Company, Limited, (hereinafter called the company), and was built for the purpose of running between Campbellton and Gaspé. After some negotiations the owners agreed to hire the plaintiff as master of the steamer and on the 27th of January, 1905, an agreement of hiring in writing was entered into between the company and the plaintiff. The agreement, which is in evidence, in the first place recited that the company proposed to establish a steamship line plying between Campbellton, in the Province of New Brunswick, and Gaspé, in the Province of Quebec, and for that purpose would at the opening of navigation in the (then) coming spring place on the route the steamship *Lady Eileen*, and also that at a duly constituted meeting of the directors of the said company held at the town of Campbellton, on Thursday, the 26th of January, (then) instant, that the said Leander Joseph Pouliot (the plain-

tiff) be constituted and appointed master of the said steamship, and that an agreement for that purpose be entered into upon the terms and conditions (then) following. The agreement then follows. It is not necessary here to set it out in full, but by it the plaintiff was appointed master of the *Lady Eileen* until the first day of January, A.D. 1906, or until such earlier time as might be ordered by the said managers. He was to report at the office of the company in Campbellton on the 1st of February, 1905, and then proceed to Glasgow, Scotland, and take command of the steamer and bring her to the port of Sydney, Cape Breton. The agreement then proceeds:

"After which he will, subject and obedient to the "orders of the managers of the said company continue "in command of the said steamship until the first day of "January, A.D. 1906, or until such earlier time as may "be ordered by the said managers. And it is hereby "covenanted and agreed by the said company to and "with the said Leander Joseph Pouliot that it will com-"pensate and pay to the said Leander Joseph Pouliot "for his services for the period extending from the said "21st day of February, A.D. 1905, down to and includ-"ing the day of arrival of the said steamship at the said "port of Sydney a sum of money computed at the rate "of one hundred and twenty dollars and sixty-seven "cents per month for all the time aforesaid and in "addition thereto will reimburse and pay to the said "Leander Joseph Pouliot all ordinary and proper "expenses incurred by him in and about the said service "during the said period."

"And it was further agreed that the salary of the plaintiff after the steamship arrived at Sydney and as long as he continued in the employ of the company should be one hundred and sixteen dollars and sixty-six

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cents a month and free board on the steamship while on duty.

"There was a further provision that in the event of the company requiring the services of the plaintiff after the close of the navigation on the said route it should have the right to command and continue his services as master in other waters for a period of three months for the gross sum of one hundred and fifty dollars and free board, but nothing in this case turns on this clause of the agreement.

"The last clause of the agreement is as follows: '"Notwithstanding anything herein contained it is the clear "intention and meaning of these presents that for his "services during the season of A.D. 1905, he, the said "Joseph Leander Pouliot, shall be paid at least the sum "of one thousand and fifty dollars irrespective of the "length of the season, unless for neglect or breach of "duty he be sooner dismised or the company have a "proper right of set off against the same.'"

"Owing to some delay in completing the work on the steamship the company notified the plaintiff not to report for orders until the 27th of February, on which day he reported at the company's office. On the 6th of March he was directed to proceed to Glasgow to take charge of the steamship. The instructions were in writing and are in evidence. I do not think, however, they effect the questions arising in this case. By the instructions, however, he was directed to bring the steamship to Sydney or whatever other port in Nova Scotia the ice would allow him to make.

"The plaintiff then proceeded to Glasgow and, when the steamship was ready, brought her to Louisburg, N.S., arriving there on the 28th of April, 1905. He reported to the company, and Mr. Blair, one of the managers, went there and met him. The steamship was then coaled and proceeded to Campbellton and

commenced running on the route between there and Gaspé, leaving Campbellton on her first trip on the 18th of May. The plaintiff continued as captain until the 30th of June, when he was dismissed by Mr. Blair, one of the managers, as he (Mr. Blair), alleges, for for breach of duty, or rather for disobeying the orders, or rather an order of the company, the order itself having been given by Mr Blair. It is for this dismissal that this action is brought.

"It appears that the steamer was subsidized by the Dominion Government to carry the mails between Campbellton and Gaspé. She made two trips a week, leaving Campbellton on Wednesday and Saturday mornings. When she left on Wednesday morning she was due to arrive at Campbellton on Thursday night or Friday morning, in time to deliver the mails at the train which passed there at about three o'clock in the morning. When she left on Saturday she got back, I should judge from the evidence, on Monday night.

"The steamer left Campbellton on Wednesday morning, the 28th of June, 1905, in charge of the plaintiff as master, on her usual trip to Gaspé, and on her return reached Dalhousie at about 9 o'clock, p.m., or perhaps a little after nine, on the night of the 28th. He discharged what cargo he had to discharge there and remained there until daylight. His reasons for doing so, he says, were that the night was very dark and he did not know the channel of the river very well, and he did not think it safe to venture further up the river until daylight. (Campbellton, I should say, is about twelve or thirteen miles farther up the river Restigouche from Dalhousie.) He also says that Peterson, who was his pilot, and who was appointed by the owners, was not a proper or safe pilot. From the evidence it appears that Peterson was appointed a special Branch Pilot, that is a commission was given him to act as pilot on the Restigouche River,

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and this it also appears was given him at the request of the managers of the *Lady Eileen*, some of whom were on the Pilot Commission, and it was given him so that he might act as pilot on the *Lady Eileen*. I gather from the evidence that he was not what could be called a good pilot, although he acted as pilot on this steamer, having been appointed for that purpose by the managers.

"The plaintiff says that after he had landed his freight at Dalhousie it was very dark and he thought it was not safe to proceed, and that he consulted the pilot, who agreed with him that there were risk and danger. The plaintiff says on his cross-examination at page 40, as follows:

"Well when she was fastened he (meaning the pilot) was on the wharf and I was on the wharf and I said "Are we going?" He says: "I think we will try it," "so we went on landing the freight and after we landed "the freight it got very dark, overcast, and it was late, "flood tide, and those dredge moorings right in the "middle of the channel, so I met Peterson and said I "'I think the best thing we can do is to wait until day-"light, we have a dark night, we have the flood tide, "there is very dangerous moorings, the harbour is full of "ships and we will get there early in the morning and "there will be no time lost,' and it was at the wharf, "passengers could take the train and go, it wasn't like "any place where passengers couldn't take the train.'" "And Peterson said: "Yes, you are all right; that is "right, captain, I agree with you, there is risk, there is "danger," and I say, "I guided myself a little by the "message I got yesterday. Take no risk."

"The message he there refers to is one he had received on Wednesday, the previous day, at Paspbiac, a port of call on his way to Gaspé, and is as follows:

"'Heavy gale and big sea at Grand River, better wait at Paspbiac and enquire at telegraph office state of

weather below before proceeding; if weather does not moderate may possibly order you to Port Daniel and return to Campbellton; take no risks and advise us fully what you do. F. S. BLAIR.'

"He says when he arrived at Port Daniel the weather was clear and he proceeded to Gaspé. I will refer to this telegram later.

Peterson, the pilot, was called by the defendant and in his direct examination as to the steamer not proceeding to Campbellton that night says as follows, at page 215:

"Q. While moored at Dalhousie, or when coming into Dalhousie, at any time that evening, did Captain Pouliot consult you about bringing the steamship on to Campbellton?—A. No, sir.

Q. Did you intimate to Captain Pouliot in any way that you approved of her being moored and staying at Dalhousie all night?—A. No, sir.

Q. What sort of night was it?—A. It was very dark.

Q. Would you consider it an unsafe night?—A. I would say it would be. It wasn't very safe to come up.

Q. Had you been captain of the steamship in Captain Pouliot's place would you have brought the vessel up?—A. Well, I couldn't say.

Q. What would you have done?—A. I would have left the wharf and see if I couldn't get an anchor.

Q. To where you could get an anchor if you couldn't get through?—A. Yes.

Q. Suppose you had been in Captain Pouliot's place and had received this order? Objected to.—A. I would have left the wharf.

Q. You would have proceeded to bring the vessel to Campbellton?—A. I might not have got to Campbellton.

Q. Would you have proceeded to bring the vessel on to Campbellton?—A. I would."

On his cross-examination he says at p. 216:

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"Q. I understand it was a very dark night at Campbellton?—A. Yes.

Q. And in your judgment it was not very safe to come up that night?—A. No, I would say it wasn't.

Q. Did Captain Pouliot tell you he didn't intend to come up that night? A. Well, he said it was too dark.

Q. And did you approve of that?—A. Well, yes. I think I did.

Q. You knew about these dredge moorings being in the channel, did'nt you—A. Yes.

Q. Did that constitute a source of danger in your opinion? A.. Well, they would be."

On this re-examination he says as follows, at page 218;

Q. As to this dredging my learned friend has asked you about was that such a serious danger as would have prevented your bringing the ship up that night?—A. I say it would be on account of her buoys. I wouldn't like to try it.

Q. You would have thought the dredging buoys would have prevented you coming up?—A. Yes, you would say so, would you?—

Q. Even with this source of danger had you received the order Mr. Blair gave you, you would still have persisted in bringing the ship, or would you?

Objected to.

A. I would.

Q. Had you received such an order, even if there were one or two or a dozen dredging buoys in the channel what would you have done?—A. I would have left the wharf and brought the ship up as far as I could and anchored.

Q. You certainly would have proceeded?—A. Yes."

"The order referred to was a telegram sent by Blair, the manager to the plaintiff, at about half past ten in the evening, and after Blair had learned that plaintiff intended to wait in Dalhousie, and is as follows:—

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'Leave Dalhousie at once. Do not lay in Dalhousie. See that you follow these orders."

F. S. BLAIR.'

To that the plaintiff replied as follows:

Will leave Dalhousie daylight to-morrow, or whenever I think proper."

CAPTAIN L. J. POULIOT."

"The plaintiff left Dalhousie at about a quarter to three, which was about daylight, and arrived in Campbellton about half past four or between that and five o'clock, but too late to deliver the mails to the train passing Campbellton that morning.

"I may say that when the plaintiff decided to remain over at Dalhousie he sent the mails to the railway station there, but the agent declined to receive them, or rather to be responsible for them, and they were taken back to the steamer. The plaintiff on his arrival in Campbellton was immediately dismissed by Mr. Blair, the manager, and it was for disobeying the order contained in the telegram of the night before that he was so dismissed.

"At the trial some evidence was given of conduct on the part of the plaintiff at other times, which on the argument it was claimed would warrant his dismissal I will, however, refer to these reasons later. The defendants claim that when the plaintiff was within reach of his owners he was obliged in any event to obey the orders they gave him, and they claim that the words in the contract "after which" (that is after he has arrived at Sydney) "he will *subject and obedient* to the *orders of the managers* of the said company continue in command of the steamship," &c., made it necessary for him to obey whatever orders they gave. I do not think these words carry the control of the managers or the company any farther than an ordinary simple contract of hiring would. The captain is always subject to the orders of his owners. The owners direct him as to the business of the ship and

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as to the way and manner in which it is to be engaged. He is, however, appointed and given charge of the ship as master because he is believed by the owners to have the requisite skill and knowledge of seamanship to properly navigate her; and as master in charge of the ship he is charged with the safety of the ship and cargo and with the life and health of her passengers and crew.

"In this case the charge is that he remained in Dalhousie after discharging his cargo on the night of the 29th June until about a quarter to three in the morning of the 30th when he proceeded to Campbellton. He did this, as I have said, because he considered it unsafe to proceed.

"Under the evidence I think there was no *mala fides* on his part in not proceeding. There may have been an error in judgment, but that would not forfeit his wages. (See *The Atlantic* 7 L. T. Reps., p. 647.) I am not, however, prepared to say that there was even an error in judgment. The evidence, I think, disclosed that he had good reasons for not proceeding. The night at Dalhousie when he had finished loading was very dark, the plaintiff himself was not sufficiently familiar with the channel of the river between Dalhousie and Campbellton to undertake to navigate it on a dark night, and the pilot (who as I have said was appointed by the owners and was not a very competent pilot) agreed that it was not safe to proceed. Dredging operations were being carried on on the river between Dalhousie and Campbellton, and this the plaintiff thought added to the difficulties and danger of proceeding that night, and he accordingly decided to remain until daylight and at daylight he did proceed and arrived at Campbellton at or a little earlier than he had arrived on previous trips.

"The evidence does not show that he acted in bad faith or from any improper motives, or in collusion with anyone, or for any ulterior purpose; but I think it shows that he did

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not proceed simply because he thought it unsafe to do so, and as I have said, acting thus *bonâ fide*, even if he made an error in judgment it would not make a forfeiture of wages already earned, or justify his dismissal.

"It is claimed, however, that as he was within easy reach of his owners that he should have communicated with them before deciding to remain, or at all events obeyed the direct order he received to proceed. It would, I think, have been a better course for him when he had decided to remain to have so informed his owners, but the fact that he did not do so, cannot, I think affect the result of this case. It is true that where a question arises as to the business or management of the ship the master must, if he is a in a position to do so, communicate with his owners and must obey the orders received from them; but that cannot be the case where it is a matter of seamanship as to whether it is safe under the conditions of the weather to proceed or not. He, in that case must be the person to determine the question, always supposing he acts *bonâ fide* and in good faith. He as master is responsible, not only for the safety of the ship, but for the safety of the lives of the passengers and crew, and the owners by directing him to proceed cannot relieve him of that responsibility. Moreover the plaintiff was at Dalhousie and knew the conditions there and the state of the weather. Mr. Blair, who gave the order, was at Campbellton and did not know and could not know the conditions as they existed at Dalhousie. The evidence is that the night was clear at Campbellton, but it is also proved, and I think not contradicted, at all events it was proved to my satisfaction, that when the plaintiff had finished unloading it was very dark at Dalhousie.

"I have therefore come to the conclusion that there was no *mala fides* on the plaintiff's part in not proceeding but that he acted in good faith, honestly believing that

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it was unsafe to proceed until daylight. It is true that the reply he sent to the telegram was not properly worded and was calculated without explanation to give offence. The plaintiff says that he did not mean to give offence, he simply meant to say that he would leave when he thought it was safe, and he accordingly did not leave until daylight the next morning.

"I have given the evidence very careful consideration, and I think the action of the plaintiff in remaining over at Dalhousie did not warrant his dismissal. From the evidence I think it clearly appears that Mr. Blair thought that the reason for the plaintiff remaining at Dalhousie was in order to make it appear that Dalhousie was the proper terminal port for the steamer, and that that was the real cause for the dismissal. In this he was entirely wrong; there is no evidence whatever to support it. The plaintiff appears to have had no interest whatever in Dalhousie, and although his own private opinion may have been that Dalhousie was the better terminal port, it did not in any way affect his judgment in remaining the few hours he did remain on the night of the 29th.

"The plaintiff had, on Wednesday on his way to Gaspé, received the telegram from Mr. Blair already referred to saying that there was a heavy gale and big sea at Grand River, and telling him to take no risks and advise fully; but finding the weather was clear he proceeded to Gaspé. The telegram, however, was of itself a caution to him to take no risks, and when he was at Dalhousie and honestly thought and believed there was risk and danger in proceeding he very naturally remembered this telegram, and that the owners wished that he should take no risk; and as he believed there was risk and danger, which belief was concurred in by his pilot, he did not venture to take the risk of proceeding.

"It is true that the pilot says that if he had received such an order as the plaintiff received he would have

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proceeded as far as he could and then have anchored. If the plaintiff, however, honestly believed there was danger in proceeding I do not think that he was obliged to proceed in order to ascertain whether or not he could succeed. It was his duty to act honestly and fairly and on his best judgment when in Dalhousie, and having done so and having shewn fair reasons for acting as he did I cannot think his dismissal for not proceeding is justified. As I have already said, I think from the evidence that Mr. Blair's real reason for dismissing him was an impression he had that the plaintiff was not acting *bonâ fide* and in good faith but that he desired to show that Dalhousie was the proper terminal port for the steamer, in which impression he was wrong.

"It was contended on the argument that the defendants might avail themselves of other reasons for his dismissal than those given at the trial, if other reasons existed, and I admit that they may do so. Some other reasons were urged on the argument which it was claimed would warrant the plaintiff's dismissal. From the evidence I do not think any of them would warrant a dismissal, but, even if they would have warranted it, the owners of the steamer knew of them at the time and by continuing him in command of the steamer waived them (1).

"The decree must be entered for the plaintiff, both for wages up to the time of his dismissal, and also for damages for wrongful dismissal.

"The plaintiff is in any event entitled to his wages up to the time of his dismissal. He was actually in command of the vessel up to that time, and no case can be found where under circumstances similar to these the master's wages have been forfeited. Even if he was guilty of an error of judgment his wages would not be forfeited.

(1) See the remarks of Sir R. Philimore in the *Roebuck*, 31 L. T. at p. 278.

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The *Roebuck* (1), which was cited by the defendant, when looked at is an authority for this proposition. The master in that case was deprived of his wages for five months, but during that time he was navigating the ship against the orders of her owners and the court found that some intrigue was carried on between himself and another party which induced him to disobey his positive instructions and make the voyages complained of; but it was held that he did not thereby forfeit any other part of his wages.

"I think, also, he is entitled to damages for wrongful dismissal. By one of the provisions of the agreement of hiring it is provided that for the services during the season A.D.1905,one thousand and fifty dollars should be paid, irrespective of the length of the season, and I think the damages should be based on that part of the agreement, giving him a reasonable amount for the expenses he had to occur in consequence of the dismissal.

"The decree will be for twelve hundred dollars, made up as follows: Wages and expenses to time of dismissal, $337 77; damages for wrongful dismissal, $862.23.

"The defendant must also pay the cost of this action."

January 17th, 1907.

The appeal was heard at St. John, N.B.

L. A. Currey, K.C., and *W. A. Mott*, for the appellants;

J. D. Hazen, K.C., and *W. H. Harrison*, for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (April 8th, 1907) delivered judgment.

This is an appeal from a decree entered in the registry of the New Brunswick Admiralty District on the first day of October, 1906, whereby in an action for wages, disbursements, and for damages for the wrongful dis-

(1) 31 L. T. N. S. at p. 274.

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missal of the plaintiff as master of the defendant ship, the learned Judge of the district pronounced the sum of twelve hundred dollars to be due to the plaintiff with costs, and condemned the ship *Lady Eileen* in the said sum and costs. Of this amount of twelve hundred dollars, the sum of three hundred and thirty-seven dollars and seventy-seven cents was awarded for wages that had accrued due and for expenses incurred before the plaintiff's dismissal; and the sum of eight hundred and sixty-two dollars and twenty-three cents for damages for wrongful dismissal. With regard to the amount allowed for wages and disbursements, there is, I think, no doubt as to the plaintiff's right to recover. But it is argued that he ought not to have his costs because he did not deliver a statement of account before bringing the action. The costs, however, were in the discretion of the learned Judge, and he has seen fit to allow them, and I see no good reason for interfering with his exercise of his discretion.

With regard to the dismissal of the plaintiff, it is sought to be justified on the ground that he wilfully disobeyed a lawful order given to him on behalf of the owners of the ship. The disobedience is admitted, but in reply grounds of justification therefor are set up. The facts are fully and clearly stated in the reasons given by the learned Judge for the decree which was made, and it is unnecessary to repeat them here. He found that the plaintiff's disobedience of the order given to him was under the circumstances of the case justified, and that his dismissal was wrongful. That was a question for the consideration of the learned Judge, as a question of fact, and of the proper inferences to be drawn from facts. (Per Strong and Henry, JJ., in *Guilford* v. *Anglo-French Steamship Company* (1)).

(1) 9 S. C. R. 309.

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I may add that in my opinion his finding was justified by the evidence.

The appeal will be dismissed with costs to the respondent.

Judgment accordingly.

Solicitor for appellant: *W. A. Mott.*

Solicitors for respondent: *Hazen & Raymond.*

BETWEEN

THE CLINTON WIRE CLOTH COMPANY ..... } PLAINTIFFS;

AND

THE DOMINION FENCE COMPANY, LIMITED, *et al* ..... } DEFENDANTS.

1907
March 25.

Patent for invention—Wire fences—Electrical welding—Infringement—Pioneer invention—Broad construction.

The defendants had made for them and had used a machine for making wire fences, the wires being, by the use of electrical currents, welded automatically at their points of intersection. It differed in a number of details from the machine described in the plaintiff's patent, but it made the same product in a similar manner and with similar devices.

Held, that giving a broad construction to the plaintiff's patent as being the first in which a successful method was devised and pointed out of making wire fences and other like products in the way described in such patent, the defendants had infringed the same.

ACTION for damages for the infringement of a patent for invention.

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

December 11th, 1906.

The case was tried at Toronto.

January 7th, 1907.

The case was argued at Ottawa.

W. Cassels, K.C., and *A. W. Anglin*, for plaintiffs;

J. B. Clarke, K.C., for the defendants.

Mr. *Cassels* contended that the plaintiffs' patent should be upheld because down to the time of its issue there had been a series of unsuccessful efforts by inventors to turn out some apparatus that would effectually and auto-

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Argument of Counsel.

matically make this woven wire fabric, which is of such enormous value to the fence industry. Perry's electrical welding machine was the first successful invention to emerge from all this experimentation. As soon as Perry had obtained his Canadian patent the defendants immediately started to get up a machine which would turn out the same fabric as that produced by Perry's invention. They applied to the Thompson Company in the United States and they replied that such a machine could not be made without infringing Perry's patent. The defendants then set about to make a machine for themselves, not utilizing Bates and Hutchins' machine, which was useless, but bringing upon the market a machine which is identical in every respect with the machine covered by the plaintiffs' patent. Then the defendants come here and ask the court to destroy the plaintiff's patent, not contending that the invention as a whole was ever before known, but simply that the art of electric welding was old. They say that as certain separate elements set up in the claims are old, that this heretofore unknown and unused combination of devices to produce a welded wire fabric is void for anticipation. Yet they failed to prove that in the state of the art at the time of the application for Perry's patent a skilled mechanic could, without invention, produce the machine. On the other hand, the evidence discloses that not only was this combination not known at the time of the Perry patent, but that all devices looking to a similar product were failures. (Cites *Terrell on Patents* (1); *Cannington* v. *Nuttall* (2); *Griffin* v. *Toronto Railway Company* (3).

Mr. *Anglin* followed for the plaintiff, contending that the various patents produced in evidence all demonstrated that the Perry machine was essentially a new thing when patented. On the question as to the liability of the direc-

(1) 4th ed. 78.

(2) L. R. 5 H. L. 216.

(3) 7 Ex. C. R. 411.

tors of an infringing company, he cited *Edmunds on Patents* (1); *Frost on Patents* (2); *Spencer* v. *Ancoats Vale Rubber Company* (3); *Day* v. *Davies* (4); *Robinson on Patents* (5).

Mr. *Clarke*, for the defendants, contended that the state of the art at the time of Perry's application for the patent in question precluded his right to a monopoly; his patent is invalid for want of novelty and there is no invention or subject-matter within the meaning of those terms in patent law. The art of wire fence making was highly developed at the time, and the only improvement Perry sought to make was to substitute for a twisting device for joining the strand and stay wire, an electric weld at the joints. Now, there is nothing new in the application of Perry's electric weld; he simply applies a well-known art to the manufacture of wire fences, a matter that discloses no invention at all. All he did was to exercise ordinary mechanical skill and embody that which had been already disclosed in connection with two well-known arts. *Birmingham Cement Manufacturing Company* v. *Gates Iron Works*, (6); *Packard* v. *Lacing Stud Company* (7).

Mr. *Anglin*, replied, citing *Proctor* v. *Bennis* (8); *Betts* v. *Menzies*, (9); *Patterson* v. *Gas Light and Coke Company* (10); *General Engineering Company* v. *Dominion Cotton Mills* (11).

The JUDGE OF THE EXCHEQUER COURT now (March 25th, 1907) delivered judgment.

The plaintiff company brings its action against the defendants for an alleged infringement of Canadian Let-

(1) 2nd ed. 364.
(2) 2nd ed. 599.
(3) 6 Cutl. R. P. C. 46.
(4) 22 Cutl. R. P. C. 34.
(5) Vol. 3, p. 79.
(6) 78 Fed. Rep. 350.
(7) 70 Fed. R. 66.
(8) L. R. 36 Ch. D. 740.
(9) 1 E. & E. 990.
(10) L. R. 2 Ch. D. 812.
(11) 6 Ex. C. R. 309.

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ters Patent numbered 68,649, bearing date the eight day of September, 1900, granted to John Cranston Perry for alleged new and useful improvements in machines for making wire fences The invention, according to the specification, has relation to machines for making wire goods such as fences, mats, lathing, barbed wire, etc., and has for its object to provide a machine of the class specified, having provisions for automatically welding the crossed wires at their points of intersection, and thereby obviating the necessity of coiling the wires at said points whereby a greater quantity of finished product is turned out from a given amount of wire than heretofore. A further object of the invention is to provide the machine with automatic mechanism by means of which its general efficiency is enhanced, its movements are rendered even and accurate, and its product turned out neatly finished and in a high state of excellence. To these ends, it is stated, the invention consists of a wire fabric machine possessing certain characteristics, or features of construction and arrangements of parts, as illustrated by the drawings described in the specification, and pointed out with particularity in the forty-seven claims with which the specification concludes.

At the hearing, the case for the plaintiff was rested upon the five claims following:

"6. A machine of the character specified comprising a plurality of welding devices, adjustable mechanism for feeding wires to said welding devices and a support on which said welding devices are mounted adjustably with relation to each other.

"7. A machine of the character specified comprising a pluralty of electrical welding devices each including electrodes and a transformer, a main circuit in which said welding devices are arranged in multiple arc, and a circuit controller for each welding device.

"33. A machine for making wire fence comprising means for feeding the strand wires, means for feeding the stay wires transversely thereof, and means for electrically welding said wires at their points of contact.

"36. A wire-welding machine comprising means for supporting a plurality of intersecting wires and means for automatically welding said wires at their intersections, said means including a plurality of transformers and electrodes and one or more circuit breakers; and

"40. A machine of the character specified, comprising a plurality of electrical welding devices, each including electrodes and a transformer, a main electrical circuit having a branch leading to each of said welding devices, a circuit close for each branch circuit and means for automatically operating said closers in succession."

The issues on which the case went to trial are these:

1. That Perry was not the first and true inventor of the alleged invention.
2. That there was no novelty in it.
3. That it was not useful.
4. That there was no invention or subject matter; and
5. That the defendants had not infringed.

In stating the conclusions I have come to in respect of the several issues stated, I wish further to limit the case by omitting from consideration claims numbered respectively thirty-three and thirty-six. As to these I express no opinion one way or the other and my findings are to be taken as having no reference thereto; but to the claims numbered respectively six, seven and forty only. Limiting the issues to these claims I have no difficulty in finding the first four issues mentioned in favour of the plaintiff. The fifth issue, namely, as to whether or not the defendants have infringed the plaintiff's patent, presents greater difficulty. The defendants have had made for them and have used a machine for making wire fences, the wires being by the use of electrical cur-

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rents welded automatically at their points of intersection. It differs in a number of details from the machine described in the plaintiff's patent; but it makes the same product in a similar manner, and with similar devices. If a somewhat broad construction is given, as I think it ought to be given, to the plaintiff's patent as being the first in which a successful method was devised and pointed out of making wire fences and other like products in the way mentioned, then I think the proper conclusion would be that the defendants have infringed the patent in question. In that view I find the fifth issue also in favour of the plaintiff.

With regard to the judgment, the plaintiff company does not ask for damages against any of the defendants. The injunction prayed for will go against them all, and there will be an order that the infringing machine, (without the drum) be delivered up to the plaintiff company. There will be costs against all the defendants, excepting Reive and Bundy, but against Harrington as liquidator, and not against him personally.

*Judgment accordingly.**

Solicitors for plaintiffs: *Blake, Lash & Cassels.*

Solicitors for defendants: *Clarke, Bowes & Swalbey.*

* On appeal to the Supreme Court of Canada, this judgment was affirmed.

APPEAL FROM TORONTO ADMIRALTY DISTRICT.

1907
March 25.

THE UPSON WALTON COMPANY (PLAINTIFFS) ..... } APPELLANTS;

AND

THE SHIPS "*BRIAN BORU*," "*SHAUGHRAN*," "*MONROE DOCTRINE*" AND "*RECIPROCITY*," (DEFENDANTS) ..... } RESPONDENTS.

Shipping—Chartered vessels—Goods supplied on credit of charterers—Lien against ships.

Goods, in the nature of ship's supplies, were furnished by the appellants to the charterers of certain ships while in the possession of the charterers. It was shown that the goods were not supplied on the credit of the ships, but were charged to the charterers in the appellants books, and accounts therefor were, in the first instance, made out to the charterers.

Held, that the appellants could not assert a lien for necessaries against the ships.

APPEAL from a judgment of the Judge of the Toronto Admiralty District, reported in 10 Exchequer Court Reports, p. 176.

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

November 13th, 1906.

The appeal was heard at Ottawa.

J. H. Rodd, for appellants, cites:

Anglin v. *Henderson* (1); *Manchester Trust* v. *Furness* (2); *Meagher* v. *Ætna Ins. Company* (3); The *August* (4); The *Maud Carter* (5); The *Livietta* (6); The *Petapsco* (7);

(1) 21 U. C. Q. B. 27.
(2) (1895) 2 Q. B. D. 539.
(3) 20 Gr. 345.
(4) (1891) P. D. 328.
(5) 29 Fed. R. 156.
(6) 8 P. D. 209.
(7) 13 Wall. 329.

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The *Alvira* (1); The *Comfort* (2); The *Havana* (3); *Norwegian SS. Company* v. *Washington* (4); The *Cumberland* (5); The *Pioneer* (6); The *General Tompkins* (7); The *Atlantic* (8); *Saylor* v. *Taylor* (9); *McCrae* v. *Bowers Dredging Company* (10); *Maclachlan on Shipping* (11).

Reasons for Judgment.

F. A. Hough, for the respondent, cited:

In re Hydraulic Steam Dredge No. 1 (12); *Pile Driver E. O. A.* (13); *Am. & Eng. Ency. of Law* (14); The *Now Then* (15); *Berwind* v. *Schultz* (16); The *Bertha M. Miller* (17); The *Lulu* (18).

Mr. *Rodd* replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 25th, 1907) delivered judgment.

This is an appeal from a judgment of the learned Judge of the Toronto Admiralty District given on the 14th day of February, 1906, whereby he dismissed the action with costs.

The plaintiff company in the year 1904 and for a number of years prior thereto carried on at Cleveland, Ohio, a ship chandlery business For ten or twelve years they had furnished goods for small amounts to the Donnelly Contracting Company, one of their customers. The course of business, as given by Mr. Charles R. Doty, the secretary of the plaintiff company, was to collect upon delivery the price of the goods sold. He does not think that there had ever been an open account; but as to this he was not sure, and could not say without examining

(1) 63 Fed. R. 144.
(2) 25 Fed. R. 158.
(3) 54 Fed. R. 201.
(4) 57 Fed. R. 224.
(5) 30 Fed. R. 449.
(6) 30 Fed. R. 206.
(7) 9 Fed. R. 620.
(8) 53 Fed. R. 607.
(9) 77 Fed. R. 476.
(10) 86 Fed. R. 344.
(11) 4th ed. p. 174.
(12) 80 Fed. R. 545.
(13) 69 Fed. R. 1005.
(14) 2nd ed. vol. 19, pp. 1093, 1094.
(15) 55 Fed. R. 523.
(16) 25 Fed. R. 912.
(17) 79 Fed. R. 365.
(18) 10 Wall. 192.

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the books. In September of 1904 and later in that year the Donnelly Contracting Company were engaged in the work of filling in a breakwater at the entrance to Cleveland Harbour. Part of the plant with which that work was carried on consisted of a dredge, the *Brian Boru*, a tug-boat, the *Shaughraun* and two dump scows, the *Monroe Doctrine* and the *Reciprocity*. These vessels and others the Donnelly Contracting Company had leased for the season from the Dunbar and Sullivan Dredging Corporation. During the months of September, October and November of 1904, the plaintiff company supplied to the Donnelly Contracting Company a quantity of goods which were used on the vessels mentioned or in connection with the work that was being carried on by means thereof. The goods were ordered by the contracting company's foreman and were charged to that company in the plaintiff company's books, and the accounts therefor were in the first instance made out to the contracting company. In that respect there was at the time no change in the manner of keeping the accounts with the contracting company. The copies of the accounts in evidence are made out against the defendant vessels respectively. But these statements were made out after the Donnelly Contracting Company had got into difficulties and had made an assignment and represent the plaintiff company's contention and position after that happened. It was at this time, according to the witness Doty, that the question of the ownership of this plant first came up between the plaintiff company and the Donnelly Contracting Company. Up to that time, he says, the officers of the former company thought these vessels belonged to the latter company. An offer or settlement made by the contracting company was refused by the plaintiff company, which thereafter sought to enforce the claim against the defendant vessels.

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To sustain that claim it is necessary, among other things, to find that the goods were supplied on the credit of the vessels themselves and not on the credit of the Donnelly Contracting Company. Mr. Doty, who has been mentioned as secretary of the company, states in his evidence that the goods were supplied on the credit of the vessels. That, I think, is an inference that he draws, and I do not attach any greater weight or importance to it than that; and the rest of his evidence and the admissions he made lead, it seems to me, to an opposite conclusion. If it had been said that the possession of this plant in 1904 by the Donnelly Contracting Company for the purpose of carrying on their work had had the effect of giving them better credit with the plaintiff company than they had enjoyed as customers in former years, I should not have had any difficulty in accepting the statement. But when it is said that credit was not given to them, but to the vessels themselves, I am not able to accept the statement. The entries in the books are not of course conclusive; but in this case they show truly, I think, that the credit was given to an old customer, the Donnelly Contracting Company, and not to each defendant vessel for goods supplied to each. I rest my judgment on this view of the facts.

I express no opinion on the questions discussed by the learned judge of the Toronto Admiralty District; but I agree that the judgment that he directed to be entered in this case is the judgment that ought to be entered.

The appeal is dismissed with costs.

Judgment accordingly.

Solicitors for appellants. *Rodd & Wigle.*
Solicitor for respondents: *F. A. Hough.*

TORONTO ADMIRALTY DISTRICT.

THE NEW ONTARIO STEAMSHIP COMPANY, LIMITED..... } PLAINTIFFS; 1907 June 24.

vs.

THE MONTREAL TRANSPORTATION COMPANY, LIMITED, THE OWNERS OF THE SHIP *WESTMOUNT* ..... } DEFENDANTS.

Rule of the road—Definition of Fairway—Amendment of Preliminary Act.

In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies to the starboard side of such vessel, and the defendant ship having violated this rule, they were held liable.

When the pleadings and the Preliminary Act were at variance and no objection taken before trial, and nobody has been misled by the pleadings an amendment of the pleadings was allowed.

ACTION *in rem* for damages for collision between vessels of the defendants and plaintiffs.

The case was tried at Toronto before the Honourable Thomas Hodgins, Local Judge of the Toronto Admiralty District, on the 5th, 6th, 10th and 11th days of April, 1907, and written arguments were put in on the 27th and 30th May, 1907.

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

The arguments of counsel were submitted in writing on the 27th and 31st May, 1907.

HODGINS, L. J. now (24th June, 1907) delivered judgment.

Since the argument of this case I have re-read the evidence which I find to be conflicting in many particulars,

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and it has confirmed the impression I formed at the conclusion of the evidence that the plaintiffs were entitled to succeed.

The plaintiff's claim in this case is for damage caused to their steamer *Neepawah's* propeller by the defendant's steamer *Westmount*, and the main issue is whether the defendant's steamer, the *Westmount*, bumped the plaintiffs' steamer, the *Neepawah*, when passing her in the level between Locks 23 and 24 in the Welland Canal on the night of the 20th October, 1904. The night has been described by several witnesses as a "dark, rainy night;" and this fact and the conflicting statements of witnesses, so general in Admiralty cases, have increased the difficulty of deciding to which side a preferable credence should be given.

But the evidence as to the fact of the bumping of the *Westmount* on the *Neepawah* satisfies me that such bumping took place, and that, together with what must have been the resultant pressure of the water on the *Neepawah* caused by the swing of the *Westmount* in straightening her course in the middle of the canal so as to enter the lock while passing the *Neepawah*, caused the *Neepawah* to swing across the canal as described by several of the witnesses on both sides. See *Cadwell* v. *C. F. Bielman* (1).

The Captain of the *Neepawah* states that he heard the reversing bell of the *Westmount*, and that her reversing had the effect of turning her against the *Neepawah* and moving her stern against his boat; and that he felt something touch his boat and that his boat "at once swung out," the stern swinging to the bank, and the bow swinging out into the canal, and that when the stern swung over the bank the two flanges of the propeller wheel were broken by striking the stone side-wall of the canal.

(1) 10 Ex. C. R. at p. 156.

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The wheelsman Laroche states that he was at the wheel steering the *Neepawah* and kept her straight but did not feel the bump, but was sure that the *Westmount* had struck the *Neepawah* "because we changed direction instantly."

Legault, who was at the stern of the *Neepawah* with a fender, states that the *Westmount's* stern struck the *Neepawah* between the aftermast and the boiler house about five or six feet from the stern of the *Neepawah*, and shoved her on the bank and broke her wheel.

McLeary, one of the defendant's witnesses, states that when the steamers were passing their respective sterns were about three feet apart and that he saw the sterns come together, and that they were coming closer together as they passed.

Tracy, a lock tender, an independent witness on shore, states that when the *Westmount* was heading to enter the lock, she was three or four feet away from the *Neepawah*; that the *Westmount* was about half way past the *Neepawah* when she began to get straightened for dock 23 and that the sides of the after part of the end of the two boats came nearest together.

Captain Milligan, of the *Westmount*, states that all the time he was straightening the *Westmount* he was shifting her stern over the centre line; and that when he was straight for the lock he would necessarily be twenty feet into his port water, and therefore there would not be room for the *Neepawah* to lie between him and the shore. And he added that he would "let it go" that the *Neepawah* had got as far as the centre line,—but not across it,—though he afterwards varied this. The frequent changes of the position of the models made by this witness and his admissions that he was only guessing has affected his credibility. And similar changes of the position of the models by others of the defendants' witnesses have caused me to hesitate in accepting their fairness in giving evi-

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dence. At first some of them placed the models anglewise across the canal but when attention was called to such positions, some of them altered the anglewise for another position.

There is another fact which is established by the evidence of the captain of the *Westmount* that he commenced to straighten for the lock before he had passed the *Neepawah*, and that he thereby got into the *Neepawah's* water. The rule of the road provides 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 to the starboard side of such vessel." The "fairway" mentioned in this rule has been defined by Bargrave Dean J., in the *Glengariff* (1), thus: "A fairway is practically defined by this article to be the midchannel. There is no rule which says that you must keep in the fairway, but the rule says you must keep to the starboard side of the fairway or midchannel in narrow channels." The water-width of the canal between locks 23 and 24 is 108 feet; the *Westmount's* beam is 43 feet and the *Neepawah's* beam is 41 feet. But the *Westmount* began to straighten her course and thereby to get out of her starboard water and into the *Neepawah's* water before she had passed the *Neepawah*, and thus violated this rule of the road. I must also find that the *Westmount* further failed to observe the rules of the road which direct crossing steam vessels to "keep out of the way of the other." These violations of the rules of the road led to the bumping of the stern of the *Neepawah*, which I find was the primary cause of the propeller wheel of the *Neepawah* striking the boom or wall of the canal and breaking two of its blades.

The defence raises an objection to the plaintiffs' preliminary act in that article 13 states that "the parts of

(1) [1905] P. 106.

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each ship which first came into collision were the port bow of the *Westmount* and the port quarter of the *Neepawah* abreast of the kitchen." The plaintiffs' statement of claim alleges substantially the same that the "*Westmount* sheered on the *Neepawah* and struck her on the port side abreast of the kitchen, and forced her stern against the boom along the stone wall * * * by reason thereof the *Neepawah's* screw came in contact with the said boom and two of her propeller blades were broken."

The rule of practice is that no mistake in the preliminary act can be amended unless an application to amend is made before trial (1). But in the *Frankland* (2), Sir Robert Phillimore, while refusing to allow the preliminary act to be amended allowed an amendment of the pleadings—adding that it would be competent to counsel "to comment on the discrepancy between the pleading and the preliminary act." And in the *Miranda* (3), the same learned judge said : "The parties in an action of damages are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary act; and it is open to them in their statement of claim, or statement of defence to state correctly any facts which may have been omitted, or erroneously stated in their preliminary act."

Apparently from these decisions the only penalty for errors and omissions in the preliminary act is that they may be "commented upon by counsel." But they could be amended if an early application for leave to amend had been made.

In the *Dictator* (4), the court allowed an amendment of the writ by increasing the amount of the claim after judgment; and the plaintiffs were subsequently allowed to sue out execution for the increased amount allowed by the amendment of the writ.

(1) Vortigern, Swab. 518.
(2) [1872] L. R. 3 A. & E. 511.
(3) [1882] 7 P. D. 185.
(4) [1892] P. 64, 304.

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But in the *Alice* and *Rosita* (1), the rule that a party seeking redress for an injury can only recover "*secundum allegata et probata*" was held to apply only to cases where the averments alleged in the pleadings were material to the issue. While I must find that the statement of claim incorrectly states the locality of the collision between the two steamers, I think the statement of defence is rather helpful in determining the locality of the bumping by stating that "the *Neepawah's* bow, being light, fell out from the bank and across the canal astern of the *Westmount* as the latter passed." The *Westmount* was in her own proper water and at a considerable distance from the point (*i.e.* the bow) where the alleged impact of the vessel is said by the plaintiffs to have taken place.

This pleading, I think, indicates the locality more fairly than the plaintiffs, that the impact was not near the bows of the two vessels but somewhere near their sterns—which the evidence warrants me in finding. And as the plaintiffs' pleading has not apparently misled the defendants, and as the points as to the preliminary act and pleadings were not taken at the opening, or early in the case, I think the plaintiffs may have leave to amend their pleading, as it seems the defendants have not been prejudiced.

After the amendment the decree will be for a reference to the Registrar to assess the damages and to tax the plaintiffs their costs of the action and reference.*

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(1) [1868] L. R. 2 P. C. 214.

* REPORTER'S NOTE—.This judgment was reversed on appeal to the Supreme Court. (40 S.C.R. 160).

IN THE MATTER of the Petition of Right of

MARGUERITE HENRIETTA JANE ARMSTRONG ..... } SUPPLIANT;

1907
June 24.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Government railway — Injury to the person — Negligence — Liability of Crown—50-51 Vict. c. 16, s. 16 (c) —Interpretation—Art. 1056 C.C.L.C. —Right of action—Waiver by accepting indemnity.

The provisions of section 16 (*c*) of 50-51 Vict. c. 16 (now R.S.C. 1906, c. 140, s. 20 (*c*)) not only gives exclusive original jurisdiction to the Exchequer Court of Canada to hear and determine claims against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment, but imposes a liability upon the Crown to answer in such cases for the wrongful acts of its officers or servants.

The suppliant's husband, in his lifetime a locomotive engineer employed on the Intercolonial Railway, was killed in an accident on the railway while on duty. The accident happened by reason of a fireman, who was employed on another train belonging to the same railway, failing properly to set and lock a switch in the performance of his duty.

Held, that the case fell within the provisions of s. 16 (*c*) above mentioned, and that the Crown was liable in damages.

Held, following *Miller* v. *Grand Trunk Railway Co.* ([1906] A. C. 187), the result of which is to overrule *The Queen* v. *Grenier*, (30 S. C. R. 42), that the right of action conferred by art. 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is responsible, is an independent and personal right of action, and is not, as in the English Act known as Lord Campbell's Act, conferred on the representatives of the deceased only; and that provision in a by-law of a society to which the deceased belonged, and to the funds of which the Crown subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the Crown for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action.

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Argument of Counsel.

PETITION OF RIGHT for damages for the death of the suppliant's husband alleged to have been occasioned by the negligence of servants of the Crown.

The suppliant's husband at the time of the accident which caused his death was employed in the capacity of a locomotive engineer on the Intercolonial Railway. The accident happened on the 27th November, 1903, at or near the Lotbinière station, in the Province of Quebec. The deceased was in charge of a locomotive which was derailed by reason of a switch being improperly set by the fireman of another train on the same railway.

Laflamme and *Mitchell* for suppliant;

Newcombe, K.C., for respondent.

January 11th, 1907.

The case was tried at Quebec; the argument being directed to be heard at Ottawa.

February 10th, 1907.

The case was now argued at Ottawa.

N. K. Laflamme, K.C., for the suppliant, contended that there was negligence proved to bind the Crown. The suppliant's husband was killed by reason of the failure of the fireman of another train to properly set and lock a switch. The deceased was a locomotive engineer on the Intercolonial Railway and was in charge of a locomotive at the time of the accident which resulted in his death. By reason of the switch being negligently set, the locomotive on which the suppliant's husband was riding was derailed. In this the Crown is clearly liable under the *Exchequer Court Act*, and Art. 1056 of the Civil Code gives a right of action in such a case to the widow and children, which is an independant right accruing only upon the death of the husband. (Cites *Miller* v. *Grand Trunk Railway Company* (1).

(1) [1906] A. C. at p. 194.

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Argument of Counsel.

E. L. Newcombe, K.C., contended that the facts did not show negligence as to the setting of the switch at all. The only theory arising from the facts is that the engineer failed to read the signals properly. If he had, he would have stopped his train. His failure to read the signals aright is attributable either to his engine running too fast or because he did not look out for them. In either event the negligence would be his.

Again, the deceased if he had lived could not have maintained an action because he had contracted himself out of his right. Art. 1056 C. C. does not give a right of action to the widow unaffected by any bar arising out of the husband's conduct during his life time.

In any event the Crown is not bound by the provisions of these articles.

Mr. *Laflamme*, in reply, cited *Grenier* v. *The Queen* (1); *Filion* v. *The Queen* (2) on the point as to the effect of art. 1056 C. C. on the Crown's rights.

THE JUDGE OF THE EXCHEQUER COURT now (June 24th, 1907), delivered judgment.

The petition is filed by the suppliant to obtain relief for herself and her two minor daughters for the death of her husband alleged to have been occasioned by the negligence of the servants of the Crown. The action is based upon clause (*c*) of the 16th section of *The Exchequer Court Act* (50-51 Vict. c. 16; see also R. S. C. 1906, c. 140, s. 20 (*c*)), by which it is provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the

(1) 30 S. C. R. 42. (2) 24 S. C. R. 482.

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scope of his duties or employment. Prior to the 23rd day of June, 1887, when the Act of the Parliament of Canada (50-51 Victoria, Chapter 16) came into force the subject had in Canada no remedy by petition of right for any wrong done to him by a servant of the Crown. (*The Queen* v. *McFarlane* (1); and *The Queen* v. *McLeod* (2). The Act 33rd Victoria, Chapter 23 (R. S. C. c. 40, s. 6) had made provision in such cases for a proceeding before the official arbitrators, but no petition of right would lie in any such case. In 1887 the jurisdiction that the official arbitrators had theretofore exercised was, by the Act first-mentioned, transferred to this court, and that jurisdiction was in that respect defined in the terms of the clause of the Act cited (50-51 Vict. c. 16, s. 16 (*c*)). This provision has been considered and discussed in a number of cases in this court, and on appeal in the Supreme Court of Canada, with the result (so far as the judgments of these courts may determine the matter) that it has been settled that the provision referred to not only gave jurisdiction to the court, but imposed a liability upon the Crown to answer in such cases for the wrongful acts of its officers and servants. (*The City of Quebec* v. *The Queen* (3); *Filion* v. *The Queen* (4); *The Queen* v. *Filion* (5); *Ryder* v. *The King* (6); *Paul* v. *The King* (7). I think, too, that it may be taken to be settled by the general concurrence of judicial opinion in the cases referred to that it was the intention of Parliament that the liability of the Crown should be determined by the general laws of each province in force at the time when such liability was imposed. If that is the true construction of the statute it will happen that the Crown may be liable to answer for its servant's wrongs in one

(1) 7 S. C. R. 216.
(2) 8 S. C. R. 24.
(3) 2 Ex. C. R. 269; 24 S. C. R. 429.
(4) 4 Ex C. R. 144.
(5) 24 S. C. R. 482.
(6) 9 Ex. C. R. 333; 36 S. C. R. 462.
(7) 38 S. C. R. 126.

province, when under like circumstances there might be no liability in some other province in the Dominion. That aspect of the matter is illustrated by *Filion's case* (1) where the cause of action arose in the Province of Quebec, and *Ryder's case* (2) where it arose in the Province of Manitoba. In the latter case the petition failed because the negligence proved was that of a fellow servant of the deceased; while in the former case it was sustained although the negligence complained of was also that of a fellow-servant of the deceased; it being held that such defence was not open to the defendant under the laws of the Province of Quebec. And in the present case, the question arises as to whether or not the Crown's liability is to be determined as a subject's would be by reference to the provisions of article 1056 of the Civil Code which provides that in all cases where the person injured by the commission of an offence or a quasi-offence, dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relatives have a right, but only within a year after his death, to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death. That provision formed part of the general law of the Province of Quebec not only in 1887, when the Act 50-51 Victoria, Chapter 16, was passed, but also in 1870 when the *Official Arbitrators Amendment Act*, 33 Victoria, Chapter 23, was enacted. If that provision is applicable to cases where the death results from the negligence of the Crown's servants acting within the scope of their duties or employment on a public work in the Province of Quebec, the Crown's liability will in that province be different from what it is in the other Provinces in Canada. Dealing

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(1) 4 Ex. C. R. 144; 24 S. C. R. 482.

(2) 9 Ex. C. R. 330; 36 S. C. R. 462.

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with a similar question, Sir Henry Strong, C.J., in *The City of Quebec* v. *The Queen* (1), is reported as follows:

"It can make no difference that all the provinces save one derive their common law from that of England; the circumstance that the private law of one province, that of Quebec, is derived from a different source, makes it impossible to say that there is any system of law apart from statute, generally prevalent throughout the Dominion. No inconvenience can result from this, since every case which could arise would be provided for by the law of some one or other of the provinces."

I think the question as to whether article 1056 of the Civil Code of Lower Canada is applicable to cases where the death is occasioned by the negligence of a servant of the Crown acting within the scope of his employment upon a public work in the Province of Quebec, should be answered in the affirmative. And although such a construction of the statute makes against a uniform law throughout Canada respecting the Crown's liability in such cases, the Crown will not after all stand in any different position in that respect to any railway or other corporation which carries on its business in several Provinces of the Dominion.

The accident which occasioned the death, on the day following, of the suppliant's husband, occurred on the 26th day of September, 1903, in the Province of Quebec, at de Lotbinière Station on the Intercolonial Railway, a public work of Canada. The deceased was a locomotive engineer, and at the time of the accident was on duty on his engine which was derailed at the station mentioned. The accident happened because one Albert Charland, a fireman employed on another train on the railway, failed properly to set and lock a switch that, under the particular circumstances of this case, it was his duty to open and close. It is admitted that he failed to lock the

(1) 24 S. C. R. 429.

switch; and the weight of the evidence leads, I think, to the conclusion that he also failed to set it properly. The case is, I think, within the provisions of clause (*c*) of the 16th section of the *Exchequer Court Act* (1), that has been cited.

That leads to the consideration of a defence on the part of the Crown which is stated in the following terms in paragraphs eight to thirteen of the statement of defence:

" 8. The deceased Holsey Cleveland Goddard became during his lifetime and was at the time of his death, a member of the Intercolonial Railway Employees' Relief and Insurance Association, Class C.

" 9. Under the constitution, rules and regulations of the said association, of which the deceased had been furnished with a copy and the certificate of membership issued to him and in which he had nominated his wife, Marguerite Henrietta Jane Armstrong, the above named suppliant, as the person to receive all insurance moneys accruing upon the said certificate, the suppliant became entitled on the death of the said Holsey Cleveland Goddard to receive from the said association the sum of $250 insurance money.

" 10. The said sum of $250 was duly tendered by the said association to the said Marguerite Henrietta Jane Armstrong, who refused to accept the same.

" 11. By the constitution, rules and regulations of the said association it was provided that in consideration of the annual contribution of $6,000 from the railway department to the association, the railway department should be relieved of all claims for compensation for injury to or death of any member. The railway department made the said contribution.

" 12. It was further provided that all permanent male employees of the Intercolonial Railway should be contri-

(1) 50-51 Vict. c. 16, s. 16 (*c*).

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butors to the said association during their employment. It was one of the terms on which the said Holsey Cleveland Goddard sought and accepted employment on the Intercolonial Railway that he would become a member of the said association and be bound by its constitution, rules and regulations.

"13. The said Holsey Cleveland Goddard, in his lifetime, by his contract of employment with the respondent, released and discharged the respondent from and agreed that the respondent should not be liable for any claim or demand of the kind sued for, including the suppliant's claim herein."

Except that in the present case the suppliant has not as yet accepted the insurance money to which she is entitled, the defence does not in this aspect of the case, differ materially from that which came under consideration in *Grenier* v. *The Queen* (1). In that case it was in this court held that the defence failed. In the Supreme Court of Canada, on appeal from this court, the defence was sustained. (*The Queen* v. *Grenier* (2). It is now contended that the result of the decision in *Miller* v. *The Grand Trunk Railway Company of Canada* (3) is to overrule *The Queen* v. *Grenier* (1). It seems to me that the contention is well founded and that the defence on which the Crown relies in this case cannot, in view of their Lordship's decision in *Miller's Case*, be sustained. In the latter case, following *Robinson* v. *The Canadian Pacific Railway Company* (5), it was held, contrary to what had been held in the Supreme Court in *The Queen* v. *Grenier* (6), that the right of action conferred by article 1056 of the Civil Code of Quebec on the widow and relatives of a deceased employee whose death has been caused by negligence for which the employer is

(1) 6 Ex. C. R. 276.
(2) 30 S. C. R. 42.
(3) [1906] App. Cas. 187.
(4) 30 S. C. R. 42.
(5) [1892] A. C. 481.
(6) 30 S. C. R. 42.

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responsible is an independent and personal right of action; and not as in the English Act known as Lord Campbell's Act conferred on the representatives of the deceased only; and that a provision in a by-law of a society to which the deceased belonged, and to the funds of which the defendant company subscribed, that in consideration of such subscription no member of the society or his representatives should have any claim against the company for compensation on account of injury or death from accident, did not constitute a good defence to the widow's action. The insurance money to which she became entitled under the rules of the society did not proceed from the company, had no relation to its offence and was equally payable in case of natural death; and the deceased could not, by reason thereof, be said to have obtained indemnity or satisfaction within the meaning of article 1056 of the Civil Code. That case is not, I think, distinguishable either from the *Grenier Case* or from this case.

There will be a declaration that the suppliant is entitled to the following relief, that is to say:—to recover from the Crown for damages occasioned by the death of her late husband, (1) for her own use the sum of five thousand dollars; and (2) in her quality or capacity of tutrix for her minor children the sum of two thousand five hundred dollars, the latter sum to be apportioned as follows, namely:—one thousand dollars to Hilda Foster Goddard, and one thousand five hundred dollars to Lyall Wurtele Goddard.

The suppliant will also be allowed the costs of her petition.

Judgment accordingly.

Solicitors for suppliant: *Laflamme & Mitchell.*

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

IN THE MATTER of the Petition of Right of

1907
June 24

AMANDA DESROSIERS..... SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railway—Accident to the person—50-51 Vict. c. 16, sec. 16 (c) (now R. S. C. 1906 c. 140 sec. 20 (c)—Brakesman—Negligence of section foreman—Liability.

Suppliant's husband while engaged in coupling cars as a brakesman on the Intercolonial Railway, at Sayabec Station, P.Q., caught his heel between the rail and the guard rail and being unable to get clear was run over by the cars and killed. It was shown to be the duty of the section foreman to see that the space between the rail and guard rail was properly filled or packed, and that he had been guilty of negligence in respect of such duty.

Held, that the Crown was liable for such negligence.

PETITION OF RIGHT for damages for the death of the suppliant's husband alleged to have been occasioned by the negligence of an officer or servant of the Crown on a public work.

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

April 10th, 1907.

The case was heard at Quebec.

L. Taché, for the suppliant, argued that the facts in evidence showed negligence in respect of keeping the road in repair. The nature of the repairs done after the accident show that it was negligent to leave the rail as it was at the time of the accident.

[THE COURT: It is immaterial what they did after the accident.]

There is no doubt as to the right of the suppliant to recover for the death of her husband notwithstanding

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Argument of Counsel.

that the accident was caused by the negligence of a fellow-servant of the deceased. The case of *Grenier* v. *The Queen* (1), as decided in the Exchequer Court, is right, and the Supreme Court was wrong in reversing that decision (2) in so far as the Supreme Court held that the right of action of the widow and children under art. 1056 could be barred by the agreement of the husband in his life time. That is the result of *Miller* v. *Grand Trunk Railway Company* (3) which holds that the right of action accruing to the widow and children under art. 1056 C.C. is an independent and personal right, and not derived from the deceased or his representatives.

E. L. Newcombe, K.C., for the respondent, argued that upon the facts the death of the suppliant's husband was produced by his own negligence. He was walking backwards over the track engaged in conversation with some one on the platform when the accident happened. He stumbled over the guard rail and the cars passed over him. His heel was caught between the rail and the guard rail, and being unable to get clear, he was killed. The space between the rail and guard rail had been filled a few days previous to the accident, so there was no negligence on the part of the Crown. In any event the deceased knew of the dangerous character of his work in coupling cars, and he must be assumed to have taken the risks incidental to his work. In any case his conduct did not show reasonable care.

If there is negligence at all affecting the Crown it is negligence of a fellow-servant for which the Crown is not liable. *Priestly* v. *Fowler* (4); *Smith on Master and Servant* (5). In the Province of Quebec, no more than by the law of England, can a servant recover against his master for injury sustained in consequence of his negli-

(1) 6 Ex. C. R. 276.
(2) 30 S. C. R. 42.
(3) [1906] A. C. 187.
(4) 3 M. & W. 1.
(5) 6th Ed. p. 192.

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gence. As to the case of *Grenier* v. *The Queen* (1), it is not overruled by *Miller* v. *Grand Trunk Railway Company* (2), in so far as the Supreme Court held that the deceased could by contract in his life time exonerate his employer from liability for injury or death in the course of his employment.

Mr. *Taché* replied.

THE JUDGE OF THE EXCHEQUER COURT (now June 24th, 1907) delivered judgment.

The suppliant brings her petition on her own behalf and as tutrix to her minor child, to obtain relief from the Crown for the death of her late husband which occurred on the 22nd day of May, 1900, at Sayabec Station, on the Intercolonial Railway, and which is alleged to have been occasioned by the negligence of the Crown's servants while acting within the scope of their duties or employment. The deceased was a brakesman, and at the time of the accident was engaged in coupling cars at the station mentioned. In doing this work he caught his heel between the rail and guard rail and being unable to get clear was run over by the cars and killed. It was the duty of the section foreman at that place "to see that all spaces less than five inches between "rails at frogs, crossings, switches, guard rails, etc., were "filled and kept filled in with wood packing or other "suitable material, such packing not to reach higher "than the underside of rail head." The evidence shows, I think, that the section foreman who was at the time in charge of the permanent way at Sayabec had failed in his duty in respect of the place where the deceased caught his foot between the rail and guard rail. In other respects the case does not materially differ from that of *Armstrong* v. *The King* in which judgment has just now been given; and there is in this case as in that, a

(1) 30 S. C. R. 42. (2) [1906] A. C. 187.

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defence founded upon the fact that the deceased was at the time of the accident a member of the Intercolonial Railway Employees' Relief Insurance Association. It will be sufficient if I refer to my reasons for judgment in that case, and without repeating them make them a part of the reasons for judgment in this case.

There will be judgment for the suppliant, and a declaration that she is entitled to the following relief, that is to say, to recover from the Crown as damages for the death of her late husband the sum of three thousand dollars in her own right, and the further sum of one thousand dollars in the right of her minor child.

She will also be allowed the costs of the petition.

Judgment accordingly.

Solicitors for suppliant: *Louis Taché.*

Solicitors for defendant: *E. L. Newcombe.*

BETWEEN

1907
April. 22.

HIS MAJESTY THE KING.....PLAINTIFF;

AND

FRANCES R. ROGERS, ADMINISTRATRIX OF THE LATE CHARLES E. ROGERS, DECEASED, AND OTHERS.....} DEFENDANTS.

Expropriation—Licensed hotel—Special value of premises to owner arising from liquor license—Compensation.

The Crown expropriated for the purposes of a public work certain premises which the owner used as a hotel licensed to sell liquors. The license was an annual one, but as the license laws then stood, it could be renewed in favour of the then owner, or in case of his death, of his widow; but no license could be granted to any other person for such premises. If the owner sold the property it was shown that the use to which he put it could not be continued.

Held, that while this particular use of the property added nothing to its market or selling value, it enhanced its value to the owner at the time of the expropriation, and that such was an element to be considered in determining the amount of compensation to be paid to him for the premises taken.

THIS was an information by the Attorney-General of Canada for the expropriation of certain lands required for the purposes of the Intercolonial Railway of Canada.

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

January 22nd, 1907.

The case was heard at Halifax.

R. T. MacIlreith and *C. F. Tremaine* for the plaintiff;

W. B. A. Ritchie, K.C., and *T. F. Tobin* for defendants.

THE JUDGE OF THE EXCHEQUER COURT now (April 22nd, 1907) delivered judgment.

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THE KING v. ROGERS.

Reasons for Judgment.

The information is filed to obtain a declaration (1) that the lands and premises therein described, situated in the City of Halifax, and taken for the purposes of the Intercolonial Railway, are vested in His Majesty; and (2) that the sum of $6,000 is sufficient and just compensation to whomsoever may prove to be entitled thereto for and in respect of such lands and premises and for all claims in respect of any damage or loss sustained or to be sustained by reason of the entering upon, taking possession of and expropriation of the same, as stated in the information.

The lands and premises mentioned were expropriated on the 26th day of January, 1906. They were situated on Water Street, in the said city, and were known as the "Acadia Gardens Hotel." They were at the time in the possession and occupation of the owner and proprietor Charles E. Rogers, who held a hotel license for the sale of spirituous and intoxicating liquors granted him by the municipality of the City of Halifax for the said premises. Since the expropriation Charles E. Rogers has died; and his widow, the defendant Frances R. Rogers, has been appointed administratrix to his estate, and guardian of Morris Rogers, an infant She and William S. Rogers have also been joined as heirs at law of Charles E. Rogers. There appear to be, or to have been, some incumbrances upon the property; and to avoid an enquiry before the court as to the respective rights and interests of the parties it was agreed that any declaration made as to compensation should be made in favour of the defendant Frances R. Rogers, as administratrix, as guardian, and in her own right, on condition that before payment of the amounts of such compensation she would procure and deliver to the Crown good and sufficient releases of all claims on the fund.

The only question at issue is the amount of the compensation to be awarded for the lands and premises taken. The plaintiff, by the information, offered to pay the sum

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of $6,000. The defendants claim $30,000. The evidence put in by the former would show that the sum of $6,500 would be a fair amount to allow, while the testimony produced by the defendants would, if it were accepted, go to show that such compensation should be assessed at a sum ranging from $15,000 to $20,000.

I am quite unable to accept the higher figures. Property on Water street, in this neighbourhood had for some time before the expropriation been decreasing in value. It had lost in a large measure its former value for residential purposes, and it had not acquired any considerable value for commercial or industrial purposes. Apart from the special use which the proprietor, Charles E. Rogers, made of the premises, to which reference will be made later, the opinion of Mr. Patrick M. Duggan may be safely taken as giving their fair value when taken. He and Mr. Reid were employed by the Crown to value this and other properties. He was well qualified by experience and knowledge to make the valuation, and I found him to be fair minded, and a man of good judgment. He put the value of the property when taken at $6,500, though he thought that that sum was more than it was really worth to the owner. That was without reference to the particular use the owner was making of it at the time. He stated on cross-examination that ten years ago the property, as a licensed hotel, would have been worth $8,000 or $10,000 to the owner; but he thought that the business had fallen off, and that the value of the premises had been diminished. The fair result of his evidence as a whole was that the sum of $6,500 was large enough to cover any value the premises had as a hotel with an annual license for the sale of liquors renewable at the pleasure of the City Council.

It appears, however, that from its situation these premises had some advantages for the class of business carried on therein which prevented it from sharing

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equally with other properties in the neighbourhood in the depreciation in value that had undoubtedly taken place. The evidence, too, would go to show that the owner did at the time a larger business than Mr. Duggan was aware of.

With respect to the annual license held for these premises it appears that it could, as the license laws then stood, be renewed in favour of the then owner, or in case of his death, of his widow; but no license could be granted to any other person for these premises. If the owner sold the property the use to which he put it could not be continued. That particular use therefore added nothing to the market or selling value of the property. It enhanced its value to the owner, but not its actual value. It seems to me, however, that the defendants are entitled to its value to the owner at the time of the expropriation, having regard to any use he could make of it, including, of course the use he was then putting it to. As I have stated, I am quite unable to accept the values that the defendants' witnesses have put upon these premises. At the same time it appears to me that neither the sum of $6,000 which is offered in the information, nor the sum of $6,500 at which Mr. Duggan placed the value of the premises, is sufficient. I am not inclined, however, to go beyond the $8,000 that he thought the premises were worth some years before. I think it will be fair to all parties to assess the compensation to be paid at that amount.

There will be a declaration:

1. That the lands and premises described in the information are vested in His Majesty the King;

2. That the defendant Frances R. Rogers, as administratrix of the estate of the late Charles E. Rogers, and as guardian of Morris Rogers and in her own right, upon giving to the Crown good and sufficient releases and discharges from all persons having any claim thereto, is

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entitled to be paid the sum of $8,000, with interest from the 26th day of January, 1906, as compensation for such lands and premises and for all damages arising from or incident to the taking of the same as mentioned.

I have had some doubts as to the proper disposition to be made of the question of costs in view of the large claim set up by the defendants. But there are a number of defendants, and one is a minor, and perhaps the matter did not lend itself to arrangement and accommodation. In that view the fact that a large or extravagant claim was made did not materially increase the costs.

The defendants will have their costs; such costs to be limited to the issue as to the value of the premises to the owner for the particular use or purpose he was making of them at the time they were taken.

Judgment accordingly.

Solicitor for plaintiff: *R. F. MacIlreith.*

Solicitor for defendant: *T. F. Tobin.*

BETWEEN

HIS MAJESTY THE KING..... .....PLAINTIFF; 1907 April 22.

AND

WM. STAIRS, SON & MORROW.....DEFENDANTS.

Expropriation—Claim for damages for business—Claim for depreciation of value of machinery—Compensation.

Where the whole property is taken and there is no severance the owner i entitled to compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. He is not entitled to damages because such taking injuriously affects a business which he carries on at some other place.

2. Defendants, in expropriation proceedings, at the time their premises were taken had them fitted up as a boiler and machine shop. The machinery was treated as personal property by the defendants and sold for less than it was worth to them when used for such purposes.

Held, that they were entitled to compensation for the depreciation in value of the machinery by reason of the taking of the premises where it had been in use.

THIS was a proceeding by information at the suit of the Attorney-General of Canada to expropriate certain lands required for the purposes of the Intercolonial Railway of Canada.

The facts are stated in the reasons for judgment.

January 19th, 1907.

The case was heard at Halifax.

R. T. MacIlreith and *C. F. Tremaine* for the plaintiff;

F. H. Bell for the defendants.

THE JUDGE OF THE EXCHEQUER COURT now (April 22nd, 1907), delivered judgment.

The information is filed to obtain a declaration (1) that certain lands and premises therein described situated in

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Reasons for Judgment.

the City of Halifax and taken for an extension of the Intercolonial Railway, are vested in His Majesty the King; and (2) that $7,000 is sufficient and just compensation for such lands and premises, and for all claims in respect of any loss or damage sustained by the defendants or to be sustained by them by reason of the entering upon, taking possession and expropriation of the same, as stated in the information.

The defendants deny the sufficiency of the compensation tendered. They say in substance that the lands taken were worth the amount offered and they claim in addition thereto:—

(1) The sum of two thousand dollars as loss or damage sustained upon the sale of a quantity of machinery which was upon the said premises, suitable for the use of a boiler and machine shop, which they were unable to remove to any other place and which they sold at auction at a price, it is alleged, much below its value to them; and

(2). The sum of five thousand three hundred dollars for loss sustained in their business of dealers in iron and steel plates and other materials by reason of the discontinuance of the business which their tenants carried on the said premises.

The premises were fitted up as a boiler and machine shop, and at the time the lands were taken were in the occupation of Ferguson & Cox, boiler makers and machinists and general repairers, at a nominal rent; and on the understanding, or as Mr. Stairs puts it, on "an "unwritten agreement that practically all they needed "they would buy from" the defendants' warehouse. Then the defendants estimate their sales to Ferguson & Cox at an average of $2,878 per annum, and they say that their profit on this would be fifteen per centum net, making a yearly profit of $530, which they capitalize at ten per centum, making the amount of $5,300 claimed.

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Now, what the defendants are entitled to in a case of this kind where the whole property is taken and there is no severance, is compensation for the land and property taken, and for such damages as may properly be included in the value of such land and property. They are not entitled to damages because such taking injuriously affects a business which they carry on at some other place. But even if it were otherwise, it was not the lands and premises taken from the defendants that of themselves earned the $530 per annum that they claim as profits on the business done with Ferguson & Cox. There were other elements, such as capital employed and their business enterprise and activity. In lieu of the profits mentioned, which constituted all the benefit derived from the lands and premises taken, the defendants will now have for all time the interest on the sum awarded therefor. And in my view they will in this aspect of the case be better off with $7,000 in hand then they were formerly with a property for which with all the machinery therein they could not get more than a nominal rent and a parol undertaking that the tenants would deal with them.

With regard to the other item of loss alleged, there is greater difficulty. The machinery on the premises in question was personal property. At least it was treated as such and was removed and sold. The Crown did not take it, but its value was lessened by reason of the taking of the premises where it had been used. Indirectly, if not directly, compensation may, I think, be given for a loss of that kind. The fact that the defendants had this property fitted up as a boiler and machine shop made it more valuable to them than it otherwise would have been, and that matter may, I think, be taken into account in assessing the value of the lands and premises taken. Because the premises were fitted up with machinery which could be used there but for which the

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defendants had no other use, the premises were worth more to them than they otherwise would have been worth.

Mr. Read and Mr. Duggan, the Government valuators, put the value of the property at $6,000, and that of certain foundations for machinery at $500. This valuation was, I think, a liberal one, but it was intended to represent the actual value apart from the fact that the premises were fitted up as a boiler and machine shop, and without considering the use to which they were put, at the time of the taking, and that by the taking the defendants would be left with a lot of machinery on their hands for which they would have no use.

In my view a sum of $7,500 will cover fully the actual value of the lands and premises taken and any damages the defendants are entitled to in connection with such taking.

There will be the usual declaration as to the vesting of the lands, and that the defendants are entitled to compensation in the sum of $7,500, with interest from the 26th day of January, 1906.

With regard to costs, the only issue was as to the sufficiency of the amount of compensation offered; and as to that the defendants succeed in part in respect of one of the two contentions made by them, and fail as to the other. There will be no costs to either party.

Judgment accordingly.

Solicitors for plaintiff: *R. T. MacIlreith.*

Solicitor for defendant: *F. H. Bell.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING *v.* THE SHIP "*NORTH.*"

1905
August 25.

Illegal fishing by foreign vessels—R. S. C. (1886) *c.* 95—*Three mile limit—Jurisdiction of Dominion and Provinces over fisheries—Constitutional law.*

The American schooner *North* was discovered by the fisheries protection cruiser *Kestrel* fishing for halibut in Quatsino Sound, Vancouver Island, within the three mile limit, having all her boats out. On observing the *Kestrel* the schooner picked up two of her boats and stood out to sea. The *Kestrel* picked up one of the schoonor's boats within the three mile limit and then overhauled the schooner and seized her about a mile and three-quarters outside of the three mile limit. There were freshly canght halibut on the schooner at the time of the seizure.

Held, that seizure was lawful, the pursuit having commenced within the three mile limit and having been continuous.

Observations on jurisdiction of Dominion and Provinces over fisheries.

THE trial took place in Vancouver, B.C., before Mr. Justice Martin, Local Judge, on 27th and 28th July, 1905.

C. Wilson, K.C., for owners of schooner, objected to seizure as unlawful as vessel was beyond the territorial jurisdiction of Canada. No crime has been committed; there is no property in the fish, and in any event only a breach of regulations *re* foreigner fishing in Canadian waters without a license. A British ship within territorial jurisdiction of a foreign state is subject to that jurisdiction, but when beyond it the ship is British territory. Cites *Lesley's case* (1); *The Queen* v. *Carr* (2); *Marshall* v. *Murgatroyd* (3); *The Queen* v. *Keyn* (4); *The Queen* v. *Anderson* (5); *Cranstoun* v. *Bird* (6). As

(1) [1860] Bell's, C. C. 220.
(2) [1882] 10 Q. B. D. 76.
(3) [1870] L. R. 6 Q. B. 31.
(4) [1876] 2 Ex. D. 63.
(5) [1868] L. R. 1 C. C. 161.
(6) [1896] 4 B. C.R. 569.

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the Dominion Statute does not provide any punishment for men infringing fishery regulations, their detention on cruiser was unlawful.

D. G. Macdonell for Crown: A ship found committing an offence within the jurisdiction may be followed beyond it provided pursuit continuous. Cites *Hudson* v. *Guestier* (1); *Church* v. *Hubbart* (2); and *The Alexander* (3).

Wilson, in reply: Judgment in *Hudson* v. *Guestier* is *obiter* on point that a vessel may be seized without the jurisdiction for an offence committed within. Cites *Rose* v. *Himely* (4).

On the 25th August, 1905, the following judgment was delivered by:

MARTIN, L. J. This case raises important questions relating to the fisheries of this province in general and to the extensive and valuable halibut banks of Vancouver Island in particular.

There is, and can be from the evidence, very little dispute about the facts, which are clear, and I find as follows:—That on the morning of the 8th of July last the foreign schooner *North* alleged in its statement of defence to be "navigated according to the laws of the United States of America," was hove-to and unlawfully engaged in halibut fishing in Quatsino Sound, Vancouver Island, within the three-mile limit, having all its four fishing boats, dories, out for the purpose; that on observing the approach in obvious pursuit, within the three-mile limit and approximately four or five miles off, of the Canadian Fisheries Protection Cruiser *Kestrel*, she picked up two of her dories and stood out to sea; that the *Kestrel* continued in pursuit at her highest speed in the attempt to intercept the *North*; that in the course of that pursuit the *Kestrel* observed another dory close to and pulling hard from the land towards the schooner,

(1) [1810] 6 Cranch, 283.
(2) [1804] 2 Cranch, 187.
(3) [1894] 60 Fed. 914.
(4) [1808] 4 Cranch, 240.

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which dory the *Kestrel*, after slightly deviating from her course, picked up and seized within the three-mile limit, and, after fixing her position by cross-bearings, continued her pursuit of the *North*, which she overhauled in about ten to twelve minutes and seized, with the two first-mentioned dories about one and three-quarter miles outside the three-mile limit. There were freshly caught halibut lying on the *North's* deck at the time of seizure, which in all the circumstances must be held to have been caught within the limit. There were also several tons of halibut in her hold, but it cannot be said where they were taken. The schooner and the three dories were towed to Winter Harbour, Quatsino Sound, where the fourth dory was afterwards taken when it came in.

I may say that quite apart from the admission of the master of the *North* of his knowledge of wrong-doing, no difficulty is experienced here in regard to fixing the various positions in issue, as was the case in *The King* v. *The Kitty D.* (1), because they were exactly established by cross-bearings.

So far as the two dories taken within the limit and their tackle, gear and equipment are concerned, it was not argued that they were improperly seized, but as to the schooner and the other dories, it is contended on several grounds that the seizure thereof cannot be justified.

The first is, that no seizure can be made on the high seas for an offence committed within the three-mile limit, which is merely an infringement of municipal or local laws or regulations and not a crime in the proper sense of that word, in which case it is admitted a seizure may be made where the pursuit is continuous. Here the pursuit was begun within the three-mile limit and was clearly continuous, which in fact was not nor could be seriously disputed, for it would be unreasonable to contend that its continuity was broken by stopping to

(1) [1904] 34 S. C. R. 673.

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pick up within the limit one of the best evidences of the commission of the offence, as it would be in the case of a constable in pursuit of a thief stopping to pick up the stolen article which the pursued threw away in the course of his flight. Indeed the inference is stronger and the act more advisable in the case of a poaching vessel with her boats out in the ordinary course of fishing operations, because the boats are manned by members of her crew who are a living and active part and parcel of her engaged in breaking the law. See on the wide meaning of "fishing" and "preparing to fish," the case of *The Queen* v. *The Ship Frederick Gerring, Jr.* (1); the cases reported and cited in Stockton's Admiralty Digest (1894) on pp. 200 and 598-600: those on the Behring Sea Seal Fishery in this court; and on the same subject in the United States Court of Admiralty, *The James G. Swan* (2); *The Kodiak* (3); and *The Alexander* (4).

As regards the rights of merchant vessels in foreign ports, it was said in the leading case of *The Queen* v. *Anderson* (5), that "when vessels go into a foreign port they must respect the laws of that nation to which the port belongs," though they may there be still subject to the laws of their own country as though they were on the high seas. And see *The Queen* v. *Carr* (6); *Marshall* v. *Murgatroyd* (7).

It has likewise been repeatedly laid down by the Supreme Court of the United States, adopting the language of Chief Justice Marshall in the celebrated case of *The Exchange* (8), that :—

"When merchant vessels enter (foreign ports) for the purpose of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to con-

(1) [1896] 5 Ex. C. R. 164; [1897] 27 S. C. R. 271.
(2) [1892] 50 Fed. 108.
(3) [1892] 53 Fed. 126.
(4) [1894] 60 Fed. 914.
(5) [1868] L. R. 1 C. C. 161 at p. 166.
(6) [1882] 10 Q. B. D. 76.
(7) [1870] L. R. 6 Q. B. 31.
(8) [1812] 7 Cranch, 116, at p. 144.

tinual infraction, and the government to degradation, if such * * * merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country."

Followed in *United States* v. *Diekelman* (1), and *Wildenhus's Case* (2).

There is no case in English or Canadian reports on this first point, but it has been dealt with by American courts. *Church* v. *Hubbart* (3), is a case where an American ship was seized by the Portuguese Government outside of the three-mile limit for a violation of the prohibition of the Crown of Portugal against all trade by foreigners with its colonies, or hovering off their coast for that purpose. [The learned Judge here quoted the language of Chief Justice Marshall at pp. 234-5-6.]

In *Rose* v. *Himely* (4), the majority of the judges of the same court gave a decision which, it is true, cannot be reconciled with that just cited, but I draw attention to the fact that three of the judges, Livingston, Cushing and Chase, JJ., did not express themselves on the present point, and Mr. Justice Johnson dissented. But the matter must, in my opinion, be considered as settled by the subsequent case of *Hudson* v. *Guestier* (5), decided by the same court, wherein *Rose* v. *Himely* is overruled, all the judges concurring, with the exception of Chief Justice Marshall, who gives an explanation (p. 285) of his misapprehension in regard to his former view being shared by certain of his colleagues. In that case it was held that a ship may be seized on the high seas for a breach of municipal regulations committed within the territorial jurisdiction. The court said:

"If the *res* can be proceeded against, when not in the possession or under the control of the court, I am not

(1) [1875] 92 U. S. 520.
(2) [1886] 120 U. S. 1.
(3) [1804] 2 Cranch, 187.
(4) [1908] 4 Cranch, 240.
(5) [1810] 6 Cranch, 283.

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able to perceive, how it can be material, whether the capture was made within or beyond the jurisdictional limits of France, or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she (France) interfered with the jurisdiction of no other nation, the authority of each being there concurrent."

There the capture was more than two leagues at sea, and the ship was condemned for trading to the revolted parts of the Island of Hispaniola contrary to the ordinances of France.

The Supreme Court of Louisiana in *Cucullu* v. *Louisiana Insurance Co.* (1), followed the principle laid down in *Church* v. *Hubbart*, *supra*.

And, *a fortiori*, the right would exist after the territorial waters had been actually entered and violated.

This view is, as would be expected, to be found in the text books on the subject, and I proceed to give extracts from the latest of them*

The case of *Church* v. *Hubbart* is referred to in the American note to Philimore's International Law, but the editor does not seem to have been aware of the later and broader decision in *Hudson* v. *Guestier*.

This distinction between seizures made upon the high seas which are the exclusive property of no nation, and the general property of all nations, and the seizures made within the territory of another state is, I find, illustrated in a striking manner by *Lee on Captures in War* (1803) 123, wherein he lays it down in the case of war, though it is said to be "the most that can be allowed" that—

"During the engagement, it is lawful to pursue the flying enemy into another government; for the same

(1) [1827] 16 Am. Dec. 199. See p. 297.

*REPORTER'S NOTE.—The learned Judge here quoted from Woolsey on International Law, 6th Ed., 1898, p. 71, par. 58; p. 365, par. 212; Taylor on Public International Law (1901) p. 307, par. 262; p. 310, par. 267; Hall's International Law, 4th ed. ed. pp. 213, 215, 263, 266; Phillimore's Commentaries on International Law, Am. Ed., 1854, Vol. 1, p. 179.)

reasons as Philip the Second, King of Spain, in an edict he published relating to criminals in the year 1570, par. 76, permitted the delinquent to be pursued into the territories of another. But it is one thing to begin force, and another to press forward with force in the heat of action. In a word, the very being in the port of a friend forbids us to commence any force there; but it does not prohibit the use of any force which was begun without the bounds of his territoy, while the matter is warm; for we may then pursue it into the very territory of our friend. And, though this is a question little noticed by writers on public justice, yet this distinction appears quite reasonable."

Over the waters within the three-mile limit the chief heads of jurisdiction generally asserted by nations are four:—(1) The prohibition of hostilities; (2) the enforcement of quarantine; (3) the prevention of smuggling; and (4) the policing of fisheries; and this last, involving the assertion and protection of the exclusive right of its subjects to fish within said limit, is certainly not the least important duty of a State. So far as this continent is concerned, it is of much consequence in view of the great value of the fisheries; and this "police jurisdiction" by the two nations chiefly concerned (Canada and the United States) has been acquiesced in for a long period, and is admitted, so it is unnecessary to discuss it. As regards the North Atlantic fishery, its history is given by Wharton in his International Law Digest (1886) vol. 3, pars. 300-1; and see Hall's International Law, *supra*, 99 and 154 on British American fisheries generally. Though poaching on the fisheries of a friendly nation is not essentially a crime, yet, as was said by the Supreme Court of Canada in *The Queen* v. *The Frederick Gerring, Jr.*, *supra*, it is a "nefarious business" and one which "so far as Canadian waters are concerned has been prohibited and criminalized," and the cases hereinbefore

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cited shew that the governments of Canada and the United States have endeavoured rigidly to suppress the depredation of their waters by foreigners.

It follows from all the foregoing that the seizure herein was lawful. Such being the case, it becomes unnecessary to consider the question of the alleged extent of Quatsino Sound from Cape Cook to Topknot Point, on the "headland to headland" theory, which raises a very involved question which I see has been in recent years considered by the Supreme Court of Newfoundland in *Rhodes* v. *Fairweather* (1); see also an appeal from that court on the same question in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (2); and *Mowat* v. *McPhee* (3).

The remaining question is that the government of Canada, as a result of the *Fisheries Case* (4), is not vested with the authority to prevent any one from fishing, and has no status except for revenue purposes; in other words, that while it has the right to control, it has not the right to absolutely prohibit foreign nations, and that it is the Province of British Columbia and not Canada that has, if any one has it, the right of property in the fish and therefore the Federal government has no police jurisdiction. In view of the long continued undisputed exercises of this right by the Federal power, as shewn by a perusal of the cases already cited, and others such as *The Grace* (5), and the *The Queen* v. *The Henry L. Phillips* (6), it would seem to be somewhat late to raise the point. Indeed it has been laid down in the former case, p. 288, as follows:—

"Now it is also an axiom of International law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects and therefore the

(1) [1888] Newf. Dec. 321.
(2) [1877] 2 App. Cas. 394.
(3) [1880] 5 S. C. R. 66.
(4) [1898] A. C. 700.
(5) [1894] 4 Ex. C. R. 283.
(6) [1895] *ib.* 419, [1896] 25 S.C.R. 691.

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Act respecting fishing by foreign vessels is strictly within the powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights."

And then follows the reference to the statute shewing that it does in its first section provide for the issue of a license to a foreign ship, and the onus is upon such ship when fishing in our waters to prove its possession of a license. *The Queen* v. *The Henry L. Phillips*, *supra*. Here there is no evidence of a license, nor of the nationality of the owners; all before the court on that point is that the vessel was navigated according to the laws of the United States. It was laid down in the *Fisheries Case*, (1) that—

"It is impossible to exclude as not within this power (raising money) the provision imposing a tax by way of licence as a condition of the right to fish. It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a license in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention."

And further, that (2).

"The enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures."

While these rights are not proprietary, they are manifestly of a such a nature that it is within the competence of the Federal power to exercise the sovereign rights which have been delegated to it by the British North America Act, and protect, in the interest of the nation at large, those fisheries which it is authorized to

(1) [1898] A. C. at page 713. (2) *Ibid.* at p. 716.

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regulate and license. I can find nothing in the *Fisheries case* which goes to support a contrary view.

The judgment of the court is that the schooner *North*, her boats, tackle, rigging, apparel, furniture, stores and cargo are condemned and declared forfeited to His Majesty.

Judgment accordingly.

APPEAL FROM NOVA SCOTIA ADMIRALTY DISTRICT.

THE SHIP *MANHATTAN* AND HER CARGO (DEFENDANT)..... } APPELLANT; 1907 June 10.

AND

JAMES SULLIVAN AND OTHERS (PLAINTIFFS)..... } RESPONDENTS.

Shipping—Salvage—R.S.C. 1906, *c.* 113. *sec.* 814—*Delivery of salved goods to receiver of wrecks—Penalty.*

Under the provisions of sec. 27 of the *Wrecks and Salvage Act*, R. S. C. 1886, c. 81 (now R. S. C. 1906, c. 13, sec. 814) a salvor who has delayed the delivery of salved goods to the receiver of wrecks for a short time, not with the intention of retaining the goods but merely for the purpose of having the amount payable to him for salvage determined before giving up possession, does not thereby forfeit his right to salvage, or incur the penalties mentioned in such section.

APPEAL from the following judgment of the Local Judge of the Nova Scotia Admiralty District:—

MACDONALD, L.J.:—The schooner *Manhattan*, of Lunenburg, while on a voyage from Carbonear, near Newfoundland, to Lunenburg with a cargo of dried fish, was cast away in a violent gale of wind at or near Glasgow Head, on the 17th of January last between 8 and 9 a.m. The master during the previous night had taken shelter in the harbour of Canso and on the morning of the 17th January put to sea to pursue the voyage, but was driven ashore as stated a few miles from the port in which he had sought shelter. When the vessel struck it appears from the master's evidence on the trial that he was so impressed with the danger of the situation to vessel and crew that he and the crew under his direction at once left the vessel in the schooner's boat, and made the shore, apparently with some difficulty and no little danger and risk

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on account of the heavy sea. Before leaving the vessel the master and crew lowered the jib and foresail, but left the heavy mainsail set, and exposed to the full force of the gale. After the master and crew had left the vessel, some young fishermen of the locality who had heard of the vessel being ashore went to the scene of the wreck and with great difficulty and very considerable risk to themselves succeeded in removing the sails and a quantity of rigging to the shore. This property was afterwards taken to the port of Canso, a few miles distant and there delivered to the agents of the owners under an agreement for compensation. When the cargo was ultimately got from the ship's hold at Canso, and sold at Canso, the plaintiffs claimed that they had rendered salvage services which entitled them to consideration in the proceeds of the cargo. They contended at the trial that their work in taking down and removing the sails from the ship, particularly the large mainsail contributed to the ultimate recovery of the cargo. That the then condition of the weather and the vessel rendered it doubtful if the latter could long survive the action of the sea in such a gale on an open and exposed coast, and that the action of the heavy mainsail if left in the condition in which they found it would materially increase the risk of a total loss of the cargo, as if the vessel should break up as was quite possible, a total loss of the fish would result. The following authorities were cited and relied on at the trial as sustaining the plaintiff's contention for salvage services out of the proceeds of the cargo: the *Sarah* (1); the *Melpomene* (2); the *Camellia* (3); the *Aeolus* (4); the *Pickwick* (5); Williams and Bruce's Admiralty Practice (6).

The latter says:—"When however the exertions are meritorious and the property is afterwards saved, the

(1) 3 P. D. 39.
(2) L. R. 4 A. & E. 129.
(3) 9 P. D. 27.
(4) 42 L. J. Adm. 14.
(5) 16 Jur. 669.
(6) 3 Ed. 132.

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court will it seems on very slight evidence conclude that the services were in some degree instrumental towards the ultimate result."

The evidence in the case leads me to the conclusion that had the vessel been left to the mercy of the gale prevailing when boarded by the plaintiffs and in the position and under the conditions in which they found her, the cargo would have been totally destroyed or rendered worthless before any considerable portion could be saved, and that the services rendered by the plaintiffs were of a character to entitle them to be remunerated for their services and the risk they incurred in rendering their services. There will therefore be judgment for the plaintiffs with costs and I assess the amount of salvage to be paid plaintiffs at the sum of four hundred dollars to be equally divided between them. This to include all salvage claims of the plaintiffs rendered the ship and cargo including sails and rigging landed by them.

January 25th, 1907.

The appeal was argued at Halifax.

Mr. *J. B. Kenney* for appellants;

Mr. *W. K. A. Ritchie, K.C.*, for respondents.

THE JUDGE OF THE EXCHEQUER COURT now (June 10th, 1907, delivered judgment.

This is an appeal from a judgment or decree made on the 26th day of May, 1906, by the learned Judge of the Nova Scotia Admiralty District, whereby in an action for salvage he found for the plaintiffs and assessed the amount of salvage to be paid to them at the sum of four hundred dollars, to be equally divided between them. This amount included all claims for salvage for services rendered by the plaintiffs to the ship, including sails and rigging and to the cargo.

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The following is the master's account of the wreck of the *Manhattan*:

"I belong to Lunenburg. I was master of the *Manhattan*. She would be four years old this spring. She was built and owned in Lunenburg. She was on a voyage from Carbonear, Newfoundland, to Lunenburg, loaded with a cargo of dry codfish. We went into Canso for a harbour. Coming out we got under way about one o'clock Monday night, or Tuesday morning, January 16th. We caught a nice breeze and got out as far as Black Rock at Canso, and there the wind suddenly died out. We thought we might get out clear and kept on for some minutes, but the sea was heavy and we tried to tack the ship and go back, but she would not come round. Then we tried to wear her, and she would not wear. The wind was light and the sea heavy. We made a second attempt to tack ship, and after some time we got her around and headed in and got inside Black Rock, abreast of Glasgow Head, and there we got becalmed altogether. I saw that we could not get up and said to the crew that we would let go the anchor. We let go the anchor and lowered the jibs, and lowered away the foresail. The mainsail we did not lower. The sea then was boarding her. I gave the crew orders to put out the boat and get her ready alongside. While taking out the boat a heavy sea boarded us and nearly took two or three of the crew over. We had to take to the boat and get off as fast as we could. We came up to Canso, knowing that there was a tow boat there, to try and get her to go down and get the schooner towed up to the harbour. After we had left her three or four minutes we saw she had parted the chain or taken the anchor with her and gone head on the land. I knew then that there was no chance for us and that there was no use taking the tow boat. We went up and got two dories instead of our boat, and went down to Glasgow

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Head. There was no chance of getting on board and I landed and came up to Canso. This was before daylight."

About nine or ten o'clock of the same day the plaintiffs went to the place of the wreck. At that time the *Manhattan* was on the beach with her bow to the shore. There was a heavy sea running, but the wind had gone down. She was on the rocks, the end of her jibboom being ten or fifteen yards from the shore. The tide was high. After several attempts, and at some considerable risk and peril, the plaintiffs got on board the vessel and proceeded to strip her. This work lasted until evening. During the day the master and crew of the *Manhattan* returned to the wreck, removed what belonged to them, and assisted, it appears, in saving the sails and rigging. The master does not, however, appear to have gone on board the vessel, and when he was asked about the mainsail he answered that they had all off then and they might as well take the mainsail. And then the mainsail was taken down. This was done to save the sail, not with any view at the time of preventing the vessel from breaking up. That, however, was the result of the plaintiffs' action in taking down the mainsail, for in the afternoon and evening a breeze sprang up, and during the following night the wind blew heavily. With the mainsail set she might have pounded to pieces, and the cargo, which was afterwards salved by others, might have been lost.

Now, apart from the defence set up in pursuance of *The Wrecks and Salvage Act* (1), to which reference will be made, it is not denied that the plaintiffs are entitled to salvage for their services in saving the sails and rigging of the defendant vessel. It is contended, however, that they are not entitled to any salvage in respect of the cargo. The learned Judge who heard the case found

(1) [1886] R. S. C. c. 81.

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against that contention, and I think he was right. The vessel was not, it is true, stripped and the mainsail taken down with a view to saving the cargo ; and, standing by itself, what was done would not have had that result, yet it contributed to it, and as the service rendered was in itself meritorious, I think the learned Judge was justified in taking the matter into consideration in assessing the amount of salvage to be paid to the plaintiffs. To entitle a person to salvage it is not necessary, it seems to me, that he should foresee or intend all the benefit that may result from the salvage service that he renders. I am also of the opinion that the amount allowed was a reasonable and moderate amount.

By the 26th section of *The Wrecks and Salvage Act* in force at the time the salvage services in question was rendered (R. S. C. c. 81, s. 26), it was, among other things, provided that whenever any person took possession of a wreck within the limits of Canada, he should as soon as possible deliver the same to the receiver of wrecks.

By the 27th section of the Act mentioned it was among other things further provided that any person who failed to deliver possession of a wreck to the receiver in pursuance of the provision referred to should forfeit any claim to salvage and should be liable to pay as a penalty double the value of such wreck, and a further sum not exceeding four hundred dollars. There was in this case some delay by the plaintiffs in delivering up a part of the sails and rigging saved. There was no intention on their part to retain the goods, but they wanted to have the question of the amount to be paid to them determined before they gave up possession. And on the whole it does not appear to me that their action is unreasonable. The receiver of wrecks at Canso was brought into the matter, but not as receiver of wrecks. He acted as auctioneer for the sale of the goods at the instance of the master and of his own brother who was the ship's

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agent at that place. The delay in delivering up possession of the sails and rigging was not in fact a delay in delivering them to the receiver of wrecks, but a delay in delivering them to the auctioneer engaged by the master of the vessel. The only use the receiver made of his office was to get possession of the goods as auctioneer. After some negotiation it was arranged that the plaintiffs should be paid for their services in saving the things that were taken from the vessel on the day mentioned one half of what they realized at auction. So far as there was delay in delivering to the owner's agent possession of the things salved the parties themselves settled the matter, and there really was no question at any time of delivering them to the receiver of wrecks at Canso in his quality and office as receiver. In my opinion the defence sought to be set up under the statute referred to fails.

The appeal will be dismissed with costs to the respondents.

Judgment accordingly.

Solicitors for appellant: *Drysdale & McInnis.*

Solicitors for respondents: *Ritchie & Robertson.*

IN THE MATTER of the Petition of Right of

1907
April 15.

WILLIAM MONTGOMERY, A LUNATIC, BY WILLIAM MONTGOMERY, THE COMMITTE OF HIS ESTATE AND PERSON.... } SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Tort by Crown's servants—Diversion of flowing water—Liability—Amendment of Petition of Right—Practice.

The suppliant, by his petition of right, alleged, in substance, that the Crown, through the Minister of Railways and Canals, and his servants, agents and employees, having no right to do so, had diverted the water of a certain brook, which flowed through his property in the parish of Dalhousie, N.B., and used the same for supplying the engines and locomotives of the Intercolonial Railway and vessels in the harbour of Dalhousie.

Held, that the suppliant's action was laid in tort, and a petition of right would not lie therefor.

Upon an application by the suppliant to amend his petition the court declined to grant the same until a draft of the proposed amendments was submitted, and the court had an opportunity of considering how far it was necessary for the suppliant to depart from his original petition.

PETITION OF RIGHT for damages for the diversion of a water-course.

April 8th, 1907.

The arguments of a motion for judgment by the Crown upon certain points of law raised by the defence was now heard.

E. L. Newcombe, K.C., in support of motion;

F. A. Magee, contra.

THE JUDGE OF THE EXCHEQUER COURT now (April 15th, 1907) delivered judgment.

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Reasons for Judgment.

It appears from the Petition of Right that the suppliant has been for a number of years seized in fee simple of certain lands and premises in the Parish of Dalhousie, in the County of Restigouche and Province of New Brunswick, through which a brook known as the Ship Yard brook flowed; that on the 15th day of October, 1887, he and his wife surrendered to the Crown two parcels of such lands for the purposes of the Intercolonial Railway. What those purposes were is not distinctly shown, but it is perhaps a fair inference that one parcel was acquired by the Crown for the permanent way of the Dalhousie branch of the Intercolonial Railway, and the other parcel in connection with a supply of water for the use of the railway at that place; for it is alleged that by virtue of the surrender mentioned the Crown became a riparian proprietor on the Ship Yard Brook, and in the description of one parcel of land there is mention of a reservoir, and there is also an express grant to the Crown of a right to take up and repair water pipes at any time it might be considered necessary. The substance of the suppliant's complaint is that the Crown through the Minister of Railways and Canals, and his servants, agents and employees, having no right to do so, had diverted the water of the said Brook and used it in supplying water to the engines and locomotives of the Intercolonial Railway and in supplying and furnishing water to vessels in the harbour of Dalhousie; and he claims damages in respect of water used for such engines and locomotives in the sum of nine hundred dollars, being at the rate of fifty dollars per year for eighteen years; and for water supplied to such vessels the sum of seven hundred and fifty dollars, that is a sum of fifty dollars yearly for fifteen years.

It is objected to this petition that the action is laid in tort, and that no cause of action for which a petition will lie is disclosed; and it appears to me that the objection is well taken.

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What the Minister of Railways and Canals and his agents and servants are alleged to have done has either been done lawfully in the exercise of his statutory powers (R. S. C. 1906, c. 143, s. 3, ss. (*b*) and (*f*) or wrongfully, as being in excess of or outside of the statute. In the latter case the person who committed or authorized the commission of the wrong would be liable therefor, but the Crown would not be liable, and no petition of right could be maintained for the alleged wrongful act. On the other hand, if what was done was lawfully done under the statute the suppliant would not be entitled to any damages excepting those for which the statute makes provision; and there is no provision for such damages as are claimed in this petition.

At the argument of the points of law raised by the statement of defence, counsel for the suppliant asked leave to amend. I shall not dispose of that application at present. I should like first to have an opportunity of considering the proposed amendments, and of seeing how far it is necessary for the suppliant to depart from the present petition. But I reserve to him leave to apply for such amendments as he proposes to make, a draft thereof to be presented when the application is made.

There will be judgment for the respondent, with costs upon the points of law raised by the statement of defence. The suppliant has leave to apply to amend upon payment of costs, a draft of the proposed amendments to be submitted at the time the application to amend is made.

Judgment accordingly.

Solicitor for suppliant: *W. A. Mott.*

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

BETWEEN

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... } PLAINTIFF;

1907
April 27.

AND

JOHN A. THOMPSON ..... DEFENDANT.

Expropriation—Foundry—Depreciation in value of machinery and tools by reason of expropriation—Compensation.

Where a building used as a foundry is expropriated for the purpose of a public work, the owner who is unable to find suitable premises elsewhere to carry on his business is entitled to compensation for the depreciation in value of the machinery, tools and other personal property with which his foundry is fitted up.

THIS was an information for the expropriation of lands for the purposes of the Intercolonial Railway of Canada.

The facts are stated in the reasons for judgment.

January 25th, 1907.

R. T. MacIlreith and *C. F. Tremaine*, for plaintiff;

W. B. A. Ritchie, K.C. and *J. A. McKinnon*, for defendant.

THE JUDGE OF THE EXCHEQUER COURT now (April 27th, 1907) delivered judgment.

Certain lands and premises situated on Water street, in the City of Halifax, described in the information herein, and of which the defendant was owner, were taken by the Crown for the purposes of the Intercolonial Railway. At the time of the taking the defendant occupied and used these premises as a foundry. For the purpose to which he put the property it was worth to him, he says, $5,000, and Mr. Duggan, one of the Govern-

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Reasons for Judgment.

ment valuators, agrees with that view. Apart from this particular use of the property by the defendant, its value was, it appears, about $3,500.

The defendant also claims $5,000 for loss of business. Being dispossessed and turned out of his property he was not able, or did not find it convenient, to re-establish himself elsewhere. He has since been employed as foreman in another foundry. Of course no man cares to lose his own business and work for others in the same business, and it is a hardship to be compelled to do so. But in this case there has been no pecuniary loss. The defendant says that including about $140 a year received for rents for a part of the property, and not counting his own labour, he made out of the business which he did on these premises $900 or $1,000 a year. That gave him for his superintendence of his business and for his labour about $750 or $850 a year; and his services as foreman are really worth more than that. So that there is in that aspect of the case no pecuniary loss, and there is no reason on that account to come to the conclusion that the lands and premises, used as a foundry, were worth to him when taken more than the sum at which he and Mr. Duggan agreed in estimating it.

The defendant also claims a sum of $5,000 for loss on certain machines, tools and other articles with which his foundry was fitted up. An inventory and appraisement of these things is in evidence in which their value is put at $5,488.70. At auction they realized $361.50. Such a loss as this is, I think, when inevitable, an element to be taken into account in determining the value of the lands and premises taken; and the amount of the compensation to which a defendant is entitled. If in such a case as this it is inevitable that a defendant upon being dispossessed must make a loss on the personal property with which his foundry is fitted up, then the property taken is worth more to him than its actual or market

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value; more than it would be worth in the hands of one who would not on dispossession be compelled to make such a loss. In this case however the great disparity between the appraised value of the articles mentioned and what they realized is not, I think, satisfactorily explained. If the values are as stated a prudent sale or disposition of the property ought to have realized more. I have great difficulty in coming to the conclusion that so great a loss was necessary or inevitable. The Crown officers do not appear to have had any notice of the sale or that any such claim would be put forward.

On the whole case I think that a sum of $5,500 will represent a just and sufficient compensation to the defendant, including the compulsory taking and other elements of damage that ought to be taken into consideration.

There will be a declaration :—

1. That the lands and premises described in the information are vested in His Majesty ;

2. That the defendant, upon procuring and giving to the Crown good and sufficient discharges or releases from any person or persons having any claim upon such compensation money, is entitled to be paid as compensation for the lands and premises taken and for all damages arising from such taking, the sum of $5,500, with interest thereon from the 26th day of January, 1906.

3. That the defendant is entitled to his costs.

Judgment accordingly.

Solicitor for plaintiff, *R. T. MacIlreith.*

Solicitor for defendant : *J. A. McKinnon.*

IN THE MATTER of the Petition of Right of

1907
June 20.

JOSEPH E. SNOW.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Fishery bounty—R. S. 1906, *c.* 46—*Regulations of December* 10*th*, 1897—*Fisherman required to serve three months on fishing vessel.*

To entitle a fishing vessel to bounty under the regulations of December 10th, 1897, the fishermen employed on board of her must serve the full time of three months on such vessel during the season; service for such time partly on one vessel and partly on another will not suffice.

PETITION OF RIGHT for a fishing bounty under R. S. 1906, c. 46.

The facts are stated in the reasons for judgment.

January 18th, 1907.

The case was heard at Halifax, N.S.

R. G. Monroe for the suppliant;

R. T. MacIlreith for the respondent.

THE JUDGE OF THE EXCHEQUER COURT now (June 20th, 1907) delivered judgment.

The suppliant brings his petition to recover from the respondent the sum of one hundred and twenty-nine dollars and sixty-four cents, which he alleges that he is entitled to for fishing bounties earned in the year 1904 by the fishing vessels *Earnest F. Norwood* and *W. Parnell O'Hara*. The payment of these bounties is regulated by an order of His Excellency in Council passed on the 10th day of December, 1897, and published in the Canada Gazette on the 1st day of January, 1898. By the 14th

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paragraph of the regulations thereby prescribed it is provided as follows :—

"Any person or persons detected making returns "that are false or fraudulent in any particular will be "debarred from any further participation in the bounty "and be prosecuted according to the utmost rigour of "the law."

In his statement of claim for fishing bounty alleged to have been earned in the year 1894 by the fishing vessel *Ernest F. Norwood*, the suppliant inserted, among others, the name of one Alfred Cossaboom as a fisherman employed on board the said vessel; and in the affidavit appended to such statement he deposed that it was true and correct in all particulars; that each fisherman whose name was entered in this claim was of the full age of fourteen years; that he fished three full months in the aforementioned vessel and had caught at least 2,500 pounds of sea fish. As a matter of fact the statement of claim is not true and correct in respect of the time that Cossaboom fished on the said vessel, and the Crown, among other things, relies upon the making of this false allegation as a defence to the petition. It is not denied that the allegation that Cossaboom "fished three full months in the aforementioned vessel" is false, and that the suppliant knew that it was false when he made it. It is said, however, that Cossaboom had during the season of 1904 fished long enough although he had not fished long enough on board the fishing vessel *Ernest F. Norwood* to earn it; and that the suppliant had included his name in the statement of claim referred to at the instance of the fishery officer who made out the claim for the suppliant. That is unfortunate for the latter, but it does not help his case. If the fishery officer advised what he is alleged to have advised, he did wrong, but that does not excuse the suppliant who made the false allegation; and the Crown is not bound by the

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action of its officer in that respect; and its defence is not thereby in any way prejudiced.

There will be a declaration that the suppliant is not entitled to any portion of the relief sought by his petition. The costs will, as usual, follow the event.

Judgment accordingly.

Solicitor for suppliant: *R. G. Munroe.*

Solicitor for respondent: *R. T. MacIlreith.*

TORONTO ADMIRALTY DISTRICT.

DONALD BEATON, ARCHIBALD GALBRAITH, DONALD McNEIL, MARTIN BELL AND PATRICK KELLY..... PLAINTIFFS;

1907
Oct. 5

AGAINST

THE STEAM YACHT "*CHRISTINE*"

Shipping — Seaman's wages—Jurisdiction — Merchant Shipping Act — Limitation of Actions.

A number of seamen forming part of the crew of a ship to whom separate and varying sums are claimed to be due for wages may combine in one action to recover same.

The limitation of actions to amounts over $200 discussed.

ACTION *in rem* for the recovery of a seaman's wages.

The case came on for trial at Toronto before the Honourable Thomas Hodgins, Local Judge of the Toronto Admiralty District, on the 10th day of September, 1907, and several witnesses were heard and preliminary objections taken to the action. The case was adjourned and shortly afterwards was settled between the parties.

C. W. Thompson, for Plaintiffs.

Frank Denton, K.C., for the Ship.

HODGINS, L.J., now (5th October, 1907) delivered judgment on the preliminary objections raised at the trial.

This is an action *in rem* brought by five seamen, members of the crew of the defendant steam yacht *Christine*, for certain separate balances due to them for their wages up to the 2nd August last. They were engaged in Greenock, Scotland, as part of the crew of the steam yacht *Christine*, and they appear to have left her upon the date mentioned. And the question to be considered is whether

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this Court has jurisdiction to entertain in one action the claims of a number of seamen forming part of the crew of a ship, to whom separate and varying sums are claimed to be due for wages, etc., or whether each seaman must bring his separate action and have his special claim adjudicated upon in such separate action, in the appropriate Court having special jurisdiction respecting such claim.

In the *Royal Arch.* (1), Dr. Lushington, after referring to the wider jurisdiction of the American Courts, added : "The Admiralty Courts in our North American Provinces exercise a fuller jurisdiction than the High Court of Admiralty in England. The reason seems to be that after the revolution of 1640 broke out, there was a great jealousy against the Ecclesiastical Courts; and this was extended to the High Court of Admiralty; and so in Lord Holt's time its jurisdiction was curtailed.", This statement is borne out by an examination of the cases for prohibition from the King's Bench to the Admiralty Court which may be found in the twelve volumes of "Modern Reports" which contain most of the decision of that great Chief Justice who presided in the Court of King's and Queen's Bench from 1689 to 1710. The judicial reason may have been that claims respecting agreements under seal had to be tried before a jury.

Thus in *Opy* v. *Adison* (2), Lord Holt affirmed that mariners' wages were suable in the Admiralty Court, if the agreement was by parol; but *aliter* if the agreement was by a special agreement in writing under seal.

And in *Clay* v. *Snelgrave* (3), the same learned judge held that although a suit might be brought in the Court of Admiralty for a seaman's wages it could not be brought in that court for the wages of a master.

In the *Mariners' Case* (4), a prohibition was suggested because "the contract had been reduced in writing for

(1) [1857] Swab. p. 277.
(2) [1639] 12 Mod. 38.
(3) [1700] 12 Mod. 405.
(4) [1725] 8 Mod. 379.

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the wages." But it was held that if it was a special contract the defendant may plead it in the Court of Admiralty, and if that court did not allow the plea, then it might be proper to move in the King's Bench for prohibition, "for if it should be granted before the plea is disallowed, it would be a pre-judging the justice of that court."

Similarly in *Howe* v. *Nappier* (1), the court held that as the seamen's contract was under seal it was therefore special, and the Court of Admiralty had no jurisdiction to try it.

These distinctions restricted the jurisdiction of the Admiralty Court up to 1861, for the *Debrecsia* (2), disclosed special conditions as to the voyage and the work to be done on board and as to a return home, and Dr. Lushington held the agreement was very special and different from that which the court was in the habit of taking into consideration; and he added: "I am not in a condition to exercise jurisdiction." See also the *Enterprise* (3), and the *Harriett* (4), in which latter case the learned judge said: "I am happy to say that an Act (24 Vict. c 10) is now passing through the legislature which will remedy the defect in the jurisdiction of the court, which, in the present case has operated with such hardship on the plaintiff."

The Admiralty Act of 1861 (24 Vic. c. 10) did away with these distinctions, and provided in section 10 that "the High Court of Admiralty shall have jurisdiction over any claim by a seaman for wages, whether the same be due under a special contract, or otherwise; and also over any claim by the master for wages, and for disbursements made by him on account of the ship." The above section and some unrepealed sections part of the statute law respecting the jurisdiction of the High

(1) [1766] 4 Burr. 1944.
(2) [1848] 3 W. Rob. 36.
(3) [1861] 5 L. T. N. S. 29.
(4) [1861] Lush. 285.

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Court of Admiralty in England became applicable to this Admiralty Court by section 2, subsec. 1, of the Colonial Courts of Admiralty Act of 1890 (53 & 54 Vic. c. 27 (Imp.)

This action is brought under the exceptional privilege accorded to seamen by which any number of them forming the crew of a ship may unite as plaintiffs in one action in the Court of Admiralty for variable amounts due to them individually as wages. The origin of this exceptional privilege dates back to early times.

The first reported case in which this exceptional privilege was acknowledged is *Anonymous* (1), which decided that "a prohibition shall not go to the Admiralty to stay a suit there for Mariners' wages, though the contracts were made on land; for it is more convenient for them to sue there because they may all join." The subsequent cases affirm the same rule. Thus in *Wells* v. *Osmond*, (2) it was held, *Per Cur.*, that the true reason why seamen may sue for their wages in Admiralty is that there the ship is made liable to them; and besides they may all join in the suit, neither of which may be allowed at the common law. And in the *Mariners' Case* (supra) the further reason was given that "it is the cheapest and most expeditious method to recover their wages." See further *Ross* v. *Walker*, (1765) (3) *Howe* v. *Nappier* (1766) (4)

By the 2nd William IV, ch. 51 (1832), the Crown was authorized by Order-in-Council to make regulations respecting the practice of Admiralty Courts abroad; and by s. 15 of an Order-in-Council regulating such practice, the number of seaman who might bring a suit in such Vice Admiralty Courts was limited to six. But this Act was repealed in 1890 by the Colonial Courts of Admiralty Act (c. 27). and with that repeal the limitation prescribed

(1) [1670] 1 Ventris, 146.
(2) [1705] 6 Mod. 238.
(3) (1765) 2 Wils. 264.
(4) (1766) 4 Burr. 1944.

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by the Order-in-Council, became imperative as applicable to Canada.

A proviso to section 10 of the Admiralty Act of 1861 (Supra) enlarging the jurisdiction of the Exchequer Court of Admiralty says: "Provided that in any such cause (actions by master or seaman for wages), if the plaintiff do not recover £50 he shall not be entitled to any costs, charges or expenses, incurred by him therein; unless the judge shall certify that the cause was a fit one to be tried in the said court."

The prior Merchant Shipping Act of 1854 c. 104, sec. 188, authorized seamen to sue in a summary manuer before two Justices of the Peace for any amount of wages not exceeding £50; and by sec, 189 it prohibited suits by seamen for wages under the sum of £50 in the Admiralty or Superior Courts in Her Majesty's Dominions; under certain exceptions which are not necessary to consider here.

The present Merchant Shipping Act of 1894 re-enacts in section 164 the summary proceedings for wages; and in sec. 165 it re-enacts the prohibition of suits for wages not exceeding £50, in the Admiralty or Superior Courts; but by the schedule of the repeals of certain Imperial Acts, section 10 of the Admiralty Act of 1861 is exempted from repeal. By section 260 of the Merchant Shipping Act of 1894, the sections quoted, (164 and 165), are made to apply, "to all sea-going ships registered in the United Kingdom," of which this defendant steam yacht is one.

I must not omit to notice here the conflict of decisions between the Admiralty Court for this province, and that for the province of Quebec respecting actions for seamen's wages. In Ontario it was held that the Admiralty Act of 1891 having conferred upon the court all the jurisdiction possessed by the High Court in England, it could try any claim for seamen's wages, including claims below $200, and that the limitation in R. S. C., c. 75, s. 34

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had been repealed by implication; and that the costs of such action were in the discretion of the court. Ship *W. J. Aikens* (1). In Quebec the above was not followed, and it was held that under R. S. C., c. 74, s. 56, or c. 75, s. 34, the Court had no jurisdiction to entertain a claim for seamen's wages on a Canadian registered ship, below $200; nor under the Merchant Shipping Act of 1894, s. 165, a claim for seamen's wages on a British registered ship under £50; *Gagnon* v. *Ship Savoy*, (2). Since these decisions the limitation clause of the former Canada Shipping Acts have been re-enacted in R. S. C., (3). And as to the statutory conflict between the unrepealed section 10 of the Admiralty Act of 1861, and section 165 of the Merchant Shipping Act of 1894, see *Green* v. *The Queen* (4) and *Garnet* v. *Bradley* (5). But as the parties have settled this case it is not necessary to consider the question of jurisdiction further.

Had the case required the ascertainment of the total amount of the claims of these plaintiff seamen, it would have to follow the decision in *Phillips* v. *Highland Railway Company* (6), where the limitation as to the £50 wages claim was considered by the Judicial Committee of the Privy Council, in an appeal from a Vice-Admiralty Court in Australia by six seamen, where the total amount found to be due to all of them for wages and wrongful dismissal, amounted to £203 19s. 8d., but the amount found due to each seaman was less than £50, it was held by the Judicial Committee that the Vice-Admiralty Court had jurisdiction, and that it was wrong in dismissing the suit for want of jurisdiction, for that the Merchant Shipping Act of 1854 (s. 189) did not take away such right of suit so long as the total aggregate

(1) (1893) 4 Ex. C. R. 7.
(2) (1904) 9 Ex. C. R. 238.
(3) (1906), c. 103, s. 191 and 348.
(4) (1876), 1 A. C. 513.
(5) (1888) 3 A. C. 944.
(6) [1883] 8 A. C. 329.

amount recovered as due to all the seamen exceeded £50.

The parties in this case having adjusted their claims there will be no decree.

Rowell, Reid, Wilkie, Wood & Gibson: Plaintiffs' Solicitors.

Denton, Dunn & Boultbee: Defendants Solicitors.

TORONTO ADMIRALTY DISTRICT.

1905
Jany. 5.

HIS MAJESTY THE KING.....PLAINTIFF;

AGAINST

THE SHIP "*H. B. TUTTLE.*"

Motion for Pleadings—Release of ship—Giving of Bond.

No ship after being arrested can be released except by order of a Judge or by a release issued by the Registrar.

Where a ship escaped from the custody of the Marshall and no bond was given an order for pleadings was in the meantime withheld.

MOTION in Chambers for an order for pleadings.

Notice of motion for an order for pleadings and that a Bond be delivered was filed on the 5th September, 1904, and after several adjournments was argued on the 15th December 1904. The facts of the case are further set forth in the reasons for judgment.

A. G. Murray, for Plaintiff;

E. G. Morris, for Defendant.

HODGINS, L.J., now (January 5th, 1905) delivered judgment.

The proceedings before me on this interlocutory application discloses several irregular and unexplained proceedings on the part of some of the officials concerned in the following matters.

On the 2nd August, 1904, a writ of summons and warrant of arrest were issued out of this court at the instance of the Government of Ontario against the Ship "*H. B. Tuttle,*" for injuries caused by her to the Point Bridge in Manitoulin. On the 4th August the ship was arrested at French River by the Collector of Customs at that port. On the 8th August the following

telegram from the Public Works Department was sent to the solicitors for the Crown at Gore Bay:

"*H. B. Tuttle* was sold by Marshall, Admiralty Court, in 1903. Claim now invalid. Attorney advises release."

On the following day the above telegram was cancelled by the following to the same solicitor:

"Message of yesterday cancelled. On further information with regard to the *Tuttle* withdraw order for release at once."

This telegram was supplemented by the following on the same day:

"On reading your letter of sixth, Attorney General desires *Tuttle* held and wire of yesterday cancelled."

But it was admitted during the argument that some person interested in the ship had obtained from the Public Works Department (whether from the head or a subordinate officer of the department has not been disclosed), a copy of the first mentioned telegram advising release of the ship. A copy of this telegram appears to have been telegraphed to the Collector of Customs to whom the warrant of arrest had been sent and in whose custody the ship then was, who without any communication with the solicitor for the Crown to whom the telegram had been addressed, and without any order of the Judge, or direction from the Registrar of the court, or any other authorization than the copy of the telegram mentioned above, released the ship *Tuttle* from the arrest which had been made on the 4th August under authority of the warrant of arrest which had issued from this court on the 2nd of the same month.

The rules of this Admiralty Court respecting the release of ships and property arrested under its warrants are set out in rules 53 to 59. Ships so arrested are in the custody of the court and can only be released by order of the Judge, or by a release issued by the Registrar under the prescribed conditions as to security.

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Reasons for Judgment.

On the 12th August the Collector of Customs at Little Current sent the following telegram to the solicitor for the Crown :

"Have steered steamer *Tuttle* for Buffalo to save further expense, on copy of McNaughton's telegram eighth. Send formal release."

The act of the collector in releasing the *Tuttle* "on copy of McNaughton's telegram," the first telegram, appears to have been clearly unauthorized and in entire disregard of the rules of this court above cited, authorizing releases of "property arrested by warrant."

No explanation has been given by any official of the Public Works Department of the circumstances under which a copy of the first or McNaughton's telegram was furnished to some party interested in the ship. Nor has any explanation been given by the Collector of Customs of the circumstances under which he released the ship without the authority which the Admiralty rules prescribe.

I cannot on this interlocutory application for pleadings, and a bond, try the questions involved in the arrest and release of the ship on the eleventh of August last. All the facts effecting these questions have not been proved or explained and they must therefore be reserved for the trial.

On the twelfth of August, an appearance was entered by a solicitor for the ship *Tuttle* and the owners thereof.

Mr. Murray, as solicitor for the Crown, in his affidavit states that "no release was sent to the Customs officer as requested by his telegram, but immediately requested the Public Works Department to have the ship arrested at Windsor by His Majesty's Collector of Customs there, in whose hands I had previously placed a warrant of arrest; and I am informed that the Collector of Customs at Windsor did duly arrest the said ship, but that she escaped from his custody as appears from the telegram

now shown to me and marked exhibit C hereto." The telegram is as follows from the Collector of Customs. "Windsor, August 17, 1904: *Tuttle* arrested on Saturday but escaped later; am sending full report to Department, Toronto."

Some of the facts respecting the arrest of the *Tuttle* appear to be as follows:

On the 13th August the following telegram was sent from the Attorney-General's office to the Collector of Customs at Amherstburgh (not Windsor): "Arrest steam barge *H. B. Tuttle* on passing channel there on warrant from Maritime Court at instance of Public Works Department of Ontario."

On the same day a Customs officer of the Amherstburgh office went on board the *Tuttle* and showed the Master the telegram and "placed the ship under arrest." The vessel however proceeded for about two miles and then ran aground. The detailed statement of the Customs officer in making the arrest is set forth in his affidavit. But he is silent as to the escape.

Neither the "full report" of the Collector of Customs at Windsor, nor a report from the Collector of Customs at Amherstburgh whose officer made the arrest, as to how the ship escaped from custody has been furnished on this interlocutory application.

The full and consecutive history of the proceedings effecting the arrest and release, of the re-arrest and the escape of the ship is therefore incomplete and unsatisfactory. But from what appears, I think the fact of the arrest and improper release of the ship at French River is primâ facie established, and that the onus of proving that the ship was lawfully released from custody by the Collector of Customs at French River lies therefore on the defendant's ship and her owners.

Then, as to the bond moved for by the Crown, I find that the correspondence between the solicitors shows that

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Reasons for Judgment.

the solicitor for the owners as late as the 26th September 1904,—over a month after the alleged release by the Collector of Customs at French River agreed to give a bond. I must therefore hold that the owners are bound to give the bond agreed upon. After the bond has been given and approved an order for pleadings may issue.

Costs are reserved for the hearing.

Solicitor for Plaintiffs: *A. G. Murray*,

Solicitor for Defendants: *E. G. Morris.*

THE TORONTO ADMIRALTY DISTRICT.

THE DUNBAR AND SULLIVAN DREDGING COMPANY AND M. SULLIVAN..... } PLAINTIFFS:

1907
Nov 22.

AGAINST

THE SHIP "*MILWAUKEE.*"

Admiralty—Arrest of ship out of jurisdiction—Jurisdiction of the Admiralty Court considered— Waiver of protest.

The giving of a bond to release a vessel under arrest constitutes a waiver of any objection that might be taken to the jurisdiction of the Court. The *D. C. Whitney* (38 S. C. R. 303) distinguished.

THIS was a motion in Chambers to set aside the writ of summons and warrant issued in this action, on the ground, first, that at the time of the issue of the writ and warrant the ship seized was not in Canadian waters, and secondly, that following the *D. C. Whitney*, 38 S. C. R. 303 the Court had no jurisdiction.

Further facts and argument of counsel appear in the reasons for judgment.

The motion was argued before His Honour Judge Hodgins at the city of Windsor on the 3th day of October and 8th day of November, 1907.

F. A. Hough, for Plaintiffs.

A. R. Bartlett for Defendant.

HODGINS, L. J. now (November 22nd, 1907), delivered judgment.

This action is brought by the plaintiffs as owners of the "Derrick Scow Number Seven" against the defendant ship *Milwaukee* for damages occasioned by a collision between the ship and scow in the Canadian channel of the

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Detroit River, and within the territorial jurisdiction of this Court, on 14th December 1906, causing the sinking of the scow. The writ of summons and warrant of arrest were issued on the 25th July, and were served and executed on the 22nd August, and appearance "under protest" was entered on the 23th August 1907. A bond was given under the rule (not under protest) on the 7th September, but was not finally completed until the 26th October, 1907.

The seizure of the defendant ship was made as stated in the affidavit ot Maxime Laporte, who executed the warrant of arrest as Deputy for the Sheriff of the County of Essex; "I boarded the defendant ship for the said purpose in the Canadian channel of the Detroit River about one hundred yards above the head of Bois Blanc Island, and effected the service of seizure aforesaid, when the ship was between the said Island and the Town of Amherstburg. The defendant ship then proceeded in the said channel to the lower end of the said Island, when she came to anchor in the waters known as Callams Bay, a small inlet or anchorage in the Township of Malden in the County of Essex, below the said Town of Amherstburg, were arrangements were made for bonding the ship. After the bond had been given. I was instructed by the plaintiffs' solicitor to release the ship, and I returned to where she lay at anchor for that purpose; withdrew the man I had left in charge and permitted her to proceed on her course. During the whole time that I was on the defendant ship in fullfillment of my duties, and while she lay at anchor in Callams Bay aforesaid the said ship was wholly in Canadian waters." His oral evidence is much to the same effect.

The affidavit of Frank D. Osborne, master of the defendent ship, states; "At the time the said ship *Milwaukee* was arrested she was in motion in passing through the channel between Bois Blanc Island, and the Canadian

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shore, or thereabouts, on her voyage between Chicago and Buffalo, having cleared from Chicago for the said last mentioned port,—both of said ports being ports of the United States of America. The said ship *Milwaukee* was not entering, lying at, or bound for, any Canadian port; but while she was in motion proceeding on the said voyage, she was hailed by a tug having on board the officer who made the seizure in this action; and it was in consequence of the demand of such officer who purported to be carrying into effect tho process of this Honourable Court, that I submitted to the arrest of the said ship."

The parties agree that the question of the jurisdiction of this Court to try the action be first disposed of.

This case brings up some of the questions considered by the Supreme Court in the case of the *Ship D. C. Whitney* v. *The St. Clair Navigation Company*, (1) reversing the judgment of this Court which is reported in 10 Ex. C. R. 1. But in that case no evidence was given, nor argument advanced, at the trial before me, either that "the ship was in motion on her voyage," or "had come to anchor;" and there seems to have been a difference of opinion respecting either fact in the Supreme Court. See pages 308, 309 and 324.

The water territory within which the alleged collision occurred, and within which the arrest was made, was declared by several Statutes, from the Upper Canada Act of 1831, c. 2 s. 1, down to R. S. O. (1897), c. 3, s. 7, (if the Proclamation of the 16th July, 1792, or the Upper Canada Acts of 1798, c. 5, or of 1818, c. 10, had not done so), to be part of the county of Essex, by the following re-enactment: "the limits of all the townships lying on the * * * River Detroit * * * shall extend to the boundary of the Province in such * * * river, in prolongation of the outlines of each township respectively."

(1) 38 S. C. R., 303.

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By the same Act of 1831, s. 2, jurisdiction was vested in the Upper Canada Courts to try all crimes and offences committed in, or upon, the said waters; and that they should be tried within any district lying adjacent to such waters;—which jurisdiction has been continued down to R. S. C. (1906), c. 146, s. 585.

The extent of the exceptional jurisdiction of Admiralty Courts appears to be little known; nor has the statutory jurisdiction conferred upon the Canadian courts by the sovereign authority in control of the Dominion of Canada been as yet clearly or authoritatively defined; and, so perhaps it may be conceded that a little juridicial and statutory literature on both jurisdictions, may be explanatory and useful for the guidance of the profession in future cases.*

Subsequent to the Merchant Shipping Act of 1854, s. 521, Imp. (now s. 685 of the Act of 1894), it was held in The *Queen* v. *Sharp*, (1859), 5 Pr. R. 135, that so much of the boundary lakes and rivers as were within the Canadian side of the International Boundary line, were bodies of water "over which the Admiralty jurisdiction extended;" and that by the Imperial Act of 1849, c. 96, s. 1, there was jurisdiction in the Canadian Courts to take cognizance of offenses, although committed within American waters. And that this jurisdiction was reciprocal in Admiralty matters in the American Courts, was sustained by the Supreme Court of the United States in *United States* v. *Rodgers*, (1). And in *Rex* v. *Meikleham*, (2) it was held that the laws of Ontario extended to the International bountary line of the Provincial waters, and also that where the Legislature had intended to disregard, or interfere with, a rule of International Law, the Courts were

* JUDGE'S NOTE:—Mr. Justice Story has apparently furnished a precedent for this in stating in his judgment *Re Bellows and Peck*, (1844), 3 Story, p, 441, "It may be proper to make a few observations upon the practice which ordinarily regulates the action of the District Court."

(1) (1893), 150 U. S. 249. (2) (1905), 11 O. L. R. 366.

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bound to give effect to its enactments. This doctrine was also broadly affirmed by the Judicial Committee of the Privy Council in the Conception B case, a bay 20 miles wide at its sea-mouth,—that where the British Parliament had by its Acts declared that bay to the part of British territory, and subject to the Legislature of Newfoundland, such legislation was conclusive on British tribunals; *Direct United States Cable Co.* v. *Anglo American Telegraph Company*, (1)*

To these authorities may be added the following clause (s. 685) of the Merchant Shipping Act. of 1894, which by s. 712, is declared "to apply to the whole of Her Majesty's Dominions" and which is a re-enactment of s. 521 of the Merchant Shipping Act. of 1854.

"Where any district within which any Court or Justice of the Peace, or other Magistrate, *has jurisdiction* either (*a*) under this Act, or (*b*) under any other act, or (*c*) at common law, *for any purpose whatever*, is situate on the coast of any sea, or abutting on, or projecting into, any bay, channel, lake, river, or other navigable water; every such Court, Justice, or Magistrate, *shall have jurisdiction over any vessel being on or lying, or passing, off that coast, or being in, or near that bay, channel, lake river, or navigable water; and over all persons on board that vessel, or for the time being belonging thereto*, in the same manner as if the vessel or persons were within the limits of the original jurisdiction of the Court, Justice, or Magistrate."

Some of the statutory jurisdiction of the British Courts over foreign ships under the above Act, may be classified as follows:

(1) Sec. 418. The collision regulations "shall be observed by all foreign ships within British jurisdiction"; and

(1) (1877) 2 A. C. at page 420.

*JUDGE'S NOTE:—This decision disregards the generally accepted doctrine of International Law that says of six marine miles width at their mouth, measured from headland to headland are wholly part of the territory of the sovereignty to which both headland shores belong.

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"foreign ships shall, so far as respects the collision regulations, * * * be treated as if they were British ships".

(2) Sec. 504. "Where any liability is alleged to have been incurred by the owner of a * * * foreign ship in respect of loss of, * * * or damage to, vessels or goods, and several claims are made, or apprehended, in respect of that liability, then the owner may apply, * * * in a British possession, to any competent court, and that court may determine the amount of the owner's liability, and may distribute that amount ratcably among the several claimants".

(3) Sec. 424 enacts that whenever the Government of any foreign country is willing that the British Collision Regulations should apply to the ships of that country, the Crown may by an Imperial Order-in-Council, "direct that those regulations and provisions shall, subject to any limitation of time, provisions and qualifications, contained in the order, apply to ships of the said foreign country, whether within British jurisdiction or not; and that such ships shall, for the purpose of such regulations and provisions be treated as if they were British ships". Orders-in-council have been made under this section, and will be quoted later on.

(4) Sec. 684: "For the purpose of giving jurisdiction under this Act, every (criminal) offence shall be deemed to have been committed, and every (civil) cause of complaint to have arisen, either in the place in which the same actually was committed, or arose, or in any place in which the offender, or person complained against, may be.

The jurisdiction "under any other Act," may be found in the Imperial Act of 1840, c. 65, s. 6: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of * * * damages received by any ship, or sea-going vessel, * * * and to enforce the judgment thereof, whether such ship or vessel may have been *within the body*

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*of a county, or upon the high seas, at the time when the * * * damage was received.*" By the Imperial Act of 1849, c. 96, s. 1, a jurisdiction was conferred upon Colonial Courts to try crimes or offences committed on the sea, or in any haven, river, creek, or place, where the Admiral had jurisdiction, as if such offences had been committed within the local jurisdiction of the courts of such colony. And in the Imperial Admiralty Act of 1861, c. 10, a special jurisdiction which may be said to be world-wide is conferred by s. 7, which enacts: "the High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship." The term "any ship" in the above clauses, and in s. 685, applies to a foreign ship in any British port, just as much as to an English ship: "Where the words are general, and are not such as to cause a conflict of laws, then there is no reason why such provisions should not apply to foreign ships also." *Reg* v. *Stewart* (1).

These jurisdictional powers have been conferred upon this Admiralty Court (being a court situate on the "navigable waters" of lakes and rivers described in s. 585 of the Merchant Shipping Act, 1894;" and also by s. 2 of the Colonial Courts of Admiralty Act of 1890, (Imp.) which reads: "The jurisdiction of a Colonial Court of Admiralty, subject to the provisions of this Act, shall be over the like places, persons, matters and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute, or otherwise; and the Colonial Court of Admiralty may exercise such jurisdiction in like manner, and to as full an extent, as the High Court in England, and shall have the same regard as that Court to International Law, and the comity of nations." And as if to make this enlarged jurisdiction more clear, sub-section (*a*) of section 2, provides that: "Any enactment in an Act of the Imperial

(1) [1899] 1 Q. B. at p. 970.

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Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were therein substituted for England and Wales."

And by sub-section 4, the exercise of jurisdiction by a Colonial Court "in respect of matters *outside* the body of a County, or other like part of a British possession. "That jurisdiction shall be deemed to be exercised under this Act, and not otherwise." See further Howell's Admiralty Law, Canada, p. 207.

Pursuant to sec. 424 above referred to, the Government of the United States having signified its consent, as provided in that section, an Imperial Order-in-Council was approved on the 7th July, 1897, declaring that thereafter the British regulations respecting collisions should apply to *all ships of the United States, whether within British jurisdiction or not.* Under the prior Act of 1854, a similar order-in-council had been approved on the 9th January, 1863; and on the 30th November, 1864, another order-in-council made the latter order-in-Council apply to ships of the United States navigating the inland waters of Canada. See "Statutory Rules and Orders-in-Council," (Imp.) v. 4, pp. 1168-1174; Maude and Pollock's Law of Merchant Shipping, p. 586, note (*j*) and Appendix pp. 36–46; Abbott on Shipping, (14th ed.) pp. 1201, note (o), and p. 1280, note (s).

Under this section, and the consent given by the Government of the United States, as well as under sec. 418, and assuming the alleged collision in this case to have taken place in Canadian waters, the alleged offending vessel of the United States is to be treated as if she were a British ship in the jurisdictional proceedings taken against her in this Admiralty Court. And this jurisdiction appears to be confirmed by the case of *Pieve Superiore*, (1)

(1) (1874) L. R. 5 P. C. at p. 491.

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where it was said ; "If the jurisdiction of the Court of Admiralty over the claim once attached, that Court, in their Lordships' opinion, would be competent, at any subsequent time, to entertain a suit either *in personam or in rem*, by the arrest of the ship, whenever it came within reach of its process." And in *the Girolamo* (1); it was held that foreign vessels and foreign persons are liable to the local municipal laws of the country for acts done within the local jurisdiction of its Courts.

Counsel for the defendant ship relies for a defence on the statements in the affidavit of Frank D. Osborn, recited above, and on the seventh article of the Ashburton Treaty of 1842, which reads as follows; "It is further agreed that the channels in the River St. Lawrence, on both sides of the Long Sault Rapids, and of Barnhardt Island, the channel of the River Detroit on both sides of the Island of Bois Blanc, and between that island and the American and Canadian shores, and all the several channels and passages between the various Islands lying near the junction of the River St. Clair, with the lake of that name, shall be equally free and open to the ships, vessels and boats of both parties." And as to other free passages, through the water communications, and land portages between Lake Superior and the Lake of the Woods, see Article II.

By Article XXVI of the Washington Treaty of 1871, a further portion of the River St. Lawrence was declared "for ever to remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain, or of the Dominion of Canada, not inconsistent with such privileges of free navigation." Comparing these Articles, it cannot be claimed, I think, that the vessels of the United States, sailing over the 1871 Treaty portion of the St. Lawrence River, are subject to the jurisdiction

(1) (1834) 3 Hagg. Ad. 169.

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of the Canadian Statute Law and Courts. But when sailing over the 1842 Treaty portion of the river, that they are immune from such jurisdiction. The Treaty of 1871 affirms a long established doctrine of International Law which must he held to be applicable to both Treaties;—That no independent sovereignty is to be construed to contract itself, by implication, out of its fundamental sovereign rights, nor out of "one of the highest rights of sovereignty, viz.; the right of legislation;" *Hall's International Law*, 5th Ed. pp. 339, 340. And per Lord Mansfield, C.J.; "The Law of Nations, to its full extent, is part of the law of England," *Triquet* v. *Bath*, (1).

It has long been a doctrine of International law that the territory and jurisdiction of an independant sovereignty are co-extensive. And it is a constitutional rule that to its courts and judges certain of the juridicial powers of the sovereignty are delegated, to be exercied within the territorial boundaries of such sovereignty. And it has long been a doctrine of British law that when the jurisdiction of its courts of justice, and of their juridicial authority have been once established by Legislative Acts within such territorial boundaries, or within certain described portions of them, such jurisdiction and authority cannot be suspended, or lessened, or abrogated by the Crown, (unless so authorised by Statute) but only by similar legislative acts of the Parliament, or other legislative authority, by which such jurisdiction and authority had been established.

Mr Justice Story has defined the distribution of the powers of sovereignty to "include within its scope, at least if it is to possess suitable stability and energy, the exercise of the three great powers, upon which all Governments are supposed to rest, viz: the Executive, the Legis-

(1) 3 Burr. 1478.

lative and the Judicial. "Constitution of the United States" par. 518.

In the British system of government, the Legislative power is supreme: "Bracton and Fleta both affirm: *Rex habet superiores in regno, deum et legem. Item, curiam suam*" (1) Lord Campbell's Lives of the Chief Justices, v. 1, p. 131.

And, commenting on the British treaty-making power, Halleck's International Law says, as to certain classes of treaties: "Nevertheless the treaty binds nobody till its provisions are enacted by law; and a treaty cannot he pleaded in the courts, unless confirmed by an Act of Parliament" (2).

A different constitutional rule prevails in the United States, for by its Federal constitution all treaties with foreign nations take rank as statute law by Article VII, which reads: "This constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall he made, under the authority of the United States, shall be the supreme law of the land".

"Where a Treaty is the law of the land, and as such affects the rights of parties litigating in the United States' Courts, that Treaty is as much to be regarded by the Courts as an Act of Congress": Per Marshall, C. J., in *United States v Schooner Peggy*, (3).

The seventh Article of the Ashburton Treaty of 1842 was construed by one of the United States Appellate Courts in the case of a criminal offence committed on the Canadian side of the Detroit River in 1859; and, quoting the Article, the Court said: "This is no more than the innocent use of the water, without any surrender of jurisdiction, according to the principles of International Law; except that the latter (innocent use), being an im-

(1) 12 Co. Rep. 65. (2) 3rd. Ed. vol. 1, page 281.
(3) (1801), 1 Cranch, (U. S.), 110.

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perfect right, was subject, in many respects, to the will of the nation in which such channels may be; and therefore, without treaty, might be refused to either. Certainly it cannot be claimed that the provision can detract from, in any respect, the entire and exclusive jurisdiction which each party had, in its own water, over persons there being or passing, any more than if this right of passage had been given to either over the lands of the other." "The right of passage by land", (referring to the land portages described in Article II, "or water, for commercial purposes, cannot, I think, in any case, be construed as a surrender of jurisdiction. It is too clear to admit of any serious doubt. that there is nothing in any of these Articles depriving the British Government of that complete and exclusive jurisdiction over that part of the lakes and rivers on her side of the boundary line, which any nation may exercise upon the land within her acknowledge territorial limits": *People v Tyler.* (1) The above Court held that it had no jurisdiction to try crimes committed outside its jurisdiction, and within the Canadian waters; but the Supreme Court of the United States, in 1893, without reversing the above interpretation of the Treaty, held that both American and Canadian Courts has jurisdiction to try crimes committed within the territorial waters of either country: *United States v Rodgers* (2).

And in the diplomatic discussion respecting the reciprocal fishing privileges to American and Canadian fishermen under the reciprocity Treaty of 1854, the American view was thus stated by Mr Secretary Mercy in 1853; "By granting the mutual use of their inshore fisheries, neither party has yielded its rights to civic jurisdiction over a marine league along its coasts. Its laws are as obligatory upon its citizens, or subjects of the other, as upon its own". U. S. Foreign Relations, 1880-1, page 572.

(1) (1859) 7 Mich. (3 Cooley) p. 161 and 233.

(2) (1893), 150 U. S. 249.

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The seventh article of the Ashburton Treaty of 1842, conceding the free navigation through the Canadian water-ways, was never ratified by any Legislative Acts of Great Britain, (see Imperial Act of 1848, c. 76); nor of Canada, (see Canada Act of 1849, c. 19); nor of the United States, (see Act of Congress of 1848, c. 167).

These articles of 1842 and 1871, practically confirmed the privileges of free navigation, or innocent passage, as defined by the Roman law: "*Riparum usus publicus est jure gentium, sicut ipsius fluminis.*" Dig. 1, 8, 5 pr.

And although generally classed as an "imperfect right," Wheaton's International Law says: "It was a right as real as any other right; and where it is to be refused, or to be shackled with regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us (United States), it would then be an injury of which we should be entitled to demand redress." "Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect of the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not national," (pages 306 and 313).

But the supreme authority as to the effect of a treaty on the jurisdiction of British Courts, is that of the Judicial Committee of the Privy Council in the case of *Damodhar Gordhan* v. *Deoram Kanji* (1), where by a convention, or transfer made by the Indian Government, with the sanction of the Secretary of State for India in Council, of certain British territories in India to a native prince, and a Government Proclamation excluding such territories from the jurisdiction of the British laws and courts, theretofore established within them, it was held that it was beyond the powers of the British Crown, in time of peace, to make any cession of British territory, or to exclude it from the jurisdiction of the British courts

(1) [1876] 1 A. C. 332; s. c. 3 Ind. App. 102.

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therein, or to substitute for it any other extraordinary jurisdiction, without the concurrence of the Imperial Parliament.

And this decision conforms to an old maxim affecting the prerogative, which declares that "the king cannot grant to any one that he shall not be impleaded; or, if a man does a trespass to me, that I shall not have an action against him." 16 Viner's Abridgement, p. 561.

The cession of Heligoland to Germany, was confirmed by the Imperial Act of 1890, c. 32; and the cession to France of certain British territories in Africa, and the concession of certain fishing privileges in the Newfoundland coast-waters, were confirmed by the Imperial Act of 1904, c. 33, and are parliamentary precedents in support of the judgment of the Judicial Committee of the Privy Council.

As supplementary to the general question, it may be proper to quote the words of Sir V. Page Wood, V.C., in *General Iron Screw Collier Company* v. *Shurmanns* (1). "If within the territory over which this country has the right to legislate, the legislature has expressly exempted all foreign vessels from the operation of the law, not only would the beneficial effect of the Merchant Shipping Act be diminished, but British shipping would be positively prejudiced for the benefit of foreigners." And, referring to s. 527 of the Act of 1854, (now s. 688 of the Act of 1894), he said that there is very strong evidence of intention in that section which directs that whenever any foreign ship which has done damage to any British ship, shall come within three miles, the British ship-owner shall be entitled to arrest that vessel, and bring her into harbour to recover the damages that have accrued; *i.e.* to arrest her while in motion or "passing off" the coast within the three miles. And in argument Mr. Hugh Cairns stated that the sections of the

(1) [1860] 1 J. & H. 195.

Merchant Shipping Act he quoted (one being s. 521), authorized the seizure of foreign ships within three miles of the coasts," (p. 182).

And it may be instructive in seeking for a judicial interpretation of the expression "ship is found", in sec. 688 of the Merchant Shipping Act of 1894, to refer to a case in the Supreme Court of the United States in which that Court had to deal with the unlawful seizure of an American merchant vessel within the territorial jurisdiction of a foreign sovereign power, and the bringing of her within the jurisdiction of a Court of the United States, which seizure was an offence against that foreign sovereign power, could only be adjusted by the political departments of the two governments, but in respect of which the courts of the United States could take no cognizance. The Supreme Court held that it could not connect that international trespass with the subsequent arrest of such vessel, when seized within the jurisdiction of the United States, under the process of one of its civil Courts, so as to annul the legal proceedings against the vessel; and the condemnation of such vessel by the United States Court was therefore affirmed; *Ship Richmond v United States* (1). And as to the expression "person complained of *may be*", and "person is *found*", in sec. 686, see *Regina v Sattler* (2), and *Ex parte Ker* (3).

But while courts of justice may be without jurisdiction to investigate and adjudicate upon the unlawful proceedings of outside parties, of officers of ships, in arresting alleged offending ships beyond, or within, the civil or criminal jurisdiction of such courts; or the unlawful abduction or kidnapping of alleged offenders, and by such means bringing such ships or offenders within the locality of the court which has jurisdiction over the offences charged, it will investigate and declare invalid any unlaw-

(1) (1815), 9 Cranch, (U. S.) 102. (2) (1858), 27 L. J. M. C. 50; (3) (1883), 18 Fed. R. 167

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ful proceedings committed by any of its officers in the execution of the process of such court, and so that any illegality or violence committed by them under its process, which would taint and degrade the administration of justice, should be promptly excised from its records, and disallowed.

This jurisdiction was illustrated in the case of *Borjesson v Carlberg* (1), which was, as stated by the Lord Chancellor, "purely and simply a question of practice", or in other words, "procedure".

It appeared that under a warrant to arrest a Norwegian vessel, which had improperly broken her previous arrest by sailing on a foreign voyage from Greenock, the messenger-at-arms of the court pursued her in a steam tug, with thirty men on board with him, overhauled the ship and compelled her crew to put her about and return to Greenock, where they proceeded to dismantle her. The petition to set aside the arrest, and the judgment thereon, are reported as *Carlberg v. Borjesson* (2). The President said: "What the messenger did, with the help of 30 men, was to capture the vessel. It is not possible to describe the affair in any other way. She was then brought into the harbor of Greenock as a prize. Such a proceeding on the part of a messenger-at-arms is outrageously illegal." Lord Deas said, "I greatly doubt if their was any illegality in bringing her back to the harbour, provided there was nothing objectionable in the mode in which that was gone about." And as to her being found within the channel of the river, and within the jurisdiction of the Court, he added: "If that be so, it is difficult to see why she might not be brought back from the open river, equally as if she had been seized at the mouth of, or immediately outside, the harbour." But he agreed that the mode of the arrest had been made "inimiously and oppressively." Other

(1) (1878), 3 A. C. 1316 and 1322. (2) (1877), 5 Ct. of Sessions Cas., 4th series, 188.

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judges made observations which were not applicable judicially to the case, the attention of the members of the court apparently not having been called to the expressions in the Merchant Shipping Act: "vessel being on, or lying, or passing off that coast, or being in, or near, that bay, channel, lake, river, or other navigable water," in s 685; or "person is found within the jurisdiction of any Court in Her Majesty's Dominions," in s. 685; or whenever any injury is done to the property of the Crown, or of a subject, by a foreign ship, and "that ship is found in any port, or river, of the United Kingdom, or within three miles of the coast thereof," a Judge may issue an order directed to the sheriff to detain the ship; or where "the ship in respect of which the application is to be made will have departed from the limits of the United Kingdom, or three miles from the coast thereof, the ship may be detained," etc., in s. 688, expressions which would apply to a vessel in motion and sailing on a voyage.

Lord Cairns, L. C., declined to commit himself to the opinions expressed by some of the Scotch Judges by saying: "I should be unwilling actually to decide, (it does not seem to me to be necessary to decide), whether the ship having sailed upon her voyage, and being in motion, it was competent to those who desired to execute the warrant to go on board her at all to serve the warrant of arrestment there. I rather infer from the language of some of the learned Judges in the Court of Session, that they doubted whether the ship could be served with the arrestment after she had thus commenced her voyage and was in motion. But, be that as it may, it appears to me, that the very utmost that could be done would be that those who got on board of her might affect the master, whatever might be the consequence of it, with the knowledge that an arrestment was there, and was served there on board the ship. But I can find no authority whatever which would justify them in turning the ship about and bringing her back into port."

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Lord Hatherley concurred in part, saying: "I am induced to come to this conclusion in the first instance, mainly because this is a question arising upon *a point of practice* of the Courts in Scotland, founded upon that extensive knowledge which the Judges must necessarily possess of the practice of their own Courts." And he added, "It is quite enough for us to say that we are not concluding that question" (turning the ship about and bringing her into port) in any way. There are modes of proceeding against persons who, neglecting, or despising, the orders of the Court, proceed to act contrary to the orders of which they have had notice, through means of a messenger. It may be that the messenger may have the power of nailing the warrant to to the mast, which is one mode of serving the order of arrest, of fixing thereby the person who has charge of the vessel, and who ventures afterwards to remove it upon his own authority, with a heavy responsibility. And there may be means of arriving at justice, if any injustice be done in the course of such procedure." And as to this, see the *Petrel* (1) and the *Nautik*, (2)

Those observations of the law lords leave the question open, with a leaning towards allowing services of the warrant of arrest upon the offending vessel while in motion and sailing upon her voyage, which apparently might be authorized by the sections of the Act above referred to. But in any event, the question before the Lords was, as stated by them, "purely and simply a question of practice" of the Scottish Courts, and one that might be held to be waved by taking a step in the cause, as the practice decisions governing such questions decide.

The rules of this court, as do the rules of the English and Scotch Courts, prescribe the modes by which service of the writ of summons on, and the warrant of arrest

(1) (1836) 3 Hagg. Ad. 299. (2) (1895) P. 121.

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of, a ship may be made, (rules 10 and 41), by services "upon a ship * * * by attaching the writ (or warrant), for a short time to the main mast, or the single mast, or to some other conspicuous part of the ship, and by leaving a copy of the writ, (or warrant) attached thereto. And by rule 11." If access cannot be obtained to the property on which it is served, the writ (or warrant) may be served by showing it to any person appearing to be in charge of such property, and by leaving with him a copy of the writ (or warrant); "a formality which is as public as could be devised." See the *Parlement Belge* (1).

There can be no doubt that a *vi et armis* mode, or a force not sanctioned by law, such as was adopted by the messenger-at-arms and his 30 men in the case before the House of Lords, of capturing the ship "as a prize," and then dismantling her, was as stated by the Scottish judges, using the process of the court "nimiously and oppressively," and a proceeding that was "outrageously illegal."

No such *vi et armis* mode was adopted here.

A., the marshall's deputy was admitted, without protest, on board, and he served the writ and warrant as prescribed by the rules, and the master of the defendant ship submitted, and suggested Callam's Bay in which he would anchor his ship while under arrest; and he carried the messenger with him to that bay and voluntarily anchored there until bail was given and his ship released, thereby as I must find submitting himself and the ship to the jurisdiction of this Court.

The jurisdiction of the Admiralty Court over the cases of an arrest, or non-arrest, of a ship, was explained by Dr. Lushington in the *Volant* (2). "The damage confers no lien on the ship; but an arrest offers the greatest security for obtaining substantial justice in furnishing a

(1) [1880] 5 P. D. 218. (2) [1862] 1 W. Rob. p. 387.

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security for prompt and immediate payment." But where it was found impracticable to arrest the ship, he added: "I know of no reason why an action could not be maintained in this Court, although the ship could not be arrested. The jurisdiction of this Court does not depend upon the existence of a ship, but upon the origin of the question to be decided, and the locality." "Where there is an appearance to the action, and bail given, as to the bail, the action cannot be extended beyond what they (the owners), who are strangers to the cause, have voluntarily made themselves responsible for."

In the *Johann Friederich*, (1) where both of the colliding vessels were the properties of foreign subjects, and an appearance under protest to the jurisdiction had been entered, Dr. Lushington in commenting on the alleged unusual course adopted by the Courts, thus explained the enalogy between the law of arrest in Admiralty Courts, and the law of Foreign Attachment, in the ordinary Civil Courts; "But, admitting this to be true, analogous cases exist, as in that of Foreign Attachment, in which the property of foreigners may be attached in order to compel an appearance, or to secure bail to the action. And if such a process is open to the foreigner in that case, it is difficult to understand the ground of disputing the jurisdiction of this Court in this instance" p. 37.

Under the law of Foreign Attachment, the right of a plaintiff to attach the goods of his debtor, while *in transitu*, in recognized as part of that law. Thus where goods had been shipped to a factor for sale to liquidate advances which he had made to the shipper, and to hold the balance of such sale subject to the shipper's control, it was held that the factor had acquired no right of property in them, nor could until they actually came into his possession; and that the plaintiff had the right to attach such goods

(1) (1839) 1 W. Rob. 35.

while *in transitu* on board a vessel. *Bonner* v. *Marsh* (1) *Dickman* v. *Williams*, (2) Drake on Attachment (3).

The defence further objects to the premature issue of the writ of summons, and of the warrant of arrest, on the 25th July 1907, when the defendant ship was not then within Canadian waters, and the jurisdiction of this Court. And the notice of motion asks for an "Order that the writ of summons, the service thereof, and the warrant to arrest the said ship, and the seizure thereof under the said warrant be set aside".

The mode of the service of the writ of summons, and of the seizure of the ship under the warrant of arrest, is stated in the affidavits filed by both parties, and have been quoted above, and also in the oral examination of the Deputy Marshal, Laporte; and they give fuller details than were disclosed to the Supreme Court in the *D. C. Whitney* case. The main objections to the writ and warrant are based on section 18 of the Admiralty Act 1906, cap. 141, which provides that: "Any suit may be instituted in any Registry, when the ship or property, the subject of the suit, is at the time of the institution of the suit, within the district, or division, of such Registry".

This clause is classed under the title of "procedure" and by virtue of the auxiliary verb "may" the clause is to be read as permissive, and not as imperative. Interpretation Act, S. 34, sub. 24, "May" means "to have liberty, leave, licence, or permission; to be permitted to be allowed.' A man may do what the laws permit: "Webster's Dictionary, see also the observations of Gwynne, J., in *Bernardin* v. *North Dufferin* (4). The clause may also be classed as "directory:" and as to such, Lord Mansfield, C. J., in *Rex.* v. *Loxdale*, (5) said: "there is a known distinction between circumstances which are of the essence

(1) (1848) 10 S & M (Miss), 376.
(2) (1874), 50 Miss. 500.
(3) (7th Ed.) par. 246.
(4) (1891) 19 S. C. R. at p. 618.
(5) (1758) 1 Burr. p. 447.

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of a thing required to be done by an Act of Parliament, and clauses merely directory. The precise time in many cases is not of the essence." And in *Rex* v. *Justices of Leicester* (1) a case where the Quarter Sessions had not been held at the statutory time. viz.; the week after the 10th October, Lord Tenderden, C. J., held that the statute was merely direotory, that Sessions could, notwithstanding the enactment, be legally holden at another time; adopting Lord Hale's dictum in 2 Hale's Pleas of the Crown, p. 30. In *Danaher* v. *Peters*, (2) where a statute required that applications for licenses should be considered at a meeting of the municipal council to be held not later than the first day of April in each and every year; but the Mayor gave notice, and received applications, for licenses on the 26th April,—Patterson, J., said: "I am satisfied that the reference to time in s. 27, (1st April), cannot be properly treated as otherwise than directory, so that, even if the provisions of that section apply to the Mayor of St. John in the same way as to a Municipal Council, the adjudication of the applications for licenses on the 25th April was good and valid." See further *Morgan* v. *Perry*, (3)

And further as to this premature issue of process—I may quote what Lord Stowell said in the case of the premature seizure of a ship, which involved weightier consequences: "The seizure was perhaps premature; but shall the Court on that account,—the time for payment having long since arrived,—compel the parties to relinquish these proceedings, seek another jurisdiction, and begin again *de novo?* What advantage would be derived? *Cui bono*, should I occasion so much delay and expense?" The *Jane*. (4)

The issue of the writ of summons and of the warrant of arrest are, under the statute, matters of procedure, and

(1) (1827), 7 B. & C, 12.
(2) (1889), 17 S. C. R., 44.
(3) (1855), 17 C. B. 334.
(4) (1814), 1 Dobs. 461.

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not of jurisdiction, and may be affected by such proceeding on the part of the litigant objecting to such matters of procedure, as may bring him within the rules as to estoppel or waiver. These terms, though not technically identical, are so nearly allied, and so similar in the results which follow their application, that they are often used indiscriminately. And in this case, the defendant ship, by having voluntarily anchored in Callam's Bay, and by the owners submitting to the jurisdiction of the Court, (see the *Dundee*, 1 Hagg. Ad. p. 110) by giving a bond, without any reservation or protest, in which their sureties "jointly and severally submit themselves to the jurisdiction of the said Court," and consent if the owners make default, that execution may issue against them; and obtain thereby a release of their ship, have waived any irregularity in the procedure, affecting the issues of the writ and warrant. The bond now represents the ship, and the giving of it, after appearance under protest, with the special conditions above cited, was a step in the cause. Chitty's Archbold Vol. 2 p. 1399, says; "If any necessary proceedings on the part of the plaintiff be not had within the time limited for it, or be had before the time appointed for it, by the practice of the Court, it may be set aside for irregularity. "If the party complains of an irregularity, take a fresh step in the action, after acknowledge of it, he cannot apply to set aside the irregular proceeding, or otherwise take advantage of it. Therefore by entering an appearance the defendant waives any irregularity in the process. So, by pleading, the defendant waives any irregularity in the declaration." Ibid. p. 1402. In this case after entering "an appearance under protest," and instead of promptly moving against the alleged irregularity, the defendant ship-owners, ten days afterwards, took a step in the cause by giving the bond, with the condition of submission to the jurisdiction of the Court as above specified, they by first reprobating, and

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then approbating, the jurisdiction, must be held to be estopped from now impeaching its jurisdiction.

The Canadian cases which may be referred to on this point are *Racey* v. *Carman* (1), where Robinson, C. J. held that where an affidavit to hold to bail was irregular, but the defendant put in special bail, he thereby waived the irregularity. See further *Herr* v. *Douglas* (2), and *Smith* v. *Smith* (3). So in the United States, where defendants, on being arrested, offered bail to the plaintiff's attorney, and induced him to examine and accept the bail, by which means the defendants procured their release, this was held to be an act on the part of the defendants which assumed that it was proper to require bail of them, amounted to a waiver of any objection of their having been held to bail; *Dale* v. *Radcliff* (4). And in *Brymer* v. *Atkins* (5), a case from a Colonial Vice-Admiralty Court, it was said: "The security given in Admiralty is no more than an undertaking to submit to the directions of the Court" "Operating therefore as a stipulation, execution of it belongs to that court, and that jurisdiction to which the parties have agreed to submit"; (p. 189) see also note (*a*) 3 Hagg. Ad. 431.

I find, therefore, that the giving of a bond, in which the sureties, on behalf of the owners of the defendant ship, submit themselves to the jurisdiction of the Court, and consent as therein set forth, (form No. 17); and which, being given after the appearance under protest, was a step in the cause, and thereby a waiver of the protest.

Besides, the other facts proved and proceedings in this case, and the law applicable to them as detailed above, show clearly marked distinctions between it and the *D. C. Whitney Case* (6); and I must therefore hold that this

(1) [1857] 3 U. C. L. J. 207.
(2) 4 Ont. P.R. 102.
(3) [1868] Ibid. 354.
(4) [1857] 25 Barb. (N.Y.) 333.
(5) [1789] 1 H. Black, 164.
(6) 38 S. C. R. 303.

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Court has jurisdiction to adjudicate upon the questions at issue between the parties, and that the motion to set aside the writ of summons, the warrant to arrest the ship, and the seizure thereof under the said warrant, should be dismissed with costs in the cause to the plaintiffs in any event.

Franklin A. Hough (Amherstburg) : Solicitor for plaintiff.

Clark, Bartlett & Bartlett (Windsor) : Solicitors for defendant.

IN THE MATTER of the Petition of Right of

THE ALASKA FEATHER AND DOWN COMPANY, LIMITED..... } SUPPLIANT;

1907
June 24.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Public work—Siphon-culvert—Flooding of premises.

In this case the suppliant charged in its petition that its stock in trade had been damaged by the flooding of its premises near the River St. Pierre, in the City of St. Henri, district of Montreal, caused by an alleged defective siphon-culvert constructed by the Dominion Government to carry the waters of the river under the Lachine Canal. The facts showed that the siphon-culvert was not defective in its construction, and that there was no negligence on the part of the officers or servants of the Crowns with repect to it within the meaning of sec. 16 (c) of *The Exchequer Court Act;* while on the other hand the evidence established that the lands adjacent to the suppliant's premises were of a porous character, and that the basement of its buildings had been connected by a drain with the River St. Pierre, which permitted the water to back up and flood the suppliant's premises when the river rose to a certain height.

Held, that the allegations in the petition were not supported by the evidence, and that the petition must be dismissed with costs.

PETITION OF RIGHT for damages arising out of alleged negligence in the construction of a public work.

The facts of the case are stated in the reasons for judgm nt.

February 1st, 1907.

The case was now heard.

A. W P. Buchanan, for suppliants;

C. Le Beuf, for respondent.

THE JUDGE OF THE EXCHEQUER COURT now (June 24th, 1907,) delivered judgment.

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Reasons for Judgment.

The suppliant company is the owner of lands and premises situated at the corner of St. Elizabeth and St. Ambrose streets, in the City of St. Henri in the district of Montreal, where it carries on its business. In the early days of April, 1904, the company had in stock, and stored in the basements of the buildings occupied by it, a considerable quantity of feathers, flock, cotton, cotton waste and other materials. The premises are near the River St. Pierre, the waters of which are at a point lower down the river carried under the Lachine Canal by a siphon-culvert. The lands adjacent to the company's premises are of a porous character, and the basement of its buildings has been connected by a drain with the River St. Pierre so that whenever the water of the river rises to a sufficient height the basement is liable to be flooded. Such a flooding took place the 2nd day of April, 1904, causing a great deal of damage to the stock of goods that the company then had stored in such basement and to certain floors that the company had put down. It alleges that this flooding was caused by the negligence of the Crown's servants while acting within the scope of their duties or employment in respect of this siphon-culvert, and it seeks to recover from the Crown the damages that it thereby sustained. First, it is alleged in the suppliants' petition that the construction of the siphon-culvert is defective and not suited to the requirements of the river. But that allegation is not sustained by the evidence. On the contrary there is, I think, no reasonable ground of complaint with respect to the construction of this culvert or with the work that the Crown has done in deepening and straightening the River St. Pierre.

But notwithstanding that the fact is as stated, the river is liable to overflow its banks and to flood the suppliant's basement whenever any one of the following things happen :—

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1 Whenever the River St. Lawrence into which the River St. Pierre discharges its waters, rises, as it may do, to a height sufficient to back up and stop the flow of the waters of the River St. Pierre. That, as will be seen by reference to Mr. Henry Hadley's evidence, actually occurred on the 10th of April, 1904, about a week after the flooding complained of. On that occasion the suppliant's basement was also flooded. It is contended for the Crown that the flooding that happened on the 2nd of April was due to the same cause. But I am not able on the evidence as a whole to find that to be the actual fact in this case.

2. Whenever the waters of the River St. Pierre are locally obstructed near its mouth by ice or otherwise so that they rise considerably higher than the waters of the River St. Lawrence. It is possible that such an event may have happened on the 2nd of April, 1904. There is some evidence that would appear to support such a conclusion; but I do not find that to be the actual cause of the flooding of the 2nd of April, 1904. It may have been, but that is not certain.

3. Whenever there is an extraordinary thaw with heavy rains and a freshet that suddenly brings down more water than either the siphon-culvert or the prism of the river could for a short time take care of. I think something of that kind happened on the 2nd of April, 1904. Here is what Mr. Henry Hadley, who for a number of years has kept the levels of the River St. Lawrence at the Verdun pump-house, at the mouth of the River St. Pierre, and about three-eighths of a mile from the outlet of the River St. Pierre, says as to that:—

"Q Can you explain, Mr. Hadley, how it is that on the 2nd of April you have not got the measurements for that day?—A. During a heavy thaw we had to pump out the drainage water, and while the pump is working I cannot take the gauges.

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By the Court:—Do you mean to say there was a heavy thaw?—A. Yes, we pumped forty-seven hours without stopping between the 1st and 3rd.

Q. How long?—A. Forty-seven hours to keep the water out of Verdun.

By the Court:—Q. That was on account of the heavy thaw?—A. Yes.

By the Court:—The snow was melting and coming down on you, was that it?—A. Yes.

By the Court:—You were pumping to get rid of the surplus and drainage water that was coming from the melting snow and ice?—A. Yes, the area enclosed by the tail-race bank. The aqueduct and Verdun dyke is low, and the drainage and snow melting has to be pumped out when the river is at a higher level than the water is inside. It is all enclosed by dykes.

By the Court:—But at this time the water in the river went higher than the ordinary level of Verdun?—A. Yes; if we had allowed the water to escape by gravitation, the sluices in Verdun would have been flooded.

By the Court:—You had to pump the water over the dykes in order to keep Verdun from being flooded by the thaw!—A. Yes.

By the Court:—The river was not coming back on you but it was so high it could not get away?—A. Yes.

BY RESPONDENT'S COUNSEL:—

Q. The River St. Lawrence came back into the St. Pierre river without coming back to your place? A. Yes.

By the Court:—Do the dykes that protect Verdun go along the river and up the River St. Pierre as well?—A. Yes, the tailrace bank is the bank of the river St. Pierre and protects us.

BY RESPONDENT'S COUNSEL:—

Q. If I understand you well there might be a blockade at the mouth of the River St. Pierre and the water of the

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St. Lawrence might come back into the St. Pierre River to a certain extent without interfering at all with Verdun, unless it does to a large extent?—A. Unless it came high enough to come over the dykes."

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4. Whenever the siphon-culvert through neglect to keep it clean becomes choked so that it cannot discharge the water that comes to it under normal conditions. The suppliant company alleges that this is what happened on the 2nd of April, 1904. And the burden of making out that fact is on the company. That burden has been in the present case, in my opinion been discharged. I find this issue for the respondent.

In this connection I ought, I think, to add that if I had been of a different opinion as to what the finding should be on this, the principal issue, in the case there would have been another difficulty in the way of the suppliant company. I concede its right, if it chose so to do, to store such goods as feathers, flock and cotton in a basement such as the one mentioned was, but in such a case it was bound, I think, to keep a look out in times of thaw and freshet to see when the waters of the St. Pierre River were rising to a height that exposed its goods to the danger of being flooded, in order that they might be removed in time from the danger that threatened Any ordinary care and prudence exercised by the company's servants on the occasion mentioned in the direction indicated would haveput them on their guard and the stock could without difficulty have been removed to a place of safety, so that even if the Crown's servants had been negligent in not keeping the siphon-culvert clean and free, the company's servants exercising ordinary and reasonable care could easily have avoided the results of such negligence. And this, they were, I think, bound to do But as I have stated the issue ought in my view of the evidence to be found for the respondent and it is not necessary further to consider this aspect of the case.

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There will be judgment for the respondent and a declaration that the suppliant company is not entitled to any portion of the relief sought by its petition. The costs will as usual follow the event.

Judgment accordingly.

Solicitors for applicant: *White & Buchanan.*

Solicitor for respondent: *C. Le Beuf.*

TORONTO ADMIRALTY DISTRICT.

1908
April 25.

R. O. & A. B. MACKAY.....PLAINTIFFS;

AGAINST

THE SHIP "*POLLUX*".

Shipping—Third party motion—Parties out of jurisdiction—Practice.

There is no provision in the Rules of the Admiralty Division of the Exchequer Court of Canada for an order for an issue of a third party notice under an alleged indemnity, especially if the parties sought to be brought into court in that way reside out of the jurisdiction.

MOTION in Chambers on the 14th April, 1908, by the owner of the defendant ship, for an order for the issue of a third party notice.

The facts brought out on the motion are stated in the reasons for judgment.

J. W. Nesbitt, K.C., counsel for plaintiff.

Featherston Aylesworth, counsel for third party.

F. E. Meredith, K.C., (of the Quebec Bar), and

D. L. McCarthy, K.C., counsel for defendant ship and its owner.

HODGINS, L.J., now (April 25th, 1908), delivered judgment.

The defendant ship *Pollux* is a Norwegian ship, owned by one Ole M. Bugge, of Trondhjem in Norway, and was arrested at Port Dalhousie under a warrant of arrest issued by the plaintiffs claiming the sum of $4,000 for necessaries supplied to the said ship *Pollux* at the Port of Sarnia, on the 11th day of October, 1907, and at the said port of Sarnia and other ports on other days, and for damages for breach of charter-party.

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By a charter-party dated the 19th July and made in New York, between J. H. Winchester & Co., by cable authority from Messrs. Fearnley and Eger, agents for owners, and Carbray, Son & Co., charterers of the City of Quebec, the said owner agreed to let and the said charterers agreed to hire, the said steamship from the time of delivery until the end of the lake season. The charterers to have liberty to sub-let the steamer for all or any part of the time covered by the charter. The charterer to pay for the use and hire of the vessel £600 sterling per month, payable in cash or bills, at the owner's option monthly in advance in London, or as agreed. The hire to continue until delivery at a port in the St. Law rence River, at the charterer's option.

By a sub-charter-party dated the 21st August, 1907, and made in Quebec between Carbray, Son & Co., direct charterers, agents for owners and R. O. and A. B. MacKay, charterers of the City of Hamilton, Ontario, the said owners agreed to let, and the said charterers agreed to hire the said steamship from the time of delivery to about the 31st October, 1907. The charterers to have liberty to sub-let the steamer for all or any part of the time covered by the charter. The Charterer to pay for the use and hire of the vessel £700 sterling per month payable in cash or bills on Quebec at owner's option monthly in advance or as agreed. The hire to continue until delivery at Erie, Pennsylvania, U.S.

It will not be proper at this stage of the proceedings to make any findings respecting the agencies alleged, or the effect of the differences in the conditions of these respective charter-parties.

The foreign owner of the defendant ship now moves "for an order that a notice by way of third party notice do issue against the said Carbray, Son & Company of Quebec, in the Province of Quebec, ordering the said Carbray, Son & Company to appear personally, or by their

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solicitors, in the present action to answer the claim of the said owner of the ship *Pollux*, the defendant herein, by which the said owner claims to be entitled to indemnity in the premises over against the said Carbray, Son and Company, who are not as yet parties to the present action; and to order the service thereof at Quebec aforesaid."

There is no provision in the Admiralty Rules of this Court for bringing in third parties who are liable to indemnify a defendant respecting a claim made against him by a plaintiff, except by importing the Rules of the High Court of Justice in England, under Rule 228 regulating the practice and procedure in Admiralty cases. Rule 20 of our Rules cannot, I think, be read as applicable to such process for it is expressly limited to "service out of the jurisdiction of a writ of summons or notice of a writ of summons"; while the process to bring in third parties by the English Order XVI, Rule 48 is "a notice (hereinafter called a third party notice) to that effect, stamped with a seal with which writs of summons are sealed."

It may be conceded that were this foreign owner suing these third parties on any contract of indemnity contained in the charter-party executed in New York, or the sub-charter-party executed in Quebec, he would have to commence his suit by a writ of summons, or such other process as the practice of the Superior Court of that province prescribes; but whatever may be the practice of that court, it cannot be made operative in Ontario so as by analogy, or otherwise, to make its process equivalent to the process prescribed by the English rule referred to.

But the principal difficulty in the owner's way is that the third parties sought to be added reside in the Province of Quebec, and in the case of *Spiller* v. *Bristol Steam Navigation Company* (1), the English Queen's

(1) [1884] 13 Q. B. D. 96.

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Bench Division held that rule 48 did not authorize service out of the jurisdiction of the third party notice on a third party domiciled or ordinarily resident in Scotland; and such third party was neither "a necessary or proper party" to the action. This case affirmed the decision in the previous analagous case of *Lenders* v. *Anderson* (1), that the English court had no power under Order XI, Rules 1 and 2, to allow the service of a writ of summons out of the jurisdiction in actions for breach of contract where the defendant was domiciled or ordinarily resident in Scotland or Ireland. See also *Emanuel* v. *Symon* (2).

Another difficulty may arise respecting the meaning of the term "indemnity" which Brett, M.R., in *Emanuel* v. *Symon* thus interpreted in the Court of Appeal. "It seems to me that indemnity in the new rule must have the same meaning it had in the old rule, and that it can only apply to the case where a third person has contracted to indemnify the defendant;" and he held that in the case before him there was no contract to indemnify, adding: "If the defendants' case be true, they may probably recover the same damages against the ship-owner (the third party) of whom they chartered the ship, as the cargo-owner may recover against them; but that is not enough to entitle them to give the third party notice, inasmuch as to entitle them to do so, there must be a contract to indemnify them."

The motion must therefore be dismissed. But as this is the first occasion in which this third party question has been brought before the Admiralty Court, I think there should be no costs.

Judgment accordingly.

Solicitors for plaintiffs: *Nesbitt, Gould & Dickson*;

Solicitors for owners of ship *Pollux*: *Campbell, Meredith, Macpherson, Hague & Holden.*

(1) [1883] 12 Q. B. D. 50.

(2) [1908] 1 K. B. 302.

ON APPEAL FROM BRITISH COLUMBIA ADMIRALTY DISTRICT.

BETWEEN

1907
April 22.

BOW McLACHLAN & COMPANY, LIMITED, (PLAINTIFFS)..... } APPELLANTS;

AND

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

Shipping—Mortgage action—Defence—Motion to strike out—Set-off and counterclaim.

Held, affirming the judgment appealed from, that in an action upon a mortgage given to builders for the purchase price of a ship, defendants may plead a set-off for moneys they have been obliged to expend to replace defective workmanship and complete the ship in accordance with the contract.

2. Distinction in procedure between set-off and counterclaim discussed.

APPEAL from a judgment of the Local Judge for the British Columbia Admiralty District, reported in 10 Ex. C. R. 403.

April 8th, 1907.

J. S. Ewart, K.C. and *G. Osler*, for appellants, cited *Best* v. *Hill* (1); *Ogders on Pleading* (2); *Government of Newfoundland* v. *Newfoundland Railway Co.* (3).

F. H. Chrysler, K.C., cited, for respondents, *Young* v. *Kitchin* (4); *Annual Practice*, 1907 (5); *Benjamin on Sales* (6).

The JUDGE OF THE EXCHEQUER COURT now (April 22nd, 1907), delivered judgment.

(1) L. R. 8 C. P. 10.
(2) P. 233.
(3) 13 App. Cas. 199.
(4) L. R. 3 Ex. D. 127.
(5) P. 274.
(6) 5th ed. p. 1008.

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McLACHLAN AND CO. v. THE SHIP CAMOSUN.

Reasons for Judgment.

The plaintiffs appeal from an order made on the 9th day of January, 1907 by the learned Judge in Admiralty of the British Columbia Admiralty District, in an action on a mortgage of the defendant ship, whereby he gave the defendant leave to file and serve an amended statement of defence in accordance with a draft then presented ; and they ask that the order be reversed in so far as it gives the defendants liberty to file a defence containing the matters set forth in the seventh paragraph of such draft defence, or any defence setting up the alleged wrong construction or equipment of the defendant ship.

By the fourth paragraph of the statement of defence the Union Steamship Company of British Columbia, Limited, the owners of the said ship, allege among other things, that they entered into a contract with the plaintiffs to build the said ship *Camosun* at their works at Paisley, Scotland, in accordance with certain letters, plans and specifications, at and for the contract price of £28,000 ; that the said ship when constructed was registered temporarily in the name of Gordon Tyson Legg as trustee for the said owners ; that for interim security the said Legg gave the plaintiffs the mortgage on the said ship referred to in the statement of claim herein ; that upon the said steamer arriving at Vancouver she was conveyed to and registered in the name of the said owners ; that the said owners thereupon in accordance with a previous understanding entered into an agreement with the plaintiffs varying the terms and times of payment of the said mortgage moneys which were in reality moneys due by the said owners to the plaintiffs for the construction of the said ship. The agreement is then set out and is followed by allegations to show that the defendants are not in default.

By the seventh paragraph of the statement of defence the owners of the defendant ship, alternatively by way of

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equitable defence to the plaintiffs action (in the event of it being held that they have made default under the said agreement and mortgages and that the plaintiffs are entitled to recover), allege that the plaintiffs did not build the said ship *Camosun* in accordance with the terms of the contract, plans and specifications set out in the fourth paragraph of the statement of defence ; but that 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 Lloyds 100 A 1 Class and Board of Trade, nor in accordance with the plans and specifications of the same, with the result that the said owners were forced to expend in repairing and replacing defective materials and bad workmanship ; and in making the said ship comply with the requirements of Lloyds 100 A 1 Class and Board of Trade ; and in repairing and renewing fittings, decorations, furniture and stoves damaged through leaking decks and hull, and other defective material and workmanship, and other incidental expenses, the sum of £3638, particulars thereof have already been delivered to the plaintiffs ; and the defendants, the owners of the said ship, claim that 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 £3638 so expended by them as aforesaid, with interest and costs.

If this were an action by the plaintiffs against the defendants for the stipulated price of the ship which the former had agreed to build for the latter in accordance with the alleged contract it would be competent to the defendants to set up by way of defence to the action that the plaintiffs had not built the ship according to contract and to show how much less the ship was worth by reason of such breach of contract. *Mondel* v. *Steel* (1); *Church*

(1) 8 M. & W. 871, 872.

v. *Abell* (1); *Benjamin on Sales* (2); *Mayne on Damages* (3) and in that way they might obtain an abatement of the price; and such abatement would not be a bar to a cross action for special or consequent damages for the breach of contract.

In *Benjamin on Sales* (4), where these questions are discussed, it is stated as follows:—

"The Judicature Acts have not affected these rights of the buyer, for in giving a defendant a right to set off, or set up by way of counter-claim, any right or claim, they did not abolish the distinction between a defence and a cross-action, but had it in view only to prevent circuity of action. The Acts deal with procedure only. Accordingly what before those Acts would have been a ground of defence may still be set up as a defence, and what would have been the subject of a cross-action will now be raised by a counter-claim in the strict meaning of the term."

The distinction between a set off and a counter-claim is alluded to in *Odger's on Pleading* (5), in the following terms:

"The Judicature Act which gave every defendant a very wide power of counter-claiming did not alter the rules as to set-off. Whatever was a good set-off either at law or in equity in 1875 is a good set-off still; and nothing else is admissible as a set-off, though it may be an excellent counter-claim. The distinction is important because it carries with it this result—that a set-off is still a defence proper to the plaintiff's action, while a counter-claim is practically a cross-action."

Now if in an action for the price agreed upon the defendants might have defended themselves by showing as alleged in the seventh paragraph of the statement of defence that the plaintiffs did not build the said ship in

(1) 1 S. C. R. 442.
(2) 5th Ed. 1008.
(3) 6th ed. 110.
(4) 5th ed. page 1008.
(5) 6 ed. page 234.

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accordance with the terms of the contract, but on the contrary built it negligently and with defective work and materials with the result that the defendants had to expend a large sum of money in remedying such defects; that is, in substance, that the ship when delivered was worth that much less than the contract price, what good reason exists or can be suggested for refusing them permission to set up these facts as a defence to an action on a mortgage given to secure the stipulated price?

The jurisdiction of the court over a claim for building, equipping and repairing a ship depends upon the 4th section of *The Admiralty Courts Act*, 1861, which gives jurisdiction if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the court That of course is not the present case. But assume that the defendant ship, or the proceeds thereof, had been under arrest in the court, and the plaintiffs had instituted an action for the price which they now claim, would any one doubt the right of the defendants to defend themselves in the same way and form, and to the same extent that they might have done if the action had been brought in the usual way in any court of competent jurisdiction. And I do not see that a different practice should be adopted for the reason only that the action is upon a mortgage given to secure the price agreed upon. To the extent that the facts stated in the seventh paragraph of the statement of defence entitles the defendants to an abatement in the price of the ship, such facts may, it seems to me, be pleaded in defence of plaintiffs' action. But I do not think that the defendants have in this action any right to set off special or consequential damages arising from the alleged breach of the contract. Such damages would be the subject of a cross action or counterclaim for such breach, and for reasons which I have given elsewhere I do not think the court has any jurisdiction over such a claim. It is possible that some

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such damages are sought to be set off by the seventh paragraph of the statement of defence; but that would, if anything, be a ground for amending or striking out a part of the paragraph as embarrassing, not for striking out the whole paragraph as I am asked to do on the ground that it discloses no defence open to the defendants in this action.

It was suggested at the argument that where, as here, a specific sum has been agreed upon to be paid for a ship to be built according to contract, the defendant in an action against them for such sum might without pleading or giving notice of the defence be admitted to show that by reason of some breach of the contract the ship was not worth as much as was contracted to be paid; but *Basten* v. *Butter* (1), shows, I think, that in such a case the plaintiff ought to have notice that the payment is disputed on the ground of the inadequacy of the work done, otherwise he may have some ground to complain of surprise. There can, of course, be no objection to such a defence, if a good one, being set up in the pleadings, and in a case such as this, where the action is not for the stipulated price but on a mortgage given to secure that price, such a defence ought, I think, to be set up if the defendants intend to rely upon it.

It was also argued that such a defence was not a set-off. Assuming the argument to be well founded, that would be a matter of form only and not of substance, and would not afford good ground for allowing the appeal and striking out the paragraph of the statement in defence in question here.

The appeal will be dismissed with costs to the respondents.

Judgment accordingly.

Solicitors for the appellants: *Ewart, Osler, Burbidge & Maclaren.*

Solicitors for the respondents: *Chrysler, Bethune and Larmonth.*

(1) 7 East, 482.

QUEBEC ADMIRALTY DISTRICT.

BETWEEN

1906
Dec. 20.

BOUCHARD AND OTHERS (PLAINTIFFS) ..... } RESPONDENTS;

AND

THE MONTREAL GRAIN ELEVATING COMPANY, OWNERS OF ELEVATOR No. 7 (DEFENDANTS) ..... } APPELLANTS;

AND

THE MONTREAL GRAIN ELEVATING COMPANY (PLAINTIFFS).. } RESPONDENTS;

AND

THE S S. "*GASPESIEN*," BOUCHARD AND OTHERS (DEFENDANTS).. } APPELLANTS.

Shipping—Collision—Motions to consolidate and transfer actions from one registry to another—Present constitution of Quebec Admiralty District-Jurisdiction of Local Judge and Deputy Judge to remove causes from Quebec to Montreal—The Admiralty Act, R.S. 1906, c. 141.

There is at present only one registry in the Admiralty District of Quebec and the provisions of *The Admiralty Act*, 1891, as amended by the third section of the Act, 63-64 Vict. c. 45 (now R. S. 1906, c. 141, sec. 18 (2)) which enact that when a suit has been instituted in any registry no further suit shall be instituted in respect of the same matter in any other registry of the court, do not prevent a further proceeding being instituted in the office of the Deputy Registrar at Montreal in respect of the same matter in which prior proceedings have been instituted in the registry at Quebec.

2. The Deputy Judge has jurisdiction equally with the Local Judge in Admiralty in cases instituted within the Quebec Admiralty District to order the consolidation of such cases for the purposes of trial.

INTERLOCUTORY appeals from certain orders made respectively by the Local Judge and the Deputy Local Judge of the Quebec Admiralty District.

November 20, 1906.

The appeals now came on for argument.

Dr. Davidson, K.C., for the appellants;

C. A. Pentland, K.C., for respondents.

THE JUDGE OF THE EXCHEQUER COURT now (December 20th, 1906) delivered judgment.

These actions numbered 178 and 182, respectively, in the Admiralty District of Quebec arise out of a collision which took place in the harbour of Montreal. The plaintiffs in action No. 178 are the defendants in action No. 182; and the plaintiffs in the latter action are the defendants in the former. In action number 178 the proceeding was commenced in the registry at the City of Quebec. Afterwards the defendants in that action instituted the action numbered 182, the process of the court being issued from the office of the Deputy Registrar at Montreal. In the latter action Mr. Justice Dunlop, the Deputy Judge in Admiralty of the Quebec District residing at Montreal, made three orders from which appeals are taken by the defendants in that action, that is to say:

1st. An order of the 23rd day of October, 1906, whereby he dismissed the defendants' motion to dismiss the action;

2nd. An order of the same date, whereby on the application of the plaintiffs, he set the case down for trial at the City of Montreal on the 13th day of November, 1906; and

3rd. An order of the 2nd day of November, 1906, whereby he dismissed a motion made by the defendants to consolidate the action with action numbered 178, hereinbefore mentioned.

In the action numbered 178, Mr. Justice Routhier, the Local Judge in Admiralty of the District of Quebec, on

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the 30th day of October, 1906, made an order whereby he granted a motion made by the plaintiffs in the action to fix the time of trial, and ordered that the same should take place on the 8th day of November last at the Court House in the City of Quebec, and whereby he dismissed a motion made by the defendants for an order fixing the trial for the 13th day of November last at the City of Montreal. Against that order the defendants in action numbered 178 appeal. Pending the appeals mentioned the orders setting the cases down for trial have not been acted upon, but have been held in abeyance.

The first question to be answered, and the most important, is as to whether or not the action numbered 182 ought to be dismissed? I agree with Mr. Justice Dunlop in answering that question in the negative. By the seventeeth section of *The Admiralty Act*, 1891, the Province of Quebec was constituted an Admiralty District for the purposes of the Act, with a registry at the City of Quebec. By the fifth section of the said Act, as amended by the Act 63-64 Victoria, Chapter 45, the Governor-in-Council is given authority from time to time to

(*a*) Constitute any part of Canada an Admiralty District for the purposes of the Act.

(*b*) Assign a name to any such district and change such name as he may think proper.

(*c*) Fix and change the limits of any such district.

(*d*) Establish at some place within any Admiralty District a registry of the Exchequer Court on its Admiralty side; and

(*e*) Divide the territory comprised in any Admiralty District into two or more registry divisions, and establish a registry of the Exchequer Court on its Admiralty side at some place in each of such divisions.

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None of these powers have been exercised by the Governor-in-Council in respect of the Province or District of Quebec. What has happened is this: By the tenth section of *The Admiralty Act*, 1891, it is provided that a local Judge in Admiralty may from time to time, with the approval of the Governor-in-Council, appoint a deputy Judge; and such deputy Judge shall have and exercise all such jurisdiction, powers and authority as are possessed by the Local Judge. The Local Judge in Admiralty of the district of Quebec has, with the approval of the Governor-in-Council, appointed Mr. Justice Dunlop as deputy Judge; and Mr. Dunbar, the Registrar of the Quebec Admiralty District has appointed Mr. W. S. Walker to be his deputy, with an office at the City of Montreal. But there is at present no registry of the Exchequer Court on its Admiralty side at the City of Montreal. Mr. Walker's office there is merely an adjunct of the registry at the City of Quebec. For the convenience of persons who at Montreal have business to transact with the Quebec registry, Mr. Walker receives and issues documents; but any papers filed with him as deputy of the Quebec Admiralty District ought to be transmitted to the latter at the earliest possible time.

Now, the ground on which Mr. Justice Dunlop was asked to dismiss the action numbered 182 was that it was instituted in contravention of the provisions of the thirteenth section of *The Admiralty Act*, 1891, as amended by the third section of the Act 63–64 Victoria, Chapter 45, whereby it was, among other things, provided that when a suit has been instituted in any registry no further suit shall be instituted in respect of the same matter in any other registry of the Court without leave of the Judge of the Court. It was contended that there were two registrars of the Court in the District of Quebec, one at the City of Quebec and the other at the City of Montreal; and that as the two

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suits were in respect of the same matter, the second, that is the one numbered 182, could not be instituted without the leave of the Judge of the Court, which had not been obtained. But the objection fails because the contention that there are two registrars of the Court in the Admiralty District of Quebec cannot be sustained. The appeal from the order of the 23rd day of October, 1906, whereby Mr. Justice Dunlop refused to set aside the proceedings in the action numbered 182, is dismissed with costs to the respondents.

There being then two actions in which the questions at issue are substantially the same, both pending in the same district and registry, the question arises as to whether or not the two actions should be consolidated and whether an order should be made that the two actions should be tried at the same time and on the same evidence. It is clear I think that to save expense one or the other of the two courses mentioned should be adopted; and I understood it to be conceded by both parties that the Judge of the Exchequer Court would have jurisdiction to make such order as seemed proper in the premises. But it is equally clear, I think, that both the Local Judge in Admiralty of the Quebec District and the deputy Judge in Admiralty there have the same and equal jurisdiction and authority to make such an order. It makes no difference whether the proceedings were commenced at the City of Quebec or at the City of Montreal, each has jurisdiction in respect thereof. It would not do of course for both to exercise such jurisdiction as that might lead to the making of conflicting orders and to confusion and inconvenience. But that is a matter that may well be left to the sound judgment and discretion of the learned Judges in whom the authority is vested. Either the two actions should be consolidated, or they should be tried at the same time and on the same evidence; but in either case the trial

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would be had before one Judge, not before two. And it seems to me fitting that the question as to which of the two courses suggested should be adopted, and also the question as to where such actions should be tried should be left to the determination of the learned Judge before whom the trial will proceed. And that it would be proper for me to refrain from doing more on this appeal than to rescind any order that might stand in the way of the questions mentioned being again raised before and decided by the Local Judge in Admiralty of the Quebec District, or by the Deputy Judge of the district, according as to whether the former saw fit to hear the questions or to leave them to the decision of the Deputy Judge. For that purpose and with that end in view I allow the appeal from the order made by Mr. Justice Dunlop on the 23rd day of October, 1906, setting the action number 182 down for trial at the City of Montreal on the 13th day of November, 1906, and set aside such order with costs to the appellants. I also allow the appeal from his order of the 2nd day of November, 1906, dismissing a motion to consolidate the two actions, and set aside such order with costs to the appellants. I also allow the appeal from the order of Mr. Justice Routhier of the 30th of October, 1906, before mentioned, and set aside the same with costs to the appellants.

And it is further ordered and directed that either the two actions be consolidated or that they be tried at the same time and on the same evidence; but the question as to which of the two courses mentioned should be adopted and also the question as to where the trial of such actions should take place will be left to the determination of the Local Judge in Admiralty of the Quebec Admiralty District, or to the deputy Judge in Admiralty of such district, according as to whether the former sees fit to hear and determine the said questions or to leave them to the decision of the deputy Judge.

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And in connection with the question as to where the trial of the said actions should take place, the Registrar of this Court is authorized and directed to transmit forthwith to the Registrar of the Quebec Admiralty District at the City of Quebec the affidavit of Alexander McDougall made at the City of Montreal on the 28th day of November, 1906, and the affidavit of Joseph Albert Bouchard made at the City of Quebec on the 26th day of November, 1906.

Order accordingly.

QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY..... } PLAINTIFFS; 1907 May 27.

AND

THE STEAMSHIP "*CAPE BRETON*"...DEFENDANT.

Practice in Admiralty cases—Collision action—Taxation of costs—Commission on bail—Appeal from taxing officer to local judge.

Held, that a party putting in bail in a collision action in the form of a guarantee company's bond was entitled to a commission or fee thereon not exceeding ten per cent. of the total amount of the bond. (See English Admiralty Orders, 21*a*).

APPEAL from a taxation of costs by the Deputy Registrar.

May 11th, 1907.

The plaintiffs petitioned the Local Judge for the Quebec Admiralty District (The Honourable A. B. Routhier) that the taxation by the Deputy Registrar of the defendants' bill of costs herein be reviewed by the Local Judge on the ground that certain fees as allowed by the Deputy Registrar were excessive.

May 27th, 1907.

Per Curiam.—Considering that the item contested by plaintiffs in the defendants' bill of costs, for costs of security bond, was allowed by the Deputy Registrar to the amount of $1,775 being one per centum of the total amount of the bail ($71,000) for two years and a half;

Considering that according to the British Rule 21*a* it is provided that the commission or fee to be allowed on taxation in such a case shall not in the aggregate exceed

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THE RICHELIEU AND ONTARIO NAVIGATION CO. v. STEAMSHIP CAPE BRETON

Reasons for Judgment.

one pound per centum on the amount in which bail is given ;

Considering that such commission or fee is not in the nature of an interest per annum on the bail, which is not entitled to arrears of such a fee ;

The said item is reduced to $710 ; and the total bill of costs is accordingly taxed and allowed at the sum of ($3,852.67) three thousand eight hundred and fifty-two 67/100 dollars without costs on this petition.

Order accordingly.

QUEBEC ADMIRALTY DISTRICT.

THE HARBOUR COMMISSIONERS OF MONTREAL..... PLAINTIFFS; 1907 June 1.

vs.

THE STEAMSHIP *UNIVERSE*.....DEFENDANT.

Practice — Action for damages by collision — Costs-- Taxation —Appeal from Deputy Registrar.

Held, reversing the ruling of the Deputy Registrar, that the defendant was entitled to have the costs of the bond of a guarantee company, given as bail in a collision action, taxed in the bill of costs against plaintiff at the rate of one per cent. on the total amount of security given in said bond.

APPEAL from a taxation of costs by the Deputy Registrar to the Deputy Local Judge for the Quebec Admiralty District at Montreal.

June 1, 1907.

Per Curiam: — Whereas the defendants after due notice given to plaintiff moved to review the taxation of their attorney's bill of costs, contending that the Deputy Registrar in taxing their bill of costs had refused to allow and include in said bill of costs the sum of $675, costs of a bond of a guarantee company under which defendants gave bail in the present case.

The parties having been duly heard by their respective counsel, and having filed factums setting forth their respective contentions as regards this, the only item in dispute;

Considering that defendants gave bail by a bond of a guarantee company to the amount of $60,000 said bond covering $50,000 bail given in suit No. 157 in this court, wherein the Harbour Commissioners of Montreal were plaintiffs, and the owners of the S.S. *Universe* were

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THE HARBOUR COMMISSIONERS OF MONTREAL v. STEAMSHIP UNIVERSE.

Reasons for Judgment.

defendants, and $10,000 bail in case No. 165 in which the Boutell Steel Barge Company were plaintiffs, and the owners of the S.S. *Universe* were defendants, and defendants claimed $810 costs of the total amount of said bond from its date to the date of the final judgment in this cause, and demand that five-sixths thereof, to wit, $675 be included in their attorney's bill of costs taxable against the plaintiffs herein, and which charge or fee was disallowed by the Deputy Registrar in taxing said bill of costs;

Considering that according to the British rule 21*a* it is provided that the commission or fee to be allowed on taxation in such case should not in the aggregate exceed one pound per centum on the amount for which bail is given;

Considering that such commission or fee is not in the nature of a rate of interest per annum on the account of bail, which is not a loan, and that defendants are not entitled to arrears of such fee:

Considering that the said item claimed as commission or fee is reduced to the sum of $500, as the amount of said commission or fee taxable in the present case (see judgment in case No. 150, the *Richelieu and Ontario Navigation Company* v. the S.S. *Cape Breton*, rendered by the Hon. Mr. Justice Routhier, Local Judge in Admiralty at Quebec, on the 27th May, 1907);

This Court doth maintain the motion made by the defendant for the revision of said taxation and adjudge and order that the sum of $500 be allowed, and included in defendants bill of costs, and taxed accordingly by the Deputy Registrar, but without costs of the present motion or application.

Solicitors for plaintiffs: *Geoffrion, Geoffrion & Cusson.*

Solicitors for defendant: *Campbell, Meredith, Mac-Pherson & Hague.*

(ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.)

BETWEEN

1908
Jan. 7.

THE OGILVIE FLOUR MILLS COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE RICHELIEU & ONTARIO NAVIGATION COMPANY (DEFENDANTS)..... } RESPONDENTS;

THE NORTHERN ELEVATOR COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE RICHELIEU & ONTARIO NAGATION COMPANY (DEFENDANTS) } RESPONDENTS;

THE CANADA ATLANTIC RAILWAY COMPANY (PLAINTIFFS)..... } APPELLANTS;

AND

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY (DEFENDANTS)..... } RESPONDENTS.

Admiralty law—Shipping—Tug and tow—Damage by overtaking ship—Displacement wave—Presumption as to cause of accident—Finding of trial judge.

Held, (affirming the judgment appealed from, reported *ante*, p. 25), that as the essential question involved in the case was purely one of fact, there being no presumption one way or the other as to how the accident occurred, there was no reason to disturb the finding of the trial judge.

APPEAL from a judgment of the deputy Local Judge of the Quebec Admiralty District.

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THE OGILVIE FLOUR MILLS CO. v. THE RICHELIEU AND ONTARIO NAVIGATION CO.

Reasons for Judgment

The facts are stated in the report of the judgment at first instance, *ante*, p. 25.

November 5th, 1907.

The argument of the appeals was now heard.

E. Lafleur, *K.C.*, and *C. A. Pope* for appellants.

A. R. Angers, *K.C.*, and *A. E. de Lorimier*, *K.C.*, for respondents.

THE JUDGE OF THE EXCHEQUER COURT now (January 7th, 1908) delivered judgment.

These are appeals from the decrees entered in the Quebec Admiralty District, on the 31st day of May, 1907, by Mr. Justice Dunlop, whereby he dismissed the plaintiffs' actions with costs. It appears that the barge *Huron* laden with wheat in tow of the tug *Ida* grounded on the south side of the Soulanges Canal and was injured while the steamship *Hamilton* was passing the *Ida* and *Huron*. On a signal from the *Hamilton* which, being a passenger steamer, had a right to pass the tug and tow under proper conditions, the *Ida* with her tow left the fair-way of the Canal and took up a position on the south side thereof, but without stopping. Under the circumstances proved in the case it must, I think, be taken to have been agreed upon between the *Ida* and the *Huron* on the one side and the *Hamilton* on the other, that the *Hamilton* should pass the former in the manner mentioned. That of course made it necessary for the *Hamilton* to pass the *Ida* and the *Huron* at a greater rate of speed than would have been required if the latter had come to a standstill, but that did not relieve either from their proper responsibilities. It was for the *Hamilton* to pass as slowly and as carefully as possible and for the *Ida* and the *Huron* to take all proper precautions against any injury or accident while the *Hamilton* was passing. Now it appears to me that the accident that did happen,

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Reasons for Judgment.

viz.: the grounding of the *Huron* with the result that she was so injured as to founder shortly afterwards, is equally consistent with the view that the *Hamilton* passed too near or at too great a rate of speed and with the view that the *Ida* and the *Huron* were not properly navigated, but that the *Huron* was put upon the south bank of the canal through the inexperience or want of care of the men at her helm. So that in my view of the case there is no presumption one way or the other as to how the accident happened. In so far as the *Hamilton* is concerned it is a pure question of fact to be found upon the evidence as to whether she passed the *Ida* and the *Huron* in a prudent and careful manner.

That fact the learned Judge who heard the case has found in favour of the *Hamilton* and I see no reason why I should disturb his finding. The appeals will be dismissed with costs.

Judgment accordingly.

Solicitor for Appellants: *Lafleur, McDougall and Macfarlane.*

Solicitors for Respondents: *Angers, de Lorimier and Godin.*

1907

June 24.

(ON APPEAL FROM QUEBEC ADMIRALTY DISTRICT.)

BETWEEN

THE JOINT STOCK STEAMSHIP COMPANY, LIMITED, OWNERS OF THE STEAMSHIP *TORDENSKJOLD*, (PLAINTIFFS)..... .... } APPELLANTS;

AND

THE STEAMSHIP *EUPHEMIA*, (DEFENDANT)..... } RESPONDENT.

AND

THE STEAMSHIP *TORDENSKJOLD*, (DEFENDANT)..... .... } APPELLANT;

AND

THE HORN JOINT STOCK COMPANY OF SHIPOWNERS, OWNERS OF THE STEAMSHIP *EUPHEMIA*, (PLAINTIFFS)..... } RESPONDENTS.

Shipping—Collision—Approaching vessels—Change of course—Negligence—Nautical Assessor in Appeal Court—Opinion not accepted by Court.

Where two steamships were approaching each other at night, green light to green light, so that if each ship had kept its course they would have passed each other safely, and one at a distance of between one-fourth and one-half mile away from the other changed her course, showing first her three lights, and then her red and mast head lights only, and then when the other ship had put her helm hard to port, changed her course again, exhibiting her three lights, she was held solely responsible for a resulting collision.

2. In this case the court on appeal availed itself of the services of a nautical assessor, but the court declined to adopt his opinion as to the vessel at fault.

APPEALS from a judgment of the Local Judge of the Quebec Admiralty District.

1906

THE JOINT STOCK STEAMSHIP CO. v. THE STEAMSHIP EUPHEMIA.

Reasons for Judgment of Trial Judge.

The facts appear in the following reasons of the learned trial judge, and in the reasons for judgment on appeal.

April 2nd, 1906.

ROUTHIER, L. J.—Ce sont deux actions qui ont eu la même cause une collision entre deux steamers, *Tordenskjold*, steamer norvégien et l'*Euphemia*, steamer allemand. Tous les deux ont été endommagés gravement, le *Tordenskjold* plus gravement que l'*Euphemia*, et tous les deux s'accusent réciproquement de plusieurs fautes qui auraient causé la collision.

La date de l'accident n'est pas douteuse : c'est le 23 octobre 1905. L'heure est plus incertaine. L'*Euphemia* prétend que c'est à minuit et trois quarts le *Tordenskjold* dit : minuit et demi.

Cette différence d'heure n'a aucune importance dans la cause.

L'endroit où a eu lieu la collision est également douteux. Ce qui est certain, c'est qu'elle a eu lieu entre les lumières de St Antoine et celles de Ste Croix. L'endroit précis n'a pas été constaté de façon absolument satisfaisante. Le *Tordenskjold* dit à environ 1200 pieds en bas des bouées 29 et 30. Cela ne me paraît pas correct. L'*Euphemia* dit : un mille et demi plus bas. C'est plus vraisemblable. Mais enfin, le lieu n'a pu être exactement constaté. L'*Euphemia* a tenté d'en faire la preuve en produisant des morceaux de charbon trouvés dans le fleuve. On comprend que cet indice est loin d'être sûr, vu que du charbon peut avoir été jeté là par n'importe quel steamer.

Cependant une autre chose plus importante, relativement à l'endroit, est ceci :

Le *Tordenskjold* dit : la collision a eu lieu du côté nord de la ligne centrale du chenal et l'*Euphemia* dit du côté sud.

Je crois qu'il ressort de la preuve que c'est plutôt au sud. Les officiers de l'*Euphemia* le disent d'abord, et

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ceux du *Tordenskjold* affirment de leur côté, qu'avant la collision et avant leur dernier mouvement, qui les portait plus au sud, comme nous allons le montrer plus long, ils étaient en ligne avec les lumières de St Antoine en arrière d'eux. Or, ces lumières indiquent justement la ligne centrale du chenal, à l'endroit où était alors le *Tordenskjold*. Mais ce steamer ayant ensuite effectué un mouvement qui le fit tourner à gauche il a dû nécessairement se trouver un peu plus au sud que la ligne centrale. Pas autant, cependant que le prétend l'*Euphemia*. Evidemment, la collision ne peut pas avoir eu lieu à l'endroit indiqué sur la carte par certains témoins de l'*Euphemia*. Mais du fait qu'elle aurait eu lieu au sud de la ligne centrale du chenal, l'*Euphemia* conclut que le *Tordenksjold* était en dehors de sa voie normale, puisqu'il montait à Montréal, et qu'il aurait ainsi enfreint l'article 25 des Règlements concernant la navigation, article qui lui enjoignait de passer du côté droit, c'est-à-dire dans la moitié nord du chenal.

A cela le *Tordenskjold* répond que cet article 25 n'est pas d'application rigoureuse, et, sur ce point, il a raison.

Il soutient, de plus, qu'il n'a toujours vu que la lumière verte de l'*Euphemia* et que, montrant lui-même sa lumière verte, ils pouvaient très bien se rencontrer verte à verte.

Cette doctrine est correcte, s'il est vrai, toutefois, que les officiers du *Tordenskjold* n'ont toujours vu que la lumière verte de l'*Euphemia ;* mais cela ne paraît invraisemblable quand les deux vaisseaux étaient encore à trois ou quatre milles de distance. Il n'est pas vraisemblable que les officiers du *Tordenskjold* n'aient pas alors aperçu la lumière rouge du l'*Euphemia ;* car, vers ce temps-là, le *Tordenskjold* suivait une courbe pour dépasser les lumières de St-Antoine et pour les mettre en ligne derrière lui, comme il dit l'avoir fait tandis que l'*Euphemia* dirigeait sa course vers les mêmes lumières et en ligne avec elles

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Or, jusqu'à ce que le *Tordenskjold*, qui se dirigeait ainsi vers le sud, soit arrivé à placer les lumières de St-Antoine en ligne derrière lui, il se trouvait un peu au nord de l'*Euphemia* il lui présentait son *starboard bow* et sa lumière verte, et, nécessairement, il devait voir le *port bow* et la lumière rouge de l'*Euphemia*.

Etant données la courbe du chenal à cet endroit et la course des deux vaisseaux, il ne me semble pas possible que le *Tordenskjold* n'ait pas vu alors la lumière rouge de l'*Euphemia*. Et s'il l'a vue, il a dû penser que la rencontre pourrait très bien se faire rouge à rouge.

Mais je reconnais qu'alors les deux vaisseaux étaient encore assez éloignés l'un de l'autre pour n'être pas tenus de décider immédiatement comment se ferait la rencontre. Il me semble aussi que le *Tordenskjold* suivant la course qui devait le mettre en ligne avec les lumières de St-Antoine en arrière de lui, a dû penser qu'alors les deux vaisseaux se trouveraient *nearly end on*, presque en ligne et que, dans ce cas, il devrait se conformer à l'article 18 des Règlements concernant la navigation, diriger sa course à *starboard*, c'est-à-dire au nord, puisqu'il montait à Montréal pendant que l'*Euphemia*, qui descendait le fleuve, ferait le même mouvement à *starboard*, c'est-à-dire au sud.

Mais ce n'est pas en nous appuyant sur ces articles 18 et 25 que mon assesseur et moi croyons devoir décider cette cause.

Les contradictions de la preuve sont nombreuses ; car non seulement les témoins de l'un des steamers contredisent ceux de l'autre sur un grand nombre de points, mais plusieurs des témoignages entendus de part et d'autre sont inconsistants, et se contredisent eux-mêmes. Les contradictions sont flagrantes, surtout quand il s'agit de distance et de durée ; c'est d'ailleurs presque toujours le cas dans les causes de cette nature, et cela s'explique : il arrive très fréquemment que telle distance paraît être

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un mille à un témoin, et de trois milles à l'autre, que telle course a duré quelques minutes pour l'un et quelques secondes seulement pour l'autre — mais en dépit des invraisemblances et des contradictions, il y a certains faits qui nous paraissent indubitables et qui nous permettent de décider quelles ont été les fautes commises, qui ont causé la collision.

Ainsi, quand les deux vaisseaux étaient assez rapprochés pour bien voir les lumières, et bien juger de leur course respective, il n'est pas douteux qu'ils s'avançaient l'un vers l'autre, en se montrant mutuellement leurs lumières vertes ; et si chacun d'eux avait tenu sa course, ils se seraient rencontrés, sans danger, verte à verte. Remarquez bien, je dis là qu'ils s'avançaient verte à verte, quand ils se sont rapprochés ; car auparavant, quand ils étaient à trois ou quatre milles de distance, le *Tordenskjold* devait nécessairement voir la lumière rouge de l'*Euphemia*, mais quand ils se sont rapprochés, ils étaient à peu près sur la même ligne et se montraient réciproquement leur lumière verte.

Alors à un moment donné, le pilote du *Tordenskjold* a commandé *port the helm* et il a montré sa lumière rouge à l'*Euphemia*.

Les autres officiers du *Tordensjold* ont essayé de soutenir que cet ordre, *port the helm*, n'avait pas duré assez longtemps pour montrer leur lumière rouge à l'*Euphemia* ; mais les meilleurs juges sur cette importante question sont d'abord Brunet, le pilote, qui répète dix fois plutôt qu'une *qu'il voulait montrer sa rouge et qu'il l'a montrée*, et ensuite, les officiers de l'*Euphemia*, *qui l'ont vue*.

Il n'y a pas de doute que le *Tordensjold* a gardé ce mouvement de *port the helm* assez longtemps pour montrer sa lumière rouge.

Mais pourquoi cet ordre, *port the helm*, a-t-il été donné ?

Brunet l'a dit dans sa déposition devant le capitaine Spain. Il voulait voir la lumière rouge de l'*Euphemia*,

qui persistait, dit-il à montrer sa verte. Brunet voulait voir la rouge de l'*Euphemia*, et rencontrer rouge à rouge.

Voici ce qu'il dit, à la page 5 de sa déposition.

"R. J'ai montré ma lumière rouge pour lui faire montrer la sienne et ensuite, je suis revenu en droite ligne, la même course que j'étais.

Q. Vous avez compris la question? Je vous la pose encore. C'est ceci: Voyant toujours la lumière verte de l'*Euphemia*, vous avez continué dans votre course jusqu'à ce que vous ayez cru nécessaire de montrer votre lumière rouge pour lui faire montrer la sienne?—R. Oui, pour lui faire montrer sa lumière rouge.

Q. C'est pour cette raison-là?—R. Oui, monsieur.

Q. Pourquoi avez-vous fait cela?—R. C'était pour qu'il vint à prendre une bonne course; il aurait dû montrer sa lumière rouge s'il avait en bonne course.

Q. Vous vouliez passer rouge à rouge?—R. Je voulais passer rouge à rouge, c'est pour cela."

Et à la page 7:

"Q. Quel effet est-ce que ça eu sur votre vaisseau, l'ordre de mettre votre roue à port?—R. Ça eu l'effet de montrer ma lumière rouge à l'autre.

Q. Ça dû avoir le même effet sur la lumière de l'autre vaisseau?—R. Ça n'a rien fait; il a toujours resté avec sa lumière verte.

Q. Après que vous avez mis votre roue à port, sur quel côté de votre vaisseau se trouvait la lumière verte de l'*Euphemia*?—R. Elle se trouvait du côté de la lumière rouge.

Q. Sur la lumière rouge?—R. Oui, monsieur."

Brunet voulait donc, alors, rencontrer *rouge à rouge*, c'est-à-dire qu'il voulait, dans ce moment-là, appliquer la règle 25.

Nous croyons que ça été là une faute très grave. Il était déjà tard pour changer sa course.

Cette faute est celle que prévoit Todd à la page 280 de son ouvrage *Practical Seamanship*. John Todd est un

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marin qui a navigué pendant vingt ans sur la Tamise, la Seine, l'Elbe et la Gironde, rivières où la navigation est pleine de dangers et infiniment plus difficile que sur le St-Laurent. C'est donc un homme de grande expérience, et son opinion fait autorité.

Voici ce qu'il dit (p. 280) :

"When two steamers are passing on opposite courses, so that if each held on her course they would pass clear of each other green to green, for one of them to *port his helm* and cross the opposite vessel's bow thus showing his red to the other's green, is a most *lubberly* trick, unworthy of any one calling himself a seaman to do....

"As regards starboarding the helm for a red light, nothing need be said as it would be nothing short of madness to do so." Cette ligne est de moi et non de Todd, ce n'est pas une citation : Porting the helm to a green light is the same fault.

Il serait difficile de condamner en termes plus sévères la fausse manœuvre du pilote Brunet du *Tordenskjold*.

Cependant, si Brunet, après avoir montré sa lumière rouge, avait persisté dans cette manœuvre, qui était, comme il l'admet, un signal à l'*Euphemia* de montrer, lui aussi, sa rouge au *Tordenskjold*, les deux steamers auraient pu se rencontrer encore rouge à rouge ; car le pilote de l'*Euphemia* avait compris le signal, qui était une espèce d'ordre auquel il devait obéir, et il avait commandé immédiatement *hard a port*. Mais Brunet ajouta une seconde faute à la première, et sans attendre que l'*Euphemia* lui eût montré sa lumière rouge, et cela ne peut pas se faire dans quelques secondes, il fallait donner le temps nécessaire pour que le navire tournât de façon à montrer sa rouge, sans attendre que l'*Euphemia* eut montré sa lumière rouge. Brunet donna lui-même un second ordre, contradictoire du premier : *starboard the helm*, pour montrer de nouveau sa propre lumière verte.

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Pendant ce temps-là l'*Euphemia* tournait, le *Tordenskjold* n'avait pas encore vu sa lumière rouge, mais l'*Euphemia* tournait vers le sud pour la lui montrer sur l'ordre de *hard a port*. Et il montra au *Tordenskjold*, au moment où celui-ci lui montrait de nouveau sa verte.

L'*Euphemia* donna alors un coup de sifflet et ordonna : *full speed astern*. C'était le seul mouvement qui lui restait à faire. Quant au *Tordenskjold*, il ne fit que présenter, pour ainsi dire, son flanc droit pour recevoir le choc. Et comme il n'a été frappé que sur l'avant, il est probable que l'*Euphemia* aurait encore pu passer sans le toucher, si le *Tordenskjold* s'était seulement mis *full speed astern*, dès qu'il entendit le coup de sifflet de l'*Euphemia*, et vit sa lumière rouge.

Mon assesseur s'accorde entièrement avec moi dans l'appréciation que je viens de faire de la preuve et des faits, et son opinion est consignée par écrit dans les réponses qu'il a faites aux cinq questions que je lui ai posées, en sa *capacité nautique*.

Voici les questions et les réponses qui y ont été données.

1. When the two steamers were approaching each other, showing green to green, was it right for the *Tordenskjold*, instead of keeping her course, to port her helm in order to show her red light to the *Euphemia* ?—A. It was the most grievous fault committed in this case, and the first cause of the collision.

2. After thus showing her red light to the *Euphemia*, do you believe that the *Tordenskjold* should have continued that new course so as to pass red to red ?—A. Most certainly.

3. As soon as the *Euphemia* saw the red light of the *Tordenskjold* bearing a little on her port bow, was she bound to hard port her helm in order to pass red to red ? —A. The *Euphemia* had every reason to believe that the *Tordenskjold*, by showing her red light, signalized

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her intention to pass red to red, and then she was bound to hard port her helm.

4. After porting her helm and showing her red light to the *Euphemia*, do you find fault with the *Tordenskjold* in starboarding again her helm?—A. Certainly, it was a fault to starboard again, after showing her red light.

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5. When the *Tordenskjold* saw the red light of the *Euphemia* and heard her short blast, do you think it was still time for the *Tordenskjold* to order full speed astern? —A. I think so. The *Tordenskjold* having been struck in the bow, not very much abaft of the stem, it appears to me probable that the *Eupheumia* could have slipt clear, if the *Tordenskjold* had been full speed astern a few seconds before the collision.

Dans notre opinion donc, les fautes les plus graves du *Tordenskjold*, ou plutôt de son pilote,—car c'est le pilote qui est responsable de tout dans cette affaire, ont été de changer de course après avoir dépassé l'endroit qu'ils nomment "chez King", de montrer sa lumière rouge à la lumière verte de l'*Euphemia*, puis de la cacher et de montrer ensuite, de nouveau, sa lumière verte.

Le conseil du *Tordenskjold*, M. Meredith, a essayé de justifier ce mouvement, d'une manière très ingénieuse, mais qui n'est pas soutenue par la preuve. Il a prétendu que si le *Tordenskjold* avait dévié un peu, c'était uniquement pour se mettre en ligne avec les lumières de St-Antoine derrière lui. Jusque là il n'avait pas à changer de course, mais quand les lumières de St.-Antoine se sont trouvées en arrière et en droite ligne, il fallait redresser un peu pour prendre la course de l'ouest ; alors, dit-il, il est naturel que le vaisseau ait tourné un peu plus qu'il ne fallait et ait montré sa lumière rouge à l'*Euphemia*.

C'est une explication ingénieuse, et ce serait peut-être possible, sans le témoignage de Brunet, qui dit que ce n'est pas cela du tout. Et il sait, mieux que personne, ce qu'il avait l'intention de faire et ce qu'il a fait.

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Brunet nous dit :—Je voulais montrer ma lumière rouge à l'*Euphemia*, parce que je voulais rencontrer rouge à rouge.

En face de cette déclaration, l'explication de M. Meredith devient inacceptable.

J'ai référé à tous les précédents qui m'ont été cités. Quelques-uns sont plutôt favorables à l'*Euphemia* ; d'autres n'ont pas d'application ici, parce qu'ils sont basés sur des faits différents.

Enfin, je dois dire que les deux pilotes qui ont été entendus dans cette cause-ci manquent de connaissances, et ils en manquent dans une large mesure. Ils ne connaissent pas le compas, ni les règles de la navigation, ni beaucoup la carte du fleuve. Cependant il est juste d'ajouter que Dufresne, le pilote de l'*Euphemia*, paraît avoir observé les règles et gouverné son vaisseau comme il devait le faire dans la circonstance.

La conclusion est double, naturellement, puisqu'il y a deux actions.

L'action du *Tordenskjold* contre l'*Euphemia* doit être renvoyée et les demandeurs condamnés aux dépens.

L'action de l'*Euphemia* contre le *Tordenskjold* doit être maintenue, et les défendeurs condamnés à payer aux demandeurs la somme qui sera fixée en la manière ordonnée par le jugement.

April 5th and 19th, 1907.

The appeals were argued at Montreal and Quebec.

C. A. Pentland, *K.C.*, and *F. E. Meredith*, *K.C.*, for the appellants, contended that in view of the different stories told by the crews of the two ships, there is a strong presumption against the respondents. The protest, preliminary acts, pleadings and evidence of the respondents are wholly irreconcilable. The *Alhambra* (1) ; the *Princess Royal* (2) ; the *Ailsa* (3) ; the *Mary Stewart* (4).

(1) 25 Fed. Rep. 846.
(2) Cook 250.
(3) 2 Stuart 38.
(4) 2 Wm. Rob. 244.

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The respondents knew, or must be presumed to have known the course the *Tordenskjold* had to follow. Article 29 of the Steering and Sailing Rules in the Regulations for Preventing Collisions (1); the *Pekin* (2); the *Velocity* (3); *Kay on Shipmasters and Seamen* (4); *City of Macon* (5); the *Soulanges* and the *Neptune* (6).

The *Tordenskjold* was running with the flood-tide and the *Euphemia* was running against it, so that the *Euphemia* was obliged to keep out of the way of the ship running with the tide and to exercise any other necessary precautions. Arts. 27 and 29 of the Steering and Sailing Rules; the *Talabot* (7); the *Galatea* (8).

While the *Euphemia* was proceeding down the river, and the *Tordenskjold* was on the stretch of her course before the last bend (opposite "Chez King"); that is, was coming up from opposite the St. Antoine Range Lights to opposite "Chez King," and so showed her green light to the *Euphemia*, under such circumstances the *Euphemia* had to keep her course, and should not have changed it as she did some time before she whistled, whether endeavoring to pass "red to red," or for any other reason. Art. 21 of the Steering and Sailing Rules; the *N. Churchill* and the *Normanton* (9); the *Leverington* (10); the *Tasmania* (11); *Spencer on Marine Collisions* (12).

The *Tordenskjold*'s navigation was correct in view of her charted course, and the *Euphemia*'s position to the north of mid-channel. The *Talabot*. (13).

The *Tordenskjold* was not obliged to give any signal, as she followed her charted course up the river. Art. 28 of the Steering and Sailing Rules; the *Mourne* (14); the *Bermuda* (15).

(1) R. S. C. c. 79, sec. 2, as amended by O. C. of 9th February, 1897.
(2) [1897] A. C. 532.
(3) L. R. 3 P. C. 44.
(4) 2nd ed. p. 534.
(5) 92 Fed. Rep. 207.
(6) Stockton Ad. Dig.
(7) 63 L. T. N. S. 812; s. c. in 15 Pritch. D. 194.
(8) 92 U. S. 439.
(9) Cook, 65.
(10) 55 L. T. N. S. 386.
(11) 15 App. Cas. 223.
(12) P. 167.
(13) 63 L. T., N. S. 812.
(14) [1901] P. 68.
(15) 11 Fed. Rep. 913.

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Argument of Counsel.

The serious faults committed by the *Euphemia* in putting her helm hard aport without whistling; in keeping on at full speed until the collision was inevitable; in having come down on the wrong side of the mid-channel and not keeping out of the other way of the ship that was following the winding channel and running with the flood-tide; and in not whistling when putting her engines full speed astern; all these facts would give the *Tordenskjold* the benefit of the rule that if there had been any doubts as to the *Tordenskjold's* navigation those doubts would have to be resolved in the *Tordenskjold's* favour. The *Victory* (1); the *Umbria* (2); the *City of New York* (3); the *Ludwig Holberg* (4); the *Stanmore* (5); *Moore's Rules of the Road* (6); *Kay on Shipmasters and Seamen* (7); *Marsden's Collisions at Sea* (8); the *Arabian* (9); *Birgitte* v. *Forward* (10); the *Underwriter and Lake St. Claire* (11).

Even if one vessel is guilty of misconduct, that does not relieve the other from responsibility. The *City of Antwerp* (12); *Spencer on Marine Collisions* (13); *Marsden's Collisions at Sea* (14); the *Baltimore* (15); the *Memnon* (16); *Spencer on Marine Collisions* (17); *Moore's Rules of the Road* (18); *Allen* v. *Reford* (19).

The *Euphemia* should have whistled at once when intending to put her helm hard aport instead of waiting until the collision was inevitable. The *Uskmoor* (20).

(1) 168 U. S. 410.
(2) 166 U. S. 404-409.
(3) 147 U. S. 72-85.
(4) 157 U. S. 60.
(5) 10 P. D. 134.
(6) Pp. 51, 52.
(7) Vol. 2, p. 958.
(8) 5th ed. pp. 424-430.
(9) 2 Stuart, 72.
(10) 9 Ex. C. R. 339.
(11) 3 Asp. M. C. 361.
(12) L. R. 2 P. C. 25.
(13) Sec. 80.
(14) 5th ed. 430.
(15) 34 Fed. Rep. 660.
(16) 6 Asp. M. C. 488.
(17) P. 197.
(18) P. 49.
(19) 15 Q. L. R. 341.
(20) [1902] P. 250.

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Argument of Counsel.

A. H. Cook, K.C., and *L. C. Pelletier, K.C.*, for the respondents, contended first, that the *Euphemia* kept her proper course until the moment of the collision; the *Tordenskjold* was a crossing ship and should have kept out of the way; secondly, the *Euphemia* was guilty of no breach of the rules which contributed in any way to the accident. The finding upon the facts by the learned judge was in the *Euphemia's* favour, and the respondents rest on that judgment. No appeal court would for a moment reverse the finding of the trial judge in a case of this sort, where the evidence is contradictory, and the judge at first instance had an opportunity of estimating the credibility of the witnesses. The finding of the learned judge is supported by the weight of evidence, and ought not to be disturbed.

THE JUDGE OF THE EXCHEQUER COURT now (June 24th, 1907) delivered judgment.

There are two appeals in these matters. The Joint Stock Steamship Company Limited, the owners of the steamship *Tordenskjold* assert an appeal from a judgment of the Judge in Admiralty of the Admiralty District of Quebec, made on the 2nd day of April, 1906, whereby he pronounced the plaintiffs to have been in fault as to the collision between the two vessels the *Tordenskjold* and the *Euphemia* in the River St. Lawrence between the St. Antoine and St. Croix Range Lights, on the twenty-third day of October, one thousand nine hundred and five, and dismissed the action and condemned the plaintiffs in costs.

There is also an appeal on behalf of the steamship *Tordenskjold* from a judgment rendered at the same time by the learned Judge whereby in an action in which The Horn Joint Stock Company, the owners of the steamship *Euphemia* were Plaintiffs and the steamship *Tordenskjold* was Defendant, arising out of the collision mentioned, he

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pronounced in favour of the plaintiff's claim and condemned the defendant in an amount to be found due to the plaintiffs for damages and costs, and ordered that an account should be taken in the usual manner.

The learned Judge was assisted by Captain Charles Koenig, master of the steamship *Druid*, as Assessor. On the appeal I had the assistance, as Assessor, of Captain William Tooker, R.N., an officer of great knowledge, skill and experience.

The facts on which the decision of the two cases must turn lie within a narrow compass. It is common ground with the parties that a few minutes, probably not more than two minutes, before the collision, and when the two steamships were not more than half a mile apart, they were approaching each other green light to green light, and that if each ship had kept its course they would have passed each other safely. The account of what then happened, given by the pilot, officers and men of the *Tordenskjold* is briefly this: That the *Tordenskjold* kept her course, and that when the two ships were within about a ship's length of each other the *Euphemia* blew one blast of her whistle, suddenly shut out her green light, and opened her red light; that the *Tordenskjold's* engines were then stopped and that there was not time to do anything more to prevent the collision, which was imminent, or to decrease the effect of the blow that was then impending and which the *Tordenskjold* almost immediately received on her starboard side.

The pilot, officers and men of the *Euphemia* agree that when the two ships were about half a mile apart they were approaching each other green light to green light; but they deny that the *Euphemia* was the first to change her course and thereby to bring the two ships from positions of safety into conditions of danger. On the contrary they allege that the *Tordenskjold* was the first to change her course. Their account as given in the

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preliminary act, and supported by their evidence is this:—That when the *Tordenskjold* was at a distance of between one fourth and one half of a mile away she suddenly changed her course and showed first her three lights and then her red and mast-head lights only. The *Euphemia's* helm was then put hard to port. When the *Tordenskjold's* red light was slightly on the *Euphemia's* port bow the *Tordenskjold* again changed her course and exhibited her three lights. The *Euphemia* then blew one blast of her whistle and her engines were put full speed astern.

Now, on this question of fact, as to which the parties are at issue, the learned Judge of the Quebec Admiralty District has in substance found in favour of the *Euphemia* and against the *Tordenskjold*, and I think his finding ought not to be disturbed. I am not myself able to support that finding as he does by the evidence of the *Tordenskjold's* pilot as to the first porting of her helm, which he admits having directed; for that happened at a time anterior to that with which we are here concerned. But I do not doubt that the *Tordenskjold* overran the line of the St. Antoine range lights and that at the time we are speaking of she was seeking to return to that line or to get to the north of it, a thing that she could not do without using her port helm. The learned judge and Captain Koenig and Captain Tooker are all agreed that it was wrong of the *Tordenskjold* to port her helm to the green light of the *Euphemia* when the two vessels were close together; and there can, I think, be no question about that. But it is also to be observed that this change of course on the *Tordenskjold* was, according to the *Euphemia's* account, continued until the *Tordenskjold's* red light was a little on the *Euphemia's* port bow, and as the latter was then under the influence of a hard to port helm it is probable that the two ships would have passed each other without a collision if the *Tordenskjold* had

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persisted in the course she had taken. But she again changed her course, this time to port, and that, I think, was the real cause of the collision. After that had taken place, I do not well see how anything could have been done by either steamship to avoid a collision. I regard that as the gravest fault committed by the *Tordenskjold*.

Then with regard to the *Euphemia* the learned judge of the Quebec Admiralty District, with the concurrence of his assessor, found that she was not in fault. With that finding Captain Tooker does not fully agree.

The following question was submitted to Captain Koenig :—

"3. As soon as the *Euphemia* saw the red light of the *Tordenskjold* bearing a little on her port bow, was she bound to port her helm in order to pass red to red?" This was his answer to that question :—The *Euphemia* had every reason to believe that the *Tordenskjold* by shewing her red light signalized her intention to pass red to red and then she was bound to hard port her helm.

Captain Tooker answers the same question in the negative, for the reason that the ships were then too close to give a reasonable chance of clearing at their approach. In his opinion the *Euphemia* was in fault "in not going full speed astern and giving the usual "signal of three blasts 'when' she saw the *Tordensk-*"*jold's* three lights at position T4 in chart numbered 1, "for in view of the fact that the ships were closing at "the rate of about 2,000 feet per minute she had no "reasonable chance of clearing by the use of the port "helm alone." I think there is a clerical error in the answer from which the above is taken, and that the reference intended was to chart numbered 2.

Now with regard to the question referred to, that the learned judge submitted to his assessor and which was answered by him and by the assessor whose assistance I

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had, there is this to be said, that it suggests that the *Euphemia* first ported her helm when she saw the *Tordenskjold's* red light bearing a little on her port bow, while the fact is that the *Euphemia* at the time her helm was ported had the *Tordenskjold's* three lights on her starboard bow, and it is to that condition of affairs that Captain Tooker's answer and opinion has reference. At least so I understand it. The *Euphemia* was under the influence of her port helm when the *Tordenskjold's* red light was seen a little on her port bow, and so continued until the collision occurred. Captain Tooker's opinion is entitled to the greatest respect and consideration, but the fact that the two ships actually came into the position indicated in the question referred to, which appears to have been one of comparative safety if thereafter both ships had persisted in the respective courses they were then on, makes it difficult for me to accept and make my own his view that when the *Euphemia's* helm was put hard to port there was no reasonable chance of the two ships clearing by the use of the port helm alone. I do not doubt that the course which he suggests would have been the safer course. And I quite agree that the *Euphemia* was not bound to port her helm and try to pass red to red, when it would have been safer to have gone full speed astern, giving the usual signal to indicate what she was doing. But that is not the exact question that has to be answered. The question is not whether the *Euphemia* might have done something else that would have been better; but whether she was justified in doing what she did in the emergency that the *Tordenskjold* had brought about by changing her course to starboard when the two ships were approaching each other starboard side to starboard side. In my view the *Euphemia* was justified in porting her helm when she did; and I agree with the learned judge who heard the

case that there is no fault to be attributed to her in respect of the collision between the two steamships.

The two appeals will be dismissed with costs to the respondents.

Judgment accordingly.

Solicitors for appellants : *Pentland, Stewart & Brodie.*
Solicitor for respondents : *A. H. Cook.*

IN THE MATTER of the Petition of Right of

1908
Jan. 7.

FLORA LEFRANÇOIS.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence—Government railway—Public work—Effect of Government acquiring running rights and powers over another railway and operating it as part of Intercolonial Railway.

The suppliant's husband was mortally injured while employed as a locomotive fireman on an Intercolonial Railway train, running between Levis and Chaudiere, at a point on the Grand Trunk Railway enclosed between two sections of the Intercolonial Railway over which the Government of Canada had acquired running rights and powers in perpetuity and free of charge under 43 Vic. c. 8. Over this section of railway the Government operated its trains and locomotives as on a part of the Intercolonial Railway system.

Held, that the place where the accident happened might properly be taken as an extension of the Intercolonial Railway, and therefore was to be regarded as a public work within the meaning of section 20 c. of R. S. 1906, c. 140.

MOTION to dismiss petition of right on points of law raised in defence.

December 2nd, 1907.

The argument of the motion now took place.

E. L. Newcombe, K.C, in support of the motion;

C. Lane, contra.

THE JUDGE OF THE EXCHEQUER COURT now (January 7th, 1908) delivered judgment.

The petition is brought by Flora Lefrançois for damages for the death of her husband, in his lifetime a locomotive fireman, who was mortally injured while running on an Intercolonial Railway train between Levis and Chaudiere, at a point on the Grand Trunk Railway enclosed between

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two sections of the Intercolonial Railway where the Government of Canada has acquired running rights and powers in perpetuity and free of charge under 43 Vic., chap. 8; and over which the Government of Canada runs its trains and locomotives as on a part of the Intercolonial Railway system. It is admitted that the Intercolonial Railway is a public work of Canada, but it is argued that the place where the accident happened was not a part of a public work of Canada, and therefore the suppliant has no right of action under the statute (R.S.C., 1906, Cap. 140, s. 20, clause (*c*)). That contention raises, I think, the question as to whether or not the part of the Grand Trunk Railway over which the Government has running powers may with propriety be considered an extension of the Intercolonial Railway as defined in the 80th section of *The Government Railways Act* (R.S.C. 1906, Cap. 36 s. 80), which is in these terms:—"All railways and all branches and extensions thereof and ferries in connection therewith vested in His Majesty, under the control and management of the Minister and situated in the Provinces of Quebec, Nova Scotia, and New Brunswick, are hereby declared to constitute and form the Intercolonial Railway."

In my view I think that the place where the accident happened may properly be taken to be an extension of the Intercolonial Railway. I am, therefore, of opinion that the accident complained of happened on a public work, and that the question of law raised should be determined against the respondent and in favour of the suppliant.

*Motion refused.**

* REPORTER'S NOTE:—Affirmed on appeal to Supreme Court of Canada, 40 S. C. R. 431.

BETWEEN

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January 7.

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

AND

THE BONANZA CREEK HYDRAULIC CONCESSION, LIMITED ..... DEFENDANTS.

Mining—Yukon Territory—Hydraulic lease—Breach of Conditions—Construction—Forfeiture—Judgment for purposes of appeal.

INFORMATION by the Attorney-General of Canada for the cancellation of a hydraulic mining lease and the delivery of possession of the lands covered by the lease to the Crown.

G. F. Shepley, K.C. and *H. C. Bleecker* for the plaintiff;

J. B. Pattullo, F. R. McDougall and *J. P. Smith* for defendants.

The case was heard at Dawson on the 24th July, 1907, before the late Mr. Justice Burbidge, who delivered the following judgment on the 7th January, 1908:—

I venture to ask the parties and anyone who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson was forwarded to the Registrar of the court at Ottawa and the record thereby completed, and since that time, my other engagements were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the case the consideration which it deserves. However it

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does appear to me to be important that the litigation should be advanced another stage, and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada rather than that there should be a rehearing and a reargument in this court. And for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1) the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interests. The main question it seems to me that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the defendants.

There will be judgment for the plaintiff.

*Judgment accordingly.**

Solicitors for the plaintiff: *McDonald, Shepley, Middleton & Donald.*

Solicitors for the defendants: *Belcourt & Ritchie.*

(1) 14 S. C. R. 345.

* REPORTER'S NOTE :—Reversed on appeal to Supreme Court of Canada, 40 S. C. R. 281.

IN THE MATTER of the Petition of Right of

FREDERICK DANIEL FROOKS.....SUPPLIANT;

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January 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Mines and minerals—Yukon Territory Act—Hydraulic mining regulations —Application for lease—Refusal by Crown to grant same.

PETITION OF RIGHT by the suppliant, a free miner in the Yukon Territory, asking for the grant of an absolute lease of hydraulic mining privileges within certain areas for which at the time of filing his petition he held a provisional lease.

July 25th, 1907.

T. Mayne Daly, K.C. for the suppliant;

Geo. F. Shepley, K.C. and *Henry C. Bleecker* for the respondent.

The case was heard at Dawson before the late Mr. Justice Burbidge. The learned judge having fallen ill before his engagements permitted him to deliver a considered judgment in this case, he delivered the following judgment for the purpose of enabling the parties to bring the questions at issue before the Supreme Court on appeal.

January 7th, 1908.

I venture to ask the parties and anyone who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence, taken at Dawson, was forwarded to the registry of the court at Ottawa and the record thereby completed, and since that time, my other engagements

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were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the case the consideration which it deserves. However, it does appear to me to be important that the litigation should be advanced another stage and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada rather than there should be a rehearing or reargument in this court. And for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1), the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interest. The main question it seems to me that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the suppliant.

There will be judgment for the respondent in the usual statutory form of judgments on Petitions of Right.

*Judgment accordingly.**

Solicitors for the suppliant: *Daly, Crichton & McClure.*

Solicitor for the respondent: *G. F. Shepley.*

(1) 14 S. C. R. 345.

* REPORTER'S NOTE :—Affirmed on appeal to Supreme Court of Canada, 40 S. C. R. 258.

BETWEEN

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January 7.

HIS MAJESTY THE KING ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA ..... } PLAINTIFF;

AND

THE KLONDIKE GOVERNMENT CONCESSION, LIMITED ..... } DEFENDANTS.

Mines and minerals — Yukon Territory Act — Regulations — Hydraulic lease—Breach of conditions — Deed — Forfeiture—Practice—Application to amend defence—Counter-claim—Fiat—Judgment to facilitate appeal to Supreme Court of Canada.

A statement in defence cannot be so amended so as to set up a counter-claim. A substantive claim such as would form the basis of a proceeding of that kind requires a fiat before it can be presented to the court for hearing and determination.

INFORMATION by His Majesty's Attorney-General for the Dominion of Canada for the annulment of a certain hydraulic mining lease on Hunker Creek, in the Yukon Territory, granted to the defendants on the 12th day of February, 1900. The case was tried by the late Mr. Justice Burbidge at Dawson, Yukon Territory, on the 22nd day of July, 1907.

G. F. Shepley, K.C. and *H. G. Bleecker* appeared for the plaintiff.

J. B. Pattullo, C. W. C. Tabor, and *W. L. Phelps* appeared for the defendants.

Before the evidence was proceeded with, Mr. Pattullo, for the defendants, asked leave to amend the statement of defence by setting up a substantive claim against the Crown.

[BY THE COURT:—Any amendment in the way of counter-claim, I could not possibly allow. If you have

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a claim against the Crown you will have to obtain the Crown's fiat before you can present it.]

The late Mr. Justice Burbidge having fallen ill before his engagements permitted him to deliver a considered judgment in this case, and desiring to put the parties in a position where the questions at issue might be brought before the court of appeal, on the 7th January, 1908, he delivered the following judgment:—

I venture to ask the parties and anyone who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson was forwarded to the Registrar of the court at Ottawa, and the record thereby completed, and since that time my other engagements were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the case the consideration which it deserves. However, it does appear to me to be important that the litigation should be advanced another stage, and that it is in the interests of the parties themselves that it be put in a position when the questions in issue may be brought before the Supreme Court of Canada, rather than that there should be a rehearing or a re-argument in this court, and for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1), the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interest. The main question, it seems to

(1) 14 S. C. R. 345.

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me, that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the defendants.

There will be judgment for the plaintiff.*

Solicitors for plaintiff: *McDonald, Shepley, Middleton & Donald.*

Solicitors for defendants: *Chrysler, Bethune & Larmonth.*

*REPORTER'S NOTE:—Reversed on appeal to Supreme Court of Canada, 40 S. C. R. 294.

IN THE MATTER of the Petition of Right of

EDWARD WARD SMITH.....SUPPLIANT; 1908

AND January 7.

HIS MAJESTY THE KING..... .....RESPONDENT.

Mines and minerals—Yukon Territory Act—Hydraulic Regulations—Application for lease—Refusal by Crown to grant same.

PETITION OF RIGHT by the suppliant, a free miner in the Yukon Territory, asking for a grant of hydraulic mining privileges within the said territory.

July 24th and 25th, 1907.

T. Mayne Daly, K.C., for the suppliant;

George F. Shepley, K.C. and *Henry C. Bleecker* for the respondent.

The case was heard and argued before the late Mr. Justice Burbidge, at Dawson. The learned Judge having fallen ill before his engagements permitted him to deliver a considered judgment in the case, he delivered the following judgment on the 7th January, 1908, for the purpose of enabling the parties to bring the questions at issue before the Supreme Court on appeal :—

I venture to ask the parties and anyone who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson, was forwarded to the registry of the court at Ottawa and the record thereby completed, and since that time, my other engagements were such as to prevent me from taking the matter up and dealing with it in an adequate manner. And now the state of my health prevents me from giving the

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Reasons for Judgment.

case the consideration which it deserves. However, it does appear to me to be important that the litigation should be advanced another stage, and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada, rather than that there should be a rehearing or a re-argument in this court. And for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1) the decision of the Exchequer Court was taken by consent and without argument in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interest.

The main question it seems to me that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the suppliant.

There will, therefore, be judgment for the respondent in the usual statutory form of judgments on Petitions of Right.

*Judgment accordingly.**

Solicitors for the suppliant: *Daly, Crichton & McClure.*

Solicitor for the respondent: *G. F. Shepley.*

(1) 14 S. C. R. 345.

*REPORTER'S NOTE:—Affirmed on appeal to Supreme Court of Canada, 40 S. C. R. 258.

IN THE MATTER of the Petition of Right of

THOMAS DUFFERIN PATTULLO.....SUPPLIANT; 1908

AND January 7.

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Yukon Territory Year-Book—Publication by private indidual—Authority of Commissioner to bind Dominion Government.

The Commissioner of the Yukon Territory on the 24th November, 1903, had no authority to bind the Crown, as represented by the Government of Canada, by a contract entered into with a private individual for the printing and publication of a year-book relating to the Yukon Territory.

PETITION OF RIGHT for the recovery of money alleged to be due upon a contract entered into by the suppliant with the Government of Canada.

The suppliant by his petition of right set out the following facts:—

On or about the twenty-fourth day of November, 1903, the suppliant entered into an agreement in writing with the Commissioner of the Yukon Territory, acting on behalf of the Government of the Dominion of Canada, for the publication of one thousand copies of "The Yukon Year-Book of 1903," for the sum of four thousand dollars ($4,000), which agreement was in the words and figures following:—

DAWSON, Y.T., Nov. 24, 1903.

"To Hon. F. T. CONGDON,

"Commissioner, Yukon Territory.

"SIR,—I beg to requisition for the following articles for department and public.

"1,000 copies Yukon Year-Book, 1903, copy for same to be furnished publisher complete within forty-five days

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Statement of Facts.

from date hereof. Contract price, four thousand dollars, not to exceed 200 pages, $4,000.00.

"(Sgd.) J. N. E. BROWN,
"*Terr. Secretary.*"

"To T. D. PATTULLO,—

"Please supply the above articles and send account at the end of the month to the Government of the Yukon Territory, together with this requisition.

"(Sgd.) FRED. T. CONGDON,
"*Commissioner.*"

Suppliant accepted this order set out in the preceding paragraph, and after he had commenced the work of publication, and incurred obligations in respect thereto, the Commissioner cancelled the said order, and notified the suppliant that the Government would not accept delivery of the books in question, and would refuse to pay therefor, and declined to supply the suppliant with the copy necessary to enable him to prepare the Year-Book in question; and, in consequence, thereof, suppliant suffered damages for expenses incurred in preparing said publication, and lost his profit on the contract so entered into.

He claimed $2,000 damages.

By his defence the Attorney-General of Canada denied the authority of the Commissioner of the Yukon Territory on behalf of the Government of Canada to enter into the contract set up by the suppliant; that the contract upon its face did not show that it was made on behalf of the Government of Canada; that it was contrary to the provisions of R. S. 1886 c. 27, which required such work to be done by the Department of Public Printing and Stationery; and that Parliament had not voted money for the payment of any such claim.

The evidence adduced on behalf of the suppliant did not show that at the time of entering into the alleged

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contract the Commissioner of the Yukon Territory had any authority to incur a liability on behalf of the Government of Canada in respect of the undertaking in question.

July 23rd, 1907.

Argument of Counsel.

The case was heard at Dawson, Y.T.

J. K. McRae, for the suppliant, contended that the Commissioner must be held to have acted for the Dominion Government and not for the Government of the Yukon in making the contract with the suppliant. Under the orders in council referring to the administration of the Territory "printing and stationery is a charge against the Federal Government."

Chapter 27 of R. S. 1886, sec. 5 (R. S. 1906, c. 80, s. 16) is merely directory in its provisions respecting public printing. It is not imperative, and could not be extended to prevent the making of a contract such as this in the Yukon Territory. (Cites *Leprohon* v. *City of Ottawa* (1); *Hardcastle on Statutes* (2); *Caldow* v. *Pixell* (3); *Johnson* v. *The King* (4); *Henderson* v. *The Queen* (5).

J. M. Carson followed on the same side, citing *Kenney* v. *The Queen* (6); *Boyd* v. *The Queen* (7).

G. F. Shepley, K.C., for the respondent;

The contract set up by the suppliant is directly in defiance of the provisions of the statute (R. S. 1906, c. 80, s. 16). Beyond this, there is the fundamental objection that the Commissioner lacked any authority to bind the Crown in right of the Dominion by any such agreement. There is nothing to show that the undertaking was referable to the Dominion Government. It was a Territorial matter. There are no funds available on the part of the Dominion Government to pay the claim.

Mr. McRae replied.

(1) 40 U. C. Q. B. 478.
(2) 3rd ed. pp. 259-268.
(3) 2 C. P. D. 562.
(4) 8 Ex. C. R. 370.
(5) 6 Ex. C. R. 39.
(6) 1 Ex. C. R. 68.
(7) 1 Ex. C. R. 186.

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Reasons for Judgment.

January 7th, 1908.

THE JUDGE OF THE EXCHEQUER COURT now delivered judgment.

This case turns upon the question whether or not the Commissioner of the Yukon Territory had authority in respect of the contract he made with the suppliant to bind the Crown as represented by the Government of Canada. It is necessary in order to maintain the petition to answer that question in the affirmative and the burden of sustaining that proposition rests upon the suppliant, otherwise the respondent is entitled to the judgment of the court. For myself I have been unable to come to the conclusion that the Commissioner had, in respect to the matter in question, authority to bind the Crown as represented by the Government in Canada. I therefore am of opinion that the suppliant's petition fails.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by his petition.

Solicitors for the suppliant: *Ritchie, Ludwig & Ballantine.*

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

IN THE MATTER of the Petition of Right of

DELIA E. RYAN.....SUPPLIANT; 1908

AND January 7.

HIS MAJESTY THE KING.....RESPONDENT.

Government railway--Passenger--Injury while alighting from train—Negligence of conductor and brakeman—Liability of Crown.

The suppliant was injured while alighting from an Intercolonial Railway train on which she was being carried as a passenger. Owing to the negligence of a brakeman in failing to open the vestibule door of the car next to the station platform, and leaving the opposite door open, the suppliant was compelled to use the latter. While in the act of alighting and before she had reached the ground, the conductor started the train, with the result that the suppliant was thrown down and sustained bodily injury.

Held, that both the conductor and brakeman of the train were guilty of negligence upon the facts shown, and that the Crown was liable in damages.

PETITION OF RIGHT for damages for bodily injury sustained by the suppliant alleged to have arisen from the negligence of certain servants of the Crown employed on the Intercolonial Railway.

The facts are stated in the reasons for judgment.

October 15th and 17th, 1907.

The case was heard at St. John, N.B.

G. W. Fowler, K.C., and *W. B. Jonah*, for the suppliant;

Mr. *McKeown, K.C.*, for the respondent.

Mr. *Jonah* opened for the suppliant, citing *T. Eaton Co.* v. *Sangster* (1); *Mayne on Damages* (2); *Osborne* v. *London and N. W. Railway Co.* (3).

Mr. *McKeown*, for the respondent, cited *Adams* v. *Lancashire and Yorkshire Railway Co.* (4); *Gee* v. *Metropolitan Railway Co.* (5); *Dulieu* v. *White & Sons* (6).

(1) 24 S. C. R. 708,
(2) (7 ed.) pp. 70, 71, 73 and 77.
(3) 21 Q. B. D. 220.
(4) L. R. 4 C. P. 739.
(5) L. R. 8 Q. B. 161.
(6) [1901] 2 K. B. 669.

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Reasons for Judgment.

Mr. *Fowler* replied.

THE JUDGE OF THE EXCHEQUER COURT now (January. 7th, 1908,) delivered judgment.

The suppliant was thrown to the ground and injured while attempting to leave an Intercolonial Railway train at Norton Station, on the night of the 13th of July, 1905. She was accompanied by her husband and daughter, and when the train stopped at the station mentioned they all went to the rear of the carriage, upon which they were travelling, to disembark. Arriving there they found the door of the vestibule next the station closed and the opposite door open. After attempting to open the vestibule door next the station platform and failing they attempted to get off on the opposite side. This the husband did safely, but as the suppliant was on the steps in the act of alighting the train was started and she fell to the ground, receiving serious injuries. By following the moving train the husband got the daughter off safely, and then returned to the relief of his wife. The brakeman whose duty it was to see that the door next to the station platform was open and the opposite door closed, and the conductor states that that was actually the condition of the carriage on arrival at Norton station. But it is absolutely impossible to give credit to their testimony in this respect. The brakeman was no doubt guilty of gross negligence in the matter, and it is not possible to exonerate the conductor from a want of care in starting his train before passengers had time to alight. I think the case presented by the suppliant has been made out, and there will be judgment for the suppliant for eight hundred dollars and costs.

*Judgment accordingly.**

Solicitors for the suppliant: *Fowler, Jonah & Parlee.*

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

*REPORTER'S NOTE.—Affirmed on appeal to Supreme Court of Canada, 9th March, 1909.

BETWEEN

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

1908
January 7.

AND

A. B. PALMER, R. H. PALMER AND DAVID DOIG..... DEFENDANTS.

Mining — Yukon Territory — Hydraulic privileges — Lease—Breach of conditions—Recovery of possession of demised lands by Crown.

INFORMATION to recover possession of certain mining lands in the Yukon Territory demised to the defendants, who were alleged to have broken the conditions of the lease.

July 26th, 1907.

The case was heard at Dawson by the late Mr. Justice Burbidge.

G. F. Shepley, K.C. and *H. C. Bleecker* for the plaintiff;

J. K. McRae for the defendants.

The following judgment was delivered by Mr. Justice Burbidge on the 7th January, 1908.

I venture to ask the parties and anyone who reads this short note not to come to the conclusion that the judgment which I am about to enter is given upon due consideration of the merits of the case. At the time when the evidence taken at Dawson was forwarded to the Registrar of the court at Ottawa, and the record thereby completed, and since that time, my engagements were such as prevented me from taking the matter up and dealing with it in an adequate manner. And now

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the state of my health prevents me from giving the case the consideration which it deserves. However, it does appear to me important that the litigation should be advanced another stage, and that it is in the interests of the parties themselves that it be put in a position where the questions in issue may be brought before the Supreme Court of Canada, rather than that there should be a rehearing or a re-argument in this court, and for that I am not without a precedent. For in the case of *The Attorney-General for British Columbia* v. *The Attorney-General for Canada* (1), the decision of the Exchequer Court was taken by consent, and without argument, in order to facilitate the bringing of the case directly to the Supreme Court. It is true that in this case I have not the consent of the parties, but I think I may take it for granted that they would consent to a course of procedure which appears to me to be so much in their interests. The main question, it seems to me, that I need to decide is as to the party upon whom the burden of bringing the appeal should be thrown, and in this case I think that burden should fall upon the defendants. There will be judgment for the plaintiff.

Judgment accordingly.

Solicitors for the plaintiff: *Macdonald, Shepley, Middleton & Donald.*

Solicitors for the defendants: *McGiverin & Haydon.*

(1) 14 S. C. R. 345.

IN THE MATTER of the Petition of Right of

BELIVARD ROBILLARD..... .....SUPPLIANT; 1908 January 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Negligence on a Public Work—Unskilled labourer required to remove electric wire—Bodily injury—Timekeeper—Fellow-servant—Liability.

R., a labourer employed by the Department of Public Works in the reconstruction of a public building, was ordered by a timekeeper to remove an electric wire which had been used for the purposes of such reconstruction. R. had no skill in respect of this particular work. The timekeeper was permitted by the officer of the Department in charge of the work to direct the workmen to attend to matters of this nature, and they were done under his direction from time to time. Removing the wire under the conditions then existing was attended with danger, and this fact was known or ought to have been known to the timekeeper, but he gave no notice of this to R. at the time he directed him to remove the wire. While engaged in removing it, R. received a severe electric shock; and was thrown from a girder upon which he was standing, falling to a lower story of the building and in that way receiving serious bodily injury.

Held, following *Ryder* v. *The King* (9 Ex. C. R. 330; 36 S. C. R. 462), that the negligence of the timekeeper was the negligence of a fellow-servant of R., and that the Crown was not liable therefor.

PETITION OF RIGHT for damages for bodily injuries occasioned by the alleged negligence of a servant of the Crown on a public work.

The facts are stated in the reasons for judgment.

May 21st and 22nd, 1907.

The case was heard at Ottawa.

A. Lemieux, for the suppliant, contended that the facts disclosed that Fraser, the timekeeper, was an officer or servant of the Crown for whose negligence the Crown would be responsible under s. 20 (*c*) of R. S. 1906 c. 140.

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E. L. Newcombe, K.C., for the respondent, argued that the case was clearly within the doctrine laid down by the court in *Ryder* v. *The King* (1). Fraser was a fellow-servant of the suppliant, and there can be no recovery.

THE JUDGE OF THE EXCHEQUER COURT now (January 7th, 1908) delivered judgment.

The suppliant brings his petition under the provision of the statute which is now to be found in clause (*c*) in the 20th section of *The Exchequer Court Act* (R. S. 1906, Chap. 140, s. 20 (c)), which gives the court exclusive original jurisdiction to hear and determine every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment.

It appeared that the suppliant was employed as a labourer upon the reconstruction of the Post Office in the City of Ottawa, and that upon the morning of the 16th of October, 1905, he was ordered by one William J. Fraser to ascend to the roof of the building and remove an electric extension wire or cord which had been left hanging by the workmen employed in the building up to midnight of the preceding Saturday. Fraser was a time-keeper who was permitted to, and did from time to time, give directions in respect of the work being done on the Post Office building. Under the conditions then existing, the removal of the electric extension wire was attended with danger of which the suppliant was ignorant, but which was known or ought to have been known to Fraser, and of which he gave the suppliant no notice. In the result the suppliant received a severe electric shock, and was thrown from a girder upon which he

(1) 36 S. C. R. 462.

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wa s standing and fell to a lower storey, and in that way sustained serious injuries.

The respondent, amongst other defences, pleads that the negligence complained of, if any, was that of a fellow-servant of the suppliant, and that the Crown is not liable therefor. In support of that defence reliance is placed upon the case of *Ryder* v. *The King* (1) As I am not able to distinguish the two cases in principle, it seems to me that this defence is made out.

There will be judgment that the suppliant is not entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitor for the suppliant: *A. Lemieux.*

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

(1) 36 S. C. R. 462.

NEW BRUNSWICK ADMIRALTY DISTRICT.

BETWEEN

1907
Mar. 2.

JOHN READ AND JOHN L. READ, OWNERS OF THE SCHOONER *MALABAR* ..... } PLAINTIFFS;

AND

THE TUG *LILLIE* ..... DEFENDANT.

Shipping — Towage — Contract — Negligence — Inevitable Accident — Damages.

Where a towage contract is made it implies an undertaking that each party will duly perform his share of it; that proper skill and diligence will be used on board both tug and tow; and that neither party by neglect or mismanagement will create unnecessary risks to the other, or increase any risk which might be incidental to the service undertaken.

2. If, in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action will arise.

The *Julia* (14 Moo. P. C. 210 at p. 230) followed.

ACTION for damages for negligence in performing a contract of towage.

The facts are stated in the reasons for judgment.

October 5th and December 2nd, 1905;

August 14th, 1906.

The case was now heard.

H. H. McLean, K.C., and *F. R. Taylor* for plaintiffs;

C. J. Coster, K.C., for defendant.

MCLEOD, L. J. now (March 2nd, 1907,) delivered judgment.

This is an action brought by the owners of the schooner *Malabar*, a vessel of about 98 tons burthen, registered in

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Charlottetown, Prince Edward Island, against the tug *Lillie* of Saint John, N.B. The action is brought for damages sustained by the *Malabar* in consequence, as is alleged by the plaintiffs, of negligence on the part of the tug *Lillie*, or rather the captain in charge of her, while the *Malabar* was being towed by the tug. The accident occurred on Musquash River, at what is called "The Rapids" on that river, on the twenty-second day of August, 1905.

I will first refer to the law with reference to the liability of the vessel or tug in claims for damages of this kind. Where a tug engages to tow a vessel, it is her duty to use due diligence and care in regard to it; and if the vessel suffers or is damaged in consequence of negligence on the part of the tug, the tug will be liable. On the other hand, it is also the duty of the vessel being towed to use care and diligence and if the tug is injured in consequence of the negligence of the vessel, the vessel itself will be liable to the tug.

In the *Julia* (1) the law is stated as follows in reference to contracts of towage Their Lordships say:—

[When such a contract is made, it in law, implies] "an engagement that each party to the contract will perform his duty in completing it; that proper skill and diligence will be used on board both the vessel and tug; and that neither party, by neglect or mismanagement, will create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken. If, in the course of the performance of the contract, any inevitable accident happens to the one, without any default on the part of the other, no cause of action could arise. Such an accident will be one of the necessary risks of the engagement to which each party was subject, and could create no liability on the part of the other. If, on the other hand, the wrongful act of either

(1) 14 Moo. P. C. 210, at page 230.

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occasion any damage to the other, such wrongful act will create a responsibility on the party committing it, if the sufferer had not, by any misconduct or unskilfulness, on her part, contributed to the accident."

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That is the plain rule of law which governs in all cases of this kind. In this case the plaintiffs claim that the accident was caused by the negligence of those in charge of the tug. The defendants in the first place claim that there was no negligence on the part of the tug; in the second place, they say, that the contract under which the vessel was towed relieved the tug from any negligence that there might have been on the part of those in charge of the tug. In the third place that those on board the *Malabar* were guilty of conduct that contributed to the accident. This defence raises the following questions: First, was there such a contract as would relieve the owners of the tug from damage although the injury to the schooner may have been occasioned by negligence of those on board the tug; secondly, was there, in fact, negligence on the part of the tug that caused the accident; thirdly, was the accident contributed to by any misconduct or unskillfulness on the part of those on board the schooner?

As to the facts, it appears that the *Malabar* was chartered on the 1st of August, 1905, by Stetson, Cutler & Company, to proceed from St. Stephen, in Charlotte County, N.B., to what is known as Knight's Mills, on the Musquash River, and there load a cargo of laths for New York. Musquash River is a tidal river emptying into the Bay of Fundy. At low water in the channel where this accident happened, it is nearly dry. At high tide there is ample water for schooners and tugs, such as this, to go up and down. Knight's Mills is situated some miles up the river. The schooner left St. Stephen and arrived at what is called Five Fathom Hole, on the 18th of August, 1905. Five Fathom Hole is about a

mile from the mouth of the river. The charter stipulates that Stetson, Cutler & Company were to provide towage, or, to use the words of the charter itself: "Towage in and out of Musquash, free to vessels." From this I take it that as between the charterers and the plaintiffs, the charterers were to provide for towing the vessel up the Masquash River to Knight's Mills, and down from Knight's Mills. I think, also, it clearly appears from the evidence, that the tug *Lillie* was doing all the towage of Stetson, Cutler & Company, that is, that it towed their scows or rafts or any schooners required, up the river and down the river, charging the towage to Stetson, Cutler & Company. The charter-party itself would not be taken to make a contract between the tug *Lillie* or the owners of the tug *Lillie* and the plaintiffs to tow the schooner up Musquash River; but the facts are that the schooner was to be towed up and down the river at the expense of Stetson, Cutler & Company, and the tug *Lillie* did all that towing for Stetson, Cutler & Company, and charged such towage to Stetson, Cutler & Company.

When the *Malabar* arrived at Five Fathom Hole, on the 18th of August, the tug *Lillie* was there about to take up some rafts, and the captain of the *Malabar* called to the captain of the tug to tow him up. He, at first refused, saying he had load enough, and he said afterwards that if he took the schooner up he would not be responsible. The captain of the schooner replied that he must be responsible Leaving the conversation practically in this way, the tug took the *Malabar* and towed her up. I do not think that anything turns on what took place at Five Fathom Hole, as nothing arises out of that. The tug towed the schooner up the river, and arrived there safely with her. Correctly speaking, the schooner was towed up to the bridge, which was a short distance below Knight's Mills, and from there sailed up,

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went into the dock and loaded her cargo. On the 22nd of August she was loaded and ready to go down. The tug *Lillie* was there about to take some rafts down. The *Malabar* was in the dock and grounded. The captain attempted to kedge her out but he could not do it and called upon the tug *Lillie* to take him out of the dock. There appears to have been some danger in taking her out of the dock, because there was what is called a sand-bank in front of her. The difficulty appears to have been as to the safety of taking her out of the dock at the time. Without going fully over the evidence given by the captain of the schooner and the captain of the tug, it appears that the captain of the tug told the captain of the schooner to give him a line and he would give him a "jerk out," but he would take no responsibility. The captain of the schooner stated shortly as follows, at page 12 of the evidence: "The captain said, "I will put a line on your main-mast and give you a "jerk out, but I will take no responsibility." I said, "I will take the responsibility, for I will put a spring out "and spring around the head of the wharf." I ordered "the mate to put a spring on and ordered her to go "ahead and slack the spring until I got the vessel "floated." Captain Hazlett of the tug, after saying that he told the captain of the schooner that he had better stay there until the next day when the tide would be higher, and that he would not be responsible for anything that happened on his vessel, as he did not consider it safe, says further, on page 204, as follows: "So I came "back and he wanted me to give him a hold of the slip "and take him down, so I backed the boat up and "he wanted me to give him a line. I asked him for "his line, he said he hadn't any, so before the men "handed the hawser over I said I would give him the "hawser, but I would not be responsible for anything "that happened to him in hauling him off and down

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" the stream. So then he asked me for a line, I gave it " to him." There are other witnesses as to what took place then, and after hearing the witnesses, and after having again examined the evidence, I have come to the conclusion and find that what the captain of the schooner said he would take the responsibility of was the responsibility of taking him out of the dock. It was dangerous, or seemed to be dangerous, and the captain of the tug agreed that he would try to take him out, but would not be responsible for any accident that might happen. Mr. Knight, who was called on behalf of the defendants, in speaking of what took place at the time, says in answer to a question, on page 302: " Yes, I heard the captain of the *Lillie* tell the " captain of the *Malabar* that he would make a line fast " to his mast, he would give him a pull out but he would " not be responsible for any damage." He says he did not hear Captain Read's reply. It is on the contract or agreement there made, if a contract or agreement was there made, that the owners of the tug claim they would not be liable, even though the accident was caused by negligence on the part of the master of the tug. In support of that contention that defendants cited, *The United Service* (1), in which latter case the judgment of Sir Robert Phillimore was sustained. In that case there was negligence on the part of the tug in taking too many vessels in tow, but the owners of the tug were The Great Yarmouth Steam Tug Company, Limited, and they were owners of various steam tugs that were doing this class of work, and they gave notice distinctly that they would tow vessels, boats or crafts, on certain conditions, and the conditions were as follows:

" That they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat or craft, or any of

(1) 8 P. D. 58, and also 9 P. D. 3.

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the cargoes on board of the same while such vessel, boat or craft is in tow of either of the steam-tugs on the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steam-tugs or either of them, or the machinery or any part of the same; or any delay, stoppage, or slackness of the speed of the same, however occasioned, or for what purpose whatsoever taking place, and that the owner or persons interested in the vessels, boats or craft, or of the cargoes on board the same so towing, undertake, bear, satisfy and indemnify the said tug owners against the same."

In that case, it was clear that when a contract was entered into with any of the defendants' tugs for the towage of vessels, that specified notice became part of the contract itself, and it was held that, as it was a part of the contract of towage, there would be no liability, although the accident was caused by negligence of the master of the tug itself. I have already said that I not think the contract referred to the towing of the tug down the river, but that it was confined to simply taking her out of the dock. It seems to me there was no necessity to make a special contract with the tug for towage down the river, for by the terms of the charter-party the schooner was to be towed down free; and as I have said, the towage for Stetson, Cutler & Company was done by the *Lillie*, and it is in evidence that the towing in this case, as in other cases, was to be charged to Stetson, Cutler & Company. I therefore think there was no special contract made for towing down the river, and certainly none that would relieve the tug from liability for the negligence of the captain himself. If, however, I am wrong in that finding, as a matter of fact, I think the contract as stated by the defendant himself, and set up by the defence, would not relieve the owners of the tug for an accident

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happening through negligence of the master himself. The fact that the master of the tug simply said that he would not be responsible, could not be construed and would not be construed to say that he would not be responsible for his own negligence. The most that could be said is that he would not be responsible for any accident happening which would not be attributable to his negligence. I therefore think that the claim put forward by the defendants that they are not liable, if the accident happened in consequence of the negligence of the tug, cannot be sustained. After the schooner was taken out of the dock the tug took the schooner in tow in the ordinary way. He took her in tow first behind the tug and then some rafts behind that again, and towed her down below the bridge. The tug was then backed up and the schooner lashed on the port side of the tug, and they proceeded down stream in this way. About four miles below Knight's Mills is what is called "The Rapids." It is a place where there are certain rough rocks, on a high rocky place, practically in the middle of the river. There is a channel on both the western and eastern side of these rocks. The eastern channel is never used; the channel on the western side is used. The western side of this western channel would be on the right hand or starboard side of the schooner as she came down the river, and at the western or starboard side there was sufficient water, at that time of tide, for both the schooner and tug to pass down safely. It was then about half an hour before high water. In going down, therefore, with the schooner lashed as she was, to the port side of the tug, it was important and absolutely necessary, for the safety of the schooner, that the tug should be kept to the right hand or starboard side of the channel. A short distance above the rapids, where the accident occurred, there is a shoal place in the river, or rather a bar, extending some distance out into the river,

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but, as it goes out, it drops off quickly. There was some dispute as to just where that was; but I take it from the evidence that the bar spoken of was where what is called the "clump of bushes" are—that is bushes on the bank—the branches of one of the trees extending ont some distance over the river. The bushes are marked on Plan No. 12, put in evidence by the plaintiffs, and the different depths of water given for some distance out in the river. These bushes are also marked on Plan "B." No. 2, put in evidence by the defendant, but the bar is there marked as being some distance above where the bushes are. However, after hearing the witnesses and after having examined the evidence, I think the bar, where it was necessary to keep a little further from the western bank or the starboard side, is where the bushes are as stated and claimed by the plaintiffs. In going over that bar (shoal place), it is alleged by the defendants, that the keel of the schooner touched the ground, and that in consequence of that she took a sheer to the port side and the tug was unable to control her, and she went on the rocks in consequence. The captain of the schooner and the men on board of her say that she did not touch the ground; and having heard the evidence and read it, I think that I must find, that as a matter of fact, she did not touch the ground at that place. Some statements are made, in the evidence, by the defendants that the captain of the schooner gave some orders to the man at the helm, whilst coming down the river, as to changing his helm. I think the weight of evidence shows that he did not give instructions. The helm was put amidships, and being put in that way the schooner would follow the tug as she might go. When, however, they came down close to these rapids the captain of the schooner, in the first instance, called the attention of the mate of the tug and subsequently the attention of the captain himself, to the fact that they were keeping too

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far out in the stream, that the helm should be put to port, and the vessel turned more towards the starboard side of the stream; and he says the captain at that time said there was water enough there at any time. The captain of the schooner then gave the word to port the helm, but it was too late and the vessel went on the rocks and the damage was done. The evidence shows that there was almost water enough where the schooner struck for her to pass over the rocks. Even in that position, the tug drawing much less than the schooner and being on the schooner's starboard side, was not injured. If the schooner had been but a short distance further to the westward, that is to the starboard side of the stream, no damage would have been done; and by porting the helms of the tug and schooner earlier both the tug and schooner could easily have been kept to the starboard side of the stream and escaped damage entirely. The captain of the tug, and I think some other witnesses on behalf of the defendants, say that the captain of the schooner, as they were crossing this sandbank, gave the order to starboard the helm, which, of course, would send her further to port. The captain of the schooner denies that, and having examined the evidence carefully, I think no such order was given. As I have already said, I think the schooner did not strike the sandbank or bar that has been spoken of. The plaintiff's witnesses say she did not, and the witnesses for the defendants do not seem to me to satisfactorily show that she did. They say that shortly after crossing this bar she went on the rocks. I think that even if she had touched on the sandbank there was sufficient distance, if the helm had been ported, to avert the disaster. My opinion from the evidence is that where the schooner first touched was on the rock on the bank just as she stopped. She appears to have just glided over the first rock and then struck the rocks following. There was almost water

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enough where she was to keep her afloat. The tug did keep afloat. There is the further evidence of different parties who made measurements on the bar referred to that the tug, drawing eight feet of water, and the *Malabar* drawing eleven feet, at a proper distance from the bank it was impossible that the *Malabar* should strike on this bar and the tug go free, as the bank settled so quickly that if the *Malabar* struck the tug would also strike, the tug being nearer the shore than the *Malabar;* and it is admitted that the tug did not strike on this bar. I therefore think the schooner did not touch the bar but first struck on the rocks where the accident occurred. There is no doubt that just before the schooner went on the rocks the captain of the *Malabar* did call out to port the helm, but it was not ported. If the helm of the tug even then had been ported, I do not think the accident would have occurred. I have concluded from the evidence, if the captain of the tug had displayed due diligence, that diligence required of him when he took this vessel in tow—proper, ordinary diligence—that the collision could have been avoided, that he could have easily kept closer to the bank. He required to be but a very little distance closer to the bank, and if so both the tug and the schooner could have gone safely down the river. The trouble seems to me to have been that the captain, possibly thinking there was water enough where he was, but without a proper right to think there was water enough, and knowing, as he should have known, that there was ample water on the western or starboard side to take both vessels down with safety, kept too far out and did not port his helm as he should have done.

I, therefore, come to the conclusion that the damage was occasioned in consequence of negligence on the part of the tug in not taking what may be called ordinary care in bringing the vessel down, that she was guilty of negli-

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gence in not taking sufficient care in passing what are called "The Rapids"—not keeping sufficiently close to the starboard side. If he had done that, and there was ample room for him to do it, and no reason shown why he could not and did not do it, the vessel could have been taken down safely.

As to the claim of contributory negligence on the part of the schooner, the alleged contributory negligence, so far as I can gather, is that the master interfered coming down the river with reference to the steerage of the schooner, and gave orders himself as to how the helm of the schooner should be put. As I have already said, I do not think the evidence bears that out. The evidence shows that the helm of the schooner was simply put amidships and this could have no effect, as the schooner would go in any direction taken by the tug. Indeed, I think it was what should have been done. I think the only order the captain of the schooner gave and the first order, was when he gave the order to port the helm, that is when he saw there was danger of going on the rocks, and after he had called the attention of the master and engineer to the fact that they were not keeping close enough to the shore. This order did not and could not contribute to the accident. Indeed, if the order had been obeyed and carried out at the time it was given, the accident would not have occurred.

I think, therefore, that there was no negligence on the part of the schooner. The decree will therefore be, that the tug be condemned in damages and costs; and as there is no evidence as to the damage if the parties do not agree, I will order a reference.

*Judgment accordingly.**

Solicitor for plaintiffs: *F. R. Taylor.*

Solicitor for defendants: *C. J. Coster.*

* REPORTER'S NOTE.—On appeal to the JUDGE OF THE EXCHEQUER COURT OF CANADA this judgment was affirmed. January 7th, 1908.

IN THE MATTER of the Petition of Right of

1907
March 18.

DAME CLARA E. MASSICOTTE.....SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT;

Government steam dredge — Negligence of employee — Boiler explosion — Fatal injury—Liability of Crown—Public work.

B., an employee on board of a dredge belonging to the Dominion Government, was charged with the duty of keeping the boilers supplied with water, the condition of the boilers being indicated to him by means of water-guages. These guages demanded unremitting attention owing to the peculiar character of the boilers. B. was instructed by the engineer and fully understood that these guages demanded his unremitting attention, and that it was dangerous for him to leave except momentarily a position which gave him a view of some of the guages. B. left such a position for about ten minutes, going to another part of the dredge, and during his absence one of the boilers exploded and he was fatally injured. Upon a petition of right by his widow for damages,

Held, that the accident was attributable to B's own neglect, and that the petition must be dismissed.

Quære: Whether the dredge was a "public work" within the meaning of sec. 20 (*c*) of *The Exchequer Court Act*.

PETITION OF RIGHT for damages for injury resulting in the death of the suppliant's husband on a Government steam dredge within the Province of Quebec.

The facts are fully stated in the report of the Registrar printed below.

June 15th, 1905. The case was referred to the Registrar for enquiry and report.

December 5th, 1905. The Registrar now filed his report which was as follows:—

"Whereas by an order made herein on the 15th day of June, A.D. 1905, by the Honourable Mr. Justice Bur

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Statement of Facts.

bidge, the matters in question in this case were referred to Louis Arthur Audette, Registrar of this court, 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 before the undersigned, at the town of Sorel, on the 28th and 29th days of June, A.D. 1905, and at the city of Montreal, on the 20th day of July, A.D. 1905, in the presence of E. Brassard, Esq., and P. G. Martineau, Esq., of counsel for the suppliant, and L. P. Bérard, Esq., of counsel for His Majesty the King; and upon hearing read the pleadings, and upon hearing the evidence adduced and what was alleged by counsel aforesaid, the undersigned submits as follows:—

"The suppliant brings her petition of right to recover the sum of $8,000 for alleged damages resulting from the death of her husband who was killed by one of the boilers of the dredge *J. Israel Tarte* which exploded on the 3rd of November, 1903, while engaged at Lake St. Peter on Government works. She claims that her husband was so killed on a public work through the negligence of the employees of the Crown while acting within the scope of their duties or employment.

"The respondent admits that the suppliant's husband was so employed on board the said dredge and that he was killed in the above mentioned manner, but through his own negligence, he being the one in charge of the boiler which so exploded.

"Now there were four locomotive boilers in use on the dredge, and the water was fed into each boiler by means of a steam pump sending water by a main pipe to which was attached a small distributing pipe connecting with each boiler. This pump was proved to be amply sufficient to supply the water to the four boilers. There was a glass gauge at each end of each boiler, *i.e.*, there were

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eight glass gauges in all. One set of four were at one end where the man in charge of them stood, and the other four were placed at the other end of the boilers, for greater security, at the end where the firemen were working.

"At the time of the accident in question, which resulted in the death of Theophile Brunelle, the latter was in charge of these gauge-glasses which serve as an index to what is going on inside the boilers, showing the height of the water therein. That was the work assigned to him by the engineer in charge, and Brunelle had been performing it both during 1903 and sometime during 1902, and was looked upon as perfectly competent to discharge that duty, and he had nothing else to do but to watch these glass gauges and supply water as required to each boiler by means of a valve on top to be opened or closed as required. The glass guages placed at the extremity of the boilers where the fireman were working were a kind of check upon the other four and Brunelle could refer to them when he wished, and it was the custom of the man in charge to go two or three times per hour to that end and look at them, and it is a matter of half a minute to go to those near the firemen.

"This work of controlling these gauges and feeding the boilers was looked upon as easy and not difficult; but as in these locomotive boilers the water goes up and down in a comparatively short time, and use quite a quantity of water, Brunelle's work required a constant, assiduous watch.

"Jean Bilodeau, engineer in charge of the dredge, performed Brunelle's work during four and a half to five months the first year, besides his own work of engineer, and at that time they had no glass guages on the fireman's side of the boiler.

"Felix Saint-Martin who was discharging the same duties as Brunelle during 12 hours of the day, while

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Brunelle had the other 12 hours, says he was always watching his glass gauges, and that he had to go and look at them every seven or eight minutes. He contends he could not remain seven or eight minutes without seeing to the gauges, and that he never failed in this obligation.

"The consensus of opinion is, and all the witnesses to whom the question was put are of opinion, that the cause of the accident was the want (*manque*) of water in the boiler which exploded. Who was the officer in charge whose duty it was to look to that very thing not occurring? It was Brunelle.

"Now, what did happen to Brunelle at the time of the accident? Where was he? Was he at his post near the glass gauges? The evidence shows us he was on deck.

"According to the evidence it takes about half a minute to go from the four glass gauges immediately under Brunell's care to the four other checking glass gauges at the firemen's quarters.

"Then we have the evidence of Napoleon Dumas, a fireman at the time of the accident, who says that Brunelle had left the firemen's quarters, inspecting the gauges there, "ten minutes, seven or eight minutes, ten minutes "at most before the explosion."

"Then we have the evidence of Adeodas Cherrier, the assistant engineer on board the dredge, who comes and tells us that Brunelle "at the time of the explosion "was with him on the bridge, inside, at the platform, "just opposite from where they start to leave the engine, "that is where they were stopping (*c'est l'à qu'on était "arrêté.*") Asked at what distance Brunelle was from the feeding pipe, witness says there were two small flights of steps to go down, one of three steps and the other of five or six steps. Asked at what distance he was from Brunelle, he says he was alongside of him when

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the explosion took place, and Brunelle was on duty at the time, and was coming from the fire-hole, and he told him that he was coming from the engine and that he was going to the stern * * * he was coming back from verifying the gauges in the bow of the dredge.

It was while standing on deck with Cherrier that the boiler exploded and went up about 100 feet in the air. Brunelle then ran away with the view of protecting himself, but it struck him on the back of the head and broke one of his legs. Had he been at his post or remained on the bridge at the place he was at the time of the accident, he would not have been touched, but the irony of fate willed it otherwise.

"Engineer Desy took Brunelle to the hospital after the accident, and as people were saying he had been the cause of the accident, he told Desy that what he was most sorry about and regretted the most, was that he was accused of having been negligent, not having kept water in the boilers * * *

"Now in view of what has been said, if we look for some officer or servant of the Crown whose negligence can have caused the accident, we would obviously say that Brunelle was the person to see that there should be water in the boilers. Moreover, if we pursue this course and ask ourselves where was Brunelle at the time of the accident? It would appear that, while the inspection of the gauges at the fire-hole might take half a minute, he had left them about ten minutes before the explosion, and that on his way back he had met Cherrier on the bridge and that they were both standing there at the time of the accident.

"I regret to say that the late Brunelle had but himself to blame for the accident, and that under the circumstances the suppliant cannot recover."

October 26th, 1906. The case now came before the court by way of appeal by the suppliant from the Registrar's report.

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P. G. Martineau, K.C., for the suppliant;
L. P. Bérard for the respondent.

BURBIDGE, J. now (March 18th, 1907,) delivered judgment.

The suppliant is the widow of Theophile Brunelle, who being on the 3rd day of November, 1903, employed on the Government dredge *J. Israel Tarte*, was killed by the explosion of one of the boilers of the dredge. The explosion, it appears, occurred because there was not sufficient water in the boiler, it being the duty of the deceased at the time to attend to that matter.

The claim is based upon the statute that gives the court jurdisdiction to hear and determine, among other things, every claim against the Crown arising out of any death 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 (1). On the question as to whether this accident happened on a public work within the meaning of the statute, I express no opinion one way or the other. It is not necessary to do so, in the view which on the other branch of the case ought, it seems to me, to prevail. The Registrar of the court, to whom the matter was referred for enquiry and report, has found that the deceased met his death in an accident which happened by reason of his own neglect, and not by reason of the negligence of any other servant or officer of the Crown. On the appeal from the Registrar's finding on this question of fact it was contended that as the type of boilers used on this dredge required constant and exacting care and watchfulness to see that sufficient water was maintained therein, and that any neglect of duty in that behalf was likely to lead to an explosion, Brunelle's superior officers were negligent in permitting him to be and remain in charge of such

(1) R. S. C. 1906, c. 140, s. 20 (c).

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boilers. But surely that was a matter for himself to decide and not for them. He knew as well as they the care that was required and the danger to which he and others were exposed in case he neglected his duty. It is clear, I think, that the accident happened through his own fault and not through the neglect of his fellow-servants.

There will be judgment for the respondent, and a declaration that the suppliant is not entitled to any portion of the relief sought by her petition.

Judgment accordingly.

Solicitors for suppliant: *Gouin & Brassard.*

Solicitor for respondent: *L. P. Bérard.*

IN THE MATTER of the Petition of ELKINGTON & CO., Limited, of the City of Birmingham, England; 1908 Feby. 18.

AND IN THE MATTER of the registration of the Specific Trade-Mark of "ELKINGTON & CO." as applied to the sale of Electro-Plate, and Goods of Precious Metals, Table Knives, Carving Knives, Cake Knives, and other articles of cutlery, in pursuance of the provisions of the Trade-Mark and Design Act.

Trade-mark—Petition for registration—Specific mark—Name of firm as applied to sale of Electro-plated ware and cutlery—English and Canadian Statutes compared.

Held, that the wording of the Trade-Mark and Design Act (R. S. c. 71, s. 5) is wider than the Imperial Patents, Designs and Trade-Marks Act, 1883, (46-47 Vict., c. 57, sec. 64), and that under the word "names" as used in the Canadian Act, the name of an individual or firm, without anything more and without being accompanied by any particular distinctive feature, may be considered and known as a trade-mark, and is entitled to registration as such.

[REPORTER'S NOTE.—The facts disclosed in the material filed in support of the petition established that the name "Elkington & Co." (as applied to the sale of electro-plate and goods of precious metals, table knives, carving knives, cake knives and other articles of cutlery) without any distinctive mark or form was registered in England as a trade-mark in 1876 by the petitioners' predecessor in title; and that the name had been in use as a trade-mark by them for some thirty-five years before, and had acquired distinctiveness and become well-known throughout the world owing to such long continuous use.]

PETITION to obtain an order for the registration of a specific trade-mark.

The grounds upon which the petition was based are set out in the following affidavit:—

I, Hyla Garrett Elkington, of the said City of Birmingham, England, managing director of Elkington & Co., Limited, of 128 Newhall Street, in the said City of Birmingham, and the petitioners named herein, make oath and say:—

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1. That the said petitioners are a chartered company, with head office in the City of Birmingham, and carry on business as Silversmiths and Electro-Platers and Cutlers, in the United Kingdom of Great Britain and Ireland; and in all the principal countries of the world—the original company being entitled "Elkington & Co."

2. That the said petitioners duly acquired the said trade-mark "Elkington & Co." as applied to the sale of electro-plate and goods and precious metals, table knives, carving knives, cake knives, and other articles of cutlery, from their predecessors in business, Elkington & Co., who were the original proprietors thereof.

3. That on the 16th day of April, A.D. 1907, the said petitioners duly filed an application for the registration of the said Specific trade-mark "Elkington & Co." in the Department of Agriculture (Trade Mark and Copyright Branch) at Ottawa, Canada, under number 58,766, as applied to the sale of electro-plate and goods of precious metals, and on the 20th day of May, 1907, amended the application so as to embrace the additional articles of cutlery referred to in clause 2.

4. The registration of the said specific trade-mark "Elkington & Co." has been duly refused in the form as presented, the office holding that the name of an individual or firm should be presented in a distinctive form for registration.

5. That the said trade-mark "Elkington & Co." as applied to the sale of "Electro-Plate and Goods of Precious Metals," and without any distinctive mark or form, and as presented for registration in Canada, was duly registered by Elkington & Co. as a trade-mark in the United Kingdom of Great Britain and Ireland under No. 4311, Clause 14, on the 28th day of March, 1876, and was in use as a trade-mark on said goods by said Elkington & Co. for thirty-five years prior to the said date; and has been continuously so used up to the pre-

sent time by the said petitioners and their said predecessors in business, Elkington & Co.

6. That the said trade-mark "Elkington & Co." as applied to the sale of "table knives, carving knives and cake knives," and without any distinctive mark or form, and as presented for registration in Canada, was duly registered by the said petitioners as a trade-mark in the United Kingdon of Great Britain and Ireland under No. 248,080, Class 12, and such trade-mark has been continuously used in respect of said goods by the said petitioners and their said predecessors in business since the year 1869 up to the present time.

7. That such trade-mark "Elkington & Co." in simple block letters, and without any distinctive characteristics, applied to the sale of the goods referred to in Clause 2, has acquired distinctiveness and is well known throughout the world, owing to long continuous use.

8. That the said trade-mark "Elkington & Co." in the form presented in Canada has also been registered as a trade-mark in several of the European countries.

9. That the said petitioners have no knowledge of any person or firm or company bearing the name of "Elkington & Co." who are manufacturers of electro-plate and cutlery either in England or elsewhere; and the said petitioners are the exclusive proprietors throughout the world of said term "Elkington & Co." applied as a trade-mark for the sale of the goods heretofore specified in Clause 2.

10. That the trade-mark "Elkington" in simple block letters, and without any distinctive mark or form, as applied to the sale of electro-plate and goods of precious metals, has already been registered by the said petitioners in Canada on the 8th day of November, 1901.

11. The said petitioners are desirous of obtaining prompt registration of said trade-mark "Elkington & Co." as now presented and applied for in Canada under

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number 58,766 with a view of complying with the conditions of "The Gold and Silver Marking Act, 1906."

February, 10th, 1908.

Argument of Counsel.

C. J. R. Bethune, in support of the petition, cited the following authorities:—

"Elkington & Co." as a trade-mark, as applied to silver has been in continuous use for 35 years prior to 28th March, 1875, or since the year 1842, a period of 65 years, in round numbers, and has acquired a secondary meaning.

When the word "Canadian" although only in use seven years, and not a registered trade-mark, had acquired a secondary meaning then the law of trade-marks applied and t· e term "Canadian" was not geographical. *Rose* v. *McLean Publishing Co.* (1).

In *Gage* v. *The Canada Publishing Co.* (2), the use of the name "Beatty," the party's own name, as applied to a rival book, was restrained—there was no registered trade-mark—but the action was maintainable as a case of unfair trade competition.

The English cases reported as to unfair trade competition are more numerous than those on registered trade-marks, and the firm Elkington & Co., Limited, now have an exclusive right to the name "Elkington & Co." as applied to silverware, &c., even without registration, and could restrain others from using this name as applied to silver on the basis of unfair trade competition. By section 45 of the last British Trade-Mark Act, 1905, this common law right is expressly reserved.

"Names" in Canada should follow the principle laid down in *Ainsworth* v. *Wamsley* (3), and there is nothing to prevent another firm of silversmiths of the same surname from registering their name as a trade-mark, but it must be done in such a distinguishing manner as to

(1) 24 O. A. R. p. 246.

(2) 6 Ont. R. 68; 11 O. A. R. 402; 11 S. C. R. 306.

(3) L. R. 1 Eq. 518.

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prevent confusion with the previously registered mark, which trade-mark, as in our case, has been known and used for over sixty years.

See also *Skinner* v. *Oakes* (1), "a trade-mark may, and "often does consist in the name of a person or partnership "firm, and the exclusive use of such trade-mark is "upheld, with this limitation that another person of the "same name is not to be prevented from using his name "in the same way provided there are no special circum-"stances which make it inequitable for him to do so."

The registration of the name "Elkington & Co." as a trade-mark in Canada as applied to silverware, &c., knives, &c, deprives no person of any rights whatever. We have a right of action under the common law respecting unfair trade competition, but the petitioners want to comply with the provisions of *The Gold and Silver Marking Act*, 1906, sec. 11.

See also U. S. Off. Gaz. No. 5, Vol. 132, No. 27304, of 4th. Feb., 1908, where the name "Newman" is registered as a trade-mark, having been used some ten years. See also *Smith* v. *Fair* (2).

February 18th, 1908.

SIR THOMAS W. TAYLOR, Judge *pro tempore* of the Exchequer Court of Canada, now delivered judgment.

This is an application by a firm carrying on business as silversmiths, electro-platers, and cutlers, at the City of Birmingham, England, to obtain registration of a trade-mark.

The petition they present alleges that on the 16th of April, 1907, they filed an application for the registration of a specific trade-mark "Elkington & Co.," in the Department of Agriculture, at Ottawa, under No. 58,766, as applied to the sale of electro-plate and goods of precious metals, and on the 20th May, 1907, amended

(1) 10 Mo. App. at p. 56. (2) 14 O. R. 729.

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the application so as to embrace certain additional articles of cutlery. It is further alleged that registration of that specific trade-mark has been refused, in the form presented, the office holding that the name of an individual firm should be presented in a distinctive form for registration.

Probably this ruling was based upon some more recent English authorities. Claiming to be persons agrieved by the refusal or omission to make an entry in the Register of Trade-Marks of the trade-mark they desire to have registered, as they say, without sufficient cause, they now, under section 42 of *The Trade Mark and Design Act*, apply to this court for relief.

In support of the petition there is filed an affidavit of H. G. Elkington, of Birmingham, England, describing himself as managing director of the petitioner's firm. The rules of court as to publication in the *Canada Gazette*, and service upon the Minister of Agriculture seem all to have been duly complied with. No objections have been lodged, and on the return of the notice of hearing the petition no one appeared to oppose it.

As registration of the trade-mark in question was refused by the Minister of Agriculture, and this is, I understand, the first application to the court in which the question now arising has come before it, it deserves, even though unopposed, careful consideration.

It may be that since the passing of the Imperial Act of 1883, 46 & 47 Vict. c. 57, the trade-mark in question, in the form presented, would not obtain registration in England. The proper disposition of this application must therefore depend upon whether there is a difference between the terms of the Canadian Act now in force and the English Act.

The Trade Mark and Design Act, R. S. c. 71, s. 5, seems wider in its terms than the English Act of 1883. The enumeration in it of the particulars of what are

to be considered and known as trade-marks, is exactly the same as is found in the Canadian Act of 1875, 42 Vict. c. 22, s. 8. It was when comparing that latter Act with the English Act of 1883 that Mr. Justice Proudfoot in *Smith* v. *Fair* (1), said it "defined trade-"marks in the most comprehensive terms, as all marks, "names, brands, labels, or other business devices for the "purpose of distinguishing any manufacture no matter "how applied, whether to the article or the box." This is much more general than the definition of trade-mark in the Imperial Act of 1883, 46 & 47 Vict. c. 57, s. 64, and some care must be used in considering decisions in the English courts.

It seems singular that, as stated in the affidavit filed in support of the petitition, the name "Elkington & Co.", just as presented here, was in March, 1876, registered in England. The Act then in force, and under which it must have been so registered, the 38 & 39 Vict. c. 91, s. 10, was worded just as the Act of 1883 is: "A "name of an individual or firm printed, impressed, or "woven, in some particular and distinctive manner."

To provide that "names" shall be considered and known as trade-marks, is certainly more comprehensive than that they shall be so, when printed, impressed or woven in some particular and distinctive manner. In the one case, the name alone seems sufficient, in the other, there must be something more than the name—something particularly distinctive in the way it is designed, in the form it takes, in the colouring, or in the surroundings.

I cannot see what objection there can be to a mere name being a trade-mark, under the provisions of an Act which says that "names", saying nothing more, may be considered or known as such.

(1) 14 Ont. R. at p. 732.

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As V. C. Page, Wood said in *Ainsworth* v. *Walmsley* (1), "is not a man's name as strong an instance of trade-"mark as can be suggested, subject only to the incon-"venience that if a Mr. Jones or a Mr. Brown relies on "his name, he may find it very inadequate security "because there may be several other manufacturers of "the same name?"

I must hold that the wording of *The Trade-Mark and Design Act*, R. S. c. 71, s. 5, is wider than that of the English Act of 1883, and that under the word "names" as used in the Canadian Act, the name of an individual or firm, without anything more, without being accompanied by any particular distinctive feature, may be considered and known as a trade-mark, and is entitled to registration as such. That being so, the petitioners are entitled to have the name "Elkington & Co.", as presented to the Department of Agriculture under No. 58,766, considered and known as a trade-mark.

There should therefore be, as prayed, an order to enter the name as a trade-mark in the proper register kept for making entry of such marks.

Ordered accordingly.

(1) L. R. 1 Eq. at p. 525.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

CABLE.....PLAINTIFF; 1907 Nov. 8.

v.

THE SHIP "*SOCOTRA*".

Shipping—Engagement for return voyage—Seamen left in foreign port by reason of sickness—Merchant Shipping Act, 1906 (Imp.), secs. 37, 38—Merchant Shipping Act, 1894 (Imp.), secs. 158, 166—Certificate of discharge—Mistake in computing wages due—Action—Costs.

Section 166 (1) of *The Merchant Shipping Act*, 1894 (Imp.) provides that where a seaman is engaged for a voyage which is to terminate in the United Kingdom, he shall not be entitled to sue in any court abroad for wages unless he is discharged with such sanction as is required by the Act, and with the written consent of the master, etc. By *The Merchant Shipping Act*, 1906 (Imp.), secs. 37 and 38 it is provided that where a master leaves a seaman behind on shore in any place out of the United Kingdom on the ground of his unfitness or inability to proceed to sea, he shall deliver to the person signing the required certificate of the proper authority, a full and true account of the wages due to the seaman. The master shall pay the amount of wages due to a seaman left behind on the ground of his unfitness or inability to proceed to sea, if he is left in a British possession to the seaman himself, and if he is left elsewhere to the British consular officer.

The plaintiff shipped for a voyage from Shields, England, to Victoria, B.C., and return. Before the termination of the voyage he was left at an American port by reason of illness and remained in the hospital there for fifteen days, beginning on the 18th of July, 1907. On the 18th of July the master of the ship left a certificate of discharge with the British Vice-Consul at such port as required by sec. 31 of the Act of 1906, but such certificate was not dated by the master, and the date of the 22nd of August was inserted in the certificate by the Vice Consul when the plaintiff called upon him after leaving the hospital. The master made an error in computing the amount of the plaintiff's wages due on the 18th of July and deposited less than the full amount due in the hands of the Vice-Consul. In an action for the recovery of wages by the plaintiff,—

Held, that the requirements of the statute respecting the certificate of discharge was sufficiently complied with; that the plaintiff was properly discharged on the 18th of July, and that he was entitled, under sec. 158 of the Act of 1894, to the full amount of his wages up to that date.

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2. That as the master made an error, though unintentionally, in computing the wages, and the plaintiff had been obliged to bring action, he was entitled to his costs.

ACTION for wages.

The case was heard at Victoria, B.C., by Mr. Justice Martin, Local Judge of the British Columbia Admiralty District, on the 2nd and 5th days of November, 1907.

R. C. Lowe for plaintiff;

F. Peters, K.C., for Ship.

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

MARTIN, L. J., now (November 8th, 1907) delivered judgment.

With respect to the opening objection to the right of the plaintiff to invoke the aid of this court, based upon the bar set up by sec. 165, of *The Merchant Shipping Act*, 1894, because the claim is under fifty pounds, I am of the opinion that Mr. Lowe's contention is correct, viz., that the facts clearly bring it within the fourth exception to that section, and therefore the action is properly brought.

The ship is a British bottom, registered at Glasgow, and is on a voyage from Shields to Los Angeles (California), Seattle, Victoria, and back to Shields, from which last port she sailed on the 26th of January last. The plaintiff shipped for the whole voyage as cook and steward, at five pounds per month, and was left behind at Los Angeles on the 18th of July for the reason that he was admittedly unfit and unable to proceed to sea because of illness, being at the time in the hospital, wherein he was detained fifty days, owing to an accident to his leg that he sustained in the cook's galley, which injury was aggravated by the fact that he had for some time been suffering from varicose veins which necessitated an operation in the hospital at Los Angeles.

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I pause here to say that I am satisfied that the charges he makes against the master or mate for neglect of duty, either as regards the supply of sufficient oil to light the galley, or as regards humane attention to him after his accident, are not, in my opinion, based upon anything substantial.

It is claimed by the plaintiff that he has never been lawfully discharged and is therefore still on the ship's articles and entitled to his wages to the date of the writ.

In answer to this the defendants rely on section 166 (1) of *The Merchants Shipping Act*, 1894, as follows :—

"166. (1) Where a seaman is engaged for a voyage or engagement which is to terminate in the United Kingdom, he shall not be entitled to sue in any court abroad for wages, unless he is discharged with such sanction as is required by this Act, and with the written consent of the master, or proves such ill-usage on the part or by authority of the master, as to warrant reasonable apprehension of danger to his life if he were to remain on board."

If, therefore, the plaintiff has not been "discharged with such sanction as is required by the Act" (see sec. 36 of 1906 for the procedure) he cannot maintain this action, seeing that both the voyage and his engagement are to "terminate in the United Kingdom," unless he "proves such ill-usage, etc." This he has attempted to do, but I need only to say that he has failed to convince me that there is any good ground therefor. The consequence of this is that unless he was discharged, despite his contention to the contrary, his action must be dismissed. But the defendants contended that he was duly discharged and left behind under secs. 30, 31, 32, 36, 37, 38 and 39 of *The Merchant Shipping Act*, 1906.

First, in regard to the question of leaving behind. This is a procedure and matter quite distinct from that of a discharge, as is clearly shown by said sections, particu-

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larly Nos. 158, 36 and 37, and I have no difficulty in coming to the conclusion here that the proper sanction was obtained to leave the plaintiff behind and that consequently and by operation of sec. 158 the service "terminated" (as to which cf. *Sivewright* v. *Allen* (1)), on the 18th of July, and that the plaintiff, as the section provides, is "entitled to wages up to the time of such termination, but not for any longer period." It was urged on behalf of the plaintiff that this procedure was dependent upon the delivery by the master, to the proper authority, of a full and true account of the wages due to the seaman," under sec. 37, and that if such an account were not delivered the proper authority could not grant the necessary certificate.. It is admitted that the account made out by the master was incorrect, and I find that he should have allowed the seaman one dollar and seventy cents more than he did.

After a careful consideration of all the various sections which might throw light on this matter, I have come to the conclusion that this is not the proper construction of the Act, for the granting of the certificate is clearly in the nature of a judicial act of the authority under sec. 36, which stands apart from, and is to be determined before, any question arises as to the duty of the master regarding the payment of wages under the following section 37. Indeed, it must be so, as this case illustrates, for the question as to whether or no the plaintiff was, in the opinion of said authority, fit to proceed to sea could not from any point of view be dependent upon the amount of his wages. The fact that he did lie in the hospital for fifty days shows how impossible it would be to give effect to a contrary view, for it would defeat the intended remedy.

Then, second, with regard to the discharge. I am satisfied on all the evidence that the master duly obtained

(1) [1906] 2 K. B. 81.

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the sanction of the proper authority, under said sec. 30 to discharge the plaintiff, and my observations with respect to leaving behind apply in principle to this procedure. And I find that the master did in fact make out a certificate of discharge for the seaman as required by sec. 31, though in view of the not unreasonable uncertainty of the master in regard to the signature on exhibit 7, purporting to be his, I am not satisfied that said exhibit 7 is the original discharge, but since it was obvious that the uncertainty of the master was, as he explained, largely due to the strange fact that the certificate, No. 7, was dated the 22nd of August instead of the 18th of July, on which date the master left it with the Vice-Consul, it may be that after all it is really the original certificate, though signed in blank by the master on 18th July, and the otherwise unaccountable date (which not unnaturally created the uncertainty) is the day upon which the Vice-Consul filled in the blank and gave it to the plaintiff when he called upon him after leaving the hospital, which in fact would be the 22nd of August because the plaintiff says he went there on the 3rd of July and stayed there fifty days. This document, moreover, is the same which the Consul-General at San Francisco says, in his letter of September 30th to the shipping master here, was left with him by the plaintiff. However, be that as it may, I am satisfied, as has been said, that a proper certificate was made out, and I should be inclined to think, if anything turned on the point, that in the circumstances the leaving of such certificate with "the proper authority" (here the Vice-Consul) was a sufficient "giving" thereof to the seaman to satisfy said sec. 31.

The result is that had the master left the correct account and amount of wages with the proper authority, the plaintiff would have had no claim upon the ship, for

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all the master's obligation would have been discharged under and by virtue of sections 38 and 39. Unfortunately, however, the master made a slip which, though an honest one, nevertheless placed the seaman in a position of embarrassment and the fact is that he has never yet had deposited to his credit in the hands of any proper authority or formally tendered to him, either in California or here, the full amount of the balance of his wages, and consequently he was justified in refusing to accept the offer of $13.65 in full settlement of his demands. Indeed, nothing has yet been paid into court to satisfy his claim and it is plain that the defendants cannot invoke the statute to support an insufficient deposit of wages, and therefore the plaintiff is entitled to judgment for fifteen dollars and thirty-five cents being the balance of the amount that should have been paid to him on the 18th of July when his engagement terminated by operation of sec. 158.

With respect to costs, though the matter is small in amount yet it is not so in principle, and difficult questions were raised which are of general importance to masters and seamen. Though the plaintiff is obviously of a peculiar disposition and did not create a favourable impression in the witness box, and has advanced extreme claims, both legal and on the merits, which have been disallowed, yet at the same time he was undoubtedly placed in a very perplexing position by the neglect of the master, (though quite unintentional) to perform his statutory duty and make out a correct account of his wages,—which, I may say, is a matter wherein great care should be taken to see that the mariner is allowed everything that is justly due to him. If he is not, this court should, I think, in pursuance of its general policy to protect to every reasonable extent the interests of mariners, give him his costs of recovering his wages in full, however trifling the amount, unless there are stronger

reasons than are to be found in this case for depriving him of them.

Judgment accordingly.

Solicitor for plaintiff: *R. C. Lowe.*

Solicitors for ship: *Peters & Wilson.*

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April 14.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

ROBERTS v. THE SHIP "*TARTAR.*"

Shipping—Master's wages—Custom of port as to discharge of master without notice—Set-off.

It is not the custom of the port of Vancouver that masters of tug-boats and small coasting vessels may, on the one hand, be discharged without notice, and, on the other hand, leave their employer's service in the same manner, in either case receiving their wages up to the date of the termination of the service.

2. An item of set-off asserted by the owners against the master's claim for wages, consisting of an amount of $30.75 charged for the fare and board of a friend of the master who had been taken with him on one of his trips on the owner's tug-boat, was not allowed because it was a general practice in the port of Vancouver to allow the masters such a privilege.

ACTION by a master for wages and for damages for wrongful dismissal.

The facts appear in the reasons for judgment.

The case was tried in Vancouver before Mr. Justice Martin, Local Judge for the British Columbia Admiralty District, on 1st April, 1908.

A. C. Brydon Jack for plaintiff;

R. L. Reid, K.C., for ship.

MARTIN, L. J. now (April 14th, 1908,) delivered judgment.

This action raises a question of importance to mariners of the port of Vancouver, viz.:—Is it the custom of that port that masters of tug-boats and small coasting vessels may on the one hand be discharged without notice, and, on the other, leave their employer's service in the same manner, in either case receiving their wages up the date of the termination of the service?

The owners of the defendant tug-boat adduced evidence to support the custom and the plaintiff brought forward

witnesses to the contrary, with the result that I am satisfied said alleged custom does not exist. It is of so unusual a nature that I should have expected evidence to satisfy me beyond reasonable doubt that it was the "settled and established practice of the port," as was said in *Postlethwaite* v. *Freeland* (1), but even the defendants' evidence hardly went that length. But in any event I could not hold such a custom to be reasonable, the objections to it being so many and so obvious; to give one example only, it would be an extraordinary state of affairs, and one contrary not only to the interests of master and owner but of the travelling public, if a master on a trip from, say, Vancouver to Van Anda, thence to Nanaimo, and back to Vancouver, could, in effect, desert his ship at Van Anda without any notice, leave his passengers and his owners in the lurch, and yet get paid for such a manifest breach of all marine traditional obligations and standards. A Court of Admiralty can hardly be expected to sanction anything of that sort.

If the defendants were not justified in dismissing the plaintiff in pursuance of the said custom, which I find they were not, then after a careful consideration of all the evidence I have come to the conclusion that there was no other ground for his dismissal. The question very largely depends upon the state of the weather when the tug had the boom in tow, and though the master of the *Schelt* was called by the defendant to disprove the plaintiff's statement on that head, he admitted he was unable to do so.

Such being the case, the plaintiff is entitled to the sum of $116.35, being the amount of wages actually due up to his discharge on the 15th of January, and I award him the further sum of $100 damages, *i.e.* one month's salary for wrongful dismissal.

(1) [1880] 5 A. C. 599 at p. 616.

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Mr. Jack rightly contended that it has been the practice of this court to make an allowance of a month's wages to mariners engaged on a monthly basis who have been wrongfully dismissed, provided they showed due diligence, as the plaintiff did here, to obtain similar employment elsewhere after dismissal but were, as here, unsuccessful in the effort.

Turning then to the set-off. The first item, for merchandise, has been abandoned, and the second one, for washing, the owners have not established. The third does not found any claim against the plaintiff. It is true that he, as master, increased the mate's wages on the pay-sheet sent to the owners, but they were not misled by it, and if they chose to pay the additional amount, which there was no legal obligation to do, they cannot recover the sum from the plaintiff.

The two last items in the set-off amount to $30.75 and are sought to be deducted from the plaintiff's wages because the owners objected to his taking a friend with him on the tug on one of her trips, and so they charged the fare up against him, $9, together with his friend's board for twenty-eight days at 75c., $21.75. But I do not think it would be just to allow this, deduction in view of the fact that one of the defendants own witnesses admitted that owners in general did not object to captains of tug-boats taking their friends on such trips, even for a longer period than twenty-eight days, and that it would not be customary to object to the captain extending in this way the courtesy of his vessel, so to speak, to a friend who no doubt would reciprocate. Such being the fact it would, I think, have been better, in case the owner's herein objected to such a recognised practice, if they had definitely informed their master of that fact beforehand, otherwise it would not be fair to him to seek to make him liable.

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The result is that judgment will be entered in favour of the plaintiff for $116.35 wages and $100 damages, total $216.35.

As to the costs Mr. Reid asks that they should not be awarded to the plaintiff because the amount was relatively small, under fifty pounds (1), and the action might have been brought in the County Court. It is true that the amount is not large, but as is frequently the case with actions regarding seamen's wages, questions of principle are herein involved, (as a recent example of which in this court see *Cable* v. *Socotra* (2)), and the two questions of custom which have arisen are of general importance to mariners on this coast, and merit the consideration of a court of superior jurisdiction. But further, as was urged by plaintiff's counsel, this court affords a special remedy for the recovery of wages, by the seizure of the vessel, which is not open to other courts, and its practice affords the means for a very desirable prompt determination of the claim. I see no good reason to depart from general rule No. 132, that the costs should follow the event. No question of accounts, properly so called, arises here, as was the case in the *Fleur de Lis* (3), it is a simple claim for so much wages for so many days, as fully within the defendants' knowledge as the plaintiff's, and damages for wrongful dismissal.

Judgment accordingly.

Solicitor for plaintiff: *A. C. Brydon Jack.*

Solicitors for ship: *Bowser, Reid and Wallbridge.*

(1) Howell's Admiralty Practice, 63.

(2) 11 Ex. C. R. 301.

(3) [1866] L. R. 1 Ad. & Ecc. 49.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1908
April 28.

HIS MAJESTY THE KING.....PLAINTIFF;

AGAINST

THE SHIP "*CARLOTTA G. COX.*"

Behring Sea Award Act, 1894—Illegal sealing—Vessel arrested within prohibited zone with fresh skins on board — Log—Evidence —Irregularities connected with the seizure—Effect on proceedings—Practice.

The Behring Sea Award Act, 1894, forbids subjects of Great Britain from pursuing, killing or capturing seals during the close season, (beginning on the 1st May and extending to 31st July) on the high seas north of the 35th degree of N. latitude and E. of the 180th degree of longitude. On the 29th May, 1907, a British sealing schooner was boarded, searched and arrested by the United States Revenue Cutter *Rush* in the North Pacific Ocean off Yakutat Bay, in latitude 59° 10' N. and longitude 141° 19' W. There were found on board 77 fur-seal skins, 6 of them being green with fresh blood on them. The schooner's log was not written up at the time of search, but the master said he had a note-book with pencil entries containing the particulars of seals killed from which he was able to make entries in the log as required by Article 5 of the first schedule of said Act. The master afterwards did enter in the log that the last killing of seals had taken place on the 27th of April. While not engaged in sealing at the time of being boarded, the schooner was admittedly within the prohibited zone, and was fully manned and equipped for sealing; and fur-seals had been seen by the *Rush* in the vicinity for several days before. The master did not give evidence at the trial nor was any excuse given for his failure to do so. Expert evidence was given on behalf of the Crown that the seals from which the said six skins were taken had been killed within four days before the 29th of May, and possibly some of them not longer than 24 hours.

Held, that, upon the facts, the schooner was employed in the unlawful killing of seals as charged.

2. Where the offending vessel is properly before the court and in the custody of its marshal, any antecedent irregularities in the manner in which she was originally seized or in the means whereby she was ultimately brought within the jurisdiction of the court, will not vitiate the proceedings.

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THIS was an action *in rem* against a sealing schooner for condemnation for an alleged contravention of the Behring Sea Award Act, 1894.

The case came on for trial at Victoria, B.C., on the 4th day of February, 1908, before the Honourable Mr. Justice Martin, Local Judge of the Admiralty District of British Columbia.

A. P. Luxton, K.C., for plaintiff;

F. Peters, K.C., for the ship.

Mr. *Peters* raised the point, amongst others, that the seizure of the schooner was unlawful in that the Commander of the U. S. Revenue Cutter *Rush* was not shown to have been "duly commissioned and instructed by the President" to seize a British vessel in accordance with Imperial Order in Council of 30th April, 1894, sec. 1, and that the name of the cutter was not communicated to His Majesty in accordance with said Order in Council.

Mr. *Peters* raised the further point that sec. 103 of the *Merchant Shipping Act*, 1854, had not been complied with.

The facts are fully set out in the judgment.

On 7th March, 1908, the Local Judge delivered judgment ordering the forfeiture of the ship, but in case of payment of a fine of $400 and costs within 30 days she was to be released, and the following reasons for judgment were handed down by the Local Judge:—

April 28th, 1908.

On the 29th day of May, 1907, shortly after 7 a.m., the sealing schooner *Carlotta G. Cox*, John Christian, master, a British vessel registered at Victoria, was boarded, searched and detained by the U. S. Revenue Cutter *Rush* in the North Pacific Ocean off Yakutat Bay, in latitude 59° 10′ N. and longitude 141° 19′ W., being suspected of contravening *The Behring Sea Award*

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Act, 1894, which, *inter alia*, forbids subjects of Great Britain and the United States of America from pursuing, killing or capturing fur seals during the close season (beginning on the 1st of May and extending to the 31st of July) on the high seas north of the 35th degree of N. latitude and eastward of the 180th degree of longitude. Later, and on the 4th of June, the schooner was formally seized at Sitka, where she had been towed by the *Rush*, and she was thence towed to Fort Simpson, B.C., where she was handed over to Captain Hackett, master of the Canadian Government steamer *Quadra*, then employed by the Department of Marine and Fisheries in the light-house service, who arranged with Captain Christian that he should take the schooner to Victoria and deliver her to the collector of customs there, which was done.

At the time of the first searching on May 29th there were 77 fur seal skins in the schooner's salt-room, of which the six top ones were very green, with blood on them so fresh that it soiled the fingers; the seventh and following skins were quite distinct in appearance, not fresh nor moist, but cured. On the 4th of June when these six skins were again examined they had changed in appearance so that they could not be distinguished from the others; when the said six were first seen they had a thin layer of salt on them. The schooner's log was not written up but the master said he had a note-book with pencil entries which he produced and said contained the particulars of seals killed, from which he claimed to be able to make the entries in the log required by article five of the first schedule of said Act, and later he did, before reaching Sitka on the 4th of June, make certain entries showing his total catch to be 133, out of which 56 skins had been landed at Hesquiat, V.I., on April 22nd, for shipment to Victoria.

The schooner was fully manned and equipped for sealing, and was admittedly within the prohibited area when

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seized; but the contention of her captain is that all the seals had been taken before the close season and outside of the prohibited area. At the time she was first discovered, about 6 a.m., by the *Rush*, she was lying-to, not sealing; the weather was clear, and Mount St. Elias could be distinctly seen, 68 miles away. That locality is well known to sealers as the Fairweather Sealing Grounds; and fur seals had been seen by the *Rush*, in the vicinity for several days before, and at the time of search a Japanese sealer was engaged in sealing within five or six miles of the *Carlotta G. Cox*, with several boats out, and other Japanese vessels had previously been sighted sealing in the vicinity and using firearms, the use of which is forbidden British and United States subjects by article 6 of the said first schedule. As one of the officers of the *Rush* described it: "Japanese vessels were shooting all round there," and though the *Rush* boarded one of them on the same morning, shortly after she had searched and detained the *Carlotta G. Cox*, nothing could be done to stop it because Japan is not a party to the treaty between Great Britain and the United States of America, upon which the said *Behring Sea Award Act*, 1894, is founded.

With respect to the said six green skins I am satisfied, largely upon the convincing evidence of the pilot of the *Rush*, James W. Keen, who has had a long experience in salting, overseeing and examining seal skins in the waters in question, and in connection with seizures, that the seals from which they were taken had been killed within four days before the 29th of May at the outside, and possibly some not longer than 24 hours. But even taking the killi to have been within four days what explanation is offered by the master? Nothing that is satisfactory to this court, and in the circumstances the entry in his log which states that the last killing of seals took place over a month before, viz., on the 27th of

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April when 25 were captured, is entitled to no credit. The master was not brought forward as a witness to explain this suspicious circumstance, and I have no hesitation on all the facts in rejecting the suggestion that he happened to be in the locality in question hunting for sea otters, or on his way to Kadiak Island, or the Shumagin Islands for that purpose. It was laid down by this court in *The Minnie* (1), and in *The Shelby* (2), and followed by a long line of cases ending with *The Otto* (3), that the statutory onus upon the master to explain his conduct in circumstances similar to these is a strong one, but, like the master in the *Shelby Case*, he did not come forward (though this was done, *e. g.*, in *The Ainoko* (4), to discharge that onus, nor was any reason given for his failure to do so, therefore, I am satisfied on all the facts that his schooner was employed in the unlawful killing of seals as charged.

There is a further charge in par. 9 of the statement of claim, that proper entries were not made in the official log giving the particulars of killing as aforesaid and the condemnation of the vessel is also asked on that ground, but it has been already decided by this court in *The Beatrice* (5) that such neglect is not one that attaches any penalty or forfeiture to the ship, though the master is personally liable to suffer the statutory consequences; therefore it is unnecessary to consider that point in relation to the schooner. With respect to the decision in the *Beatrice Case*, it may be that, as Mr. Luxton contends, full consideration was not given to sec. 4 of the said Act, nevertheless, Mr. Peters is justified in claiming it as an express decision on the point in his favour, by which I am bound.

(1) 4 Ex. C. R. 151; 23 S. C. R. 478.
(2) 5 Ex. C. R. 1.
(3) 6 Ex. C. R. 188.
(4) 5 Ex. C. R. 366.
(5) 5 Ex. C. R. 378.

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But the objection is raised that the seizure here was unlawful in that the commander of the *Rush* is not shown to have been "duly commissioned and instructed by the President" to seize a British vessel, as is required to be done by sec. 1 of the Imperial Order in Council of 30th of April, 1894, and also that the name of the United States vessel making the seizure was not beforehand "communicated by the President of the United States to "Her Majesty as being a vessel so appointed" for that purpose, as is also required by said order in council. And it is further objected that the commander of the *Rush* neither brought the schooner "for adjudication "efore any such British Court of Admiralty," nor "delivered her to any such British officer as is mentioned "in the said section (103 of *The Merchant Shipping Act*, "1854) for the purpose of being dealt with pursuant to "the recited Act" (*i. e. hring Sea Award Act*, 1894). Said sec. 103 is as follows:—

"Sec. 103. And in order that the above provisions as to forfeitures may be carried into effect, it shall be lawful for any commissioned officer on full pay in the military or naval service of Her Majesty, or any British officer of customs, or any British consular officer, to seize and detain any ship which has, either wholly, or as to any share therein, become subject to forfeiture as aforesaid, and to bring her for adjudication before the High Court of Admiralty in England or Ireland, or any court having admiralty jurisdiction in Her Majesty's Dominions, and such court may thereupon make such order in the case as it may think fit, and may award to the officer bringing in the same for adjudication such portion of the proceeds of the sale of any forfeited ship or share as it may think right."

In my opinion, (after careful consideration of these important questions now for the first time raised in these sealing cases), even assuming that the commander of the

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Rush was not "duly commissioned and instructed" to seize the schooner, and even though the commander of the *Quadra*, to whom she was first delivered, is not an officer who can take proceedings against her under said sec. 103, yet seeing the fact is that she has been brought for adjudication, and is now before this court (and in the custody of its marshal) by and at the instance of an officer, Commander Allgood, R N., who admittedly is within said sec. 103, and who claims her condemnation for contravention of *The Behring Sea Award Act*, it is not open to her owners to answer that charge (whatever other remedies they may have) by setting up irregularities in the manner in which she was originally seized, or in the means whereby she was ultimately brought within the jurisdiction of this court, and, later, before it by Commander Allgood, who instructed the writ to be issued on the 29th of November, as appears by the indorsement thereof. According to the principle decided in *The Annandale* (1), the forfeiture here accrued at the time the illegal act was done, and I am unable to agree that any of said antecedent irregularities can affect the admittedly regular proceedings of this court.

The result is, therefore, that I find there has been a contravention of *The Behring Sea Award Act*, 1894, in the manner aforesaid, by the schooner *Carlotta G. Cox*, and I therefore declare her and her equipment and everything on board of her to be forfeited to His Majesty, but, following the precedent established in *The Ainoko* (2), and *The Beatrice* (3), in case of payment of a fine of four hundred pounds and costs within thirty days, she, her equipment, and everything on board of her may be released.

Though I have come to this conclusion, yet I think it proper to observe that I have not overlooked the strong

(1) [1877] 2 P. D. 179.
(2) 4 Ex. C. R. 195.
(3) 5 Ex. C. R. 9.

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appeal of the defendant's counsel that this court should now cast a lenient eye upon these infractions of *The Behring Sea Award Act*, 1894, since, it is contended, the facts proved in the course of the hearing show that it has failed in its object and not only places the citizens of Canada at a disadvantage in their sealing enterprises in adjacent waters, but creates special opportunities to foreign sealing vessels from, *e. g.*, the other side of the Pacific. But however strong a case such facts may ground in diplomatic circles for a change in the Treaty and Act, they can have no weight in a court of justice. The sole duty of a judge is to administer the law as it is given to him by that Legislature which has the power to enact it, and therefore I have imposed a penalty just as though there had been no change in the condition of affairs since 1894 when the statute was passed.

Judgment accordingly.

Solicitors for the Crown: *Pooley, Luxton & Pooley.*

Solicitors for the Ship: *Peters & Wilson.*

APPEAL FROM TORONTO ADMIRALTY DISTRICT.

THE MONTREAL TRANSPORTATION COMPANY, LIMITED..... } PLAINTIFFS;

1908
May 4.

AGAINST

THE SHIP "*NORWALK.*"

Shipping—The Admiralty Act, R. S. c. 141, s. 19—Local Judge—Jurisdiction—Removal of action from one Registry to another—Practice.

A Local Judge in Admiralty has jurisdiction under *The Admiralty Act*, R. S. c. 141, sec. 19, sub-sec. 2, to order the transfer of an action from the registry in his district to the registry of another Admiralty district in Canada.

APPEAL from an order of the Local Judge of the Toronto Admiralty District refusing a motion to transfer an action to another district.

The grounds of the motion are set out in the following judgment of HODGINS, L. J., delivered on the 28th February, 1908 :—

The question of jurisdiction in a case of this kind is not unfamiliar to me, because I have had to consider it in administering justice under another Dominion jurisdiction which is conferred upon the provincial courts by *The Dominion Winding-Up Act*; and if counsel will look at the provisions in *The Winding-Up Act* which I will now read, and which have not been included in *The Admiralty Act*, they will see the reasons (which I shall give shortly) why the jurisdiction sought to be invoked here does not exist in the Admiralty Courts.

Section 125 of *The Winding-Up Act* says: "The courts of the various Provinces,"—that means the provincial courts,—"and the judges of the said courts respectively, shall be auxiliary to one another for the purposes of this Act;" but here is the substantial factor

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in the section; "and the winding up of the business of the company, or any matter or proceeding relating thereto, may be transferred from one court to another, with the concurrence or by the order or orders of the two courts, or by an order of the Supreme Court of Canada." That section has not been incorporated into *The Admiralty Act*; nor has this next one. (126) "When any order made by one court is required to be enforced by another,"—that is the order of one provincial court is required to be enforced by another provincial court,—"an office copy of the order so made, certified by the clerk or other proper officer of the court which made the same, under the seal of such court, shall be produced to the proper officer of the court required to enforce the same."

Now I have exercised jurisdiction under both of those sections in liquidation cases under the Dominion *Winding-Up Act*. In one case I transferred a case which had been originally instituted in the Ontario High Court to the Superior Court in the Province of Quebec. In other cases—quite a number—orders made by me here in the Winding-up Court against contributories who were residents in other provinces, have been enforced, under section 126, in the courts of those other provinces by inscribing in the records of the other provincial court a copy of the order made in the Ontario High Court here; and execution has issued in such cases from the court in which the order has been so inscribed. Neither of those sections have been incorporated into *The Admiralty Act*.

But there is enough in *The Admiralty Act*, independent of this, which shows me that the jurisdiction invoked does not exist. There are two terms used in *The Admiralty Act*, one is the term "district" that means the territorial extent of the jurisdiction of the court in trying actions; the other is "registry," that means the local place for recording the judicial action

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and proceedings of the court of the district. The 19th section of the present Act says: "When in any district there are more registries than one, all proceedings in any suit shall be carried on in the registry in which the suit is instituted, unless the judge shall otherwise order." Then comes in the second clause: "Any party to a suit may, at any stage of such suit, by leave of the court, and subject to such terms as to costs or otherwise as the court directs, remove such suit pending in any registry to any other registry,"—meaning within the same district.

Now the "court" that is spoken of here is the court of the district which has judicial authority and jurisdiction in Admiralty cases over the whole of the district. The word "registry" is the local place of recording the judicial action and proceedings of the court of the district in the proper books of the court, which are necessary for the keeping of the records of the court in proper shape. These words, therefore, in the Act clearly show that there is a distinction between the term "district" which applies to the whole Province of Ontario, and the term "registry" which applies to the local offices of the court in county towns within the district; and they satisfy me that I have not the jurisdiction which is possessed under *The Winding-Up Act* to transfer a case from one provincial court to another, or as sought in this case, to transfer an Admiralty action from one Admiralty judicial district to another district within the Dominion; and, therefore, having no jurisdiction other than that conferred upon the court to remove a pending action from one local registry to another local registry within the same judicial district, I have no jurisdiction to transfer this action to the Province of Quebec.

The word "registry" which is used in the Act has been defined by the United States Supreme Court in the

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action of *United States* v. *Castillero* (1), as follows: "What is a "a registry?" * * * "The word is the same in Spanish and in English. Both derive it from the latin, *Liber rerum gestarum*, which the Roman lawyers contracted into *registrum*. To register a thing is to write it in a book; to preserve it from the danger of simulation, defacement, fraud, and loss, to which separate papers would be exposed."

This is a sufficiently precise and clear definition of the word "registry"—the place for recording the proceedings by writing them as a record in a book; and that word being used in *The Admiralty Act* I must give it a similar interpretation; and, therefore, hold that I have no jurisdiction to transfer this action from this judicial district of the Dominion Admiralty Court to another judicial district as asked for by the plaintiffs. The motion, therefore, must be dismissed with costs.

March 31st, 1908.

The appeal came up for argument.

E. E. Howard, for appellant.

A. H. Clarke, for the ship.

CASSELS, J., now (May 4th, 1908) delivered judgment.

The application to the learned Judge of the Toronto Admiralty District was for an order allowing the plaintiff to remove this suit from the Registry known as the Toronto Admiralty District to the Registry in Quebec.

The learned Judge came to the conclusion that he had no jurisdiction to make such an order, and dismissed the application.

The Admiralty Act, R. S. c. 141, provides, (sec. 6) that the Governor in Council may from time to time constitute any part of Canada an Admiralty District, &c., &c.

(1) 2 Black's Reports, p. 109.

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No action has been taken by the Governor in Council pursuant to the provisions of this section, and the present question must be determined on the construction of the statute as it was prior to this amendment.

By section 7 of the statute it is enacted:—

"Until otherwise provided by the Governor in Council the following provinces shall each constitute an Admiralty District for the purposes of this Act, and a registry of the Exchequer Court on its Admiralty side shall be established and maintained within such districts at the places following:—

"The Province of Ontario, under the name of the Toronto Admiralty District, with a registry at the City of Toronto;

"The Province of Quebec with a registry at the City of Quebec, &c."

In the case of *Bouchard* v. *The Montreal Grain Elevating Co.* (1), the former Judge of the Exchequer Court had occasion to construe this enactment, and his conclusion was that there was but one registry of the Exchequer Court on its Admiralty side in the Province of Quebec, namely, at Quebec, and that the office in Montreal of the Deputy Registrar was not a registry of the Exchequer Court on its Admiralty side at the City of Montreal but a mere adjunct of the registry at Quebec.

The same reasoning applies to the Toronto District.

Section 19, sub-sec. 2 of the statute reads as follows:—

"Any party to a suit may at any stage of such suit by leave of the court and subject to such terms as to costs or otherwise as the court directs remove such suit pending in any registry to any other registry."

This section in Cap. 141 of the Revised Statutes of Canada, 1906, is practically the same as section 19 in 54-55 Vict. Cap. 29, the former referring to any appeal in addition to suit.

(1) 11 Ex. C. R. 220.

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It is manifest, if the opinion of the late Mr. Justice Burbidge is correct, that under section 19, sub-sec. 2, if there be a removal from one registry to another registry it must be a removal from one province to the other.

Section 10 of Cap. 141 (R. S. C. 1906) provides that:—

"Every Local Judge in Admiralty shall within the Admiralty District for which he is appointed have and exercise the jurisdiction and the powers and authority relating thereto of the Judge of the Exchequer Court in respect of the Admiralty jurisdiction of such court."

This section is carried forward from 54-55 Vict. cap. 29.

To place a construction on this section that would take from the Local Judge the power of removal from one registry to another as prescribed by section 19 sub-sec. 2, would in my judgment do violence to the spirit and intention of the statute.

In any event I have the jurisdiction.

On the merits I was not satisfied with the particulars set forth in the affidavits and gave leave to the plaintiff to file a further and more precise affidavit, with leave to the ship also to file further affidavits in answer.

Further affidavits have been filed; on behalf of the plaintiff, the affidavits of E. E. Howard and J. A. Cuttle, and on behalf of the ship the affidavit of Frank Goodrow.

It appears that the collision between the barge *Jet* and the S.S. *Norwalk* occurred in the lower portion of Lake St. Louis, about three miles from the upper entrance of the Lachine Canal.

The writ was issued out of the Toronto Admiralty District. This became necessary for the reasons stated in the affidavit of Cuttle.

Howard in his affidavit states that "the width, depth "and direction of the ship channel at the place where "the collision occurred, the direction and speed of the "current at that place, and the exact position of lightship "No. 2 are facts essential to the determination of the

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"issues involved in this suit." This statement is not contradicted.

Howard states it will be necessary to secure the attendance of (1) the engineer under whose direction the channel was dredged and swept, and the assistant engineer who had immediate supervision of the work; (2) the officer of the Department of Marine and Fisheries who made the hydrographic survey of Lake St. Louis; (3) the officer and crew of the S.S. *Scout* who placed the lightship, and the employee of the Dominion Government who was in charge of the same during the season of navigation.

All these witnesses, except the captain of the S.S. *Scout* reside at or near Montreal. The residences of the captain and crew of the S.S. *Scout* are not known.

Cuttle states in his affidavit that the captain and crew of the barge *Jet*, the barge *Winnipeg* and the S.S. *Glide*, in all nine or ten in number, are necessary witnesses. These witnesses reside at or near Montreal.

He also states that the lock-master and officials in charge of the locks at the head of the Lachine Canal and at the lower end of the Soulanges Canal—the salvors of the *Jet* and her cargo, are necessary witnesses. These are resident in or near Montreal.

In answer to these affidavits Goodrow, the captain of the *Norwalk*, swears that the pilot and six members of the crew, in all seven, are necessary witnesses. In addition there are five other members of the crew.

Of these witnesses two reside in Detroit, one in Green Bay, Wisconsin, and two at Port Huron, five in all.

The fifth paragraph of the affidavit is undoubtedly incorrect. It refers to the fourth paragraph, and states that one resides at Buffalo and the others in the neighbourhood of Chicago. Perhaps it means to refer to the third paragraph.

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I think the plaintiff's application should be granted. The fact of the writ having issued out of the Toronto Admiralty District has very little weight under the circumstances. A great many of the witnesses of the ship reside out of the jurisdiction, and can be examined on commission.

The Judge who tries the suit will no doubt exercise a reasonable judgment as to the time of the trial so as to secure the evidence of the witnesses for the ship.

The order will issue allowing the plaintiff to remove the suit from the registry known as the Toronto Admiralty District to the registry of Quebec.

The costs of the application before the learned Judge in Toronto and of this appeal will be costs in the cause.

Judgment accordingly.

Solicitors for the appellants: *Beatty, Blackstock, Fasken & Chadwick.*

Solicitors for the respondents: *Clark, Bartlet & Bartlet*

IN THE MATTER of the Petition of Right of

1908

April. 10.

SIMON VIGER.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Railways—Government Railways Act—R. S. 1906, c. 36, secs. 22, 23—Fences—Trespasser—Injury—Liability.

Where not required by the adjoining proprietors to fence its line of railway, there is no duty, in favour of a trespasser, cast upon the Crown by the provisions of secs. 22 and 23 of *The Government Railways Act* to fence as aforesaid.

2. The suppliant, while working on a property adjoining the Intercolonial Railway within the City of Levis, P.Q., was injured while innocently trespassing on the right of way, there being no fence erected, or other means taken, by the Crown to mark the boundary between the adjoining property and the railway. It was not alleged that the adjoining owner had requested the Crown to fence.

Held, that the suppliant had made no case of negligence against the Crown under sub-sec. (c) of sec. 20 of R. S., c. 140.

PETITION OF RIGHT for damages arising out of bodily injury alleged to have been caused by the negligence of the Crown's servan on a public work.

By his petition the suppliant alleged that on the 22nd day of August, 1906, he was employed as a mason in the construction of a building on Commercial Street in the City of Levis. The property of the owner of the house in course of construction adjoined the right of the Intercolonial Railway, but there was no fence between such property and the railway, nor anything to indicate the line of demarcation between them. While engaged in his work, it became necessary for the suppliant to go to the rear of the property on which the house was being built for the purpose of selecting some stones for the foundation which had been piled there. While doing this he was struck by a train passing on the railway, and was seriously injured. He claimed that the Dominion Gov-

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ernment was guilty of negligence in not having fenced between the railway and the said preperty, or in failing to take some means to indicate the line of demarcation.

The Crown, by its statement of defence, objected that the petition was bad in law, *inter alia*, because there was no duty on the part of the Crown, towards suppliant, to erect a fence or otherwise indicate the line of demarcation between the said property and the line of railway; and because the suppliant was a trespasser, and himself guilty of negligence which resulted in the injuries sustained by him.

Reasons for Judgment.

April 9th, 1908.

The objections in law now came on for argument.

A. Lemieux for the suppliant;

E. L. Newcombe, K.C., for the respondent.

CASSELS, J. now (April 10th, 1908,) delivered judgment.

The points of law raised by the defence were argued before me yesterday. I reserved judgment to consider the forcible argument of Mr. Lemieux, but I am of opinion the points of law raised by respondent must be given effect to.

Section 22 of *The Government Railways Act* (Cap. 36, R. S. 1906) provides as follows:—

"22. Within six months after any lands have been taken for the use of the railway, the minister, if thereunto required by the proprietors of the adjoining lands, shall erect and thereafter maintain, on each side of the railway, fences at least four feet high and of the strength of an ordinary division fence, with swing gates or sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the railway, for the use of the proprietors of the lands adjoining the railway.

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Reasons for Judgment.

2. The minister shall also, within the time aforesaid, construct and thereafter maintain cattle-guards at all public road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway.

3. In the case of a hurdle gate fifteen inches longer than the opening, two upright posts supporting the gate at each end shall be deemed to be proper fastenings within the meaning of this section.

4. Every railway gate at a farm crossing shall be of sufficient width for the purpose for which it is intended. R. S. c. 38, s. 16; 50-51 V. c. 18, s. 2.

Section 23 reads as follows :—

" 23. Until such fences and cattle-guards are duly made, and at any time thereafter during which such fences and cattle-guards are not duly maintained, His Majesty shall, subject to the provisions of this Act relating to injuries to cattle, be liable for all damages done by the trains or engines on the railway, to cattle, horses or other animals on the railway, which have gained access thereto for want of such fences and cattle-guards. R. S. c. 38, s. 17."

The suppliant can hardly be classed as an "animal" within the meaning of this section. It provides for the damage in case of non-compliance with the provisions of section 22.

There is no statement that even for the benefit of the proprietor of the adjoining land the duty of erecting a fence, as provided by section 22, was placed upon the minister.

As against the respondent no such statutory duty is created, and I think the petition should be dismissed with costs, to be paid by the suppliant to the respondent.

Judgment accordingly.

Solicitor for suppliant: *A. Bernier.*

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

GENERAL RULES AND ORDERS

REGULATING THE PRACTICE AND PROCEDURE

IN THE

EXCHEQUER COURT OF CANADA

COMING INTO FORCE ON JANUARY 11th 1909.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL RULES AND ORDERS.

In pursuance of the provisions contained in the 87th section of *The Exchequer Court Act* (R.S., 1906, ch. 140), in the 2nd section of an *Act to Amend the Exchequer Court Act*, ch. 27, 7-8 Ed. VII., and sec. 368 of *The Railway Act* (R.S., 1906, ch. 37), it is hereby ordered that all General Rules and Orders of the Exchequer Court now in force be rescinded and that the following rules and orders be substituted therefor and be in force for the purpose of regulating the practice and procedure in the Exchequer Court of Canada:—

GENERAL PROVISIONS.

RULE 1.

Mode of practice and procedure in cases not provided for by any Act of Parliament or by these Rules.

(1) In all suits, actions and matters in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any general Rule or Order of the Court, the practice and procedure shall :—

(*a.*) If the cause of action arises in any part of Canada, other than the Province of Quebec, conform to and be regulated as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's High Court of Justice in England ; and

(*b.*) If the cause of action arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's Superior Court for the Province of Quebec ; and if there be no similar suit, action or

matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in His Majesty's High Court of Justice in England.

INFORMATIONS IN SUITS BY THE CROWN, PETITIONS OF RIGHT AND STATEMENTS OF CLAIM.

RULE 2.

Suits on behalf of the Crown to be by Information—How signed.

All suits on behalf of the Crown in the interest of the Dominion of Canada are to be instituted by information filed in the name of the Attorney-General of Canada, and signed by the Attorney-General of Canada, or by some person duly authorized to affix thereto the signature of the said Attorney General.

RULE 3.

Form of information.

The information shall conclude with a claim for the relief sought, and the commencement and conclusion thereof may be in the form given in Schedule A to these orders.

SCHEDULE A.

Form of information.

(*Rule 3.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada,

Plaintiff;

AND

JOHN SMITH,

Defendant.

Filed on the....day of....., A.D. 190 .

To The Honourable the Judge of the Exchequer Court of Canada:—

The Information of the Honourable.....His Majesty's Attorney-General of Canada, on behalf of His Majesty, sheweth as follows:—

(Here state facts concisely.)

CLAIM.

The Attorney-General, on behalf of His Majesty the King, claims as follows:—

(*a.*)
(*b.*)

Dated at , this day of 190 .

(Sigature)

A. B. A.,

Attorney-General.

RULE 4.

Joinder of proceedings in rem and in personam.

Where, by reason of the commission of any offence, any thing is liable to condemnation, and the offender is also liable to a penalty, such condemnation and penalty may be enforced and recovered in one and the same proceeding; but no judgment for any such penalty shall be given against any person who has not been served with the information.

RULE 5.

Joinder of causes of action in information of intrusion.

Proceedings to recover profits or damages for intrusion may be joined to proceedings to remove persons intruding upon the King's possession of lands or premises.

RULE 6.

Suits to be instituted by information, petition of right, reference or statement of claim.

1. Actions, suits or proceedings in this Court, on behalf of the Crown and in the name of the Attorney-General of Canada,

may be instituted by filing an information in the name of the Attorney-General.

2. Actions, suits or proceedings against the Crown are to be instituted by filing a Petition of Right, or in any case where there is a Reference of a claim against the Crown by the Head of any Department, by filing a statement of claim.

3. Any other actions, suits or proceedings in this Court, unless otherwise specially provided for, may be instituted by filing a statement of claim, which may be according to the form given in Schedule B to these Rules and Orders, and shall conform to the rules of pleading herein prescribed.

SCHEDULE B.

Form of Statement of Claim in Action on Postmaster's Bond.

(*Rule 6.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

The Postmaster General for Canada,

Plaintiff ;

AND

A. B., C. D. and E. F.,

Defendants.

STATEMENT OF CLAIM.

Filed the....day of.....190 .

1. The defendants, by their bond bearing date the day of A.D. 19 , became jointly and severally bound to His Majesty the King, in the sum of $ to be paid by the said defendants to His Majesty the King, subject to certain conditions thereunder written, upon fulfilment whereof the said bond was to become void.

2. One of the said conditions was and is that the said A. B. should, from time to time, and at all times when thereunto required, well and truly pay over to the Postmaster General for Canada all sums as might or ought to be had and received by him for the sale and disposal of postage stamps and stamped envelopes, according to the value of the same, respectively, entrusted to him for sale as postmaster at, &c.

3. Postage stamps and stamped envelopes to the value of one thousand dollars were, on day of or thereabouts, entrusted to the said A. B., as postmaster at, &c., for sale, and he has sold the same.

4. The said A. B. has paid over only $100 of the amount received by him on account of such sale, and refuses to account for the balance of the amount received by him for the sale of the said postage stamps and stamped envelopes, although he has been required to do so.

5. A statement of the account of the said A. B. as such postmaster and attested as correct, by the certificate and signature of the accountant of the Post Office of Canada, shows such balance of $900 to be due and unpaid by the said A. B.; and, by virtue of the 'Post Office Act, R.S., 1906, ch. 66,' the plaintiff is entitled to demand judgment against the defendants for double the amount of the said balance.

The plaintiff claims—

1. Judgment against the said defendants, jointly and severally, for the sum of $1,800 and costs of suit.

REFERENCE OF CLAIM BY HEAD OF DEPARTMENT.

RULE 7.

When reference made, statement of claim to be filed by claimant.

Whenever a claim is referred to the Court by the Head of any Department of the Government of Canada, the claimant shall file with the Registrar a statement of his claim, as provided for by Rule 6, and shall leave at the office of His Majesty's Attorney-General of Canada, an office copy thereof with an endorsement thereon in the form given in Schedule 'C,' and the pleading and procedure subsequent thereto shall be regulated by and conform to, as near as may be, the mode of pleading and procedure in proceedings against the Crown by petition of right.

SCHEDULE C.

(*Rule 7.*)

The claimant prays for a statement in defence on behalf of His Majesty the King within four weeks after the date of the service hereof, or otherwise that the statement of claim may be taken as confessed.

DISPENSING WITH PLEADINGS.

RULE 8.

Dispensing with pleadings by consent in cases instituted by reference.

Whenever a claim is referred to the court by the Head of any Department of the Government of Canada, a consent in writing, signed by the parties or their attorneys, that such claim shall be heard without pleadings may be filed with the Registrar, and an order of court in the terms thereof may thereupon be made. The claim shall thereupon be deemed ripe for trial.

RULE 9.

Order to dispense with pleadings.

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

RULE 10.

When order taken out claim may be heard.

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

REFERENCES UNDER THE 179TH AND 180TH SECTIONS OF 'THE CUSTOMS ACT' (R.S., 1906, ch. 48).

RULE 11.

Customs reference to be heard in manner provided by Rule 7.

Every Reference to the Court of any matter in pursuance of the 179th section of *The Customs Act* (R.S., 1906, ch. 48) shall be heard in the manner provided for in Rule No. 7 ; but any question of law arising upon any such reference may, as in other cases, be stated in the form of a special case for the opinion of the Court.

RULE 12.

Procedure on Customs Reference.

Every such matter so referred by the Minister of Customs shall be regulated by and conform to, as near as may be, the procedure in proceedings against the Crown by Petition of Right.

EXTENTS.

RULE 13.

Writs of immediate extent and diem clausit extremum may issue on affidavit of debt and danger and debt and death.

A commission to find a debt due to the Crown shall not be necessary for authorizing the issue of an Immediate Extent or a writ of Diem Clausit Extremum ; and an Immediate Extent may be issued on an affidavit of debt and danger, or a writ of Diem Clausit Extremum may be issued on an affidavit of debt and death, and, in either case, on the *fiat* of the Judge of the Exchequer Court of Canada. 28-29 Vict. (U.K.), ch. 104, sec. 47 and following. (*For forms of affidavit, order and writ, see Schedule D hereto.*)

RULE 14.

Sheriffs executing extents need not enquire by the oaths of Jurors.

The Sheriff in executing a writ of Immediate Extent or a writ of Diem Clausit Extrenum need not enquire by the oaths of good and lawful men in his bailiwick, but shall execute the said writ or writs in the same manner as is provided for the execution of writs of *Fieri-Facias,* against goods and lands, or of Sequestration.

SCHEDULE D.

(1) Form of affidavit for writ of Immediate Extent in chief.

(*Rule 13.*)

IN THE EXCHEQUER COURT OF CANADA.

(Full style of cause.)

I, A. B. (*insert residence and occupation*), make oath and say as follows:—

1. I am (*state if he is an officer of the Crown, and in what capacity and under what authority he is acting herein*).

2. That the said defendant is indebted to the Crown in the sum of $...., or thereabouts (*state here in what manner it arose, and that it is in danger of being lost; and it should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded or that an execution has issued against him. Where against a bond debtor to the Crown, the affidavit should contain a distinct, positive and unequivocal allegation of the breach of the condition of the bond, &c.*)

3. The defendant further says he verily believes that unless some method more speedy than the ordinary course of proceeding at law be had against the said defendant, , for the recovery of the sum of $, or thereabouts, the same is in danger of being lost.

Sworn, &c.

(2) Form of fiat or order for issue of an Immediate Extent.

IN THE EXCHEQUER COURT OF CANADA.

Before

The Honourable Mr. Justice

In Chambers.

(Style of cause.)

Upon hearing A. B. of Counsel for His Majesty the King, and upon hearing read the affidavit of C. D., let a writ or writs of Immediate Extent issue against the said defendant, for the recovery of the sum of $.

Dated at Ottawa, the day of A.D. 19 .

(3) Form of writ Immediate Extent.

(Full style of cause.)

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of

GREETING:

Whereas, by the affidavit of C. D., it appears that A. B. of is indebted to Us in the sum of $

lawful money of Canada, for which said sum of $ still remains due and unpaid to Us as by reference to the said affidavit filed in Our said Exchequer Court more fully appears.

Now We being willing to be satisfied the said sum of $ so due to Us with all the speed We can, as is just, do command you that you omit not by reason of any liberty, but enter the same and summon the said A. B. to appear in Our said Exchequer Court, at Ottawa, on the day of A.D. 19 , and that you diligently inquire what lands and tenements and of what yearly values that said A. B. now has in your bailiwick, and what goods and chattles, and of what sorts and prices, and what debts, credits, specialties and sums of money the said A. B., or any person or persons to his use or in trust for him now hath or have in your said bailiwick and that all and singular the said goods and chattles, lands and tenements, debts, credits, specialties and sums of money in whose hands soever the same now are, you diligently appraise and extend, and do take and seize the same into Our hands, there to remain until We shall be fully satisfied the said debt, according to the form of the Statute made for the recovery of such Our debts. And lest this Our command should not be fully executed, We further command and empower you by these presents to summon before you such persons as you shall think proper and carefully examine them in the premises, and that you distinctly and openly make appear to Our said Exchequer Court immediately (*unless a special day of return is mentioned in the fiat*) after the execution hereof, and in what manner you shall have executed this Our command, and that you then have there this writ ; provided that what goods and chattels you shall seize into Our hands, by virtue hereof, you do not sell or cause to be sold until We shall otherwise command you.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, this day of A.D. 19 .

By the warrant of

Mr. Justice

PATENTS OF INVENTION, COPYRIGHTS, TRADE-MARKS AND INDUSTRIAL DESIGNS.

INFRINGEMENT.

RULE 15.

Actions for infringement.

Any action or proceeding for the infringement of a Patent of Invention may be instituted by filing a statement of claim.

IMPEACHMENT OF LETTERS PATENT OF INVENTION.

RULE 16.

Action to impeach or annul Patent of Invention.

Any action or proceeding to impeach or annul any patent of invention may be instituted:—

(*a*) By Information in the name of the Attorney-General of Canada; or

(*b*) By a Statement of Claim filed by any person interested; or

(*c*) By a writ of *scire facias* as provided in the 35th section of *The Patent Act.*

RULE 17.

Certified copy Patent, petition, affidavit, specification and drawings to be filed.

With any Information, or Statement of Claim filed, or on issuing a writ of *Scire Facias,* to impeach or annul a patent of invention, there shall be filed, with the Registrar of the Court, a sealed and certified copy of the patent and of the petition, affidavit, specification and drawings relating thereto.

RULE 18.

Security for costs.

In any proceeding by Statement of Claim to impeach or annul a patent of invention, the plaintiff shall give security for the defendant's costs therein in the sum of one thousand dollars.

RULE 19.

Writ of Scire Facias.

A writ of *scire facias* to impeach or annul a patent of invention may be in the form 'E' in the Schedule hereto. It shall be tested of the day on which it is issued. It may be served in any manner in which an Information or a Statement of Claim may be served, and shall be returnable immediately after service thereof.

SCHEDULE E.

(*Rule 19.*)

(Writ of Scire Facias.)

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of the County of Carleton, or any other of Our Sheriffs in the Dominion of Canada.—GREETING:

Whereas We lately by Our letters patent sealed with the seal of Our Patent Office, in the City of Ottawa, in Our Dominion of Canada, and signed by the Honourable Our Commissioner of Patents (*or as the case may be*), and bearing date the day of A.D. 19 , and registered in Our said Patent Office, at Ottawa aforesaid, as No reciting that whereas A. B. (*residence and occupation*) had petitioned the Commissioner of Patents praying for the grant of a patent for an alleged new and useful (*as the case may be*) a description of which invention is contained in the specification of which a duplicate is thereunto attached and made an essential part thereof, and had elected his domicile at (*as the case may be*), and had also complied with the other requirements of 'The Patent Act,' ch. 69 of 'The Revised Statutes of Canada, 1906,' did by Our said letters patent, grant to the said A. B., his executors, administrators, legal representatives and assigns, for the period of years from the date thereof, the exclusive right, privilege and liberty of making, constructing and using and vending to others to be used in Our Dominion of Canada the said invention,—subject nevertheless to adjudication before any Court of competent jurisdiction, and to the conditions contained in the Act aforesaid.

And whereas (*set out assignments, if any*).

And whereas E. being desirous, for the reasons hereinafter mentioned, to impeach the recited letters patent bearing date the day of A.D. 19 , granted to the said A.B. (*if assignment,* and assigned to the said) as aforesaid, has obtained a sealed and certified copy thereof, and of the petition, affidavit, specification and drawings relating thereto, and has, in accordance with the provisions in that behalf contained in the said Act, filed the said sealed and certified copies of said letters patent, petition, affidavit, specification and drawings, in the office of the Registrar of Our Exchequer Court of Canada, and the said letters patent and documents aforesaid are now of record in the said Court.

(Then set out reasons for impeachment, as for example:)

And whereas We are given to understand that Our said letters patent bearing date the day of A.D. 19 , and numbered issued to the said A. B. (*if assigned,* and assigned to the said) as aforesaid, were and are contrary to the law, in this : that whereas the said A. B. did in the said petition state that he had invented a certain new and useful (*as the case may be*) not known or used by others before his invention thereof, as set forth in the said specification and drawings accompanying said petition.

And whereas the said A. B. in the said affidavit did swear that he verily believed that he was the inventor of the alleged new and useful (*as the case may be*) described and claimed in the said specification, and did swear that the several allegations contained in the said petition were respectively true and correct.

And whereas We are given to understand and be informed that the said A. B. did not invent the said alleged invention in the said petition and letters patent No. mentioned and claimed.

And also, &c., &c.

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

And We, being willing that what is just in the premises should be done, command you Our Sheriff of Our said County of Carleton or other Our said Sheriffs, that you give notice to

the said A. B. (*or as the case may be, if assigned*) that before Us in Our said Exchequer Court of Canada he be and appear within *fourteen days* from the service upon him of a copy of this writ, inclusive of the day of such service, to show if he has or knows anything to say for himself why the said letters patent No. as aforesaid so granted to him (*as the case may be*) ought not, for the reasons aforesaid, to be adjudged to be void, vacated, cancelled and disallowed, and further to do and receive those things which Our said Court shall consider right in that behalf, and that you return this writ immediately after the execution thereof, stating how you have executed the same, and the day of the execution thereof.

WITNESS the Honourable W. G. P. Cassels, Judge of Our Exchequer Court of Canada, at Ottawa, the day of in the year of Our Lord one thousand nine hundred and in the year of Our reign.

L. A. A.,
Registrar.

RULE 20.

Appearance within fourteen days.

An appearance shall be entered for the defendant within *fourteen days* from the day of service of the writ, inclusive of the day of service.

RULE 21.

If no appearance, judgment may be given.

If the defendant does not appear according to the exigency of the writ, the Court may, on motion therefor, give such judgment, as upon the writ, the plaintiff is considered to be entitled to.

RULE 22.

If appearance before judgment signed, defendant served with statement of claim.

If the defendant appears before judgment is signed, he shall be served with a Statement of Claim, and thereafter the action shall proceed in accordance with the practice of the Court in proceedings commenced by a Statement of Claim.

RULE 23.

Right to begin.

On the trial of any action to impeach or annul a patent of invention the defendant shall be entitled to begin and give evidence in support of the patent, and if the plaintiff gives evidence impeaching the validity of the patent the defendant shall be entitled to reply.

PARTICULARS IN ACTION TO IMPEACH A PATENT, OR FOR INFRINGEMENT.

RULE 24.

Particulars with information or statement of claim.

With an Information or Statement of Claim to impeach or annul a patent the plaintiff must deliver particulars of the objections on which he means to rely.

RULE 25.

Particulars with action for infringement.

In an action for infringement of a patent the plaintiff must deliver with his Statement of Claim particulars of the breaches complained of.

RULE 26.

Particulars with statement in defence.

The defendant must deliver with his Statement in defence, particulars of any objections on which he relies in support thereof.

RULE 27.

What particulars must be delivered by defendant if validity of patent disputed.

If the defendant disputes the validity of the patent, the particulars delivered by him must state on what ground he disputes it, and if one of those grounds is want of novelty, he must state the time and place of the previous publication or user alleged by him.

RULE 28.

Further particulars.

Further and better particulars may be ordered to be delivered as the Court or a Judge may see fit.

RULE 29.

Amendment of particulars.

Particulars delivered may be from time to time amended by leave of the Court or a Judge.

RULE 30.

No evidence of objection or infringement of which no particulars, except by leave.

At the hearing no evidence shall, except by leave of the Court or a Judge, be admitted in proof of any allegations of which particulars are not so delivered.

RULE 31.

Costs when particulars delivered not proven.

The Court or a Judge may disallow any costs of, or connected with, the particulars delivered by either party, if it appears that such particulars were unnecessary or have not been proven; and the Court or Judge may, notwithstanding the result of the action, order either the plaintiff or the defendant, whether or not successful in the action, to pay to the opposite party any costs occasioned thereby.

RULE 32.

Order for injunction, inspection or account in action for infringement.

In an action for infringement of a patent the Court or a Judge may, on the application of either party, make such order for an injunction, inspection or account, and impose such terms and give such directions respecting the same and the proceedings thereon as the Court or Judge may see fit.

COPYRIGHTS, TRADE-MARKS AND INDUSTRIAL DESIGNS.

RULE 33.

Proceedings for registration of copyright, trade-mark or industrial designs or to expunge, vary or rectify same may be instituted by filing petition.

Any proceeding in the Exchequer Court for the registration of any copyright, trade-mark or industrial design, or to have any entry in any register of copyrights, trade-marks or industrial designs made, expunged, varied or rectified, may be instituted by filing a petition in the Court.

RULE 34.

Notice of filing petition published in 'Canada Gazette.'

A notice of the filing of the petition, giving the object of the application and stating that any person desiring to oppose it must, within *fourteen days* after the last insertion of the notice in the *Canada Gazette*, file a statement of his objections with the Registrar of the Court and serve a copy thereof upon the petitioner, shall be published in four successive issues of the *Canada Gazette*.

RULE 35.

Upon whom copy of petition and notice to be served.

A copy of such petition and notice shall be served upon the Minister of Agriculture and upon any person known to the petitioner to be interested and to be opposed to the application.

RULE 36.

If application not opposed, may move for order upon petition.

If no one appears to oppose the application, the petitioner may file with the Registrar an affidavit in support of the application, and upon *ten days* notice to the Minister of Agriculture, and upon serving him with a copy of any affidavit so filed, may move the Court for such order as upon the petition and affidavit he may be entitled to.

RULE 37.

Statement of objections to be filed fourteen days after last publication.

If any person appears to oppose the application he shall, within *fourteen* days after the last publication of the said notice in the *Canada Gazette,* file with the Registrar, and serve upon the petitioner, a statement of his objections to the application.

RULE 38.

Application to expunge, vary or rectify may be joined in action for infringement—By plaintiff in statement of claim—By defendant by counter-claim.

An application to have any entry, in any register of copyrights, trade-marks or industrial designs, expunged, varied or rectified, may be joined with or made in an action for infringement :

(1) By the Plaintiff in his statement of claim, where such entry has been made at the instance of the Defendant, or someone through whom he claims, and the Plaintiff is aggrieved thereby ; or

(2) By the Defendant by counter-claim, where such entry has been made at the instance of the Plaintiff, or some one through whom he claims, and the Defendant is aggrieved by such entry.

RULE 39.

When reply to be filed and served.

The petitioner may, within *fifteen days after* service of the statement of objections, file and serve a reply thereto; and thereupon any issue or issues raised may be set down for trial or hearing in accordance with the practice of the Court.

RULE 40.

To whom notice of trial to be given.

Notice of trial shall be given as well to the Minister of Agriculture as to the opposite party.

GENERAL.

RULE 41.

Practice and procedure in Patent, Copyright, Trade-mark and Industrial Design cases not provided for by any Act of Parliament or by these rules.

In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade-mark or industrial design, the practice and procedure shall, in any matter not provided for by any Act of the Parliament of Canada or by the Rules of this Court (but subject always thereto) conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's High Court of Justice in England.

SCHEMES OF ARRANGEMENT UNDER THE RAILWAY ACT (R.S. 1906, ch. 37, sec. 365.)

SCHEMES OF ARRANGEMENT—PREPARATION AND FILING OF SCHEME.

RULE 42.

How entitled.

Every scheme to be filed in this Court, pursuant to *The Railway Act,* R.S., 1906, chapter 37, section 365, and every declaration, affidavit, petition, summons, notice or other proceeding relative thereto shall be entitled in the Court, and in the matter of the company in question.

RULE 43.

Scheme to be printed.

Every scheme to be filed as aforesaid shall be printed in the manner prescribed for the printing of pleadings and other proceedings in this Court.

RULE 44.

How to be filed.

Every such scheme shall be filed in the office of the Registrar of the Court, and the declaration and affidavit required by

section 365 of the said Act shall be annexed to such scheme and filed at the same time therewith, and the Registrar shall not file any such scheme, unless accompanied by such declaration and affidavit.

RULE 45.

How to be endorsed.

There shall be endorsed upon every scheme so filed as aforesaid the name and address of the solicitor and Ottawa agent (if any) of the company.

RULE 46.

Certified copy of written scheme to be obtained for printing.

Where a written scheme is filed, the person bringing the same to be filed shall, at the same time, leave with the Registrar a fair copy thereof, and the Registrar shall examine such copy with the scheme filed, and return it so examined with a certificate thereon that it is correct and proper to be printed.

RULE 47.

Printed copy of written scheme to be filed within five days.

The directors shall cause the scheme to be printed from such certified copy, and before the expiration of five days from the filing of the scheme, shall leave a printed copy thereof with the Registrar, with a written certificate thereon by the solicitor of the company that such print is a true copy of the scheme so certified, and after the expiration of such five days no evidence of the scheme having been filed shall be admissible until such printed copy thereof has been filed.

COPIES OF SCHEME.

RULE 48.

Five days after filing of scheme, any person may demand copy thereof.

At any time after the expiration of five days from the filing of a scheme, whether printed or written, any person may demand, by a requisition in writing, delivered at the principal office of the company, or at the office of their solicitor, or of his

Ottawa agent (if any), any number, not exceeding ten, of printed copies of the scheme, and the copies so required shall on such demand be delivered to the person so requiring the same, with a written certificate thereon by the solicitor of the company that they are true copies of the scheme filed.

RULE 49.

Cost of such copy.

Every such copy is on delivery to be paid for at the rate of one cent per folio, except in the case provided for by the 369th section of the said Act, in which case it is to be paid for at the rate of ten cents for each copy as therein provided.

NOTICE OF FILING SCHEME.

RULE 50.

How notice to be signed and what it shall contain.

The notice to be published in the *Canada Gazette*, of the filing of the scheme shall be signed by the solicitor of the company, or his Ottawa agent, and shall state whether the scheme contains any provisions for settling and defining any rights of shareholders among themselves, or for raising any and what amount of share or loan capital, and which, and shall set forth the name and address of the solicitor and Ottawa agent (if any) of the company, and may be in the form of Schedule F hereto, with such variations as the circumstances of the case may require.

SCHEDULE F.

Advertisement of Scheme.

(*Rule No. 50.*)

IN THE EXCHEQUER OF CANADA.

IN THE MATTER OF
The Railway Company.

NOTICE is hereby given, that on the day of 19 , a scheme of arrangement between the above named Company and their creditors (*state here whether the scheme contains or not any provisions for settling the rights of any and what classes of shareholders as among themselves, or for raising additional share or loan capi-*

cal, and which, and to what extent) was filed in the Exchequer Court of Canada, and a copy of the said scheme will be furnished to any person requiring the same by the undersigned, or at the office of the company at on payment of the prescribed charges for the same.

A. and B. of (Agents for C. and D. of)
Solicitors for the Company.

RULE 51.

Certificate of filing.

When a scheme has been filed the Registrar shall, at the request of any person, give and sign a certificate of the filing thereof, or of the filing of a printed copy thereof; and such certificate may be in the form of schedule G hereto, with such variations as the circumstances of the case may require.

SCHEDULE G.

Certificate of Filing Scheme.

(*Rule No. 51.*)

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF
The Railway Company.

I DO HEREBY CERTIFY that a (*printed or written, as the case may be*) scheme of arrangement between the above named company and their creditors, under 'The Railway Act,' R.S., 1906, ch. 37, section 365, was, on the day of 19 , duly filed in the Exchequer Court of Canada, together with the declaration and affidavit required by the said statute (and that a printed copy of such scheme was on the day of 19 , duly filed in the said Court pursuant to the general order of Court made in that behalf.)

Dated, &c. L. A. A.,
Registrar.

RULE 52.

Restraining actions after scheme filed.

No order under section 365 of the said Act for restraining an action against the company, by reason of a scheme having been filed, shall be made, except on an undertaking by the com-

pany to be answerable in such damages (if any) as the Court or Judge may think fit to award in the event of the plaintiff being ultimately held entitled to proceed with such action; and on such further terms (if any) as the Court or Judge may think reasonable.

RULE 53.

Petition for confirmation of scheme.

Every petition for confirmation of a scheme shall be presented by the directors or the major part of them. Such petition shall not set forth the scheme, but only refer thereto; and may be in the form given in the Schedule H hereto, with such variations as the circumstances of the case may require.

SCHEDULE H.

Petition to confirm scheme.

(*Rule No. 53.*)

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

The Railway Company.

TO THIS HONOURABLE COURT :

The humble petition of directors of the above named company,

Sheweth:

That on the day of 19 , the directors of the above named company filed in this Court a scheme of arrangement between the above named company and their creditors.

Your petitioners therefore humbly pray that the scheme so filed as aforesaid may be confirmed by the order of this honourable Court. And your petitioners will ever pray, &c.

RULE 54.

Petitioners to be treated as representing company, &c.

The petitioners presenting such petition as aforesaid, shall, for the purposes of such petition, be treated as representing the company, and the company shall not otherwise appear on the hearing of such petition.

RULE 55.

How day for hearing appointed.

When any petition to confirm a scheme is presented, the directors, or the major part of them, shall apply to the Judge in Chambers to appoint the day on which the same may come on for hearing, such day not to be before the expiration of three weeks from the time of such application, and shall cause a notice of the presentation thereof to be inserted in the *Canada Gazette* and in two newspapers circulating in the province or district wherein the principal office of the company is situate, as the Judge may direct. Such notice shall state the day on which the scheme is filed, and the day on which the petition was presented and the day on which the same is directed to come on for hearing, and the name and address of the solicitor and Ottawa agent (if any) of the company, and may be in the form given in Schedule I hereto, with such variations as the circumstances of the case may require.

SCHEDULE I.

Advertisement of a Petition to confirm a Scheme.

(*Rule No. 55.*)

IN THE EXCHEQUER COURT OF CANADA.

IN THE MATTER OF

The Railway Company.

NOTICE is hereby given that a petition was on the day of 19 , presented to The Exchequer Court of Canada by the directors of the above-named company, praying for the confirmation of a scheme of arrangement between the said company and their creditors, filed in the said Court on the day of 19 , and that the said petition is directed to be heard on the day of 19 , and any person whose interests are affected by such scheme, and who may be desirous to oppose the making of an order for the confirmation thereof under the provisions of 'The Railway Act,' R.S., 1906, ch. 37, should enter an appearance and file a printed statement of his objections thereto at the office of the Registrar of the said Court on or before the day of 19 , and appear by himself or counsel at the hearing of the said petition. And a copy of the scheme will be furnished to any person requiring the

same by the undersigned, or at the office of the company at , on payment of the prescribed charge for the same.

A. and B. of (Agents for C. and D. of),
Solicitors for the petitioners.

RULE 56.

When petition to come on for hearing.

The petition shall not come on to be heard until at least twenty-one clear days after the last insertion of such notice as aforesaid. Such notice shall, at least once in every week which shall elapse between the time of the first insertion thereof and the day on which such petition is directed to come on for hearing, be again inserted in the *Canada Gazette* and in such two newspapers as aforesaid on such day or days as the Judge may direct.

RULE 57.

Appearance and objections to be filed seven days before hearing.

Any creditor, shareholder, or other party whose rights or interests are affected by such scheme, and who shall be desirous to be heard in opposition to the confirmation thereof, shall, at least seven clear days before the day on which the petition for confirmation is directed to come on for hearing, enter an appearance at the office of the Registrar and file a printed statement of his objections thereto, and, in default of so doing, he shall not be entitled to be heard, unless by the special leave of the Court or a Judge.

RULE 58.

Any person appearing deemed submitting to jurisdiction of Court as to costs.

Any person so entering an appearance shall be deemed to have submitted himself to the jurisdiction of the Court as to the payment of costs and otherwise.

CONFIRMATION OF SCHEME.

RULE 59.

Scheme not deemed confirmed until enrolled.

No scheme shall be deemed to have been confirmed by the Court until such scheme and the order for confirming the same have been enrolled.

RULE 60.

What procedure to take when either confirmation of scheme is not opposed, or when it is opposed.

If the order for the confirmation of a scheme is not opposed, the scheme and such order may be enrolled forthwith. If the order is opposed, notice of the order shall, at least once in every week which shall elapse between the pronouncing of such order and the expiration of thirty days from the pronouncing thereof, be inserted in the *Canada Gazette* and two such newspapers as shall have been appointed by the Judge for the insertion of advertisements under the 55th rule hereof. And such scheme and order shall not be enrolled until the expiration of thirty days from the day of the order having been pronounced, nor until the *Canada Gazette* and the newspapers containing such notices are produced to the Registrar.

GENERAL PROVISIONS.

RULE 61.

How orders drawn up.

All orders made in Chambers, under *The Railway Act,* R.S., 1906, ch. 37, shall be drawn up in Chambers, unless specially directed to be drawn up by the Registrar, and shall be entered in the same manner as other orders drawn up in Chambers.

RULE 62.

Mode of practice and procedure in cases not provided for by 'The Railway Act' and these rules respecting said schemes.

In cases not expressly provided for by the said Act or by these rules, the practice of the Court shall, so far as applicable and not inconsistent with the said Act or these rules, apply to all proceedings in the Court under the said Act.

PRINTING PLEADINGS.

RULE 63.

What pleadings to be written and what printed.

Every pleading which shall contain less than three folios of one hundred words each (every figure being counted as one

word) may be either printed or written, or partly printed and partly written, and every other pleading shall be printed.

E. O. xix. R. 5.

RULE 64.

How to be printed.

Pleadings and other proceedings required to be printed, shall be printed on foolscap size paper of good quality, in small pica type leaded, with an inner margin about three-quarters of an inch wide, and an outer margin about two inches wide.

RULE 65.

Written copies may be filed in case of urgency.

In any case which may appear to the Registrar to be one of urgency he may permit a written copy of a pleading to be filed, upon the party so filing the same giving a written undertaking to file a printed copy within *five days* thereafter.

RULE 66.

Printed copy to be furnished opposite party.

The party printing any pleading or other proceeding shall, on demand in writing, furnish to any other party, his Attorney or Solicitor, any number of printed copies, not exceeding ten, upon payment therefor at the rate of five cents per folio for one copy, and three cents per folio for every other copy.

SERVICE OF INFORMATION, STATEMENT OF CLAIM OR PETITION OF RIGHT.

RULE 67.

Petitions of Right, how to be served.

Petitions of Right are to be left at the office of His Majesty's Attorney-General, and served as prescribed by the statute in such case made and provided.

RULE 68.

Office copy of information or statement of claim to be served—How to be endorsed.

In suits instituted by information, or by filing a statement of claim, no writ or process to appear, plead or answer, shall

issue; but an office copy of the information or statement of claim duly certified by the Registrar, shall be served on the defendant, with an indorsement thereon in the form or to the effect set forth in Schedule J to these orders appended.

SCHEDULE J.

(*Rule 68.*)

Indorsement on information or statement of claim.

Notice to the defendant within named.

You are required to file with the Registrar of the Exchequer Court of Canada, at his office, in the City of Ottawa, your plea, answer or exception, or otherwise make your defence to the within information (*or* statement of claim, *as the case may be*) within four weeks from the service hereof. If you fail to file your plea, answer or exception, or otherwise make your defence within the time above limited, you are to be subject to have such judgment, decree, or order made against you as the Court may think just upon the informant's (or plaintiff's) own showing; and if this notice is served upon you personally you will not be entitled to any further notice of the further proceedings in the cause.

NOTE.—This information (*or* statement of claim) is filed by A. B., &c., His Majesty's Attorney-General of Canada, on behalf of His Majesty (or by of the City of , Solicitor for the within named plaintiff).

RULE 69.

Service of office copy information or statement of claim to be personal; need not exhibit original.

Service upon a defendant of an office copy of the information or statement of claim is to be effected personally, except in the cases hereinafter otherwise provided for; but it shall not be necessary to produce the original information, statement of claim or petition of right at the time of service.

RULE 70.

Service upon a Corporation.

Service of an information, statement of claim or petition of right, writ, summons, or other process, notice, proceeding or document required to be served, within the jurisdiction of the

Court, upon a Corporation aggregate is to be effected by personal service of an office copy thereof on the Warden, Reeve, Mayor, or Clerk in case of a Municipal Corporation, or on the President, Manager or other head officer, or the Cashier, Treasurer or Secretary at the head office, or at any branch or agency in the Dominion of Canada, or on any other person discharging the like duties, in the case of any other corporation.

Taylor's C. Chy. O. 91.

RULE 71.

Service upon partners.

When partners are sued in respect of any partnership liability, the information, statement of claim or petition of right may be served either upon any one or more of the partners, or at the principal place (within the jurisdiction) of the business of the partnership upon any person having, at the time of service, the control or management of the partnership business there; and such service shall be deemed good service upon all the partners composing the firm.

E. O. ix., R. 3.

SUBSTITUTIONAL SERVICE.

RULE 72.

Substitutional service.

If it be made to appear to the Court or to a Judge, that from any cause prompt personal service cannot be effected, the Court or Judge may make such order for substituted or other service as may seem just.

SERVICE ON PARTICULAR DEFENDANTS.

RULE 73.

On husband and wife.

When husband and wife are both defendants, service on the husband shall be deemed good service on the wife; but the Court or a Judge may order that the wife shall be served with or without service on the husband.

E. O. ix., R. 2.

RULE 74.

On infant.

When an infant is defendant to an information, statement of claim, or is required to be served with a copy of the petition

in an action instituted by petition of right, service on his or her father or guardian or tutor, or, if the father be dead and there is no guardian or tutor, then upon the person with whom the infant resides, or under whose care he or she is, shall, unless the Court or a Judge otherwise orders, be deemed good service on the infant ; provided that the Court or a Judge may order that service made or to be made on the infant shall be deemed good service.

E. O. ix., R. 4.

RULE 75.

On lunatic.

When a lunatic, so found by inquisition, or (in the Province of Quebec)a lunatic or person of unsound mind, or one who, foi other causes, has been judicially interdicted, or subjected to judicial advisers, is a defendant to any suit, service of the information, petition of right or statement of claim on the committee of the lunatic, the curator of the interdicted person, or any one of the judicial advisors shall be deemed good service.

RULE 76.

On lunatic not interdicted, &c.

When a person of unsound mind, not so found by inquisition or judicially interdicted, or subjected to judicial advisors, is a defendant to any suit or is to be served, service of the information, petition of right or statement of claim on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless the Court or a Judge otherwise orders, be deemed good service on such defendant or person of unsound mind.

E. O. ix., R. 5.

PROCEEDINGS IN REM.

RULE 77.

Service of information in proceedings in rem.

In any proceeding *in rem* for the condemnation of any thing, the information shall be served by posting up one office copy thereof in the office of the Registrar of the Court, and by taking one of the following steps, that is to say :—

(*a.*) If such thing is in the custody of any Collector of Customs or of Inland Revenue, or other officer or person for

the Crown, one office copy of such information shall be posted up in the office of such collector, officer or person, as the case may be, and another such copy thereof ;

(1) On the door or some conspicuous part of the warehouse or building in which such thing is stored or kept ; or,

(2) In the case of a vessel, railway carriage, car, or other thing not so stored or kept, on some conspicuous part thereof ;

(*b.*) If such thing has been delivered up to the owner or any person for him an office copy of the information shall be served upon such owner or person in like manner as in other cases ;

(*c.*) If such thing has been sold under any law authorizing such sale, an office copy of the information shall be posted up in the office of the collector, officer, or person in whose custody the same was at the time of such sale.

RULE 78.

Service of information in proceedings in rem in cases not provided for in preceding rule.

In any case not provided for in the rule next preceding, the Judge may make such order for service as to him seems just.

RULE 79.

When person, after commencement of proceedings for condemnation of the res, desires to claim the same.

Every person who, after proceedings for the condemnation of any such thing have been commenced, desires to claim the same shall :

(*a.*) Give security to the satisfaction of the Judge by a bond in a penal sum of not less than four hundred dollars, or by a deposit of a sum of money not less than such amount, for the payment of the costs of the proceedings for condemnation; and

(*b.*) File a statement of his claim with the Registrar of the Court, and serve an office copy thereof upon His Majesty's Attorney-General of Canada, and such statement of claim shall disclose the name, residence and occupation or calling of the person making it, and be accompanied by an affidavit of the claimant, or of his agent having knowledge of the facts, setting forth the nature of the claimant's title to such thing.

RULE 80.

In default of security judgment may be obtained.

If within one month after the service of the information security for costs is not given and a claim made, as hereinbefore mentioned, the Attorney-General may set down the action on motion for judgment, and such judgment shall be given upon the information as the Court or Judge considers the Attorney-General entitled to.

RULE 81.

Service out of jurisdiction.

When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right, or statement of claim be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer or exception, or otherwise make his defence according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

RULE 82.

Service by advertisement in case of a defendant not to be found.

In case it appears to the Court or a Judge by sufficient evidence that a defendant cannot be found, after due and diligent search, to be served with an office copy of the information, petition of right, or statement of claim, the Court or a Judge may order the defendant to file his plea, answer or exception, or otherwise make his defence according to the procedure applicable to the case, within a time to be limited in the order, and may direct a copy of the order together with a notice to the effect set forth in Schedule K to these orders appended, to be published in such manner as the Court or a Judge thinks fit; and in case the defendant does not file any plea, answer or exception, or otherwise make his defence within the time limited by such order, the Court or a Judge, upon

proof that advertisements have been duly published according to the requirements of the order, may direct that the case shall thereafter proceed as though the defendant had filed a plea, answer or defence traversing or denying the allegations contained in the information, petition of right or statement of claim, and the action shall thereafter proceed accordingly.

SCHEDULE K.

(*Rule 82.*)

Advertisement in case a defendant is not to be found.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff ;

AND

C. D.,

Defendant.

(Copy order)

To the defendant C. D.,

Take notice that unless you file your plea, answer, or exception, or otherwise make your defence pursuant to the requirements of the above order, the Court or a Judge may direct that the case shall thereafter proceed as though you had filed a plea, answer or defence traversing or denying the allegations contained in the information (petition of right or statement of claim, *as the case may be*) filed in this cause, and the action will thereafter proceed accordingly.

RULE 83.

Judge may also order copy of information, &c., and copy of order to be mailed.

In any case provided for by the last preceding rule, the Court or a Judge may, in addition to the advertisement therein mentioned, direct that an office copy of the information, petition of right or statement of claim, and an office copy of the order shall be forthwith mailed, with the postage prepaid, to the address of the defendant or person to be served, at such place as the Court or a Judge may direct, in which case proof by affidavit, of due compliance with such requirement, shall be produced before any order is made permitting the plaintiff to proceed as provided for by the next preceding rule.

NO APPEARANCE REQUIRED—PLEADINGS.

RULE 84.

No appearance required—How pleadings are to be filed.

No appearance to any information, petition of right or statement of claim shall be required except when otherwise provided by these rules; but a defendant who is served with an information, petition of right or statement of claim, shall file his statement in defence or answer to the information, petition of right or statement of claim conformably to the procedure and mode of pleading hereby provided for as the first step in his defence.

RULE 85.

Time for filing statement in defence to information and statement of claim.

The statement in defence or answer shall be filed within four weeks after the service of the information or statement of claim, or within such further extended time as the Court or a Judge may order.

FORM OF PLEADING IN PETITIONS OF RIGHT.

RULE 86.

Petition of Right, pleadings in.

In suits by Petition of Right the pleadings subsequent to the Petition shall be regulated by and conform to the procedure and mode of pleading hereinafter prescribed.

RULE 87.

Time for filing defence to petition of right.

The Attorney-General shall file his statement in defence or answer to a petition of right within four weeks after an office copy of the petition, with the indorsement thereon required by the statute in that behalf made, shall have been left at his office in the City of Ottawa.

PLEADING GENERALLY.

RULE 88.

All pleadings to be concise statements of material facts, but not of evidence, divided into numbered paragraphs—Dates, sums and numbers to be in figures—Signature of Counsel.

Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies, but not the evidence; such statement being divided into paragraphs, numbered consecutively, and each paragraph containing, as nearly as may be, a separate allegation. Dates, sums and numbers shall be expressed in figures and not in words. Signature of Counsel shall not be necessary, except as regards informations, petitions of right and statements of claim. Forms similar to those in Schedule L hereto may be used.

E. O. xix., R. 4.

SCHEDULE L.

FORMS OF PLEADING.

(1) Form of information of intrusion.

(*Rule 88.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

HIS MAJESTY THE KING, on the information of the Attorney-General of Canada,

Plaintiff;

AND

JOHN SMITH,

Defendant.

Filed day of A.D. 19 .

To this Honourable Court:

The information of the Honourable His Majesty's Attorney-General of Canada, on behalf of His Majesty.

SHOWETH AS FOLLOWS:

1. That certain lands and premises situate in the city of Ottawa, in the county of Carleton, Province of Ontario, and being, &c., on the first day of October, in the year of our Lord,

19 , and long before were and still ought to be in the hands and possession of His Majesty the King.

2. That the Defendant on the said first day of October, in the year aforesaid in and upon the possession of His Majesty the King, of and in the premises, entered, intruded and made entry, and the issues and profits thereof coming received and had and yet doth receive and have to his own use.

CLAIM.

The Attorney-General, on behalf of His Majesty the King, claims as follows :—

1. Possession of the said lands and premises.
2. $ for the issues and profits of the said lands and premises from the said first day of October, A.D. 19 , till possession shall be given.

(Signed) 19 ,

.....

(2) Form of Qui Tam Action.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., who sues as well for His Majesty the King as for himself,

Plaintiff ;

AND

C. D.,

Defendant.

Filed day of A.D. 19 .

STATEMENT OF CLAIM.

1. By section of the Act passed by the Parliament of Canada in the year of His Majesty Edward the Seventh's reign, intituled: 'An Act , it is enacted, among others things, as follows: (*Set forth the material part of the Section.*)

2. *Add any other grounds.*)

CLAIM

The Plaintiff claims :

1. Judgment against the said Defendant for the said sum of , and costs of suit.

(3) STATEMENT IN DEFENCE.

(Title.)

1. The Defendant, in answer to the Plaintiff's statement of claim, says as follows :—

1. He admits the statements in paragraphs 1, 2 and 3 (*as the case may be*).

2. (*Add any other grounds of defence—each one to be stated concisely in a separate paragraph.*)

3. The defendant therefore, &c., &c.

Dated at the day of A.D. 19 .

Solicitor for Defendant.

(4) REPLY.

(Title.)

1. The Plaintiff joins issue upon the Defendant's statement in defence.

(*Add any other grounds of reply in concise separate paragraphs.*)

RULE 89.

A copy of every pleading to be served on opposite party.

Every pleading is to be filed, and a copy thereof is to be served on the opposite party or on his Attorney or Solicitor, if he has one, or left at the office of the Attorney-General, as the case may be.

RULE 90.

How pleadings to show date of filing and be entitled.

Every pleading shall on its face be entitled of the day and year on which it is filed, and shall also be entitled in the cause.

RULE 91.

No plea or defence to be pleaded in abatement.

No plea or defence shall be pleaded in abatement.

RULE 92.

When an allegation of fact in a pleading is to be taken as admitted.

Every allegation of fact in any pleading in an action, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be

taken to be admitted, except as against an infant, lunatic, person of unsound mind not so found by inquisition, or other person judicially incapacitated.

RULE 93.

Every party must allege all facts on which he means to rely—and all grounds of defence and reply which might take opposite party by surprise, or raise new issues.

Each party in any pleading, not being an information, petition of right, or statement of claim, must allege all such facts not appearing in the previous pleadings as he means to rely on, and must raise all such grounds of defence or reply, as the case may be, as if not raised on the pleadings would be likely to take the opposite party by surprise, or would raise new issues of fact not arising out of the pleadings.

E. O. xix., R. 18.

RULE 94.

No pleadings to be inconsistent with previous pleadings of same party.

No pleadings shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

RULE 95.

Allegations of fact must not be denied generally.

It shall not be sufficient for a defendant in his defence to deny generally the facts alleged by the information, petition of right or statement of claim, but he must deal specifically with each allegation of fact of which he does not admit the truth.

E. O. xix., R. 20.

RULE 96.

Issue may be joined on defence by reply—Effect of joinder of issue.

The Attorney-General, petitioner or plaintiff by his reply may join issue upon the defence, and each party in his pleading, if any, subsequent to reply, may join issue upon the pre-

vious pleading. Such joinder of issue shall operate as a denial of every material allegation of fact in the pleading upon which issue is joined, but it may except any facts which the party may be willing to admit, and shall then operate as a denial of the facts not so admitted.

E. O. xix., R. 21.

RULE 97.

Allegations not to be denied evasively.

When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. And when a matter of fact is alleged with divers circumstances, it shall not be sufficient to deny it as alleged along with those circumstances, but a fair and substantial answer must be given.

E. O. xix., R. 22

RULE 98.

Sufficient to state effect of document.

Whenever the contents of any document are material it shall be sufficient in any pleading to state the effect thereof as briefly as possible without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

E. O. xix., R. 24.

RULE 99.

Sufficient to allege notic as a fact.

Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact unless the form or precise terms of such notice be material.

E. O. xix., R. 26.

RULE 100.

Sufficient to allege contract arising from letters or conversations as a fact—and contracts arising therefrom may be stated in the alternative.

Wherever any contract, or contractual relation between any persons, does not arise from an express agreement, but is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to

such letters, conversations, or circumstances, without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one, as to be implied from such circumstances, he may state the same in the alternative.

E. O. xix., R. 27.

RULE 101.

Not necessary for party to allege matters of fact which law presumes in his favour.

Neither party need in any pleading allege any matter of fact which the law presumes in his favour, or as to which the burden of proof lies upon the other side, unless the same has first been specifically denied.

E. O. xix., R. 28.

PLEADING MATTERS ARISING PENDING THE ACTION.

RULE 102.

Pleading matters arising pending the action, by defendant before delivering defence or time for its delivery expired.

Any ground of defence which has arisen after action brought, but before the defendant has delivered his statement in defence, and before the time limited for his so doing has expired, may be pleaded by the defendant in his statement in defence, either alone or together with other grounds of defence.

E. O. xx., R. 1.

RULE 103.

After delivery of defence or time for its delivery expired.

Where any ground of defence arises after the defendant has delivered a statement in defence, or after the time limited for his doing so has expired, the defendant may, within *fourteen days* after such ground of defence has arisen, and by leave of the Court or a Judge, deliver a further defence setting forth the same.

E.O. xx., R. 2.

RULE 104.

On confessing defence arising after commencement of action plaintiff may sign judgment for costs.

Whenever any defendant, in his statement in defence, or in any further statement in defence as in the last rule men-

tioned alleges any ground of defence which has arisen after the commencement of the action, the Attorney-General, petitioner or plaintiff may deliver an admission of such defence, which admission may be in the form in Schedule M hereto, with such variations as circumstances may require, and he may thereupon sign judgment for his costs up to the time of the pleading of such defence, unless the Court or a Judge shall, either before or after the delivery of such admission, otherwise order.

E. O. XX., R. 3

SCHEDULE M.

FORM OF ADMISSION OF DEFENCE.

(*Rule 104.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff ;

AND

C. D.,

Defendant.

The informant (or Plaintiff) confesses the defence stated in the paragraph of the Defendant's statement in defence (*or*, of the Defendant's further statement in defence).

OFFER TO SUFFER JUDGMENT BY DEFAULT.

RULE 105.

Offer by defendant to suffer judgment for specific amount.

If the defendant in any action files in the office of the Registrar an offer and consent in writing, signed by himself or his attorney of record, to suffer judgment by default, and that judgment shall be rendered against him for a sum by him specified in the said writing, the same shall be entered of record, together with the time at which it was tendered, and the plaintiff or his attorney may, at any time within fifteen days after he has received notice of such offer and consent, file a memorandum in writing of his acceptance of judgment for the sum so offered, and judgment may be signed accordingly with costs; or, if after such notice, the Judge, for good cause,

grants the plaintiff a further time to elect, then the latter may signify his acceptance as aforesaid at any time before the expiration of the time so allowed, and judgment may be rendered upon such acceptance as if the acceptance had been within fifteen days as aforesaid.

Con. S. N. B. 255.

RULE 106.

Effect of offer as to costs.

If in the final disposition of any such action, wherein such offer and consent have been made by the defendant, the plaintiff does not recover a larger sum than the one so offered, not including interest from the date of such offer, the defendant, whatever the result of the action, shall be entitled to his costs by him incurred after the date of such offer.

Con. S. N. B. 256.

RULE 107.

Such offer or consent, if not accepted, shall not be evidence against the party making the same.

No such offer or consent made, as above mentioned, which has not been accepted shall be evidence against the party making the same, either in any subsequent proceeding in the action in which such offer is made, or in any other action or suit.

Con. S. N. B., 256.

STATEMENT IN DEFENCE.

RULE 108.

First pleading to be called 'Statement in defence,' when to be filed.

The first pleading by a defendant is to be termed the statement in defence, and it shall be filed within the time hereinbefore or by the said Petition of Right Act prescribed, and a copy of it shall also be served as hereinbefore provided for pleadings generally.

DISCONTINUANCE.

RULE 109.

Discontinuance.

The Attorney-General, petitioner or plaintiff may, at any time before receipt of the defendant's statement in defence, or

after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing, wholly discontinue his action or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay the defendant's costs of the action, or if the action be not wholly discontinued, the defendant's costs occasioned by the matter so withdrawn. Such costs shall be taxed, and such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this Rule otherwise provided, it shall not be competent for the Attorney-General, petitioner or plaintiff to withdraw the Record or discontinue the action without leave of the Court or a Judge, but the Court or a Judge may, before or at or after the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise as may seem fit, order the action to be discontinued, or any part of the alleged cause of complaint struck out. The Court or a Judge may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

REPLY AND SUBSEQUENT PLEADINGS.

RULE 110.

The reply.

The pleading of the Attorney-General, petitioner or plaintiff in answer to the defence shall be called the reply.

RULE 111.

When to be filed and served.

The Attorney-General, petitioner or plaintiff shall file and serve his reply, if any, within fourteen days after the defence or the last of the defences have been served, unless the time shall be extended by the Court or a Judge.

E. O. xxiv., R. 1.

RULE 112.

No pleading subsequent to reply except joinder, without order of Judge.

No pleading subsequent to reply other than a joinder of issue shall be pleaded without leave of the Court or a Judge, and then upon such terms as the Court or Judge shall think fit.

E. O. xxiv., R. 2.

RULE 113.

Time for delivery of pleadings subsequent to reply.

Subject to the last preceding Rule, every pleading subsequent to reply shall be filed and served within fourteen days after the service of the previous pleading, unless the time shall be extended by the Court or a Judge.

RULE 114.

Default in replying within time limited—Effect of.

If the Attorney-General, petitioner or plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of facts in the pleading last delivered shall be deemed to have been denied and put in issue.

RULE 115.

Close of pleadings.

As soon as either party has joined issue upon any pleading of the opposite party simply without any further or other pleading thereto, the pleadings as between such parties shall be deemed to be closed.

E. O. xxv.

ISSUES.

RULE 116.

Issues.

Where in an action it appears to a Judge that the pleadings do not sufficiently define the issues of fact in dispute between

the parties, he may direct the parties to prepare issues, and such issues shall, if the parties differ, be settled by the Judge.

E. O. xxvi.

AMENDMENTS.

RULE 117.

Amendment of pleadings.

The Court or a Judge may at any stage of the proceedings allow either party to alter his information, petition of right, statement of claim, defence, reply or any other pleadings, or may order to be struck out or amended any matter in such pleadings or statements respectively which may be impertinent or irrelevant, or which may tend to prejudice, embarrass or delay the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real question or questions in controversy between the parties.

E. O. xxvii., R. 1.

RULE 118.

Attorney-General or plaintiff may amend upon præcipe any time before filing of defence.

The Attorney-General, petitioner or plaintiff may, upon præcipe and without any leave, amend the information, petition of right or statement of claim or any pleading by which a cause or action may be instituted, at any time before the filing of a defence or objections and also once after defence or objections filed before the expiration of the time limited for reply, and before replying.

E. O. xxvii., R. 2.

RULE 119.

Opposite party may apply to disallow amendment.

Where any party has amended his pleading under the last preceding Rule, the opposite party may, within *two weeks* after the delivery to him of the amended pleading, apply to the Court or a Judge to disallow the amendment or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same.

E. O. xxvii., R. 4.

RULE 120.

On amendment by one party, other party may apply for leave to plead or amend.

Where any party has amended his pleading under Rule 118, the other party may apply to the Court or a Judge for leave to plead anew or to amend his former pleading within such time and upon such terms as may seem just.

E. O. xxvii., R. 5

RULE 121.

Further powers of amendment with or without application.

In addition to the foregoing powers of amendment, at any time during the progress of any action, suit or other proceeding in the said Exchequer Court, the Court or a Judge may, upon the application of any of the parties, and whether the necessity of the required amendment shall or shall not be occasioned by the error, act, default or neglect of the party applying to amend, or without any such application, make all such amendments as may seem necessary for the advancement of justice, the prevention and redress of fraud, the determining of the rights and interests of the respective parties and the real question in controversy, and best calculated to secure the giving of judgment according to the very right and justice of the case, and all such amendments shall be made upon such terms, as to payment of costs or otherwise, as to the Court or Judge ordering the same to be made shall seem meet.

RULE 122.

If amendment not made within time limited order for amendment to become void.

If a party who has obtained an order for leave to amend a pleading delivered by him does not amend the same within the time limited for that purpose by the order, or if no time is thereby limited, then within *two weeks* from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such *two weeks,* as the case may be, become *ipso facto* void, unless the time is extended by the Court or Judge.

E. O. xxvii., R. 7.

RULE 123.

How pleadings may be amended.

A pleading may be amended by written alterations in the pleading which has been filed, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 50 words in any one case, or are so numerous or of such a nature that the making them in writing would render the pleading difficult or inconvenient to read, in either of which cases the amendment must be made by filing a print as amended.

E. O. xxvii., R. 8.

RULE 124.

Amended pleadings to be marked with date of order under which amendment made.

Whenever any pleading is amended, such pleading when amended shall be marked with the date of the order, if any, under which the same is so amended, and of the day on which such amendment is made in the manner following, viz., 'Amended day of .'

E. O. xxvii., R. 9.

RULE 125.

When amended pleading to be served.

Whenever a pleading is amended, such amended pleading shall be served on the opposite party within the time allowed for amending the same.

E. O. xxvii., R. 10.

PROCEEDINGS IN LIEU OF DEMURRER.

RULE 126.

Pleading matters of law—Proceedings in lieu of demurrer.

No demurrer, as a separate pleading, shall be allowed, but any party shall be entitled to raise by his pleading any point of law; and any point so raised shall be disposed of by the Court or a Judge at or after the trial: provided that by consent of the parties, or by order of the Court or a Judge, on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

E. O. xxv., R. 1. (1883).

DEFAULT OF PLEADING.

RULE 127.

When default in pleading, action may be set down on motion for judgment.

If the defendant makes default in delivering a defence, the Attorney-General or plaintiff may set down the action on motion for judgment, and the allegations of facts in such information or statement of claim shall be taken as confessed, and such judgment shall be given as upon the information or statement of claim the Court or Judge shall consider the Attorney-General or plaintiff to be entitled to.

E. O. xxix., R. 10.

RULE 128.

When one of several defendants makes default.

Where there are several defendants, then, if one of such defendants makes such default as aforesaid, the Attorney-General or plaintiff may either set down the action at once on motion for judgment against the defendant so making default, or may set it down against him at the time when it is entered for trial or set down on motion for judgment against the other defendants.

E. O. xxix., R. 11.

RULE 129.

Motion for judgment by default.

A motion for judgment by default, pursuant to Rule 127 or 128 of the Exchequer Court, may be made *ex parte* if a copy of the information or statement of claim, with an endorsement as provided by Rule 68 of the Exchequer Court, is served personally upon the defendant.

RULE 130.

Default by Attorney-General.

In case the Attorney-General makes default in filing any pleading in any action or proceeding within the prescribed time, the plaintiff may apply to the Court or a Judge on motion for an order that the action may be taken as confessed, or for an order giving him liberty to proceed as if the Attorney-Gen-

eral had filed a statement in answer, traversing or denying the case made, and upon either of such orders being made, the case may thenceforth proceed accordingly.

RULE 131.

Dismissal of action for want of prosecution—Notice of trial.

If the plaintiff does not within three months after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or make such other order and on such terms, as to the Court or Judge may seem just.

RULE 132.

Judgment by default may be set aside by Court or Judge.

Any party may be relieved against any default under any of these Rules, by the Court or a Judge, upon such terms as to costs or otherwise as such Court or Judge may think fit.

E. O. xxix., R. 14.

CONSENT ORDER.

RULE 133.

Consent of parties to become an order of Court.

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

DISCOVERY.

EXAMINATION FOR DISCOVERY.

RULE 134.

Petitioner, plaintiff or defendant may be examined by opposite party.

After the defence is filed any plaintiff and any suppliant in a Petition of Right, and any defendant, other than the Crown or the Attorney-General, may, at the instance of the opposite party, and without order, be examined for the purpose of dis-

covery before the Registrar or before some other officer of the Court specially appointed for that purpose, or before a Judge, if so ordered by the Court or a Judge.

E. O. xxxi.

RULE 135.

Departmental or other officers of the Crown may be examined.

Any departmental or other officer of the Crown may, by order of the Court or a Judge, be examined at the instance of the party adverse to the Crown in any action for the same purposes and before the same officers or before the Court or a Judge, if so ordered.

RULE 136.

Examination in actions against corporations.

If any party to an action be a body corporate or a joint stock company, or any other body of persons empowered by law to sue or to be sued, either in its own name, or the name of any officer or other person, any member or officer of such corporation, company or body, may, at the instance of any adverse party in the action and without order, be examined for the purposes of discovery before the same officers in the two next preceding Rules mentioned, or before a Judge, if so specially ordered by the Court or a Judge.

RULE 137.

Subpœna to be issued to enforce attendance.

The attendance of a party, officer or other person, for examination under the three next preceding Rules, may be enforced by a writ of subpœna *ad testificandum* in the same manner as the attendance of witnesses for examination at the trial of an action is to be enforced.

RULE 138.

Production of documents at examination.

Such parties or officers, or other persons liable to examination may be compelled to produce books, documents, and papers by a writ of subpœna *duces tecum*.

RULE 139.

Parties to be examined to be paid.

Parties, officers, or other persons called upon to submit to examination under the preceding rules shall be entitled to be

paid the same fees as witnesses subpœnaed to give evidence at the trial of an action.

RULE 140.

Examination of parties without jurisdiction.

Any party, officer or member of a corporation, or other person liable to examination for purposes of discovery, under any of the foregoing rules, who is or resides out of the jurisdiction, shall be liable to be examined for discovery upon service upon his solicitor, or the solicitor of the corporation in the case of an officer or a member of a corporation, of an appointment served by leave of a Court or a Judge upon notice to all parties at a time fixed by the Court or the Judge before the day appointed for said examination, and at the time of the service of the said appointment the proper witness fees shall be paid to or tendered to such solicitor who shall forthwith communicate the appointment to the person required to attend and forward to him the witness fees so paid, and shall not apply the witness fees on any debt due to the solicitor or any other person, or pay the same otherwise than to such person for his witness fees, nor shall such witness fees be liable to be attached.

RULE 141.

Examinations, how to be taken in shorthand.

Examinations on Discovery, whether the same be of parties within or without the jurisdiction, shall be taken in shorthand, unless it is otherwise ordered by the Judge or Registrar, and the shorthand writer may be named by the examiner so appointed. It shall not be necessary for such deposition to be read over to, or signed by, the person examined.

RULE 142.

Case of party omitting to answer.

If any person examined omits to answer, or answers insufficiently, the party examining may apply to the Court or a Judge for an order requiring him to answer, or to answer further, as the case may be, and an order may be made requiring him to answer, or answer further, either by affidavit or *vivâ voce* examination, as the Judge may direct.

E. O. xxi., R. 11.

DISCOVERY OF DOCUMENTS.

RULE 143.

Order for production may be made by Court or Judge at any time.

It shall be lawful for the Court or a Judge, at any time during the pendency of any action or proceeding, to order the production by any party thereto, or by any officer of the Crown, upon oath, of such of the documents in his possession or power relating to any matter in question in such action or proceeding, as the Court or Judge shall think right, and the Court or Judge may deal with such documents when produced in such manner as shall appear just.

E. O. xxi., R. 10.

RULE 144.

Order for discovery of documents may be obtained from Registrar upon præcipe.

The Attorney-General, plaintiff or petitioner, after the time for delivering the defence has expired, and any party after the defence is delivered, may obtain an order of course, upon præcipe, directing any other party, or any officer of the Crown to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question in the action.

E. O. xxi., R. 12.

RULE 145.

Affidavit to be made by party upon whom order made.

The affidavit to be made by a party or officer of the Crown, against whom such order as is mentioned in the last preceding rule has been made, shall specify which, if any, of the documents therein mentioned, he objects to produce, and it may be in the Form in Schedule N hereto, with such variations as circumstances may require.

E. O. xxi., R. 13

SCHEDULE N.

Form of affidavit as to documents.

(*Rule 145.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D.,

Defendant.

I, the above named defendant, C. D., make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That (*here state upon what grounds the objection is made, and verify the facts as far as may be*):

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power (*state when*).

6. That (*here state what has become of the last-mentioned documents, and in whose possession they now are*).

7. According to the best of my knowledge, information and belief, I have not now and never had in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, power or custody of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy or extract from any such document, or of any other document whatsoever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the first and second schedules hereto.

Sworn, &c.,)
)

RULE 146.

Production of documents for inspection.

Every party to an action or other proceeding shall be entitled, at any time before or at the hearing thereof, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his attorney, solicitor or agent and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such action or proceeding, unless he shall satisfy the Court or Judge that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice.

E. O. xxxi., R. 14.

RULE 147.

Form of notice to produce.

Notice to any party to produce any documents referred to in his pleadings or affidavits shall be in the form in Schedule O hereto.

E. O. xxxi., R. 15.

SCHEDULE O.

Form of notice to produce documents.

(*Rule 147.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

AND

C. D.

TAKE NOTICE that the plaintiff (*or* defendant) requires you to produce for his inspection the following documents referred to in your statement of claim (*or* defence, *or* affidavit), dated the day of A.D. . *(Describe documents required.)*

Dated at day of 19 .

X. Y.,

Solicitor for the

To Z., solicitor for

RULE 148.

Notice when inspection can be made.

The party to whom such notice is given shall, within *two days* from the receipt of such notice, if all the documents therein referred to have been set forth by him in such affidavit as is mentioned in Rule 146 or if any of the documents referred to in such notice have not been set forth by him in any such affidavit, then within *four days* from the receipt of such notice, deliver to the party giving the same a notice stating a time within *three days* from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his solicitor, attorney or agent at Ottawa, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice may be in the form in Schedule P hereto, with such variations as circumstances may require.

E. O. XXXI., R. 16.

SCHEDULE P.

Form of notice to inspect documents.

(*Rule 148.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

AND

C. D.

TAKE NOTICE that you can inspect the documents mentioned in your notice of the day of A.D. 19 , (except the deed numbered in that notice), at my office, on Thursday next, the instant, between the hours of 12 and 4 o'clock.

Or that the plaintiff (*or* defendant) objects to giving you inspection of the documents mentioned in your notice of the day of A.D. 19 , on the ground that (*state the ground*).

Dated day of , 19 .

X. Y.,
Solicitor for

To Z., solicitor for

RULE 149.

Order for inspection may be obtained.

If the party served with notice under Rule 146 omits to give such notice of a time for inspection, or objects to give inspection, the party desiring it may apply to a Judge for an order for inspection.

E. O. xxxi., R. 17.

RULE 150.

Application for inspection of documents to be to a Judge upon affidavit.

Every application for an order for inspection of documents shall be to a Judge. And except in the case of documents referred to in the pleadings or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, such application shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party or of an officer of the Crown.

E. O. xxxi., R. 18.

RULE 151.

Judge may order any question or issue to be first determined.

If the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court or a Judge may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the action, or that for any other reason it is desirable that any issue or question in dispute in the action should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

E. O. xxxi., R. 19.

RULE 152.

Consequences of not appearing to comply with subpœna or order for vivâ voce examination and for discovery and inspection of documents.

If any party or officer of the Crown fails to comply with any subpœna or order for *vivâ voce* examination, to answer interrogatories, or for discovery or inspection of documents,

he shall be liable to attachment. He shall also, if a plaintiff, or petitioner in a petition of right, be liable to have his action dismissed for want of prosecution, and if a Defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party examining or interrogating may apply to the Court or a Judge for an order to that effect, and an order may be made accordingly.

E. O. xxxi., R. 20.

RULE 153.

How service of order for discovery or inspection may be made.

Service of an order for discovery or inspection made against any party on his Attorney, Solicitor, or Agent shall be sufficient service to found an application for an attachment for disobedience to the order. But the party against whom the application for an attachment is made may show in answer to the application that that he has had no notice or knowledge of the order.

E. O. xxxi., R. 21.

RULE 154.

Using at trial examination for discovery.

Any party may, at the trial of an action or issue, use in evidence any part of the examination for the purposes of discovery of the opposite party ; but the Judge may look at the whole of the examination, and if he is of opinion that any other part is so connected with the part to be used that the last mentioned part ought not to be used without such other part, he may direct such other part to be put in evidence.

Where any departmental or other officer of the Crown, or an officer of a corporation has been examined for the purposes of discovery, the whole or any part of the examination may be used as evidence by any party adverse in interest to the Crown or corporation; and if a part only be used, the Crown or corporation may put in and use the remainder of the examination of the officer, or any part thereof, as evidence on the part of the Crown or of the corporation.

ADMISSIONS.

RULE 155.

Notice of admission.

Any party to a cause or matter may give notice, by his pleading or otherwise, that he admits the truth of the whole or of any part of the case of any other party.

E. O. xxxii., R. 1.

RULE 156.

Notice to admit and costs of refusing.

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the action may be, unless at the hearing or trial the Court certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

E. O. XXXII., R. 2.

RULE 157.

Form of notice.

A notice to admit documents may be in the Form in Schedule Q hereto.

E. O. XXXII., R. 3.

SCHEDULE Q.

Form of notice to admit documents.

(*Rule 157.*)

IN THE EXCHEQUER COURT OF CANADA,

BETWEEN

A. B.,

AND

C. D.

TAKE NOTICE that the Plaintiff (or Defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the Defendant (or Plaintiff), his solicitor or agent, at on the day of , between the hours of ; and the Defendant (or Plaintiff) is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed as they purport respectively to have been; that such as are specified as copies are true copies, and such documents as are stated to have been served, sent or delivered were so served, sent or delivered respectively, saving all just exceptions

to the admissibility of all such documents as evidence in this cause.

Dated, &c.

To E. F., Solicitor (or agent) for Plaintiff (or Defendant).
G. H. solicitor (or agent) for Plaintiff (or Defendant).

Here describe the documents, the manner of doing which may be as follows :—

ORIGINALS.

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A. B. and C. D., first part, and E.F., second part	January 1, 1848.
Indenture of lease from A. B. to C. D.	February 1, 1848.
Indenture of re-lease between A. B., C. D., first part, &c.	February 2, 1848.
Letter, Defendant to Plaintiff	March 1, 1848.
Policy of insurance on goods by ship *Isabella*, on voyage from Oporto to London	December 3, 1847.
Memorandum of agreement between C. D., captain of said ship, and E. F.	January 1, 1848.
Bill of Exchange for £100, at three months, drawn by A. B. on and accepted by C. D., indorsed by E. F. and G. H.	May 1, 1849.

COPIES.

Description of Document.	Dates.	Original or Duplicate served, sent or delivered, when, how and by whom.
Register of baptism of A.B. in parish of X.	January, 1, 1848	
Letter, Plaintiff to Defendant	February, 1, 1848	Sent by general post February 2, 1848.
Notice to produce papers	March 1, 1848.	Served March 2, 1848, on Defendant's attorney, by E. F., of, &c.
Record of judgment of the Court of Queen's Bench, in an action, J. S. *v.* J. N.	Trin. Term, 10 Vict.	

RULE 158.

Affidavit as to admissions.

An affidavit of the solicitor or his clerk, of the due signature of any admissions made in pursuance of any notice to

admit documents, and annexed to the affidavit, shall be sufficient evidence of such admissions.

E. O. xxxii., R. 4.

INQUIRIES AND ACCOUNTS.

RULE 159.

Inquiries and accounts.

The Court or a Judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

E. O. xxxiii.

QUESTIONS OF LAW.

RULE 160.

Special case may be stated for opinion of Court.

The parties to any cause or matter may concur in stating the questions of law arising therein in the form of a special case for the opinion of the Court. Every such special case shall be divided into paragraphs numbered consecutively, and shall concisely state such facts and documents as may be necessary to enable the Court to decide the questions raised thereby. Upon the argument of such case the Court and the parties shall be at liberty to refer to the whole contents of such documents, and the Court shall be at liberty to draw from the facts and documents stated in any such special case any inference, whether of fact or law, which might have been drawn therefrom if proved at trial.

E. O. xxxiv., R. 1.

RULE 161.

Questions of law may be first tried.

If it appears to the Court or a Judge, either from the statement of claim or defence or reply or otherwise, that there is in any action a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, the Court or Judge may make an order accordingly, and may direct such questions of law to be raised

for the opinion of the Court, either by special case or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed.

E. O. xxxiv., R. 2.

RULE 162.

Special case to be printed.

Every special case shall be printed by the Attorney-General or plaintiff, in the same form and manner as hereinbefore provided with reference to pleadings, and shall be signed by counsel for all parties, and shall be filed by the Attorney-General or plaintiff. Printed copies for the use of the Court shall be delivered by the party printing the same at the time of setting down the case for argument.

E. O. xxxiv., R. 3.

RULE 163.

Special case in actions where married woman, infant or lunatic is party.

No special case in an action to which a married woman, infant or person of unsound mind is a party shall be set down for argument without leave of the Court or a Judge; the application for which must be supported by sufficient evidence that the statements contained in such special case, so far as the same affect the interest of such married woman, infant or person of unsound mind, are true.

E. O. xxxiv., R. 4.

RULE 164.

Entry of special case for argument.

Either party may enter a special case for argument by delivering to the proper officer a præcipe, in the form in Schedule R hereto, and also if any married woman, infant or person of unsound mind be a party to the action, by producing a copy of the order giving leave to enter the same for argument.

E. O. xxxiv., R. 5.

SCHEDULE R.

Form for setting down special case.

(*Rule 164.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D. AND OTHERS,

Defendants.

Set down for argument the special case filed in this action on the day of .

Dated, &c.

X. Y.,
Solicitor for

RULE 165.

Particulars in expropriation proceedings—Change in tender—Undertaking—Costs.

Where the Attorney-General, on behalf of the Dominion of Canada, institutes proceedings to ascertain the value of lands expropriated, the owner of such land, if dissatisfied with the amount of compensation tendered, shall in his statement in defence set out the particulars both of his objections to the amount tendered and of the amount claimed. If the Crown, upon the receipt of such particulars, desires to amend the expropriation proceedings by varying or limiting the quantity of land or estate to be expropriated, it will, within 15 days after the delivery of such statement in defence, be at liberty to amend and tender a further or other sum, and if the case proceeds to trial, or if the owner accepts such amended tender, the costs of the action, or any portion thereof, will be in the discretion of the Court or a Judge.

TRIAL.

RULE 166.

Order fixing time and place of trial—Setting down for trial without order at special sittings.

When any action is ready for trial or hearing, a Judge may, on application of any party and after summons or notice served

on all parties to the suit, fix the time and place of trial or hearing, and may direct when and in what manner and upon whom notice of trial or hearing, together with a copy of the Judge's order, is to be served, and such notice and order shall be forthwith served accordingly.

Sittings of the Exchequer Court of Canada may be held at any time and place appointed by a Judge, of which notice shall be published in the *Canada Gazette*, and at which any action ready for trial or hearing may be set down for trial by either party thereto, upon giving the opposite party ten days' notice of trial, or by consent of parties, and without taking out any summons, or obtaining any directions, as hereinbefore provided.

Such sittings shall be continued from day to day until the business coming before the Court be disposed of.

On the first day of each such sittings the Court will hear arguments of points of law raised by any pleading, special cases, motions for judgment, appeals from the Report of the Registrar or other officer of the Court, or other motion, application or business which cannot be transacted by a Judge in Chambers.

RULE 167.

Printed copies of pleadings to be furnished for use of Judge.

The party who gives notice of trial shall furnish for the use of the Judge a printed copy of the pleadings, issues and order for trial; and where the trial is holden at any place outside of the City of Ottawa the same shall be certified by the Registrar of the Court.

RULE 168.

Right to begin and reply as to questions of compensation and title in proceedings by information.

Whenever on the trial of any proceeding by information in respect of land or property acquired or taken for, or injuriously affected by, the construction of any public work, any question of compensation or title arises, the defendant shall in respect of such questions begin and give evidence in support of his claim, and if in respect thereof evidence is adduced on the part of the Crown, the defendant shall be entitled to the reply.

RULE 169.

Countermand of notice of trial.

No notice of trial shall be countermanded except by consent or by leave of the Court or a Judge, which leave may be given subject to such terms as to costs as may be just.

E. O. xxxvi., R. 13.

RULE 170.

Sitting or trial stand adjourned when Judge unable to attend.

In case the Judge is unable from any cause to attend on the day fixed for any sitting or for the trial of any issue, such sitting or trial shall stand adjourned from day to day until he is able to attend.

RULE 171.

Default by defendant in appearing at trial.

If, when an action is called on for trial the Attorney-General, plaintiff or petitioner appears, and the defendant does not appear, then the Attorney-General, plaintiff or petitioner may prove his claim as far as the burden of proof lies upon him.

E. O. xxxvi., R. 18.

RULE 172.

Default of Attorney-General or petitioner in appearing at trial.

If, when an action is called on for trial, the defendant appears and the Attorney-General, plaintiff or petitioner does not appear, the defendant shall be entitled to judgment dismissing the action.

E. O. xxxvi., R. 19.

RULE 173.

Postponement of trial.

The Judge may, if he thinks it expedient for the interest of justice, postpone or adjourn the trial for such time, and upon such terms, if any, as he shall think fit.

E. O. xxxvi., R. 21.

RULE 174.

Directions by Judge at trial.

Upon the trial of an action the Judge may at, or after, such trial, direct that judgment be entered for any or either party, as he is by law entitled to upon the findings, and either with or without leave to any party to move, to set aside, or vary the

same, or to enter any other judgment upon such terms, if any, as he shall think fit to impose, or he may direct judgment not to be entered then, and leave any party to move for judgment. No judgment shall be entered after a trial, without the order of the Court or a Judge.

E. O. xxxvi., R. 22.

RULE 175.

Acting Registrars of the Exchequer Court of Canada.

(*a*) The Judge of the Court may from time to time, by General Order, name and appoint a person at any place who shall, if the Registrar, or his Deputy, is not present thereat, act as Registrar of the Court at any sitting held at such place.

(*b*) The District Registrars on the Admiralty side of the Exchequer Court shall, within their respective Admiralty Districts, be Acting Registrars of the Exchequer Court.

(*c*) Until further order, the following persons shall be Acting Registrars of the Exchequer Court for sittings of the Court to be held at the following places, that is to say:—

W. S. Walker, Esquire, Deputy Prothonotary of the Superior Court of the District of Montreal and Deputy Registrar of the Quebec Admiralty District, at Montreal, in the Province of Quebec, for sittings of the Court to be held at the city of Montreal;

Godfrey Henry Walker, Esquire, Prothonotary of the Court of Queen's Bench for the Province of Manitoba, for sittings of the Court to be held at any place in the Province of Manitoba;

C. H. Bell, Esquire, Clerk of the Supreme Court of the Province of Saskatchewan, for the Judicial District of Western Assiniboia, for sittings of the Court to be held at the town of Regina, in the said Province;

Lawrence John Clarke, Esquire, Clerk of the Supreme Court of the Province of Alberta, for the Judicial District of North Alberta, for sittings of the Court to be held at the town of Calgary, in the said Province; and

Arthur B. Pottenger, Esquire, District Registrar, of the Supreme Court of British Columbia, for the Vancouver Judicial District, and Deputy District Registrar of the British Columbia Admiralty District, for sittings of the Court to be held at the cities of Vancouver and New Westminster, in the Province of British Columbia.

(*d*) Whenever any sitting of the Exchequer Court is held at any place other than the city of Ottawa, and the Registrar of the Court at Ottawa, or his Deputy, is not present, the Acting Registrar for the District or place shall act as Registrar at such sitting, and if there be no such Acting Registrar, or if he be not in attendance, the Court may appoint any other person to act as Registrar at such sitting, and in any case the person so acting as Registrar at such sitting shall, for the purposes thereof, have all the powers and authorities of the Registrar of the Court.

RULE 176.

Seals.

Acting Registrars of the Exchequer Court, who are at the same time District Registrars of the Court on the Admiralty Side thereof, shall, in proceedings in the Exchequer Court, use respectively the seals provided for use in the several Admiralty Districts, and other Acting Registrars shall use such seals as the Judge of the Exchequer Court may from time to time direct.

RULE 177.

Subpœnas.

Subpœnas to witnesses to attend at any place other than the City of Ottawa, may be issued under the hand of the Registrar of the Court and the seal of the Court, according to the existing practice of the Court, or under the hand of the Acting Registrar at the place where the attendance of the witness is desired, and under the seal prescribed for the use of such Acting Registrar.

RULE 178.

Fees.

The Acting Registrars shall be entitled to and shall take to their own use respectively the fees prescribed in the schedule hereto marked S.

SCHEDULE S.

FEES TO ACTING REGISTRARS.

(*Rule 178.*)

1. Entering any cause or matter for hearing or trial (to be paid by the plaintiff or applicant)... .. .. $1 00

2. For attendance at any hearing or trial, when hearing or trial does not exceed one hour (to be paid by the plaintiff)	1 00
And	
For every hour additional occupied on such hearing or trial (to be paid by the party whose case or motion is proceeding)	1 00
3. Fee on order of reference to special referee or referees	1 00
4. Administering oath to special referee	0 50
5. Swearing each witness (to be paid by party producing witness)	0 20
6. Marking each exhibit (to be paid by party filing same)	0 10
7. On issuing each writ of subpœna	1 00
8. For copy of any document per folio of 100 words	0 10
9. Each certificate required from the Acting Registrar. (The certificate required under Rule 179 to be paid by plaintiff)	1 00

RULE 179.

Findings of fact and directions of Judge to be entered by Acting Registrar.

Upon every trial, where the officer present at trial is not the Registrar by whom judgments ought to be entered, the Acting Registrar shall take down all such findings of facts as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and shall, forthwith after trial, transmit such notes, duly certified under his signature, to the Registrar of the Court, at Ottawa.

E. O. xxxvi., R. 23.

RULE 180.

Where Judge directs the Acting Registrar to enter judgment in favour of any party absolutely.

If, under the circumstances mentioned in Rule 179 hereof, the Judge directs that any judgment be entered for any party absolutely, the minutes of trial, duly certified by the Acting Registrar to that effect, shall be a sufficient authority to the Registrar to enter judgment accordingly.

E. O. xxxvi., R. 24.

RULE 181.

Where Judge directs judgment to be entered subject to leave to move.

If the Judge directs that any judgment be entered for the party subject to leave to move, judgment shall be entered accordingly upon the production of the officer's certificate.

E. O. xxxvi., R. 25.

RULE 182.

Evidence generally.

Witnesses at the trial of any action shall be examined *vivâ voce* and in open Court; but the Court, or a Judge, may at any time, for sufficient reason, order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial on such conditions as the Court or Judge may think reasonable, or that any witness whose attendance in Court ought for some sufficient reason to be dispensed with be examined *vivâ voce* by interrogatories or otherwise before a Commissioner or other officer of the Court, provided that where it appears to the Court or Judge that the other party *bonâ fide* desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

E. O. xxxvii., R. 1.

RULE 183.

Evidence by affidavit in certain cases subject to cross-examination.

Upon any motion, petition or summons, evidence may be given by affidavit, but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

E. O. xxxvii., R. 2.

RULE 184.

Copy of Judge's notes, when to be made.

After the trial of any action or issues by a Judge, the Registrar shall, if so directed by the Judge, cause a copy of the Judge's notes of the evidence to be made, and after careful examination of the same he shall cause such copy to be filed with the other papers in the cause.

RULE 185.

What affidavits to contain.

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter or copies or extracts from documents shall be paid by the party filing the same.

E. O. xxxvii., R. 3.

RULE 186.

Court or Judge may order any person to be examined.

The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

E. O. xxxvii., R. 4.

RULE 187.

Order for Commission.

An order for a commission to examine witnesses shall be in the Form No. 1 of Schedule T, and the writ of commission shall be in the Form No. 2 of the said Schedule, with such variations as circumstances may require.

E. O. 488.

SCHEDULE T.

FORM No. 1.

(*Rule No. 187.*)

(Order for issue of Commission.)

IN THE EXCHEQUER COURT OF CANADA.

BEFORE

THE HONOURABLE MR. JUSTICE.....

In Chambers.

(Style of Cause.)

UPON the application of the and upon hearing read the summons issued herein on the day of A.D.

190 , and the affidavit of filed, and upon hearing what was alleged by Counsel as well for the as for the .

I DO ORDER that the be at liberty to issue herein, in the form provided for by the Rules of this Court in that behalf, a Commission for the examination of witness (or witnesses *as the case may be*), on behalf of at

AND I DO FURTHER ORDER that the Commission may issue directed to Commissioner (or Commissioners, *as the case may be*) for the examination *vivâ voce* (*or* on interrogatories and cross interrogatories, *as the case may be*) on oath, *affirmation* or otherwise of witness (*or* witnesses) on behalf of the said (*or* on behalf of the plaintiff and defendant, respectively, *as the case may be*).

AND I DO FURTHER ORDER that the costs of and incidental to this order and of the Commission to be issued by virtue thereof, and the depositions and affirmations to be taken thereunder be and the same are hereby reserved (*or as the case may be*) costs in the cause.

Dated at Ottawa, this day of A.D. 190 .

J. E. C.

FORM No. 2.

(*Rule 187.*)

Commission to examine Witness.

IN THE EXCHEQUER COURT OF CANADA.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

(Full style of cause.)

To of, and of &c. Commissioner named and appointed on behalf of the said plaintiff (or defendant, *as the case may be*).

GREETING:

KNOW YOU that We, in confidence of your prudence and fidelity, have appointed you (jointly and severally, *as the case may be*), and by these presents do give unto you (and each of you, *as the case may be*) full power and authority diligently to examine before you, as hereinafter mentioned, at the city of or at such other place in aforesaid as may seem to the said Commissioner (or

Commissioners, *as the case may be*) most convenient, A.B. and C.D. (or the witnesses on behalf of the said and respectively) *vivâ voce* (or on interrogatories and cross interrogatories, *as the case may be*) on oath, affirmation or otherwise, according to the religion or belief of the said witness (or witnesses, *as the case may be*) to be produced, sworn and examined, upon the matters in question in a certain suit now pending in Our Exchequer Court of Canada, at the City of Ottawa, in the Province of Ontario, in the Dominion of Canada, wherein is plaintiff, and is defendant, and (*if not on interrogatories*) to cross-examine the said witness (or witnesses, *as the case may be*) *vivâ voce* on oath, on such matters or arising out of the answers thereto, and to re-examine the said witness (or witnesses, *as the case may be*) on matters arising out of such cross-examination.

And we command (*or* request, *when out of the jurisdiction*) you (*or* either of you, *as the case may be*) that without delay on a day or days, and at a certain place or places at aforesaid to be appointed by you (or either of you, *as the case may be*) for that purpose, you cause the said witness (*or* witnesses, *as the case may be*) for the plaintiff (plaintiff or defendant, *as the case may be*) to come before you at the city of , or at such other place as aforesaid, and then and there examine and cross-examine *vivâ voce* (*or* on interrogatories and cross interrogatories, *as the case may be*) as aforesaid, on their corporeal oaths being first taken before you according to the form of oath first endorsed hereon, upon the Holy Evangelists, or in such other manner as shall be sanctioned by the form of the religion of the person (*or* persons) to be examined, and such as shall be considered by him (*or* them) to be binding on his (*or* their respective) conscience, which oath you are hereby empowered to administer to such witness (*or* witnesses).

And we hereby give you (or either of you, *as the case may be*) full power and authority, if you shall see reasonable occasion after the commencement of the examination under this Commission, to adjourn any meeting or meetings or to continue the same *de die in diem* until the witness to be examined hereunder shall have been examined, without giving any further or other notice of such subsequent meeting or meetings than notice to be given on the occasion of such adjournment or continuation of the meeting.

And we further command (or request *when out of the jurisdiction*) you (or either of you, *as the case may be*) that it shall not be necessary to annex to the said Commission, the depositions or affirmations, or to return with the same, to the office of the Registrar of this Court hereinafter mentioned, any books, documents, letters or other papers produced or read in evidence before you the said Commissioner and referred to in the evidence of the said witness *or* witnesses) under and by virtue of the Commission, but that extracts from the said books and copies of the documents, letters or other papers respectively shall be verified under the hand of you the said Commissioner (or either of you, *as the case may be*) as being the document or documents mentioned in such evidence, and as being correct copies of the originals and referred to as being marked with the letter 'A,' or with any other letter or letters respectively, or in any other manner as to you the said Commissioner shall seem meet. And that you do take such examination, cross-examination or re-examination, if any, in the English language on paper, and when you have so taken the same, that you do within from the date hereof, or such further time as the Judge of the said Exchequer Court of Canada may direct, send and return the same closed up under your seal distinctly and plainly set together with this writ, and together also with any books, documents or other papers and exhibits produced or read in evidence before you and referred to in the evidence of said witness , and together with any extracts from the said books and copies of said documents, letters or other papers, verified and certified as herein provided, to the office of the Registrar of the Exchequer Court of Canada, at the City of Ottawa, in the Province of Ontario, in the Dominion of Canada, to be there filed of record in Our said Court.

And We further command (*or* request, *when out of the jurisdiction*) you that the depositions and affirmations taken under and by virtue of this Commission, if taken down in writing by the Clerk hereinafter mentioned, be subscribed by the said witness (*or* witnesses, respectively, *as the case may be*) and you the said Commissioner ; but if taken down in shorthand by such Clerk, they shall be written out at length and shall be certified to and subscribed by such clerk only.

And We further command (*or* request, *when out of the jurisdiction*) you that all books, papers and documents produced

in evidence shall be marked as exhibits by you the said Commissioner .

And We further command (*or* request, *when out of the jurisdiction*) you that before you in any manner act in the execution hereof, you do take and subscribe, before any person authorized under The Exchequer Court Act, ch. 140, section 61, of The Revised Statutes of Canada, 1906, to administer an oath concerning any Court of Canada, the oath hereon secondly endorsed, upon the Holy Evangelists or otherwise, in such manner as shall be sanctioned by the form of your religion and shall be considered by you (or either of you, *as the case may be*) to be binding on your conscience.

And We further command (*or* request, *when out of the jurisdiction*) you that you may appoint a clerk or clerks to take down in shorthand, or otherwise transcribe or engross, the depositions of the witness to be examined before you by virtue hereof.

And We further command (*or* request, *when out of the jurisdiction*) that the clerk or clerks employed in taking, writing, transcribing or engrossing the deposition or depositions of the witness to be examined by virtue hereof, shall, before he or they be permitted to act therein, take the oath hereby thirdly endorsed, which oath you (or either of you, *as the case may be*) are (or is) hereby empowered to administer to such clerk or clerks upon the Holy Evangelists, or otherwise in such manner as shall be sanctioned by his or their several religions, and shall be considered by him or them, respectively, to be binding on his or their respective conscience.

And We further command (*or* request, *when out of the jurisdiction*) that both the said plaintiff and defendant be at liberty to be represented before you the said Commissioner either by Counsel, Solicitor or Agent.

And We further command (*or* request, *when out of the jurisdiction*) that previous to the execution of this Commission, which is granted by Us at the instance of the and by prosecuted, you the said Commissioner do give or cause to be given unto each of the said parties, their Counsel, Solicitor or Agent, four days' notice in writing under your hand of your intention to examine the said witness to be examined on behalf of the said , and of the time and place or times and places of your so intending to examine

the same, by leaving the said notice or causing the same to be left at the place of business of the Counsel, Solicitor or Agent of the said parties.

And We further command (*or* request, *when out of the jurisdiction*) you that if such Counsel, Solicitor or Agent for either party neglects to attend pursuant to such notice, you shall proceed with and take the said examination in his absence *ex parte*.

And We give you (and each of you, *as the case may be*) power and authority to do all such other acts and things as may be necessary and lawfully done for the due execution hereof.

WITNESS THE HONOURABLE , the Judge of Our Exchequer Court of Canada, at the day of in the year of Our Lord one thousand nine hundred and and in the year of Our reign.

Registrar.

Witness' Oath.

You are true answers to make to all such questions as shall be asked you, without favour or affection to either party and therein you shall speak the truth, the whole truth, and nothing but the truth.

SO HELP YOU GOD.

Commissioner's Oath.

You shall, according to the best of your skill and knowledge, truly and faithfully and without partiality to any or either of the parties in this matter, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the Commission within written.

SO HELP YOU GOD.

Clerk's Oath.

You shall truly and faithfully and without partiality to any or either of the parties in this matter, take down, transcribe and engross the depositions of all and every witness or witnesses produced before and examined by the Commissioner named in the Commission within written, as far forth as you are directed and employed by the said Commissioner to take, write down, transcribe or engross the said depositions.

SO HELP YOU GOD.

RULE 188.

Deponents on affidavit may be cross-examined.

Any person making an affidavit to be used in any action may be required to appear before the Registrar, or any other person specially appointed for that purpose, to be cross-examined thereon. The attendance of such person may be enforced by Subpœna *ad testificandum*. Any person served with a subpœna for such purposes shall be entitled to the same fees as a witness at trial. *Two clear day's* notice of such cross-examination is to be given by the cross-examining party to the opposite party.

Taylor's C. Chy. O. 268-269.

RULE 189.

How affidavits to be drawn.

Affidavits are invariably to be drawn in the first person, and in numbered paragraphs, and no costs are to be taxed for any affidavits not so drawn.

Gen. Rules (Ont.) T. T. 1856, 112.

RULE 190.

When to be filed and served.

Affidavits to be used in support of any motion or application are to be filed when the order *nisi* or summons is moved or applied for, or, if the motion is to be made upon notice, before notice of motion is served, and such affidavits are to be served two clear days before the return of the summons and before the motion is made. Affidavits in reply are to be filed before the application comes on to be heard.

JUDGMENT.

RULE 191.

Motion for judgment—Dispensing with trial.

After the pleadings are closed, any party to the cause may apply to the Court or a Judge, upon due notice of such application to the opposite party, for an order dispensing with trial and permitting the cause to be set down forthwith on motion for judgment with liberty to prove documents and facts by affidavits on the motion for judgment, and the Court or a Judge may grant such application.

RULE 192.

Judgment to be obtained on motion.

Except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment.

E. O. xl., R. 1.

RULE 193.

Subject to leave to move for judgment granted at trial—Setting down on motion for judgment and giving notice.

Where at the trial of an action the Judge has ordered that any judgment be entered subject to leave to move, the party to whom leave has been reserved shall set down the action on motion for judgment, and give notice thereof to the other parties within the time limited by the Judge in reserving leave, or if no time has been limited, within *fourteen days* after the trial; the notice of motion shall state the grounds of the motion and the relief sought, and that the motion is pursuant to leave reserved.

E. O. xl., R. 2.

RULE 194.

Setting down on motion for judgment where issues or questions of fact ordered to be determined.

Where issues have been ordered to be tried or issues or questions of fact to be determined in any manner, the Attorney-General, plaintiff or the petitioner may set down the action on motion for judgment as soon as such issues or questions have been determined. If he does not so set it down and give notice thereof to the other parties within *fourteen days* after his right to do so has arisen, then after the expiration of such *fourteen days* any defendant may set down the action on motion for judgment and give notice thereof to the other parties.

E. O. xl., R. 7.

RULE 195.

Where some only of such issues have been tried.

Where issues have been ordered to be tried or issues or questions of fact to be determined in any manner, and some only of such issues or questions of fact have been tried or determined, any party who considers that the result of such trial

or determination renders the trial or determination of the others of them unnecessary, or renders it desirable that the trial or determination thereof should be postponed, may apply to the Court or Judge for leave to set down the action on motion for judgment, without waiting for such trial or determination. And the Court or Judge may, if satisfied of the expediency thereof, give such leave, upon such terms, if any, as shall appear just, and may give any directions which may appear desirable as to postponing the trial of the other questions of fact.

E. O. xl., R. 8.

RULE 196.

No action to be set down for motion for judgment after the expiration of one year.

No action shall, except by leave of the Court or a Judge, be set down on motion for judgment after the expiration of *one year* from the time when the party seeking to set down the same first became entitled so to do.

E. O. xl., R. 9.

RULE 197.

Proceedings on motion for judgment—May direct matter to stand over and order issues or questions to be first determined—New trial.

Upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly, or may, if it shall be of opinion that it has not sufficient materials before it to enable it to give judgment, direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit ; and so soon as the issues are tried, or the report filed, as the case may be, the motion may be brought on again for further consideration on *ten days'* notice by any party, and any application for a new trial of the issues, or to vary or refer back the report of the Judge, Registrar, or other officer, or to reverse the findings therein contained, shall come on and be heard at the same time as the further consideration of the motion for judgment: Provided at least *eight days'* notice of such application shall have been given.

RULE 198.

Order may be applied for on admission of facts.

Any party to an action may at any stage thereof apply to the Court or a Judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties. The foregoing Rules shall not apply to such applications, but any such application may be made by motion, so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The Court or a Judge may, on any such application, give such relief, subject to such terms, if any, as such Court or Judge may think fit.

E. O. xl., R. 11.

RULE 199.

Entry of judgment, form of.

Every judgment shall be entered by the proper officer in the book to be kept for the purpose. An office copy of the judgment stamped with the seal of the Court shall be delivered to the party entering the same. The forms of Schedule U may be used with such variations as circumstances may require.

SCHEDULE U.

FORMS OF JUDGMENT.

1. Default of defence in case of liquidated demand.

(Rule 199.)

IN THE EXCHEQUER COURT OF CANADA.

Monday, the day of A.D. 19 .

Present,

The Honourable Mr. Justice

BETWEEN

A. B.,

Plaintiff ;

AND

C. D. AND E. F.,

Defendants.

The defendants not having filed any statement in defence;

This Court doth order and adjudge that the said plaintiff recover from the said defendants the sum of $ and costs to be taxed.

2. Judgment in default of defence in action for recovery of land.

(Heading as in Form 1.)

No defence having been filed to the information herein;

This Court doth order and adjudge that the plaintiff recover possession of the land in the information mentioned.

3. Judgment in default of defence after assessment of damages.

(Heading as in Form 1.)

The defendants not having filed a statement in defence, and the cause having been referred to to assess the damages which the plaintiff was entitled to recover, and the said having, by his report, dated the day of , 19 , reported that the said damages have been assessed at the sum of $;

This Court doth order and adjudge that the plaintiff recover the sum of $ and the costs to be taxed.

4. Judgment at trial.

(Heading as in Form 1.)

This action coming on for trial, at the city of this day (or having come, &c., on the day of , A.D. 19), before this Court, in the presence of counsel for the plaintiff and the defendants (*or if some of the defendants do not appear,* for the plaintiff and the defendant, C. D., none appearing for the defendants E. F. and G. H., although they were duly served with notice of trial, as by the affidavit of , filed on the day of , appears), upon hearing read the pleadings herein (*and such other documents as may be material, or any examination taken before trial, by commission or otherwise*), and upon hearing what was alleged by Counsel aforesaid (*when case reserved add as follows:*—This Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment).

WHEN JUDGMENT IN FAVOUR OF PLAINTIFF.

This Court doth order and adjudge that the said plaintiff is entitled to recover from His Majesty the King the sum of $ and the costs to be taxed.

WHEN ACTION DISMISSED.

(Same as above for the first part.)

This Court doth order and adjudge that the said plaintiff recover nothing against the said defendant, and that the defendant recover against the plaintiff her (*or his*) costs of the action to be taxed.

5. Judgment at trial when action instituted by petition of right.

IN THE EXCHEQUER COURT OF CANADA.

Monday, the day of A.D. 19 .

Present,

The Honourable Mr. Justice

In the matter of the Petition of Right of
A. B.,

Suppliant ;

AND

HIS MAJESTY THE KING,

Respondent.

The Petition of Right of the above named suppliant coming on for trial, at the city of this day (*or as the case may be,* having come, &c., on the day of A.D. 19), before this Court in presence of Counsel for the suppliant and the respondent, upon hearing read the pleadings herein (*or such other documents as may be material, or any evidence taken before trial by commission or otherwise*) and upon hearing the evidence adduced at trial, and what was alleged by Counsel aforesaid (*when case reserved add:*—This Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment).

WHEN RELIEF GRANTED.

This Court doth order and adjudge that the said suppliant is entitled to recover from His Majesty the King the sum of $ being the relief (or part of the relief, *as the case may be*) sought by his Petition of Right herein, and costs to be taxed.

WHEN RELIEF REFUSED.

(Same as above for first part.)

This Court doth order and adjudge that the said suppliant is not entitled to the relief sought by his Petition of Right

herein, and that His Majesty the King recover from the said suppliant His costs herein, to be taxed.

6. Judgment on motion generally.

(Heading as in Form 1.)

This action having this day (*or as the case may be,* on the day of A.D. 19), come on before this Court on motion for judgment on behalf of and upon hearing Counsel for the (*when motion reserved add :* this Court was pleased to direct that this matter should stand over for judgment, and the same coming on this day for judgment).

This Court doth order and adjudge that, &c.

RULE 200.

Settling of judgment.

Any party to the action may obtain an appointment from the Registrar for settling the minutes of judgment, and shall serve a copy of the draft minutes and a copy of the appointment upon the solicitor for the opposite party two clear days at least before the time fixed for settling the judgment. The Registrar shall satisfy himself in such manner as he may think fit that service of the minutes of judgment and of the notice of appointment has been duly effected.

RULE 201.

Minutes settled in absence of party duly served.

If any party fails to attend the Registrar's appointment for settling the draft of any judgment, the Registrar may proceed to settle the draft in his absence.

RULE 202.

When to be dated.

Where any judgment is pronounced by the Court or a Judge in Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced and the judgment shall take effect from that date, unless the Court shall otherwise order or direct that the judgment be antedated or postdated.

E. O. xli., R. 2.

RULE 203.

Effect of judgment of non-suit.

Any judgment of non-suit, unless the Court or a Judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant ; but, in any case of mistake, surprise or accident, any judgment of non-suit may be set aside, on such terms as to payment of costs or otherwise, as to the Court or a Judge shall seem just.

E. O. xli., R. 6.

REFERENCES.

RULE 204.

Interpretation.

Unless the context otherwise requires, the expression 'Judge,' as hereinafter used, means a Local Judge in Admiralty of the Exchequer Court; and the expression 'Referee' includes any such Judge and the Registrar or any officer of the Court, or any official or special referee to whom any cause, matter or question is referred.

RULE 205.

A cause may be referred.

Whenever any cause or matter is at issue, and at any stage of the proceeding thereafter, the Court may for the determination of any question or issue of fact, or for the purpose of taking accounts or making inquiries, refer such cause or matter or any question therein to a Judge or other referee for inquiry and report.

RULE 206.

Proceedings on a reference to a Judge or the Registrar.

Whenever any cause or matter, or any question therein, is referred to a Judge or to the Registrar, he shall, on the application of any party thereto, fix the time and place of the hearing of the reference, of which due notice shall be given to the opposite party, and he shall proceed with the hearing thereof in like manner as at a trial before the Judge of the Exchequer Court. Officers of the Court in attendance at such hearing, and the Solicitors and Counsel of the parties shall be entitled to the like fees on such hearing as at a trial before the Judge of the Exchequer Court.

RULE 207.

Proceedings on a reference to other referees.

Whenever any cause or matter, or any question therein, is referred to any referee other than a Judge or the Registrar, the referee shall, on the application of any party thereto, make an appointment to proceed with the hearing of the reference, of which due notice shall be given to the opposite party. At the time and place appointed such hearing shall be proceeded with *de die in diem,* but may, for good cause, be from time to time adjourned to some other day.

RULE 208.

Copy of pleadings and order of reference to be furnished.

The party who applies to a referee to fix a time and place, or to make an appointment, for the hearing of any reference, shall furnish to the referee for his use a copy of the pleadings, issues and order of reference, certified by the Registrar of the Court.

RULE 209.

Evidence taken on reference.

Evidence shall be taken upon a reference before the referee, and the attendance of witnesses may be enforced by subpœna in the same manner, as nearly as may be, as at a trial before the Judge of the Exchequer Court. In any case of a reference the testimony of any witness may be taken down in shorthand by a stenographer, who shall be previously sworn to faithfully take down and transcribe the same.

RULE 210.

Power of referee.

A referee shall have the same authority in the conduct of the reference as the Judge of the Exchequer Court, when presiding at any trial before him, and the same power to direct that judgment be entered for any or either party as the said Judge; but nothing herein contained shall authorize him to commit any person to prison, or to enforce any order by attachment.

E. O. XXXVI., R. 50.

RULE 211.

Referee may reserve questions for decision of Court.

A referee may, before the conclusion of any hearing before him, or by his report under the reference made to him,

submit any question arising therein for the decision of the Court, or state any facts specially with power to the Court to draw inferences therefrom, and in any such case the order to be made on such submission or statement shall be entered as the Court may direct, and the Court shall have power to require any explanations or reasons from the referee and to remit the cause or matter, or any part thereof, for further inquiry to the same or any other referee.

RULE 212.

Report, &c., to be filed.

The report of a referee, with a copy of the evidence taken on the reference, and the exhibits and other papers and documents filed with the referee, shall be transmitted by him to the Registry of the Court as soon as possible after the report is signed, and the Registrar, on receipt of the same, shall forthwith give notice to all the parties. Thereupon any party to the proceeding may cause such report, evidence, exhibits and other papers and documents to be filed, and shall give notice of such filing to the other parties to the proceeding.

RULE 213.

Appeal from report.

Within *fourteen days* after service of the notice of the filing of any report, any party may, by a motion, setting out the grounds of appeal, of which at least *eight days'* notice is to be given, appeal to the Court against any report, and upon such appeal, the Court may confirm, vary or reverse the findings of the report and direct judgment to be entered accordingly or refer it back to the referee for further consideration and report.

E. O. xl., R. 6.

RULE 214.

Report becoming absolute—Judgment on Report.

The report of a Judge, or the Registrar, or any other officer of the Court, to whom a reference has been made, shall become absolute if not appealed against within *fourteen* days after the service of notice of filing of the same. Unless otherwise directed by the order of reference, judgment on such report will not be entered without an order thereupon, obtained upon motion for judgment of which at least *eight* days' notice shall be given.

RULE 215.

Proceedings where judgment against the Crown directing payment of money.

No execution shall issue on a judgment against the Crown for the payment of money. Where in any proceeding there is a judgment against the Crown directing the payment of money, for costs or otherwise, the Judge or the Registrar may, on application, certify to the Minister of Finance the tenor and purport of the judgment, and such certificate shall be by the Registrar transmitted to, or left at, the office of the Minister of Finance.

RULE 216.

Judgment for payment of money against any party other than Crown may be enforced by fi. fa. or sequestration.

A judgment or order for the payment of money against any party to a suit other than the Crown may be enforced by writs of *fieri facias* against goods, *fieri facias* against lands, or sequestration.

RULE 217.

Judgment for payment of money into Court may be enforced by sequestration.

A judgment for the payment of money into Court may be enforced by writ of sequestration.

E. O. xlii., R. 1.

RULE 218.

For recovery or delivery of possession of land by writ of possession.

A judgment for the recovery or the delivery of possession of land may be enforced by writ of possession.

E. O., xlii., R. 3.

RULE 219.

Where judgment for recovery of any property other than land or money.

A judgment for the recovery of any property other than land or money may be enforced—

By writ for delivery of the property;

By writ of attachment;

By writ of sequestration.

E. O. xlii., R. 4.

RULE 220.

Where judgment requires the doing of, or abstaining from, any act.

A judgment requiring any person to do any act other than the payment of money or to abstain from doing anything may be enforced by writ of attachment or by committal.

E. O. xlii., R. 5.

RULE 221.

No attachment to issue to compel payment of money.

No writ of attachment or other writ or process against the person is to issue to compel the payment of money.

RULE 222.

Meaning of terms 'writ of execution' and 'issuing execution' against any party.'

In these rules the term 'writ of execution' shall include writs of *fieri facias* against goods and against lands, sequestration and attachment and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution' against any party shall mean the issuing of any such process against his person or property as under the preceding rules shall be applicable to the case.

E. O. xlii., R. 6.

RULE 223.

No execution to be issued without production of judgment.

No writ of execution shall be issued without the production to the officer, by whom the same should be issued, of the judgment upon which the writ of execution is to issue, or an office copy thereof shewing the date of entry, nor without leaving with such officer a copy of the said writ. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

E. O. xlii., R. 9.

RULE 224.

Præcipe to be issued.

No writ of execution shall be issued without a *præcipe* being filed for that purpose.

E. O. xlii., R. 10.

RULE 225.

When writ to be dated.

Every writ of execution shall bear date of the day on which it is issued.

E. O. xlii., R. 12.

RULE 226.

Poundage fees and expenses of execution may be levied.

In every case of execution the party entitled to execution may levy the interest, poundage fees and expenses of execution over and above the sum recovered.

E. O. xlii., R. 13.

RULE 227.

How writ to be endorsed.

Every writ of execution shall be endorsed with the name and residence of the attorney or solicitor who issues the same, and if issued through an agent the name and residence of the agent also.

E. O. xlii., R. 11.

RULE 228.

Directions to sheriff on.

Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff, or other officer to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of five per cent. per annum from the time when the judgment was entered up.

E. O. xlii., R. 14.

RULE 229.

Writs of fi. fa. may be issued fifteen days after judgment except in certain cases.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, after the expiration of 15 days from the time when the judgment was duly rendered, be entitled to sue out one or more writ or writs of *fieri facias* against goods and against lands to enforce payment thereof, subject nevertheless as follows:—

(a) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(b) The Court or a Judge at the time of giving judgment, or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed.

E. O. xlii., R. 16.

RULE 230.

Renewing writs.

A writ of execution if unexecuted shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a Judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked with a seal of the Court bearing the date of the day, month and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and bearing the like seal of the Court; and a writ of execution so renewed shall have effect, and be entitled to priority according to the time of the original delivery thereof.

E. O. xlii., R. 26.

RULE 231.

Evidence of Renewal.

The production of a writ of execution, or of the notice renewing the same, purporting to be marked with such seal as in the last preceding rule mentioned, showing the same to have been renewed, shall be sufficient evidence of its having been so renewed.

E. O. xlii., R. 17.

RULE 232.

Execution may issue within six years.

As between the original parties to a judgment, execution may issue at any time within six years from the recovery of the judgment.

E. O. xlii., R. 18.

RULE 233.

After that time by leave of Court or Judge.

Where six years have elapsed since the judgment, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a Judge for leave to issue execution accordingly. And such Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or Judge may impose such terms as to costs or otherwise as shall seem just.

E. O. xlii., R. 19.

RULE 234.

Every order of Court or Judge may be enforced in the same manner as judgment.

Every order of the Court or a Judge, whether in an action, cause or matter, may be enforced in the same manner, as a judgment to the same effect, and it shall in no case be necessary to make a Judge's order a rule or order of the Court before enforcing the same.

E. O. xlii., R. 20.

RULE 235.

Enforcing order or judgment against person not being party to an action.

Any person not being a party in an action who obtains any order, or in whose favour any order is made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the action, and any person not being a party in an action, against whom obedience to any judgment or order may be enforced, shall be liable to the same process for enforcing obedience to such judgment or order as if he were a party to the action.

E. O. xlii., R. 21.

RULE 236.

Application for stay of execution.

Any party against whom judgment has been given may apply to the Court or a Judge for a stay of execution or other

relief against such judgment, upon the ground of facts which have arisen too late to be pleaded, and the Court or Judge may give such relief and upon such terms as may be just.

E. O. xlii., R. 22.

WRITS OF FIERI FACIAS.

RULE 237.

Forms of writs of fi. fa.

Writs of *fieri facias* against goods and lands may be in the form given in Schedule V, and shall be executed according to the exigency thereof.

SCHEDULE V.

(1) *Form of Writ of Fieri Facias.*

(*Rule 237.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

Plaintiff;

AND

C. D. AND OTHERS,

Defendants.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of , Greeting:

We command you that of the goods and chattels of C. D., in your bailiwick, you cause to be made the sum of and also interest thereon at the rate of five per centum per annum, from the day of (*day of judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be*), which said sum of money and interest were lately before Us in Our Echequer Court of Canada, in a certain action (*or* certain actions, *as the case may be*), wherein A. B. is plaintiff and C. D. and others are defendants (*or* in a certain matter there depending, intituled 'In the matter of E. F.,' *as the case may be*) by a judgment (*or* order, *as the case may be*) of Our said Court, bearing date the day of adjudged (*or* ordered, *as the case may be*) to be paid by the said C. D.

to A. B., together with certain costs in the said judgment (*or* order, *as the case may be*) mentioned, and which costs have been taxed and allowed, by the taxing officer of Our said Court, at the sum of , as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D., in your bailiwick, you further cause to be made the said sum of (costs), together with interest thereon at the rate of five per centum per annum, from the day of (*the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order*), and that you have that money and interest, together with the costs incurred upon issuing and executing the present writ, before Us in Our said Court immediately after the execution hereof, to be paid to the said A. B., in pursuance of the said judgment (*or* order, *as the case may be*), and in what manner you shall have executed this Our writ, make appear to Us in Our said Court immediately after the execution thereof, and have there then this writ.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, this day of in the year of Our Lord one thousand nine hundred and , and in the year of Our reign.

(2) *The præcipe for a writ of fieri facias may be in the following form, which can be adapted to other writs also:*

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., *Plaintiff*;

AND

C. D., *Defendant.*

Seal a writ of *fieri facias* directed to the sheriff of to levy, of the goods and chattels of C. D., the sum of $ and interest thereon at the rate of five per centum per annum, from the day of (and $ costs).

Judgment (or order) dated day of

(Taxing Master's certificate, dated)

X. Y., Solicitor for (*party on whose behalf writ is to issue*).

RULE 238.

What interests may be sold under such writs.

Any interest equitable as well as legal of an execution debtor in goods or lands may be sold under writs of *fieri facias*.

RULE 239.

Lands may not be sold until after lapse of time enacted by laws of Province within which lands are situate.

Lands shall not be sold under a writ of *fieri facias* within a shorter period than that provided for by the laws of the Province within which the lands are situate; but such period may be either enlarged or shortened by the Court or a Judge.

RULE 240.

Lands and goods to be bound from delivery of writ.

Lands and goods respectively shall be bound for the purposes of execution from the date of the delivery of writs of *fieri facias* to the sheriff or other officer.

RULE 241.

Writ of venditioni exponas may issue, form of.

Upon the return of the sheriff or other officer, as the case may be, of 'lands or goods on hand for want of buyers' a writ of *Venditioni Exponas*, in the form in Schedule W, may issue to compel the sale of the property seized.

SCHEDULE W.

(*Rule 241.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., *Plaintiff*;

AND

C. D. and others, *Defendants.*

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India:

To the Sheriff of , Greeting:

Whereas by Our writ we lately commanded you that of the goods and chattels of C. D. (*here recite the fieri facias to the*

end), and on the day of you returned to Us, at Our Exchequer Court of Canada aforesaid, that by virtue of the said writ to you directed, you had taken the goods and chattels of the said C. D., to the value of the money and interest aforesaid, which said goods and chattels remained on your hands unsold for want of buyers (*as the case may be*). Therefore, We being desirous that the said A. B. should be satisfied, his money and interest aforesaid, together with the costs incurred upon the present writ, command you that you expose for sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you, in form aforesaid, taken, and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before Us, in Our said Exchequer Court of Canada, immediately after the execution hereof, to be paid to the said A. B., and have there then this writ.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, this day of in the year of Our Lord, one thousand nine hundred and and the year of Our reign.

L. A. A.,
Registrar.

RULE 242.

Sheriff to follow laws of his province as to mode of selling.

In the mode of selling lands and goods and of advertising the same for sale, the sheriff or other officer shall, except in so far as the exigency of the writ otherwise requires or as is otherwise provided by these Rules, follow the laws of his province applicable to the execution of similar writs issuing from the Superior Court or Courts of original jurisdiction therein.

WRIT OF ATTACHMENT.

RULE 243.

Writ of attachment to be executed according to exigency thereof.

A writ of attachment shall be executed according to the exigency thereof.

RULE 244.

No writ of attachment to be issued without leave of Court or Judge.

No writ of attachment shall be issued without the order of the Court or a Judge.

WRIT OF SEQUESTRATION.

RULE 245.

When writ of sequestration may issue.

When any person is by any judgment or by any order of the Court or Judge directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining an order for that purpose, to issue a Writ of Sequestration against the estate and effects of such disobedient person.

E. O. xlvii.

RULE 246.

Form and effect of.

Such Writ of Sequestration may be in the form given in Schedule X hereto, and it shall have the same effect as the Writ of Sequestration in use in His Majesty's High Court of Justice in England has, and the proceeds of the sequestration, subject to the provisions of these Rules, may be dealt with in the same manner as the proceeds of Writs of Sequestration are dealt with according to the practice in that behalf, from time to time in force in His Majesty's said High Court of Justice.

SCHEDULE X.

(*Rule 246.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

Plaintiff;

AND

C. D. AND OTHERS,

Defendants.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To , Greeting.

Whereas lately, in Our Exchequer Court of Canada, in a certain action there depending, wherein A. B. is plaintiff and

C. D. and others are defendants (*or*, in a certain matter there depending, intituled, 'In the matter of E. F., *as the case may be*), by a judgment (*or* order, *as the case may be*) of Our said Court, made in the said action (*or matter*), and bearing date the day of , 19 , it was ordered that the said C. D. should pay into Court, to the credit of the said action, the sum of (*or, as the case may be*). Know ye, therefore, that We, in confidence of your prudence and fidelity, have given, and by these presents do give to you full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said C. D., and to collect, receive and sequester into your hands not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever, and therefore We command you that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said C. D., and that you do collect, take and get into your hands not only the rents and profits of his said real estate, but also all his goods, chattels and personal estate, and detain and keep the same under sequestration in your hands until the said C. D. shall pay into Court, to the credit of the said action, the sum of (*or, as the case may be*), clear his contempt, and Our said Court make other order to the contrary.

Witness, &c.

RULE 247.

Court or Judge may order proceeds of to be paid into Court.

The Court or a Judge may, in its or his discretion, order the proceeds of any Writ of Sequestration, whether the same be lands, goods or other property, to be sold and the money produced by the sale to be paid into Court.

WRIT OF POSSESSION.

RULE 248.

When writ of possession may issue.

A judgment that the Crown or any other party do recover possession of any land may be enforced by Writ of Possession, in the form given in Schedule Y, and in the manner from time to time in force in actions for the recovery of the possession of land in His Majesty's High Court of Justice in England.

E. O. xlviii., R. 1.

SCHEDULE Y.

(*Rule 248.*)

Writ of Possession.

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.

Plaintiff;

AND

C. D.,

Defendant.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of , Greeting.

WHEREAS by a judgment of Our Exchequer Court of Canada, bearing date the day of , 19 , (A. B. recovered), *or* (C. D. was ordered to deliver to) *or* (We recovered) possession of all that (*insert here description of land and premises*) with the appurtenances in your bailiwick: Therefore, We command you that you omit not by reason of any liberty of your county, but that you enter the same, and without delay you cause the said (A. B. *or* Us *when at the instance of the Crown*) to have possession of the said land and premises with all the appurtenances thereof. And in what manner you shall have executed this Our writ make appear to Us in Our said Court immediately after the execution hereof. And have you then there this writ.

WITNESS the Honourable , Judge of Our Exchequer Court of Canada, at this day of in the year of Our Lord, one thousand nine hundred and and in the year of Our reign.

L. A.,
Registrar.

RULE 249.

May issue on affidavit.

Where by any judgment any person therein named is directed to deliver up possession of any lands to the Crown or some other party, the party prosecuting such judgment shall, without any order for that purpose, be entitled to sue out a

Writ of Possession on filing an affidavit showing due service of such judgment, and that the same has not been obeyed.

E. O. xlviii., R. 2.

WRIT OF DELIVERY.

RULE 250.

Writ of delivery.

A writ for delivery of any property, other than land or money, may be in the form in Schedule YY hereto and may be issued and enforced in the manner from time to time in use in actions of *detinue* in His Majesty's High Court of Justice in England.

E. O. xlix.

SCHEDULE YY.

Form of Writ of Delivery.

(*Rule 250.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B.,

Plaintiff;

AND

C. D. and others,

Defendants.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To the Sheriff of *Greeting:*

We command you that without delay you cause the following chattels that is to say (*here enumerate the chattels recovered by the judgment, for the return of which execution has been ordered to issue*), to be returned to A. B., lately in Our Exchequer Court of Canada recovered against C. D. (*or* C. D. was ordered to deliver to the said A. B.) in an action in Our said Court.* And We further command you, that if the said chattels cannot be found in your bailiwick, you distrain the said C. D., by all his lands and chattels in your bailiwick, so that neither the said C. D., nor any one for him to lay hands on the same until the said C. D. render to the said A. B. the said chattels; and in what manner you shall have executed this Our writ make appear

to Us at Our said Exchequer Court of Canada, at Ottawa, immediately after the execution hereof, and have you there then this writ.

Witness the Honourable , Judge of Our Exchequer Court of Canada, at Ottawa, the day of , in the year of Our Lord one thousand nine hundred and , and in the year of Our reign.

The like, but instead of a distress until the chattels is returned, commanding the sheriff to levy on the defendant's goods the assessed value of it.

(Proceed as in the preceding form until the*, and then thus:) And We further command you that if the said chattels cannot be found in your bailiwick, of the goods and chattels of the said C. D., in your bailiwick you cause to be made (*the assessed value of the chattels*), and in what manner you shall have executed this Our writ make appear to Us at Our Exchequer Court of Canada, at Ottawa, immediately after the execution hereof, and have you there then this writ.

Witness, &c.

CHANGE OF SOLICITORS.

RULE 251.

Change of attorney or solicitor.

A party suing or defending by an attorney or solicitor shall be at liberty to change his attorney or solicitor in any action, cause or matter, without an order for that purpose, upon notice of such change being filed in the Office of the Registrar, and upon payment of his attorney's or solicitor's costs; but until such notice and some document evidencing such payment are filed, the former attorney or solicitor shall be considered the attorney or solicitor on the record of the party.

RULE 252.

Death, &c., of attorney or solicitor.

Upon the attorney or solicitor of one of the parties ceasing to act as such, either in consequence of being appointed to a public office incompatible with his profession, or of suspension or death, notice must be given to the opposite party of the appointment of

the new attorney or solicitor before the latter can proceed in the action. If the party who employed the deceased attorney or solicitor neglects to appoint a new one after notice, the opposite party may proceed in the action as if the party were acting in his own behalf in the action.

E. O. vii. R. 44; Wilson's Judicature Act, p. 143, and C. C. P. L. C., Art. 200 *et seq.*

CHANGE OF PARTIES BY DEATH.

RULE 253.

Action not to be abated by marriage, &c.

An action shall not become abated by reason of the marriage, death or insolvency of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite.*

E. O. 1., R. 1.

RULE 254.

Addition of parties in certain cases.

In case of the marriage, death or insolvency or devolution of estate by operation of law, of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, assignee, or other successor in interest, if any, of such party, be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just and shall make such order for the disposal of the action as may be just.

RULE 255.

Continuation of action in case of assignment or change of estate or title.

In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the action may be continued by or against the person to or upon whom such estate or title has come or devolved.

E. O. 1., R. 3.

RULE 256.

Adding or changing parties in certain cases.

Where by reason of marriage, death or insolvency, or any other event occurring after the commencement of an action, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action, or for any other cause, it becomes necessary or desirable that any person not already a party to the action should be made a party thereto, or that any person already a party thereto should be made a party thereto in another capacity, an order that the proceedings in the action shall be carried on between the continuing parties to the action and such new party or parties, may be obtained *ex parte* on application to the Court or a Judge, upon an allegation of such change, or transmission of interest or liability, or of such person interested having come into existence.

E. O. 1., R. 4.

RULE 257.

Service of order for.

An order so obtained shall, unless the Court or Judge should otherwise direct, be served upon the continuing party or parties to the action, or their attorneys or solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following Rules, be binding on the persons served therewith, and every person served therewith, who is not already a party to the action, shall be bound to file his defence thereto within the same time and in the same manner as if he had been served with a copy of the information, petition of right, or statement of claim, as the case may be.

E. O. 1., R. 5.

RULE 258.

Application may be made to discharge or vary such order.

Where any person who is under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action, shall be served with such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within *twelve days* from the service thereof.

E. O. 1., R. 6.

RULE 259.

Where person served is under any disability.

Where any person being under any disability other than coverture, and not having a guardian *ad litem* appointed in the action, is served with any such order, such person may apply to the Court or a Judge to discharge or vary such order at any time within *twelve days* from the appointment of a guardian or guardians *ad litem* for such party, and until such period of *twelve days* shall have expired such order shall have no force or effect as against such last-mentioned person.

E. O. 1., R. 7.

RULE 260.

Persons appointed to represent a class.

In any case in which the right of an heir-at-law, or the next of kin or a class shall depend upon the construction which the Court or a Judge may put upon an instrument, and it shall not be known or shall be difficult to ascertain who is or are such heir-at-law or next of kin or class, and the Court or Judge shall consider that in order to save expense or for some other reason it will be convenient to have the questions of construction determined before such heir-at-law, next of kin or class shall have been ascertained by means of inquiry or otherwise, the Court or Judge may appoint some one or more persons to represent such heir-at-law, next of kin or class, and the judgment of the Court or Judge in the presence of such persons shall be binding upon the heir-at-law, next of kin or class so represented.

E. O. R. 154.

RULE 261.

Conduct of action.—Costs.

The Court or a Judge may require any person to be made a party to any action or proceeding, and may give the conduct of the action or proceeding to such person as it or he may think fit, and may make such order in any particular case as it or he may think just for placing the defendant on the record on the same footing in regard to costs as other parties having a common interest with him in the matters in question.

E. O. R. 170.

THIRD PARTY PROCEDURE.

RULE 262.

Notice to third party in cases of contribution, &c.

Where a defendant claims to be entitled to contribution, or indemnity, over against any party not a party to the action, he may, by leave of the Court or a Judge, issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal of the Court. A copy of such notice shall be filed with the Registrar and served on such person according to the rules of this Court relating to services. The notice shall state the nature and grounds of the claim, and shall, unless otherwise ordered by the Court or a Judge, be served within the time limited for delivering his defence. Such notice may be in the form given in Schedule Z, with such variations as circumstances may require, and therewith shall be served a copy of the information, petition of right or statement of claim, as the case may be.

E. O. R. 161.

SCHEDULE Z.

Third Party Notice.

(*Rule 262.*)

IN THE EXCHEQUER COURT OF CANADA.

BETWEEN

A. B., *Plaintiff;*

AND

C. D., *Defendant.*

Notice filed 19 .

To X. Y.:

Take notice that this action has been brought by the plaintiff, against the defendant [as surety for M. N., upon a bond conditioned for payment of $2,000 and interest to the plaintiff].

The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him on the ground that you are (his co-surety under the said bond *or* also surety for the said M. N., in respect of the said matter, under another bond made by you in favour of the said plaintiff, dated the day of A.D.).

Or (as acceptor of a bill of exchange for $500, dated the day of A.D. , drawn by you upon and accepted by the defendant, and payable three months after date.

The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation).

Or (to recover damages for a breach of a contract for the sale and delivery to the plaintiff of 1,000 tons of coal

The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent).

And take notice that, if you wish to dispute the plaintiff's claim in this action as against the defendant C. D., or your liability to the defendant C. D., you must cause an appearance to be entered for you within *eight days* after service of this notice.

In default of your so appearing, you will be deemed to admit the validity of any judgment obtained against the defendant C. D., and your own liability to contribute or indemnity to the extent herein claimed, which may be summarily enforced against you.

(Signed) E. T.,
or X. Y.,
Solicitor for the defendant E. T.

Appearance to be entered at

RULE 263.

Appearance by third party—Default.

If a person, not a party to the action, who is served as mentioned in Rule 262 (hereinafter called the third party), desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the action within *eight days* from the service of the notice. In default of his so doing, he shall be deemed to admit the validity of the judgment obtained against such defendant, whether obtained by consent or otherwise, and his own liability

to contribute or indemnify, as the case may be, to the extent claimed in the third party notice. Provided always, that a person so served and failing to appear within the said period of *eight days* may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit.

E. O. R. 171.

RULE 264.

Default by third party—Judgment against third party.

Where a third party makes default in entering an appearance in the action, in case the defendant giving the notice suffers judgment by default, he shall be entitled at any time, after satisfaction of the judgment against himself, or before such satisfaction by leave of the Court or a Judge, to enter judgment against the third party to the extent of the contribution or indemnity claimed in the third party notice: Provided that it shall be lawful for the Court or a Judge to set aside or vary such judgment upon such terms as may seem just.

E. O. R. 172.

RULE 265.

Default by third party—Judgment on trial of action.

Where a third party makes default in entering an appearance in the action, in case the action is tried and results in favour of the plaintiff, the Judge who tries the action may, at or after the trial, enter such judgment as the nature of the case may require for the defendant giving notice against the third party: provided that execution thereof be not issued without leave of the Judge until after satisfaction by such defendant of the judgment against him. And if the action is finally decided in the plaintiff's favour, otherwise than by trial, the Court or a Judge may, on application by motion or summons, as the case may be, order such judgment, as the nature of the case may require, to be entered for the defendant giving the notice against the third party at any time after satisfaction by the defendant of the amount recovered by the plaintiff against him.

E. O. R. 173.

RULE 266.

Trial as between defendant and third party—Judgment.

If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a

Judge for directions, and the Court or Judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the Court or Judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

E. O. R. 174.

RULE 267.

Liberty to third party to defend.

The Court or a Judge upon the hearing of the application mentioned in Rule 266, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action

E. O. R. 175.

RULE 268.

Costs upon third party notice.

The Court or a Judge may decide all questions of costs, as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other, or others, or give such direction as to the costs as the justice of the case may require

E. O. R. 176.

RULE 269.

Contribution, &c., against co-defendant.

Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as

would be issued and taken against such other defendant, if such last-mentioned defendant were a third party: but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action.

E. O. R. 177.

INTERLOCUTORY ORDERS AS TO INJUNCTIONS, RECEIVERS AND PAYMENT INTO COURT.

RULE 270.

Injunctions and receivers.

An injunction may be granted or a receiver appointed by an interlocutory order of the Court or a Judge in all cases in which it shall appear to the Court or Judge to be just or convenient that such order should be made, and any such order may be made *ex parte* or on notice, and either unconditionally or upon such terms and conditions as the Court or Judge shall think just. The form or order in Schedule ZZ hereto may be used when the interlocutory injunction for infringement is refused on terms.

SCHEDULE ZZ.

(*Rule 270.*)

Form of Order when Motion for Interlocutory Injunction of Infringement refused on Terms.

IN THE EXCHEQUER COURT OF CANADA.

day, the day of A D 190 .

Present:

THE HONOURABLE MR. JUSTICE

Style of cause.

UPON MOTION made unto this Court this day (under special leave, *or as the case may be*) by counsel on behalf of the above named plaintiff , in the presence of counsel for the above named defendant , for an order that the defendant (*here recite the notice of motion*) upon hearing read the notice of motion herein dated the day of 190 , and the affidavits of and the exhibits therein referred to, filed, and upon hearing what was alleged by counsel aforesaid; and the defendants, by their counsel, undertaking until the trial of this action, to keep an account (*here recite the undertaking filed by the defendants*).

THIS COURT DOTH NOT THINK FIT to make any order on the said motion, other than that the costs thereof be costs in the cause (or that the costs thereof be reserved, *as the case may be*).

By the Court,

L. A. A.,
Registrar.

RULE 271.

Conservatory orders.

The Court or a Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be paid into Court or otherwise secured.

E. O. III., R. 1.

RULE 272.

How money to be paid into Court.

Any party directed by any order of the Court or a Judge to pay money into Court must apply at the office of the Registrar for a direction so to do, which direction must be taken to the Ottawa Branch or agency of the Bank of Montreal or to such other Bank as may be named by the Court or a Judge, and the money there paid to the credit of the cause or matter, and after payment the receipt obtained from the Bank must be filed at the Registrar's Office.

RULE 273.

Order for payment of money out of Court.

If money is to be paid out of Court an order of the Court or a Judge must be obtained for that purpose upon notice to the opposite party.

RULE 274.

How money to be paid out of Court.

Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, countersigned by a Judge.

MOTIONS AND OTHER APPLICATIONS TO THE COURT.

RULE 275.

Sittings of Judge in Court.

The Judge when not otherwise engaged, will sit in open Court at Ottawa every Tuesday, or on the next juridical day, in

the event of any Tuesday being a holiday, for the purpose of hearing the argument of special cases, motions for judgment, points of law raised by any pleading, appeals from the Report of the Registrar or other officer of the Court, and all other motions, applications and business which cannot be transacted by a Judge in Chambers.

RULE 276.

Setting down of special cases and motions.

Special cases, motions for judgment, argument of points of laws raised by any pleading, ordinary motions on notice, and petitions, are to be set down to be heard at least *two days* before the hearing, unless the Court or a Judge shall otherwise order, and are to be called on in the order in which they are set down.

RULE 277.

Last rule not to apply to ex parte motions.

The last foregoing rule is not to apply to *ex parte* motions.

RULE 278.

Application to be made to a Judge in Court by motion.

Where by these Rules any application is authorized to be made to the Court or a Judge in an action, such application if made to a Judge in Court, shall be made by motion.

E. O. III., R. 1.

RULE 279.

Motions to be on notice.

Unless authorized by these Rules to be made *ex parte* motions are to be on notice unless the Court or a Judge shall think fit in the interests of justice to dispense with notice.

E. O. III., R. 3.

RULE 280.

Notice of motion to be served and filed two clear days before hearing.

Unless the Court or Judge give special leave to the contrary there must be at least two *clear days* between the service and the filing of a notice of motion and the day named in the notice for hearing the motion.

E. O. III., R. 4.

RULE 281.

Proceedings where notice not given to proper parties.

If on the hearing of a motion or other application the Court or Judge shall be of opinion that any person to whom notice has not been given ought to have or to have had such notice, the Court or Judge may either dismiss the notice or application, or adjourn the hearing thereof, in order that such notice may be given, upon such terms, if any, as the Court or Judge may think fit to impose.

E. O. III., R. 5.

RULE 282.

Hearing of any motion may be adjourned.

The hearing of any motion or application may from time to time be adjourned upon such terms, if any, as the Court or Judge shall think fit.

E. O. III., R. 6.

RULE 283.

Notice may be served without special leave in certain cases.

The Attorney-General, plaintiff or petitioner shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with the information, petition of right or statement of claim, has not answered within the time limited for that purpose.

E. O. III., R. 7.

RULE 284.

May be served with or after filing of information, petition of right or statement of claim.

The Attorney-General, plaintiff or petitioner may, by leave of the Court or a Judge to be obtained *ex parte*, serve any notice of motion upon any defendant along with the information, petition of right, or statement of claim or at any time after a service of the information, petition of right or statement of claim, and before the time limited for the answer of such defendant.

E. O. III., R. 8.

RULE 285.

Sitting of Judge in Chambers.

The Judge, when not otherwise engaged and except during the vacations of the Court or legal holidays, will sit in Chambers, at Ottawa, at 11 o'clock in the forenoon, on Monday and Friday, in each week.

RULE 286.

Sitting of Registrar in Chambers.

The Registrar, except during the vacations of the court or legal holidays, or unless prevented by necessary cause, will sit in Chambers, at Ottawa, on every Monday, Tuesday, Wednesday and Friday, at 11 o'clock in the forenoon, or at such other hour he may specify from time to time by notice posted in his office.

APPLICATIONS IN CHAMBERS.

RULE 287.

Application in Chambers.

Every application to a Judge in Chambers or to the Registrar in Chambers, as authorized by these Rules, shall be made in a summary way either by summons or by petition, of which notice of two clear days shall be given.

RULE 288.

Judge or Registrar may rescind his own order.

The Judge or Registrar may respectively rescind his own order made in Chambers.

COSTS.

RULE 289.

Costs may be awarded against the Crown.

Costs may be awarded against the Crown, subject to the provisions of these rules, that no execution shall issue on a judgment or order for the payment of money by the Crown.

RULE 290.

Provisions as to costs.

The costs, of and incident to all proceedings in the said Exchequer Court, shall be in the discretion of the Court or a

Judge and shall follow the event unless otherwise ordered. The Court or a Judge may also direct the payment of a fixed or lump sum in lieu of taxed costs.

E. O. lv.

SECURITY FOR COSTS.

RULE 291.

Security for costs.

In any action, suit, cause, matter or other judicial proceeding in which security for costs is required, the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a Judge shall direct. For form of order see No. 1 Schedule Z1.

E. O. R. 981.

SCHEDULE Z1.

FORM No. 1.

(*Rule No. 291.*)

Order for security for costs.

IN THE EXCHEQUER COURT OF CANADA.

BEFORE:

THE HONOURABLE MR. JUSTICE

In Chambers.

(Style of Cause.)

UPON the application of the and upon hearing read the summons issued herein on the day of A.D. 190 , and the affidavit of and upon hearing what was alleged by counsel for both parties.

I do order that the do, within 30 days from the service of this order, give security on behalf in the penal sum of $400 to answer the costs of this action, and that all proceedings be in the meantime stayed.

Dated at Ottawa, this day of A.D. 190 .

J. E. C.

FORM No. 2.

(*Rule No. 291.*)

Bond for security for costs.

Know all men by these presents, that we, A. B. of (The plaintiff giving security) and C. D. of, &c., and E. F., of, &c. (bondsmen), are jointly and

severally held and firmly bound unto G. H., of, &c. (the defendant or person requiring security) in the penal sum of ($400) four hundred dollars of lawful money of Canada to be paid to the said G. H., his executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves and each of us by himself, our, and each of our heirs, executors and administrators, respectively, firmly by these presents. Sealed with our seals.

Dated at , this day of A.D. 19 .

Whereas by an order dated the day of A.D. 19 , and made in a certain action now pending in the Exchequer Court of Canada, wherein the said A. B. is plaintiff and the said G. H. is defendant, it was ordered that the said A. B. should, within , from the date of said order, give security to the said defendant in the penal sum of four hundred dollars, to answer the defendant's costs of this action.

NOW THE CONDITION OF THIS BOND is such that if the above bounden A. B., C. D. and E. F., or one of them, their, or one of their heirs, executors or administrators, do and shall well and truly pay or cause to be paid to the said G. H., his executors, administrators or assigns, all such costs as may be awarded to him the said G. H. in the said action, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered in presence of } A. B., C. D., E. F.

RULE 292.

When plaintiff ordinarily resident out of jurisdiction.

A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction.

RULE 293.

Bond for security to be given to the person requiring the security.

Where a bond is to be given as security for costs, it shall, unless the Court or a Judge shall otherwise direct, be given to the party or person requiring the security, and not to an officer of the Court. For form of bond see No. 2 Schedule Z1.

E. O. R. 982.

RULE 294.

How to give security.

Where a party to any action or proceeding has been ordered to give security for costs, or for any other purpose, and desires to file a bond therefor, he shall first obtain an appointment from the Registrar to approve of such bond, and shall serve the appointment upon the party or parties in whose favour the order for security was made. At the time and place appointed by him, the Registrar shall decide as to the sufficiency of such bond and the right of the party tendering it to file the same. From the decision of the Registrar in approving or rejecting such bond an appeal shall lie to the Court or a Judge. Such appeal shall be taken within 10 days from the date of the Registrar's decision.

RULE 295.

Costs—How to be taxed.

All costs between party and party shall be taxed pursuant to the Tariffs contained in Schedules Z2, Z3, Z5 and Z6 appended to these orders. Such costs shall be taxed by the Registrar or by his Deputy, appointed under the provisions of Rule 314; and they shall be the Taxing Officers of the Court, exercising exclusive authority in respect of such taxation; subject, however, to review by a Judge in Chambers.

SCHEDULE Z2.

(*Rule No. 295.*)

EXCHEQUER COURT TARIFF.

Fees and charges to be allowed to Counsel, Attorneys and Solicitors in the taxation of costs between party and party.

Instructions.

1. Instructions to sue	$5 00
2. Instructions to defend	5 00
3. For informations, statements of claim and petitions of right, motion by way of appeal from Local Judge, or any pleading by which a cause or action may be instituted	5 00
4. For special cases, answers, argument of points of law set down and disposed of before trial, pleas and exceptions	5 00

5.	To amend any pleading, when the amendment is proper and not occasioned by error or default of party amending	$2 00
6.	For brief on interlocutory applications, in the discretion of the Registrar	2 00
7.	For interrogatories and *vivâ voce* examinations of parties or witnesses	2 00
8.	For special petitions or motions in interlocutory matters and for issuing summons	2 00
9.	For special affidavits, including affidavits on production, in the discretion of the Registrar	1 00
10.	For brief in suits coming on for trial or hearing	2 00
11.	To revive or add parties	2 00
12.	For such other important step or proceeding in the suit as the Registrar is satisfied warrants such a charge	2 00

The preparation of pleadings and other documents.

13.	Drawing informations, petitions of right, statements of claim or any other judicial proceeding by which a cause or action may be instituted, not exceeding 20 folios	5 00
14.	Drawing defence, answer or other pleading, not specially mentioned, not exceeding 5 folios in length	2 00
15.	Engrossing any pleading so drawn, for printer, or in case of pleading not required to be printed, engrossing fair copy thereof, per folio	0 10
16.	For examining and correcting the proof of any pleading or affidavit or other paper required to be printed, per folio	0 05
17.	Preparing reply or joinder of issue, not exceeding 3 folios	1 00
18.	Suggestion as to the death of parties and the like	1 50
19.	Affidavit of service of information, statement of claim, petition of right or any originating judicial proceeding	1 50
20.	Special affidavit not exceeding 5 folios	1 50
21.	Every bill of costs not exceeding 5 folios	2 00
22.	Copies of all documents or papers, per folio	0 10
23.	Preparing certified copy of pleadings, or issues, for use of Judge	1 50

24.	Drawing particulars, 5 folios or under	$2 00
	For every additional folio above 5	0 20
25.	Notice of motion	1 50
26.	Certificate to appoint guardian *ad litem*	1 50
27.	Summons to attend Judge's Chambers	1 50
28.	Notice for service out of jurisdiction	1 50
29.	Advertisements to be signed by Registrar, not exceeding 5 folios in length	1 50
30.	Every writ of mesne or final process, not exceeding 5 folios	2 00
31.	Suing out subpœna *ad testificandum*	1 00
32.	Suing out subpœna *duces tecum*	1 25
33.	For every folio beyond the number provided for in any case, and for drawing or amending every other proceeding, notice, petition or paper in a cause requiring to be drafted, not herein specially provided for, per folio of necessary matter	0 20
	(The above charge does not include engrossing, or copies to file and serve.)	

PERUSALS.

34.	For perusing the print of an information, petition of right, statement of claim or any other judicial proceeding by which any cause or matter may be instituted, not exceeding 20 folios	1 00
35.	For every folio, exceeding 20 folios	0 05
36.	For perusing an amended information, petition of right, statement of claim or any other judicial proceeding by which any cause or matter may be instituted, when amended in writing or in print.	1 00
37.	(The same rate as above for perusing a statement in defence, answers, or replies (not being a mere joinder of issue) and amendments thereof.)	
38.	To the attorney or solicitor for perusing interrogatories, not exceeding 20 folios	1 00
39.	For every folio, exceeding 20 folios	0 05
40.	(Perusing special cases and all special affidavits filed by opposite party, including, in the discretion of the Registrar, affidavits on production, and examinations of party, at the same rate.)	
41.	For perusing copy of supplemental statement and copy of order to revive, each	1 00

42.	In cases where pleadings or papers are printed, the amount actually and properly paid the printer is to be allowed, not exceeding per folio	$0 50

ATTENDANCE.

43.	To inspect or produce for inspection documents pursuant to notice to admit or order for inspection;	
44.	On taxation of costs. Each, per hour	2 00
45.	To examine and sign admissions	1 00
46.	To obtain or give undertaking to defend. Each	1 00
47.	On a reference or examination of witnesses or parties, per hour	4 00
48.	On issuing summons	2 00
49.	On the return of a summons, and obtaining order thereon at Judge's Chambers, per hour	2 00
	To be increased in the discretion of the Registrar.	
50.	In Court on motion, per hour	3 00
51.	In Court on argument of points of law raised by any pleading, special petition or application adjourned from Judge's Chambers, when set down for hearing or likely to be heard, per hour	4 00
52.	On consultation or conference with counsel, if Registrar think the same reasonable and proper, per hour	2 00
53.	On hearing or trial of any cause or matter, per hour.	3 00
54.	To hear judgment when same adjourned	2 00
55.	For entering order made at Judge's Chambers and having same signed by Judge	2 00
56.	To settle draft of any judgment, decree or order	2 00
57.	To pay money into Court	2 00
58.	Every other proper attendance	0 50
59.	On approval of Bond for security for costs, or otherwise	2 00

BRIEFS.

60.	For drawing brief, per folio, for original and necessary matter	0 20
61.	For drawing brief, per folio, for matter not original but necessary	0 10
62.	Copy of document, per folio	0 10

63. Copy of brief for second counsel, when fee taxed to him, per folio $0 10

(But nothing shall be allowed for any copy of any pleading included in such brief, or of any document which the Registrar thinks was not reasonably and necessarily included therein, and the Registrar may, in any case in which he sees fit, allow a lump sum instead of, but not exceeding, the per folio allowance above provided for.)

LETTERS.

64. All necessary letters, in the discretion of the Registrar (besides postage) 0 50

COUNSEL.

65. Fee on drawing or settling pleadings, and advising on evidence 5 00
66. Fee on motion in Court, not to exceed 20 00
67. Fee on argument of points of law raised by any pleading, not to exceed 25 00
68. Fee with brief on trial of issues or hearing, or on motion by way of appeal from Local Judge, not to exceed 100 00
69. (No more than two counsel fees to be taxed without an order of a Judge.)
70. Fee on motion for judgment, not to exceed 20 00
71. (The above fees to counsel may be increased by order of the Court or a Judge.)

SERVICES.

72. For services on a party or witness, such reasonable charges and expenses as may be properly incurred.

OATHS AND EXHIBITS.

73. To Commissioners for oaths 0 20
74. To the attorney or solicitor for preparing each exhibit 0 20
75. To Commissioners for marking each exhibit 0 10

DISBURSEMENTS.

76. Besides the Registrar's fees, reasonable charges shall be allowed to attorneys and solicitors for necessary disbursements and postage on services

of notices, motions, subpœnas, translations, printing of the same, copies, and other incidental proceedings.

FEES TO SPECIAL EXAMINER.

77.	Every appointment in writing	$0 50
78.	Administering oath or taking affirmation	0 20
79.	Marking and endorsing every exhibit	0 20
80.	Taking deposition or examination, per hour	2 00
81.	Every necessary certificate issued by Examiner, at request of parties	1 00
82.	Making up and forwarding deposition or examination to Registrar, at Ottawa	1 00
83.	For every attendance upon an appointment when solicitor or witness do not attend and Examiner not previously notified	1 00

The charge for the taking and transcribing of the evidence or examination is 10 cents per folio when taken in longhand, and 20 cents per folio supplying four copies when taken in shorthand.

The evidence or examination is to be transmitted by the Examiner to the Registrar, at Ottawa, with the shorthand-writer's account, which is paid by the Registrar and the fees collected by the latter from the parties in the case.

SPECIAL REFERENCE.

84.	In cases of special references, where, by order of the Court or a Judge, the inquiry is to be proceeded with at some place other than Ottawa, or when the referee does not reside at the place where the inquiry is made, he shall then be allowed his actual travelling expenses, and a per diem sustenance allowance of	4 00
85.	Every appointment in writing	0 50
86.	Administering oath or taking affirmation	0 20
87.	Marking and endorsing every exhibit	0 20
88.	Every necessary certificate issued by Referee at request of parties	1 00
89.	Drafting report on reference, per folio	0 30
90.	Making up and forwarding evidence, reports and all other papers and documents	1 00

91. Per diem fee during the time employed on the reference. $10 00

(This fee may be increased by order of the Court or a Judge.)

GENERAL.

92. In actions under $400, a deduction of one-third of the amount of the fees (other than disbursements) above allowed shall be made by the taxing officer, unless otherwise ordered by the Court or a Judge.

93. In any case where the defendants sever in their defence, the plaintiff's attorney, counsel or solicitor shall receive, on each additional issue, one-half of the sum which he would have received had there been but one issue; the whole amount to be payable in equal proportions, by the party or parties to each issue.

94. When the proceedings are carried on according to the practice of His Majesty's Superior Court in the Province of Quebec, and where the foregoing tariff may not provide for, or be applicable to, any such proceedings, the fees shall be taxed according to the tariff from time to time in force in the said Superior Court.

RULE 296.

Taxing Costs of Crown's Solicitor.

The Registrar of the Court shall have authority, at the request of the Minister of Justice, or his Deputy, to tax any bill of costs made against the Crown by any one acting for the Crown in any proceeding in the Court, and in such cases may allow counsel fees in excess of those prescribed in the Tariff now in force.

RULE 297.

Witness fees.

Witnesses shall be entitled to be paid the fees and allowances prescribed by Schedule Z3 annexed hereto.

SCHEDULE Z3.

FEES AND ALLOWANCES TO WITNESSES.

(*Rule 297.*)

To witness residing within three miles of the Court House, per diem (not including ferry and meals). $ 1 00

To witness residing over three miles from the Court House (exclusive of meals and ferry).. .. .. $1 25

Barristers, attorneys, physicians, surgeons, engineers, surveyors and architects, other than parties to the cause, when called upon to give evidence in consequence of any professional or technical services rendered by them, or to give professional or technical opinions, per diem.. .. .. 5 00

If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause they will be entitled to a proportionate part in each cause only.

When witnesses travel over three miles they shall be allowed expenses, according to the sum reasonably and actually paid, which in no case shall exceed 20 cents per mile one way.—Note:—Mileage shall only be allowed where there is no railway or other public conveyance carrying passengers at specific rates or tolls.

APPEALS TO THE SUPREME COURT OF CANADA.

RULE 298.

Notice to Registrar by party appealing.

Whenever an appeal is taken from a decision of the Exchequer Court to the Supreme Court of Canada in pursuance of the provisions of *The Exchequer Court Act,* the appellant shall, within the time limited in section 82 of the said Act (R.S., 1906, ch. 140) for the deposit of security for costs on such appeal, or such further time as may be allowed under the provisions thereof, give notice in writing to the Registrar of the Exchequer Court, stating that he intends to prosecute an appeal; and if such appeal is thereafter discontinued or abandoned, the appellant shall give notice in writing to the Registrar of the Exchequer Court of the discontinuance or abandonment of such appeal.

RULE 299.

Case in appeal how to be settled and what to contain.

The case, in appeal from the Exchequer Court to the Supreme Court, is, in case the parties differ about the same, to be settled by a Judge upon *one day's* notice of an appointment for that purpose to be served on the opposite party by the party intending to appeal, and it is to contain the pleadings and

evidence or such parts thereof as the Judge may think material, and also a copy of any written judgment pronounced by the Judge whose decision is appealed from; or in case no written judgment has been pronounced a note showing the grounds and reasons for the decision.

AGENTS AND SERVICE OF PAPERS.

RULE 300.

The Agent's Book.

There is to be kept in the Registrar's Office a book of the said Exchequer Court to be called the Agent's Book, in which may be entered the names of persons residing at the City of Ottawa and entitled to practice in the said Court, who are to act as agents for attorneys and solicitors residing in other places.

RULE 301.

When the party appears in person.

Any party to any action or suit or other proceeding, not residing at the said City of Ottawa, who appears in person, may also enter in the said book some place within the limits of the said city at which papers may be left for service upon him and which shall be called his address for service.

RULE 302.

Service in case of neglect to enter name but not requiring personal service.

In case the attorney or solicitor in any action, suit or other proceeding, shall have neglected to enter the name of an agent, or a party appearing in person, to enter an address for service in the said book, papers not requiring personal service may be served by affixing them in the office of the Registrar in some conspicuous place therein.

WRITS.

RULE 303.

Writs.

All writs shall be prepared in the office of the Attorney-General or by the attorney or solicitor suing out the same, and the name and address of the attorney or solicitor suing out the same shall be endorsed on such writ, and every such writ shall

before the issuing thereof be sealed at the office of the Registrar and a copy of the said writ and a *præcipe* therefor shall be left at the said office, and thereupon an entry of issuing such writ, together with the date of sealing and the name of the attorney or solicitor suing out the same, shall be made in a book to be kept in the Registrar's office for that purpose, and all writs shall be tested of the day, month and year when issued.

RULE 304.

Subpœnas.

Subpœna to witnesses may be in the form set forth in Schedule Z4 to these orders annexed.

SCHEDULE Z4.

(a) Subpœna.

(*Rule 304.*)

IN THE EXCHEQUER COURT OF CANADA.

EDWARD THE SEVENTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

1. To
2.
3.
4.

GREETING:

WE COMMAND YOU that all excuses ceasing, you and each of you, do personally be and appear before the at on the day of , at o'clock in the noon to testify the truth according to your knowledge in a certain cause depending in Our Exchequer Court of Canada, wherein is and is on the part of and hereof fail not at your peril.

WITNESS the Honourable , the Judge of Our Exchequer Court of Canada, at the day of in the year of Our Lord one thousand nine hundred and and the year of Our reign.

Registrar.

(b) Subpœna duces tecum.

The same as the preceding form, adding before the words 'and hereof fail not at your peril *the words* 'and that you bring with you and then and there produce before the said Judge (Registrar, Referee or Commissioner, *as the case may be*) the following documents, viz.:—(*Here state the documents required to be produced*) and show all and singular those things which you know, or which the said paper writing doth import of, in or concerning the present cause now depending in Our said Court.'

(c) Præcipe for Writ of subpœna.

(Title of Case.)

Seal (one or two *as the case may*) Writ of Subpœna
on behalf of . Dated the day of 19 .

(Signature)
Solicitor for

RULE 305.

Writs in revenue causes how to be tested and returned.

All writs in revenue causes are to be tested of the date on which they issue, and shall be made returnable immediately after the execution thereof, or on a day certain to be fixed by a Judge of the Court; and all necessary alterations may be made in the forms of writs in revenue causes to adapt them to the law and practice of the Court; and the Judge of the Court in granting his fiat for any such writ, if any granted, may settle the terms and form in which the writ shall issue.

RULE 306.

Writs may be amended.

Any writ may at any time be amended by order of the Court or Judge upon such conditions and terms as to costs and otherwise as may be thought just, and any amendment of a writ may be declared by the order authorizing the same to have relation back to the date of its issue or to any other date or time.

RECOGNIZANCES.

RULE 307.

Recognizances.

Recognizances in revenue and all other causes may be taken and acknowledged before any Commissioner or other officer

having authority to take recognizances of bail in the Exchequer Court.

See sec. 76, ch. 140, R.S., 1906.

RULE 308.

May be on paper.

Recognizances may be prepared on paper.

OFFICERS OF THE COURT.

RULE 309.

Registrar's office hours.

The Registrar is to keep his office open each day, except Sundays and holidays, from 10 in the forenoon until 4 o'clock in the afternoon, and on Saturdays from 10 in the forenoon until 1 o'clock in the afternoon, and all officers of the Court are to be in attendance during those hours.

RULE 310.

Registrar's office hours in vacations.

During vacations the Registrar's office is to be kept open each juridical day from 11 in the forenoon to 12 o'clock, noon.

RULE 311.

Books to be kept in Registrar's office.

There are to be kept in the Registrar's office all books necessary and proper for recording and entering all proceedings in Court and Chambers, and in which all judgments, reports, orders, rules, filings of pleadings, and other papers are to be entered.

RULE 312.

Jurisdiction of Registrar in Chambers.

The Registrar shall have power to do any such thing and transact any such business as is specified in these Rules, or in any such Rules or orders which may be hereafter made, and to exercise any such authority and jurisdiction in respect thereof as is now or may be hereafter done, transacted or exercised by the Judge of the Exchequer Court sitting in Chambers in virtue of any statute or custom or by the practice of the Court.

(1) In case any matter shall appear to the said Registrar to be proper for the decision of the Judge, the Registrar may refer the same to the Judge, who may either dispose of the matter or refer the same back to the Registrar with such directions as he may think fit.

(2) Every order or decision made or given by the said Registrar in Chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a Judge sitting in Chambers.

(3) All orders made by the Registrar sitting in Chambers are to be signed by the Registrar.

(4) Any person affected by any order or decision of the Registrar may appeal therefrom to the Judge in Chambers, and such appeal shall be made by a petition on notice setting forth the grounds of objection, and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by the Judge or the Registrar.

(5) The petition shall be presented on the Monday or Friday named in the said petition or notice, which shall be either the first Monday or first Friday after the expiry of the delays provided for by the foregoing subsection, or so soon thereafter as the same can be heard by the Judge, and shall be set down, not later than two days before the hearing, in a book kept for that purpose in the Registrar's office.

RULE 313.

Registrar's ministerial powers.

The Registrar shall have power in revenue causes to do any ministerial act mentioned in these Rules and which the King's Remembrancer in His Majesty's late Court of Exchequer in England could have done in the same class of cases, and when any proceedings in such cases in the said Court of Exchequer were required to be taken in the office of the King's Remembrancer the same proceedings may be taken here in the office of the Registrar.

RULE 314.

Deputy Registrar.

Any Officer of the Court whom the Registrar of the Court, with the approval of the Governor in Council, may appoint to

be his deputy shall, subject to the direction of the Registrar, perform the duties of Registrar, and shall for that purpose have and exercise all the powers, authority and jurisdiction of the Registrar in Chambers.

RULE 315.

Sheriff's fees.

Sheriffs and coroners shall be entitled to the fees and poundage prescribed by Schedule Z5 to these orders annexed.

SCHEDULE Z5.

Sheriff's Tariff.

(*Rule 315.*)

EXCHEQUER COURT OF CANADA.

The following fees and allowances shall be taken and received by the sheriff in suits in the Exchequer Courts of Canada:—

Every warrant to execute any process mesne, or final directed to the sheriff, when given to a bailiff	$0 75
Arrest, when amount does not exceed $200	2 00
" " " $400	4 00
" " over $400	6 00
Bail or other Bond	2 00
Assignment of the same	1 00
Service of Process, *Scire Facias,* Writ of Revivor, Information, or Statement of Claim, each defendant, (no fee for affidavit of service in such cases to be allowed unless service made or recognized by the sheriff)	1 50
Serving other pleadings, Subpœnas, Rules, Notices, or other papers (besides mileage)	0 75
For each *additional* party served	0 50
For each Summoner on Writ of *Scire Facias* per day, to be paid by sheriff	1 00
Receiving, filing, entering and endorsing all writs, informations, statements, pleadings, rules, notices, or other papers, each	0 25
Return of all process and writs (except subpœna), informations, statements, pleadings, rules, notices, or other papers	0 50
Every search, not being by a party to a cause or his attorney	0 30

Certificate of result of such search, when required (a search for a writ against lands of a party shall include sales under writ against same party and for the then last six months)	$0 75
Poundage on executions and on writs in the nature of executions where the sum made shall not exceed $1,000, five per cent.	
When the sum is over $1,000 and under $4,000, two and a half per cent., when the sum is $4,000 and over, one and a half per cent., in addition to the poundage allowed up to $1,000, exclusive of mileage, for going to seize and sell, and except all disbursements necessarily incurred in the care and removal of property.	
Schedule taken on execution of other process, including copy to defendant, not exceeding five folios	1 00
Each folio above five	0 10
Drawing advertisements when required by law to be published in the *Official Gazette* or other newspaper, or to be posted up in a Court House or other place, and transmitting same, in each suit	1 50
Every necessary notice of sale of goods, in each suit	0 75
Every notice of postponement of sale, in each suit	0 25
The sum actually disbursed for advertisements required by law to be inserted in the *Official Gazette* or other newspaper.	
Executing writ of possession besides mileage	6 00
Bringing up prisoner on attachment or *habeas corpus*, besides travel, at 20c. per mile	1 50
Actual and necessary mileage from the Court House to the place where service of any process, paper or proceeding is made, per mile	0 13
Seizing estate and effects on attachment against debtor.	3 00
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by order of the Court or a Judge.	
Presiding or attendance on execution of writ of inquiry or under any writ of escheat, or other writ of like nature	5 00
Hire of room, if actually paid, not to exceed $2 per day.	
Mileage from the Court House to the place where writ executed, per mile	0 13

Drawing bond to secure good seized, if prepared by sheriff	$1 50
Every letter written (including copy) required by party or his attorney respecting writs or process, when postage prepaid	0 50
Drawing every affidavit when necessary and prepared by sheriff	0 25
Giving possession of lands, exclusive of mileage and assistance	5 00

All necessary disbursements to surveyors and others for surveying the lands and giving possession, to be allowed to the sheriff.

Coroners.

The same fees shall be taxed and allowed to coroners for services rendered by them in the service, executions and return of process, as allowed to sheriffs for the same services and above specified.

Tariff of fees to crier.

The following fees shall be taxed to the crier of the Exchequer Court:—

Calling every case	0 50
Swearing each witness or constable	0 15
Proclamation and calling parties connected with proceedings other than witnesses or constables, each person	0 25

SCHEDULE Z6.

The following fees shall be paid to the Registrar of the Exchequer Court of Canada.

1. On filing every information, statement of claim and petition of right, or on any pleading by which a cause or action may be instituted	$2 00
2. On filing every plea, answer and exception to above.	1 00
3. On filing every scheme of arrangement	5 00
4. On filing every document, proceeding or paper not specially provided for	0 10
5. On marking every exhibit filed at trial, on reference or on examinations	0 10
6. On sealing and issuing every writ (besides filing)	2 00

7.	On certifying every office copy of information, statement of claim or petition of right, writ of fi-fa, writ of sci-fa and schemes of arrangement, or any pleading by which a cause or action may be instituted, and affixing the seal of the Court when necessary	$2 00
8.	Enrolling order and scheme of arrangement, not exceeding five folios	2 00
	Each additional folio	0 20
9.	On issuing third party notice and sealing same	2 00
10.	On every renewal of writ	1 00
11.	On every writ of subpœna	1 00
12.	Præcipe for writ of subpœna or any other præcipe not otherwise provided for	0 10
13.	Amending every writ or other proceeding or paper.	0 50
14.	Every ordinary rule or order, not exceeding five folios	0 50
	Each additional folio	0 20
15.	Special rule or order, not exceeding five folios	1 00
	Each additional folio	0 20
16.	Every judgment or Court order, and entering the same, not exceeding five folios	2 00
	Each additional folio	0 20
17.	Taxing every bill of costs (besides filing) per hour.	2 00
18.	Every allocatur	1 00
19.	Every reference, enquiry, examination or other special matter referred to the Registrar, for every meeting not exceeding one hour	2 00
20.	Every additional hour or less	2 00
21.	For every report made by the Registrar upon such reference, &c	2 00
22.	On payment of money into Court, or out of Court, (charge to be made once only) every sum under $200	1 00
23.	On $200 to $400	2 00
24.	Over $400 to $800	4 00
	A percentage on money over $800 at the rate of half of one per cent.	
25.	Receipt for money in margin of answer, plea, &c.	0 25

26	Every other certificate required from Registrar (including any necessary search), and seal of the Court when necessary	$1 00
27.	Exemplification or office copy of proceedings, per folio	0 10
	(A folio shall consist of 100 words.)	
28.	Every search for special paper, or a general search in one cause	0 25
29.	Every search in any book	0 25
30.	Every affidavit, affirmation or oath administered by Registrar	0 25
31.	Every commission or order for examination of witnesses	1 50
32.	Entering or setting down any cause for trial or hearing on points of law raised by any pleadings, special case, petition of right, information, statement of claim or otherwise	2 00
33.	Setting down a case by default	0 50
34.	Every fiat or summons	0 50
35.	Every appointment made by a Judge	0 50
36.	Every enlargement on application to Judge in Chambers or on return of summons or otherwise.	0 25
37.	Every appointment for taxation of costs or otherwise made by the Registrar	0 25
38.	Enlargement of same	0 10
39.	Comparing, examining and certifying transcript record on appeal to the Supreme Court of Canada or on transmission of original record, if ordered, each	5 00
40.	Comparing any document, paper or proceeding with the original on file or deposited in the Registrar's office, per folio	0 03
41.	On each opposition for payment or claim above $1,000	2 50
	On each opposition for payment or claim above $400, but under $1,000	1 60
	On each opposition for payment or claim of $400 or under	1 40
42.	On each opposition to secure charge, to annul, to withdraw or retain—	
	In actions above $1,000	2 50

	In actions above $400, but under $1,000	$1 60
	In actions of $400 or under	1 40
43.	For drawing a report of destribution	8 00
44.	On every opposition or claim collocated in any report of distribution or in any motion to distribute moneys	2 00
45.	On any contestation of a report of distribution	2 50
46.	For drawing any judgment of distribution	8 00
47.	For drawing *procès verbal* upon improbation	2 50
48.	On every deposition of every witness taken in writing (long hand), for every folio	0 10
49.	Approving or taking bond, or recognizance	4 00
50.	Signing, settling, or approving an advertisement	1 50
51.	Settling conveyance deed of railway sold under judgment of court and issuing same, not exceeding five folio	15 00
	Every additional folio	50

Shorthand writers.

1. Every shorthand writer employed under the authority of the Court shall, if directed by the Judge, Registrar, Referee or Commissioner before whom the examination of any witness is taken, or if requested by any party to the proceeding, furnish to such Registrar, Referee or Commissioner, four copies of the notes of evidence, one of which shall be handed to the Judge, one filed of record in the Court, and the others given to the plaintiff and defendant respectively when paid.

2.	For taking and transcribing such examination or notes of evidence, there shall be paid to the Registrar, Acting Registrar, Referee or Commissioner, per folio	$0 20
	If for any reason the evidence is not required to be transcribed, for each hour occupied by the examination	2 00

3. If such notes of evidence are furnished as hereinbefore provided by direction of the Judge, Registrar, Referee or Commissioner, the fee last mentioned shall be paid by the party who called the witness, but if furnished at the request of either party, then by such party.

4. If any fee herein mentioned is not paid by the party liable therefor it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause,

or the Judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just.

5. Any Acting Registrar, Referee or Commissioner to whom any such fee is paid shall forthwith transmit the same to the Registrar of the Court.

RULE 316.

Bailiff's fees.

Bailiffs who serve any process or paper by direction of any party to any cause or matter, shall not be paid the fees prescribed for sheriffs and coroners, but the fee or fees allowed to bailiffs for a like service in the Superior Court of the province in which the service is made.

VACATIONS.

RULE 317

Christmas vacation.

There shall be a vacation at Christmas, commencing on the 15th of December, and ending on the 10th of January.

RULE 318.

Long vacation.

The long vacation shall comprise the months of July and August.

COMPUTATION OF TIME.

RULE 319.

Computation of time.

In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the foregoing rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless such last day shall happen to fall on a Sunday or on a day appointed by the Governor General for a public fast or thanksgiving, or any other legal holiday or non-juridical day, as provided by the statutes of the Dominion of Canada.

RULE 320.

Certain days not to be computed.

Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking

any proceeding, Sunday, or a day appointed as aforesaid for a public fast or thanksgiving, or any other non-juridical day or legal holiday, shall not be reckoned in the computation of such limited time.

E. O. lvii., R. 2.

RULE 321.

Where time for taking any proceeding expires on a Sunday or a day on which office is closed.

Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or procedure shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

E. O. lvii., R. 3.

RULE 322.

No pleadings to be amended, filed or delivered during vacations.

No pleadings shall be amended, filed or delivered during the vacations, unless otherwise ordered or directed by the Court or a Judge.

E. O. lvii., R. 4.

RULE 323.

Vacations not to be reckoned in computation of time.

The time of the long and Christmas vacations shall not be reckoned in the computation of the times appointed or allowed by these rules for filing, amending or serving any pleading, unless otherwise directed by the Court or a Judge.

E. O. lvii., R. 5.

RULE 324.

Powers of Court or Judge as to enlarging or abridging time.

The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed.

E. O. lvii., R. 6.

RULE 325.

Formal objections not to prevail.

No proceeding in the Exchequer Court shall be defeated by any merely formal objection.

RULE 326.

Effect of non-compliance with rules.

Non-compliance with any of these rules shall not render the proceedings in any action void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.

E. O. IIx.

INTERPRETATION.

RULE 327.

In the preceding rules the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, that is to say:—

1. The terms 'a Judge,' 'the Judge' or 'Judge' mean any Judge of the said Exchequer Court transacting business out of Court and shall also include the Registrar sitting in Chambers under the powers conferred upon him by Rule 312.
2. The word 'Registrar' extends to and includes his deputy lawfully appointed.
3. Words importing the singular number, include the plural number, and words importing the plural number include the singular number.
4. Words importing the masculine gender include females,
5. The word 'party' or 'parties' and words 'Plaintiffs' and 'Defendants' include a body politic or corporate, and also His Majesty and His Majesty's Attorney-General.
6. The word 'affidavit' includes affirmation.
7. The words 'Revenue Causes' include the several classes of cases mentioned in section 31, sub-sec. *(a)* of 'The Exchequer Court Act' (Ch. 140, R.S., 1906).

8. The words 'Non-revenue Causes' includes the several classes of cases mentioned in section 31, sub-sec. *(d)* of 'The Exchequer Court Act' (Ch. 140, R.S., 1906), as well as a petition of right.
9. The word 'Petitioner' used alternatively with the words 'Attorney-General' and 'Plaintiff' shall mean the suppliant in any petition of right.
10. The word 'action' shall include a suit or proceeding by information by the Attorney-General as well as a petition of right, a reference by the Head of a Department, or an action by a private suitor.
11. The expression 'plaintiff' occurring in any rule of the Exchequer Court of Canada, includes the Crown or the party prosecuting any proceeding, and the suppliant in a petition of right.
12. The expression 'defendant' occurring in any rule of the Exchequer Court of Canada, includes the Crown or the party defending any proceeding, and the respondent in a petition of right.
13. The word 'month' means calendar month where lunar months are not expressly mentioned.
14. The words 'the Act' mean the Exchequer Court Act.

Dated, this 11th day of January, A.D., 1909.

W. G. P. CASSELS.
J. E. C.

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