REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

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

REPORTER.

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JUDGE

OF THE

EXCHEQUER COURT OF CANADA.

THE HONOURABLE GEO. W. BURBIDGE.

Appointed on the 1st day of October, 1887

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

During the period of these Reports :

The Honourable	A. B. ROUTHIER, - - - - -	Quebec	District.
do	JAMES MCDONALD, C.J.S.C. - -	N. S.	do
do	EZEKIEL MCLEOD, - - - -	N. B.	do
do	WILLIAM W. SULLIVAN, C.J.S.C.	P. E. I.	do
do	Archer Martin - - - - -	B. C.	do
do	JAMES CRAIG, J.T.C. -	Yukon Territory	District.

His Honour THOMAS HODGINS, K.C. Toronto do
(Appointed 9th February, 1903,)

ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA

During the period of these Reports :

THE HONOURABLE CHARLES FITZPATRICK, K.C.

SOLICITORS-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE H. G. CARROLL, K.C.
THE HONOURABLE RODOLPHE LEMIEUX, K.C.

ERRATUM.

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CASES

DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

THE GEORGIAN BAY NAVIGATION COMPANY ..... } PLAINTIFFS ; 1902 June 2.

AGAINST

THE SHIPS "*SHENANDOAH*" AND "*CRETE*."

Admiralty law—Collision—Right of way.

In the case of a river traversed annually by thousands of vessels and used by two nations, a custom which in effect supersedes a statutory rule ought to be established by the most conclusive and cogent proof; and when it is sought to make it binding upon foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed amongst mariners generally, and extended to mariners sailing on vessels carrying a foreign flag and habitually traversing a busy river.

THIS is an action brought by the plaintiffs against the American steamer *Shenandoah* and the barge *Crete*, the latter being in tow of the former, to recover damages for injuries to the plaintiffs' steamer *Carmona*, as the result of a collision which took place in the River St. Clair, on the morning of the 25th of June, 1899.

The trial of the case took place at Windsor on the 17th, 18th and 20th days of January, 1902, and the argument of counsel was heard, at Toronto, on the 1st day of February, 1902.

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Argument of Counsel.

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

T. Mulvey and *J. W. Hanna* for the plaintiffs;

F. A. Hough for the defendants.

T. Mulvey for the plaintiffs: I do not think there is any doubt as to how the *Carmona* came into the river. She was on her voyage from Goderich to Sarnia and of course came down the easterly side of the lake, and, while still in the lake, passed a tow starboard to starboard. After she got into the river and some distance below the lighthouse, she passed a single vessel port to port, and that is the point I lay stress upon; because it is to some extent an answer to the contention of my learned friend that she should not have gone down the American side of the river, and of itself, I think, shows that we were taking our proper course down the river. When she passed this vessel there was no fog. It was not until about as she crossed the ranges that the fog set in. This would bring her about opposite the Grand Trunk freight sheds on the American side, and the chart shows that point to be about 1,500 feet from the place where the collision occurred. Various opinions were expressed with regard to the strength of the current. The defendants' preliminary act says seven miles an hour, some witnesses say four; but the reason I take up that point is to estimate the time that the *Carmona* was in the fog. Supposing she was run as slowly as she could be to retain steerage way—about two miles an hour, and the current was running five miles an hour, she would be travelling about the rate of seven miles an hour and would be passing the land at the rate of half a mile in the neighbourhood of four minutes.

[BY THE COURT: In other words she would have been travelling from the time she entered the fog, from four to five minutes.]

It would be in the neighbourhood of three and one-half minutes she was in the fog. There is no doubt she came quite close to the American bank in the fog, and we say that at the time she sighted the *Shenandoah* she was within about 75 or 100 feet from the bank.

There are some variations in evidence as to how the *Carmona* was headed at the time the *Shenandoah* saw her. Captain Stevenson, the master of the *Shenandoah*, said she was coming down broadside, but the evidence of the plaintiffs' witnesses do not agree with that. Captain Stevenson also states that the *Shenandoah* moved up the river and swung a little to port, and then the *Carmona* backed into the *Shenandoah*. By models here I show this would be impossible, because if the *Carmona* were coming down broadside upon the bow of the *Shenandoah* she must have gone into the bank, and she could not, as he states, have backed into her. I think the evidence of the master of the *Shenandoah* is on that point entirely inaccurate, because there was not room for the *Carmona* to come broadside like that—there was not room to do it, as her length was 180 feet over all.

[BY THE COURT: Or they must have been a good deal further out.]

In their evidence they do not say they were any further out—not one of their witnesses say they were more than 200 feet out, and there was this barge at the dock with a beam of 40 feet, and they expressly said that the space between the barge and the *Shenandoah* was not 200 feet; but there was that space between the dock and the *Shenandoah*, so that there could have been only 150 feet between the barge and the *Shenandoah* at the time of the accident. We say that the *Shenandoah* was nearer, that they were only from 100 to 150 feet from the shore at the time of the accident, and that the position

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of the *Carmona* was heading down the river almost parallel with the American shore, and her port bow in a line with the stem of the *Shenandoah*. Not only does the position of the vessels at the time indicate that, but also their subsequent manœuvres, because the *Carmona* in backing made very little headway against the current—one of the witnesses for the defendants, I think the master of the *Shenandoah*, said that although the *Carmona* was backing for all she was worth, she was still going down the stream, and he also states that when they came together the *Carmona* was going down the stream, that is relatively with the *Shenandoah*.

[BY THE COURT: That she was moving down stream although she was backing.]

Yes, and the *Shenandoah* was going ahead relatively to her. That shows that the pleadings are not accurate. The *Carmona* did not back with the *Shenandoah*, but they came together while passing one another. It may have been a sheer or suction from the *Carmona* that brought them together. It is hard to say how that happened, for at any rate the *Carmona* was backing, but was not going up the stream faster than the *Shenandoah*.

[BY THE COURT: Still the backing into her might be while passing, that is to say, she was altering her position in the stream while moving onwards.]

But the position in which they came together shews it was not a backing but a pulling together. It is well known that a large vessel will pull a small vessel towards her when passing.

[BY THE COURT.—That may be in still water.]

A large number of collision cases, even in the Detroit River, show that that it is very likely to happen.

There is considerable dispute regarding the whistles that were given and I draw attention to the fact that

a starboard whistle was given by the *Shenandoah* and subsequently a port whistle. It is true that the crews of the *Crete* and *Granada* both say that they did not pay any attention to these whistles. That may be so, but I submit that it is impossible to give an intelligent explanation of how this accident happened unless they did give some attention to these whistles, because I think it is most clearly shown that the *Crete* had her bow turned in somewhat towards the American shore, and therefore she had starboarded when the two-whistle blasts were given. I am not saying whether the two-whistle blasts were given before or after the *Carmona* signalled, but at any rate they were given, and subsequently the *Shenandoah* gave one blast, and they ported their wheels. The *Crete*, after that port whistle was given, could not have had time to change her course because it was almost immediately, the captain of the *Shenandoah* says, when the *Carmona* was passing by his stern that she gave that whistle, and then the *Carmona* would have only about 300 feet to go to come to the *Crete*, and in that distance the alteration of the *Crete* could amount to very little.

Now there is some dispute in the evidence as to the way the tow-line was broken. I submit the circumstances show clearly that the plaintiffs' contention on that point is accurate. The evidence is that the tow-line was "chewed" up to about 100 feet from the bow of the *Crete*—that about 100 feet of it went in on the *Crete*, and the balance, 400 feet, was taken in on the *Shenandoah*; and there was no chewing whatever on the part the *Crete* took in, and there was no "chewing" near the stern of the *Shenandoah*—but that the "chewing" took place in the outer 100 feet of the part taken in by the *Shenandoah*. One of the witnesses for the defence says he was at the bow of the

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Crete when the collision took place, and saw the *Carmona* about 75 feet from the *Crete* and saw the line snap across the bow of the *Carmona*. The circumstances do not show that that is accurate. If that were so how would the line be "chewed" in the last 100 feet from the break? The only thing that could "chew" the line was the action of the paddle, wheels on it, and how could it be "chewed" if it broke across the bow of the *Carmona*.

On the other hand one witness, who was on the bow of the *Carmona* immediately before the *Crete* and *Carmona* came into collision, says that while the *Carmona* was fifteen feet away from the *Crete* he looked down and saw the line still taut against the side of the *Carmona*. I think the evidence all shows that the way the break of the line took place was, that when the vessels came together there was a sudden jar, and the line at that time being under the wheel of the *Carmona*, the sudden jar broke it off. The line could not have been snapped across the bow of the *Carmona*. The line was a very heavy one and the *Carmona* was not headed across the line. Then the *Carmona* came down upon the *Crete* and struck her about five feet from the stem on her starboard bow.

Now as to the law applicable to the case. First, I will take a point raised by my learned friend that there was a custom of vessels to go to the American side of the river in going up. In discussing that point I draw attention to the International rules. Art. 25. says "In narrow channels every steam-vessel shall when it is safe and practicable keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." That is not the United States rule but the International rule, and that applies to all vessels over which the Canadian Government has jurisdiction. It applies to mid-channel in that river.

That is concluded in authority because it has been held in more than one American case, that the Canadian rules apply on the Canadian side of the channel. (Cites the *Lansdowne* (1).

[BY THE COURT:—Do the United States courts hold that this rule applies to their vessels in Canadian waters?]

Yes. Their vessels are governed by the Canadian rules when they pass the centre of the river. That is held by the Supreme Court in the case of the *New York* (2). The whole point is considered there. It is held there that the Canadian and United States rules apply on their respective sides of the International boundary.

My learned friend put a series of questions to his expert witnesses as follows: "Do you know the custom of mariners in passing Botsford's elevator?—A. Yes. What do you do there?—A. We go to starboard." Now if they went to starboard in Canadian waters they would be going contrary to Art. 25, and they would be in fault, so that they were going a little beyond the mark in answering those questions as they did. There is no corresponding rule for the United States side of the boundary; but there is a clear and well defined rule for the Canadian side; and these expert witnesses did not limit their testimony at all, but without qualification they said, in passing that part of the river—they didn't say one side or the other—we go to the starboard, because it is proper to go to starboard.

There is a number of cases in which the law on this subject is clearly and well laid down. The cases I propose to cite show that it is good navigation to go port to port in such places as that and not starboard to starboard. I will cite English cases decided before this

(1) 105 Fed. Rep. 436. (2) 175 U. S. 187.

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Article 25 was adopted as a rule of law, that is adopted as practically laid down by statute, and I submit that even for United States waters these are good decisions now. The first rules on the subject were adopted by the Trinity House in 1840, but these rules had no binding effect; they were rules laid down by the Trinity masters for the guidance of navigators, and one of the rules was "a steam-vessel passing another in a narrow channel must always have the vessel she is passing on the larboard hand." (Cites the *Duke of Sussex* (1); *The Friends* (2). The rules of the Trinity House were superseded in 1853 by *The Merchants Shipping Act* of 1854, sec. 297, but it is unimportant to discuss that section here and it practically gives statutory force to this particular rule; before that the rule was merely good seamanship. In 1862, 25 & 26 Vict., that section of *The Merchants Shipping Act* was repealed, and for some time after that there was no statute upon that point at all, and it was not until the rules of 1880 that the rule was adopted again that in narrow channels the ships must go to port.

[BY THE COURT:—Were there any intermediary decisions when there was no statutory rule?]

Yes; in the case of the *Unity* (3) decided in 1856, while the statute was in force the same point was held; there is also the case of the *Fyenoord* (4). This case merely holds that these rules apply to foreign vessels. I refer you to the *Vianna* (5); that was the case of a collision at a launching and it was contended that all customary notice was given of the launching; there the court says "no custom is proved because a custom in law must be universal, or at least so universal that any departure from it is recognised as unusual and extraordinary." (Cites *Hand of Providence* (6); *The*

(1) 1 W. Rob. 274.
(2) 1 W. Rob. 478.
(3) Swab. 101.
(4) Swab. 374.
(5) Swab. 405.
(6) Swab. 107.

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Sylph (1); *The Nimrod* (2); *The Seine* (3); *The Velocity* (4); explained in *The Esk* (5).

It was held in *The Rhondda* (6), since the rules, that the vessel which, in a narrow channel, did not go to the starboard side was to blame or in fault. There are some United States cases also, which may be a little more instructive.

[BY THE COURT:—They are more apposite, dealing with American waters.]

I refer also to the *Newport News* (7), this was a case of a collision in a fog on the Potomac, tried in 1900. *The Pavonia* (8); *The James Bowen* (9).

[BY THE COURT:—All the masters and seamen called in this case stated that the general rule was to keep to the right, but they contended that there was a custom here which varied it.]

Mr. Mulvey cites *The City of Macon* (10); *The Milwaukee* (11); and the *Mary Shaw* (12). There is only one case, so far as I know, in Canada where there is any such local custom as that spoken of by the expert witnesses for the defence, and that is provided for in Art. 35 of the International rules. There are circumstances where the port side should be taken in a narrow channel, and the rules provide for it; that exception is as well known as the rules themselves. That is what I think the case of the *Mary Shaw* requires. *Wheeler* v. *The Eastern State* (13), is another case regarding the effect of custom, as is also *Barrett* v. *Williamson* (14).

I say the *Shenandoah* and *Crete* both acted improperly in not cutting the hawser and in support

(1) 2 Spinks 75.
(2) 15 Jur. 1201.
(3) 5 Jur. N.S. 298.
(4) L. R. 3 P. C. 44.
(5) 2 L. R. 3 P. C. 436.
(6) 8 App. Cas. 549.
(7) 105 Fed. Rep. 389.
(8) 26 Fed. Rep. 106.
(9) 52 Fed. Rep. 510.
(10) 85 Fed. Rep. 236.
(11) Brown's Ad. Rep. 313.
(12) 6 Fed. Rep. 918.
(13) 2 Curtis 141.
(14) 4 McLean 589.

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of that I cite the *Jane Bacon* (1), a decision of the Court of Appeal. It is quite clear if in this case the *Crete* had cut their tow rope as soon as the *Carmona* came in sight, there would have been no accident at all; no complaint is made about the collision with the *Shenandoah*; it was trifling.

There are a number of United States cases also showing the duty and liability of tugs and tows. I cite the *Mary A. Bird* (2); *The America* (3). These cases show that the English and the United States law upon this subject is the same.

[BY THE COURT:—Had the *Crete* any time to do anything when she first saw the *Carmona*?]

The matter was almost instantaneous. I have some other authorities which will help us out on that point. A second would have done it. There should have been an axe there ready to cut the hawser, and then the *Carmona* could have gone down the river without any trouble at all. It was the headway that the *Crete* was making up the river at the time which caused the injury to the *Carmona*. I also refer to the *George S. Shultz* (4), and the *Mount Hope* (5).

The *Shenandoah* should have arranged a signal with the *Crete* to tell her to cut the tow-line. That is held in the case I last cited, and also in the *David Crockett* (6). In the *Osceola* (7), it is held that the tow is bound to stop just the same as the other vessel. More than one rule says that the plaintiffs here would have the right of way, and that the other vessel should have stopped. Every rule applicable to navigation shows that the *Shenandoah* should have stopped. There are a number of authorities about stopping in fogs, and on that point I cite the *Kirby Hall* (8). It is only fair

(1) 27 W. R. 35.
(2) 102 Fed. Rep. 648.
(3) 102 Fed. Rep. 767.
(4) 84 Fed. Rep. 508.
(5) 84 Fed. Rep. 910.
(6) 84 Fed. Rep. 698.
(7) 50 Fed. Rep. 326.
(8) 8 P. D. 71.

to say that the English decisions qualify to some extent the liability of a tow, and the latest case upon the subject is the *Lord Bangor* (1). In that case it is held that for all purposes a tug and a tow are not one vessel, and that the rule should not govern them as one vessel. In that case it is also held that in a fog a tug and tow are not bound to come to a stand still, but they are bound to come to such a speed as will merely keep their tow-line out of trouble. Apply that case to the one before us. Here we are in a current going at the rate of about five miles an hour; if the *Shenandoah* had stopped, her line could not have been fouled; even if she had reversed—had gone back, she could not have fouled because the current would have held the barges away from her. If she had slackened her speed in the first instance the accident would not have happened at all. It was the *Shenandoah's* duty to have stopped as soon as she saw the *Carmona*, and she would have gone back without trouble; in either case she was at fault. If she had had only headway on, and no more, she could have stopped and reversed without getting her line into trouble. I refer here to the *Passaic* (2), as showing that it would be improper for the *Carmona* to have anchored there when she found herself in the fog.

I also refer to the *Galatea* (3); also to the *Columbia* (4). There are a number of other cases to show that in a fog the fact that a whistle is not heard should not prevail against the person that does not hear it.

The *Genevieve* (5) relates to cross signals and the duties of vessels under such circumstances. In the *Marguerite* (6), it is held that a vessel which has a right to be where she is should not be held to be in fault for

(1) [1896] P. 28.
(2) 76 Fed. Rep. 460.
(3) 92 U. S. 439.
(4) 104 Fed. Rep. 105.
(5) 96 Fed. Rep. 859.
(6) 87 Fed. Rep. 953.

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Argument of Counsel.

an unwise manœuvre made in a moment of extreme danger. I also refer to the *H. M. Whitney* (1), a case in regard to tugs and tows.

The defendant in his evidence sought to show that at the time of the accident the *Shenandoah* was making for the Grand Trunk wharf. I objected to that evidence but was overruled. I point out that there is nothing with regard to this in the preliminary act of the defendants and at the trial a party cannot give evidence contrary to the statements contained in his preliminary act. On that point I refer to the *Vortigern* (2). It was not until the second day of the trial that we heard anything about the *Shenandoah* making for a dock. The defendants no doubt saw that it was necessary to account more particularly for the presence of the *Shenandoah* on the *American* side, and I object strongly to the admission of this evidence, and I say that that evidence should not be considered in disposing of this case; my learned friend might say that his preliminary act is substantially correct and that the course was up the St. Clair Rapids; but is there not a very great omission? Her course was not up, but across, if he were landing at the wharf; and when my learned friend put in a preliminary act as he did, he had in his mind that the *Shenandoah* was on her course to Duluth. While I object to the evidence, if it is to be considered I wish to comment upon it. Notwithstanding the fact that the *Shenandoah* was going for the wharf she should have looked out for us; we had the right of way, and she was taking the risk.

I call attention to the fact that the *Carmona* was following her usual course in going down the river.

As to the question of damages from loss of profits, I think a perfectly fair way to get at it would be to

(1) 86 Fed. Rep. 697. (2) Swab. 518.

compare the trips of that season with the trips of the succeeding season. I do not think it would be fair to take the succeeding trip in 1899, i.e. after the accident happened, and say what the profits likely would be from that. I think you might take the two corresponding trips.

I also refer to two further cases, the *Godiva* (1), and the *Miranda* (2).

J. W. Hanna followed for the plaintiffs:

I wish to draw attention to the evidence of Capt. Stevenson. There can be no doubt that the *Shenandoah* was moving up the river, and did move up the river, from the time when she first met the *Carmona* until the *Crete's* tow-line was broken, some 900 feet. If you take the evidence of Capt. Stevenson as to the rate of speed at which he was moving, it would occupy twenty minutes to go 900 feet; but there can be no doubt that from the time the two boats met until the tow-line of the *Crete* had parted there were only a few minutes. The circumstances that we find do not tally with Capt. Sevenson's evidence that he was only going through the water at the rate of a mile an hour, but they do corroborate the evidence of the plaintiff's witnesses that he was going at a greater speed, in fact that he was running at an illegal rate of speed. I also point out that in the statement of defence the place of contact is given differently from what any of the witnesses have sworn to.

[BY THE COURT: Of course the pleadings are not conclusive.]

They are an indication of the instructions given the solicitor at the time as to which part of the ship came into contact. The statement in the defence is exactly as we state, that it was on the port side aft that the two ships came into contact; but according to Capt.

(1) 11 P. D. 20. (2) 7 P. D. 185.

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Stevenson's version, as soon as the *Carmona* had passed the bow of the *Shenandoah*, after striking, she appeared to go down sidewise. Some of the other witnesses, however, say that she went down with her bow thrown in and her stern towards the middle of the river. The theory of the defence is that after the *Shenandoah* and the *Carmona* came together, the *Carmona* was put ahead apparently without any regard to which direction she was going and she did run across the tow-line. If that contention were correct, if there were any force being applied by the *Carmona* as against the tow-line, as quick as the tow-line parted, would not the *Carmona* be released and would not that very same force that had broken the tow-line drive her over onto the other side so that she would have avoided the *Crete* altogether? Instead, however, we find that she came down and struck the *Crete*, almost on the starboard side of the bow.

What I submit the facts show is this, that it was the fault of the *Shenandoah* that the *Crete* acted as she did, and that she was to blame. I think the captain of the *Crete* did exactly what any good seaman would do; he tried to pass the *Carmona* on the side that it was indicated to him the steamer was going to pass on, and in doing that I think he exercised good judgment. The captain of the *Shenandoah* said that there was between 150 to 200 feet between him and the shore. Why did he blow an alarm whistle if there was no danger? Why did Captain McFarlane go out and tell the captain of the *Carmona* to run her nose in the mud if there was no danger, if there was 150 feet of clear water there? Or is the fact not as we have stated that we were being crowded by those barges, and there was not that much water; we have evidence that they did attempt to pull the barges out, and it seems to me that that is really the key-note of the whole thing.

McFarlane would not have spoken in that way if there had not been some occasion for it.

I wish to point out further that there are three witnesses which should be called in the case of a collision, that is the captain, the wheelman and the engineer, but here we have only the captain.

The whole question comes down to this, was the *Carmona* rightfully where she was? If she was, did she herself contribute to the accident? The authorities cited by my learned friend show clearly that she did have a right to be where she was. Then we ask was there anything she should have done that she did not do? There is no doubt as soon as she heard another steamer approaching it was her duty to slow down; but I do not think it was her duty to back as it was the duty of the other steamer, she having the right of way. I refer to rule 15 of the American rules corresponding to the 16th English rule, rule 17 American, corresponding to rule 18 English, rule 18 American corresponding to rule 19 English, 21 American corresponding to 23 English. These rules all apply more or less to this case. I refer also to the case of *Stoomvaart Maatschappy Nederland* v. *Peninsular, &c., Navigation Co.* (1); the *Ceto* (2); the *Franklin* and the *Kestrel* (3); the *Love Bird* (4), and the *Kirby Hall* (5). These cases make it incumbent for a boat meeting another to stop and back; it is not merely sufficient that she should stop, but she should stop and back, and there does not appear to be any exception made in the case of a tow. All the circumstances corroborate the plaintiff's story, and there are none that corroborate the defendants' story as to how the collision occurred.

F. A Hough for the defendants:

(1) 5 App. Cas. 876.
(2) 14 App. Cas. 670.
(3) L. R. 4 P. C. 529.
(4) 6 P. D. 80.
(5) 8 P. D. 71.

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It is clear that we have never claimed the custom which we have set up in this suit to be one which existed through the whole of the St. Clair River, but simply at this particular point, and the moment you pass the shoulder of the bend in the river the reason for that custom ceases to exist and the custom ceases to exist with it. As to my learned friend's statement that above the scene of the accident they had passed another vessel port to port, and his using that as an argument against the custom which we have set up, we might with just as much consistency say that the fact of their having passed another boat further up starboard to starboard, is an argument in favour of the custom for which we are contending. I submit that neither of these instances can have any effect on the situation at the point where the collision took place. My learned friends also urged that the *Carmona* did not back into the *Shenandoah*. If that is so and the mate of the *Carmona* shouted out to the captain to "Go ahead, you are backing into this ship"—that was their own language—it seems to me it is immaterial whether he backs astern or backs in a sideways direction. The facts on the evidence, I think, show that the *Carmona* did the backing into the *Shenandoah*, and did the running into the *Crete*. As far as the question of suction is concerned, it is a well known fact that there can be no suction unless the vessel which caused it is a very large one and moving very rapidly; but that I submit on the evidence was not the case here.

The next statement made was as to the tow-line, and my learned friends wish to show that the tow-line did not break until the collision took place and that the "chewing" was done by the paddle-wheel. The evidence is that the line was chewed for a distance of seventy-five feet from the bow. If that were done by the paddle-wheel it could not have got within that

distance of the bow because the paddle-wheel of the *Carmona* is about 125 feet from her bow, so that it is impossible that the chewing could have been done by the paddle-wheel. Looking at the lithograph of the *Carmona* I submit fairly that these braces could be held to cause the erosion and straining of the line.

The next point that I wish to refer to is that the *Carmona* buckled to starboard. I do not know that it is necessary to give any reason for it buckling to starboard; if it were, as I think it is clear, practically a shell, it must buckle some way when there is force coming against it, and the ordinary law would be that it would give in the weakest point. I submit that the least inclination would be sufficient to buckle the stem in the opposite direction. The fact of the *Carmona* coming down as she did and crossing the tow-line and getting on the shore, when she was not working her engines, simply indicates to my mind the fact that the current sets in towards the American shore at this point; and I think that that fact is also established by the fact that the *Crete* and the *Grenada* both, when they were loosened, went ashore here on the American side. It was not because the *Grenada* was out in the stream in one direction and the *Crete* in another; it seems to me a ridiculous contention to make that the tow could go up the river in that zigzag way such as is now indicated. Unless my learned friends can show that the *Crete* was headed in shore, and headed in shore by reason of those two whistles, then their case must fail.

The next point my learned friends made was that the *Shenandoah* must have gone 900 feet up the river during the accident. If the *Carmona* did not move at all, if she stood perfectly still, that would take the *Crete* away up to this position (indicated on chart) before she would strike. I submit the proposition is ridicu-

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lous. The minute the *Crete's* tow-line was broken she dropped her anchor, that is as soon as the collision took place, and it is safe to say she did not go any further up than that.

As to the variation of the testimony of the witnesses, when the plaintiffs' witnesses made their declarations before the notary they all wanted, no doubt, to hold their jobs; if there was any inducement for a man to stretch a point in favour of his employer it was at that time, and having made them they were tied down to them. I would expect, however, that when they made those declarations the day after the collision that there would be a perfect unanimity among them with regard to all the salient facts; but when one man swears the very next day as to one set of signals and another man swears to a different one, if their evidence is the same now, then I say it is not reliable. The defendants' witnesses differ in many of the minor points, but as to the one point of the signals they are absolutely unanimous, there is no difference of opinion, and I submit that the evidence of the defendants show that they were thoroughly honest in everything they did say and that they did agree in all the important points.

Then the plaintiffs urge that the *Shenandoah* and *Crete* acted improperly in not cutting the tow-line. I submit that the navigators of the *Shanandoah* and *Crete* had no reason to suppose that this vessel was going to attempt to cross their tow-line until she actually did it. The *Crete* could not have known the *Carmona* was coming down on her tow-line until she saw her, and she was then 150 feet from her, and I submit that at that time and under those circumstances there was not time to cut the tow-line or do anything which could possibly have prevented it at that point.

I wish to cite the case of the *Lord Bangor* (1), already referred to, as to a vessel with a tow not being bound

(1) [1896] P. 28.

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to reverse or jeopardise herself by getting the tow-line in her wheel; that is good seamanship the world over. I am satisfied to have the evidence given by the witnesses who swore that they were going to the dock and that the lines were ready at the time of the collision. I think the circumstances show that it was a very wise thing for the captain of the *Shenandoah* to do under the conditions existing at the time. As to the delay in the plaintiff bringing this action, it seems to me that the man who is honest and who thinks he has a fair case would not have waited two years in bringing his action unless there was some motive.

The plaintiffs knew that there was a fog and they knew that there was a vessel in the fog; then I say they were negligent in coming down the river as they did. By coming down the river in the position in which the *Carmona* placed herself, she could not alter her course to starboard, she could not alter her course in any way except by crossing the bows of another boat, and I submit that the fact of the *Carmona* coming down there as she did put her in a pocket for which they alone are liable, and I say that, aside from any custom existing at that point, they should have expected and provided for the very thing that happened.

I submit the *Carmona* had no business to go down the river at the rate she did. The cases are clear that when a vessel hears another ahead of her in a fog in such a position that she cannot ascertain her location she must stop; it is not sufficient for her to check her speed, but she must stop. That is what I say the *Carmona* should have done until she ascertained where the other vessel was.

I submit that when the *Carmona* did get the starboard signal from a vessel in front of her, if her navi-

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gators were at all familiar with the locality, she should have taken it for granted that the other boat was either close to the dock, or going to the dock, or was hugging the American shore, and she should have known that there was ample room to the starboard; then she should have accepted the signal and passed to starboard.

My next reason is that having come in to the port of the *Shenandoah*, she clearly should have held her course. That, I think, is the foundation and the vital point of this whole action; as she saw that she had about 150 feet of water inside there was no reason for her attempting then to cross the tow-line. But instead of doing that she moves across the tow-line and gets herself caught, and is, I submit, responsible for her own misfortune. Another alternative which my learned friends suggested was that they could have tied up at the Grand Trunk dock; that would have been a wise thing to do according to the experts; anything would have been wise rather than what they did coming down that river in a fog. It is considered one or the most dangerous localities on the Great Lakes.

That brings me to the first proposition which I have to make, which is that, if the defendants were entirely in fault, the plaintiffs cannot succeed if at any time they could have done anything to prevent the damage and did not do it. The second proposition is that unless the preponderance of evidence is found in favour of the plaintiffs, the onus being upon them, the action must fail.

I submit that the experts who gave testimony clearly prove the existence of a custom at the point where this accident took place, that the up-bound boat should take the west side of the channel, and the down boats should pass to starboard. I submit that

your lordship cannot but find on the evidence of the defence that there is such a custom existing at the point where this collision took place. If this is so found, then the *Carmona* was clearly wrong in attempting to come down, knowing, as she should have known, that she was liable to meet an up-bound boat. As to the discrepancy spoken of between the preliminary acts of the defendants and the evidence, I submit that there is no great discrepancy in our act, in not saying that we were going to tie up at the dock any more than there is in their preliminary act by their not saying that they were bound for Sarnia. I submit that there is no substantial variance, and if there is it is owing to the plaintiffs' delay in bringing the action and our inability to get reports and to get the evidence in shape.

I do not think that I need argue that the White Law is to govern in this case and the White Law only, the collision taking place in American waters.

[BY MR. MULVEY: That is admitted.]

The International rules have no bearing on the subject whatever.

[BY MR. MULVEY: I do not admit that by any means; they have some bearing on the question of whether there is a custom at that point.]

[BY THE COURT: Do I understand the contention of the plaintiffs is that even with the White Law, the defendants are in fault unless the custom they allege lets them out?]

[BY MR. MULVEY: Yes, and I say there cannot be a custom because under the Canadian rules it is illegal for a vessel to go down on that side—it is contrary to the express statement in the International rules for a vessel to go down on the Canadian side, so that if a Canadian vessel starboarded opposite the elevator in Canadian water she is in fault.]

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[BY THE COURT: The point is this, that even under their own rules they were in fault as to the steps taken unless they establish, with clearness, a custom which should be known to people using the American side of the river; and if it were a custom established by such consensus of opinion and for a large number of years, that the *Carmona* should be presumed to have notice of by using American waters.]

Should have known it; if they did not it is immaterial to us.

As to the negligence of the *Carmona* I would cite the *Baltimore* (1). I submit that the *Carmona* did not comply with that rule; that she could have stopped much sooner than she did, and if she had done so the collision would have been avoided. I refer also to the *Aurania* (2). The fact that the cases are all strong to the effect that "we had the right of way", is not a sufficient answer to the damage as done. (The *Beryl* (3). I think it is plain in law that the simple fact of one vessel having the right of way does not entitle her to navigate without using ordinary precautions. The strong case on that point is the *Warren* (4). As to the negligent navigation of the *Carmona* in the fog at the time of this collision, I refer to the *North Star* (5). Also the *City of New York* (6).

I submit that the captain of the *Shenandoah* acted in accordance with what is laid down in these cases—he brought his vessel to a practical stand-still. He swore to his intention of going into the dock and states he thought he would wait until the vessel which he heard coming down got by. And I submit that he took every precaution that a careful man should take,

(1) 34 Fed. Rep. 660.
(2) 29 Fed. Rep. 98.
(3) L. R. 9 P. D. 137.
(4) 18 Fed. Rep. 559.
(5) 62 Fed. Rep. 71, and in appeal 22 U. S. App. 242.
(7) 35 Fed. Rep. 604, afterwards in 147 U. S. 72.

and that the other boat continued to come down the river three miles an hour and never once stopped. I refer to *Marsden on Collisions* (1). As to the general usage governing the navigation of local waters, I refer again to rule 38 of the White Law; to the *City of Washington* (2); to *Spencer on Collisions* (3); *Marsden on Collisions* (4). And also to the *James Bowen* (5), as to the effect of a custom in regard to vessels meeting and passing in the Delaware River; in that case it is clearly held that the custom superseded the rules.

I submit that on the whole evidence the plaintiffs cannot succeed in their action.

T. Mulvey in reply.

Notwithstanding what my learned friend says it is quite apparent from the map that the *Shenandoah* went 1,000 feet during the accident, and the assertion of my learned friend to the contrary I think does not answer that.

My learned friend argues that the *Carmona* crowded the *Shenandoah* into shore and did not go to starboard. The evidence all shows that it was impossible, when the *Carmona* saw the *Shenandoah*, to go any other way than to port; the *Carmona* could not have gone slower than she did and have maintained steerage way. As to the reasons given by my learned friend why the plaintiffs should not succeed, even assuming that the plaintiffs' evidence were true—there is no question that we knew there was a fog, but we did not know of that fog until after we got into the river, and got into the current, so that we could do nothing but go down.

The second point he advances is that the *Carmona* had no business to come down the river at the rate she did, and should have stopped when she heard the

(1) 3rd ed. pp. 396, 435.
(2) 92 U. S. 31.
(3) Sec. 22.
(4) P. 467.
(5) 52 Fed. Rep. 510.

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whistle ahead. My answer is that she could not have gone down the river at any other rate. She would not have steerage way if she went slower, and she stopped as soon as she saw a vessel ahead.

His next point is that having come in to the port side of the *Shenandoah* she should have held her course and not come across the tow-line. I have a comment to make on that which I made a short time ago. The mate of the *Shenandoah* said "Run ashore!" I do not think that is very satisfactory advice to give. There was some chance of getting out the other way, and if the *Crete* or *Shenandoah* had cut their tow-line as they should have done, we could have got out the other way, and there would have been no accident at all.

My learned friend's next proposition is that if the defendants are in fault and the plaintiffs could have done anything to prevent the accident and did not do it, they cannot recover—but he does not cite any authority upon that subject neither does he suggest anything that we might have done to prevent the accident which we did not do.

My learned friend also says that the onus is upon the plaintiff, and he says, too, that Captain Cameron in his evidence stated that this was his first trip down the river and that he was taking the usual course. It is not fair comment to say that because this was his first trip he did not take the accustomed course.

McDOUGALL, L.J., now (June 2nd, 1902) delivered judgment.

This is an action instituted by the plaintiffs in the Exchequer Court, Admiralty side, against the American steamer *Shenandoah* and the barge *Crete*, (the latter being in tow of the former, but both belonging to the same owners), to recover damages for injuries to

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the plaintiff's passenger steamer *Carmona* as the result of a collision between the *Carmona* and both the *Shenandoah* and *Crete* on the morning of the 25th June, 1899. The collision took place in the River St. Clair, opposite Botsford's Elevator, Port Huron, at or near the foot of what is commonly known as the St. Clair Rapids.

The *Carmona* is a British paddle wheel steamer one hundred and eighty-three feet long, and the *Shenandoah* is an American steam barge or propeller three hundred and twenty-eight feet long, and the *Crete* is an American tow barge three hundred feet long. The *Shenandoah* and her tow were coming up the river on their way to Duluth, loaded with coal; the *Carmona* was descending the river with passengers upon her regular voyage from the Sault St. Marie to Cleveland, intending to call at Sarnia on her way down the river. The time of the accident was about 1.30 a.m.; the weather had been clear and fine and there was no wind but a bank of fog covered the river from about the Grand Trunk Railway docks for some distance down the river. When the *Carmona* entered the river it was clear and she had no difficulty in getting the range lights, but when she reached the Grand Trunk docks she encountered the fog. The *Shenandoah* had had clear weather up the river until a little below the water works dock on the American side, or about five hundred yards below Botsford's elevator, when she too entered the fog. The collision took place opposite Botsford's elevator, which, as nearly as may be, is about four or five hundred yards down the river from the Grand Trunk Railway docks; in other words the fog bank covered approximately a thousand yards of the river. The collision took place between the vessels about the centre of the fog.

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The plaintiff's case, as made upon the pleadings' charges that the cause of the collision was the negligent navigation of the *Shenandoah*, and alleges that the *Carmona* did everything possible to avoid the collision. The defence sets up that when first seen the *Carmona* was coming rapidly down the river, and apparently heading for the docks on the American side. The night is alleged to have been very foggy, with no wind; that the *Carmona* had no lights, or such inferior lights as to be invisible to those on the *Shenandoah*. It also alleges that the latter vessel was properly navigated, and had all her regulation lights duly burning. As soon as the *Shenandoah* saw the *Carmona*, the former's helm was put hard aport and several sharp danger whistles were blown. It is further alleged that the *Carmona* was uncontrollable, and, after clearing the *Shenandoah's* bows, reversed her engine and backed stern first into the *Shenandoah* striking the latter on the port side aft; the *Carmona's* engines were then started ahead and she crossed the tow-line of the barge *Crete*, cutting the same in two, and struck the starboard bow of the *Crete*. The allegation is then repeated that the *Carmona* was then controllable, was not kept on her course as required by law, and was negligent in attempting to run down the St. Clair Rapids during the heavy fog prevailing at the time. The defence avers that the collision was caused by some or all of the matters and things therein alleged, or otherwise by the default of the *Carmona* or those on board her, and was not caused or contributed to by anything done by the *Shenandoah* or those in charge of that ship. The defendants then counterclaim for their damages for injuries caused by the collision and for the breaking of the tow-line by the *Carmona*, and the consequent delay and damage to the *Crete* and

Grenada (another tow barge), which latter vessel it is alleged went ashore.

The plaintiffs in reply deny the allegation of the counterclaim and allege that any loss or damage suffered by the *Shenandoah* and *Crete* was solely due to their own negligence and that the plaintiffs were guilty of no contributory negligence whatever.

No action was taken by either vessel against the other at the time, but in August, 1901, the *Crete* got upon a shoal or bar at or near the lime-kiln crossing in the Detroit River, in Canadian waters, and the plaintiffs hearing of this fact issued process out of this court and had her libelled for damages for the collision. The case came on for trial before me at Windsor, on the 17th, 18th and 20th days of January, 1902. As usual in such cases a large number of witnesses were examined on behalf of the plaintiffs and defendants, and the usual dispute arose as to which vessel was in fault and responsible for the collision. The argument of counsel was heard on the 1st of February at Toronto. At the argument it was arranged that the shorthand notes of the evidence should be extended before my judgment should be considered; the lengthy transcript took the reporter five or six weeks to prepare, and my judicial engagements in other courts during March and April have prevented my considering the matter earlier.

I find upon the evidence that the *Carmona* had a full crew and was properly manned, and that her proper lights were burning, and that she was upon her regular trip between the Sault St. Marie and Cleveland on the night in question. The weather had been clear and bright on the lake, and when she passed the lighthouse beyond the mouth of the river that she picked up, without difficulty, the range lights, one of them being at the entrance to the river, another at the

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freight sheds and the third at the Botsford elevator. After getting into the river and as the *Carmona* was making the turn in the river after passing the freight sheds, the fog bank appeared ahead and in a moment it surrounded the vessel. The *Carmona*, before entering the fog, and inside the lighthouse, had passed another steam vessel, port to port, going out of the river. The *Carmona* came down the American shore following the trend, at first keeping about three hundred feet out, but when the fog came up so thick as to obscure and shut out the shore lights, the master altered his course so as to get closer to the shore in order to pick up the land-marks and loom of the land. Just prior to the collision the *Carmona's* course would take her to within fifty or sixty feet of the bank. Before entering the river her engine had been checked down to five or six miles an hour; and on entering the fog a second check was given and the engine reduced in speed to about two miles an hour. The second check meant that the engineer was standing at the engine, working it with a hand bar. This speed would give a reasonable steerage way only. The current of the river varies at different points; at some points it is said to be six or even seven miles an hour; but at the point of collision, about opposite Botsford's elevator, it is said to be between four and five miles an hour. On the night of the collision, as I have said, there was no wind to affect the current and the current therefore may be assumed to have been normal. Captain Stevenson, the master of the *Shenandoah*, states that the current opposite Botsford's elevator would be between four and five miles an hour. Before entering the fog the master of the *Carmona* had heard fog signals down the river, but he states these would not indicate with certainty whether the vessel giving them were coming up or going down. The

men were at the wheel and the master, Captain Cameron, was on the bridge. After entering the fog the *Carmona* commenced to sound regular fog-signals and just as Botsford's elevator loomed up, the *Carmona* being then perhaps seventy-five feet from the shore, Captain Cameron and his mate saw a light ahead, two head lights and a green light, over his port bow, nearly abeam; this would indicate that the *Shenandoah* (whose lights they were) was approaching him nearly stem on. He immediately stopped his engine and reversed while his mate sounded a port whistle—one blast. The *Shenandoah* answered with two blasts. The *Carmona* immediately repeated the single blast and a danger signal—three or four short blasts. The *Shenandoah* ported her wheel, and when the bows of the two boats were almost abreast of each other, blew a port signal. The *Carmona* by reversing her engine practically stopped her way and the two steamers passed within ten or fifteen feet of each other, the *Carmona's* engines still backing. The mate of the *Carmona* sung out, "Stop backing, or you will back into the steamer;" and at the same moment Saunders, a sailor, called out, "There is a tow-line." The master stopped the engine backing and took a turn or two ahead. The port quarter of the *Carmona*, however, grazed and touched the side of the *Shanandoah* but doing no special damage to either vessel. Just as the engine started ahead came the warning about the tow-line and the engine was instantly stopped, when suddenly the *Crete*, which was being towed about four or five hundred feet behind the *Shenandoah*, loomed up dead ahead, showing both her port and starboard lights but with her stem pointing towards the American shore; she was coming directly into the *Carmona*; the latter's engines were immediately reversed again at full speed, but the vessels came together. The *Crete*

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struck the *Carmona* on the starboard bow, buckling it to starboard. The *Carmona* struck the *Crete* on the bluff of her starboard bow. After passing the *Shenandoah*, the *Carmona* had apparently got foul of the tow-line of the latter vessel, it passing under her port guards, and she apparently followed along the line to within 75 or 100 feet of the *Crete's* bow when the tow-line parted. Immediately after the contact with the *Crete*, the *Carmona's* rudder became jammed and she could not use her helm. At the instant of contact the *Carmona's* engine was still reversing, but she had apparently not yet got stern way. After the collision the engine was stopped, and the current then carried the *Carmona* down the stream and she drifted past the starboard side of the *Crete* and then across the tow-line between the *Crete* and the *Grenada* and past the port side of the *Grenada* till she brought up on a mud bank below the *Grenada*. The *Crete*, when the tow-line between herself and *Shenandoah* parted, promptly dropped her anchor, and the *Grenada* hung in the stream. The *Carmona* did not touch the *Grenada* in passing. It was speedily ascertained that the *Carmona* was not leaking badly, the damage done being well above the water-line. She signalled for a tug, and one came in a few moments and pulled her off the bank and towed her over to Sarnia. An examination of her condition was made at Sarnia and an hour or two later she proceeded down the river to Detroit, discharged her passengers and went upon the dry dock for repairs.

The master of the *Shenandoah* states that he first came into the fog a little below the water works; that he checked down his engine to a speed of between two and three miles an hour over the ground, and later checked the engine down again to a speed of perhaps not more than half or three quarters of a mile against

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the current. He had made up his mind, he says, to tie up at Botsford's elevator dock till the morning; he had not given out the order but had told his men to stand by the lines. When he got abreast of the elevator, however, he found another vessel lying there and he decided to proceed further up the river and tie up at Grand Trunk docks. He thinks his vessels were about 150 feet out in the river, outside of the vessel tied up at the elevator dock, in other words out in the stream about 190 to 200 feet from the face of the dock. He could make out the face of the dock and the elevator 150 feet away, but he could not make out his own tow 500 feet down the river behind him. He had blown fog-signals as he came up the river after encountering the fog. He had heard several fog-signals ahead of him up the river, and later, the sound of paddle-wheels, and by the sound this appeared to him to be a vessel several thousand feet, or say, about half a mile distant. He answered the fog-signal and also blew a danger signal, and a moment later, he says, and before the *Carmona* came in sight, he blew a starboard signal. To this the *Carmona* replied by a port signal; he states he at once announced it by a port signal and a danger whistle; and by the time he gave the danger signal the *Carmona* suddenly appeared about 300 feet above him almost head-on and starboarding rapidly. He then quickly ported his wheel and cleared her. He is quite positive he heard no other signal from the *Carmona* (save a fog signal which he heard before any passing signals had been given) except the one port signal and this was in reply to his first passing starboard signal. On the other hand the master of the *Carmona* and several of his witnesses are equally positive that the first passing signal given by either vessel was the *Carmona's* port signal, followed by the reply from the *Shenandoah* of a starboard signal. That then

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the *Carmona's* port signal was repeated and later adopted by the *Shenandoah*, and a port signal given by that vessel just as the bows were passing each other. Captain Cameron avers that he followed both his port signals with danger whistles, and upon giving his own first port whistle had stopped and reversed his engine. Each master, therefore, charges the other with crossing signals.

After carefully considering this conflict of testimony, in which both masters were supported by several witnesses, I find as a fact that the *Carmona* blew the first port whistle and that it was answered by the *Shenandoah* with a starboard signal; that the *Carmona* instantly repeated the port signal, which was answered later by a port signal, thus indicating that the upbound vessel would comply with the signal and pass to port. The *Carmona* stopped and reversed; the *Shenandoah* kept on, porting her wheel half a point. Captain Stevenson says that the *Carmona* when she passed his stem was twenty or twenty-five feet to port of him (reversing her engines had stopped her way or given her sternway) and when she had gone about one hundred feet from his bow she backed into him, grazing his vessel. Then the *Carmona* stopped backing, and took a turn or two ahead, drifting past and clearing the *Shenandoah*. The collision with the *Shenandoah*, however, is not the one especially complained of; neither vessel was appreciably injured by the contact. The subsequent collision with the *Crete* caused the chief damage. The fact of fouling the line between the *Shenandoah* and *Crete* was evidenced by marks along the braces under the guard of the *Carmona* from the point of their commencement near the bow aft as far as her paddle-boxes. After the slight contact with the *Shenandoah* the *Carmona's* engine had only taken a couple of turns ahead before the lights of

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the *Crete* appeared. The engine, as I have said before, was instantly stopped, and reversed at full speed, but this manoeuvre did not prevent the collision. Fouled with the tow-line, carried down by a five mile current, the *Crete* moving up stream, bow towards shore, a collision between the two vessels became inevitable. In going slightly ahead to avoid the *Shenandoah* she had got to perhaps within fifty or sixty feet of the shore; ahead of her, lying at the dock, was a vessel occupying a portion of this fifty or sixty feet of space; she had lost steerage way by backing and was virtually pocketed. In trying to keep out a little to avoid the vessel at the dock, she fouled the *Crete*'s tow-line and as the *Shenandoah* continued to move up stream the *Crete* approached her at the speed the *Shenandoah* was making.

In reference to the position of the *Shenandoah* just before the collision the defendant's witnesses say that their vessel was from 150 to 200 feet from the shore. This is disputed by those on the *Carmona* who say that the *Shenandoah* was very little, if any, more than 100 feet from the shore. It is fortunate under all the circumstances that the collision did not do more damage. It is equally fortunate that the injuries were all above the water-line. One of the witnesses on the *Carmona*, the second mate, states that as they were passing the *Shenandoah* he heard the latter signal to the engineer to go ahead at full speed. The master of the *Shenandoah* positively denies giving any such signal; his engineer, however, was not called, and no satisfactory explanation was made for his absence. It would not perhaps have been unreasonable to have given such a signal had its object been to endeavour to pull his barges out further into the stream before the *Carmona* reached them. The course of the *Shenandoah* had been changed half a point according to her

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master's statement, with the object of giving more sea room to the *Carmona* to pass him to port; as far as the *Shenandoah* was concerned this change of course had cleared the *Carmona*, except the slight contact due to the sternway acquired by the *Carmona* from reversing her engines. Although the *Carmona's* engine took a turn or two ahead she was moving with a five mile current and the *Crete* was approaching her at whatever speed the *Shenandoah* and her barges were making up stream, and she struck the *Crete* with considerable force. The period of time between coming in contact with the *Shenandoah* and the collision with the *Crete* was so brief that the *Carmona*, without steerage way, was practically helpless to avoid the *Crete*, notwithstanding that she had reversed her engine the instant she discovered that vessel directly in her course. The *Crete* was uninjured by the collision; with a bluff bow, and deeply laden, she withstood the shock and beyond the knocking off of a little paint she sustained no injury. The value of the tow-line broken exceeded many times the pecuniary injury occasioned to her hull. As soon as the line broke the *Crete* let go her anchor. Singularly enough, as before remarked, after drifting past the starboard side of the *Crete*, the *Carmona* drifted across the second tow-line, between the *Crete* and *Grenada*, without breaking it, and passed on the port side of the *Grenada* until she took the ground below both barges.

It is said by several witnesses on the *Carmona* that at the time of the collision the *Crete* was apparently under a starboard helm and heading towards the American shore, while the *Grenada* appeared to be under a port wheel and pointing more directly out into the stream. This is positively denied by the master of the *Crete* and his mate, who were the only two of the crew of that vessel called as witnesses.

The master was at the wheel at the stern of the vessel when the collision occurred. He swears he paid no attention to the starboard signal first given by the *Shenandoah*, but waited for an answer from the approaching vessel before acting; that he next heard an answer of a port whistle from the approaching vessel, and then a port signal from the *Shenandoah*. He then immediately ported his wheel about half a point. This movement, according to the same witness, would throw the *Crete's* head out about twenty-five feet to starboard from the course he had been steering, yet the *Carmona* struck him on his starboard bow, and drifted by him on his starboard side and a moment or two later passed his consort 500 feet down stream on her port side. The way on the two barges could not have entirely ceased for a moment or two after the line between the *Crete* and the *Shenandoah* had parted; the *Carmona*, her engines stopped, drifting in the current, would take about a minute to pass the *Crete*,

$$\frac{5280 \times 5}{60} = 440 \text{ feet per minute.}$$

The actual course of the *Carmona* seems to point to the conclusion that the *Grenada* and the *Crete* could not have been in a direct line with each other or steering the same course; the *Grenada* must have been further out in the stream than her sister barge. Had it been otherwise, the *Carmona* would doubtless have also collided with the *Grenada* and passed her to starboard. This conflict of testimony illustrates how widely witnesses will differ in their account of the same occurrence. The fact is, however, admitted that the *Carmona* passed one barge to starboard and the other barge to port. This, to my mind, strongly supports the testimony of the plaintiff's witnesses in their statement that one barge was heading towards the Ameri-

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can shore while the other was pointing out into the stream. It is to be noted that the trial took place two and a half years after the collision. It is in evidence that the crew of the *Carmona* immediately on the arrival of that vessel at Detroit were taken before a notary and they made sworn statements as to the facts relating to the collision; the plaintiff's witnesses had, therefore, a means of refreshing their memories by reference to their former statements. The crews of the *Shenandoah* and *Crete*, on the other hand, not hearing of any action taken, had probably dismissed the matter from their minds, and at the trial, in 1902, were compelled to rely solely upon recollection for the incidents of what had become to them a remote occurrence. The recrudescence of the case, two and a half years later, was the last thing they could probably have anticipated after such a lapse of time. Other features in the evidence given for the defence at the trial calls for comment. The master of the *Shenandoah*, apparently in part explanation of his close proximity to the elevator dock on the night in question in the fog, swore that he had formed the intention to land at that dock and tie up till the fog lifted; he and his mate both stated that orders had been given to the crew to stand by the lines so as to prepare for the landing. This important fact ought certainly to have been communicated to the defendant's solicitor and by them to have been incorporated in the prelimiary acts filed by the defendants; but no statement of the intention to land is mentioned in the defendant's preliminary acts filed nor is it set out in their statement of defence. In answer to the question in the preliminary acts, "the course and speed of the ship when the other was first seen" the defendants say "up the St. Clair Rapids, well over on the American side of the channel, going very slowly." Preliminary acts

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are instituted for two reasons: To get a statement of the facts from the parties of the circumstances *recenti facto*, and to prevent the defendant shaping his case to meet the case put forward by the plaintiff. In practice it has been found very useful, and neither party is allowed to depart from the case he has set out in his preliminary acts (1). If the *Shenandoah* was truly making for a dock this would reasonably account for her proximity to the American shore, apart from any evidence of an alleged customary track. Another statement in the defendants' preliminary acts was that the *Shenandoah's* wheel was put hard aport as soon as the *Carmona* appeared on the *Shenandoah's* port bow. But the master, in the witness box, gives a very different account of what was done with the wheel; he swore that after he had answered the *Carmona's* port signal by a port signal he put his wheel to port half a point, and as soon as he had cleared the *Carmona* he immediately steadied his wheel. The defendants' preliminary acts and statement of defence are also silent as to any crossing signals given by either vessel save, it is stated in both, that the *Shenandoah* had blown several sharp danger whistles.

In the preliminary acts of the plaintiffs, in answer to the question: "The measures which were taken, and when, to avoid the collision?" the answer is: "Engines reversed and one blast sounded. The *Shenandoah* answered with two blasts. The *Carmona* blew one blast and an alarm whistle." The plaintiffs in both their preliminary acts and statement of claim charge that the collision was due to the negligent navigation of the *Shenandoah* and her tow the *Crete*; and aver that everything was done on the part of the *Carmona* to avoid the collision. The defendants, in their preliminary act assign, as constituting the negligence of the

(1) *The Vortigern*, Swab. 518.

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Carmona causing the collision, the absence of lights on the *Carmona*, that the *Carmona* was not under control, was on the wrong side of the channel, did not exercise proper precautions in coming down the rapids in such a fog; and in their statement of defence they charge the absence of lights on the *Carmona*, or such inferior lights as to be invisible to those on the *Shenandoah*; that the *Carmona* was uncontrollable, and was not kept on her course as required by law, and was negligent in attempting to run down the St. Clair Rapids in the heavy fog which prevailed at the time of the collision; and aver proper action on the part of the defendants' vessel, and that the collision was not caused or contributed to by any default of the defendants.

As this collision took place in American waters, the rules to be observed by vessels using the American side of the river will be those prescribed by the American law for the navigation of inland waters. These rules were put in at the trial and spoken of as the "White Law." The Act of Congress is entitled "An Act to regulate navigation on the Great Lakes and their connecting and tributary waters" (1). The first of these rules, important in the light of the issues raised in the present case, is rule 24: "That in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers, are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one half mile of each other, give the signal necessary to indicate which side she elects to take." In the present case the *Carmona*, therefore, had the right of way under the rule; and I find, as a fact, that as soon as she sighted the *Shanandoah* she sounded a port signal to indicate the side she elected to take. It is true that it is contended that this signal was not heard by the

(1) Statutes at Large Vol. 28 cap. 64. p. 645.

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Shanandoah. In a dispute between vessels as to what signals have been given by either vessel the evidence of witnesses upon the vessel giving the signal, if no circumstances are shown which would go to impeach their credit or truthfulness, is to be preferred to the evidence of witnesses equally credible upon the other vessel, who also testified that the alleged signal was not given by the first vessel (1). It may be the fact that such signal from the *Carmona* was not heard on the *Shenandoah*, but the rule provides for giving the signal, and the vessel which gives the signal cannot be held responsible because those on the approaching vessel did not hear it. The *Campania* (2). If the fact of giving the signal is satisfactorily proved the rule to that extent has been obeyed. The *Carmona's* whistle was in working order, for the fog whistles sounded by it further up the river had been heard by those on the *Shenandoah*. If the *Shenandoah* did hear the first port whistle then the *Shenandoah* was in serious fault in not crossing signals by sounding a starboard signal after receiving a port signal (3). If the *Shenandoah* did not hear the port signal of the *Carmona*, but heard the approaching paddle-wheels and heard no passing signal, her master was justified in sounding a starboard signal if he desired the approaching vessel to pass him to starboard; and when he heard the port signal sounded after he had given the starboard signal his following port signal would be, as far as he was concerned, a cross signal. If he had thought it was not safe to accept the port signal he did hear he should have sounded a danger whistle and stopped or reversed his engine, and not replied to it by a port signal. He said he did not sound a danger signal, but admits he first sounded a port signal in reply. He thus indi-

(1) *The Milwaukee*, Brown's Ad Cas. 313.

(2) [1901] P. D. 289.

(3) Rule 26.

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cated to the *Carmona* that he would give her the port side, and in doing so he undertook the responsibility of keeping out of her way. If the port signal was given by the *Shenandoah*, as stated by her master, as soon as he sighted the *Carmona*, under Rule 20, the *Carmona* was bound to keep her course. The *Shenandoah* by adopting the passing signal of the *Carmona* (3) was bound on approaching the *Carmona*, if there was any apparent danger, to slacken speed or stop and reverse; but she did none of these things. The evidence of the different witnesses establishes the fact that the *Shenandoah* and her barges were proceeding at a very moderate rate of speed over the ground, possibly less than a mile an hour—the master puts it at not more than half a mile an hour—against the current. One would think, working against a five mile current, there would be no difficulty or danger in stopping his engine, even if there was danger from his tow-line by reversing. By his own admission the master of the *Shenandoah* must be held to have been in fault; he got, according to his testimony, a cross signal from the *Carmona*, and he then sounded a danger whistle; but he did more, he crossed his own first signal by a reply which invited the *Carmona* to keep on her course to starboard and so pass him port to port. Rule 26 of the American rules regulates his procedure in such a contingency and directs him to reduce his speed to bare steerage way, and, if necessary, to *stop and reverse*, not *or reverse* as in Rule 21. Now, applying these same rules to the *Carmona*, what appears to have been her conduct? She was coming down the river having the right of way; she gave, as I have found, the first passing signal (a port signal) and her signal was crossed by a starboard signal of the *Shenandoah*. The *Carmona* immediately stopped her

(3) Rule 21.

engines and reversed and sounded a danger whistle and then repeated her port signal; this was answered an instant later by the *Shenandoah* with a ratifying port signal, and the *Carmona* kept on her course to starboard. At question 76 of his examination in chief Captain Stevenson puts the position this way:

"76. Q. What did you do after you heard one blast in answer to your two?.—A. Shortly after he blew the one, he came in sight; and I seen how he was going, and I answered his one whistle, and ported my wheel.

"77. Q. You answered the one with one whistle?—A. Yes.

"78. Q. That was the first you saw of him, just about the time he blew his one blast?—A. Shortly after, yes.

"79. Q. Then what did you do?—A. I ported my wheel.

"80. Q. What did you do with your whistle if anything?—A. I blew an alarm whistle, a danger signal.

"88. Q. What was the next thing that took place?—A. The steamer appeared in sight heading about on to us, and rapidly swinging to starboard. I ported quick, and got clear of him."

It was equally the duty of the *Shenandoah* in taking measures to avoid the *Carmona* to consider the safety of her tow as well as her own safety. It has been held that the taking of a step which would clear the towing ship, if she were unencumbered, might be held to be a fault contributing to the collision if in the taking of such a step, though clearing herself, she should bring about a collision with her tow. The *Arthur Gordon* and The *Independence* (1). The *Kingston by the Sea* (2).

(1) Lush. 270. (2) 3 W. Rob. 152.

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The giving of the starboard signal followed by a port signal was confusing to her tow and if the giving of such a port signal contributed in any way to bringing about the collision between the *Crete* and the *Carmona*, the *Shenandoah* is responsible under the rules. Again, if the *Carmona* by keeping her course, was likely to collide with either of the barges in tow, it appears to me that the observance of Rule 21 demanded that the *Shenandoah* should have stopped her engine even if she could not safely have reversed. She did not stop, but kept on at the rate of speed over the ground she had been pursuing, and therefore increased to that extent the weight of force of the impact between the *Crete* and the *Carmona* which followed. The object of Rule 21 of the American rules (Rule 23 English) is to obviate as well as minimize the results of a collision (1). In the same case it is laid down that the burden of shewing why she did not comply with the rule, and stop and reverse, is thrown upon the steam-ship which was by the rules bound to keep out of the way of the other.

It is important now to consider for a moment what effect upon the movement of the tow barges was produced by the *Shenandoah* sounding the starboard signal followed immediately by a cross port signal. The position of the *Crete* and *Grenada*, at the time of the collision and immediately thereafter, throws some light upon the matter. I may say I discredit the statement of the master of the *Crete* that he paid no attention to the first starboard signal given by the *Shenandoah*. The latter position of the two barges, as indicated by the *Carmona's* course in passing them, convinces me that the *Crete*, immediately before the collision, had been carrying a starboard helm, while

(1) Stoomvart Maatschappy Nederland v. Peninsular & Oriental Nav. Co., 5 App. Cas. 876, 902, 903, 904.

the *Grenada* below her had apparently followed the last signal and had ported its helm and was, therefore, further out in the stream. The force of the current against the bows of the barges was sufficient to cause them to obey their rudders. I am satisfied that the *Crete* obeyed the *Shenandoah's* first starboard signal and the *Grenada* the later port signal.

If the *Carmona*, in descending the river, made her election of the side she would take, by giving the first passing signal, the fact that the *Shenandoah* did not hear it cannot put the *Carmona* in fault. If the *Shenandoah* in good faith thought she herself had given the first passing signal, then she could only justify crossing her own signal as an act *in extremis* and rather as a warning to her tow that as necessary to protect herself, for by slightly porting her wheel without more she had been able to clear the *Carmona*.

According to the rule the *Shenandoah's* duty I repeat was to keep clear of the *Carmona*, as the latter had signalled her choice to keep the port side. Judged by these rules the *Shenandoah* was alone in fault and solely responsible for the collision. To combat this view and displace the force of the navigation rules laid down by the American statute, the defendants at the trial set up the defence that in navigating the St. Clair Rapids a local custom prevails which supersedes the rule, and a number of witnesses were called to prove the alleged custom. For many years past, they deposed, it has been the almost invariable practice or custom for vessels coming up the St. Clair Rapids, especially steamers having tows, to keep close to the American bank from a point a little below Botsford's elevator to the mouth of the river, or at least to a point above the Grand Trunk freight sheds and dock, while the descending vessels came down out in the stream passing the up-bound vessels starboard to starboard.

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It was urged that the custom was well known to all navigators in these waters, and therefore, it was urged that the *Carmona* was in fault in coming down the river on the night in question so close to the shore, especially in a fog; for she was thus placing herself in the well-known customary track of up-bound vessels; and that as the *Carmona* on entering the river had heard fog-signals below, she was guilty of culpable negligence in thus choosing her course close to the American bank, and the collision which followed, under all the circumstances, was the result of her own negligence in contravening this local custom. This particular defence is not hinted at in the statement of defence, though in the preliminary acts filed by the defendants; amongst the negligent acts charged against the *Carmona*, it is said that she was on the wrong side of the channel.

Seven witnesses, chiefly masters of vessels who had navigated the St. Clair River and the Upper Lakes for many years, were called to give evidence of the existence of the alleged custom; two or three of them were very positive that such a practice had to their personal knowledge prevailed in navigating the St. Clair Rapids for at least thirty or forty years, ascending vessels hugged the shore and descending vessels kept further out in the stream, passing up-bound vessels starboard to starboard. One of the witnesses, however, Captain Basset, a local man and a tug captain residing at Port Huron, with twenty-eight years experience, put it thus: "As a general rule a steamboat going up with a tow always makes the land very close on the Ameri-"can side, and if she meets a down bound boat she "always give her the starboard side; that is the gene-"ral rule." He gives the current as the reason for the custom—stating that if a down bound boat makes the shore closely it sets him in to the shore and the

up-bound boat with a tow has a better chance for keeping away. The current is not as strong in close to the shore as it is in the centre; and he declares this practice or custom is, generally, known to navigators. In cross-examination, however, he said that in a fog a down-bound vessel generally takes the course next to the American shore through the rapids; that is because they can pick up points, docks and elevators, along that shore and know where they are; and down vessels proposing to turn at Butler Street for Sarnia also keep close to the American shore. He adds that at the date of the collision there were no land marks which would serve as guides on the Canadian side of the river at this point, opposite the rapids. This witness thus gives conflicting answers, namely: that under conditions of fog, vessels, both in going up and coming down, keep close to the American shore, especially down vessels intending to turn at Butler Street for Sarnia. In clear weather the alleged custom prevailed, and the descending vessel should keep to starboard of up-bound vessels. Several other masters who had sailed in these waters for many years spoke of the custom much as contended for by the defendants, and spoke of its having been in existence for all the years they had sailed in the river. Captain Davidson, the owner of the *Shenandoah*, admitted that it was impossible for a down bound vessel to come down through the rapids in a fog and steer by the compass; if it were attempted, the cross currents would place the vessels in a very short time either ashore or on the middle ground, or into some vessel; and his view of the course to be taken by a down-bound boat in case of fog was either to not enter the river at all, or if they did so and encountered fog to tie up at the first dock, or to drop anchor in the stream and not attempt to come down. Up-bound vessels by hugging the

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shore might probably safely ascend. He added if a fog struck his vessel coming up the river before getting into the rapids he would tie up at Sarnia, or some other point, and wait for the fog to disperse rather than attempt to go up the river.

Captain Cameron of the *Carmona* and his first and second mate, the former holding a master's certificate, on the other hand declare that they never knew or heard of this alleged custom of the river and they had been navigating it for years. Captain Bassett rather limited the custom to steamers having tows and did not make out clearly that the practice prevailed between steamers unencumbered; but several other of the masters examined declared that it applied to all vessels ascending and descending the river at this point. In point of numbers the witnesses for the defendants exceeded the plaintiffs' witnesses on this point, and their testimony supported the contention of the defendants that at the St. Clair Rapids a practice or custom appeared to exist for up-bound vessels to keep to the west side of the river and close to the bank, and for down-bound steamers to keep out in the stream and pass up-bound vessels to starboard.

There is no corresponding statutory rule in the American regulations to Rule 25 of the English Navigation Rules.

The English rule reads as follows:—

"25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

For the period between the years 1862 and 1880, Rule 25 did not exist in the English rules of Navigation, and hence we have some English cases upon the question of the practice or course of conduct to be observed by vessels traversing rivers—in the absence

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of a statutory regulation on the subject, regulated since 1880 by Rule 25. The first of these cases, the *Velocity* (1), held that a down vessel, pursuing a customary track in the river in the absence of express regulations, was not in fault in keeping on her course, and where the up-vessel departed from a course which would have carried her safely by, and a collision ensued the latter vessel was held solely in fault. The ground for so holding the *Velocity* not in fault being that she was pursuing the customary track of vessels coming down the river, and the approaching vessel ought to be held to be aware of the custom and should not have assumed, because he saw the port light of the *Velocity* for a moment due to a bend in the river, that that vessel intended to cross the river and thus depart from the customary track along the north shore. The court did not hold that a custom binding on all vessels had been actually proved, but held that where the collision was due to the up-vessel crossing into the customary track of the down-vessel, while if she had kept up the river *on the course she was following* when she sighted the down-vessel she would have passed clear, the ascending vessel was alone in fault for the collision. The court also stated with emphasis, "Even supposing the *Carbon* (the up-vessel) to have excusably mistaken the course (i.e. the intention to cross the river) of the *Velocity*, how can she recover unless she shew that the *Velocity* was in fault." This case was followed and commented on in the case of the *Esk* and the *Niord* (2) in the same volume. The repeal of the section of *The Merchant Shipping Act* corresponding to the present English Rule 25 allowed (the court said in both cases), "Vessels navigating the river were now at liberty to go on whichever side of it they pleased, taking care of course to observe

(1) L. R. 3 P. C. 44. (2) L. R. 3 P.C. 436.

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the regulations for preventing collisions." The general principles laid down in the *Velocity* were approved and followed in the *Ranger* and the *Cologne* (1).

I think, therefore, that the *Shenandoah* was not in fault (assuming the alleged custom in the St. Clair River at this point to have been satisfactorily established) in taking her course close to the American bank, for she was in the customary track of up-bound vessels. I do not, however, for a moment hold that she had the exclusive right to that side of the river; but she was not guilty of negligence in being where she was on the night in question. The *Carmona* in coming down in a fog on the west side of the river must be taken to have been aware (if such a custom existed, that it was the customary track of up-bound vessels, and she was, therefore, bound to exercise unusual care and precaution in following this course, and if a collision took place she alone would be held in fault if the other vessel did all in her power to avoid the collision which ensued.

As between the two vessels, if the custom prevail, and be held to supersede the statutory rule, the *Carmona* was on the wrong side and the *Shenandoah* was on the right side; but the important question remains to be determined: Did the *Shenandoah* do all the law required to keep clear and avoid a collision? Rule 24 is the Statutory rule that differs from the alleged custom. Rule 24 enacts that the descending vessel shall have the right of way, but must indicate by signal the side she elects to take, and this choice must be made when the vessels are within half a mile of each other. This rule, however, could not be complied with where the vessels, by reason of fog, failed to see each other until they arrived within three or four hundred feet of each other, therefore the giving of the port

(1) L. R. 4 P.C. 519.

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signal by the *Carmona*, when within three or four hundred feet from the *Shenandoah*, could hardly be considered to have been a signal under Rule 24. There was imminent danger of collision the moment the two vessels sighted each other. They were approaching each other end on or nearly end on; the evidence of both masters, in my judgment, establishes this fact. The *Carmona* was slightly closer to the American shore than the *Shenandoah*. So far as I can see the *Carmona*, when their position was apparent, did everything possible to avoid the collision.

A five mile current was driving her forward, and a vessel was approaching her at an unknown rate of speed. It would have been the worst of judgment to have attempted to cross the latter's bows and go to starboard. Rule 17 applied, and the *Carmona* did what the rule commanded. She reversed at full speed and gave a port signal and a danger signal, and having the right of way kept on her course (1). What did the *Shenandoah* do to avoid a collision? Her master alleges that he did not hear the first port signal claimed to have been given, but he heard a paddle wheel steamer approaching him; he sounded a starboard signal and a danger whistle; in answer he got a port signal and almost immediately he sighted the *Carmona* coming towards him and on or nearly end on. He at once sounded a port whistle and ported his wheel. *He did not stop or reverse.* Did he hear the first port signal? I have no doubt whatever that it was given. I am unable to find as a fact that he actually heard it. Brown, one of the owners of the *Carmona*, says that the *Shendandoah's* starboard signal in reply to the first port signal was almost a continuation of the whistling of the *Carmona*; it followed so quickly. Captain Cameron, the master of the *Carmona*, in answer to

(1) Rule 20.

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question 103, "What interval was there between the one blast of the *Carmona* and the two by the *Shenandoah*?" answered: "There was very little I think when he—" the *Carmona's* mate—"stopped his first blast, the first one, the other fellow was blowing." From this it would appear that it is quite possible that the signals were practically simultaneous, and that Captain Stevenson may not have picked out the port signal, as he has sworn. Getting no passing signal from the approaching vessel the *Shenandoah's* master was justified in giving a passing signal. His starboard signal indicated his intention to pass to starboard. A moment later the situation became critical, for he suddenly saw the *Carmona* bearing down upon him swinging rapidly to starboard so as to take his port side; he decided to go to port, and put his wheel over half a point. Was this action calculated to take his tow out of danger? Had he put his wheel hard aport and, seeing his own vessel would clear, had gone ahead at full speed, he might have materially changed the course of his tow and possibly have prevented the collision with the *Crete*; or having ported and cleared his own steamer he could have stopped his engine and so diminished the shock of a collision with the *Crete* if one was inevitable. The giving of the conflicting signals of starboard and port confused his tow and as I have already found caused one to carry a starboard helm and the other a port helm. He ported only half a point for a moment then steadied his helm. Having cleared the *Carmona* with the *Shenandoah* he kept on his way up the river.

I find that the *Shenandoah* was in fault in not having adopted any effective measures to avoid a collision. Had the *Shenandoah* committed no fault the *Carmona* would have been without recourse for the damage she sustained. The speed of the *Carmona* for some time

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before the collision of about two miles an hour faster than the current, I find was moderate—barely enough to give her proper steerage way. As soon as she sighted the *Shenandoah* at a distance of three or four hundred feet, she at once stopped her engine and reversed at full speed. She gave the correct signals followed by danger signals. Her way was stopped, and she had even acquired steerage way to such an extent that she touched with the *Shenandoah*. The turn or two ahead her engine subsequently made, when her master saw she was backing into the *Shenandoah*, was necessary to avoid injury to that vessel and his own. The *Carmona* reversed again at full speed when she discovered the *Crete*, and had that vessel not been out of her course and headed towards the American bank, the collision would probably not have occurred with the *Crete*. Unless the single circumstance of the *Carmona* coming down the course on the west bank, close to the shore, assuming it to be the customary track of up-bound vessels, amounts to negligence, and that such negligence contributed to the collision, I do not see wherein she was to blame.

The St. Clair River is an international highway, and therefore a custom which varies or conflicts with the regular rules of navigation should be strictly proved by the party setting it up. The custom should be universally known that any departure from it would be considered as unusual and extraordinary (1). I have already adverted briefly to the evidence offered in support of the alleged custom. More witnesses affirm the custom than negative it; but is the evidence so overwhelming as to justify the court in holding that it supersedes statutory Rule 24, which gives the descending vessel the right of way and choice of course? As put by the learned judge in the *Milwau-*

(1) *The Vianna* Swab. 405.

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kee (1). "There is no rule that vessels navigating rivers must in all cases when meeting keep to the right of the centre of the navigable channel. Vessels navigating rivers in this country, like vehicles on the highway, may use any part of the channel they see fit, observing in all cases when meeting and passing other vessels, the ordinary rule of navigation." Again, in reference to a local custom, it is said in the *Newport News* (2): "There should be no doubt of its actual existence known generally to persons engaged in the business to be affected and the proof should be clear and conclusive."

I think that upon a river like the St. Clair traversed as it is annually by thousands of vessels, and used by two nations, a custom which in effect superseded a statutory rule ought to require the most conclusive and cogent proof; and as it is sought to make it binding upon foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed amongst mariners generally, and extended to mariners sailing on vessels carrying the foreign flag and habitually traversing this busy river. After the most careful consideration of the testimony, I have arrived at the conclusion that the evidence offered to support the existence of the alleged custom falls short of satisfying the conclusive proof demanded by the dicta expressed in both American and English cases (3).

I am of opinion upon the evidence, and after a careful consideration of the American Rules of navigation in force in the St. Clair River and the American and

(1) Brown's Ad. 313.
(2) 105 Federal, 389.
(3) The *Unity* (Swab. 101). The *Hand of Providence* (Swab. 107). The *Velocity* (L.R. 3 P.C. 44). The *Promise*, and H. M. S. *Topaze* (2 Mar. Law. Ca. O. S 38.). The *Duke of Sussex* (1 Wm. Rob. 270). The *Pavonia* (26 Fed. 106). The *James Bowen* (52 Fed. 510). The *Newport News* (105 Fed. 389). The *Vanderbilt* (6 Wall. 225).

English cases, to which I have been referred, that the *Shenandoah* was solely in fault for the collision set out in the pleadings, which occurred between the *Carmona* and herself, and also with the *Crete* her tow, on the morning of the 25th June, 1899.

As to the damages, I find that the *Carmona* is entitled to recover for the cost of the repairs made upon her at Detroit amounting $1,054. These I fix at $1,054.

She is also entitled to recover for the cost of maintaining her crew, for the time she was delayed at Detroit while the repairs were being executed, which I fix at $100 per diem for eight days; expenses of sending passengers to Cleveland, $50, and interest at 5 per cent. from 25th June, 1899, to 31st May, 1902. The plaintiffs' evidence as to loss of profits is so unsatisfactory that I can allow nothing in respect of alleged loss of profits. I make the same remark and finding as to the claim for advertising. The amount of these items, with interest, makes the total damages for which the plaintiffs are entitled to judgment, the sum of $2,183.25 and full costs of suit.

I find, therefore, the collision in question in this case was occasioned by the fault or default of the master and crew of the steam-ship *Shenandoah*; and I find that the plaintiffs are entitled to damages in consequence thereof. And I further find against the defendants' counterclaim, and order that the same be dismissed with costs; and I direct that the said ship, the *Shenandoah*, the defendants and their bail be condemned in the sum of $2,183.25 for damages and the plaintiffs' costs.

Judgment accordingly.

Solicitor for plaintiff: *J. W. Hanna.*

Solicitor for defendant: *F. A. Hough.*

QUEBEC ADMIRALTY DISTRICT.

1902
Aug. 25.

THE CORPORATION OF PILOTS FOR AND BELOW THE HARBOUR OF QUEBEC, A BODY POLITIC AND CORPORATE, HAVING ITS PRINCIPAL PLACE OF BUSINESS IN THE CITY OF QUEBEC ... } PLAINTIFFS;

AGAINST

THE SHIP OR VESSEL "*GRANDEE.*"

The Pilotage Act, R. S. C. c. 80—Tow and tug—Absence of motive power on former—Exemption from pilotage dues.

A vessel which is proceeding on its course in charge of a tow-boat and has no motive power of itself, either by sails or steam, is exempt from compulsory pilotage dues under R. S. C. c. 80.

THIS was an action to recover pilotage dues under the provisions of *The Pilotage Act*, R. S. C. c. 80.

The *Grandee* is a coal-barge, of about one thousand tons register, owned by the Dominion Coal Company, Limited, of Montreal. She was employed in the summer of 1902 in carrying coal from Sydney, N.S., to the City of Quebec. The said barge had no motive power of her own, either by sails or steam; but was propelled entirely by being towed by a steam collier belonging to the defendants. This steam collier was exempt from the compulsory payment of pilotage dues under the R. S. C. c. 80; but it was sought by the plaintiff corporation to make the *Grandee* liable to pay such dues, as not coming within the class of vessels exempt from dues under section 59 of the said statute. For this purpose the *Grandee* was proceeded against on the Admiralty side of the Exchequer Court for the sum of one hundred and thirty-nine dollars and twenty-four cents. The owners of the *Grandee* appeared to the

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writ of summons, and the case was heard by the honourable A. B. Routhier, Local Judge for the Quebec Admiralty District.

August 19th, 1902.

A. Rivard for the plaintiffs.

C. Pentland, K.C., for the ship.

ROUTHIER, L. J. now (August 25th, 1902) delivered judgment.

Le statut qui oblige les vaisseaux naviguant dans les eaux canadiennes à payer des droits de pilotage est le chapitre 80 des *Statuts Révisés du Canada*, et la section 59 exempte expressément de ces droits "les navires mus entièrement ou en partie par la vapeur."

La question est donc de savoir si la barge *Grandee*, qui n'a aucun pouvoir moteur et qui est remorquée dans ses voyages par un remorqueur (tow-boat), doit être considérée comme un navire exempt de pilotage.

1. Tout d'abord, il me paraît peu raisonnable d'imposer l'obligation de prendre un pilote à un navire qui n'a par lui-même aucun pouvoir moteur, qui conséquemment ne se meut pas lui-même, et ne peut avoir sur sa marche aucun contrôle, aucune direction.

Un pilote est un homme qui doit posséder des connaissances spéciales et une certaine expérience, qui est présumé connaître surtout les eaux où il navigue, les dangers et les écueils qui s'y rencontrent, la direction à suivre pour les éviter, et qui, à raison de ses connaissances, est chargé de la conduite du navire. C'est lui qui en contrôle la marche, de manière à suivre la ligne la plus courte et la plus sûre, à éviter les bancs de sable, les récifs, les courants dangéreux et les collisions avec d'autres navires.

Pour remplir ce rôle, si important au point de vue de la sécurité des personnes et des propriétés, il faut

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que le pouvoir moteur soit à sa disposition. Si donc vous le mettez à bord d'un vaisseau qui n'a pas de pouvoir moteur, qui est remorqué et qui, par conséquent, reçoit forcément du remorqueur sa direction, il est évident qu'alors ce pilote n'a pas d'action à exercer sur la marche du navire et il ne peut plus remplir le rôle important que je viens de lui assigner. Dès lors il est inutile à bord ce vaisseau remorqué.

Mais on dit: il aura à sa disposition le gouvernail, les ancres, les amarres, et il pourra ainsi exercer une certaine action sur la course du vaisseau remorqué.

Strictement parlant c'est vrai. Mais cette action est presque insignifiante. Sans doute, à certains moments il pourra au moyen du gouvernail imprimer au vaisseau remorqué une légère déviation du sillage du remorqueur; mais il sera constamment forcé de rentrer dans le même sillage, et si le remorqueur prend une mauvaise direction, il faudra bien qu'il le suive. Il n'aura donc pas en réalité le contrôle et la direction du navire et de la course à suivre. Il ne sera pas libre de ses mouvements, puisque le navire lui-même n'a pas de mouvement propre. Un pilote n'est pas chargé d'ailleurs de manier le gouvernail, et dans un vaisseau remorqué le maniement du gouvernail appartient aux hommes de roue, et peut être confié à un simple manoeuvre ou matelot.

Pour cette première raison il me semble qu'un pilote serait un officier inutile dans la barge *Grandee*, et ne doit pas lui être imposé.

2. En second lieu, il y a en matière de responsabilité maritime une présomption légale qui trouverait ici son application: "c'est qu'un navire en marche est présumé en faute quand il vient en collision avec un navire à l'ancre."

Pourquoi cela? Parce que le navire à l'ancre ne peut se mouvoir.

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En bien, je dis, 1o: Que la barge *Grandee* ne peut se mouvoir elle-même, ni à la voile, ni autrement, et 2o: Qu'elle est *mûe par la vapeur quand elle est remorquée par un bateau à vapeur.* Dans ce dernier cas elle est exemptée de pilotage par la section 59 du statut; et quand elle *n'est mûe d'aucune façon*, il est bien évident qu'elle n'a pas besoin de pilote.

3. Une autre règle, déduite de la jurisprudence, permet encore à la barge *Grandee* de bénéficier de l'exemption légal accordée par le statut. Je la trouve au XVIe. volume de *l'American and English Encyclopedia, verbo navigation*, p. 319: "Where a tow is in "charge of a tug, the tug and tow are to be treated as "being one vessel, and that a steam-vessel." Un grand nombre de précédents en note ont confirmé cette règle; et cela nous parait être une raison décisive de déclarer la barge *Grandee* exempte de droits de pilotage.

On a invoqué de la part de la poursuite divers précédents dans lesquels les deux vaisseaux, remorqueur et remorqué, ont été tenus responsables de collisions avec d'autres navires. Mais ces précédents n'ont guère d'application au cas qui nous occupe. Car en matière de responsabilité dans les cas de collision, tout dépend de la faute commise et la responsabilité pèse naturellement sur celui qui l'a commise. Il peut très-bien arriver qu'un vaisseau remorqué, par un faux coup de gouvernail, par une ancre jetée mal à propos, par une amarre mal placée ou attachée, soit cause d'une collision, et par conséquent soit responsable. Il peut arriver aussi qu'il y ait faute commune du remorqueur et du remorqué, et tous deux alors sont responsables.

Mais il n'en est pas moins vrai qu'en principe général la règle suivante est adoptée: Quand le vaisseau remorqué est exclusivement sous le contrôle

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et à la charge du remorqueur (*tug-boat*) *le tug est le seul principal*, et conséquemment le seul responsable. Ibidem, p. 320.

D'ailleurs, la question de pilotage est toute autre, et doit être décidée par les règles et les motifs que j'ai exposés, je crois. Le vaisseau remorqué n'est qu'un accessoire, un chargement, un objet transporté ou trainé, comme une voiture par un cheval; ce n'est pas à proprement parler un navire*.

Judgment accordingly.

Solicitors for plaintiffs: *Casgrain, Lavery, Rivard & Chauveau.*

Solicitors for the ship: *Caron, Pentland, Stuart & Brodie.*

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*REPORTER'S NOTE.—Affirmed on appeal to THE JUDGE OF THE EXCHEQUER COURT, see *post*.

BETWEEN:—

THE LUXFER PRISM COMPANY, LIMITED ..... } PLAINTIFFS;

AND

GEORGE MACLAIRE WEBSTER, AND THOMAS JESSE PARKES, TRADING UNDER THE NAME, STYLE AND FIRM OF WEBSTER BROS. & PARKES ..... } DEFENDANTS.

1902
July 15.

Patent for invention—Prisms for deflecting light—Anticipation—Novelty.

A patent for prisms intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses and shops, is not void for anticipation by reason of prior patents for prisms for use where the light falls vertically or obliquely on glass placed horizontally, as in pavements.

Semble, that if the former patent were to be broadly construed as for a device for deflecting the course of light passing through glass it would fail for want of novelty.

THIS was an action for infringement of Canadian letters-patent, No. 57,152, for alleged new and useful improvements in prismatic glass.

May 2nd, 1902.

The case came on for trial at Toronto.

C. Robinson, K.C and *Britton Osler* for the plaintiffs;

A. R. Oughtred for the defendants.

THE JUDGE OF THE EXCHEQUER COURT now (July 15th, 1902) delivered judgment.

This action is brought by the plaintiffs against the defendants to restrain the latter from infringing the

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patents mentioned in the statement of claim, and for damages

By agreement between the parties the issue is limited to patent numbered 57,152 granted on the 21st of August, 1897, to Frank C. Soper for alleged new and useful improvents in prismatic glass; and with reference to that patent the only questions in controversy are as to whether or not the alleged invention was anticipated by the Nain and Waddell patent, numbered 1121, issued from the English Patent Office, or by the the Jacob patent, numbered 458,850, issued from the United States Patent Office. If any attempt were made to give the Soper patent a broad construction as a device for deflecting the course of light passing through glass the conclusion would, I think, be inevitable that the patent failed for want of novelty. But the prisms made under the Nain and Waddell, and under the Jacobs patents, were intended to be used where the light falls vertically or obliquely on glass placed horizontally, as in pavements; and the prisms made under the Soper patent are intended for use in deflecting the course of rays of light falling obliquely or horizontally on glass placed vertically, as in the ordinary windows of houses and shops. The former depended principally for their effectiveness upon the principle of internal or total reflection of prisms having certain angles; the latter upon the principle of refraction only. It seems to me, therefore, that it is not possible to say that either of the two patents mentioned is an anticipation of the Soper patent, if the latter is limited, as I think it should be, to the particular devices described and intended for the special uses to which they are put.

It is possible that if the enquiry had taken a wider range evidence would have been available to show

that this patent construed in that narrow way has been anticipated; but that is not an issue at present; and it is proper to confine oneself to the issues the parties have seen fit to submit for decision.

There will be judgment for the plaintiffs on the issues in controversy.

Reasons for Judgment.

Judgment accordingly.

Solicitors for plaintiffs: *McCarthy, Osler, Hoskin and Creelman.*

Solicitors for defendants: *Hutchinson & Oughtred.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1902 WILLIAM HARGRAVE.....SUPPLIANT;

Nov. 10.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Postmaster's salary—Claim for difference between amount authorized and that paid—Interest—Civil Service Act, R. S. C. c. 17, sec. 6 and sched. B.—51 Vict. c. 12, sec. 12—Extra allowances.

By *The Civil Service Act* (R. S. C. c. 17, sched. B.) a city Postmaster's salary, where the postage collections in his office amount to $20,000 and over, per annum, is fixed at a definite sum according to a scale therein provided. No discretion is vested in the Governor in Council or in the Postmaster-General to make the salary more or less than the amount so provided. Notwithstanding the statute, it was the practice of the Postmaster-General to take a vote of Parliament for the payment of the salaries of postmasters. For the years between 1892 and 1900, except one, the amount of the appropriation for the suppliant's salary was less than the amount he was entitled to under the statute.

Upon his petition to recover the difference between the said amounts, *Held*, that he was entitled to recover.

2. That the provision in the 6th section of *The Civil Service Act* to the effect that "the collective amount of the salaries of each department shall in no case exceed that provided for by vote of parliament for that purpose" was no bar to the suppliant's claim, even if it could be shown that, if in any year the full salary to which the suppliant was entitled had been paid, the total vote would have been exceeded.

Such provision is in the nature of a direction to the officers of the Treasury who are entrusted with the safe-keeping and payment of the public money, and not to the courts of law. *Collins* v. *The United States* (15 Ct. of Clms. at p. 35) referred to.

3. The suppliant was not entitled to interest on his claim.

4. The provision in the 12th section of the Civil Service Amendment Act, 1888, (51 Vict. c. 12) that "no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy head, officer or employee in the Civil Service of Canada, or to

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Argument of Counsel.

any other person permanently employed in the public service," does not prevent Parliament at any time from voting any extra salary or remuneration; and where such an appropriation is made for such extra salary or remuneration, and the same is paid over to any officer, the Crown cannot recover it back.

PETITION OF RIGHT for the recovery of an alleged balance of salary due to a city postmaster.

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

June 20th, 1902.

The case was heard at Ottawa.

Dr. Travers Lewis, for the suppliant, contended that under schedule B of *The Civil Service Act* (1) the suppliant, between the years 1892 and 1899, was entitled to be paid the sum of $2,800, per annum, because the postage collections of his office amounted to over $80,000. The statute cited left nothing to the discretion of the Governor in Council or to that of the Postmaster-General; the salary was fixed definitely and finally by the scale in schedule B.

Secondly, no appropriation bill, without apt words, could override a solemn Act of Parliament. Parliament never intended in merely granting supplies to repeal any of its existing Acts. Therefore, whether the estimates of the Postmaster-General's department provided a larger or smaller sum than was fixed by the statute, the suppliant was nevertheless entitled to the annual salary prescribed in the schedule to the statute—no more and no less. The departmental estimates are not to be taken as the will of Parliament in the matter now before the court; that must be determined solely by reference to the provisions of *The Civil Service Act*. The suppliant looks to that Act and the terms of his commission for the embodiment of his rights.

(1) R. S. C. c. 17.

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Argument of Counsel.

He cited *Mechem on Public Officers* (1); 19 *Am. and Eng. Encyc. of Law* (2); *United States* v. *Langston* (3); *Dunwoody* v. *United States* (4); *Wallace* v. *United States* (5); *Collins* v. *United States* (6).

F. H. Chrysler, K.C., for the respondent, argued that the suppliant could only obtain an increase of salary upon an order in council passed under the provisions of sec. 24 of *The Civil Service Act*. No such order in council was in evidence. Again, the 6th section of the Act provides that "the collective amount of the "salaries of each department shall in no case exceed "that provided for by the vote of Parliament for that "purpose." Hence the plain intention of Parliament is that all salaries must be estimated for in the supply bill. Civil servants can only be paid on the basis of the parliamentary appropriation.

Allowances have been made to the suppliant in this case without sufficient authority therefor, and the Crown counterclaims against his petition for a return of the moneys paid him as such allowances.

Dr. Lewis replied.

THE JUDGE OF THE EXCHEQUER COURT now (November 10th, 1902,) delivered judgment.

The suppliant brings his petition to recover the sum of two thousand and fifty dollars, and interest, for salary as postmaster of the City of Winnipeg, over and above the amount paid to him during the years from 1892 to 1900. The defence is that he was paid all the salary that he was entitled to for the years mentioned. The Crown also claims by way of counterclaim the sum of two thousand three hundred and ninety-three

(1) Secs. 885, 887.
(2) (1st ed.) p. 595.
(3) 21 Ct. of Clms. 10 and 118 U. S. 389.
(4) 143 U. S. 535.
(5) 133 U. S. 185.
(6) 15 Ct. of Clms. 22.

dollars and thirty cents for sums paid to the suppliant in excess of his ordinary salary during the years 1882 to 1890, inclusive.

By *The Civil Service Act* in force during the years in which the suppliant's claim arose (1) it was, among other things, in substance provided that the city postmasters should be paid according to the following scale:—

"CITY POSTMASTERS.

"Class 1.	When postage collection exceed					$4,000
" 2.	"	"	are from	200,000	to $250,000	3,750
" 3.	"	"	"	150,000	to 200,000	3,500
" 4	"	"	"	100,000	to 150,000	3,250
" 5.	"	"	"	80,000	to 100,000	2,800
" 6.	"	"	"	60,000	to 80,000	2,400
" 7.	"	"	"	40,000	to 60,000	2,200
" 8.	"	"	"	20,000	to 40,000	2,000
" 9.	"	"	less than		20,000	1,400

to $1,800, as the Postmaster-General determines. These salaries shall not be supplemented by any allowances, commissions or perquisites whatsoever" (2).

It may be stated in passing that it is conceded, and if it were not, it is clear that the words "as the Postmaster-General determines" occurring in this extract refers to the 9th class mentioned, and not to the preceding classes.

To comprehend the question at issue it should be borne in mind that, notwithstanding the statutory authority cited, it has been the practice to take a vote of Parliament for the payment of the salaries alluded to. Not that a vote is taken for the amount of each salary; but an estimate is made up and submitted to Parliament, giving in detail the salaries and allowances and other things for which it is intended to

(1) R. S. C. c. 17, as amended 51 Victoria, chapter 12, and by 52 Victoria, chapter 12.

(2) R. S. C. c. 17, s. 25; and 52 Victoria, c. 12, s. 3.

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make provision, and then there is a vote for a large sum covering all these matters. Perhaps it will be convenient to illustrate this by reference to a particular year. In the fiscal year ending the 30th of June 1893, the total vote for the post office under the head of "Collection of Revenue" was $3,420,800.40 (1). Of that sum $2,046,842 was attributed to the "mail service"; $1,163,350 to "salaries and allowances"; and $206,000 to "miscellaneous." By referring to the "estimates" for that year, page 84, it will be seen that these three amounts were included in vote numbered 258. Then follows at pages 85 to 90 the items in detail that go to make up the amount of $1,163,350 for salaries and allowances, among which, at page 90, the salary of the postmaster at Winnipeg is set down at $2,400; and that is the amount that was paid him in that year, although the postage collections at Winnipeg for the same year were $93,211.56, a sum sufficient under the statute to entitle him to a salary of $2,800. In all the years referred to there is only one year in which the salary paid to the suppliant exceeded the amount mentioned in the estimate. For the fiscal year ending the 30th June, 1897, the estimate for his salary was $2,600, and the amount paid $2,800. The postage collections at the Winnipeg office were for that year $98,125.49, so that the amount paid and the amount authorized by the statute were in that year the same. For convenience, these particulars and some others respecting the claim for the year mentioned and later years are given in the statement on the following page.

Now what reason can be advanced against allowing the salary in this case at the rate prescribed by the statute? No question of acquiescence or of the statute of limitations as to any part of the claim is set up.

(1) 55-56 Victoria, c. 2, Acts of 1892, p. 30.

STATEMENT REFERRED TO IN NOTES OF REASONS FOR JUDGMENT.

Fiscal Year.	Amount voted for salaries and allowances of outside service of Post Office; part of total vote.	Reference to Statute.	Estimate of salary for postmaster at Winnipeg, as given in estimates; not in Statute.	Postage collections at Winnipeg.	Salary of the Postmaster at Winnipeg, according to the Civil Service Act.	Except in the year 1896-97, the salary was paid according to the estimate; in that year $2,800 was paid. Balance claimed.
	$ cts.		$ cts.	$ cts.	$ cts.	$ cts.
1892-1893	1,163,350 00	55-56 Vict., c. 2, Acts of 1892, p. 40	2,400 00	93,211 56	2,800 00	400 00
1893-1894	1,185,420 00	56 Vict., c. 1, Acts of 1893, p. 37	2,600 00	91,815 01	2,800 00	200 00
1894-1895	1,202,220 00	57-58 Vict., c. 1, Acts of 1894, p. 45	2,600 00	85,721 90	2,800 00	200 00
1895-1896	1,193,515 00	58-59 Vict., c. 2, Acts of 1895, p. 24	2,600 00	91,417 34	2,800 00	200 00
1896-1897	1,223,295 00	60 Vict., c. 3, Acts of 1896-97, vol. 1, p. 47.	2,600 00	93,125 49	2,800 00	.....
1897-1898	1,172,400 00	60-61 Vict., c. 2, Acts of 1897, p. 44	2,800 00	108,876 54	3,250 00	450 00
1898-1899	1,171,081 00	61 Vict., c. 1, Acts of 1898, p. 43	2,800 00	111,067 72	3,250 00	450 00
1899-1900	1,065,305 70	62-63 Vict., c. 2, Acts of 1899, p. 32	2,800 00	116,020 92	*1,083 33	150 00
Amount claimed	.....	.....	.....	.....	.....	2,050 00

* For one-third of year.

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The only question is whether under the statute he was entitled to a larger salary than that paid to him in the years mentioned.

By referring to schedule B of the statute it will be seen that there are some cases in which a minimum salary, and a maximum salary is attached to an office, and in such cases there can, I think, be no doubt that the officer would not be entitled to an increase of salary, until the increase had been authorized by the Government or by Parliament. A definite and certain amount is not authorized. But where the amount is prescribed by the statute itself nothing more is necessary. Now the salary to be paid to a city postmaster is made to depend upon the postage collections of the office under his charge. Where these are less than $20,000 the Postmaster-General is to decide as to what the salary is to be within prescribed limits. But in other cases there is no discretion as to the amount to be paid vested in anyone. It is suggested that the intention may have been that the Governor in Council should fix the amount of salary of a city postmaster for any given year by reference to, and in accordance with, the postage collections of the preceding year. But that is not what the statute says. Such a provision might have its advantage, but if Parliament had intended so to provide it would no doubt have used language indicative of that intention. When, for instance, a statute in effect provides that where the postage collections at a post office are between eighty thousand dollars and one hundred thousand dollars a year, an annual salary of two thousand eight hundred dollars shall be paid to the postmaster at that office, the natural meaning of the words is that the salary is payable in respect of the year in which the collections are made, and not in respect of some other year. If that is the meaning of the statute, it cannot, I think,

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be said that its provisions were overridden or rendered nugatory by the estimate presented each year to Parliament. That was only what it professed to be, an estimate. It was not possible in the particular case here in question to know in advance what the postage collections at the Winnipeg Post Office would be, and so at best only an estimate could be given of what the salary would be. The salary, according to the statute, might be more or less than such estimate. Some authority at the end of the year must determine that. But no discretion was vested in the Governor in Council, or anyone else, to make it either more or less than an amount to be ascertained by "the scale" prescribed by Parliament. The rule was given, the rest was a matter of calculation

It is suggested, however, that the provision for determining the salary of city postmasters must be read subject to section 24 of *The Civil Service Act*, by which it is enacted that no increase of salary shall be given except upon an order in council passed in the manner therein prescribed. I do not think that section is applicable to the present case. The salary of a city postmaster may, under the provision referred to, be for any given year more or less than it was for the preceding year; yet it is, under the statute, his salary for that year, and if it is more than it was for the preceding year there is no question of increase in the sense in which that word is used in the 26th section of the Act. That section would no doubt apply in cases where the Governor in Council had authority to increase a salary; or where some discretion was vested in him to be exercised with respect to the amount of it. But here, as has been said, there is no such discretion. The rule is given. By that rule the salary is to be ascertained, and then it is for an amount certain, the amount so ascertained.

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Then it was also argued, perhaps not very strongly, that the provision in the 6th section of *The Civil Service Act* to the effect "that the collective amount of the "salaries of each department shall in no case exceed "that provided for by vote of Parliament for that pur- "pose," makes against allowing the claim in question here. But it is not shown that if in any year the full salary to which the suppliant was entitled had been paid the total vote would have been exceeded. And even if that could be shown the provision would not, I think, be a bar to the suppliant's right to recover in this court. Such provisions are, as was said in *Collins* v. *The United States* (1), directions to the officers of the Treasury who are entrusted with the safe-keeping and payment of the public money, and not to courts of law, which are established for the purpose of determining legal liabilities, not of dealing with appropriations. It must often happen in this court that there will be no existing appropriation out of which to meet a judgment against the Crown, and for such a case provision has been made that the amount awarded shall be paid out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada (2). The officers of the Treasury must, of course, look to the Appropriation Acts. If a vote for any service is exhausted, nothing more must be paid in respect of that service until another vote is taken. That frequently happens, and nothing is more common than supplementary votes to meet such cases. But that is not a consideration to affect the decision as to whether or not an officer is by law entitled to a given or prescribed salary.

With respect to the principal sum of two thousand and fifty dollars claimed the petition must, I think,

(1) 15 Ct. of Clms. at p. 35.

(2) *The Exchequer Court Act*, 50-51 Vict. c. 16, s. 47.

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be sustained. I do not allow any interest thereon. Before leaving this branch of the case it may perhaps be well to add that even if one should come to the conclusion that under the statute a city postmaster's salary for any year should be determined, as was argued, by the postage collections made at his office in the preceding year, the suppliant's claim would not fail except as to part of the amount claimed. He would not under that construction of the statute be entitled to the sum of four hundred and fifty dollars claimed in respect of the year ending 30th June, 1898. Whether or not he would be entitled to the four hundred dollars claimed for the year ending 30th June, 1893, would depend upon the postage collections for the preceding fiscal year, which are not given. As to that further enquiry would be necessary. But the construction of the statute suggested would not affect the other amounts claimed.

The counter-claim set up on behalf of the Crown is to recover back certain allowances paid to the suppliant over and above the amount paid him as a salary between July 1st, 1882 and July 1st, 1890.

The following extract is taken from Schedule B appended to *The Canada Civil Service Act*, 1882 (1).

"CITY POSTMASTERS.

"Class 1.	Where postage collections exceed		$80,000		$2,600
" 2	"	"	are from	60,000 to $80,000	2,400
" 3	"	"	"	40,000 to 60,000	2,200
" 4	"	"	"	20,000 to 40,000	2,000
" 5	"	"	are less than		20,000 1,400

to $1,800, as the Postmaster-General may determine. These salaries shall not be supplemented by any allowance, commissions or perquisities whatsoever."

That these were the salaries to be paid in the cases mentioned was not expressly stated in the statute, but

(1) 45 Vict. c. 4.

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left to implication; and the matter stood that way until 1883, when it was expressly provided that the officers, clerks and employees mentioned in Schedule B of the Act should be paid according to the scale thereby established (1). By the forty-ninth section of the Act of 1882 it was provided that no extra salary, or additional remuneration of any kind whatsoever should be paid to any deputy head, officer or servant in the Civil Service of the Dominion, unless such sum should have been placed for that special purpose in the estimate submitted to and voted by Parliament. This provision was amended in 1884 by omitting the word "special" and by inserting between the words "purpose" and "in" the words "in each case" (2), so that the provision read that no such extra salary or additional remuneration was to be paid unless a sum was placed for that purpose in each case in the estimates submitted to and voted by Parliament. *The Civil Service Act* of 1882 and the amendments thereto were, in 1885, superseded by *The Civil Service Act* of that year, and the latter by Chapter 17 of *The Revised Statutes of Canada*, but without any further change in the provisions that have been referred to (1). In 1888 the provision as to the extra salaries was further amended and re-enacted in the form following: "No "extra salary or additional remuneration of any kind "whatsoever shall be paid to any deputy head, officer "or employee in the Civil Service of Canada, or to any "other person permanently employed in the public "service." It is obvious, however, that no substantial change in the law was occasioned by the omission of the provision respecting a special vote by Parliament of any such extra salary or additional remuneration. The amendment of 1888 did not, and could not, bind the hands of Parliament for the future; and whenever

(1) 46 Vict. c. 7, s. 9. (2) 47 Vict. c. 15, s. 5.

thereafter Parliament saw fit to vote any extra salary or additional remuneration to any person, the provision referred to was to that extent and for that special case abrogated.

Now with reference to the salary and allowances paid to the suppliant for the fiscal year ending the 30th of June, 1883, it appears that he was paid sixteen hundred dollars as salary and six hundred and forty dollars as a provisional allowance to meet the exceptionally increased cost of living in Manitoba. Such an allowance was at the time made to many officers of the service living in that province. I do not in the estimates for that year find any special provision for the allowance. Neither do I find any estimate for the salary of the postmaster at Winnipeg. The details of the amount to be voted for the services of the post office in Manitoba and the Territories were not in that year given with the same particularity that we find in later years. The reason for that perhaps is to be found in the fact that the estimates for that year were prepared before *The Civil Service Act* of 1882 was passed, and the necessity for giving very full details had not arisen. The appropriation out of which the suppliant was paid for the fiscal year mentioned will be found in the Act 45 Vict. chapter 2, schedule B (2), and in 46 Vict. chapter 2, schedule A (3). And the details, such as they are, will be found in the estimates for that year at page 94, and in the supplementary estimates of 1883-84, at page 12.

For the fiscal year ending the 30th June, 1884, there was appropriated by Parliament, for the post office service in Manitoba, Keewatin and the North-west Territories the sum of $153,120 (4). Among the

(1) 48-49 Vict. c. 46, ss. 25, 51 and schedule B; R. S. C. c. 17, ss. 25, 51 and schedule B.

(2) Acts of 1882, p. 37.

(3) Acts of 1893, p. 16.

(4) 46 Vict. c. 2, schedule B; Acts of 1883, p. 42.

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items which in the aggregate made up that amount are to be found in the estimates for that year, at page 105, under the head of "salaries" the following:

Heads of Expenditure.	1882-83.	1883-84.	Compared with Estimates of 1882-3.	
			Increase.	Decrease.
Salaries.	$ cts.	$ cts.	$ cts.	$ cts.
Inspectors' Division:				
1 Inspector		2,000 00		
1 Assistant Inspector		1,000 00		
1 Second Class Clerk		930 00		
1 Third " "		600 00		
1 Chief Railway Mail Clerk		1,000 00		
11 Third Class " "		5,280 00		
City Post Office, Winnipeg:				
1 Postmaster		2,200 00		
6 Second Class Clerks		5,760 00		
16 Third " "		9,080 00		
7 Letter Carriers		2,800 00		
1 Messenger		500 00		
For provisional allowance of 40 per cent. on ordinary salaries, to meet exceptionally increased cost of living in Manitoba		12,000 00		
Night duty and mileage allowance to Railway Mail Clerks		1,000 00		
Remittance to Country Postmasters for balances of salary		500 00		
Total salaries	25,000 00	44,620 00	19,620 00	

A similar appropriation is made for the years ending respectively on the 30th of June, 1885, 1886, 1887, 1888, 1889 and 1890; and in the estimates for these years like details are given. In each year the suppliant's salary was paid according to the amount stated in the estimates for that year; and, out of the amounts submitted in the estimates for the provisional allowances on ordinary salaries to meet the exceptional cost of living in Manitoba, he was in common with others paid an allowance over and above his salary. By a letter from the Secretary of the Post Office Department to the suppliant, under date of May 17th, 1893, (exhibit F. 4) he was advised that the allowance would,

after the 1st of July, 1883, be as follows: "12½ per "cent. per annum on salaries of from $1,000 to $2,000; "25 per cent. on salaries of from $600 to $1,000; and "40 per cent. on salaries of $600 and under." Whether this scale of allowances was prescribed by an order in council, or by the Postmaster-General, does not, I think, appear, nor does it matter. The suppliant was paid the allowance for the fiscal years ending, respectively, on the 30th of June, 1884, 1885, 1886 and 1887 at the rate of twelve and one-half per centum on the salary for each of these years, as estimated for, and paid. For the years ending, respectively, on the 30th of June, 1888, 1889 and 1890 he was paid at a lesser rate; but by what authority the amount was reduced is not shown.

It is now sought to recover by way of counter-claim these allowances so paid to the suppliant. It is argued that there was no sufficient warrant in law for their payment, and in that connection it is said that an appropriation for an allowance over ordinary salaries to a number of officers mentioned is not a compliance with the provisions of *The Civil Service Act* that requires the sum to be placed, for that purpose, in each case, in the estimates submitted to and voted by Parliament. That is the only objection that is taken to the payments made in the years in which the provision was in force. There is no question of mistake or concealment, or fraud. It was the intention of Parliament and of the Government that these allowances should be paid. The amounts must have been passed by the officers of the Treasury for whom the provisions referred to was a direction and a prohibition. The payments are no doubt to be found in the public accounts that were prepared and laid before Parliament from year to year. If the sufficiency of the provision or authority for making the payments had been chal-

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lenged in any year in which they were made; if it had then been suggested that it was doubtful or not sufficiently clear that such authority existed, there can, I think, be no question that any such doubts would have been removed, for it is clear that it was intended in the years mentioned to make this provisional allowance to cover the exceptional cost at that time of living in Manitoba.

I do not refer to the hardship involved in compelling anyone to whom moneys have been paid for such a purpose to return the same many years afterwards. As one has to say, and I regret to add, to say more frequently than one cares to do, the hardship of the case has nothing to do with the question of law, if the law be clear. No responsibility as to that rests with the court. But in such a case it is reasonable for a court to hold its hand if the matter is not clear, and that, I think, will be sufficient for the present case. The statute provides that the extra salary or allowance should in each case be placed in the estimates submitted to and voted by Parliament. In the cases under discussion an amount was placed in the estimates and voted by Parliament to meet a number of cases, leaving the Governor in Council or the Postmaster-General, out of the amount appropriated, to make provision for each case. A class of cases, not a particular case, was provided for. But after all it is not material whether that constituted a literal compliance with the statute or not. If it did, or even if it was a substantial compliance with the statute, that is the end of the matter. If it was not a compliance with the statute; then we have disclosed an intention on the part of Parliament in the particular cases not to comply with it, and to that extent to modify the statute. What does appear very clearly is the intention of Parliament, notwithstanding anything to the con-

trary, to make provision for the payment of these allowances, and that being so, how can it now be said that they were paid without parliamentary authority? That applies to all of the allowances in question here, except that paid in the fiscal year ending 30th June, 1883.

It appears from an order in council of the 14th of June, 1883, in evidence as Exhibit "D," that the suppliant's salary was increased on the 1st of July, 1883, from $1,600 to $2,200, and that the postage collections at the Winnipeg office then stood at a sum between $40,000 and $60,000 per annum. This, I think, constitutes all the evidence before the court as to what the postage collections were in any year between 1882 and 1890, so that it is not possible to say what, according to the statute, the suppliant's salary should have been during any of these years, except perhaps the year ending 30th of June, 1883. For that year it is, I think, fair to infer from the order in council that such collections exceeded the sum of $40,000, and if they did, the suppliant was entitled to a salary of $2,200, which would only exceed the salary and allowance on salary paid to him by the small sum of $40, and apart altogether from the special appropriation for the allowances mentioned, it could not in any case be said that the payments to him, on account of salary, were paid without authority of law so long as the total was within the amount prescribed by the statute. That applies as well to the payments made in the years subsequent to 1883, if the salary as given in the estimate was in any year less than the suppliant was by law entitled to. It would not, it seems to me, in any view of this case, be proper to allow the counter-claim without an enquiry as to the postage collections made in the respective years mentioned, so as to ascertain if the amount to which the suppliant was entitled in

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any year was exceeded by the amount of salary and allowance on salary paid to him during such year.

But in the view I take of the case no such enquiry is necessary. There will be judgment for the suppliant for two thousand and fifty dollars, and for his costs of the petition.

Judgment accordingly.

Solicitor for the suppliants: *Lewis & Smellie.*

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

APPEAL FROM QUEBEC ADMIRALTY DISTRICT.

Between

THE CORPORATION OF PILOTS FOR AND BELOW THE HARBOUR OF QUEBEC (PLAINTIFFS) ..... } APPELLANTS;

1902
Nov. 17.

AND

THE SHIP OR VESSEL "*GRANDEE*" (DEFENDANT)..... } RESPONDENT.

Shipping — Pilotage dues — Liability of barge for same — R. S. C. c. 80, sec. 58—"Every ship which navigates."

Held, affirming the judgment of the Local Judge for the Quebec Admiralty District, that a barge, having no motive power of her own, and being towed by a steam-collier within the Quebec Pilotage District, is not liable to compulsory dues under the 58th and 59th sections of *The Pilotage Act* (R. S. C. c. 80.).

APPEAL from the judgment of the Local Judge of the Quebec Admiralty District (1).

October 17th, 1902.

The appeal was now argued in Quebec.

T. C. Casgrain, K.C., cited *The Independence* (2); *The Cleadon* (3).

C. Pentland, K.C., cited *The Sinquasi* (4); *The Quickstep* (5); *Parsons on Shipping* (6); *Desty's Shipping & Admiralty* (7); *American & English Ency. of Law* (8).

T. C. Casgrain, K.C., in reply cited R. S. C. 80, sec. 58; *Imperial Dictionary* (9).

(1) Reported *ante* p. 54.
(2) Lush. 270.
(3) 14 Moo. P. C. 97.
(4) 5 P. D. 241.
(5) 15 P. D. 196.
(6) Ed. p. 535.
(7) P. 343.
(8) *Vo. Navigation* p. 272.
(9) *Vo. Navigate.*

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THE CORPORATION OF PILOTS v. THE SHIP GRANDEE.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (November 17th, 1902), delivered judgment.

This is an appeal from a judgment of the learned Judge of the Quebec Admiralty District, dismissing an action for pilotage dues.

The following admissions were made for the purposes of the action:

"1. That the vessel *Grandee*, proceeded against in the present cause, is a barge, over 1,000 tons burthen, the property of the defendants, and employed by them in the coal trade in trading between Sydeny, Cape Breton and the City of Quebec during the season of navigation.

"2. The said barge has no motive power of her own, but is entirely propelled by means of a tow-boat, to wit, one of the steam-colliers of the defendants, trading from Sydney to Quebec and back to Sydney, aforesaid, which collier is exempt from the compulsory payment of pilotage dues to the plaintiffs.

"3. That the pilotage dues stated in the libel are exigible from the said ship, if she is not exempted under the pilotage statute from the payment of pilotage dues, for the voyages and moorages stated in the summons.

"4. That the said vessel *Grandee*, during the said voyages and moorages, for the purposes of her navigation, was under the control of the said collier steamer, her crew attending to her wheel and her anchors and hawsers."

By clause (*b*) of the second section of *The Pilotage Act* (1) it is enacted that the expression "ship" shall, unless the context otherwise requires, include every description of vessel used in navigation not propelled by oars. By the 58th section of the Act cited it is, among other things, provided that every ship which

(1) R. S. C. c. 80.

navigates the pilotage district of Quebec shall pay pilotage dues unless she is exempt under the provisions of the Act. By the 59th section of the Act it is, among other things, enacted that a ship propelled wholly or in part by steam and employed as therein mentioned, shall be exempted from the compulsory payment of pilotage dues. With respect to her employment the *Grandee* was within the exemption. The question as to whether she was liable for the pilotage dues claimed depends upon two considerations. Was she a ship which navigated the pilotage district of Quebec, and so within the 58th section of the Act; and if within that section was she propelled wholly or in part by steam?

Now it may at once be conceded that the term "propelled" is not an apt one to apply to a ship that is being towed, but a ship cannot be said to "navigate" unless it is propelled or moved in some way; and it seems to me that in construing the provisions of the two sections mentioned, one is forced to adopt one or the other of two constructions, either of which is against the maintenance of the plaintiffs' action. Either the 58th section by which, with certain exceptions, pilotage dues are made compulsory, must be limited to ships that have within themselves some power or means of being moved or propelled, or the term "propelled" in the 59th section must be given a meaning large enough to include the means by which the ship is moved. I incline to the first of the two views mentioned. I think the expression "every ship which navigates" means a ship that has in itself some power or means of moving through the waters it navigates, and not a ship that has no such power or means, and which must be moved or propelled or navigated by another vessel. In that view of the case the *Grandee* was not liable to the com-

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pulsory pilotage dues claimed. But if that view is wrong, if it can with correctness be said that the *Grandee* was a ship which navigated the waters mentioned, then we must have regard to the means by which she did so. The vessel by which she was towed must be so connected with her as to make the act of navigation by both her act; and in that view of the case she was propelled by steam, and therefore exempt from payment of compulsory pilotage dues. The judgment appealed from is, I think, the judgment that ought to be entered in this case.

The appeal will be dismissed, and the costs will, as usual, follow the event.

Appeal dismissed with costs.

Solicitors for appellants: *Casgrain, Lavery, Rivard & Chauveau.*

Solicitors for respondents: *Caron, Pentland, Stuart & Brodie.*

IN THE MATTER OF THE PETITION OF RIGHT OF

THE CALGARY AND EDMONTON RAILWAY COMPANY AND THE CALGARY AND EDMONTON LAND COMPANY, LIMITED..... } SUPPLIANTS:

1902
Nov. 10.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Railway—Land Subsidy in the N. W. Territories — Mines — Reservation in grant—53 Vict. c. 4 sec. 2.—Dominion Lands Act.

By the Act 53 Vict. c. 4, the suppliant railway company, among others, was authorized to receive a grant of Dominion lands of 6,400 acres for each mile of its railway, when constructed. Under the provisions of section 2 the grants were to be made in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees, respectively, of the cost of survey of the lands, and incidental expenses. The Act came into force on the 16th of May, 1890. On that date there were certain regulations in force, made on the 17th September, 1889, under the provisions of *The Dominion Lands Act*, which provided that all patents for lands in Manitoba and the North-west Territories should reserve to the Crown all mines and minerals which might be found to exist in such lands, together with the full power to work the same.

Orders in council authorizing the issue of patents, for the lands in question, to the suppliant railway company were passed from time to time, according to the number of miles of railway constructed. There was no reference in these orders to the regulations respecting the reservation of mines and minerals of 17th September, 1889.

Held, that the regulations reserving mines and minerals applied to all grants of lands made under the provisions of the Act 53 Vict. c. 54, and that the omission of reference to such regulations in the orders in council authorizing patents to be issued did not alter the position of the suppliant railway company under the law.

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Argument of Counsel.

Semble, that where Parliament grants a subsidy of lands in aid of the construction of a railway, and nothing more is stated, the grant is made under ordinary conditions, and subject to existing regulations concerning such lands.

PETITION OF RIGHT for a free grant of Dominion lands under 53 Victoria, cap 4.

The facts are stated in the reasons for judgment.

June 10th, 1902.

The case came up for hearing at Ottawa.

I. F. Hellmuth for the suppliant: The Act incorporating the Calgary and Edmonton Railway Company is followed by the Act granting the land subsidy, and, with these two Acts, my submission is that we have nothing to do with the orders in council of October, 1887, and September, 1889. We submit that the Calgary and Edmonton Railway land grant is altogether outside and apart and free from the operation of these orders in council. This is the first position that we take.

The second position we take is that the orders in council have no application to the Calgary and Edmonton land grant, because they are *ultra vires* the Governor in Council, so far as that railway is concerned. These are the two positions upon which our claim is based. If my first position is sound it is immaterial whether the orders in council are *ultra* or *intra vires*, because then they would have no application; but again, if they do apply, I submit they are *ultra vires*. The position of the suppliants is that they were to receive under 53 Victoria, chapter 4, land to the extent not exceeding 6,400 acres per mile. This was under section 2 of the Act, which reads as follows:

"2. The said grants and each of them may be made in aid of the construction of the said railways respectively, in the proportion and upon the conditions

fixed by the orders in council made in respect thereof, and except as to such conditions, the said grants shall be free grants, subject only to the payment by the grantees, respectively, of the cost of survey of the lands and incidental expenses, at the rate of ten cents per acre in cash on the issue of the patents therefor."

Now, I submit that the words "orders in council made in respect thereof" apply to orders in council made in respect of such grants and not in respect of the lands. Therefore, if my contention is right, that class of orders in council would not include any order in council made generally under *The Dominion Lands Act*; but to orders in council made in respect of these grants only. And upon the conditions fixed by such orders in council the said grants and each of them may be made as provided for by section 2 of the Act. We submit that it is not necessary to go outside of this specific Act (1), and such orders in council as have been passed under that Act. Now we have orders in council respecting the grants to us which prescribe the conditions that shall govern us, and you do not find amongst them any reservation of mines and minerals. We have reservations but no reservation excepting minerals from the operation of the grant. I submit that the suppliants are to be governed by the orders in council made under the provisions of this Act and not by any general orders or regulations.

Turning to section 90 of *The Dominion Lands Act* it will be seen that certain powers are given there to the Governor in Council. The Crown claims what seems to me to be utterly untenable, namely, that it was beyond the power of the Parliament of Canada, in view of the order in council of 1887, to grant these lands without a reservation of coal and other minerals. That is to say, that the Parliament of Canada, having

(1) 53 Vict. c. 4.

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Argument of Counsel.

passed that Act, which authorizes the Governor General to deal with coal lands, can never repeal the Act. Why, they have been repealing that Act from time to time since it has been in operation. The first Act is 35 Victoria, chapter 23, in the year 1872. By sections 36 and 37 it is enacted that no reservation of gold, silver, iron, copper or other mines or minerals shall be inserted in any patent from the Crown granting any portion of the Dominion lands, and any person or persons may explore for mines or minerals, on any of the Dominion lands surveyed or unsurveyed, and not then marked or staked out and claimed or occupied, and may, subject to the provisions hereafter contained, purchase the same. If my learned friend's argument is correct, it amounts to the declaration that the Parliament of Canada is not competent to grant to these suppliants coal lands without a reservation as to coal, and the only question is, did they do it? Then your lordship has to find whether they had the power to do it.

The next Act is 46 Victoria, chapter 17, which consolidates the Acts of 1883, and is very similar in its terms to chapter 54 of *The Revised Statutes of Canada.* The section under which the regulations in question were made that are relied upon by the respondent, is section 47 of chapter 54 R. S. C. Now, this is a section to which I specially call your lordship's attention. There is an amending Act, 55-56 Victoria, chapter 15, section 5. That section amends section 47 of the Act in *The Revised Statutes.* Now, your lordship will observe that the Governor in Council had the right to dispose of the lands under the section as it exists in *The Revised Statutes;* but under the amending enactment his power is limited to making regulations in respect of the lands. But it must not be forgotten that so far as this petition is concerned it is

section 47, unaffected by the amendment, that prevails. It was in force at the time of the grant in question here was made. What we say shortly in respect of this is that the Governor in Council, having disposed of these lands by order in council to us, that they conceded the coal that is in them to us. And that the disposal of the lands containing coal is a disposal of the coal as well.

Now, by section 90, subsection (*b*) of *The Dominion Lands Act*, power is given to the Governor in Council to dispose of the coal lands completely. That being so, if there is a disposition by the Governor in Council of coal lands, would it not be absurd to say that in disposing of the coal lands the Governor in Council reserves the coal?

[BY THE COURT: Is there any question in this case as to this particular lot of land being within the area reserved for coal lands?]

No, my lord, there is no evidence of that. In the Crown's statement of defence they say that the lands did contain coal. It appears in the order in council that there were lands reserved for coal lands, but these were not. We were not within the coal district. I submit that even if the fact were otherwise it would not tell against us. I do not know whether, as to this particular lot, coal is contained therein, but I am prepared to admit that in similar lands that have already been patented to the suppliants there was coal. There was some, but I do not know in what proportion.

There are regulations published in the statutes of 1888 which set apart coal lands, but the townships mentioned here do not include these particular lands. They are all lands in the Province of British Columbia. The regulations applying to lands in British Columbia are different from those applying to lands in the North-

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west Territories. Our grants are not subject to these regulations as to coal, such as "lands containing anthracite at upset price of twenty dollars per acre." Now, how is it possible for lands that are sold to us to be sold to somebody else. Clearly these regulations do not apply. (He refers to section 44 and on to 49 of the regulations of 1889).

Section 47 provides for the sale of mining rights. Now it cannot be said that we obtained only surface rights. Lands granted to a railway company are applied to different purposes from those that lands granted to an individual are usually applied. And inferentially these regulations cannot apply to our lands. We would be liable to be deprived of the lands after being used for our purposes when coal is found under them, if my learned friend's contention is to prevail. It clearly was the intention that the regulations should not apply to lands acquired by a railway company. The lands of railways were never lands that could be taken away for any such purpose, because if so you would find provision expressly made for taking the right of way and the station grounds, etc. Furthermore, it could be just as well argued that the lands of the railway company under these regulations would be subject to leases to cut hay, to leases for grazing, or for any of the purposes contemplated by the statute in the case of ordinary lands. The lands in our hands were only affected by parliamentary legislation, and the orders in council especially made under such legislation. If the lands did not contain coal the regulations surely did not affect them. I should have thought that there should have been first a coal belt established before there were general regulations made.

The Minister of the Interior has duties under the Act, but they are purely ministerial. He could not add to

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the conditions imposed by the Parliament of Canada. We were clearly entitled to a free grant, and the Minister of the Interior had no right to impose conditions and reservations. (He cites chapter 51 R. S. C., section 3, subsection (*a*), as to the meaning of the word "lands"). The Crown says that our argument might be extended to a claim for the gold and silver too. We say no, because under *The Dominion Lands Act* gold and silver are expressly taken out of the grant. And we should have had an express provision granting them if we wished to obtain them. The distinction between gold and silver and coal is marked in the statute. (He refers to schedule "B.") I think I said before that in some of the lands which have not yet been patented there is no doubt but there is some coal.

[BY THE COURT: Patents have issued to you with the reservations?]

All patents that have issued have had the reservation. The department insisted upon doing this, and we have asked as to the future that no patents shall be issued reserving mines and minerals. Your lordship will probably consider the case first as if this particular lot did contain coal, and secondly, as if it did not. The issue between the parties is simply whether the patent should be issued with or without the reservation.

D. W. Saunders: It appears to me that the position of the Crown is that the Governor in Council by these regulations may control the legislature. Apparently these regulations, so far as section 8 goes, ousts the jurisdiction of Parliament in respect to the subject-matter. I submit that this is not reasonable. We have *The Dominion Lands Act*, section 47, providing that coal or other minerals could be disposed of upon such conditions as are from time to time fixed by the

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order in council. Section 47 simply reserves the coal lands, but section 90 also provides for reservations. If I understand at all the principles under which legislation has to be interpreted it is that the whole Act, all the provisions of the Act, are to be given effect to, and so that the whole Act is rendered sensible and operative. Then we must consider sections 47 and 90 together, and see if they are not in their very words consistent. Section 47 provides for the reservation of coal lands, and section 90 provides for the reservation of lands from sale and homestead entry to be given in aid of any railway; so that the Governor in Council might under section 90 have passed orders in council giving Dominion Lands to such railways as might be entitled to them *i. e.*, lands under section 90 containing coal or otherwise. There is no reason why in such a grant to a railway there should be any reservation at all, unless as a matter of contract between the Government and the particular railway mineral rights should be excepted. I submit that is the position under *The Dominion Lands Act.* Section 8 of the regulations of 1899 was apparently framed under section 47 of the Act. Taking the general Act (*Dominion Lands Act*) as a whole we might have obtained land grants under it without any reservation, but we have specific legislation dealing with the Calgary and Edmonton Railway Company. We have the Subsidy Act of 1890 providing for grants to a railway company, and providing that these grants and each of them may be made upon certain conditions. At the date of this Act, 10th May, 1890, what orders in council were in force in respect of the grants of subsidies in lands? Simply that of May, which was cancelled afterwards. I desire to point out that the grants were to be made "in respect thereof." But this section had no reference to any existing order in council, because it provides "except

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as to such conditions, the grant shall be a free grant." If we give any meaning at all to the word "free" it must be free from any burden except as found in the order in council made "in respect thereof." (He refers to section 90 of *The Dominion Lands Act*, subsection (*b*)). There are provisions for reservation from sale and homestead entry. This may be done by the Governor in Council, notwithstanding anything in this Act, so as really there is no conflict between sections 47 and 90.

The grant is to be subject only to such conditions as may be fixed by orders in council made "in respect thereof." That is the wording of our special Act. Now where the language in the statute is clear and explicit there is no reason to import any extraneous matter into it which might create a difficulty in its interpretation Where you have clear expression in words, words which are grammatical, you cannot call to your aid in its interpretation anything to cover that which is beyond such expressions. The rule is laid down most clearly in *Warburton* v. *Loveland* (1). See also last edition of *Hardcastle on Statutes* (2). And *Bradlaugh* v. *Clark* (3).

There is no reason in this case why we should not construe this statute just as Parliament has expressed it. The onus of establishing any other sense lies entirely upon those, heavily upon those, who wish it to be adopted. (He cites *Richards* v. *McBride* (4).

In paragraph seven of the statement of defence there are allegations that bear out what I have stated to be the real contention of the Crown, namely, that Parliament has exhausted its power to deal with these lands, and that by passing these regulations the Crown has exhausted its power. I fail to understand the argu-

(1) 2 Dow & Cl. 489.
(2) 3rd ed. p. 75.
(3) 8 App. Cas. 354.
(4) 8 Q. B. D. 119 at p. 122.

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ment or the premises upon which it is based, because we see that section 34 provides for selling the coal lands, and there is nothing asserting that the regulations were made in respect to mines and minerals.

What is the contract here? It is made up by the statute and the order in council. We are entitled to disregard every other document but those. You cannot go outside of the contract and refer for its terms to any such document as a departmental letter. The authorities are conclusive on that point. (He cites *Ellphinstone on Interpretation of Deeds* (1); *Shore* v. *Wilson* (2); *McNeely* v. *McWilliams* (3).

The Attorney-General of Canada for the respondent: I submit that the intention of the legislature was to distinguish between surface and mining rights. And this is not at all an unusual provision in legislative enactments. Your lordship knows that in the several provinces we have had legislation of this character, with reference to asbestos mines, mica, and so on. Sec. 47 of *The Dominion Lands Act* shows what regulations should be made as to the disposal of these mining rights. Section 8 of the regulations of 1889 contains the necessary dispositions that have to be made. These regulations have been duly published in the *Canada Gazette*. Therefore, in my view, you must read section 8 of the regulations of 1889 into *The Dominion Lands Act*. There must be a reservation of mines and minerals in any grant under the Act. This being the will of Parliament as unequivocally expressed at the time, and being the law of the land in 1890, we find that 53 Victoria, chapter 4, is passed by which the suppliants became entitled to a subsidy in Dominion Lands, in lands which the Parliament of Canada has said are not to be granted except upon a reservation of mines and

(1) Rule 10 & 11, p. 45. (2) 9 Cl. & F. 355.
(3) 13 Ont. A. R. 324.

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minerals. I cannot agree with Mr. Hellmuth when he says that the suppliants "purchased" these lands. On the contrary they were given grants as a subsidy to assist them in building a railway. Now, a subsidy to Dominion Lands must surely mean a subsidy of lands that would be granted under ordinary conditions, and, as the statute says, upon the terms fixed by the "orders in council in respect thereof." That is, in respect of the lands. I submit that the true construction is that the order in council referred to here is an order in council made in respect of the lands which are granted. Parliament has authorized 6,400 acres per mile as a subsidy in lands If I am right, then Parliament has prescribed that in every grant of Dominion Lands for the purposes of the subsidy the grant is to be taken to be made subject to the reservation. Is it a good canon of construction to say that an express direction of Parliament can be set aside?

Your lordship will see that the point is a very narrow one, although the issue is a most important matter.

E. L. Newcombe, K.C., followed for the respondent. [He showed that the order in council of 1889 was published in the *Canada Gazette* of the 21st and 18th December, 1889, and the 4th and 11th of January, 1890. He also stated that the order in council of 31st October, 1887, was not published in the *Canada Gazette*.] So far as the latter is concerned, it was not necessary in order to give the regulations validity that they should be published. There is a statute, 57-58 Victoria, chap. 26, sec. 2, which legalizes the regulations even if they have not been published. The same provisions are in the order of 1889. I submit that the regulations are perfectly valid; those of 1889 having been published, and those of 1887 being made valid by the Act of 1894. I would also direct the court's attention to page 847

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of *Bligh's Orders in Council of* 1889. These regulations are passed under *The Dominion Lands Act*, section 47. I submit in the first place that in pursuance of this section the Governor in Council could not but say that the grants to the suppliants must be made with a reservation of coal and other minerals. I understand my learned friend contends that this order in council is *ultra vires*, but how can it be *ultra vires* when Parliament provides for the regulations, and we have regulations saying that lands containing coal and other minerals should not be patented except on such a reservation? Section 90 of *The Dominion Lands Act* is broad enough to authorize these regulations, if section 47 is not. As I said before, the order in council of 1889 has been published for four consecutive weeks, and as for the order in council of 1887, we have the enabling Act.

We do not contend that the Governor in Council has exhausted his power to make orders; we say that this power has been executed by passing these regulations which have the force of law under the statute. (He cites section 48 of *The Dominion Lands Act*). It might very well be, as my learned friend contends, that there is authority under section 90 for the Governor in Council to repeal the regulations of 1889. But that could only be done by regulations brought into force in the same way as the original regulations themselves were brought into force. If, as they say, the order in council giving the suppliants their lands is a repeal of the regulations of 1889, then I say that the repealing order in council has to be put in force in the same way. If one concedes what they claim, and that an order in council giving them a subsidy is a repeal of the general order, so far as these regulations of 1889 are concerned, then the repealing order must be attended with the same formalities as the original.

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Then with reference to the argument that the grant was to be a free grant, we have to say that when the Act authorizing the subsidy to be granted was passed there was a statute already in existence, namely, *The Dominion Lands Act* which regulated the granting of such lands. Then may it not be said that Parliament voted authority to the Governor in Council to grant lands in the way of subsidy in conformity with the provisions of *The Dominion Lands Act?* The grants were to be made only as they were authorized to be made. The Subsidy Act does not authorize the Crown to grant them without reserving the mines and minerals. There is a difference between a land Subsidy Act and a money Subsidy Act. Under a land Subsidy Act, such as this, it is possible for the Crown to say to the company, we will issue these lands to you now, in order for the company to proceed with the construction of its railway. The Crown might enter into a contract with the company in respect to the subsidy in lands. With regard to the money subsidy it could only be paid upon the conditions set forth in the Act. But the lands could only be granted in conformity with the law as it existed, and under that law it was necessary for the grants to be made with a reservation. Now this particular section of lands may contain coal or it may not; but there is no doubt about this, that there is coal in that country and there is coal in lands which are already granted and which may be granted to the company. If there is any coal or other minerals in the lands, then the reservation will take effect. If there are none then your lordship should not entertain a claim to rectify the grant where the reservation has nothing to operate upon. The remedy is inherent in the condition of the parties. If the land does not contain coal or other minerals then I do not see how your lordship could rectify the patents. Of course

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there might be a declaration as to the rights of the parties. But there is no case stated here for that. In the 11th paragraph of the statement of defence the fact is stated that the obligation of the Crown, if any, to grant land to the suppliants, or either of them, arises under the order in council of 27th June, 1890, whereby a free grant is authorized to be made to them, subject, *inter alia*, to the condition that the grant shall be without interference with any previous grants or reserve; and also subject to the reservation of the coal and other mines and minerals existing, or which may be found to exist therein. Then they are entitled to a "free" grant subject to these reservations. Now, what does the word "reserves" or "reservations" mean? Because these are quotations from what they claim is the contract between the parties, so it is necessary to interpret what the words mean between the parties. We submit that the words clearly refer to a reservation of the mines and minerals.

Then there is a statement in the 15th paragraph of the defence that by the statute 53-54 Victoria, chapter 4, it was enacted that the grant to be made in aid of the construction of the railway should be made on the conditions fixed by order in council "made in respect thereof." Now I submit that the orders of 1887 and 1889 are orders in council "made in respect thereof," that is in respect of grants of land to the railway company in so far as the territory is part of that from which the grant is to be made. We have *The Dominion Lands Act* saying that coal or other minerals should always be reserved. Then the Crown passes an order in council and sends it to the railway company, and says, we will agree to make a grant to you if you will build the railway according to these specifications. I submit that their grant must be construed as being subject to the general statutory provisions, and these regulations made by the Gover-

nor in Council are part of the statute. Of course this was the view that was taken by the Government at the time, and which was notified to the suppliants before the contract, or so called contract, was executed. Orders in council of the 5th of May, 1890, 26th December, 1890 and 25th May, 1890, were sent to the company. They were informed that they were not to get the coal and other minerals. The contract which they put forward was not executed, according to their contention, until the 26th of December, 1890, and yet on the 5th of May, 1890, the order in council was passed and communicated to them by which they were to be subject to the reservation. But the evidence shows no representation on the part of the company, and no claim, that they were entitled to have the coal and other minerals. It is clear, I think, that at the time the contract was signed the suppliants did not expect to get the coal and other minerals.

I. F. Hellmuth in reply: The Attorney-General has argued upon the intention of Parliament in passing *The Dominion Lands Act.* He says that in section 47 they were from the first careful to distinguish between surface and mining rights. Now I am free to admit that 55-56 Victoria, amending the original Act, does make some distinction between surface and mining rights; but the amending Act was passed in 1892, long after our grant. There was no such distinction between surface and mining rights in the original section. In the amendment it will be noticed that the power of the Governor in Council is limited to making regulations with regard to the grants of coal and other minerals, while in the original Act he could make regulations respecting the disposal of the lands containing coal, etc. Now, I say, this distinction being made by Parliament after our grant, it is not necessary for the court to consider it in this case. We have

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to deal with this case under *The Dominion Lands Act* in *The Revised Statutes*, and section 90 may practically be wiped out if you desire to proceed under section 47. But my learned friends say you must have made a formal repeal of the regulations of 1889 by the order in council made in respect of our grant. In answer to that we say the Governor in Council disposed of these lands to us under section 90, plus such other powers as the Governor in Council had.

Now what is the fair construction to be put upon the whole Act? We say the position of the parties is this: If your lordship is forced to conclude that the 2nd section of the Subsidy Act, where it mentions "orders in council made in respect thereof" refers to the grants and not to the lands, then we must succeed beyond a doubt. Then again, if you add the word "lands," and make the passage read "orders in council made in respect of the grants of land," then I submit you do not change the meaning. The whole passage is one which invokes the primary canon of construction cited by my learned friend Mr. Saunders. The grammatical meaning supports our contention. Under the order in council of 1889 our rights are not to be determined. It was published, but the regulations of 1887 were not. The Act of 1894 could not validate an order in council as against us when our contract was executed in December, 1890. The Act of 1894 attempts to validate the order in council of 1887, but it could not enforce it as against parties who, at the time the Act of 1894 was passed, were entitled to rely upon a purchase of the lands free from the effect of the order of 1887.

Now, it is further to be remembered that the departmental letter (Exhibit E) only gives us notice of the order in council of 1887, and not that of 1889. The order of 1887 being of no force and effect so far as we

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are concerned, the notification is nugatory. I further submit that the word "reserves," in the special order in council referring to the company, means the lands themselves, and has no reference to the reservation of coal or other minerals.

My learned friends say that the order in council should have been published, but is it not unusual for the Crown to set up its own negligence in order to invalidate an order in council? I submit that the Crown cannot take advantage of any act or omission of this sort. I refer to the *Canadian Coal and Colonization Company* v. *The Queen* (1).

THE JUDGE OF THE EXCHEQUER COURT now (November 10th, 1902) delivered judgment.

The Calgary and Edmonton Railway Company has earned and is entitled to the grant of Dominion Lands of six thousand four hundred acres for each mile of its railway, as provided in the Act of Parliament 53 Victoria, chapter 4. The Calgary and Edmonton Land Company, Limited, is interested in that grant. In the patents that have hitherto been issued for portions of such land grant, all mines and minerals and the right to work the same have been reserved. The suppliants contend that no such reservation should be inserted in the patents for such lands, and that the insertion of such a reservation therein is an infringement of their rights, and they claim relief against the action of the Crown in that behalf. The Crown justifies its action; and the question at issue is whether or not the grant mentioned is subject to the reservation in question.

This grant was one of a number authorized by the Act cited (53 Vict., c. 4). By the second section of the Act it was provided that the said grants and each of them might be made in aid of the construction of the

(1) 3 Ex. C. R. 157.

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said railways respectively, in the proportion and upon the conditions fixed by the orders in council made in respect thereof, and, except as to such conditions, the said grants should be free grants, subject only to the payment by the grantees respectively of the cost of survey of the lands, and incidental expenses, at the rate of ten cents per acre in cash on the issue of the patents therefor. The Act was assented to on the 16th of May, 1890. At that date certain regulations made on the 17th of September, 1889, respecting the sale, settlement, use and occupation of Dominion Lands were in force. By the 8th section of these regulations, with an exception not material in this case, it was provided that all patents from the Crown for lands in Manitoba and the North-west Territories should reserve to Her Majesty, Her Successors and Assigns forever all mines and minerals which might be found to exist in such lands, together with full power to work the same. A similar provision occurred in an order in council passed on the 31st of October, 1887, which was not published in the manner prescribed by the 91st section of "*The Dominion Lands Act*"(1), and which for that reason failed to be operative and in force, at least until the passing of the Act 57-58 Victoria, chapter 26, by the second section of which it was provided that the omission to publish any such order or regulation in the prescribed manner should not be held to invalidate it or anything done under it.

As has been noticed, the Act authorizing the grant of land to the Calgary and Edmonton Railway Company was passed on the 16th of May, 1890. The first order in council made in respect of such grant was passed on the 5th of May of that year. That order was followed by one of the 22nd of May; and these two were cancelled by a third order in council passed on

(1) R. S. C. c. 54, s.. 91.

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the 27th of June following. There are a number of other orders in council relating to the grant, but it is sufficient for the present to say in respect of all of them that no one of them contains any condition as to the reservation of the mines and minerals in the lands which it was proposed to grant. As to that all such orders in council are silent.

About the 20th of May, 1890, that is within a few days after the Act authorizing the land grant was passed, the attention of The Calgary and Edmonton Railway Company was, through its solicitor, called to the order in council of October 31st, 1887, which provided that the reservation as to mines and minerals now in controversy should be inserted in patents for lands west of the 3rd Meridian, the lands to which the suppliants are entitled being west of that meridian. In the letter (Exhibit "E") by which the company's attention was called to this matter, it was stated that public notice of it had been given through the *Canada Gazette*. So far as that statement may be taken to have reference to the order in council of the 31st October, 1887, the writer of the letter was in error. The order in council of the 17th of September, 1889, and the regulations thereby "established and adopted" (to the 8th section of which reference has been made) had been published in the prescribed manner (1); but the earlier order in council had not been published. If in any of the orders in council made pursuant to the second section of the Act by which the Governor in Council was given authority to make the grant (2), a condition had been inserted that the grant was subject to existing regulations respecting Dominion lands, or that all mines and minerals in the lands which it was proposed to grant were reserved, there would have been

(1) The *Canada Gazette* of December 21st and 28th, 1889, and of January 4th and 11th, 1890.

(2) 53 Vict. c. 4.

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no room for controversy. That would have been the end of the matter. But that was not done, and the company have not, it seems, acquiesced in the view taken by the officers of the Crown responsible for the administration of these affairs.

Of the matters that I have mentioned there are two that may, I think, be dismissed with a brief reference. In the first place I do not, in the conclusion to which I have come, rely upon the order in council of the 31st of October, 1887. It has been seen that there was a later regulation to the same effect that was in force in May, 1890, when the Act giving authority to the Governor in Council to make the grant was passed, and it is not necessary to determine any question that otherwise might have arisen on the second section of the Act 57-58 Victoria, chapter 26, by which, as already observed, it was declared that the failure to publish any such order in council or regulation should not invalidate it or anything done under it. Neither do I think it at all material that in the letter to which reference has been made the attention of the company was called to the order in council of October 31st, 1887, as the authority for inserting in the patents for the grant to be earned by the company a reservation of the mines and minerals. The Crown officers were not bound to give any such notice, though it was a very proper and prudent thing to do. The reference to the earlier order in council prejudiced no one, and the later order in council and regulations had been published in a manner that constituted notice to everyone. The rights of the parties would have been the same if the company's attention had not been directed to any regulation on the subject.

The question to be determined is: Did the provision contained in the 8th section of the regulations of September 17th, 1889, referred to, apply to the grants

of land mentioned in the Act 53 Victoria, chapter 4, the orders in council made under that Act being silent on that subject? Were such grants subject to the reservation mentioned in the regulations?

The suppliants contend (1st) that the provision did not apply to such grants; and (2ndly) that if it did, it was *ultra vires*. Dealing with the second contention first, it will be found that the regulations mentioned purport to be made in virtue of the powers vested in the Governor in Council by *The Dominion Lands Act* (1). By the 47th section of the Act it is provided that lands containing coal and other minerals, whether in surveyed or unsurveyed territory, shall not be subject to the provisions of the Act respecting sale or homestead entry; but shall be disposed of in such manner and on such terms and conditions as are, from time to time fixed by the Governor in Council by regulations made in that behalf. That section was amended in 1892 (2), but the amendment, being later than the transactions with which we are now concerned, is not material to the decision of the present question. By clause (*h*) of the 90th section of *The Dominion Lands Act* the Governor in Council was given a general power to make such orders as are deemed necessary, from time to time, to carry out the provisions of this Act according to their true intent or to meet cases which arise, and for which no provision is made in the Act. It may also be noticed in passing that, by clause (*b*) of the same section, the Governor in Council was authorized to reserve from general sale and settlement lands required to aid in the construction of railways in Manitoba or in the Territories, but nothing turns on that provision here. The authority for the regulation in question is to be found in the special provisions of the 47th section of the Act and in the

(1) R. S. C. c. 54. (2) 55-56 Vict. c. 15, s. 5.

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general provisions contained in clause (*h*) of the 90th section.

Now it will be noticed that the 47th section of the Act gives authority for the making of regulations for the disposition of lands containing coal and other minerals, and that the 8th section of the regulations of September 17th, 1889, is not in terms a regulation respecting the disposition of lands known to contain coal or other minerals, but a general regulation affecting all lands in Manitoba and the North-west Territories which had not been sold or disposed of for valuable consideration, or entered as homestead, before the regulation came in force. That I understand to be the ground on which it is argued that this regulation is *ultra vires*. But that objection takes no account of the general power conferred on the Governor in Council by the 90th section of the Act. The reason for the form the regulation took is, I suppose, to be found in the necessities of the case. It was not to be expected that the Governor in Council should know, except in particular cases and to a limited extent, what lands in Manitoba and the Territories contained, and what lands did not contain, coal and other minerals. The intention of Parliament was no doubt thought to be that lands containing minerals should not be sold or disposed of as agricultural lands, and with the knowledge then possessed it was not possible effectively to deal with the matter except in the mode adopted in the regulation. And it seems to me that way was open to the Governor in Council, and that the regulation is within the authority conferred upon him.

Then as to the application of the regulation to the land grants mentioned in the Act 53 Victoria, chapter 4, I do not know that there is a great deal to be said. As the learned Attorney-General in his argument

stated, the point is a very narrow one, although the issue is a most important matter. For the Crown it was argued that the expressions "orders in council made in respect thereof" occurring in the second section of the Act 53 Victoria, chapter 4, should be construed as orders in council made in respect of the lands granted, of which the regulation in question was one. I do not so read the provision. I think the words "in respect thereof" refer to the word "grants," and, as I have said, all the orders in council made in respect of the grant to the suppliants are silent on this subject. That is the view I take of them. By referring to them more particularly it will be seen that they provided that the grant shall be satisfied out of certain specified lands "in so far as practicable without interfering with any previous grants or reserves," and it is suggested that the reservation in question is included in this word "reserves." I am unable to adopt that suggestion. But it does appear to me that there is great force in the argument that when Parliament grants a subsidy in Dominion lands in aid of the construction of a railway, and nothing more is stated, that must mean a grant under ordinary conditions and subject to existing regulations respecting such lands. There is nothing to indicate any intention in the present case to grant lands containing coal or other minerals in aid of the construction of the railways mentioned in the Act, or to give the companies more than they would have acquired had they purchased the lands for money instead of earning them by constructing such railways. If the lands had been purchased by the company at the time the grant was authorised the mines and minerals would have been reserved to the Crown, and in issuing the patents for such lands the reservation mentioned in the regulation would have been inserted.

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It seems to me that the regulation is equally applicable to the present case, and that the course of proceeding adopted on behalf of the Crown was right.

The case of *The Canadian Coal and Colonization Company, Limited* v. *The Queen* (1) was referred to, though not relied upon, as the circumstances were different. In that case it was held that where the Crown, having authority to sell, agrees to sell and convey public lands, and the contract is not controlled by some law affecting such lands, and there is no stipulation to the contrary, express or implied, the purchaser is entitled to a grant conveying such mines and minerals as pass without express words. Here, however, we have a regulation which I think applies to the grant to which the suppliants are entitled.

There will be judgment for the respondent.

Judgment accordingly.

Solicitors for suppliants: *Kingsmill, Torrance, Hellmuth & Saunders.*

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

(1) 3 Ex. C. R. 157; 24 S. C. R. 713.

IN THE MATTER OF THE PETITION OF RIGHT OF

1902
Dec. 5.

THE DOMINION IRON AND STEEL COMPANY (LIMITED) .... | SUPPLIANTS;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Bounties on manufacture of "pig-iron" and steel—60-61 *Vict. c.* 6—62-63 *Vict. c.* 8—*Interpretation.*

It is a general practice in the art of manufacturing steel to use the iron product of the blast furnaces while still in a liquid or molten form for the manufacture of steel, the hot metal being taken direct from the blast furnaces to the steel mill. Among iron-masters and those who are familiar with the art of manufacturing iron and steel, the term "pig-iron" has come to mean that substance or material in a liquid as well as in a solid form. A question having arisen as to whether iron when used in a liquid or molten form for the manufacture of steel was "pig-iron" within the meaning of the term as employed in the Acts 60-61 Vict. c. 6 and 62-63 Vict. c. 8.

Held, that it was, and that a manufacturer of steel ingots therefrom was entitled to the bounties provided by the said Acts in respect of the manufacture of pig-iron and of steel ingots.

PETITION OF RIGHT for the recovery of moneys claimed to be due as bounties on the manufacture of pig-iron and steel under 60 & 61 Vict. c. 6, and 62 & 63 Vict. c. 8.

The facts are stated in the reasons for judgment.

August 26th and 27th, 1902.

The trial of the case was begun at Sydney, N.S., and adjourned to Ottawa.

October 27th to 31st, 1902.

The trial was continued and the case argued at Ottawa.

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Argument of Counsel.

F. H. Chrysler, *K.C.*, and *W. B. Ross*, *K.C.*, for the suppliants;

A. B. Aylesworth, *K.C.*, and *C. A. Moss* for the respondent.

F. H. Chrysler, *K.C.*, for the suppliants;

The claim of the suppliants is for bounties, first, upon the manufacture of pig-iron and, secondly, upon the manufacture of steel ingots.

By section I of the Act, 60 & 61 Vict. c. 6, it was provided as follows:

"The Governor in Council may authorize the payment of the following bounties in steel ingots, puddled iron bars, and pig-iron made in Canada, that is to say:—

"On steel ingots manufactured from ingredients of which not less than 50 per cent. of the weight thereof consists of pig-iron made in Canada, that is to say:—

"On steel ingots manufactured from ingredients of which not less than 50 per cent. of the weight thereof consists of pig-iron made in Canada, a bounty of $3 per ton;"

"On puddled iron bars manufactured from pig-iron made in Canada, a bounty of $3 per ton;"

"On pig-iron manufactured from ore, a bounty of $3 per ton on the proportion produced from Canadian ore, and $2 per ton on the proportion produced from foreign ore."

Section 2 of this Act fixed the time within which such steel ingots, puddled iron bars and pig-iron should be made; and section 3 authorized the Governor in Council to make regulations in relation to such bounties.

By the statute 62 & 63 Vict. c. 8, the time mentioned in section 2 of the first mentioned Act was extended, and the bounty on pig-iron produced from

Canadian ore was reduced to $2.70 per ton, and upon that produced from foreign ore $1.80. The bounty upon steel ingots was fixed at $3 per ton, on ingots manufactured prior to the 23rd April, 1902, and at $2.70 on steel ingots manufactured after 22nd April, 1902, and prior to 1st July, 1903.

The principal question is, what is meant by "pig-iron" in these statutes, and in these regulations?

The other question which I apprehend will be raised is whether, granting it is pig-iron, we are not obliged to make it in its marketable form?

The principal question is of very great importance to the suppliants. It is perhaps the question of the success or failure of this business, and of other businesses like it. It is a question of a very large amount of money, even as the matter is now present before the court. The literature on the subject, to which I intend somewhat extensively to refer, is I think even more definite and clear than even the most favourable of the witnesses, showing that this is not a new term, or an outgrowth of recent conditions; but the only term, the original term, in the trade during the whole history of it in modern times. I think the argument as to the meaning of the word will incidentally remove a great deal of the difficulty of dealing with any question as to its being the proper use of the term in the trade, and in the conditions which must have been present to the mind of the legislature, and to the mind of every person seeking to take advantage of the Act.

The contention then will be that "*pig-iron*" *is the product of the process of reduction from ores of iron, which takes place in a blast furnace.*

I think that definition is comprehensive and practical. The production is complete when the fused iron falls to the hearth of the blast furnace. It is pig-iron before tapping within the blast furnace, and it is

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also pig-iron after it is tapped, whether solidified into pigs or not.

Pig-iron is the generic term for crude or raw iron in the first stage of its manufacture or reduction from the ore, whatever shape it may be made to assume when solid; or, if not allowed to become solid, when used molten, either for direct casting, for the production of wrought iron by puddling, or of steel by any of the methods for converting pig-iron into steel, of which methods by far the most important are the Bessemer process and the open hearth.

Pig-iron is the product of the smelter; it is obtained by reduction or fusion.

In the strict sense of the word, it is not manufactured but made, or produced.

Pig-iron is not a finished product. It is useless in that state for any purpose, except ballast. It has its use, I believe, in navigation to weight the bottom of ships, but as "iron" it has no value whatever until something more is done with it.

It is only raw material to be further refined and manufactured either in castings, wrought-iron bars, or steel. It is crude or raw iron, and its crudeness consists not only in its being the first step in the direction of the manufacture of useful finished products of which it is the raw material, but also in the fact that it is dirty iron, or iron combined with impurities; which, while giving it many undesirable properties, also give to it its characteristic quality of being fusible or meltable at a much lower temperature than either pure iron, wrought-iron, or steel.

Just in passing, it is not very conclusive, perhaps, but it still has some interest: The only statute which helps us in any way to ascertain what view the legislature had as to what was "pig-iron" is the statute of 1894. Later statutes simply say "pig-iron" and

we have to find out what it means otherwise; but in the statute of 1894 (1) we find after the first section has fixed a bounty of $2 per ton on all pig-iron, section 3 proceeds:—

"In the case of the products of furnaces now in operation, said bounties shall be applicable only to such products manufactured therein between the 27th day of March, 1894, and the 26th day of March, 1899."

I refer to that as showing that the "pig-iron" was the product of a blast furnace, and "manufactured therein". Whoever penned that section understood clearly the nature of the article and the manner in which it was produced.

Then I refer to *The Customs Act*. Not very significant perhaps in itself, but still when one knows of the conditions, having some significance. There is no duty upon pig-iron. The draughtsman of the schedule to *The Customs Act* knew, I think, that pig-iron did not imply shapes or forms of iron, and therefore he is careful to insert in the appropriate items of the schedule "pigs of iron", so that the Custom House officer would know that the duty was imposed upon a shape; other forms of iron having their appropriate duty or falling under the class of "not otherwise provided for or specified."

It would be possible of course to find a duty for "molten iron" if that became necessary, because it would fall under a schedule of iron "not otherwise specified."

These are the two places in the statute that I have come across in which the word is referred to, and in each case I think the inference to be drawn from the form of words which has been used is at all events not unfavourable.

(1) 57 & 58 Vict. ch. 9, s. 2.

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Pig-iron is the generic name for a substance of variable composition it is true, but still a substance whose nature and properties are well understood; and the substance bears the name of pig-iron quite irrespective of its state or condition as liquid or solid, and quite irrespective of the shape it may happen to assume in its solid condition.

If solid, it is properly and usually referred to as pig-iron, whether it forms part of the sow or of the pigs, or of broken pieces of either; whether it is in the form of sand pigs or moulded pigs, slabs, plates, bars or rosettes, or small spheres or balls, or pulverized into powder.

All these conditions are either referred to by the witnesses, or in the books. Being raw material it necessarily follows that the shape is of no consequence, the shape is to be destroyed, the iron must be melted before it is used, whatever shape it has. The shape disappears, the shape ceases to exist in the process of using it. The only thing that can be said with regard to it is that, commercially, it ought to be in some shape in which it can be handled, not by hand but by machinery, and these shapes are all devised by the iron-masters for the purpose of convenience in handling. "Pig" is not necessarily the most convenient. In many respects it is inconvenient. It may have been convenient at the time it was devised, but it has ceased to be so now because different modes of handling iron are in use, and my proposition in regard to it is that it is pig-iron in any shape or condition, solid or liquid, or any shape, if solid, in which it may be usefully employed for conversion or refining or working into the more finished materials made from it.

There is just another proposition to which I refer now, because it will appear incidentally in some of these references, and I may as well place before your lordship the use which I intend to make of it. I sup-

pose the argument from analogy, or the symmetry, if one may so use the term, of the statute, is not very strong. There may be, as one knows, glaring inconsistencies in statutes, and it is not safe to rely too strongly upon the supposed analogy or symmetry between different parts of this enactment. Still it is worth observing that the steel ingot, for which the bounty is provided in the statute, is very similar in its relation to steel, to the position of pig-iron with regard to the finished iron. It is raw material also. It is not even marketable. The lowest form of advance in the various stages of manufacture which is put upon the market is the "billet" or steel ingot rolled out into fibrous, or at all events, homogeneous iron. The steel ingot is not homogeneous. The outside cools more rapidly than the inside, and the result is that in many ingots, if allowed to cool hard and solid without treatment, a space is left inside from the contraction of the metal, and the steel has a tendency to crystallize; and one can see from the very nature of the operation which takes place that the outside of the steel ingot will be in a very different condition from the inside. Of course that perhaps is removed again when the ingot is reheated, but the steel ingot, if crushed when partially cooled, would be like a tomato or a grape, or some fruit with a hard skin and a soft interior. It requires to be reheated at all events before any further rolling can be done to it. It cannot be rolled cold.

[BY THE COURT.—Your argument on that point will be that the Act does not disclose an intention to place a duty upon a thing that is marketable?]

Quite so.

[BY THE COURT.—That is apparent, you say, in regard to the steel ingot, and you argue that it is equally applicable to pig-iron?]

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Yes, my lord. Although one of the witnesses spoke of the practice ten or twelve years ago, that they allowed steel ingots to be cooled, and to be placed in the stock pile, as he called it, that is not the modern practice. No fairly well managed steel works would think of allowing that waste. The steel has to be reheated. It can only suffer injury from allowing it to cool, and in practice it is moved on to the blooming mill or rolling mill for further treatment without allowing it to become cold, and it is not a material which can be handled with the hands. It is not a material which can be loaded into a wagon, or put into freight cars, or put into a shop for sale. It is handled so hot that it can only be handled by cranes and appliances of that kind, just as the molten iron is, and is stored for treatment in the rolling mill, in a chamber intensely heated by a gas flame.

I think these observations present the general view which I desire to support, and I will proceed to cite some scientific authorities which justify the interpretation of the statute in favour of the suppliants.

He cites 13 *Encyclopædia Britannica* (1); *Overman's "Metallurgy Mining, &c."* (2); *Percy's "Metallurgy"* (3); *Crooks' and Rohrig's "Metallurgy"* (4); *Gruner's "Studies of Blast Furnace Phenomena"* (5); *Bauerman's "Metallurgy of Iron"* (6); *Bell's "Principles of the Manufacture of Iron and Steel"* (7); *Wedding's "Basic Bessemer Process"* (8); *Johnson's "The Iron and Steel Maker"* (9); *Blair's "Chemical Analysis of Iron"* (10); *Campbell's "Manufacture and Properties of Structural Steel"* (11); *Journal of the Iron and Steel Institute*

(1) 9th ed. p. 291 et seq.
(2) P. 139.
(3) Pp. 532, 566.
(4) P. 264.
(5) Pp. 5, 27, 30. Also Appx. p. 109.
(6) Pp. 3, 273, 296.
(7) Pp. 19, 27, 30. 45, 359, 405.
(8) Pp. 9, 91, 93, 116, 183.
(9) Preface V, and p. 30.
(10) Pp. 77, 78.
(11) Pp. 16, 62, 68, 75, 83, 93.

(1); *Journal of the American Institute of Mining Engineers* (2).

Mr. Chrysler, continuing his argument, says: I desire to say, before leaving this branch of the subject, that what I have been dealing with in the collocation of these authorities is the meaning of the word "pig-iron," and its use as a term of art.

[BY THE COURT: Instead of going to the dictionaries, you have gone to the source from which dictionaries are made?]

Yes, if I had been framing a definition for a dictionary, I would have to read the works of art dealing with the history of the term in order to summarize them into a few lines. (He here cites *Attorney-General of Quebec* v. *Reed* (3); *Grenfell* v. *Commissioners of Inland Revenue* (4).)

In all we have read, and in the evidence of the witnesses, too, there is a remarkable uniformity of opinion as to the essential nature of the substance with which we have been concerned in this trial.

In the terms "pig-iron" or "crude-iron" or "raw iron," "gusseisen" or "roheisen," as the Germans call it, the essential idea in all is the same. It is a particular kind of iron which has a special property, which makes it valuable, and that property is that it

(1) 1873, pp. 11, 27, 37; 1875, pp. 194, 202 et seq.; 1876, pp. 12, 420; 1877, pp. 108, 183; 1878, pp. 17, 123; 1879, pp. 9, 120, 150, 280; 1881, pp. 12, 15, 397; 1883, (2nd vol.) 639; 1884, (1st vol.) pp. 234, 325, (2nd vol.) pp. 407, 524; 1886, (1st vol.) p. 193; 1887, (2nd vol.) p. 318; 1889, (1st vol.) pp. 18, 97; (2nd vol.) pp. 266, 380; 1890, (1st vol.) pp. 318, 319, (2nd vol.) pp. 95, 141, 791; 1891, (1st vol.) pp. 351, 428, (2nd vol.) pp. 76, 264; 1892, (1st. vol.) 13, 102, 117, (2nd vol.) p. 459; 1893, (1st vol. p. 13, (2nd vol.) p. 472; 1894, (1st vol.) p. 47, (2nd vol.) p. 139; 1895, (1st vol.) pp. 17, 398, (2nd vol.) pp. 8, 43; 1896, (1st vol.) pp. 451 et seq., (2nd vol.) pp. 19, 249; 1897, (2nd vol.) pp. 193, 217, 434; 1898, (1st vol.) pp. 298 485, (2nd vol.) pp. 20, 28; 1899, (1st vol.) pp. 17, 243, (2nd vol.) pp. 160, 173; 1900, (1st vol.) pp. 2, 33, 347, 447.

(2) Vol. 8, p. 156.

(3) 10 App. Cas. 141.

(4) 1 Exch. D. 242.

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is fusible at a low temperature and flows into moulds when used for castings. Being fusible at a low temperature it is also an economical way of manufacturing wrought iron and steel, and it is the raw material from which wrought-iron and steel are manufactured.

But when we have got that far, it is apparent that the state in which it is useful is the melted state for the metallurgist, the iron-master, the foundryman, the puddler, for all who have occasion to use it, the state in which they have to place it before using it in the fluid state. That, for their purpose, is the natural state of the iron. Even if run into pigs, or into other forms in which it is solid, the first thing that is done with it, if in pigs, or sows, is to break it up, and that is only a preliminary step to melting it.

Then just a word with regard to etymology. I do not know that etymology has very much to do with the determination of the question, but still I should like to make a point about the etymology of the word.

It has been assumed that somebody called the runner into which the iron from the blast furnace was allowed to pour out—I use the word "runner" because it appears from the witnesses that is what they now call the trench into which the metal is run from the blast furnace—that somebody called that the "sow", and then that somebody else, perhaps later on, (these things sometimes take generations or centuries in the evolution of a word or a change in the meaning of a term) some one or some class of men seized upon the fanciful idea that the little branches in which the iron was diverted from the sow were pigs.

The question is unanswered as to why the whole mass was originally called a sow. I think the word "sow" was not at first used with reference to the name of an animal. "Sow" is a word which has the

same root as we find in the word "sewer". It is a "drain" or "trench", and I find that in the *Century Dictionary* (1) that idea is supported. "Sew" pronounced "su", also "seugh," is a drain or sewer; and the passage quoted as authority for the use of the expression is from the *Nomenclator* (A.D. 1585), viz: "The town sinke, the common sew".

[BY THE COURT: Perhaps the two terms arose at once; the sow suggesting a litter of pigs.]

I think not, because your lordship will see that the original blast furnace must have been of very small dimensions. The natural method of treating the iron upon tapping it from the blast furnace, is to let it run out in some way upon the floor. Then the first man who did that discovered it was difficult to pick it up again, and it would suggest itself to him that if he confined it within some form it would be more easily handled, and immediately he puts it into a trench, and probably, from the capacity of the first blast furnace, only one small trench would be filled; but as the capacity of the blast furnace and the extent of the casting from it grew, the sewer would have to be enlarged, and branches would have to be made, and then the pigs would come as the outgrowth of more extensive manufacture. That perhaps is fanciful, but at the same time I combat the contention which has been made, that the word "pig" is the original form or title.

[BY THE COURT: I was not suggesting it was the original. It occurred to me, so far as I had examined the dictionaries, that the word "pig" was the survival of the two words, which were very likely used together at the commencement of the industry.]

I think the natural evolution of the art was to have one straight trench, the branches suggesting themselves afterwards.

(1) Vol. vii p. 5534.

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The etymology of the term is explained in the original passing of the iron into a hole in the ground in the form of a "sow" or "sewer", so called from the fact that it was run into a little drain or trench.

[BY THE COURT: The trench is not used in regard to iron only. It is used in regard to lead and other metals.]

Then if that is correct, of course the appellation "pigs" for the smaller branches of iron would be simply a playful application of the word, from the apparent resemblance of the little branches to the pigs lying beside the sow. But, when we get that far, what is it that dictates the form of the iron which is so cast out? As I have said it is only there to be used for something else. Down to about 1870, it was the practice to cast into castings without running on the ground at all, and the casting into these forms, to be afterwards melted, in the cupola, was a later growth. And what I say would dictate the form was, evidently, convenience of handling. The sow is broken up. The sow from a very large pig bed was something that would require considerable strength to lift or to break up, and the dimensions of the smaller pigs, in which it became customary after a time to run the iron, no doubt was governed by the consideration of handling; and in those days I suppose probably what two men could lift would dictate the extreme size to which these pieces would run. Because your lordship will see, although they are broken for melting in the cupola, in the first place they have to be lifted out of the pig bed, and placed away somewhere; and one of the witnesses said that the lifting, where a blast furnace was running, and making a considerable quantity of iron, had to be carried on while the iron was still hot, because if they were making four of five casts a day there would be only four or five hours for the iron to cool

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before it must be taken away, unless they had very extensive beds, and if the same sand bed is to be used over again, that iron has to be lifted and carried away as soon as it is cool enough to handle, and in the earlier days of the art the handling had to be done by manual labour. There is a passage in one of the books referred to which I did not read, but I think it is common knowledge, and I think one of the witnesses speaks of it, viz., that the pigs, even when run into sand-beds, are not now handled in that way. They are picked up by very large cranes or machinery. Therefore, the capacity of two men to lift a pig no longer governs the dimensions of it. It might be in any form that is suitable for a machine to pick up, or lift, or conveniently carry away, and the granulated iron, of which the books, and one of the witnesses, speak was not intended to be handled by men's hands at all. It was intended to be picked up by a machine similar to the dredge which is used in lifting material under water, or the steam-shovel which is used in lifting railway material. That would do away with men's handling altogether.

It follows that it is "pig-iron" in any form in which it may be handled by men or machinery. My learned friend will concede it is pig-iron in any solid form, unless it is in too large a block to be lifted; but if the conditions are such that it can be conveniently handled in its fluid form, then the desideratum which is imposed as a test by the question whether the iron must not be capable of convenient handling is fulfilled if the contract is supposed to be between a vendor who desires to sell fluid pig-iron, and a purchaser who desires to purchase fluid pig-iron, and it is delivered to the satisfaction of the purchaser, then it is handled and the requirement, if that is a necessary condition, to constitute the substance commercial pig-iron, is completely fulfilled.

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Now, turning to the statement in defence, the Crown charges that we are manufacturing steel ingots direct from iron ore. That, of course, has been completely disproved by the evidence. The blast furnace plant is in a complete and entirely separate establishment, where the pig-iron is made; and that iron is conveyed to another entirely distinct and separate establishment, a steel mill, in which steel ingots are made from the pig-iron. Then, if that contention is disposed of what remains? The residue of the averment in the statement of defence is, that we have not manufactured pig-iron within the meaning of the statutes and the regulations.

[BY THE COURT: That narrows the issue very much. That is not an allegation that it is not "pig-iron."]

If it is "pig-iron," and we have got that far, what is meant by saying it is not "manufactured pig-iron"?

[BY THE COURT: Is it not substantially a plea that it is not pig-iron in a shape on which it was the intention of Parliament that a bounty should be paid?]

I could understand the difference if there were some difficulty about carrying it out in practice. For instance, if molten pig-iron could not be weighed until it was cold. The evidence is that they take the ladle to a certain point on its route between the blast furnace and the steel mill, weigh it, then pour a quantity of iron out of it into the reservoir at the steel-mill, and then come back and weigh it again.

[BY THE COURT: Then your argument is that the point at which the bounty becomes payable is the point at which the weight of the iron is ascertained.]

That is my contention in a nut-shell. We cannot claim the bounty until the amount is ascertained. We could not claim it as it pours from the blast furnace, because we do not know what the quantity is.

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Then, as to its being manufactured. It is "manufactured," in the method I have described, in the proper technical sense of the word. The statute says the Governor in Council may authorize the payment of bounties on "steel ingots, puddled iron bars, and pig-iron made in Canada." Then the statute goes on to say "on steel ingots manufactured," etc.; so that both words are used, and my contention is that no particular stress is to be laid upon the use of the word "manufactured." The draftsman who penned that statute presumably wanted to avoid the repetition of the word "made" over and over again. I think if people who are penning statutes would not be so particular about avoiding the repetition of words, and would use the same word in every place where it occurs, it would be very much better. The word "made" is the first and substantial word. I do not think any inference can be drawn from it, if there is any difference between the words "made" and "manufactured," in favour of the defence at all.

Pig-iron consists of four grades, "forge pig," "foundry pig," "Bessemer pig," and "basic pig," and these varieties are as different as chalk is from cheese in their utility for different purposes. The foundrymen say that the "foundry pig" is the only pig that would be of any use to them, they could not make use of the other material; but "Bessemer pig" may be as valuable or more so. "Basic pig" may be as valuable or more valuable, but it is not valuable to the foundryman. Therefore, when we are making pig-iron, we are not pretending necessarily to produce a commercial commodity suitable for anyone who chooses to apply to us for it, unless we happen to be making the particular kind the man needs. When we are making pig-iron in a furnace for further conversion into steel, we do not necessarily make a commodity

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that is suitable for the use of the foundryman at all. But if it is in the shape in which the steel manufacturer wishes to have it, and in which it is most useful to him, then it is completely "manufactured," and answers all the requirements which the statute imposes upon us to earn the bounty.

Now, it is contended on behalf of the Crown that the trade in contemplation of the statute is the pig-iron trade, and it is said that the ordinary manufacturer of pig-iron produces a commercial commodity known as pig-iron, having it for sale to any one who chooses to apply to him to buy. I submit that the statute does not contemplate the foundry trade, but the trade of the metallurgist. That is the trade whose knowledge of the subject, and of the terms employed in the statute, is of the most importance. This statute addresses itself principally to the iron-masters, to those who are willing to invest their capital in making iron or making steel. If there is a difference between the foundryman and the iron-master, or steel-maker, as to the meaning of the term "pig-iron" in the statute, the view of the latter must be adopted; because the iron-masters or steel-makers are the persons who are invited to enter into this contract by accepting the offer of the bounty held out by the Government. But the evidence here shows that it is common knowledge even with foundrymen that iron to be manufactured into steel is used in the molten state, and is not necessarily cast into pigs. It is admitted on all hands that the process in use at the steel works of the claimants is modern, and is in accordance with the best recent practice, in accordance with the practice which has been gradually approaching its present state through many experiments and trials spreading over thirty odd years.

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That the use of what is called the "direct method", the direct conveyance of liquid pig-iron from the blast furnace to the steel works, is the modern practice is established by the witnesses, and by the numerous extracts which I have read from the *Journal of the Iron and Steel Institute* (1) showing the practice all over the world.

In the extracts which have been referred to, we have instances of the practice in, I think, every country in Europe where iron is made except Italy. In Great Britain, in Belgium, in France, in Germany, in Austria and Hungary, in Styria, in Southern Russia, in Russia on the Ural, in Sweden, and even in far away Japan. The works referred to comprise some of the largest and best known in the world. The English works which are referred to are known to all of us by reputation, such as the works at Barrow, at Ebbervale, at Middlesborough, the Balckow-Vaughan Works, and the works of Bell Brothers at Port Clarence. The works at Creusot in France, the Krupp works in Germany, and the works in Sweden are among some of the others that are best known to the English readers, but I think the fair inference is that by far the largest number of works now in existence practice this method.

One witness, I think, said that it was in general use, he could scarcely limit the expression; that he found it in general use everywhere he went.

In the United States it is admitted to be in use almost everywhere. There are very few works that do not use it, and the works of the largest companies. Works like the Carnegie Company, which comprise, as we hear from the evidence of Mr. Thompson, who was their assistant auditor, forty-three works handled from their office, and a large number of these are steel mills and blast furnaces. The ones most frequently

(1) See *ante* p. 115.

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spoken of in this evidence, and in those extracts that were referred to, were the Edgar Thompson works, the Homestead works, and others of this Company; the Pennsylvania Steel works at Steelton, a very large establishment, and at Maryland, at South Chicago, at Joliet, at Cleveland, and almost every place were we made enquiry we find this was the practice.

No one who has any knowledge of the subject, and I think scarcely a single witness, has said that it is not now at all events usual, and probably the better way —to avoid the waste of heat involved in casting the iron from the blast furnace into pigs, and then re-melting; but the Crown, through its counsel, here, asks you to put a construction upon the statute that involves the result that the Crown are supposed to offer a bounty to manufacturers of steel from pig-iron who will revert to what is almost an obsolete practice, who will encounter a certain amount of waste, who will expend in producing the iron and steel which the Government desires to have produced, in an industry which it desires to foster, a larger amount of money than is necessary for the purpose of carrying out literally what they say is the meaning of the Act. "We must have cold pigs, even if it cost a dollar or two a ton more, although no earthly purpose can be served by casting them cold, except that we carry out the literal, narrow interpretation of the statute," which we say is not the true one. And so I say that the whole trade, even embracing the foundrymen with all the other workers in iron, is what must be appealed to if we are to find the meaning of the trade term, and not the narrow meaning given to it by one small branch of the great iron trade.

With regard to the obligation, if any, upon the suppliants to manufacture the pig-iron in a marketable form, the Crown has directed its evidence to a large

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extent in support of the theory that the case is one of a contract between the Crown and the suppliants for the delivery of so much iron and steel, and that having to deal with such a contract it was an implied contract that the article to be supplied was to be merchantable under the terms used in the contract. I submit that such is not the nature of the transaction, or the proper construction of the statute. The Government say to manufacturers, or intending manufacturers of iron and steel: Make pig-iron under regulations which we will impose, and we will pay you so much bounty. It does not matter whether the Government does or does not get any value from our production of the article. So long as we produce it we are entitled to the bounty. He cites *Carlill* v. *Carbolic Smoke Ball Company* (1)

The intention of the Act is not solely to foster or encourage the production or manufacture of pig-iron. In the same Act, as part of the same system of legislation, is contained a series of provisions for encouraging also, in a cumulative way, the manufacture of steel, and the manufacture of puddled bars. It is an offer to the iron trade that, if they manufacture pig-iron, they will receive so much; if they manufacture steel from ingredients of which at least fifty per cent. is pig-iron made in Canada, they will receive so much more; and also if they manufacture puddled bars from pig-iron made in Canada, they will receive an additional bounty to that upon pig-iron. The only alternative placed upon the cumulative effect of the bounty is that a man shall not get three bounties. He is not to get a bounty upon pig-iron, and then upon wrought iron bars, and then upon steel made from wrought iron bars, but he may get two only. That is the policy of the Act.

W. B. Ross, K.C., followed for the suppliants:

(1) (1893) 1 Q.B. 256.

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I would like to add to the books Mr. Chrysler read a reference to two others. I desire to refer to *Chambers' Encyclopædia*, and to the title "Bessemer." I refer to that, not as containing anything new, but as shewing that what has already been read with regard to Sir Henry Bessemer is found in an encyclopædia that is perhaps more popular, and less technical, than the *Encyclopædia Britannica;* a book of universal circulation and use, which shows that as far back as 1857 the article "molten pig" was used direct from the iron furnace into Bessemer's furnace. It had a set-back on account of the bad quality of pig-iron, and it was not until the "seventies" that it became almost universally used in England, although it had never failed in Sweden.

In the "eighties" it became the most common form of making steel in the United States. Facts are shewn which would strike the popular imagination with regard to that discovery. For instance, that it decreased the cost of manufacturing steel in the proportion of one-tenth. The consequent development in the manufacture of steel is simply phenomenal.

It appears that out of about one hundred and twenty-four patents relating to the manufacture of iron and steel, a jury that sat in Paris, and afterwards in London, in connection with the exhibitions there, found that Bessemer's was practically the only one that added anything material to the development of the iron industry.

I think, my lord, that Bessemer, who made this great change, must be taken to have been almost as universally known, as Darwin, as Newton and all such men are known. I do not see how we can exclude that knowledge from the Canadian Parliament. I do not think it would be fair to our parliamentarians to say

they knew nothing about him, or about his process, which we find described in all the books.

Another book I wish to refer to is Johnson's *Universal Encyclopædia* under the title of "Steel," at page 732. It is an encyclopædia published of course before the Act was passed, or I would not refer to it. It shows that a growing practice in Europe and in the United States is to dispense entirely with the remelting of the pig-iron. The molten pig-iron as it is tapped from the furnace is run into ladles, and so on. He says the product of the blast furnace is pig or cast-iron, which tallies very strongly with what a man, Canadian born, acquiring whatever knowledge he did acquire practically in Canada in the iron trade, and a succesful man, Mr. Graham Fraser, who gave evidence in this case, says. He was asked the question what it was. He said "Well, I know of no name for it except cast-iron, most generally pig-iron."

Of course like Henry M. Howe, and all the other witnesses, when you ask whether or not there was ever any particular controversy as to that, of course they say: "No." Naturally enough there has been probably no challenge of that use of the name until this suit. There has been no occasion for it, I suppose.

Then, my lord, I wish to refer to the Act. The Act in providing for the bounty on steel provides that the material out of which the steel is to be manufactured must consist of at least fifty per cent. of pig-iron made in Canada.

My lord, what I say with regard to that is, that when you look at the whole Act you will see that Parliament, in considering the Act, must have come to the conclusion that any person or any manufacturer could take advantage of either part of the Act or of the whole of it. A man could go in for making pig-iron, or he could go in for making steel, or he could go in

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for making both. Then Parliament, assuming it directed its mind to the case of a man who said, I am going to take full benefit of the Act, would not complain of his enterprise. The more he did, the better, presumably, in furtherance of the policy of the Act. Assuming you must use fifty per cent. of your own article in your own article in your steel mill, fifty per cent. of what you use in your steel mill may be from your own blast furnace, and if you are the only man who has a blast furnace going, if you want to keep your steel mill going, it must necessarily be from your own blast furnace. My lord, in the light of what we know now, with regard to the development of the steel and iron trade, particularly with regard to the invention of Sir Henry Bessemer, we are entitled to assume that Parliament knew and contemplated that if any men entering on the business here found Bessemer ores, that he would make steel in accordance with the Bessemer method.

The Bessemer method, in its entirety, that is to say when everything is working well, certainly shuts out the remelting of the pig. You put your ore in at the top of your blast furnace, and it is a continuous process from that until you have steel rails away at a distance from where you put in your ore.

If, for instance, the works at the Canadian "Sault," which I understand have Bessemer ores from Lake Superior, and no doubt will adopt the Bessemer converter instead of the open hearth, had come up for their bounties instead of the Dominion Iron and Steel Company, I submit, my lord, they would be entitled to say: We made this steel under the Bessemer process, which has been a known practice since 1857, successfully in Sweden since 1857, successfully in England since the "seventies," and in the United States since the "eighties," and in all the books, magazines, papers,

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and everywhere, the article that we take from our blast furnace to our Bessemer converter is described as "pig-iron," pig-iron of course in its molten state, or molten pig-iron, and that they would be heard to say, unless there were words excluding the use of molten pig-iron, that they were clearly entitled to the bounty. Unless the statute expressly excluded steel produced from hot pig-iron, the bounty would be payable to them.

Furthermore, with regard to the bounty on the steel ingots. The fact about these steel ingots is that it is the first stage, both in the Bessemer process, and in the open hearth process, in which you get the steel from the mill. The steel is taken out cast, run out, it does not matter whether into large blocks or into small ones, but in that state of course it is brittle, and is altogether a different article from what is known on the street as steel or on the sidewalk by the common people. The idea in the mind of probably the most of us in regard to steel is something that is tough, strong and hard, a material that is compared with the ordinary wrought iron. The practice of the art with regard to these ingots is now almost universal. Instead of allowing them to get cold, as you could physically do, allow them to get cold and pile them up in the yard, they allow them to stand just long enough to form a shell so that you can handle them, and then take it hot and put it through the rolling mill, when you first get what is genuine steel. The whole structure of the thing is changed by the action of the roller. Instead of the brittle article, you get a thing with flexibility. The whole thing is changed. Parliament has chosen to put a bounty upon the steel ingots, a form of steel in which it is not sold. The crudest form in which the steel goes out from a modern steel mill is the billet

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or bloom, that is capable of any use to which steel can be put.

[BY THE COURT: At what stage do you claim the bounty on the ingot?]

It is weighed hot We could not get a cent until it is weighed.

[BY THE COURT: Do you weigh the ingot or the billet?]

The ingot.

[BY THE COURT: They cut a large piece off in rolling it?]

Yes. Of course there is a history to that. Your lordship will remember the first bounty Acts in regard to steel were on the steel billets, but it was changed in 1897. It was changed to the ingots. There is a reason for it. The point I am taking from that is that the same reasoning that you apply to pig-iron in this statute would apply to the steel ingots. We are entitled to say that what Parliament is contemplating there is that you must have a product, and if it wants to encourage the making of certain articles, if it gets to a certain point, why the thing will automatically take care of itself. It is as if Parliament says: When you get to the state of the steel ingot, we will give you your bounty. My lord, the bounty on a steel ingot is a very, very small fraction of what the cost of the ingot is. You cannot go through the form of making a steel ingot for less than some $15 or $16 a ton. The witnesses say they cost from $18 to $20. The bounty on that is so very small that no person can afford to make steel ingots for the mere getting of the bounty, and then throw them away.

A. B. Aylesworth, K.C., for the respondent:

The position the Crown takes in this matter is very distinctly indicated, as it seemed to us who were trying to set down upon paper that position, in the

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statement of defence, the claim of the suppliants being devoted to the two subjects of what they call pig-iron, and manufactured steel.

The Crown says by way of answer in regard to the pig-iron, that a large portion of the amount claimed by the suppliants in the petition of right consists of, or is a claim in respect of, material which consists of molten or hot metal in a liquid state, and the allegation or contention of the Attorney-General is that such molten or hot metal in a liquid state is not manufactured pig-iron within the meaning of those words as used in the statutes and regulations referred to; and that, in short, is the issue which is presented for consideration here.

I might freely concede, without in the least militating against the argument I intend to present, every word of what is supposed to have been established by the numerous references to text-writers, and to scientific works of authority, that my learned friend has made.

When we consider what the subject of those treatises, or papers, was, we can understand how, in fault of any better word or phrase to describe the article that the writer was dealing with, he would be driven to speak of the substance that he is discussing as "pig-iron," coupling that description, as is the case in the great majority of instances, with some qualifying word. It is in a sense pig-iron. It is the product of the thing which manufactures pig-iron, the blast furnace. It is pig-iron all but completed in its manufacture. It is on the way, and nearly at the end of the way, towards being actually pig-iron as known commercially. Then if anyone is desiring to write about that substance, and to convey to his reader any idea he can hardly avoid using the expression "pig-iron" when describing it, qualifying, as he naturally will, that expression by something which will indicate exactly what he

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means by speaking of it as liquid or as molten. That is exactly the position the Attorney-General's advisers were in when they came to prepare this statement of defence; but they, in order to make their position abundantly clear, and to emphasize and point the line of distinction between their contention and that of the suppliants, used the paraphrastic expression "molten, or hot metal in a liquid state," thereby avoiding either the use of the word pig, or the use of the word iron; but anyone speaking conversationally, or anyone writing in a letter or a scientific article, could scarcely convey the meaning intended with reference to this molten or liquid material without using some long description, or else compendiously speaking of it in the way these writers do.

So that the voluminous extracts that have been made in tracing the history of the art during the last thirty or forty years do not further the real inquiry here. The court would have found practically the same thing in the testimony, if we look at the phraseology of witnesses, and of counsel as well, in this case. Your lordship will find nearly every witness who seeks to define this substance using some word which involves either pig or iron or often both. The substance of course is mainly iron. It would not be proper to speak of it as carbon, or use any other term referring to its ingredients, because those ingredients are in the main, or in a large proportion, iron.

Then so speaking of it, see how variously witnesses treat it, I mean in their casual references to it, not in the distinct question in regard to what it is to be called. (He here refers to the evidence in detail.)

I submit we have established upon the testimony of the witnesses called in support of the suppliants' case just what indeed the extracts from the various text writers show, viz: that there are various paraphrastic

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methods of expression used to describe this article which is not pig-iron as ordinarily known to the people who work with it, and who have, necessarily, daily or hourly occasion to refer to it by some language. They one and all modify the phrase and qualify the phrase in some manner. In the majority of instances they endeavour to get away altogether from the word pig-iron, because they know that they will not convey to the hearer the meaning which is ordinarily attached to the term.

The point of the matter is to my mind not so much the circumstance that everyone who wishes to speak of this material and be understood uses a qualifying adjective, as in the circumstance that very many of the people who have most occasion to use this expression coin a phrase altogether different. The necessity for that coinage demonstrates that the meaning of the term that the suppliants are contending for here was not understood even by the people who are workers in metal.

Now, of course, the delving into the past as to the growth of the meaning is necessarily very largely theoretical. My learned friend's theory that the word "sow" may have been prior in its use to the word "pig" may be well founded. The natural order of events as to the use of the word "pig" when it came to be applied to this metal, or to this form of iron, necessarily must have been that in the first instance the word was a noun. It was "a pig of iron". It would then drift into its adjectival use, as describing the material of which the pig of iron consisted. It would then come to be "pig-iron". It could not have first been pig-iron.

Then, that use of the word "pig" as an adjective qualifying the word "iron" is secondary in its character. The primary meaning is "a pig of iron"; the

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secondary is a describing of the metal which composes the pig. We had had in Mr. Kennedy's testimony a fine illustration of that, as it seemed to me. He told us that there had been used very largely at one time in the history of the manufacture of steel the expression "ingot iron" as descriptive of a certain quality of soft steel. That had had the same history. It had been an ingot of iron in its origin, and then came to be descriptive of the iron itself.

It is quite true, no doubt, that those articles and the use of words by people who speak and who write is the foundation material from which lexicographers manufacture their works; but learned men, such as lexicographers must be, have to digest, as best they are able, the various and numerous uses of words, and to crystallize, into a sentence, the meaning to be attributed to a word as gathered by them from such general use.

[BY THE COURT: None of them go into any given word as exhaustively as the learned counsel has gone in this case. At least, they do not put such results in their dictionaries]

What I was going to use the reference to dictionaries for was just this, that we have there boiled down, so to speak, the researches of such an amount of time as the various lexicographers were able to devote to the subject. Counsel for the Crown have had to confine their researches to the dictionaries.

The important thing as it seems to us, and as we submit, is, that all the dictionaries are absolutely uniform in their definition of the phrase. Without a single exception we have them in every instance using an expression which shows that it is the solid material that is meant by the word. And, without reference to dates, the *Standard Dictionary* (1895) defines the word "pig" as "an oblong mass of metal cast in a rough mold, usually in sand." There, then,

is the idea of the mass of metal, of its being cast, of its being in a rough mold.

The *Imperial Dictionary* (1) defines the word "pig" as applied to iron, as follows: "An oblong mass of unforged iron, lead, or other metal. In the process of smelting, the principal channel along which the metal in a state of fusion runs, when let out of the furnace, is called the "sow," and the lateral channels or molds are denominated "pigs," whence the iron in this state is called pig-iron."

Then the *Century Dictionary* (2) gives this secondary definition of the word "pig": "An oblong mass of metal that has been run while still molten into a mold excavated in sand; specifically, iron from the blast furnace run into molds excavated in sand. The molds are a series of parallel trenches connected by a channel running at right angles to them. The iron thus cools in the form of semi-cylindrical bars or "pigs." That is a definition of "pig." In the same work (3) the definition of "pig-iron" is: "Iron in pigs, as it comes from the blast-furnace."

In the standard works, in the works that are now considered the best dictionaries, the *Standard*, the *Imperial* and the *Century*, we have in every instance the use of the identical expression, "an oblong mass of metal;" and in every instance it is the essential ingredient in the meaning that it should have been cast specifically into molds, excavated in sand or otherwise artificially formed, for the reception and the cooling of the molten material.

Now, we have had a quantity of evidence here, largely obtained, I think I may say certainly as far as I am concerned, with every honest desire for information, as to whether or not there is any distinction in

(1) Ed. 1889 vol. iii. p. 441. (2) Ed. of 1889, vol. vi., 4481.
(3) *Ibid.* vol., vi., 4482.

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the mind of people who use terms accurately between the expression "pig-iron" and "cast-iron," and I think I may say, as the result of it all, that we are told that there is no sensible distinction that can be formed. The only suggestion, and that was rather a suggestion of my own than of any witness, so far as I now recollect it,—the only suggestion of a distinction is that the words "cast-iron" might mean the product of a second melting, and a second casting, or a casting into some definite form for commercial utility; but it is conceded on all hands that chemically speaking there is no difference in the constituent elements of the substance known in ordinary parlance as "cast-iron" and the substance known as "pig-iron."

Well now, if we tested it in that way, those being convertible terms, would any one think of calling the liquid molten material as it comes from the blast furnace "cast-iron?" It may be the material out of which cast-iron will be formed when it takes shape, when it is cast, but not until then. The expression "cast-iron," just like the expression "wrought-iron" indicates that that iron has been cast into a certain shape, indicates shape, and so equally we submit does the use of the word "pig," when it is used as an adjective indicate shape of some description.

I am not surprised that writers on the subject may use the expression "cast-iron" as descriptive of the fluid material. They may qualify it, perhaps, by using some such word as "molten;" but the fact that there is in that phrase the word "cast" cannot be lost sight of, and that word, if one attends to the meaning of things, necessarily implies form and shape, necessarily negatives the fused or liquid condition.

It is not surprising that the steel men, or the scientific men, and in one or other or both of these classes I think everyone of the witnesses my learned friend

called might be put, look upon this question from the standpoint of the steel manufacturer, who now uses as his raw material in America in the great majority of instances the molten substance, and so looking at it, and never having occasion practically to think of the accurate definition of words, it is not surprising that they should one and all say, what indeed they can say with truth, that this is the same material as the cold pig-iron. I do not know what else to call it. I must call it pig-iron, though with some adjectival qualification to indicate it is liquid and not yet solidified. But when you get a man who deals indifferently with iron in all its shapes, in steel, wrought-iron and pig-iron, not himself a manufacturer, but a business dealer in a large way, and so handling all the various forms, you perhaps get a better idea of what the business man would naturally consider the meaning of the expression than you will from either the steel man who uses mainly the molten material, or the foundryman who uses, almost exclusively, the solid material.

Now, as my learned friend has conceded, this is not a case of contract. He has referred to the case of *Carlill* v. *Smoke Ball Company* (1), which was a question of contract made by tender or advertisement, to the world at large, and accepted by the individual; but I do not understand him to be putting this at all as any matter of contract which the suppliants here, or any manufacturer, earns by the work he does.

[BY THE COURT: Mr. Chrysler did not concede it was not a contract. Of course he was not pressing the point very strongly.]

[MR. CHRYSLER: It is an action on the statute, which I think in theory comes under the general class.]

[BY THE COURT: In the practice of the Exchequer Court an action on a statute might either be in tort or

(1) [1893] 1 Q B. 256.

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in contract. *The Exchequer Court Act* gives jurisdiction in respect of a claim under any law of Canada. A statute being "a law of Canada," the action might either be in tort or in contract, but still be under the statute. If there is any distinction, this would be in contract and not in tort., but I do not suppose we gain anything by trying to draw that distinction.]

My learned friend used this language in opening the case to your lordship two months ago: "I suppose the bounty is a bounty. It is not a contract of any sort. We cannot claim payment under its terms unless we comply with the condition upon which the payment is to be made." That is all I was referring to my learned friend's language for. It is a bounty, and the suppliants to entitle themselves to the bounty must show full compliance with every condition precedent that the statute, properly interpreted, fairly calls for.

I seek, indeed, to have applied to a statute of this character a consideration similar in principle to that which obtained under the well known rules as to the imposition of any tax, exactly as the exaction of customs duties is in that sense a tax. The Government taking something from a citizen's private property must show a liability, good *in omnibus*, in every respect. The Government must show that the tax is legally imposed, and just so here, *e converso*, he must show he has fully complied with the requirements of the law. In that way it struck me I might use as a matter of illustration the case which your lordship will be very familiar with, a case which involved a nice point of statutory construction, *The Canada Sugar Refining Company* v. *The Queen* (1). There the holding ultimately was by the Supreme Court, or the majority of the Supreme Court, and by the Judicial Committee, that to entitle the claimant to a return, or to exemption

(1) 27 S. C. R. 395; [1898] A. C. 735.

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from the levy which *primâ facie* they were subjected to under *The Customs Act*, every possible or every necessary condition of the full importation of their product into the country must be satisfied. Until the journey to the ultimate destination of their goods was completed they had not reached land, they could not enter for the purposes of *The Customs Act*.

Now, that is just what we have got here. The full journey is not taken to "pig-iron". The suppliants intercept and stop a step short of that destination just about by as much in proportion as a ship coming from Antwerp to Montreal stops short at Sydney, and just as the stopping short was not permitted by the court to succeed in that case, so we urge it could not here. The statute demands as a pre-requisite to the earning of this bounty, using those words as in the sense of the suppliants entitling themselves to it, that the manufacture shall be completely finished, shall be "manufactured." That is the meaning, in the framing of the sentence, I was attaching to the language used in the statement of defence. We say such molten or hot metal in a liquid state is not "manufactured pig-iron" within the meaning of those words in the statute.

Now see how the statute is framed in that view. It is set out fully in the statement of claim. "The Governor in Council may authorize payment of the following bounties on steel ingots, puddled iron bars, and pig-iron made in Canada." The word used there is "made," but in the remainder of the section the word used is in each instance "manufactured." On steel ingots "manufactured," on puddled iron "manufactured," on pig-iron "manufactured." The important word to be considered in reaching the legislative meaning in that whole clause is, I submit, the word "manufactured" as indicative of the finished product or output of the mill. It is the "manufactured" steel.

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"manufactured" iron bars, the "manufactured" pig-iron that the suppliants must show themselves to have produced before they are entitled to the parliamentary reward.

See what the legislature is saying. They give the bounty on steel in a certain shape. "Steel ingots" is the expression, not steel in the shape of billets or bars, because that is a subsequent stage of the manufacture; but once the manufacture of steel has reached the stage of the material getting into the form or shape of ingots, then it may be weighed, and at that stage, without regard to what happens afterwards. Parliament says the manufacturer is entitled to his bounty. It is on wrought-iron in bars. It is on crude iron in pigs. The three are used just in the same sense. It is not wrought-iron in any preliminary form or shape; but when the wrought or puddled bar has got into the condition of bars, no matter what may be done with those bars afterwards, then the manufacturer has done his part, and at that stage of the process entitles himself to the bounty. So we urge, as the steel must be ingots, and the wrought-iron must be in bars, the crude iron must be in pigs.

The legislature has, in the statute of 1899, guarded against the danger of a double bounty on the same product, at two stages of its manufacture, being claimed. By the second section of the Act of 1899 the legislature has said: "Notwithstanding anything in the statute of 1897, or in this Act, no bounty shall be paid under this Act on steel ingots made from puddled iron bars manufactured in Canada." The manufacturer of steel in other words cannot by going through the puddled iron bar process get a treble bounty. He gets his bounty on pig-iron if he makes pig-iron; he gets his bounty on steel as well, but if after having gotten his bounty on pig-iron he had made puddled

iron bars out of his pig-iron, and then out of his puddled iron bars had made steel, he could not by that device get the treble bounty. Of course the legislature was guarding in that provision against an entirely possible thing, as your lordship will remember. The witnesses at Sydney, Mr. Meisner. and Mr. Moxham both told us that it was practicable to make steel out of puddled iron bars. (He here refers in detail to the evidence on this point.)

So that the legislature taking care to guard against the treble bounty must be understood as intending that there should not be the double bounty which we are here protesting against, except in the case provided for by the statute. If the finished product, pig-iron, is turned out by the steel manufacturer, though he used it himself, he is entitled to the bounty; and no one is for a moment questioning the right in that regard of the suppliants to be paid a double bounty if they do that which the legislature has called for, even though the doing of that may in their particular case be a work of supererogation.

Our position is simply that the manufacturer of pig-iron, before he entitles himself to this bounty, must complete his manufacture, turning out the finished product as a merchantable commodity capable of being handled, and complete in its manufacture the article known to the trade and to the world as pig-iron.

The words "manufactured" and "made", in the statute of 1897, are convertible terms. I do not seek to distinguish between the two. Possibly the word "manufacture" implies a little more in the process of working with the raw material than merely the word "made", but I cannot in my own mind see that it does. Three times, as applied to each one of these finished products that are to entitle the maker to the bounty, the word used is "manufactured", although, in the

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same section, it says that bounties may be given on ingots, bars, and iron "made" in Canada. I do not, however, attach any difference to the meaning.

In that connection, as interpreting this statute upon which the right is founded, and which is set out in full in the statement of claim, I submit that nothing can be, not only more instructive, but more decisive in this matter, than what I find in the French version. That is our volume of the law just as much as the English. If we were using French here, instead of the English language, there is where we would naturally first go, and that would be the very thing we were discussing, and which the court would be called upon to interpret. I turn to the French version, and I find there the very strongest enforcement of the view which we are contending for in language which I take the liberty of saying to the court contributes very largely to the attitude of the Government in this matter. The language used throughout both these sections in the French version is not pig-iron, but iron in pigs. The expression is *le fer en gueuse*. That being the expression used in every instance it becomes significant, just as the bounty is given by the statute "sur les lingots d'acier" (ingots of steel), and "sur les barres de fer puddlé", (puddle-iron bars,) so it is given upon "le fer en gueuse", (iron in pigs.)

And, if you look at the dictionaries as defining the meaning of that expression, and as defining the expression which would be used if pig-iron was meant, we see emphasized the distinction.

I refer to *Fleming & Tibbins*, (*Français-Anglais et Anglais-Français*) *Dictionary* and in the French-English half, under the head of the word "Gueuse" (1) I find the definition in the French language which I take the liberty of translating. It is "Grosse et longue pièce

(1) P. 524.

de fer qui se forme au sortir du fourneau dans une longue rigole faite en terre "—a big, long piece of iron which is formed, or which forms itself in leaving the furnace in a long furrow made in the ground,—just carrying out the definition as found in the English dictionaries.

It is iron in that form, " le fer en gueuse ", on which the statute gives the bounty, and iron in the shape of " gueuse " is iron in the shape of a large, long piece, which forms itself, on leaving the furnace, in a long furrow in the ground.

If they had meant cast-iron they had a word to hand. I refer to the same book at the word " Fer ":—" A well known metal—iron " (1). Under this word we have the French equivalent for all manner of descriptions of iron, soft iron, brittle iron, wire iron, bar iron, wrought-iron, crude iron, and then " fer fondu " cast iron, pig-iron. If the legislature had understood, such, at least, of the parliamentarians who spoke the French language as their mother tongue—if they had understood that they were giving this bounty upon the material pig-iron as distinguished from iron in pigs they had the ready phrase to hand. They would have said " le fer fondu " instead of " le fer en gueuse."

I find by taking the English-French version of *Fleming & Tibbins* that there is another expression used as describing iron or metal in pigs. That is the word " saumon ", and in the French-English version I find " saumon " defined as " masse de plomb, d'étain ou de cuivre, telle qu'elle est sortie de la fonte." It is defined as a pig of lead, tin, or copper.

Then in *Littré* under the head of the word " Gueuse " we have a more elaborate description in the French language of the meaning of the word. Page 1956, volum 2: " Masse de fonte brute, de forme triangulaire, qui se moule dans le sable à la sortie du creuset du

(1) P. 456.

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haut fourneau." And then he gives a citation as showing the use of the expression from a decree of the 4th June, 1639, prohibiting iron-masters from using the said pigs or iron without first having them weighed. The use of the expression which we find repeated here in our statute has the well established meaning of the phrase "le fer en gueuse."

We say then, and submit with the greatest confidence, that where we have the legislature declaring by the very statute upon which this action is founded that the iron must be in the shape of pigs as distinguished from being the very material out of which pig-iron, or of which pig-iron, is afterwards made, that the suppliants do not entitle themselves to this bounty unless they make their iron "en gueuse."

The Act of 1889 contains exactly the same language. Again we have the three phrases: "les lingots d'acier, les barres de fer puddlé, le fer en gueuse."

Then a reference to the regulations, not that they can carry the matter any further, but that the statute expressly authorized the Governor in Council to make regulations regarding these bounties to carry out the intention of the statute. The regulations are divided into three parts. First, as to steel, secondly as to puddled iron bars, and thirdly as to pig-iron; and the conclusion, the last paragraph of the regulations with regard to bounties claimed in respect of pig-iron is that the claim for bounties upon all such pig-iron shall be made and substantiated to the satisfaction of the Minister of Trade and Commerce, within four months after the completion of the manufacture of the pig-iron on which said bounty is claimed. I understand that regulation to mean that you must always have your claim made within four months from any day's output. I suppose one might wait three months and claim at once for all that he had

manufactured during that time, but the point is that it is within four months after the completion of the "manufacture," as emphasizing the position which we submit is the all important consideration here, that the manufacture must be of a finished and completed thing.

Now, would it not strike any one administering the law as between three manufacturers earning bounties, as an anomalous thing, that the one who saves a dollar a ton at least should get an equal bounty with those who do not, where the saving is not at all by superior excellence of process, or by any trade secret; but where it is by stopping short and not going to the end of the course as the others do? Where the others by the additional outlay and by going through the whole of the process and not stopping at an intermediate stage earn $2.00 a ton, it would seem a discrimination that the suppliants should be allowed to earn the same amount by doing less work.

If the legislature intends this it is for the legislature to say so, and we certainly take the view that it was not intended to give the bounty unless the completed product were turned out as the result of the manufacture of pig-iron, and therefore, it being impossible for us to say you are entitled to two-thirds, or five-eighths, or nine-tenths, or to any fraction of the $2.00, it being all or nothing, it is only the legislature that can by some amendment to the statute provide for the case that is in hand. It is here a mere question of interpretation, and if we are right in the view we have taken, that everything turns upon the question whether or not the process is finished, whether or no the completed product is the output, then, judged by that test, we submit the position taken by the officers of the Crown is the correct one.

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Pig-iron as an article of commerce can be bought in the markets of the world, it can be bought in a foreign country. It is rather in the interests, or supposed to be in the interests, of those who consume it within this country that they should secure it within this country, and in that view, a bounty being but one form of protection to a native industry, the legislature has provided one for that industry.

If we have succeeded in demonstrating to your lordship's mind that the legislature never intended the bounty otherwise than upon the completely finished, completely manufactured, product, we have certainly upon the evidence shown that this product is not that which the suppliants are to-day turning out from their blast furnaces, is not the molten material upon which they claim these bounties. We rely upon that view of the true construction of the statute, and we place a special confidence upon the language which we find used in the other official form of our statutes, the French version, in which plainly the term is "iron in pigs," and not "pig-iron".

C. A. Moss followed for the respondent:

Mr. Chrysler in his argument in opening placed some reliance upon the use of the word "made" in the statute of 1897. He pointed out to your lordship that the word "made" was the first word used, and that the word was alternating with the word "manufactured," and he asked your lordship to draw the conclusion that the draughtsman of that Act had as his original word the word "made" and had simply introduced the word "manufactured" there so as to prevent tautology.

In tracing the history of this case your lordship will see that the original word was the word "manufactured." That was the word in the Act of 1883. That is the word which was carried down, and the word

"made" is only introduced in the Act of 1896 when for the first time there is a bounty paid upon articles other than pig-iron, upon the further products of pig-iron. I submit that whatever there is in the argument from the word "made" is rather in our favour.

I point also to the fact that in the French version the word is "fabriqué," and that that word is carried down from 1883, and appears in the Act of 1887, the word "manufacturé" is used once only, the word "fabriqué" being used I think in every other place. Now, on looking at the dictionary I find that "manufacturé" is said not to be as good a word as "fabriqué," but the dictionary says that they mean exactly the same thing.

Then I would refer your lordship also to the regulations made in July, 1901, and would point out that throughout those regulations in regard to pig-iron the word "manufactured" is the word used and not the word "made."

I say that even now the use of the liquid metal, or rather the use of any name for that liquid metal is but little known. That of course refers with peculiar aptness to Canada. In this country steel was never manufactured by direct process, as some of the witnesses call it, from the molten metal, until December of last year, as Mr. Baker's evidence shows. (He here refers in detail to the evidence.)

Mr. Kennedy, one of the witnesses for the Crown, puts the matter of the making of the steel in a way where it is put nowhere else, and to which I wish to refer. He says that "Steel has from a very small quantity, say up to 2 per cent. of carbon. Pig-iron has about 4 per cent. of carbon." And then he goes on: "The ordinary method of making steel is to transform the ore to pig-iron, and then turn back on your track and bring it part way back to its original form,

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steel being intermediate between wrought-iron and pig-iron."

Now, we say that the suppliants are not doing that at all, they are not going direct from the ore to the steel in a straight line, nor are they going a certain distance and turning back on their track. What they are doing is to make a short circuit, or cutting a corner, and in that way they do not get to the pig-iron at all. They are getting somewhere near to the process of making steel direct from the ore, nearer than what is contemplated by the Act, and of course upon steel made direct from the ore, as has been pointed out, there would be no bounty.

Mr. Chrysler has suggested that this statute is an Act which applies to the trade of steel and iron, and that the words used must be interpreted in their technical sense. With that I do not agree. A Bounty Act is simply another Act in the shape of protection, or a Customs Act. A bounty has been described as the worst form of protection, and although there is only one bounty being given in this Act, yet it would be very different if it were a Bounty Act in directly the opposite way to which a Customs Act is a Customs Act, that is, an Act giving a bounty on a great many objects. A Customs Act directs that a duty should be collected upon many commodities, and the interpretation of that Act to which I shall give your lordship a citation in a moment, says that the words used must be taken to be used in their commercial sense. Then I say, if this were a Bounty Act for which bounties were given upon a number of articles produced, not iron and steel only, then no one could say for a moment that it was an Act relating only to iron and steel, and I submit to your lordship that when you look at the intent of the Act your lordship must come to exactly the same conclusion now. It is an Act which is to

benefit the people at large. That is the intent of the Act. It is not an Act to benefit the iron and steel trade. The intention of this Act is that the public should be benefited. The public are those who are to gain by the pig-iron being manufactured, and the ordinary use of the word is the use which I press upon your lordship in that connection.

Then I would say this, that although it has been held that if you get an Act applying to a technical subject you must interpret the words by the meanings which they have to those who know about the subject, even if your lordship should hold that that construction was to be supplied here, I say your lordship would have some trouble in applying to a word a meaning which is not found in any dictionary whatever. It is one thing when you have several meanings given in a dictionary; but it is altogether a different thing to give a meaning to a word in an Act of Parliament when that meaning cannot be found in any dictionary whatever, because Parliament and the draughtsman can only go to dictionaries to find out what the word must mean.

He cites *Hardcastle on Statutes* (1); *The Queen* v. *Peters* (2); *Maxwell on Statutes* (3); *Ex parte Copeland* (4); *Brown* v. *McLaughlan* (5).

After all, it comes down to the question of what the words mean as used in the statute. We do not really, with all these references, and everything that can be said in regard to them, get any further than that. The intent and the true meaning of the Act, and the object of it, is what your lordship will have to consider.

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

(1) 3rd ed. pp. 82, 83, 129, 166, 167, 179.
(2) 16 Q.B.D. 636.
(3) 3rd ed., p. 24.
(4) 22 L. J. (Bankcy.) 17.
(5) L.R. 4 P.C. 543.

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The case of the *Attorney-General v. Carlton Bank* (1) enunciates a canon of construction which I think is the correct one to apply to the legislation here in question. There is no special rule that statutes of this class are to be construed either more strictly against, or more strictly in favour, of the Crown.

He cites *The Interpretation Act*, R. S. C. c. 1 sec. 7, sub-sec. 3.

The Crown cannot read into the Act terms and conditions which are not really there. If the Act says we are to produce merchantable pig-iron, then we must produce it; but clearly the Crown cannot add the word "merchantable" to the statute in order to modify its meaning. The suppliants are entitled to take the Act of 1897 or that of 1899, which are the two statutes we have to deal with here, and read them in the sense in which they would be understood the day they were passed, without regard to previous Acts.

I will not follow my learned friend into the discussion of the French meaning of the word or the French translation. I suppose if the meaning of the English translation is clear that is probably sufficient for our purposes. I do not think there is any room for doubt as to the fact that pig-iron means pig-iron as it issues from the blast furnace. My learned friend does not deny that. He says it requires something else to make it a completely manufactured pig-iron. He says in fact the statute is improperly drawn. He contends that what should have been done by the framer of this statute, if he wanted to give it the meaning which he says it has, was to have written "pigs of iron". He says there are three different objects grouped in this statute. One is "pigs of iron", the other is "bars of iron", and a third, to be consistent, should be "ingots of steel". But these are not the terms which we find

(1) (1899) 2 Q.B. 158.

in the statute. We find "pig-iron", "steel ingots", and "bars of iron"

The Customs Act of 1897, although not *in pari materiâ*, may be referred to with advantage. I have a right to ask the court to assume that the man who framed the statute under which we claim, when he spoke of "pig-iron" knew that pig-iron was a commodity, a substance differing from "pigs of iron"—as described in *The Customs Act*, another statute passed in the same session of Parliament.

Everyone of the witnesses who has been examined, and every author who has discussed the subject, if he were asked to use a word which would describe the metal, whether hot or cold, would say "pig-iron", and if "pig-iron" is not the name of the hot substance there is no other name.

The intention of Parliament was to assist the iron and steel industry, in is early stages in this country by bounties. When these establishments get upon their feet, they will be expected to go alone—to get along without such assistance. What would be more opposed to the policy of the legislature than to require these people to build old-fashioned plants which would be inevitably killed as soon as the bounty ceased by reason of the competition of newer and more modern estabishments in other countries. To compete with any hope of success, our manufacturers were obliged to adopt the most approved and advanced methods in use elsewhere. They were not previously in existence in Canada.

THE JUDGE OF THE EXCHEQUER COURT now (December 5th 1902) delivered judgment:

The petition in this case is filed to recover the sum of $196,967.15 for bounties on pig-iron and steel ingots manufactured by the suppliants, which it claims to

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be entitled to by virtue of the provisions of the Acts of Parliament 60-61 Victoria, Chapter 6, and 62-63 Victoria, Chapter 8, and of the regulations made under such Acts. The defence is that a portion of the iron on which the bounty is claimed was used in a molten or liquid state for the manufacture of steel ingots, and that in this form it was not pig-iron within the meaning of the statutes referred to.

The first Act passed in Canada to encourage the manufacture of pig-iron to which my attention has been called was passed in the year 1883. By this Act (46 Vict. c. 14) the Governor in Council, under regulations to be made by him, was authorized to pay out of the Consolidated Revenue Fund a bounty on all pig-iron manufactured in Canada between certain prescribed dates, the bounty to be one dollar and fifty cents per ton where the pig-iron was made from Canadian ore, and in other cases one dollar per ton. By the Act 49th Victoria, Chapter 38, the time within which such bounties could be earned was extended. In 1890 the bounty on pig-iron manufactured from Canadian ore was increased to two dollars per ton (53rd Victoria, Chapter 22). Up to this time the bounties were offered to encourage the production in Canada of pig-iron, and especially of pig-iron manufactured from Canadian ore. In 1894 a further step was taken, and bounties were offered for the manufacture in Canada of iron and steel from Canadian ore. By the Act of that year 57-58 Victoria, Chapter 9, the Governor in Council was authorized to pay a bounty of two dollars per ton on all pig-iron made in Canada from Canadian ore, and a like bounty on puddled iron bars made in Canada from Canadian ore, and on steel billets manufactured in Canada from pig-iron made in Canada from Canadian ore and such other ingredients as were necessary and usual in the manufacture of

such steel billets, the proportion of such ingredients to be regulated by an order of the Governor in Council. By the second section of the Act, it was provided that in the case of the products of furnaces then in operation the bounties should be applicable only to such products as were manufactured therein between March 27th, 1894 and March 26th, 1899; and that in the case of any furnace which should commence operations thereafter and before March 27th, 1899, such bounties should be applicable to the products manufactured therein during a period of five years from the date of commencing operations. None of these statutes are directly in issue in this case, but they have been mentioned to show what preceded the statutes on which the question to be determined turns, and as showing a general intention of Parliament during the years mentioned, not only to stimulate the production of pig-iron by furnaces then in existence, but to encourage the erection of other furnaces for that purpose and for the purpose of manufacturing such pig-iron into puddled iron bars and steel billets.

Coming now to the first of the two statutes under which the present claim arises, it will be seen that by the first section of the Act (60-61 Victoria, Chapter 6) it is provided as follows:—

"1. The Governor in Council may authorize the payment of the following bounties on steel ingots, puddled iron bars and pig-iron made in Canada, that is to say:—

"On steel ingots manufactured from ingredients of which not less than fifty per cent. of the weight thereof consists of pig-iron made in Canada, a bounty of three dollars per ton;

"On puddled iron bars manufactured from pig-iron made in Canada, a bounty of three dollars per ton;

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"On pig-iron manufactured from ore, a bounty of three dollars per ton on the proportion produced from Canadian ore, and two dollars per ton on the proportion produced from foreign ore."

The second section of the Act prescribed the time within which such steel ingots, puddled iron bars, and pig-iron should be made in order that the bounty might be earned; and the third section gave the Governor in Council authority to make regulations in relation to such bounties and to carry out the intention of the Act. By the Act 62-63 Victoria, chapter 8, the time mentioned in the second section of the Act 60-61 Victoria, Chapter 6, was extended, and a gradually diminishing scale of bounties prescribed; and it was also provided that no bounty should be paid on steel ingots made from puddled iron bars manufactured in Canada. A bounty could be earned on pig-iron, and then on either puddled iron bars or on steel ingots made therefrom; but the manufacturer could not earn a third bounty by making the puddled iron bars into steel ingots. In the manufacture of iron and steel from the ore two bounties, but not three, might be payable with respect to the same material in a different form or state of manufacture. The regulations made by the Governor in Council respecting the payment of such bounties are in evidence, but no question arises thereon which does not equally arise upon the statutes under which they were made, and it is not necessary to refer more particularly to these provisions.

The company, has, at Sydney, Cape Breton, four blast furnaces for the manufacture of pig-iron, and an open hearth steel plant consisting of ten "H. H. Campbell Tilting Open Hearth Furnaces" for the manufacture of steel. The construction of these furnaces was commenced in the year 1899, and they have since been completed at a great cost and are now in operation.

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Part of the product of these blast furnaces is cast in a sand bed in the usual way; part is run in moulds that form what is called the pig machine; and a part is conveyed in a molten or liquid state from the blast furnaces to the steel mill and is there poured into a mixer or reservoir for holding this liquid metal, and from which a supply is drawn whenever a charge is required for one of the steel furnaces. The liquid metal is taken from the blast furnaces to the reservoir in large ladles set on trucks, and are moved by an engine on an ordinary railway track. While in these ladles the metal is weighed. That may be, and is done with convenience and accuracy. This practice of taking the metal in a liquid state from the blast furnaces direct to the steel plant was not in 1899 or in 1897 a new practice or process in the manufacture of steel from pig-iron. As shown by Mr. Chrysler, the practice has been followed for a number of years in almost every country in which iron and steel are manufactured. It has been followed in the United States, in Great Britain, in Sweden, in Germany, in Belgium, in France, in Austria, in Hungary, in Russia, in Styria and in Japan. And although this practice has in general been adopted only in cases where the blast furnaces and steel plant were under the same management, the evidence discloses a few instances in which a manufacturer of pig-iron has sold part of the product of his furnaces to another manufacturer of iron or steel and delivered it to him in a molten or liquid state. Of course that is only possible within limits. The blast furnaces and the steel plant must be near enough to each other to permit of the ladles being moved from the one to the other without giving the metal time to cool.

There is no controversy about that portion of the product of the company's furnaces that is cast in the

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sand bed or run into the pig machine. The question in issue is raised in respect of the metal that is taken in a liquid state from the furnaces to the reservoir or mixer. As to that it is argued for the respondent that this metal in this state or condition is not pig-iron within the meaning of the statutes, that have been referred to; and that no bounty is payable in respect thereof, or in respect of the steel ingots manufactured there from. That is the question to be determined.

But before coming directly to that question it may, perhaps, be found convenient to refer to some rules that have been laid down to guide in the construction of terms occurring in Acts of Parliament. And with respect to statutes generally I do not know that I could do better than to adopt the language used in *Maillard* v. *Lawrence* (1), where it is said that the popular or received import of words furnishes the general rule for the interpretation of public laws, as well as of private and social transactions; and wherever the legislature adopts such language to define and promulgate its action, or its will, the just conclusion must be that it not only comprehended the meaning of the language it has selected, but has chosen it with reference to the known apprehension of those to whom the language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large. That is a general rule. But in the case of tariff laws it has been held that in imposing duties the legislature must be understood as describing the articles upon which the duty is imposed, according to the commercial understanding in the markets of the country, of the terms used in the statute. The commercial designation, the use of the term by merchants and importers, is in such cases the first thing to be ascertained. (*Arthur* v. *Morrison* (2),

(1) 16 How. at p. 261. (2) 96 U. S. 108.

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Robertson v. *Salomon* (1), *Nix* v. *Hedden* (2). And where a term has not acquired any special meaning in trade or commerce it is to be taken and received in its ordinary meaning in the common language of the people. In the present case we have to deal with statutes that must, I think, be taken to be addressed in the first instance to manufacturers of iron and steel. It is to them that the bounties prescribed are offered. And while persons engaged in other branches of the same industry or in other industries, as well as the community at large have an interest in the matter, it does seem that any enquiry that would leave out of account the meaning attributed by such manufacturers to the terms used in such statutes would be incomplete and might be misleading.

Pig-iron is the product of a blast furnace used for the purpose of reducing iron ores. It contains, among other things, a larger proportion or percentage of carbon than either steel or puddled iron bars. And one of the principal objects to be attained in the manufacture of steel ingots or puddled iron bars from pig-iron is to get rid of this excess of carbon. The term "pig-iron" was derived from the shape which the iron assumed in the sand beds in which it was first cast; and when first used had reference no doubt to a particular shape or form. It has since acquired a larger meaning, and as used at present includes, it is conceded, any product of the blast furnace that is cast in any convenient form or shape without reference to what that form or shape may be. So far the parties to the present controversy are agreed. It has also happened that among iron-masters and those who are familiar with the processes by which iron ores are reduced and made into pig-iron and then manufactured into wrought-iron or steel, that the term "pig-iron"

(1) 130 U. S. 413. (2) 149 U. S. 304.

REPORTER'S NOTE: See also *Unwin* v. *Hanson* [1891] 2 Q.B. at p. 119.

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has come to mean and include as well that substance in a molten or liquid state; it being usual to prefix to that expression some adjective such as "molten" or "liquid" when the speaker or writer wishes to distinguish between solid pig-iron and liquid pig-iron. But as in the nature of things difficulty and expense are involved in maintaining iron in a liquid state, and as there is in general no object in overcoming the difficulty or incurring that expense except for an inconsiderable length of time, most men see pig-iron in a solid form, and that form is in general necessary to the handling of it as an article of trade and commerce. So it must, I think, be conceded that in common speech the term "pig-iron" carries with it the meaning of something that is solid and not liquid. If one turns to the dictionaries to ascertain the meaning of the term, he will, I think, come away from the enquiry with the same impression. That of course may be because one lexicographer follows another, and does not make the original research into the modern literature of the subject that Mr. Chrysler has, with such great industry, made. Of the result of his researches, of which I have had the advantage, it is not possible with fairness to his argument and a proper regard for brevity, to make any present use further than to say that I do not think any one sitting down to make a new dictionary from original sources, and reading the extracts that Mr. Chrysler read, would adequately interpret the term "pig-iron" if he failed to make it clear that the term is now, and has for a considerable number of years, been used in a sense that includes that metal in a liquid as well as in a solid state. And if the only question were whether the metal which the company used in a liquid state for the manufacture of steel ingots was or was not pig-iron, there could, I think, be only one answer to the question,

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and that is, that it was pig-iron. But the question is somewhat narrower than that. Perhaps it would be more exact to say that there are two questions, and that one of them is narrower than that stated. With regard to the bounty on steel ingots that may be the question: Were or were not the steel ingots in question made from pig-iron? With regard to the bounty on pig-iron the question is not perhaps whether liquid pig-iron is pig-iron, a question that suggests its own answer, but whether it is pig-iron on which a bounty is payable under the statute? The steel ingots in question were undoubtedly steel ingots within the meaning of that term as used in the statute. There is no dispute about that; and they were manufactured from ingredients of which not less than fifty per cent. of the weight thereof consisted of something made in Canada, and when one asks what that something was, there is only one answer possible, namely, that it was pig-iron used in a molten or liquid state, but none the less pig-iron; for as to that there is nothing to suggest that it can make any difference in what form or condition the pig-iron was when so used. If the pig-iron as it came from the blast furnace had been allowed to cool it would have been necessary to melt it before it could be used in the further process of making steel. If it were suggested that the manufacturer who uses the liquid metal for making steel, has an advantage over one who is not in a position to do so, and that the latter would for that reason be placed in respect of the bounty in a position of inequality, the answer is that the statute does not disclose any intention on the part of Parliament in any way to equalize the conditions under which different manufacturers would earn the bounties in question. I do not know that any one could properly attribute any intention to Parliament, except that it was its intention to encourage the manu-

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facture in Canada of pig-iron, puddle iron bars and steel ingots; and the erection in Canada of furnaces and mills in which these things would be produced. But if one were to go beyond that and speculate as to matters not appearing upon the face of the statute it would, I think, be reasonable to conclude that Parliament intended (if as to that it intended anything) to encourage the erection of furnaces and mills using the most modern, efficient and best appliances and processes known to the trade or business. But for myself I am not sure that Parliament intended anything more than to leave each manufacturer to carry on his own business and to earn the bounty in his own way. All I do say, is that I do not see anything in the statute, to lead me to the conclusion that Parliament intended to handicap progress and economy in the art of making iron and steel by withholding the bounty on steel ingots manufactured from liquid pig-iron in the manner described.

But when one has said that the company has earned and is entitled to the bounty on the steel ingots that it has made from such pig-iron, it does not follow as a matter of course that it has also earned and is entitled to the bounty on the pig-iron itself. That, as has been stated, raises in some of its aspects a different question. The pig-iron, the product of the blast furnace, is as much pig-iron while it is in the blast farnace as it is when it has been run off into the ladles; but no one would suggest that the manufacturer could, with any hope of succeeding, say to the Governor in Council here are my blast furnaces full of pig-iron, pay me the bounty on that pig-iron. The answer would no doubt be, if it is pig-iron it is not in the state or condition in which a bounty is payable on it. Something more must be done. The amount of the bounty is to be determined by reference to the number of tons of

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pig-iron produced. The pig-iron must be weighed. It must also, I think, be something that can be used. Not that anyone to earn the bounty must make use of it, but no bounty is, it seems to me, payable in respect of any pig-iron that cannot be put to some use. That ought I think to be implied. The bounty is payable on pig-iron manufactured in Canada from ore. The pig-iron must be weighed before any bounty is payable, and it must be in a state or condition in which it can be used. These, it seems to me, are the conditions to be observed to entitle the manufacturer to this bounty. Have the suppliants observed them? I think they have. As stated, the material produced is pig-iron. There is no difficulty in weighing it while in the ladles. It has in fact been carefully weighed. In the molten state in which it then was, it was fitted for one of the uses pointed to in the statute itself, namely, the manufacture of steel ingots. It was used for that purpose, and in my judgment the company was entitled to the appropriate bounty prescribed by the statute.

But before leaving the subject I ought to add that I have not overlooked two arguments against the view that I have expressed, to which I have as yet made no reference. It is said that in the earlier statutes, when the bounty was confined to pig-iron, that term meant what was known generally and commonly as pig-iron, and possibly that may be so. And then it is said that the same term used in the later statutes must be taken to have the same meaning, and not a wider one. Some weight is no doubt to be given to that consideration, but it is not conclusive. Other considerations are involved. Then it is said that the term used in the French version of the statute, namely "le fer en gueuse" shows that it was the intention of Parliament to confine the bounty to pig-iron having some

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shape; and that if it had been its intention that it should also be payable on pig-iron used in a liquid state for the manufacture of puddled iron bars or steel ingots, there was not wanting a more appropriate term such as "le fer fondu" to give expression to that intention. That too, is an argument entitled to consideration, but again it is not conclusive, if, as I think, the larger meaning is to be gathered from the statute as a whole. And as to that it does seem to me that Parliament was dealing with a substance or material, and was not particularly concerned with its shape or form or condition, so long as it was pig-iron and could be weighed and put to some use; and with respect to the uses to which it could be put a special encouragement by way of bounty was offered to any manufacturer who would use it to manufacture in Canada steel ingots or puddled iron bars, and I do not think that it was intended to draw any distinction between its use in a solid or in a liquid state. The suppliants are in my opinion entitled to the relief sought by the petition. The amount claimed is as stated, one hundred and ninety-six thousand nine hundred and sixty-seven dollars and fifteen cents (196,967.15) and no question was raised as to the amount. But that an opportunity may be given to make that matter more certain, if there is any question about it, the judgment will be entered for the sum mentioned, and costs, with leave to either party to move to strike out the sum so stated and to substitute therefor such an amount as the company may on further enquiry be found to be entitled to.

Judgment accordingly.

Solicitors for the suppliants: *Chrysler & Bethune.*

Solicitor for the respondent: *A. B. Aylesworth.*

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

AND

THE TURNBULL REAL ESTATE COMPANY, LEVI THOMPSON AND GEORGE A. THOMPSON.. } DEFENDANTS.

Expropriation of land—Prospective value for purposes other than present use—Assessed value.

Where lands at the time of the expropriation had a prospective value for residential purposes beyond that which then attached to them as lands used for farming or dairy purposes such prospective value was taken into consideration in assessing compensation.

2. In assessing compensation in this case the court looked at the assessed value of the lands, not as a determining consideration, but as affording some assistance in arriving at a fair valuation of the property taken.

INFORMATION for the expropriation of certain lands situate in the City of St. John, N.B., required for the purposes of a Rifle Range.

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

May 22nd, 23rd and 26th; June 2nd, 1902.

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

September 25th, 1902.

The case was now argued.

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

Dr. Silas Alward, K.C., for the defendant company, cited *Cripps on Compensation* (1); *Guay* v. *The Queen* (2); *Cowper Essex* v. *Local Board for Acton* (3); *Browne &*

(1) 4th ed. p. 153.

(2) 2 Ex. C. R. 18; 17 Can. S. C. R. 30.

(3) 14 App. Cas. 167.

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Allan on Compensation (1); *Holt* v. *Gas Light and Coke Company* (2).

J. L. Carleton, K.C., for the defendants Thompson.

THE JUDGE OF THE EXCHEQUER COURT now (November 17th, 1902), delivered judgment.

The information is filed to obtain a declaration that certain lands, mentioned therein, taken from the defendants, are vested in the Crown, and that a sum of five thousand four hundred and seventy-three dollars and twenty-two cents ($5,473.22), which the Crown offers to pay therefor and for damages is sufficient and just compensation to the defendants. The block of lands, of which these in question here formed part, contained three hundred and forty-two acres. Of this block of lands a part containing about seventy-five acres was, at the date of the expropriation, under lease to the defendants, Levi Thompson and George A. Thompson, who were added as parties at the trial of the information. The Thompsons were farmers engaged in a dairy business, and they used the premises for the purposes of their business. They were in possession under a lease for a term of seven years from the first day of May, one thousand eight hundred and ninety-eight, at a yearly rent of three hundred and ten dollars. Of the lands demised to the Thompsons, the Crown, on the 1st of June, 1900, expropriated thirty-six acres and forty-eight hundredths of an acre, but they continued to occupy the premises without interference until April 7th, 1901, when they removed to another farm. By arrangement with the other defendant, The Turnbull Real Estate Company, they are to pay the full rent to the first of May in the present year (1902), and the company is to accept a surrender as of that date. No tender was made to the Thompsons, though it

(1) P. 117. (2) L. R. 7 Q. B. 728.

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appears that it was the intention of those who acted for the Crown that the sum of $5,473.22, which was offered to The Turnbull Real Estate Company, should include all damages to which the Thompsons, as tenants, should be entitled. With regard to the offer it is said that the amount was made up on a wrong principle; but that obviously is not the issue. The question is: Was it sufficient?

There is no great difference of opinion in this case as to the matters that should be taken into consideration in arriving at a conclusion as to the amount of compensation that should be awarded. First there is the value of the lands taken. Then with reference to the damages to other lands held therewith, such damages appear, so far at least as respects the reversion to which The Turnbull Real Estate Company was entitled, to be occasioned (1) by the severance of the lands and the practical isolation, for the present and until some arrangement can be made, of a portion of the lands; (2) by the depreciation in value of certain farm buildings not situated upon the lands taken for which there is now little or no use, as the premises can no longer be occupied for farming purposes; and (3) the depreciation in value of lands adjacent to those taken, resulting from the use of the latter for a rifle range? There is some difference of opinion as to whether lands are or are not depreciated in value by close proximity to a rifle range. I am of opinion that they are.

The principal matter of difference between the parties is the value of lands taken, at the time when they were taken. They were what I think may be correctly described as bottom lands. On each side of them are considerable hills. A brook called Newman's Brook runs through them and finds an outlet through a gorge or opening in the hills. Up to

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the time of which we are speaking they had never been used for any purpose that would give them a greater value than they would have as agricultural lands, which appears not to have exceeded one hundred dollars an acre. A number of witnesses of character and intelligence who were examined were of opinion that the probabilities of these lands ever becoming valuable for any purpose except farming or market gardening, were so remote that at the time they were taken no value attached to them for any other purpose. On the other hand other witnesses of character and intelligence have testified that at the time they had a value greatly in excess of that mentioned by reason of their proximity to the portions of the City of Saint John that have been built on, and the probability of their coming into the market in the near future for building purposes. Probably the truth lies somewhere between the two extremes. It is very clear, and I agree, that the lands in the state in which they were at time when they were taken were not suitable for building residences upon; and that the situation was not at that time a desirable one for even small residences. But these are relative matters depending upon conditions that change from time to time. I have no doubt that the lands could have been drained and made fit and useful for the erection thereon of houses and other buildings. It was a question of expense and demand for building lots. And while I agree that the lands at the time had a value beyond that which would attach to them as lands to be used for farming or market gardening, I do not think the growth of the City of Saint John in their vicinity or neighbourhood has been such as to justify the view that in June, 1900, they were as a whole worth four hundred or five hundred dollars an acre, the value put upon them by some of the witnesses.

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It is possible that a price such as that for a few acres not far removed from streets that had been built upon would not at the time have been very excessive; but such a price applied to the whole of the lands taken would have been—at least so it appears to me.

By reference to the evidence it will be seen that the whole property, containing three hundred and forty-two acres, was valued for assessment purposes at nine thousand dollars. I do not myself attach great importance to that. I have on one or two occasions, in dealing with cases such as that under discussion, found the values placed on lands for the purposes of assessment to be the full value of such lands. But generally speaking that is not the case. I always like to know in such cases the amount at which property is assessed for the reason that it affords something to keep one, when considering possibilities and probabilities and potentialities, from drifting too far from the actual and the real.

In the present case the amount of the assessment was I have no doubt very much under the actual value of the property as a whole; and it would be quite unfair to take it as a determining consideration in assessing the amount of compensation to which in this case the defendants are entitled. At the same time I do not think it at all likely or probable that the portion taken being less than forty acres out of three hundred and forty could really have been worth a sum approximating twice the amount at which the whole was assessed.

For part of the land taken, about twenty-four acres, I shall allow two hundred dollars an acre, and for the balance fifty dollars an acre. That, it seems to me, will be a liberal price, but under the circumstances fair. And I allow the sum of two thousand dollars to cover all damages, including those to which the

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Thompsons are entitled. From the best consideration I can give to the matter that sum appears to be sufficient, and at the same time not excessive. It is of course something that cannot be closely determined. At best one can only form an estimate.

The compensation to which the defendants are entitled is assessed at seven thousand four hundred and twenty-five dollars ($7,425.00) with interest on one thousand dollars of that amount from the 7th of April, 1901, and on the balance from May 1st, 1902. The rate of interest will be six per centum per annum, as the cause of action arose before the passing of the Act by which that rate was reduced. Of the sum of seven thousand four hundred and twenty-five dollars mentioned, one thousand dollars, with interest from April 7th, 1901, will be paid to the defendants Levi Thompson and George A. Thompson, and the balance of six thousand four hundred and twenty-five dollars, with interest from May 1st, 1902, will be paid to the Turnbull Real Estate Company.

The defendants are entitled to their costs, which in the case of the Turnbull Real Estate Company will be limited to the issue as to the sufficiency of the offer made by the Crown.

In other respects the judgment will be entered as claimed in the information.

Judgment accordingly.

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

Solicitor for the defendant company: *Silas Alward.*

Solicitor for the defendants Thompson: *J. L. Carleton.*

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN McGOLDRICK.....SUPPLIANT; 1902

AND Nov. 17.

HIS MAJESTY THE KING.....RESPONDENT.

Expropriation of lands—Leasehold property—Tenants' improvements—Expense of removal to new premises—Compensation.

The suppliant was tenant of certain buildings and wharves erected upon the lands of which he had acquired possession as assignee of two leases. He there carried on business us a junk-dealer. The terms for which these leases were made had expired at the time of the expropriation of the said lands by the Crown; but the leases contained a proviso that the buildings and other erections put on the demised premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the leases on the same conditions for a further term not less than three years. No such appraisement had been made, and the suppliant continued in possessession of the property as tenant from year to year. The evidence showed that the lessor had no present intention of paying for the improvements and resuming possession of the property.

Held, that in addition to the value of his improvements, the suppliant should be allowed compensation for the value, under all the circumstances, of his possession under the leases at the date of the expropriation.

PETITION OF RIGHT seeking compensation for a lessee's rights in certain lands and premises situated in the City of St. John, N.B., which were taken for the purposes of the Intercolonial Railway.

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

May 20th, 21st and 22nd, 1902.

The trial of the case took place at St. John, N.B.

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Reasons for Judgment.

September 24th, 1902.

The case was now argued.

L. A. Currey, K.C., for the suppliant;

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

THE JUDGE OF THE EXCHEQUER COURT now (November 17th, 1902) delivered judgment.

The suppliant brings his petition to recover compensation for his leasehold interest in certain lands and premises situated at the City of St. John, in the Province of New Brunswick, which were taken by the Crown for the use of the Intercolonial Railway. The suppliant was a junk-dealer doing business in a large way, and he occupied these premises in connection with his business. The possession had been acquired under two leases of which he was the assignee, one for twenty years from the 1st of May, 1873, and the other for twenty years from the 1st of November, 1874. It was a condition of each of these leases that the buildings and other erections put up on the premises should be valued by appraisers, and that the lessor or reversioner should have the option of resuming possession upon payment of the amount of such appraisement, or of renewing the lease on the same terms for a further term not less than three years. When the terms mentioned in the leases expired no appraisement was made, and the tenant continued in possession from year to year; but the person at the time entitled to the reversion was willing to renew, and ready at any time to do so.

The Crown has offered to pay the suppliant in respect of his interest the sum of five thousand eight hundred and one dollars and fifty cents ($5,801.50). This is the amount at which valuators appointed by the Crown appraised the compensation that they

thought should be paid to the suppliant. Of this amount two thousand five hundred dollars was allowed for the buildings on the premises; and one thousand five hundred dollars for the wharves and similar erections. Three hundred and fifty dollars, less a sum of ninety-eight dollars and fifty cents deducted for rent, was allowed for the removal of suppliant's stock; and fifteen hundred dollars to compensate him for his enforced removal from the premises. Acting under advice, the valuators did not put any value on the terms of which the suppliant was possessed. But they thought it was a hardship that he should be put on the street and so recommended that he be allowed the sum of one thousand five hundred dollars mentioned. For the valuators it ought, I think, to be said that they tried to be fair, and I see no good reason to disturb their valuation of the buildings and wharves. But that takes no account of the possession which the suppliant at the time had, and to which he was then entitled. In the case of one lease the year then current had nearly four months to run, and with respect to the other nearly ten months. Then it appears that Mr. Coster who, as agent for the persons entitled, managed the property, was willing at the time to renew; that he had no intention of paying for the improvements; and these are considerations that ought not to be lost sight of in putting a value upon the interest that the suppliant had in the premises in question. They are matters that would no doubt have been taken into account if a person had in July, 1899, been in negotiation with the suppliant for the purchase of his interest in the premises. If we add to these the further consideration that the suppliant did not wish to part with the premises; and that in case he disposed of his interest therein he would have to procure another place in which to carry

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on business and to remove his stock, you have, I think, the principal elements that would, when the lands were taken, have entered into any negotiation for the purchase of the suppliant's interest therein, and which between the purchaser and the seller would have gone to determine the fair value of the suppliant's interest. It is difficult of course, as Mr. Lockhart, one of the witnesses for the Crown stated, to say just what sum would represent such fair value.

There is room for considerable difference of opinion Reference has been made to the fact that Mr. Coster had at the time no intention to pay for the improvements and resume possession of the property; and that he was willing to renew for a term of years at the rent then being paid. That, as I have said, is a consideration to be borne in mind when one is considering what the probable duration of the suppliant's possession would have been if the lands had not been expropriated. But it has another bearing on the case, and an important one, for it goes to show that the possession could not in reality have had the very large value that some of the witnesses put upon it. Mr. Coster is a very capable and intelligent administrator of property of this kind, and if the value of the premises had been as large as one would be led to believe from the evidence of some of the witnesses he would not, I think, have been as ready as he was to renew at the existing rents. No doubt he would be slow to disturb a good tenant doing a good business and paying his rent promptly; and there might be some considerable disparity between the annual value of the possession and the rent being paid before he would exercise the option he had in favour of paying for the improvements and resuming possession. But one would expect a different course of action where that disparity was really very great.

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On the whole I am inclined to think that the amount mentioned by Mr. Lockhart is not far out of the way. I am disposed, however, to add something to this estimate in view of the compulsory taking. To the sum of four thousand and fifty dollars, at which the buildings and wharves were valued, I would add two thousand nine hundred and fifty dollars for the value of the suppliant's interest in the premises, apart from such buildings and erections. That gives for compensation to be paid to the suppliant by the Crown the sum of seven thousand dollars. I state it in round figures, because I do not profess to think that value in such cases can be closely determined. That, I think, would have been a fair price to be given and taken in July, 1899, between one who was anxious to buy and one who, being at the time averse to selling, was compelled to sell and to incur the expense of removing his stock and procuring and fitting up a new place of business.

There will be judgment for the suppliant for the sum of seven thousand dollars, and interest from the 7th July, 1899. He is also entitled to the costs of his petition.

Judgment accordingly.

Solicitor for the suppliant: *Currey & Vincent.*

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

IN THE MATTER OF A CASE STATED

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Dec. 5.

BETWEEN

THE DOMINION OF CANADA

AND

THE PROVINCE OF ONTARIO.

Disputed accounts—Award of arbitrators—Interest on award—Agreement as to date from which interest should be computed.

In certain arbitration proceedings between the Dominion of Canada and the Provinces of Ontario and Quebec, the first mentioned province was found to be indebted to the Dominion in the sum $1,815,848.59 on the 31st December, 1892. While proceedings before the arbitrators were pending, correspondence between the Dominion and the two provinces, concerning the rate per centum and the time from which interest was to run on the amount of the award, was opened by the Deputy Minister of Finance for Canada in a letter to the Treasurer of Quebec, of the 21st December, 1893, in which, among other things, he asked that the Province of Quebec should agree to pay to the Dominion, from the 1st January, 1894, simple interest at 5 per cent. upon the balances in account standing in favour of the Dominion on the 31st December, 1892. Quebec declined to accede to this proposal, and the correspondence in the matter was eventually closed by a letter from the Assistant Treasurer of Quebec to the Deputy Minister of Finance for Canada, of the 6th July, 1894, in which he, in effect, stated that the interest to be paid by Quebec upon any balances found by the arbitrators to be due on the 31st December, 1892, and existing on the 1st July, 1894, should be at the rate of 4 per cent. Similar correspondence between the Dominion Government and the Province of Ontario was concluded by a letter of the 18th August, 1894, from the acting Deputy Attorney-General of that province to the acting Deputy of the Minister of Finance for Canada stating, in effect, that Ontario accepted the same conditions as Quebec in respect of the payment of the interest. Prior to the date of this letter the Premier of Ontario had addressed a letter to the Premier of the Dominion, dated 26th July, 1894, as follows :—

"I understand that your Government has paid to Quebec the subsidy due July 1st instant, on the consent of the Government to pay 4 per cent. on any balance of account that might be found between the Province and the Dominion, such interest to be reckoned from and after the said 1st of July, 1894. I presume this means the balance of account in respect of the items which have already been brought before the arbitrators, and which now stand for judgment. This Government is willing to accept the subsidy on these terms."

Upon a case stated to determine whether interest was payable by the province from the 31st December, 1892, when a balance was struck in favour of the Dominion, or from the 1st July, 1894, only :

Held, that the correspondence showed an agreement on the part of the Dominion that interest should only be paid from the date last mentioned.

CASE STATED in a controversy as to the date from which interest was to be paid by the Province of Ontario to the Dominion of Canada, upon the balance found due from Ontario to the Dominion on the 31st December, 1892, by the award of Arbitrators dated 1st August, 1900.

The following is the statement of facts admitted by the parties relating to the questions in controversy between the Dominion of Canada and the Province of Ontario, in respect of interest upon the account of the said province with the Dominion of Canada, since the 31st December, 1892.

1. By an award dated the 2nd day of November, 1893, made by the Board of Arbitrators, acting under a Deed of Submission made between the Governments of the Dominion of Canada, the Province of Ontario and the Province of Quebec, upon the authority of the Act of Parliament of Canada, 54 & 55 Victoria, chapter 6, the Act of the Legislature of the Province of Ontario, 54 Victoria, chapter 2, and the Act of the Legislature of the Province of Quebec, 54 Victoria, Chapter 4, for the settlement of the disputed accounts between the said several Governments, the said Board

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of Arbitrators did thereby award, order and adjudge, amongst other things, as follows:—

"That the 'trust funds' shall be treated as intact and unimpaired, and interest thereon, at the rate of five per centum per annum, carried half-yearly into the separate accounts of Ontario and Quebec."

"That in the separate accounts of Ontario and Quebec, the said provinces shall respectively be allowed interest on any balance from time to time existing in their favour, at the rate of five per centum per annum, except where some other rate has been expressly agreed to."

"That the question as to whether or not the Dominion shall be allowed simple interest at the rate of five per centum per annum on any balance that may be found from time to time to exist in its favour in the separate accounts of Ontario and Quebec, be reserved for further argument."

2. The "trust funds" referred to in paragraph 5 of the said Award of the 2nd day of November, 1893, on which interest at five per cent. per annum is payable semi-annually, are the following sums, belonging to Ontario:—

Upper Canada Grammar School	$	312,769 04
" " Building Fund		1,472,391 41
" " Improvement Fund		124,685 18
		$1,909,845 63

Belonging to Ontario and Quebec:—

Common School Fund $2,457,688 62

(The proportion of interest payable to Ontario, according to the award of 3rd of September, 1870.)

3. On the 31st of August, 1894, the said arbitrators made and published their second award, by which they did award, order and adjudge, among other things:—

"That in respect of the separate accounts of both provinces, the Dominion be allowed interest at five per centum per annum on all sums included in any balances in its favour that represent transfers from the Province of Canada account, or payments made by the Dominion under any liability of the Province of Canada to which it succeeded."

"That in respect of the Quebec account, the Dominion be allowed interest at the rate of five per centum per annum on the two balances of $500,000 and $125,000, whenever it happens that there is a balance of $625,000 or more, and more, and whenever such balance is less than $625,000, then on such balance."

"That in respect of the Ontario account, the Dominion be allowed interest at the rate of five per centum per annum on $936,729.33, transferred to the Common School Fund, and at the rate of four per centum on the $500,000 advanced, at four per cent., Dominion stock, whenever it happens that there is a balance in favour of the Dominion of $1,436,729.33 or more, and whenever such balance is less than $1,436,729.33, then interest shall be allowed to the Dominion at the rate of four per centum per annum on such balance, to the amount of $500,000, and at the rate of five per centum per annum on any sum in excess of the amount of $500,000."

4. In pursuance of the said awards, the separate accounts of Ontario and Quebec were prepared and brought down to the 31st day of December, 1892, that being the date to which, by the statutes and orders in council constituting the said deed of submission, the accounts were to be brought down and extended, the arbitrators not having any jurisdiction or authority, under the terms or the statutes and orders, to impose or declare any liability extending or arising after the said date; and by an award made by the said arbitrators,

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on the 1st day of August, 1900, they did award, order and adjudge, that on the 31st day of December, 1892, the Province of Ontario was indebted to the Dominion of Canada in the sum of $1,815,848.59, which amount was the balance shown in the separate account as set out in full in the above award of 1st of August, 1900.

5. It is with respect to the interest payable between 1st of January, 1893, and 30th June, 1894, upon the said balance of $1,815,848.59 due by Ontario to the Dominion since the 31st December, 1892, that a controversy has arisen between the Province and the Dominion, and in respect to which controversy certain letters and correspondence passed between the parties.

The full effect of the correspondence between the parties is set out in the reasons for judgment.

November 26th, 1902.

The case was heard at Toronto.

W. D. Hogg, K.C., for the Dominion of Canada;

The only question which comes before the court in this case is as to the time at which interest runs upon a balance found by the Arbitrators to be due, in the matter of the disputed accounts between the Dominion and Ontario and Quebec, from the former province to the Dominion. There is no question as to the rate, which is to be four per centum; but the whole question here is, has the Dominion agreed to take interest only from the 1st July, 1894, or at the time when the balance of the accounts between the parties was struck, viz.: on the 31st December, 1892? On that date the sum of $1,815,848.59 was found to be due by the province to the Dominion, and unless there is any agreement to the contrary, the interest must run from that date. It is contended on the part of the province that upon the correspondence between the parties an agreement is to be found whereby the Dominion con-

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Argument of Counsel.

sented that interest should be payable only from the 1st July, 1894.

(Counsel here read the correspondence the effect of which is stated in the reasons for judgment.)

Then here we have an agreement established between the parties in this case, but an agreement for what? I submit it is an agreement that the rate of interest shall be four per cent. and nothing more. The whole tenor and object of this correspondence has reference only to the fixing of the rate of interest.

So far as the provinces were concerned they were seeking in their letters to define a time from which interest was to run, but I do not think your lordship will find anything in the letters written by the Dominion showing that there was an acceptance of any period as the date from which interest was to be calculated, because what the Dominion was dealing with throughout was the balance or balances which would be determined by the Arbitrators.

Æmilius Irving, *K.C.*, for the Province of Ontario:

There is nothing clearer upon the face of the correspondence than that the Dominion Government agreed that interest should run only from the 1st July, 1894.

With reference to the conduct of the parties as interpreting their agreement, I do not know that it is important where the agreement is so plain as to speak for itself; but the conduct between the parties was that the Dominion did retain the trust fund interest, $47,000, half-yearly, and I believe up to the present time all the while, and that on the theory that the interest only began to run on the 1st July, 1894.

Again, there must be an agreement upon which the Crown in right of the province is to be held liable to pay interest at all. (*Algoma Central Railway* v. *The King* (1). There is an agreement, but that agreement

(1) 7 Ex. C.R. 239?

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limits the rate to 4 per cent. and the time at which the interest is to run from and after the 1st July, 1894.

G. F. Shepley, K.C., followed for the Province of Ontario:

Counsel for the Dominion, it would seem to me, when he presented the case felt himself in a good deal of difficulty. My learned friend says what? He says in the first place there is an agreement. Beyond all question there is an agreement that the rate shall be 4 per cent; but he says there is no agreement, no consensus, that the interest shall run from the 1st of July, 1894, and only from the 1st of July, 1894. If there is not, then what right has the Crown, represented by my learned friend, here? If that is so the Crown has no contract to pay interest from any date. My learned friend puts himself out of court if he says that there is no contract upon the subject of the date, and my learned friend is forced to argue, and there is where his argument is inconsistent, that you must reform this contract so as to make it a contract to pay interest from the 31st December, 1892, which is not referred to from beginning to end in the correspondence making the contract. That is the exact position.

In the second place, counsel for the Dominion contends if there is a contract between the parties, you get it by reforming the agreement by correspondence into a contract, not to pay interest from the 1st of July, 1894, which is the date named in the contract, but by reforming it into a contract to pay interest from the 31st December, 1892. Where does my learned friend get the material to reform the contract by making that the date for the payment of interest? And if that is not the date, when is the interest to begin; is there any other contractual date, and therefore any remedy that the Crown, represented by my learned friend, has for this interest except that fixed by the contract itself? I submit there is none.

W. D. Hogg, K.C., replied.

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THE JUDGE OF THE EXCHEQUER COURT now (December 5th, 1902) delivered judgment.

In August, 1894, an agreement was concluded between the parties whereby the Province of Ontario agreed to pay interest at the rate of four per centum per annum upon the balance that should, in certain proceedings by way of arbitration mentioned in this case, be found to be due from the Province to the Dominion, and the only question in controversy and to be determined in this case is whether it was a term or condition of that agreement that such interest should be computed from the first day of July, 1894. If so, Ontario is entitled to the judgment of the court; if not, judgment should go for the Dominion.

By the terms of the submission under which, and subject to certain statutes referred to in the case, the arbitration was being proceeded with, the Arbitrators were to bring down and extend the accounts submitted to them to the 31st day of December, 1892, inclusive. That is, the balance was to be struck as of that date. The Arbitrators had power to make, and made from time to time a number of awards dealing with different matters submitted to them. The first award made, and set out in this case, was published on the 2nd of November, 1893. By that award it was, among other things, provided that certain trust funds belonging to the Provinces of Ontario and Quebec should be treated as intact and unimpaired, and that interest thereon at the rate of five per centum per annum should be carried half-yearly into the separate accounts of Ontario and Quebec; that the Province of Canada account should be made up at simple interest at the rate of five per cent. per annum; that in the separate accounts of Ontario and Quebec these provinces should respectively be allowed simple interest on any balance from time to time existing in

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their favour, at the rate mentioned (except where some other rate had been expressly agreed to); and that the question as to whether or not the Dominion should be allowed simple interest at the rate mentioned on any balance that might from time to time be found to exist in its favour in the separate accounts of Ontario and Quebec, should be reserved for further argument. That question was not decided until August 31st, 1894, when the award dealing therewith and set out in the present case was made. By another award, also set out in the case, published on the 1st of August, 1900, the balance due on the 31st of December, 1892, by the Province of Ontario to the Dominion of Canada, apart from the trust funds mentioned, and subject to some matters not disposed of, was determined to be $1,845,848.59. The contention of the Dominion is that interest on this sum at the rate of four per centum per annum should be computed half-yearly from and after January 1st, 1893. The contention of Ontario on the other hand is that such interest should, as a result of the agreement come to between the parties, be computed half-yearly from and after July 1st, 1894, the difference between the two contentions being represented by a sum of $113,176.54.

Between the dates of the two awards first-mentioned, that is, between the 2nd of November, 1893 and the 31st of August, 1894, the correspondence took place, out of which arose the contract or agreement now in question. It was commenced by letters dated the 21st of December, 1893, from Mr. Courtney, the deputy of the Minister of Finance, to the Treasurers of the Provinces of Ontario and Quebec, in which attention was called to the state of the accounts between the Dominion and the Provinces as affected by the award of November 2nd, 1893. It appears from the correspondence (see Sir Oliver Mowat's letter of December

28th, 1893, in answer to Mr. Courtney's) that the accounts that had from time to time been prepared, and which had been submitted to the Arbitrators, showed balances in favour of the Province of Ontario apart altogether from the trust funds referred to; and I think it is a fair inference from what appears in the case that at the time this correspondence opens it had come to be known that apart from such trust funds the balance of account would be in favour of the Dominion for a large sum.

As has been observed, the arbitrators had by their award directed that these trust funds should be treated as intact and unimpaired. It is obvious that this direction should be read in the connection in which it occurs, and that its primary object and purpose was to prescribe a rule to be followed in the computation of interest in taking accounts which by the terms of the submission were to be brought down to the 31st of December, 1892. Whether such funds, or any of them, were held by the Dominion on terms that prevented it from paying them off at any time at its will, or if not, whether the arbitrators intended, or if they so intended, whether they had authority to attach any such condition to the terms on which such funds were held, are questions outside of the present enquiry. What is evident from the correspondence printed in this case is that in December, 1893, there was some question as to the right of the Dominion to pay the Provinces the amount of these funds and so get rid of the obligation to pay interest thereon at the rate of five per centum per annum.

Briefly then, the circumstances under which the correspondence opened, were these :—An arbitration was proceeding upon accounts that showed on the face of them that apart from certain trust funds the Dominion was indebted to the Provinces of Ontario and Quebec.

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In the course of these proceedings it had become apparent that on a proper taking of the accounts the balances would be the other way, and there seems to have been some question whether or not these trust funds could be brought into account to lessen or discharge such balances. Moreover, the question of the Dominion's right to interest on such balances had not then been determined. Under these circumstances Mr. Courtney, writing for the Government of Canada, stated in the letters referred to that while it was contended on behalf of the Dominion that the Dominion should be awarded interest upon these balances, the right to such interest, so far as the past was concerned, was still a matter for determination ; but as to the future, it was deemed prudent and advisable that an understanding should be come to with regard to interest upon the balances in favour of the Dominion which would avoid any further misunderstanding or difference ; and he proposed to the treasurer of each province that the province should agree to pay to the Dominion from the 1st of January then next (1894) simple interest at five per cent. upon the balances in account then standing in favour of the Dominion, until such balances should be discharged by the Province, or in the event of the Province failing so to agree the subsidies to which it was entitled should be applied in reduction and payment of such balances. No conclusion was arrived at upon that proposal. Action was eventually deferred until the July subsidies were about to fall due when the question was again raised. And here it may be convenient to observe that while the Province of Quebec is not a party to this case, and is in no way bound by any conclusion that is come to, it is necessary to refer to the correspondence on this subject that took place between the Dominion and that Province,

and which was made the basis of the agreement come to between the Dominion and Ontario.

On the 4th of June, 1894, Mr. Courtney, in a letter to Mr. Machin, the Assistant Treasurer of Quebec, referring to previous correspondence, asked to be informed whether the Province of Quebec was willing to agree to pay the Dominion simple interest at five per cent. upon the balances in account standing in favour of the Dominion, until such balances should be discharged by the Province, or in the event of the Province failing so to agree the subsidies should be applied in reduction and payment of such balances. Passing over some correspondence that is not material now to the question in issue it will be found that in a letter of the 26th of June, 1894, Mr. Taillon, Premier and Acting Treasurer of Quebec, wrote to the Minister of Finance that the financial position of the Province of Quebec was such that it would absolutely require the half-yearly subsidy to enable it to meet its engagements, and rather than fail in these his Government was prepared, in the event of the Dominion insisting upon exerting its power to retain the subsidy, to agree to a rate of interest to be computed upon any balances which might, as a result of the arbitration then in progress, be established to exist in favour of the Dominion by the Province on the general account from the 1st of July proximo; and he suggested that three and one half per cent. per annum, being the rate of interest on the last issue of Dominion securities, should be the rate fixed upon and paid until such balances were discharged by the Province, it being fully understood that Quebec under any circumstances should not be placed in any worse position than the Province of Ontario. To that letter Mr. Courtney, on the 29th of June, 1894, answered that the arrangement could not be closed at a rate of interest less than four per cent. By a tele-

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gram of the 2nd of July, 1894, Mr. Taillon agreed to the rate of four per centum, and promised a letter confirming his telegram. On the 6th of July, 1894, Mr. Machin in a letter to Mr. Courtney acknowledging the receipt of a cheque in payment of the half-yearly subsidy and interest on trust funds stated that he was directed to confirm Mr. Taillon's telegram of the 2nd and added that " this determines the rate of interest to " be paid by the Province on any balances that may " be established by the arbitration as existing in favour " of the Dominion at the 1st of July instant, at 4 per " cent. per annum."

It is not necessary, I think, to go through the correspondence on the same subject between the Dominion and the Province of Ontario. Mr. Taillon's telegram of July 2nd, 1894, and an extract from Mr. Machin's letter of the 6th of that month were communicated to Sir Oliver Mowat, and Ontario on the 18th of August, 1894, by a letter from the Acting Deputy Attorney-General of that Province to the Acting Deputy of the Minister of Finance accepted the same conditions as Quebec in respect to the payment of the subsidy. I refer also to Sir Oliver Mowat's letter of the 26th of July, 1894, to Sir John Thompson, in which he states that he understood that the subsidy due to Quebec on the 1st of July had been paid on the consent of the Government of that Province to pay interest at four per centum per annum on any balance found to be due to the Dominion, such interest to be reckoned from and after the 1st of July, 1894, and he offered on behalf of Ontario to accept the subsidy on these terms.

Now, as has been observed, the question for determination is whether or not it was a term or condition of the agreement come to that the interest at the rate of four per centum per annum on the balances men-

tioned should be paid from the 1st of July, 1894; and that question of fact should, it seems to me, be answered in the affirmative. Mr. Courtney on behalf of the Dominion was the first to name a day from which the arrangement then proposed should take effect. When later he renewed the negotiation he did not mention any date, but Mr. Taillon in his reply, and Mr. Machin in his letter confirming Mr. Taillon's telegram did, and no question having been raised as to that matter, the Dominion must, I think, be taken to have accepted and agreed to the date proposed by Mr. Taillon. Mr. Courtney's letters of December 21st, 1893, left the question of one year's interest on the balances of the accounts as they would be found to exist on the 31st of December, 1892, to be determined in some way other than by the arrangement or agreement then proposed. Why the proposal was made in that form does not appear. It may be that it was thought at the time that the Arbitrators could deal with all the past to which reference was made, or that any rule as to interest on such balances which they should prescribe would apply until the parties agreed to some other rule. Or it may be that the matter was left to the operation of law, to be determined in any appropriate manner. The latter view of the matter would raise the question as to whether, apart from any agreement, the Dominion would be entitled to interest at the legal and current rate of interest on the balance found in its favour. That question is not raised now, and it may be that the agreement that was come to stands in the way of its being raised at any time. As to these questions it would not be proper for me to express any opinion, and I express none. One thing, however, is clear,—the proposals made in 1893 contained no provision in respect of interest prior to January 1st, 1894, on the balances mentioned. Then the

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agreement come to with the Province of Quebec in July, 1894, left the interest prior to the first of that month to be settled and determined (if at all) by reference to considerations other than those arising from the agreement of the parties. That agreement was, I think, operative from the 1st of July, 1894, and not before that date. If so, no interest could be payable under it prior to that time, and therefore I am unable to agree with the contention set up by the Dominion that it is entitled by virtue of this agreement to interest at the rate mentioned on the balance in its favour from the 31st of December, 1892, to the 1st of July, 1894. On the other hand, with respect to any claim now made for the payment of interest based on the agreement of the parties, I agree with the contention of the Province of Ontario that it is so payable from the 1st of July, 1894, only. And I understand this case to be limited to that question, and not to go beyond it; the question being briefly on the one hand whether the parties agreed to a rate of interest only; or on the other hand not only to such rate, but also to a date from which it should be computed. That, from paragraphs five, six and eleven of the case, and from the arguments of counsel, I understand to be the only question submitted for decision. And confining my answer to that question I agree with the contention put forward on the part of the Province of Ontario, and I think that judgment should, on that issue, be entered for that Province.

Judgment accordingly.

THE ATLANTIC AND LAKE SUPERIOR RAILWAY COMPANY..... } SUPPLIANTS; 1903 Jan. 26.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Petition of Right—Costs—Application for security by Crown—Limited Company—25-26 Vict. (U.K.) c. 89, s. 69—Practice.

Section 69 of *The Companies Act*, 1862 (25-26 Vict. (U.K.) c. 89) provides that, where a limited company is plaintiff in any action, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

By the 7th section of the English Petition of Right Act (23 & 24 Vict. c. 34), it is, among other things provided, that the statutes and practice in force in personal actions between subject and subject shall, unless the court otherwise orders, extend to petitions of right. The practice in the Exchequer Court is in this respect the same as the practice in England.

In a proceeding by Petition of Right in the Exchequer Court, application was made for security for costs under the provision first mentioned. There was nothing to show that it had ever been acted on in a proceeding by Petition of Right in England.

Held, that the question as to whether the provision first mentioned applied to such cases was not sufficiently free from doubt to justify the granting of the application for security.

APPLICATION, in a proceeding by Petition of Right, for security of costs to be given to the Crown.

The grounds upon which the application was based are stated in the reasons for judgment.

January 19th, 1903.

E. L. Newcombe, K.C., in support of the application.

This is an application conformably to the English practice for security for costs. The Crown feels that

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it is necessary as the case stands to obtain security from the suppliants, as in the event of the Crown succeeding in the action, the assets of the suppliant company may not be sufficient to pay costs.

The practice which we invoke is that prevailing in the High Court of Justice in England—there being no express provision for the same in the Rules of the Exchequer Court—under the 69th section of *The Companies Act*, 1862. This refers to limited companies, and I submit is the proper practice of the High Court to be applied to the case arising upon petition herein. I do not know whether the action is being carried on by the receiver or by the company. If the receiver is carrying it on for the estate or the bond-holders that would be an additional ground for security. Then there is no property or assets of the company to respond a judgment for costs if the Crown is successful, and in such case it is clear that security would be ordered under the authorities.

W. D. Hogg, K.C., contra:

I submit upon the facts set out here that there is a complete answer to the affidavit read by Mr. Newcombe. The affidavits I have read show that there are sufficient funds in the hands of the Government belonging to the suppliants under a contract for the carriage of His Majesty's mail to respond any costs in this action. Then again this company is not in the position my learned friend asks you to believe. They have assets and they have money in the Crown's hands.

[BY MR. NEWCOMBE: If mails are being carried they are carried by the receiver.]

The property is the property of the company; there is a board of directors.

[BY MR. NEWCOMBE: I do not deny that you have a paper company, but as to its property I do not know.]

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The Companies' Act, 1862, is not applicable to this case. The rule of practice in the High Court of Justice also does not make the bankruptcy or the insolvency of a company a ground upon which security will be ordered. (*Cowell* v. *Taylor* (1); *Cook* v. *Whellock* (2); *Rhodes* v. *Dawson* (3); *Annual Practice*, 1903, (4). The general rule of the High Court of Justice in England is where litigation is carried on for the plaintiff's benefit and he is not a man of straw, his bankruptcy or insolvency will not be a ground for ordering security. I submit that *The Companies' Act*, 1862, and the practice thereunder, cannot be invoked except in the case of a limited company incorporated under that Act. The present company is one incorporated under an Act of Parliament of Canada, and it is not affected by the English Act. While *The Exchequer Court Act* is in terms confined to the practice of the High Court of Justice in England, still the reasons which are given by the Ontario judges are applicable to cases arising in this court. (He cites *Walbridge* v. *Trust & Loan Co* (5); *Major* v. *McKenzie* (6).

E. L. Newcombe, K.C., in reply: So far as the facts are concerned I submit that my learned friend has stated nothing to show that costs could be realized if we got judgment against the suppliants. I may perhaps state this fact that they rented an office from the Government and never paid the rent, and the agent of the department said that it was not worth while issuing an execution against them. As to the post office contract, any business that is being done is not being done for the benefit of the stock-holders, but for the bond-holders through a receiver.

(1) 31 Chan. Div. 34.
(2) 24 Q. B. D. 658.
(3) 16 Q. B. D. 548.
(4) Pp. 935, 936.
(5) 13 Ont. P. R. 67.
(6) 17Ont. P. R. 18.

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Argument of Counsel.

As to the other point raised by my learned friend, we follow the practice and procedure of the High Court of Justice whether provided by the Judicature Act or any other Act. My contention is that the practice in English cases which is most applicable to the case arising upon the petition of right must prevail. This practice applies to a limited company, it does not matter whether it was incorporated under the English Act or under a colonial statute. I submit that there are various sections in the Act which clearly apply to a limited company incorporated otherwise than under the provisions of that Act.

As to the amount of security it should undoubtedly be large. There will have to be evidence under commission, as the statements complained of were made in London.

THE JUDGE OF THE EXCHEQUER COURT now (January 26th, 1903) delivered judgment.

This is an application, on the part of the respondent, for security for costs on the ground that there is reason to believe that if the respondent is successful in his defence the assets of the suppliant company will not be sufficient to pay his costs.

The application is based upon the 69th section of *The Companies' Act*, 1862 (1), which it is argued is in force as part of the practice and procedure in this court under the 21st section of *The Exchequer Court Act* and the Rules of Court (See *Audette's Practice*, page 217, Rule 1), which provide that the practice and procedure in the Exchequer Court shall, so far as they are applicable and unless otherwise provided for, be regulated by the practice and procedure in similar suits, actions and matters in the High Court of Justice in England. The case is not otherwise provided for; but the proceeding being by petition of right, it is necessary

(1) U. K. 25-26 Vict. c. 89.

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in the first instance to see what the practice is in England in such a proceeding. By the seventh section of the English Petition of Right Act (1), it is, among other things, in effect provided that the laws and statutes and the practice and course of procedure in force as to security for costs in suits in equity and personal actions between subject and subject shall, unless the court otherwise orders, be applicable and apply and extend to petitions of right. Under that provision the Crown may call upon the suppliant to give security for costs in any case in which if it were an action between subject and subject, an order for security for costs would be granted. The right of the Crown to obtain such an order is also recognized in the twenty-eighth section of *The Exchequer Court Act.*

So far no difficulty arises, and if the provision relied upon were a general rule applicable to all companies, or if it had been expressly made a rule of procedure in this court, there would perhaps be no good reason against following it in this case; but it is not a general rule applicable to all companies, but only to "limited companies" within the meaning of that expression as used in the section referred to; and while it is a provision which relates to practice and procedure in the case provided for, it is a provision that affects substantive rights. It constitutes a limitation upon the right which limited companies otherwise would have to bring actions or proceedings in the court upon the same terms as individuals or other companies.

Then the provision occurs in a statute relating to companies, and not in one dealing principally with procedure or practice in the courts; and while too much weight should not be given to that consideration, and none of the others may be absolutely con-

(1) 23 & 24 Vict. c. 34.

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clusive against the contention set up for the respondent, the matter does not, on the whole, appear to be sufficiently free from doubt to justify the granting of the application.

The application should, I think, be refused, with costs in any event to the suppliants, to be allowed or set off, as the case may be.

Application dismissed.

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

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

SPILLING BROTHERS .....PLAINTIFF; 1903

Feb. 14.

AND

C. A. RYALL .....DEFENDANT.

Trade-mark—Cigars—Infringement—Representations of the King and the Royal Arms—Validity—User before registration—R. S. C. c. 63, s. 8—Declaration signed by agent.

A label, as applied to boxes containing cigars, bearing upon it "in an oval form a vignette of King Edward VII., with a coat of arms on one side, and a marine view on the other surmounted by the words 'Our King', and with the words 'Edward VII.', underneath," constitutes a good trade-mark in Canada, and may be infringed by the impression, upon boxes containing cigars, of a fac-simile of the Royal Arms surmounted by the words "King Edward."

2. The English rule prohibiting the use of the Royal Arms, representations of His Majesty, or any member of the Royal Family, of the Royal Crown or the national Arms or Flags of Great Britain, as the subjects of trade-marks, is not in force in Canada.

3. It is not essential to the validity of a trade-mark registered in Canada that the person registering the same should have used it before obtaining registration. The registration must, however, in such a case, be followed by use, if the proprietor wishes to retain his right to the trade-mark. In this respect there is no difference between the law of Canada and the law of England.

4. The declaration required from the proprietor of a trade-mark by section 8 of *The Trade-Mark and Design Act*, R. S. C. c. 63, may be signed by his duly authorized attorney or agent.

THIS was an action to restrain the infringment of a trade-mark.

The facts are stated in the reasons for judgment.

January 12th, 1903.

The case was heard at Toronto.

R. G. Code, for the plaintiffs, contended that the defence must be confined to the issue of infringement.

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Argument of Counsel.

Partlo v. *Todd* (1). The question of prior user is not in controversy. The two trade-marks resemble each other so closely as to deceive the public; the word "King" is the essential feature of both marks. (*Kerly on Trade-marks* (2); *Sebastian on Trade-marks* (3); *Orr, Ewing & Co.* v. *Johnston & Co.* (4); *Smith* v. *Fair* (5); *Thompson* v. *Montgomery* (6).

The "Royal Arms" may be used in Canada as a part of a trade-mark. The prohibition of the use of these arms, or of representations of the Sovereign, is a local English rule, and does not extend to the colonies unless the legislature enacts it. The Canadian Act does not do so, nor do the regulations made thereunder.

The damages sustained by the plaintiffs do not warrant an application for an order of reference.

A. H. Clarke, K.C. for the defendant, contended that the English rule prohibiting representations of the Royal Arms, or of the person of the Sovereign to be used as trade-marks, prevailed in Canada. This is conformable to the American practice, also. The plaintiffs' trade-mark is therefore invalid. (*Browne on Trade-marks* (7).

Again, the plaintiffs had not used their mark prior to registration; this is fatal to its validity. *Browne on Trade-marks* (8); *Hogg* v. *Maxwell* (9).

The declaration required by section 8 of *The Trade-mark and Design Act* was not made by the proprietor. The statute does not contemplate the making of this declaration by an agent.

R. G. Code replied.

(1) 17 S. C. R. 196.
(2) 2nd ed. pp. 240, 242, 360.
(3) 4th ed. p. 131.
(4) 28 W. R. 330.
(5) 14 Ont. R. 729.
(6) 41 Ch. D. 35.
(7) 2nd ed. s. 29.
(8) 2nd ed. s. 840.
(9) L. R. 2 Ch. 307.

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SPILLING v. RYALL.

Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (February 14th, 1903) delivered judgment.

The action is brought to restrain the infringement by the defendant of two specific trade-marks that the plaintiffs have registered under *The Trade-Mark and Design Act* (1), to be used in connection with the sale of cigars, and for damages for such infringement.

The plaintiffs carry on the business of manufacturing and selling cigars, and have their chief place of business at the City of Toronto, in the Province of Ontario. The defendant carries on the business of a cigar manufacturer at Leamington in the said province.

One of the two specific trade-marks mentioned consists, according to the description used in the certificate of registration, of a label bearing in an "oval "form a vignette of King Edward VII with a coat of "arms on one side, and a marine view on the other "surmounted by the words 'Our King' and with the "words 'Edward VII' underneath." On some of the boxes used by the defendant and in which he sells cigars there is impressed a fac-simile of the Royal Arms surmounted by the words "King Edward," and one of the questions that arises in the case is whether or not that constitutes an infringement of the plaintiffs' registered trade-mark. That question should, I think, be answered in the affirmative.

There is evidence to justify the conclusion that cigars sold in or from boxes bearing the plaintiffs' registered trade-mark came to be known as "Our King" or "The King" or "King" cigars and are purchased by that description. That is what one would expect, and that being the case the use on cigar boxes of a mark consisting of a fac-simile of the Royal Arms surmounted by the words "King Edward" would, I think, constitute an infringement. In both cases the

(1) R. S. C. c. 63.

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cigars sold from such boxes would come to be known as "The King" or "King," and many persons might, I think, be deceived or misled into purchasing the one for the other.

It is contended for the defendant, however, that the plaintiffs' registered trade-mark is not good because it contains a representation of His Majesty, and also of the Royal Arms. That contention is based upon the English practice in such matters. By the thirtieth paragraph of the instructions to persons who wish to register trade-marks under the Act of Parliament of the United Kingdom, it is provided that where the mark had not been used before the 13th of August, 1875, no trade-mark will be registered if it, or a prominent part of it, consists of "The Royal Arms, or "Arms so nearly resembling them as to be calculated "to deceive; representations of Her Majesty the "Queen, or of any member of the Royal Family; "representations of the Royal Crown or the National "Arms or flags of Great Britain." (*Sebastian's Law of Trade-Marks.* (1). But that rule or prohibition is not in force in Canada. It is not one of the grounds on which under the Canadian Statute (2), as amended by 54–55 Vict. c. 35, the Minister of Agriculture may refuse to register a trade mark; and even if it were thought that such a regulation could be made without an amendment of the Act (3), no regulation has been made. In the absence of any such provision as that referred to the objection fails.

Then it is said that the plaintiffs' action ought not to be maintained because they are not entitled to the exclusive use of the trade-mark in question; that the allegation in the declaration by which registration was procured that they believed it to be theirs because

(1) 4th ed. 335, 468. (2) R.S.C. c. 63, s. 11.
(3) R.S.C. c. 63, s. 6.

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they had first made use of it was not true. With respect to this ground of defence, the facts appear to be that in June, 1890, the plaintiffs commenced to sell cigars of their own manufacture in boxes on the covers of which were impressed the words "Our King Cigar." On the under side of the cover were the words in large letters "Royal Crown" surmounting a Crown and other representations below which appeared the words "The King of 10c. cigars." These marks were used until the end of the year 1902, but were never registered. In 1897, anticipating that Her late Majesty's reign was drawing to a close, and that She would be succeeded by His Majesty, the plaintiffs caused to be prepared certain designs to be registered as specific trade-marks to be used in connection with the sale of cigars, one of which, omitting the words "Edward VII." was that which has been described. The words "Edward VII" were added when it was known what title His Majesty would take, and this design, with the addition mentioned, was registered on the 5th of February, 1901, the Queen having died on the 22nd of January of that year. It also appears that sometime in the year 1899, or early in 1900, Gustav A. Moebs & Company, of the City of Detroit, commenced to put up cigars manufactured by them in boxes with labels having on them a representation of His Majesty surmounted by the words "King Edward VII." They also had a brand of cigars that they sold as "King Albert" cigars. These facts appear from the evidence of the witness John A. Campbell, who resides at the City of Windsor, in Ontario, and is engaged in the business of manufacturing cigar boxes. Of cigars put up by Moebs & Company with the "King Edward VII." label, Campbell brought two boxes to Canada and sold them to cigar dealers here. One of these boxes he sold on the 22nd of January, 1901, to George

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McKee, of Windsor, who put them in his show-case and sold them. Campbell himself buying some of them. The other box he sold in May, 1902, to one Frank Giradot, a cigar dealer; but where the latter did business does not, I think, appear. Apart from these two instances there has been, so far as appears, no sales in Canada of Moebs & Company,s "King Edward VII" cigars. In addition to what has been stated, Campbell, in March, 1900, registered in the Canadian Cigar and Tobacco Journal Trade-Marks Registration Bureau a specific trade-mark to be "applied to the sale of cigars," consisting of "the words or title King Edward." This he did under an arrangement with Moebs & Company, and with an intention, never carried into execution, of manufacturing cigars to be sold in Canada under that name. The plaintiffs, when they applied to the Minister of Agriculture to register the trade-mark in question here, knew of Campbell's registration of the words "King Edward" in the Registration Bureau mentioned. It does not appear that they knew of the use by Moebs & Company of the "King Edward VII" label. The plaintiffs, since registering the trade-mark in the Register of Trade-Marks kept at the Department of Agriculture, have made use of it in their business of manufacturing and selling cigars. Campbell has not been in the business of manufacturing or selling cigars, and has not made any use of the mark that he registered in the Canadian Cigar and Tobacco Journal Trade-Marks Registration Bureau. The defendant first used the label or impression complained of in March, 1902. Now it may be that the plaintiffs' position would have been stronger than it is and less open to attack if, when they came to register their trade-mark, they had registered one more closely resembling that which they used from 1890 to 1902. It is only in respect of the matters in

which they departed from that mark that their trade-mark is now open to attack. It seems to me, however, that the important thing about all these marks is that cigars sold from boxes bearing any of such marks come naturally to be known as "Our King," or "The King," or "King" cigars. The words "Our King Cigar" were first used no doubt in some such way as a manufacturer might use the words "Our Star Cigar," and without reference to, or any suggestion of, any King. But the result it seems to me is the same, and, whatever the reference or suggestion may be, the cigar comes to be known as a "King" cigar. So far, then, as respects the use in connection with the sale of cigars of a mark that would result in that word being used to briefly designate the cigar that the purchaser wished to buy, the plaintiffs were the first to use such a mark. Moebs & Company are not before the court, and I refrain as far as possible from saying anything that would appear like passing on any question that might arise between them and the plaintiffs. But we may, I think, put aside as not being material to the decision of the case the things that Campbell did. The plaintiffs knew nothing of the sale in Canada of the two boxes of Moebs & Company's cigars of which he spoke; and the matter is in itself of too little importance to be taken into account here against any rights that the plaintiffs have. It would be trifling with the subject to hold that the selling in Canada of two boxes of cigars bearing certain marks constituted or proved a use in Canada of such marks. Then with reference to his registration of the words 'King Edward', in the Canadian Cigar and Tobacco Journal Trade-Marks Registration Bureau, the registration was neither preceded nor followed by any use of the mark. At best it only showed an intention to use it, and gave notice of that intention. But there was no use of the

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mark, and the plaintiffs' registered trade mark is not defeated because of anything done in that matter.

That leaves only the questions arising upon the use by Moebs & Company in the United States of their "King Edward VII" label. As to that the plaintiffs were, as has been seen, the first to use in connection with the sale of cigars a mark of which the most important feature or characteristic is the word "King." Then with respect to the later design in which the words "Our King Edward VII" occur, the plaintiffs formed the intention of adopting it before Moebs & Company used their mark, but they waited to see what title His Majesty, on succeeding to the throne, would take. Moebs & Company did not wait for the death of Her late Majesty, but taking their chances with the two marks "King Edward VII" and "King Albert" were happy enough to hit upon that which His Majesty adopted. But Moebs & Company do not, so far as appears, sell their cigars in Canada, and on the other hand the plaintiffs' cigars are not sold in the United States. So there is no conflict, and no one is liable to be deceived or misled. The mark is not public property, and it is not open to anyone to use it. As against the defendant and the general public the plaintiffs are, in Canada, entitled to the exclusive use of the trade-mark. If Moebs & Company should attempt to put their "King Edward VII" cigars on the Canadian market, or if they should attack the plaintiffs' registration of the marks used by them it may be that some questions would arise that need not now be considered. So long as matters stand as they are I do not see any difficulty, or anything to affect the plaintiffs' right to the exclusive use in Canada of the trade-mark in question.

Another objection urged against the plaintiffs' trade-mark is that the use of it did not precede the registra-

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tion; but that I think is not necessary. The Act provides that a mark adopted for use by any person in his trade for the purpose of distinguishing his goods may be registered for his exclusive use (1), and it is clear that one may adopt a mark without first using it. The registration must, of course, in such a case be followed by use, if the proprietor wishes to retain his right to the trade-mark. In that respect there is, I think, no difference between the law of Canada and the law of England (2).

It is also objected that the registration of the plaintiffs' trade-mark in question here was not good because the application or declaration on which it was obtained was not signed by the plaintiffs personally but by their attorneys or agents. The eighth section of *The Trade-Mark and Design Act* (3) provides that the proprietor of a trade-mark may have it registered on forwarding to the Minister of Agriculture, among other things, a declaration that the same was not in use to his knowledge by any other person than himself at the time of his adoption thereof; and the question is whether the application in which that declaration occurs may be signed for the applicant by his agent. I see nothing in the statute to lead one to suppose that the legislature intended anything special as to the signature to be attached to such a declaration or statement, and if that be the correct view of the statute the signature by the agent or attorney would be sufficient. The agent or attorney pledges, no doubt, the applicant's knowledge and belief as to the facts stated, but I do not see why if he is duly authorized he may not do that. In *Jackson* v. *Napper* (4). Mr. Justice Stirling, discussing a question similar to that

(1) R. S. C., c. 63, s. 3.
(2) See Kerly on Trade-Marks, 2nd ed., pp. 118-120.
(3) R. S. C., c. 63.
(4) 35 Ch. D. at p. 172.

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raised here, said:—"I take it that, subject to certain well-known exceptions every person who is *sui juris* has a right to appoint an agent for any purpose whatever, and that he can do so when he is exercising a statutory right no less than when he is exercising any other right." In support of that view he relied upon *In Re Whitely* (1), in which a question as to the validity of the signature by an agent of a subscriber to a memorandum of association under *The Companies Act*, 1862, arose, and in which it was held that the ordinary rule applied that signature by an agent is sufficient.

The defendant did not in any way seek to put off his goods for those manufactured by the plaintiffs, or in any way to gain any trade advantage at the expense of the plaintiffs, and the latter abandon their claim to damages. They are entitled to the injunction that they ask for and to their costs, to be taxed, and there will be judgment accordingly.

Judgment accordingly.

Solicitors for plaintiffs: *Code & Burritt,*

Solicitors for defendant: *Clarke, Cowan, Bartlet & Bartlet*

(1) 32 Ch. D. 337.

APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

THE BARGE "DAVID WALLACE"..APPELLANT; 1903

AND Mar. 9.

ALEXANDER BAIN (PLAINTIFF).....RESPONDENT.

Admiralty law—Foreign vessel—Necessaries—Charter-party — Authority of master—Liability of owner.

The action was brought by the plaintiff against a foreign vessel and owners for necessaries supplied on her account at a Canadian port. At the time the necessaries were supplied the vessel was under charter, the owner having by the charter-party transferred to the charterers the possession and control of the vessel. The charterers appointed the master, and he, for them engaged the crew. The charterers paid the wages of the master and crew and the running and other expenses of the vessel. The plaintiff knew that the vessel was under charter; but he did not know the terms of the charter-party. On the trial there was a conflict of testimony between the plaintiff on the one hand, and the master of the vessel, and the port captain or agent of the charterers on the other hand as to whether or not the necessaries were supplied on the order of the master on the credit of the vessel and owners, or on his order or that of the port captain on the credit of the charterers. The learned judge by whom the case was tried found that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor.

Held, on appeal, that the plaintiff ought under the circumstances to have the benefit of the finding in his favour but that as the master was the servant and agent of the charterers and not of the owner he had no authority to pledge the latter's credit, and that as the owner was not liable for such necessaries the vessel could not be made liable.

2. An action for necessaries at the suit of the person who supplies them cannot be maintained against the ship if the owner of the ship is not the debtor.

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3. Where the owner of the ship is the debtor the action cannot be maintained against her if the necessaries are supplied at the port to which the ship belongs; or if at the time of the institution of the action any owner or part owner of the ship is domiciled in Canada (*The Admiralty Courts Act*, 1861, s. 5; *The Colonial Courts of Admiralty Act*, 1890, s. 2 (3) (*a*).)

4. Where, by the charter-party, the owner transfers the possession and control of the ship to a charterer and the latter appoints the master and crew and pays their wages and other expenses, the master in incurring a debt for necessaries is the agent or servant of the charterer and not the agent or servant of the owner. In such a case the owner is not the debtor, and an action for such necessaries cannot be maintained against the ship.

5. The want of notice of the terms of the charter-party in such a case is not material, notice of the charter-party not being essential where the owner completely divests himself of the possession and control of the ship. (*The Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893] A. C. at pp. 19, 21.)

APPEAL from a judgment of the Local Judge of the Nova Scotia Admiralty District.

The material facts of the case are as follows:

The barge *David Wallace* was an American vessel registered at the port of Cleveland, Ohio, her owner living at Lorain in the same State. The barge was on a voyage from the Upper Lakes, via the St. Lawrence, to an Atlantic port in the United States and was towed into Port Hawkesbury, N.S., in distress. While there she obtained supplies from the respondent to enable her to complete her voyage. Having obtained such supplies the barge proceeded on her voyage as far as the port of Shelburne, N.S., where she was arrested by the respondent in an action to recover the amount of the repairs and supplies as necessaries. At the time the necessaries were supplied the vessel was under charter to the Atlantic Transportation Company, the owner having by the charter-party, which was of the description known as a "demise charter," transferred to the charterers the possession and control of the vessel. The charterers appointed the master, the crew

being appointed by him on behalf of the charterers. The charterers paid the wages of the master and crew, and also the running and other expenses of the vessel. These facts were shown, independently of the charter-party by the evidence of Cobb, the master of the barge, and Jenks, the port captain at Port Hawkesbury, of the Atlantic Transportation Company, the charterers. These men had not seen the charter-party, but had become conversant with the above facts from their employment and dealings with the charterers. The respondent knew the vessel was under charter, but he did not know the terms of the charter-party. This document was transmitted by the District Registrar as part of the record in the court below, although it was subject to an objection not disposed of by the trial judge as to the sufficiency of the proof of the signatures of the parties. But the issues turned upon the fact of its existence rather than upon any of its provisions, and the main facts were proved *aliunde*.

The instrument was as follows:

"THIS CHARTER made and entered into this 28th day of September, 1898, between David Wallace, of Lorain, Ohio, managing owner of the schooner barge *David Wallace*, capacity 1,800 gross tons, hereinafter mentioned, party of the first part, and hereinafter called owner, and THE ATLANTIC TRANSPORTATION COMPANY, a corporation organized under the laws of the State of New Jersey, party of the second part, and hereinafter called charterer."

"WITNESSETH: That the owner hereby agrees to charter to the charterer the following named schooner barge, viz.: *David Wallace*, for a period commencing October 1st, 1898, and ending on October 1st, 1901, and the charterer agrees to charter said schooner barge for the period aforesaid, both parties, however, to be governed by the conditions hereinafter expressed."

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"The owner hereby agrees to deliver said schooner barge *David Wallace* to the charterer at the port of Detroit on or about October 1st, 1898. Said schooner barge to be delivered to the charterer in good order and condition, being tight, staunch, strong, and in every way fitted for the service of carrying coarse freight and for being towed."

"The charterer hereby agrees to receive said schooner barge *David Wallace* at said port and upon the expiration of this charter to return the same to the owner at said port in as good condition as she was when received by the charterer, ordinary wear and tear excepted."

"The owner hereby charters said schooner barge to be used by the charterer for the purpose of carrying coal and other coarse freight, and for being towed along the Atlantic coast and the waters adjacent thereto."

"The charterer hereby agrees and binds himself to pay unto the owner as full compensation for the use or hire of said schooner barge *David Wallace* the sum of three hundred and twenty-five dollars ($325) per month, payable at the Commercial National Bank, Cleveland, Ohio, on the first day of each and every month during the term of this charter. The charterer also agrees to insure said schooner barge against marine and fire risks for the benefit of the owner and for the sum of eighteen thousand dollars ($18,000). The expense incident to such insurance to be paid by the charterer and the charterer further agrees to insure the owner against accidents to employees."

"The owner shall have a lien upon all cargoes and sub-freight for the charter money due under this charter. Should said schooner barge be lost, all money paid in advance and not earned, reckoned from the time of loss, shall be returned to the charterer."

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"It is further understood and agreed that the charterer shall not be bound by the terms of this contract unless the charterer shall be able to arrange for the safe passage of the said barge through the rapids of the St. Lawrence River."

"The owner agrees to sell to the charterer at any time prior to October 1st, 1899, the said schooner barge *David Wallace* at the rate of twenty thousand dollars ($20,000.")

"The charterer agrees to pay all running expenses of this schooner barge and including ordinary repairs and replacements, necessary to keep the vessel up and insurable. The charterer agrees that there shall be no authority to incur any lien or place any incumbrance on the vessel and when re-delivered, she shall be free from liens."

"In witness whereof, &c."

While there was a conflict of testimony at the trial as to whether or not the necessaries were supplied, on the order of the master, on the credit of the vessel and owners, or on his order or that of the port captain on the credit of the charterers, the judge below found that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor.

The judgment of the court below (26th November, 1902) was as follows:

MACDONALD, (C.J) L.J:

"The Barge *David Wallace*, a vessel registered at the port of Detroit, United States of America, while on a voyage from the Upper Lakes *via* the St. Lawrence, to an Atlantic port of the United States was towed into Port Hawkesbury, Nova Scotia, in distress; and while there was as the plaintiff alleges supplied by him on the order of the master with goods required to

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enable the vessel to complete her voyage. After being refitted at Port Hawkesbury the *David Wallace* proceeded on her voyage, and called at the port of Shelburne. She was arrested there in this action on the 4th April, 1899. The receipt of the goods claimed for by the master of the *David Wallace*, and that these goods and supplies were necessaries without which the vessel could not proceed on her voyage, were not denied; but it was alleged by the owners of the vessel, who appeared to the action, that the vessel was not liable because the credit was not given to them or to their agent. It was alleged that the *David Wallace* was, when these necessaries were supplied by the plaintiff, under charter to a company called the Atlantic Transportation Company of New York, and that the supplies claimed for in this action were furnished for and on the credit of that company. A certified copy of the registry of the *David Wallace* was put in on the trial, in which Ferdinand Cobb is stated to be the master; but it does not appear whether this is the person of the same name who was the master of the vessel when the supplies claimed for were furnished by the plaintiff."

"It is alleged by the defendants that, in September, 1898, the *David Wallace* was chartered by the managing owner of the Atlantic Transportation Company, a company organized under the laws of New Jersey, for a period of three years, and that the vessel was on her voyage to New York under this charter when the necessaries claimed for by the plaintiff were supplied. Before reaching her destination, and while lying in the harbour, of Shelburne the Atlantic Transportation Company became bankrupt, and its affairs put into the hands of receivers. These receivers on the 10th February, 1899, addressed to David Wallace, the managing

owner of the vessel, the following notice of abandonment of the charter:—

"DEAR SIR,—As receivers of the Atlantic Transportation Company we beg to advise you that we have decided not to adopt the charter dated September 28th, 1898, made between you as owner of the barge *David Wallace* and the Atlantic Transportation Company. We understand that this boat is at present at Shelburne, Canada, and we send you this notice in order that you may take such action as you may deem advisable for the protection of your interests in the above named barge."

"The first question to be determined is whether the supplies furuished by the plaintiff were necessaries within the meaning of the statute, and I am of the opinion that they were so, at the time and under the circumstances in proof."

"The next question is whether the goods and supplies were furnished to and on the credit of the ship or that of the company called the Atlantic Transportation Company, and represented by Jenks at Port Hawkesbury when the supplies were delivered to the master of the vessel."

"In the *Perla* (1), the Judge of the High Court of Admiralty said, "where the goods are furnished for the use and benefit of a ship the presumption is that the ship is liable, and to rebut this presumption it must be distinctly proved that credit was given to the individual only whoever he may be."

"The plaintiff in his evidence says: "All these accounts charged here were paid by me in cash at the request of the captain. The bills are 'O. K'd' by the captain, which shows that he received the bills, the signature F. T. Cobb on all of the bills is that of the master." On the arrival of the vessel the captain

(1) Swa. at p. 354.

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came to me to deposit his papers and told me he was in trouble and wanted supplies. I had some discussion with him as to the ability of his owner to pay. I asked him who his owners were and if he knew them? He said the owner was a good man and able to pay the bills. The owner's name was mentioned. The owner resides at Lorain, Ohio. "The captain left his papers with me on arrival. They were the ship's papers, the crews' list, etc. This was an American vessel. American vessels always come to me in my capacity as consular agent. I will swear that Cobb never told me at any time that this barge was under charter, not that I remember. I did not hear it from other people; nothing more than that she was in company of chartered barges when she left, not when she arrived."

"I regret that the plaintiff and the master of the defendant vessel are in serious conflict as to important facts. Cobb, the master of the *David Wallace*, says: "I do not know Alexander Bain and did not have a conversation with him about the charterer of said barge in his store when I first reached Port Hawkesbury. I did not order any supplies from him. The supplies he furnished me for the *David Wallace* were ordered by Capt. Benjamin D. Jenks, the port captain of the Atlantic Transportation Company. I simply furnished the information as to what supplies were needed. They were furnished upon the credit of the Transportation Company, and I acted throughout under the direction of Capt. Jenks." Capt. Jenks was present during the conversation I had with Mr. Bain about the charter. He (Jenks) told Bain that as the charterer would have to pay for the supplies, he (Bain) should give me only what he Capt. Jenks should direct or approve of. Mr. Bain assented, and my part in the conversation consisted only in stating what supplies I

needed. I said nothing about whose credit plaintiff should rely on in furnishing the supplies."

"Alfred Jenks says: "I know plaintiff and had several conversations with him about the charterers in his store, and during the time I was in Port Hawkesbury, in November, 1898." He proceeds to say that he ordered these goods on the credit of the company, and gave plaintiffs a draft on the company in payment of these supplies. "I know the *David Wallace* was in possession of the company because I had charge of her for the company. I do not remember that I informed plaintiff in so many words that I wanted the supplies on the credit of the Atlantic Transportation Company; but I informed him that I was their agent and acting for them, and that we had the boats under charter and that he should not furnish supplies to any of them without my order on approval. I made the same statement to him with reference to the *David Wallace*, particularly, in presence of Capt. Cobb."

"It appears from the register, put in evidence, that on the 30th day of September, 1898, Ferdinand Cobb was the master of the *David Wallace*, but there is nothing to show whether this is the same person who gave evidence in the cause and who was master of the vessel when the necessaries were supplied in the month of November in the same year. It is a reasonable inference, however, that while he states he has been appointed master by the charterers when they were put in possession of the vessel, he had been placed in charge by the owners at the date of the register, and continued in charge under the charterers. The property in the ship had changed, but was still in the owners when these necessaries were supplied, and the ruling in *Williams* v. *Alsup* (1) would appear

(1) 10 C. B. N. S. at p. 427.

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to be applicable. In that case Willes J. said: "The mortgagees have taken a property in the vessel for the purpose of securing money advanced by them. By the permission of the mortgagees, the mortgagor has the use of the vessel. He has therefore a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear in this case, this vessel could not be so used unless the repairs had been done to her. The state of things therefore seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but on the ordinary terms subject to the shipwrights' lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given. To that extent I think the property of the mortgagees is impliedly modified." In the case for decision the vessel could not proceed on her voyage without the necessaries supplied; could not have been used in the way in which vessels are ordinarily used; and the master, whether as the agent of the owners or others in possession by permission of the owners, would have the right to obtain these supplies on the credit of the ship. In the *Alexandra* (1), the court said: "That the court must not make the owners of a foreign ship liable for the supply of any articles for which, under similar circumstances, if resident here, they would not be responsible in a court of common law"; and therefore, as was said in the *Sophie* (2), it is in all cases necessary to show that the master or other person at whose order the necessaries were supplied had an authority express or implied to bind the owners.

"For the reasons given, I arrive at the conclusion that under the circumstances in evidence the master here had clearly an implied authority to bind the owners of this vessel."

(1) 1 W. Rob. 260. (2) 1 W. Rob. 369.

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"As to the question of maritime lien for necessaries I refer to the *Henrich Björn* (1), where the court said: "The remedy here is not affected by the decision that there is no maritime lien for necessaries. The court has jurisdiction over the subject-matter, and the arrest in the action gives precedence to the claim over all except liens existing at the time of arrest."

"As to the contradictions or discrepancies in the evidence of the plaintiff and Cobb, the master, I adopt the evidence of the plaintiff with little hesitation. Cobb is not corroborated by Jenks, the alleged agent for those in possession of the vessel. I have already quoted his language where he says: "I do not remember that I informed plaintiff in so many words that I wanted the supplies on the credit of the Atlantic Transportation Company, but I informed him that I was their agent, etc." While the plaintiff distinctly swears that no such information was given him. In the result I think the plaintiff must recover the amount of his claim, with costs."

January 26th, 1903.

The case on appeal was now heard at Ottawa.

J. B. Kenny, for the appellant, contended that the facts in evidence clearly showed that the goods were supplied by the respondent to the charterers. He accepted a draft in payment of the goods from Jenks, the agent of the charterers and not from Cobb, the master of the ship. This shows to whom the credit was given. The barge at that time was in possession of the charterers, but not at the time of the arrest.

Again there is no maritime lien for necessaries. (*The Henrich Björn* (2). The statute does not give any right of action that was not available at common law. A remedy is provided, but no new right of action is

(1) 10 P. D. 44. (2) 11 App. Cas. 270.

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Argument of Counsel.

given. You cannot attach the interest of the owner where the ship is under a demise charter. *The Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1); *The Castlegate* (2); *The Alexander* (3); *The Sophie* (4); *Mitcheson* v. *Oliver* (5); *Manufacturer's Accident Insurance Company* v. *Pudsey* (6); *Sandeman* v. *Scurr* (7).

R. G. Code for the respondent:

The evidence shows that the necessaries were supplied on the credit of the ship. Some of the goods were for the repair of the ship. The accounts are headed: "Schr. *David Wallace* and owners." This is strong corroborative testimony of the respondent's contention that the goods were supplied on the credit of the ship. *The Santandarino* (8).

There is no charter-party before the court. A document purporting to be such was objected to at the trial for lack of proof. This objection was never disposed of by the trial judge. It is submitted that the court on appeal ought not to have regard to this document. *Taylor on Evidence* (9); *The Lemington* (10); *The Tasmania* (11); *The Ticonderoga* (12); *The Ripon City* (13); *Abbott on Shipping* (14).

J. B. Kenny, replied, citing: *The Utopia* (15); *The Parlement Belge* (16); *The Dictator* (17); *The Druid* (18); *The Beeswing* (19).

THE JUDGE OF THE EXCHEQUER COURT now (March 9th, 1903,) delivered judgment.

(1) [1893] A. C. 8.
(2) [1893] A. C. 38.
(3) 1 Wm. Rob. 360.
(4) 1 Wm. Rob. 369.
(5) 5 El. & Bl. 419.
(6) 27 S. C. R. 374.
(7) L. R. 2 Q. B. 86.
(8) 23 S. C. R. 145.
(9) 9th ed. ii, 1219.
(10) 2 Asp. M. C. N. S. 475.
(11) 13 P. D. 118.
(12) Swa. 215.
(13) [1897] P. 226.
(14) 14 ed. 73.
(15) [1893] A. C. 492.
(16) 5 P. D. 197.
(17) [1892] P. 304.
(18) 1 Wm. Rob. 391.
(19) 5 Asp. M. L. C. 484.

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This is an appeal by the managing owner of the barge *David Wallace* from a judgment of the Local Judge in Admiralty of the Admiralty District of Nova Scotia, whereby in an action for necessaries the learned judge found the sum of one hundred and twenty-one dollars and eighty cents to be due to the respondent, and condemned the barge in that sum and costs. The appellant resided at Lorain, in the State of Ohio, in the United States of America. The respondent was the Consular Agent of the United States at Port Hawkesbury, in the island of Cape Breton and Province of Nova Scotia, where he also carried on a general business of fitting out vessels. The barge *David Wallac* was a foreign vessel, and at the time the supplies ir question were furnished was under charter to the Atlantic Transportation Company. This company was incorporated under the laws of the State of New Jersey, and had an office at the City of New York. The supplies were furnished in November, 1898, at Port Hawkesbury. Ferdinand D. Cobb was at the time master of the *David Wallace*, and Benjamin D. Jenks was port captain for the Atlantic Transportation Company, which had in its possession a number of barges that it owned or chartered. The appellant accepted from Jenks a draft on the company for the amount of his account. On the 2nd of January, 1899, the affairs of the company were placed in the hands of receivers. On the 10th of February, the barge then being at Shelburne, in the Province of Nova Scotia, the receivers gave the appellant notice that they had decided not to adopt the charter dated the 28th September, 1898, and made between him as owner of the barge and the Atlantic Transportation Company. The draft which the respondent had taken was not paid, and on the 1st of April following he commenced his action against the barge and owners. The appellant appeared and defended the action.

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On the trial of the action three questions came up for decision, namely:

1. Were the supplies furnished, and the moneys advanced, necessaries?

2. Were the supplies furnished and the moneys advanced on the order of the master and the credit of the vessel and owners, or on the order of the master or port captain and on the credit of the charterers?

3. If the necessaries were supplied on the master's order, had he authority to pledge the credit of the owners, or to make the vessel liable for such necessaries?

The first question the learned judge answered in the affirmative, and his decision is not called in question here.

On the second question there was a direct conflict of testimony between Bain the respondent on the one hand, and Cobb, the master of the vessel and Jenks, the port captain of the company, on the other. Bain's evidence was given at the trial before the learned judge. Cobb's and Jenks' was taken under commission and in answer to interrogatories. When the *David Wallace* arrived at Port Hawkesbury the master left her papers with the respondent as Consular Agent. These included her certificate of registry, but not the charter-party mentioned. The certificate of registry had on surrender of other papers on change of trade been issued on the 30th of September, 1898, at the Port of Detroit, in the State of Michigan. From the certificate it appeared that the barge or schooner had been built at Cleveland, in the State of Ohio, in the year 1884; that her net tonnage was something over one thousand tons; that she was owned by the appellant and about twenty other persons, and that Ferdinand Cobb, of Lorain, Ohio, was master. Cobb, in his evidence, gives his name as Ferdinand D. Cobb, and

his residence as Brooklyn, in the City of New York. There is no doubt, however, that the same person is intended in each case. Neither Cobb nor Jenks ever saw the charter-party; but from the positions they respectively held in the employ of the Atlantic Transportation Company, and from their dealings with the company, they knew that the barge was chartered by the company; that it was in their possession and under their control; that the master was appointed and paid by them; and that they, through the master, engaged the crew and were to pay their wages and bear other running expenses. Whether or not Bain, the respondent, was in a general way aware of these facts, was one of the matters as to which there was the conflict of testimony that has been referred to.

From the certificate of registry that was left with him Bain knew who the owners were, and he testified that he asked the master about them and whether they were able to pay. He also said that the appellant's name was mentioned and that the master said he was a good man and able to pay the bills. All of the vouchers for things supplied or paid for were certified by the master, and some were made out to the barge *David Wallace* and owners. He stated that he furnished or paid for the supplies at the request of the master and on the credit of the owners of the vessel, and not on the credit of the charterers. Cobb, the master, on the other hand, deposed that he did not order any supplies from the respondent for the *David Wallace*; that such as were furnished were ordered by Jenks, the charterers' port captain, under whose directions he acted; that he only gave the necessary information as to what supplies were needed; and that the latter were furnished on the credit of the charterers, the Atlantic Transportation Company. He also testified that Jenks took him to Bain's store, and

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introduced him and told Bain that as the charterers would have to pay for the supplies, Bain should only furnish what he, Jenks, should direct or approve of, and that Bain assented to this.

The answers of Jenks to the interrogatories submitted to him were to the same effect. He stated that he had several conversations about the charterers with Bain in his store. This was in November, 1898. On his arrival at Port Hawkesbury, Bain was already furnishing supplies to some of the Atlantic Transportation Company's boats, and he told Bain not to give anything more to any boat except on his order. He also informed Bain that he was agent for the company, and he ordered the supplies in question on their credit and gave Bain a draft on them in settlement of the account. Bain having been recalled after Cobb's evidence and that of Jenks had been read denied specifically a number of statements that they made. But he admitted that Jenks had told him in reference to some of the other captains not to supply their vessels without his order; but so far as the *David Wallace* was concerned he denied that Jenks had ordered the supplies or introduced Cobb to him. He also admitted that Jenks had given him a draft on the company in settlement of his account, and he produced the draft and explained that Cobb, when he brought his bills to him told him to put them in with Jenks. From his evidence as a whole it is clear that he knew of the Atlantic Transportation Company and that Jenks was their agent. He supplied some of their vessels on the order of the latter, and he admits that he had heard that some of the company's barges were purchased by them and others hired or chartered. He could not say that he had ever heard that this particular barge (the *David Wallace*), was under charter to the company, but he had heard it talked of that they all were. But

he denied that Cobb had ever told him that the barge was under charter to the company. However that may be, there is, I think, no reason to doubt that at the time he knew the *David Wallace* was one of the barges the company had in its possession, although he did not know what the terms and conditions of the charter-party were. Except so far as he may have thought the vessel would itself be liable, there was, it seems to me, no reason why he should at the time prefer the owners' credit to the charterers' credit. He was furnishing other supplies for the latters' barges, and for those furnished to the *David Wallace* he took without demur a draft made on them by their agent. On the other hand the master knew that the expenses incurred should be borne by the charterers and not by the owners, and, apart altogether from the question of authority, there does not appear to have been any necessity for his pledging the owners' credit.

The learned judge accepted the respondent's version of what took place and found in his favour that the necessaries in question were furnished on the order of the master and on the credit of the vessel and owners, and not on the credit of the charterers, and whatever view one might otherwise have been inclined to take, as to that, the respondent is, I think, on this appeal, entitled to the benefit of the finding in his favour.

Taking it then to be established that the necessaries were supplied on the order of the master and not of the charterers' agent or port captain, we come to the third question, namely: Had the master authority to pledge the owners' credit, or to make the vessel liable for the necessaries furnished?

Now in answering that question the first enquiry that arises is: Was the master, in ordering the supplies furnished, the servant of the owners of the vessel? For as stated by Lord Herschell, then Lord

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Chancellor, in a case decided in 1892, in which it was unsuccessfully sought to make the owners liable upon bills of lading signed by the master, it cannot be disputed as a general proposition of law that a person who does not himself enter into a contract can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority (1). In the case of *Mitcheson* v. *Oliver* (2), decided in 1855, Parke, B. expressed the same rule in these terms: "No contract can bind a "defendant unless made by some one who had real "authority to bind him, or unless the defendant is "precluded from denying that there was authority in "the person who made the contract;" and he added that it was then perfectly settled that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship. The same principle is illustrated by the case of *Frazer* v. *Marsh* (3) decided in 1811, in which Lord Ellenborough, C. J. said that it would be pushing the effect of the registry Acts too far to say that the registered owner who divests himself by charter-party of all control and possession of the vessel for the time being in favour of another who has all the use and benefit of it, is still liable for stores furnished to the vessel by order of the captain during the time. The question was whether the captain who ordered the stores was or was not the servant of the defendant who was sued as owner? And as in the case then under consideration, they did not stand at the time in the relation of owner and master to each other, it was held that the captain was not the defendant's servant, and therefore the latter was not liable for his act.

(1) *Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893] A. C. 16.

(2) 5 E. & B. 443.

(3) 13 East 239.

That being the well settled rule of the common law, one naturally enquires as to whether it is in anyway modified by anything to be found in the law or statutes relating to the Admiralty Court or its jurisdiction, which in Canada depends upon, and on this subject is the same as, the law of England (1). In approaching this enquiry it will be found in the first place that it has been held that the Court of Admiralty had no inherent jurisdiction in respect of necessaries supplied to a ship. That proposition has not been accepted without reserve by text writers (2); but it has the support of the highest authority. In their lordships' judgment in the case of *The Two Ellens*, (3), decided in the Privy Council 1872 occurs the following passage:

"It is clear that previous to the passing of the 3 & "4 Vict. c. 65, the Court of Admiralty had no juris- "diction in the case of necessaries supplied to a ship, "and that the supply of such necessaries did not give "any maritime lien upon the ship. It is perfectly true "that for many years prior to the time of Charles II "the Court of Admiralty had claimed, and to a con- "siderable extent exercised, such a jurisdiction; but "the Courts of Common Law, in the time of Charles "II., and subsequently, had prohibited them from "exercising that jurisdiction on the ground that they "never possessed it. Subsequently in the case of *The* "*Neptune* (4), it was decided by this tribunal that "there was no such jurisdiction. Therefore notwith- "standing this jurisdiction was practically exercised "for years, it must be taken now to be conclusively "the law that the Court of Admiralty, by the law of "England, never had jurisdiction in a suit for neces-

(1) *The Colonial Courts of Admiralty Act*, 1890, 53-54 Vict. c. 27, s. 2 (2) and (3) (*a*).

(2) See William's & Bruce's Admiralty Practice, 3rd ed., p. 191, note (*h*), and p. 195, note (1).

(3) L. R. 4 P. C. 166.

(4) 1 Knapp's P. C. Cases, 94.

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" saries supplied to a ship, and that necessaries so sup-
" plied did not give a maritime lien on a ship."

Then in the case of *The Henrich Björn* (1), Lord Bramwell, dealing with the contention that there was jurisdiction where the necessaries were supplied on the high seas says, in effect, that the contention had not been sustained, and that Lord Tenterden's opinion was to the contrary. Where a maritime claim arose within the body of a county the Court of Admiralty, before the year 1840, as pointed out by Lord Watson in the same case (2) never possessed, although it did occasionally, when not prohibited, exercise jurisdiction. By the 6th section of *The Admiralty Court Act*, 1840 (3), it was provided that the High Court of Admiralty should have jurisdiction to decide all claims and demands whatsoever in the nature of salvage, for services rendered to, or damages received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel was within the body of a county or upon the high seas at the time when the services were rendered or damages received, or necessaries furnished in respect of which such claim was made. Then by *The Admiralty Court Act*, 1861, section 5 (4) it was among other things provided that the High Court of Admiralty should, unless it were shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship was domiciled in England and Wales, have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belonged (5).

(1) 11 App. Cas. 282.
(2) 11 App. Cas. 277.
(3) 3 & 4 Vict. c. 65.
(4) 24 Vict. c. 10.
(5) Sec. 5.

In the case of *The Ella A. Clark* (1), and again in the case of *The India* (2), decided a little later in the same year (1863), Dr. Lushington held that the provision last cited did not apply to foreign ships. But that decision was overruled by the Court of Appeal in the case of *The Mecca* (3). Another question that arose on these statutes was whether they gave the material man a maritime lien on the ship, or only enabled him to enforce his claim in the Admiralty Court, and as one means to that end gave him a right to arrest the ship, but no right against the ship until the action was instituted The construction put upon the sixth section of the Act of 1840, and in general acquiesced in for a number of years, was that it gave such a lien to a person who supplied necessaries to a foreign ship in an English port; while an opposite view was taken as to the effect of the fifth section of the Act of 1861 (4)

In 1884 in the case of *The Rio Tinto* (5), it was held by the Judicial Committee of the Privy Council that section 10, sub-section 10 of *The Vice Admiralty Courts Act*, 1863 (since repealed) by which jurisdiction was given to Vice-Admiralty Courts in respect of claims for necessaries supplied in the possession in which the court was established to any ship of which no owner or part-owner was domiciled within the possession at the time of the necessaries being supplied, did not create a maritime lien with respect to such necessaries. Then in 1886 in the case of *The Henrich Björn* (6), the question as to whether the sixth section of the Act of 1840 gave a maritime lien in respect of necessaries

(1) Br. & L. 32.
(2) 32 L. J. Ad. 185.
(3) [1895] P D 95.
(4) *The West Friesland*, Swa. 454; *The Ella A. Clarke*, Br. & L. 32; *The Pacific*, Br. & L. 213; *The Troubadour*, L. R. 1 A. & E. 302; *The Two Ellens*, L. R. 4 P. C. 161.
(5) 9 App. Cas. 356.
(6) L. R. 10 P. D. 54; 11 App. Cas. 270.

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supplied to a foreign ship in an English port came again under discussion, and it was held by the Court of Appeal and by the House of Lords that it did not. This decision is of great importance and must always be kept in view in dealing with any question respecting the supply of necessaries to a ship. There is a wide difference between the right to enforce a lien against a ship and a right to arrest her to enforce a claim that the plaintiff has against her owner. As pointed out by Lord Justice Fry, in giving the judgment of the Court of Appeal in the case last mentioned (1): "A maritime lien arises the moment "the event occurs which creates it; the proceeding "*in rem* which perfects the inchoate right relates "back to the period when it first attached; the "maritime lien travels with the thing into whoso- "ever possession it may come (2); and the arrest "can extend only to the ship subject to the lien. But "on the contrary the arrest of a vessel under the "statute is only one of several possible alternative "proceedings *ad fundandam jurisdictionem*; no right in "the ship or against the ship is created at any time "before the arrest; it has no relation back to any "earlier period; it is available only against the prop- "erty of the person who owes the debt for necessaries; "and the arrest need not be of the ship in question, "but may be of any property of the defendant within "the realm. The two proceedings, therefore, though "approaching one another in form are different in sub- "stance."

The difference in the position of a creditor who has a proper maritime lien, and one who has no such lien, was also referred to by Lord Watson (3), as follows: "The former, unless he has forfeited the right by his

(1) L. R. 10 P. D. 54.
(2) *The Bold Buccleugh*, 7 Moo. P. C. 284.
(3) 11 App. Cas. 277.

"own laches, can proceed against the ship notwith-
"standing any change in her ownership, whereas the
"latter cannot have an action *in rem* unless at the
"time of its institution the *res* is the property of his
"debtor." And the distinction is of especial importance in cases where, as in the present case, the possession and control of the ship has passed from the actual owner to the charterer who becomes owner *pro tempore* or *pro hâc vice*. In such a case, as has been seen (1), the owner is not liable for necessaries supplied to the ship, and the ship is not liable therefor where the owners are not liable.

Dr. Lushington, in the case of *The Sophie* (2) said that he had observed in a recent case (*The Alexander* (3)), and that he wished it to be distinctly understood, that in all these cases he never could make a ship responsible for advances and supplies for which the owner himself, if he were in the country, would not be responsible. That case is referred to in *William's & Bruce's Admiralty Practice* (4) where it is stated that "it has been laid down in general terms that the "court will entertain claims for necessaries only in "cases where the owners would be liable at common "law. Therefore in all cases it should be shown that "the master or other person at whose orders the neces-"saries were supplied had authority express or implied "to bind the owners." In the class of cases under consideration, that is, where there is a demise of the ship, there is no such authority.

The question under discussion has also arisen in actions on bills of lading signed by the master, or for disbursements made by him, and in actions for damage, and it will, I think, be convenient to refer to some of these cases in further illustration of the subject.

(1) *Frazer* v. *Marsh*, 13 East. 239 and *Mitcheson* v. *Oliver*. 5 E. & B. 443.

(2) 1 Wm. Rob 369.

(3) 1 Wm. Rob. 360.

(4) 3rd ed. p. 192.

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In the case of *Colvin* v. *Newberry* (1) which was twice tried and went to the Exchequer Chamber, and from there to the House of Lords, it was held that the owners of a ship who had demised her to the master, were not liable to persons who knowing the terms of the charter-party had shipped goods on board the vessel. In such a case an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore* during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner (2). This case is an interesting one because of the difference of opinion elicited and from the fact that Lord Tenterden who had concurred in the judgment in the Court of King's Bench in favour of the plaintiffs, in the end moved the judgment in the House of Lords by which the decision of the Exchequer Chamber reversing the Court of King's Bench was affirmed. It is also an important case. It was first tried in 1820, and the decision of the House of Lords was not given until 1832. At that time the Court of Admiralty had no jurisdiction over any claim of that kind. Such jurisdiction as it now has is derived from the sixth section of *The Admiralty Act*, 1861 (3), by which it is provided that the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port of England or Wales, in any ship for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty, or breach of contract, on the part of the owner, master, or crew of the ship, unless it is shown to the satisfac-

(1) 1 C. & F. 283.

(2) Per Lord Tenterden, 1 C. & F. 297.

(3) 24 Vict. c. 10.

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tion of the court that at the time of the institution of the cause any owner or part owner of the ship was domiciled in England or Wales. The case of *The St. Cloud* (1863) (1) was, I think, the first to arise under this provision. In that case it was contended on the part of the defendant, the shipowner, that by reason of the charter party, and the nature of the action, the charterer alone, and not the owner of the ship would be liable at common law for the damage done to the goods, and that therefore the action against the ship could not be maintained. Dr. Lushington found that the defendant had not divested himself altogether of the possession of the ship; that there was no demise, and it became unnecessary for him to express any opinion upon the second proposition relied upon. He also attached weight to the fact that it had not been proved that the shipper had notice of the charter-party. "Until he had such notice" it is stated (2) he "would be justified in supposing that in dealing with "the master for the carriage of his goods, he was deal-"ing with the owner's agent. For *primâ facie*, the "master is the agent of the owner of the ship." *Sandeman* v. *Scurr* (3) was an action against the owners of the ship, not against the ship. On the facts presented it was held that there was no demise of the ship; that the charter-party amounted to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continued through the master and crew in the possession of the owner, the master and crew remaining his servants. That, Chief Justice Cockburn, delivering the judgment of the court stated, was the ground upon which their judgment was founded (4); and he added: "We think that so long as the relation of owner and

(1) Br. & L. 4.
(2) P. 15.
(3) L. R. 2 Q. B. 86.
(4) *Ibid.* p. 96.

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" master continues, the latter, as regards parties who " ship goods in ignorance of any arrangement whereby " the authority ordinarily incidental to that relation " is affected, must be taken to have authority to bind " his owner by giving bills of lading. We proceed " upon the well-known principle that, where a party " allows another to appear before the world as his " agent in any given capacity, he must be liable to any " party who contracts with such apparent agent in " a matter within the scope of such agency. The " master of a vessel has by law authority to sign " bills of lading on behalf of his owners." In this case also weight was attached to the consideration that the shipper was not aware of the charter-party. The case was decided in 1866, and we turn from it to a case that went to the House of Lords and was there decided in 1892, in which it was held that the owner of a ship who has parted with the possession and control of the ship under a charter-party to the charterer is not liable for the loss of goods shipped under bills of lading signed by the captain who was the servant of the charterer, and not of the owner, and who had no authority from the owner to pledge his credit, although the shipper of the goods had no notice of these facts (1). In that case, to which reference has already been made, the owner of the ship who was registered as such, and also as managing owner under *The Merchant Shipping Act*, 1876, let her by charter-party for a term of four months. The charter-party provided that the captain, officers and crew should be paid by the charterer; that the captain should be under the orders of the charterer as regards employment, agency or other arrangements; that the charterer should indemnify the owner from all liabilities arising from

(1) *The Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893[A. C. 8.

the captain signing bills of lading; and that the owner should maintain the ship in a thoroughly efficient state in hull and machinery for the service, and should pay for the insurance on the ship. The charterer took possession of the ship and appointed the captain, officers and crew, except the chief engineer, who was appointed by the owner in exercise of the option given him by the charter-party. The charterer sent the ship to New Orleans, where the goods were shipped under bills of lading, some of which were signed by the captain, and some by the agents of the charterer. Neither the captain nor the charterer's agents had any authority in fact from the owner to pledge his credit. The bills of lading contained no reference to the charter party, and the shippers had no notice of its terms. The goods were lost at sea during the currency of the charter owing, it was alleged, to the unseaworthiness of the ship, and the shippers brought their action against the owner for the loss. Lord Herschell, L.C., having shown that the master was not in fact in this case the owner's servant, continued as follows (1):

"But then it is suggested that the liabilities "which arise as between the shipper of goods and the "shipowner may be regarded as to some extent excep- "tional; that although looking at the matter apart from "the relationship to which I have just alluded, there "might be a difficulty in establishing liability, the lia- "bility nevertheless may be made out where the rela- "tionship of shipper and shipowner is found to exist. "But there may be two persons at the same time in diff- "erent senses not improperly spoken of as the owner of "a ship. The person who has the absolute right to the "ship, who is the registered owner, the owner (to borrow "an expression from real property law) in fee simple, "may be properly spoken of no doubt as the owner;

(1) *Ibid.* p, 17.

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" but at the same time he may have so dealt with the " vessel as to have given all the rights of ownership for " a limited time to some other person, who during that " time, may equally properly be spoken of as the owner. " When there is such a person, and that person appoints " the master, officers and crew of the ship, pays them, " employs them and gives them the orders, and deals " with the vessel in the adventure, during that time all " those rights which are spoken of as resting upon the " owner of the vessel, rest upon that person, who is, for " those purposes during that time, in point of law to be " regarded as the owner. When that distinction is once " grasped it appears to me that all the difficulties that " have been raised in the case vanish. There is nothing " in your lordships' judgment, as I apprehend, which " would detract in the least from the law as it has been " laid down with regard to the power of a master to " bind an owner, or with regard to the liabilities " which rest upon an owner. The whole difficulty has " arisen from failing to see that there may be a person " who, although not the absolute owner of the vessel, is " during a particular adventure, the owner for all those " purposes." The difference between such a case and one in which, although the vessel is chartered, the master and crew remain truly the servants of the owner, is alluded to. In the latter case he thought it to be perfectly clear that by reason of the relationship still subsisting, the owner became bound by such a contract as a bill of lading, and by all contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorized to make, binding the owner. Lord Herschell referred to a number of cases that have been cited. He adopted the test of liability that Lord Ellenborough applied in *Frazer* v. *Marsh* (1) where a master orders stores, and

(1) 13 East 238.

he expressed his opinion that there was no difference between such a case and the case of liabilty in respect of any other matter which the master has a right to do on behalf of his owner, whoever he may be. With respect to notice he did not think that that was an essential part of the defendant's case in *Colvin* v. *Newberry* (1); and he thought it unnecessary to refer to the cases of *The St. Cloud* (2); *Hayn* v. *Culliford* (3); and *Sandeman* v. *Scurr* (4) as they were all ordinary cases of charter-party where there was no pretence of saying that there had been any demise, or anything in the nature of a demise of the vessel, but where the vessel had been chartered, the master of the vessel remaining the servant of the owner. I have already referred to this case at great length, but the reasons for judgment are so instructive that I venture to add the following extracts from the judgment of Lord Watson (5):—

"At the time when the bills of lading were signed "and also at the time when the goods of the appel- "lants suffered damage, the ship was in the possession "and under the control of the charterers who em- "ployed their own master and crew in the navigation. "That point once fixed, it appears to me that there is "really no substantial question which can arise upon "this appeal * * *

"The master who signed the bill of lading was the "servant and agent of the charterers, and not the ser- "vant and agent of the respondent Furness. In that "state of facts the appellants, in order to succeed here, "must establish that the present case forms an ex- "ception from the general rule that a man is not liable "upon contracts made by persons who are neither his

(1) 8 B. & C. 166; 7 Bing. 190; and 1 Cl. & F. 283.
(2) Br. & Lush. 4.
(3) 3 C.P.D. 410; 4 C.P.D. 182.
(4) L. R. 2 Q. B. 86.
(5) [1893] A. C. at p. 21.

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" agents nor his servants. It was argued that the respondent remains liable for contracts made by the " charterer's agent with shippers who had no notice of " the terms of the charter. For that proposition no " authority whatever was produced. All the decisions " cited at the Bar, so far as they had any bearing upon " such circumstances, appear to me to point very distinctly to the opposite conclusion. No doubt, when " a shipowner who enters into a charter-party without " parting with the possession and control of his ship " seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in " any question with shippers who are ignorant of the " terms of the instrument. That, however, is a question as to the limitation of the powers of an actual " agent who has known powers according to law. " Notice of the limitation must be given to those who " deal with the agent in order to disable them from " contracting with him. But I know of no principle " or authority which requires that notice must be given " when an owner parts even temporarily with the possession and control of his ship in order to prevent " the servant of the charterer from pledging his " credit." In this case some stress was sought to be laid on the fact that the owner was also registered as managing owner. But it was held that that did not make any difference; that the managing owner was registered under the Merchant Shipping Acts, and the register carried about with the vessel for statutory purposes only; and that the legislature did not intend to effect any change in the legal relations existing at the time when the Acts were passed between owners and charterers and the shippers of cargo. In the case of the *Manchester Trust* v. *Furness* (1) the agreement between the owners and charterers was that the own-

(1) [1895] 2 Q. B. pp. 282, 539.

ers should provide and pay for all the provisions and wages of the master and crew and insure the vessel and maintain her in a thoroughly efficient state in hull and machinery during the service. An attempt, however, was made to relieve the owners from liability on bills of lading signed by the master, by providing that he should do so as the charterers' agent; and that the charterers would indemnify the owners against all liabilities arising from the master signing the bills of lading. The latter signed bills of lading in the ordinary form for goods to be delivered to the holders of the bills of lading, they paying freight and other conditions per charter-party. The goods having been misdelivered it was held in an action by the holders of the bills of lading against the shipowners for loss, that the provision in the charter-party referred to did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the master as the agent of the owners; and that the reference in the charter-party to the bills of lading did not give the holders constructive notice of the contents of the charter-party, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions. The case affords another illustration that the test to apply is to find an answer to the question: "Whose servant was the master? Who was "his undiscovered principal when he signed the bill "of lading?" (1) There is another case that may be mentioned here more conveniently than elsewhere, although it did not arise upon a bill of lading. In *Meiklereid* v. *West* (2) it was held that the owner of a demised ship was not liable under section 169 of *The Merchant Shipping Act*, 1854 (3), on an allotment note

(1) Ibid. p. 546.
(2) 1 Q. B. D. 428.
(3) See now *The Merchant Shipping Act*, 1894, s. 143.

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given by a master who was appointed by the charterers.

A seaman has, by the maritime law, a lien on the ship and freight for his wages. The master formerly had no lien therefor or for anything due to him from the owners, and no right to resort to the Admiralty Courts. That has been changed by statute, and now he has a lien on ship and freight for wages and disbursements (1). After the passing of *The Admiralty Court Act*, 1861, and until 1889, when the case of *The Sara* was decided in the House of Lords, it was thought that the master had a lien on the ship for his disbursements, as well as for his wages. That was held in the cases of *The Mary Ann*, (2) *The Feronia*, (3) and *The Ringdove*, (4) but these cases were overruled by the House of Lords in the case of *The Sara* (5), and it was held that the master had no lien on the ship for his disbursements. Then followed *The Merchant Shipping Act*, 1889, by the first section of which the lien was given (6). But this lien does not extend to disbursements made on the charterer's account. For disbursements made as the agent or servant of the owner the lien exists and may be enforced; but not for disbursements made as the agent or servant of the charterer. Here again the test is:— "Whose servant was the master in making the dis- "bursements?" If the owner's he has his lien; if the charterer's there is no lien, The distinction is illustrated by the cases of *The Beeswing*, (7) and *The Turgot*, (8) and the question was fully discussed in the

(1) 7 & 8 Vict. c. 112, s. 16; *The Merchant Shipping Act*, 1854, s. 191; *The Admiralty Court Act*, 1861, s. 10; *The Merchant Shipping Act*, 1889, 52 & 53 Vict. c. 46, s. 1; *The Merchant Shipping Act*, 1894, s. 167.

(2) L. R. 1 A. & E. 8.

(3) L. R. 2 A. & E. 65.

(4) 11 P. D. 120.

(5) L. R. 14 App. Cas. 209.

(6) 52 & 53 Vict. c. 46 s. 1, and *The Merchant Shipping Act*, 1894. s. 167, ss. 2.

(7) 5 Asp. N. S. 484.

(8) 11 P. D. 21.

case of *The Castlegate*, (1) in which it was held by the House of Lords that the master has no maritime lien on the ship for disbursements for which he has no authority to pledge the owner's credit. In the case of *The Ripon City*, (2) in which the lien of the master was sustained, will be found an exhaustive review of the cases by Mr. Justice Gorell Barnes. In the latter case the action was brought in the name of the master by the person who had furnished the supplies, a practice that is sometimes resorted to to afford the material man the benefit of a lien on the ship that would not exist in his own favour.

The Court of Admiralty always had jurisdiction over torts committed by subjects of the Crown upon the high seas. For a discussion of the question of the inherent jurisdiction of the Court of Admiralty for damage, reference may be made to the case of *The Zeta*, (3). By *The Admiralty Court Act*, 1840 (4), jurisdiction was given to the court, as has been seen, to decide all claims and demands whatsoever in the nature of damage received by any ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel was within the body of a county or upon the high seas at the time the damage was received; and by *The Admiralty Court Act*, 1861 (5) it was given jurisdiction over any claim for the damage done by any ship. The maritime lien resulting from collision is not absolute. That, Sir James Hannen, in the case of *The Tasmania* (6) said was the result of the authorities. "It is," he adds "a *primâ facie* liability of the "ship which may be rebutted by showing that the "injury was done by the act of some one navi- "gating the ship not deriving his authority from

(1) (1893) App. Cas. 38.
(2) (1897) P. D. 226.
(3) (1893) App. Cas. 468.
(4) 3 & 4 Vict., c. 65, s. 6.
(5) 24 Vict. c. 10, s. 7.
(6) 13 P. D. 118.

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"the owners; and that, by the maritime law, char-
"terers, in whom the control of the ship has
"been vested by the owners, are deemed to have
"derived their authority from the owners so as
"to make the ship liable for the negligence of the
"charterers, who are *pro hâc vice* owners. These pro-
"positions do not lead to the conclusion that where as
"between the charterers and the person injured, the
"charterers are not liable, the ship remains liable
"nevertheless. On the contrary I draw from these pre-
"mises the conclusion that whatever is a good defence
"of the charterers against the claim of the injured
"person is a good defence for the ship, as it would have
"been if the same defence had arisen between the
"owners and the injured person." And it has been held that there was no maritime lien in cases of damage where the master of the vessel who committed the act complained of exceeded his authority, (*The Druid* (1)); where the vessel in fault belonged to the sovereign of a foreign state, (*The Parlement Belge* (2)); where the charterers had protected themselves from liability by contract with the person complaining of the injury, (*The Tasmania* (3)); and where the control and management of the vessel which had been wrecked had passed from the owners to the port authorities, (*The Utopia* (4)). The following is an extract from the judgment of the Judicial Committee of the Privy Council in the case last-mentioned, delivered by Sir Francis Jeune (5).

"It was suggested in argument that as the action
"against the 'Utopia' is an action *in rem*, the ship
"may be held liable, though there be no liability in
"the owners. Such contention appears to their lord-
"ships to be contrary to principles of maritime law

(1) 1 W. Rob. 398.
(2) L. R. 5 P. D. 197.
(3) L. R. 13 P. D. 110.
(4) [1893] A. C. 492.
(5) P. 499.

" now well recognized. No doubt at the time of action " brought a ship may be made liable in an action *in* " *rem*, though its then owners are not, because, by rea- " son of the negligence of the owners, or their servants " causing a collision, a maritime lien on their vessel " may have been established; and that lien binds the " vessel in the hands of subsequent owners. But the " foundation of the lien is the negligence of the " owners or their servants at the time of the collision, " and if that be not proved no lien comes into exist- " ence, and the ship is no more liable than any other " property which the owner at the time of the collision " may have possessed." *The Bold Buccleugh* (1), *The Ticonderoga* (2), and *The Lemington* (3), afford illustrations of cases in which the maritime lien for damage was enforced. In the case of *The Castlegate*, to which reference has been made, the action was for master's disbursements, but the question of lien for damage was discussed, and Lord Watson made some observations with reference to the authorities that have just been cited (4): "In the case of lien for wages of master and " crew" he said "the legislature has recognized the " rule that it attaches to ships independently of any " personal obligation of the owner, the sole condition re- " quired being that such wages shall have been earned " on board the ship. But that rule which is found- " ed upon obvious considerations of public policy con- " stitutes an exception from the general principle of " the maritime law, which I understand to be that, in- " asmuch as every proceeding *in rem* is in substance a " proceeding against the owner of the ship, a proper " maritime lien must have its root in his personal lia- " bility. It was argued that the case of lien for dam- " ages by collision furnishes another exception to the

(1) 7 Moo. P. C. 267.
(2) Swa. 215.
(3) 2 Asp. N. S. 475.
(4) [1893] A. C. 52.

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" general rule, and there are decisions and dicta which " point in that direction; but these authorities are " hardly reconcilable with the judgment of Dr. Lush- " ington in *The Druid* (1) or with the law as laid down " by the Appeal Court in *The Parlement Belge*, (2) " where the present Master of the Rolls, with the as- " sent of James and Baggallay, L.JJ., stated: 'In a " ' claim made in respect of a collision the property is " ' not treated as the delinquent *per se*. Though the " ' ship has been in collision and has caused injury by " ' reason of the negligence or want of skill of those " ' in charge of her, yet she cannot be made the means " ' of compensation if those in charge of her were not " ' the servants of her then owner, as if she was in " ' charge of a compulsory pilot. That is conclusive to " ' show that the liability to compensate must be fixed, " ' not merely on the property, but also on the owner " ' through the property.' "

And in *Abbott on the Law of Shipping* (3) it is suggested that the grounds upon which it has been held that a ship chartered so as to pass the possession and control of the ship to the charterers may nevertheless be liable in an action *in rem* for the tortious acts of the charterers' servants seem to require further consideration. The grounds given are that as the actual owners have allowed the charterers to become owners *pro hâc vice* the latter must be deemed to have received from the actual owners authority to subject the vessel to claims in respect of which maritime liens may attach to her, and that if damage is done by the negligence of such persons or their servants, the persons injured are entitled by maritime law to a lien on the *res* for the damage sustained. It is of course as indisputable that one cannot be made to answer for the

(1) 1 W. Rob. 391. (2) 5 P. D. 197.
(3) Ed. 1901, p. 73.

wrong of a person who is not his agent or servant as it is that he is not liable on a contract made by such person, unless for some reason he is estopped from denying that the person is his agent or servant.

With regard to notice the result of the cases seems to be that in actions for necessaries or master's disbursements, or on bills of lading the notice or want of notice is important and may be essential where the real owner retains some measure of control over the ship (1); but where he wholly divests himself of the possession and control of the ship the want of notice is not material (2). In the former case the master remains the servant of the owner, and the relationship of principal and agent existing between them, the known authority of the agent cannot be effectually cut down without notice to persons who deal with the agent; but in the latter case the master is not the servant of the owner; no such relationship exists; he has no such authority, and notice is not material. In the case under consideration it seems to me from his own evidence that the plaintiff knew that the barge was under charter to the Atlantic Transportation Company, although he did not know the terms of the charter-party.

It also appears from the cases that have been cited that where a maritime lien comes into existence upon the doing of the act that gives rise to the cause of action the ship may be liable although the real owner may not be liable. But in cases where there is no such lien the ship is not liable unless the owner is liable. A person who supplies necessaries to a ship has no maritime lien on the ship for such necessaries, and the

(1) *Colvin* v. *Newberry*, 1 Cl. & F. 283; *The St. Cloud*, Br. & L. 4, 15; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86; *The Turgot*, 11 P. D. 21; *The Castlegate*, [1893] App. Cas. 38; *The Manchester Trust* v. *Furness*, [1895] 2 Q. B. D. 539.

(2) *The Baumwoll Manufactur Von Carl Scheibler* v. *Furness*, [1893] A. C. 8.

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real or absolute owner is not liable therefor where at the time the necessaries were supplied he has no possession or control of the ship. In fact, except in cases where the master has a lien for disbursements for necessaries, a matter not now under consideration, one cannot with absolute propriety, speak of the liability of a ship for necessaries. She may in certain cases be proceeded against at the suit of the person who supplies them, but the action is really for the owner's debt, not the ship's, although the necessaries may have been supplied on her account. The action, however, cannot be maintained if the owner is not the debtor, and where he is the debtor it will not lie if the necessaries are supplied at the port to which the ship belongs, or if at the time of the institution of the action any owner or part owner of the ship is domiciled in Canada (1).

In the present case the owners are not the debtors. The master, in incurring the debt, was not their agent or servant, but the agent or servant of the charterers. The owners had demised the barge in question to the charterers. The latter appointed the master, and he, for them, the crew. The master's wages and those of the crew were paid by the charterers, and the running expenses were to be borne by them also. In such a case the master in procuring supplies for the barge was the servant or agent of the charterers, and not of the real owners, and the latter are not liable therefor. Neither is the barge. It seems to me that the third question which was stated, and which was in effect answered in the affirmative by the learned judge who heard the case, should be answered in the negative, and that the plaintiff's action should be dismissed. The learned judge in holding the barge liable in this case relied upon the authority of *The Perla* (2) and *The*

(1) *The Admiralty Court Act, Admiralty Act* 1890, s. 2 (3) (*a*) 1861, s. 5; *The Colonial Courts of*

(2) Swa. 353.

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Alexander (1), but in neither of these cases was there any question of the ship being demised. He also referred to the fact that the master's name appeared on the certificate of registry of the vessel, and he thought it a reasonable inference to draw that while the master had, as he stated, been appointed by the charterers when they were put in possession of her, he had been placed in charge by the owners at the date of registry and continued in charge under the charterers. It is not, I think, a matter of importance; but the charter-party bears date of the 28th of September, 1898, while the certificate of registry taken out on surrender of other papers and change of trade was issued on the 30th of that month, so that it may be that the master had never been in the owners' employ, but having been appointed by the charterers, his name was inserted in the vessel's papers.

I am not sure that the learned judge attached any importance to the inference he drew or to the fact that the master's name appeared in the certificate of registry, although he refers thereto. It does not appear to me to make any difference that the master's name was in the certificate of registry, or whether he had, or had not, been in the service of the owners before he was appointed master by the charterers After his appointment by the latter he was their agent and servant, and not the servant or agent of the owners of the vessel.

The amount in question is inconsiderable, but the question is one of importance, and as I came to a conclusion on this branch of the case different from the view taken by the learned judge before whom the case was tried, I have referred to the authorities at much greater length than I would otherwise have thought necessary.

(1) 1 W. Rob. at p. 360.

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The appeal will be allowed with costs, the judgment appealed from set aside, and the action dismissed with costs to the defendant.

Appeal allowed with costs.

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Drysdale & McInnis.*

BETWEEN

GEORGE MACARTHUR.....SUPPLIANT; 1903 April 6.

AND

HIS MAJESTY THE KING.....RESPONDENT.

AND

PATRICK KEEFE.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Public Work—Injurious Affection—Closing up street—Compensation.

The properties of the suppliants were injuriously affected by the construction of a public work which obstructed a highway upon which the properties respectively abutted. MacArthur's property was 150 feet from the place of obstruction and Keefe's 240 feet. The suppliants' properties instead of being respectively situated as they were formerly, on a main thoroughfare, were, by the change affected by the construction of the public work, situated at the extreme end of a street closed up at one end, and forming a *cul de sac.*

Held, that in so far as the value of the properties in the hands of anyone, and used for any purpose to which they could be put, was lessened, the suppliants ought to recover therefor, but not for personal inconvenience occasioned by the obstruction.

PETITIONS OF RIGHT for damages to lands resulting from the construction of the Cardinal Canal, a public work of Canada.

The facts are stated in the reasons for judgment.

February 5th, 1903.

The cases were now argued at Ottawa.

D. B. Maclennan, K.C., for the suppliants, relied on the following cases as establishing the right of the

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suppliants to recover damages: *McQuade* v. *The King*; (1) *The Queen* v. *Barry* (2); *Metropolitan Board of Works* v. *McCarthy* (3); *Caledonian Ry. Company* v. *Walker's Trustees* (4).

F. H. Chrysler, K.C., for the respondent, contended that the English cases were not conclusive of the question of the suppliants' right to compensation for injurious affection. The English cases depend upon the construction of statutes which have not been, in many respects, adopted by the Parliament of Canada. He cited *re Stockport &c., Railway Co.* (5); *Fremantle Corporation* v. *Annois* (6); *London, Brighton & South Coast Ry Co.* v. *Truman* (7); *Eagle* v. *Charing Cross Ry. Co.* (8); *Mayor of Montreal* v. *Drummond* (9); Imperial Statutes, 8 & 9 Vict. c. 18, 8 & 9 Vict. c. 20; *Hodges on Railways* (10); *Chamberlain* v. *West End of London and Crystal Palace Railway Co.*(11); *Iveson* v. *More* (12); *Chichester* v. *Lethbridge* (13); *Pain* v. *Patrick* (14); *Benjamin* v. *Storr* (15); *Ashley* v. *Harrison* (16); *Winterbottom* v. *Lord Derby* (17); *Fritz* v. *Hobson* (18); *Chaplin* v. *Westminster* (19); *Bigg* v. *London* (20); *Lyons* v. *Fishmonger's Co.* (21); *Moore* v. *Esquesing* (22); *Falle* v. *Tilsonburg* (23); *Vandecar* v. *East Oxford* (24); *Atkinson* v. *Chatham* (25); *Ricketts* v. *Markdale* (26); *Beckett* v. *Midland Ry. Co.* (27); *Powell* v. *Toronto*,

(1) 7 Ex. C. R. 318.
(2) 2 Ex. C. R. 333.
(3) L. R. 7 H. L. 243.
(4) 7 App. Cas. 259.
(5) 33 L. J. 251.
(6) [1902] A. C. 213.
(7) 11 App. Cas. 45.
(8) L. R. 2 C. P. 638.
(9) 1 App. Cas. 384.
(10) P. 334.
(11) 2 B. & S. 605.
(12) 1 Ld. Raym. 486.
(13) Willes, 71.
(14) 3 Mod. at p. 293.
(15) L. R. 9 C. P. 406.
(16) 1 Esp. 48.
(17) L. R. 2 Ex. 316.
(18) L. R. 14 Ch. D. 543.
(19) [1901] 2 Ch. 329.
(20) L. R. 15 Eq. 376.
(21) 1 App. Cas. 662.
(22) 21 U. C. C. P. 285.
(23) 23 U. C. C P. 167.
(24) 3 Ont. A. R. 131.
(25) 29 Ont. R. 518.
(26) 31 Ont. R. 610.
(27) L. R. 3 C. P. 94.

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Hamilton & Buffalo Ry. Co. (1); *Buccleuch* v. *Metropolitan Board of Works* (2); *Ricket* v. *Metropolitan Board of Works* (3); *Bell* v. *City of Quebec* (4); *North Shore Ry. Co.* v. *Pion* (5); *Parkdale* v. *West* (6); *Nash* v. *Glover* (7); *Glasgow Union Railway Co.* v. *Hunter* (8); *Salmond's Jurisprudence* (9); *Story* v. *New York Elevated Rd. Co.* (10); *Lahr* v. *Metropolitan Elevated Rd. Co.* (11); *Proprietors of Locks & Canals* v. *Nashua &c Rd. Co.* (12); *Haskell* v. *New Bedford* (13); *Roberts* v. *Northern Pacific Rd. Co.* (14).

THE JUDGE OF THE EXCHEQUER COURT now (April 6th, 1903,) delivered judgment.

The suppliants, alleging that certain lands and premises, of which they are respectively seized, have been injuriously affected by the construction of the Cardinal Canal, a public work of Canada, bring their petitions to recover compensation for the damages sustained. The evidence in Macarthur's case, so far as it is applicable, is, by the agreement of parties, to be read in Keefe's case, and the two cases were argued together, the questions of law arising therein being the same.

The lands and premises in question, consisting of village lots with residences thereon, are situated in the village of Cardinal, in the County of Grenville. This village is situated on the north bank of the river St. Lawrence. Its population is about one thousand four hundred, and its chief industry is the Edwardsburg

(1) 25 Ont. A. R. 209.
(2) L. R. 3 Ex. 306; L. R. 5 Ex. 221; L. R. 5 H. L. 418.
(3) L. R. 4 Q. B. 358.
(4) 5 App. Cas. 84.
(5) 14 App. Cas. 612.
(6) 12 App. Cas. 602.
(7) 24 Gr. 219.
(8) L. R. 2 Sc. App. 78.
(9) P. 164.
(10) 90 N. Y. 122.
(11) 104 N. Y. 268.
(12) 104 Mass. 1.
(13) 108 Mass. 208.
(14) 158 U. S. 1; 15 S. C. Rep. (U. S.) 756.

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Starch Works, a considerable portion of its population finding employment in these works. Prior to the year 1897 the canal ran between the village and the River St. Lawrence. In that year the construction of a new canal running through the north part of the village was commenced. At that time Dundas Street was the principal street, running east and west through the village. It also formed part of the main highway along the north side of the St. Lawrence River, connecting the towns and village situated on that side of the river. By Dundas Street and the roads connecting therewith communication was had to and from Cardinal and the country to the west, north and east of the village. Among these roads was one mentioned in the evidence as the Nine Mile Road, that led to the Grand Trunk Railway Station and thence north into the country. In the construction of the new canal that part of the main highway along the north side of the River St. Lawrence that has been spoken of as Dundas Street was diverted; and a new highway constructed along the north bank of the canal. That is, Dundas Street was cut off and closed up by the canal both at the east and the west end of the village. That part of the village that was south of the new canal having theretofore been a portion of the mainland, became in reality an island. Dundas Street was cut off in the autumn of 1897. During 1898 a surface crossing from the village to the north of the canal was maintained. Then when the excavation of the prism of the canal made that impossible, a temporary bridge was put up and used for about a year. Then a permanent draw-bridge was constructed. This bridge, which is approximately half way between the two points of intersection of the canal and Dundas Street, was opened for traffic in January, 1900. As stated, it is a draw-bridge. During the season of navigation it

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has to be opened from time to time to allow vessels to pass through the canal. In addition it is crossed by a branch or siding from the Grand Trunk Railway to the Edwardsburg Starch Works. This branch is used for freight traffic only. This use of the bridge and the opening of the draw interferes from time to time with its use as a carriage way, and makes it a less convenient way from and to the village than it otherwise would be. No doubt what was thought to be sufficient and best, having regard to the expense involved, was done. That is not called in question here. But the result is that while before the construction of the public work the means of communication between the village of Cardinal and the country adjacent was free and uninterrupted, it is now restricted and not altogether convenient. This gives rise to more or less personal inconvenience to those who have occasion to go to or from Cardinal on foot or in carriages. But that is not a matter for compensation. There is no question about that. For the suppliants it is conceded that they cannot recover any damages for any such personal inconvenience. But they say that apart from that their properties situated on Dundas Street at the west end of the village, near the point where the street is obstructed by the canal, have been injuriously affected by its construction; and that for the damages thereby occasioned they are entitled to compensation. It appears that at or near this point the canal cut off not only Dundas Street, but the Nine Mile Road that has been spoken of as leading from Dundas Street to the Grand Trunk Railway Station. Macarthur's property is one hundred and ninety feet from the place where these ways are obstructed by the new canal, and Keefe's two hundred and forty. The distance from Macarthur's property to any place reached by the Nine Mile Road was increased by the

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change of way 2,145 feet, and to any place on the main highway leading westerly to Prescott, 2,470 feet. The distance to any point east of the village was increased somewhat, but not considerably. Then the properties, instead of being situated as they were formerly on a main thoroughfare, are now at the extreme end of a street that is closed up, forming a *cul de sac*. So far as these things constitute a personal inconvenience only to the occupiers of the premises, they are not, as has been stated, to be taken into account. But they have, according to the evidence of the witnesses on both sides of the case, another effect. The value of the properties, either for occupation, for letting, or for sale, are thereby lessened. And that is what one would naturally expect to be the case. Everyone knows that the value of property is determined to a greater or lesser extent by its situation and relation to ways and conveniences. There can, I think, be no doubt that the properties in question here have been injuriously affected by the construction of the public work mentioned, and that their value, in the hands of anyone, and used for any purpose to which they could be put, has been thereby lessened. But the fact that lands are injuriously affected by the construction of a public work does not necessarily give rise to a claim for compensation that can be sustained. There are many cases in which that may happen where no claim to compensation can be successfully set up. From decided cases text-writers have deduced four propositions for determining when a claimant may or may not recover compensation in such cases, no portion of his lands being taken. Where part of his lands are taken different considerations arise and different rules prevail. The propositions referred to are variously stated in different text books, but there is a general agreement as to the result of the cases. The

following propositions are given in *Browne & Allan on Compensation* (1) to determine whether the right to compensation exists or not under the Acts of the Parliament of the United Kingdom dealing with the subject. To give a right to compensation—

1. The damage caused must be occasioned by reason of what has been authorized by the legislature, and not from other acts;

2. The damage must arise from that which would, if done without the authority of the legislature, have given rise to a cause of action;

3. The damage must arise from a physical interference with some right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which gives an additional market value to such property apart from the uses to which any particular owner or occupier might put it;

4. The damage must arise from the execution of the works and not from their subsequent use.

The present cases are within the fourth proposition, and nothing more need be said as to that. They are also within that part of the third proposition which relates to a physical interference with a public right that the occupiers were entitled to make use of in connection with their properties and which gave to the latter an additional market value apart from the particular uses to which any particular owner or occupier might put them. Reference will be made to the difference between a physical interference with a public right and a private right when the second proposition is under consideration, and it will not be necessary to refer more at length to the third proposition.

The first proposition and the second are the most important in determining the cases now under con-

(1) Ed. 1896, pp. 129, 131 & 136.

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sideration, and to these should be added a third equally important; and that is that no right to compensation arises unless the statute gives it. If the Act complained of is authorised by the statute there is no remedy for the injury occasioned, unless the statute gives a remedy. That is well settled, one of the latest cases being *Fremantle* v. *Annois* (1).

To sustain the suppliants' claims in the present cases it is necessary therefore, in addition to the matters that have been briefly disposed of, to find—

1. That what was done by the authority of the Minister of Railways and Canals was authorized by Parliament;

2. That there is statutory provision for compensation for damages occasioned by what was so done;

3. That such damages arose from what would, if done without the authority of Parliament, have given rise to a cause of action for the injury complained of.

The words "for the injury complained of" are not given in the rule as laid down in the text-book from which it is taken. But they are, I think, to be implied. It is not sufficient, it seems to me, that what was done would, but for the statute, have given rise to a cause of action; but that it would have given rise to a cause of action for the particular injury from which the damages arose.

The authority of the Minister of Railways and Canals to divert the main highway along the St. Lawrence River and to cut off and close up Dundas Street in the manner mentioned is to be found in paragraph (*f*) of the 3rd section of *The Expropriation Act* (2), by which it is, among other things, provided that the Minister may by himself, his engineers, superintendents, agents, workmen and servants, divert or

(1) [1902] App. Cas. 213.

(2) 52 Vict. c. 13, amended by 62-63 Vict. c. 39.

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alter as well temporarily as permanently the course of any roads, streets or ways, or raise or sink the level of the same in order to carry them over or under, on the level of, or by the side of, the public work, as he thinks proper; but before discontinuing or altering any public road, or any portion thereof, he shall substitute another convenient road in lieu thereof.

Then as to compensation the following provisions occur in *The Expropriation Act*, by which, as seen, the minister's authority is given. By the fifteenth section certain persons are given authority, among other things, to contract and agree with the minister as to the amount of compensation to be paid for land taken or acquired, or for damages occasioned thereto, by the construction of any public work. By the twenty-second section of the Act it is provided that the compensation money agreed upon or adjudged for any land or property acquired or taken for, or injuriously affected by, the construction of any public work, shall stand in the stead of such land or property. By the twenty-fourth section of the Act every person who has any estate or interest in any land or property acquired or taken for, or injuriously affected by, the construction of any public work, is required on demand to furnish the minister with particulars of such estate or interest. By the twenty-fifth section of the Act provision is made for the filing of an information by the Attorney-General of Canada in any case in which land or property is acquired or taken for, or injuriously affected by, the construction of any public work. Among the things to be set forth in any such information are the date at which, and the manner in which, such land or property was injuriously affected. By the twenty-ninth section of the Act interest may be allowed on the compensation money from the time when the land or property was acquired, taken, or

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injuriously affected. Before leaving this Act attention ought perhaps to be called to the definition of the word "land" as used in the Act. By paragraph (*f*) of the second section of the Act that expression is defined to include among other things "all real rights, "easements, servitudes and damages, etc., for which "compensation is to be paid by Her Majesty under "the Act."

Then by clause (*b*) of the sixteenth section of *The Exchequer Court Act* (1) it is provided that the Exchequer Court shall have exclusive original jurisdiction to hear and determine every claim against the Crown for damage to property injuriously affected by the construction of any public work. Such a claim may, as we have seen, come before the court by the exhibiting of an information as provided in *The Expropriation Act*. It may also come before the court, as in the present cases, by a petition of right, or it may be referred to the court by the head of the department in connection with the administration of which it arises (2). By the thirty-first section of *The Exchequer Court Act* (3) a rule is given for determining the compensation to be made to any person for land taken for or injuriously affected by the construction of any public work. By the thirty-second section of the Act last cited it is provided that the court in determining the amount to be paid to any claimant for any land or property taken for the purpose of any public work, or for injury done to any land or property shall estimate or assess the value or amount thereof at the time when the land or property was taken or the injury complained of was occasioned. Then by the third section of the Act 52 Victoria, chapter 38, provision is made whereby in assessing future damages arising from

(1) 50-51 Vict. c. 16.
(2) *The Exchequer Court Act*, s. 23.
(3) 50-51 Vict. c. 16, and 54-55 Vict. c. 26, s. 7.

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injury to land or property injuriously affected by the construction of any public work, the court may take into account works that may have been constructed in mitigation of such damages. I have gone over these provisions at some length because it was contended that there was no statutory authority for giving compensation in the cases under consideration. On the contrary there is, it seems to me, statutory authority in a proper case for awarding damages where land is injuriously affected by the construction of a public work. That perhaps would appear more clearly than it does from the provisions that have been referred to if such provisions were traced back to their origin in the statutes from which they have been derived. But there is, I think, no occasion for that. It seems to me that there is no reasonable doubt about the matter; and from the language used in the Acts to which reference has been made the fair inference is that it was the intention of Parliament to give compensation to anyone whose land was taken for, or injuriously affected by, a public work in any case in which he would under the Acts of the Parliament of the United Kingdom be entitled to compensation.

Then, would what was done here, if done without the authority of Parliament, have given rise to a cause of action for the injury complained of, that is for the depreciation in the value of the lands in question because of the cutting off and closing up by the new canal of Dundas Street and the Nine Mile Road? That, it seems to me, is a question not free from difficulty. The right of the owners of the lands and premises in question here to go therefrom to Dundas Street was a private right appurtenant to such lands and premises. Any interference with a right of that kind would without doubt give rise to a cause of action. But that did not occur in the present cases When how-

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ever the owners were once on Dundas Street the right to use it, and to go in one direction or the other, was a public right which they enjoyed in common with all His Majesty's subjects. They may suffer more from the obstruction of the street than others because they have occasion to use it oftener; but that is a difference in degree, not in kind. It is not, it seems to me, in that aspect of the cases that we find the special damage that gives rise to the cause of action that will support the claim to compensation. The special damage is to be found in the fact that what was done was an interference with a public right, the enjoyment of which in connection with the lands and premises in question give the latter a value that is taken away or lessened by the interference with such public right. And it seems to me that it is not now possible to say that such an interference with a public right will not give rise to a cause of action, and, where that right is taken away, sustain a claim to compensation under the statute. That, I take it, is the result of cases of the highest authority. (*Chamberlain's Case* (1); *McCarthy's Case* (2); and *The Caledonian Railway Company* v. *Walker's Trustees* (3). In the case last mentioned Lord Blackburn (4) referring to the case of *The Metropolitan Board of Works* v. *McCarthy*, expressed the opinion that it decided that the right of access by a public way to land is a right attached to the land, and that if an obstruction to the public right of way occasions particular damage to the owner or occupier of that land by diminishing its value, the action which he might bring for that particular damage would be an action for an injury in respect of the land. And in this connection it seems to me that an observation made by Mr. Justice Taschereau (now

(1) 2 B. & S. 617.
(2) L. R. 7 H. L. 243.
(3) 7 App. Cas. 259.
(4) *Ibid.* p. 299.

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Chief Justice Sir Elzéar Taschereau) sitting in this court in the case of *Paradis* v. *The Queen* (1), is in point: "It is settled law" he said "upon the authority "of *Trimble* v. *Hill* (2) in the Privy Council, and *City* "*Bank* v. *Barrow* (3) in the House of Lords, that where "a colonial legislature has re-enacted an Imperial "statute, and the latter has been authoritatively con- "strued by a Court of Appeal in England, such con- "struction should be adopted in the courts of the "colony." Now while the English statutes respecting compensation for damages where lands are injuriously affected have not been re-enacted by the Parliament of Canada, certain expressions to be found in such statutes have been adopted therefrom by Parliament and used in Acts dealing with like subjects here; and the meaning which has come to be attached to such expressions and the effect that has been given to them by the highest authorities in England is the meaning that should be assigned and the effect that should be given to them in Canada.

What I have said is sufficient, it seems to me, to dispose of these cases in the suppliant's favour. There is no question here of the obstruction of the highway being too remote from the suppliants' properties to sustain a claim to compensation. In the case of *Walker's Trustees* (4), it was said by the Lord Chancellor (Lord Selborne) that "a right of access by a public road to "particular property must no doubt be proximate and "not remote or indefinite, in order to entitle the owner "of that property to compensation for the loss of it." And in that case it was held that a right of access at a distance no more than ninety yards was direct and proximate and not indirect or remote. Speaking of the limitation in the case of *The Queen* v. *Barry* (5) where

(1) 1 Ex. C. R. 193.
(2) 5 App. Cas. 342.
(3) 5 App. Cas. 664.
(4) 7 App. Cas. 285.
(5) 2 Ex. C. R. 353.

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among others, the cases mentioned are referred to, it is stated that in *McCarthy's* case (1) the point at which access to the River Thames was obstructed was three hundred and seventy-two feet distant from the premises affected. That, it was said on the argument of these cases, is an error; that the distance was only twenty feet. But I find that in the argument of the case of *Walker's Trustees* Sir Farrer Herschell then the Solicitor-General, made the distance in round numbers four hundred feet. In *McCarthy's* case (2) he is reported to have said (3):—"The dock interfered with "—which it is to be noticed is not contiguous to the "house, but twenty feet away—was only of use as "leading to the highway of the river. So what truly "damaged the claimant there was the stopping up of "the entrance to the river, which was 400 feet away. "The stopping up the end stopped it up the whole "way." And Lord Blackburn, discussing the same question (4) said that from the part of the judgment in *McCarthy's* case read by him it sufficiently appeared that the judgment "did not proceed on the ground "that the obstruction to the water highway was opposite to the plaintiff's premises, but this appears "more clearly by a reference to the case at large which "shows that the damage was all occasioned by making "the embankment across the mouth of the draw-dock "more than 400 feet from the plaintiff's premises, and "so cutting him off from the Thames. Probably when "that was done, the rest of the dock now rendered "useless was filled up, though it is not stated in the "case; but whether it was filled up or not the damage to McCarthy's premises would be the same." By referrence to the special case stated in *McCarthy's* case it will be seen that the plaintiff's premises were 20

(1) L. R. 7 H. L. 243.
(2) L. R. 7 H. L. 243.
(3) 7 App. Cas. 271.
(4) 7 App. Cas. pp. 298, 299.

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feet distant from the head of Whitefriar's dock; that the dock was 352 feet long; and that the embankment that permanently stopped up and destroyed the dock was carried along the foreshore of the Thames, that is, as I understand it, at or near the river end of the dock. That would make the distance between the plaintiff's premises and the obstruction at least 372 feet. As a matter of course the obstruction of the outer end of the dock rendered access to it at its head of no use or value, even if the dock were not filled up. But in the same way access to the portion of Dundas street west of the suppliants' properties is of no use or value to them as a means of going from their properties either in a westerly or northerly direction. The effect of the obstruction extends beyond the point at which it occurs.

With regard to the proposition that to entitle the owner to recover compensation the obstruction of the way must be proximate and not remote from the premises affected, it will, it seems to me, be found that mere distance will not afford a test altogether satisfactory. If that alone is made the determining consideration a line must in cases such as those now under consideration be drawn somewhere. If such a line were drawn at a point short of that at which lands and premises ceased to be diminished in value, that is injuriously affected, by the obstruction of the public way, no good reason could I fear be shown for giving compensation to the owner on one side of the line and denying it to the owner on the other side. Such a limitation would be arbitrary and without reason. If however distance from the obstruction is not to be the only test, and the line between those who may recover and those who may not recover compensation is to be drawn at the point at which lands and premises cease to be injuriously affected and diminished in

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value, then we have, I think, so far at least as concerns this class of cases, come back to a position not easily distinguishable from that for which Lord Westbury so stoutly, but unsuccessfully, contended in the case of *Ricket* v. *The Metropolitan Railway Company*, namely, that the expression "injuriously affected" as used in the statutes referred to, means "damnously affected" only, and that while an individual is not entitled to compensation for personal inconvenience, he is entitled thereto if by the construction of the work he sustains loss in respect of the ownership or occupancy of lands or tenements, whether at common law there would have been a right of action or not (1). The rule having been settled the other way that there shall be no compensation where at common law there would have been no right of action, there has perhaps been a tendency to enlarge the class of cases in which an action would lie. But if one should go so far as to say that there would, but for the statute, be a right of action in any case where lands are diminished in value by the construction of a work which obstructs or destroys a public way that gave an additional value to such lands, and that in such a case the owner is entitled to compensation, a conclusion would be reached that might have been arrived at more directly and without reference to any cause of action, by saying, as Lord Westbury did, that in such a case the statute gave a right to compensation. In *Walker's Trustees* (2) Lord Blackburn said:—"Now I do not dispute that an obstruc-" tion to a highway may be so distant from lands that "no one could reasonably find that the lands were " appreciably damaged by the obstruction, but I " think it unnecessary to try to give a definition of " that distance. It is enough to say that in this case " the distance is not too great." In the present cases

(1) L. R. 2 H. L. 202. (2) 7 App. Cas. 209.

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the distances from the suppliants' premises to the point of obstruction of the public way are less than they were in either *McCarthy's* case or that of *Walker's Trustees*; and there is no occasion to attempt any solution of difficulties that suggest themselves but do not directly arise in the cases under consideration.

In the statement of defence in Macarthur's case it is alleged that the new canal has been constructed on the route prayed for by the suppliant and other residents and property owners of the village of Cardinal, in a petition to the Minister of Railways and Canals. But no evidence has been adduced to support the allegation. The Crown has not sought to avail itself of any such defence, and it is unnecessary to consider whether it would be a good defence or not.

In Keefe's case it appears that the house on the lands affected was put up in the year 1897. Preparations for building it were made in the autumn of 1896 and it was finished in August or September of 1897. The first plan and description, by which the right of way for the canal was acquired, was filed on the 14th of May, 1897, and it is contended that if compensation is to be made to Keefe it must be limited to damages to his lands and premises other than his house. It seems to me, however, that the contention cannot be sustained. There was no reason why in 1896 Keefe should not add to the value of his land and premises by putting a house thereon. That was a reasonable and natural use to make of the property. Then in 1897 there was no good reason, so far as I can see, why he should not go forward and carry out the plans that he had formed, and finish the work which had been commenced. At that time he did not know, and had no means of knowing, what the conditions would be on the completion of the canal. If bridges had been constructed across the canal at both points of inter-

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section with Dundas street, none of the property in the village would have been injuriously affected in the manner now under consideration. Probably Keefe's premises would not have been appreciably affected if a bridge had been put across at the westerly intersection of the canal and Dundas street. He could not tell how these matters would be ultimately determined, and he was not bound to wait and see.

With regard to the amount of compensation to be awarded in Macarthur's case, the evidence of the witnesses he called would indicate that the depreciation in the value of his premises from the causes mentioned is about fifteen hundred dollars. Mr. James W. Thompson, a witness called by the Crown, put the depreciation at seven or eight hundred dollars. Mr. Thompson is a fair minded and reasonable man and his opinion carries weight. But it is largely a matter of speculation. Nothing has happened to show even approximately what the real depreciation is. In that case I do not feel bound to adopt the views of any of the witnesses. I think if the compensation is fixed at twelve hundred dollars in Macarthur's case, that amount to be assessed as of this date and without interest, the assessment will be a fair one. In Keefe's case, in a like manner, I assess the compensation to be made to him at six hundred dollars.

The costs will in each case follow the event.

Judgment accordingly.

Solicitors for the suppliants: *Maclennan Cline & Maclennan.*

Solicitors for the respondent: *Adam Johnston and P. K. Halpin.*

APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

1903

April 20.

Between

THE HAMBURG PACKET COMPANY (DEFENDANTS) .... } APPELLANTS;

AND

DAME CELULIE DESROCHERS (PLAINTIFF) .... } RESPONDENT.

"*THE WESTPHALIA.*"

Admiralty law—Shipping—Collision—Liability.

In a collision in Canadian waters between the steamship *W.* and the schooner *M. A.*, the *W.* was found to be at fault in a matter that occasioned the collision. It was also found that the *M. A.* had contravened the regulations for preventing collisions in Canadian waters; but that such contravention did not contribute to the accident. In an action against the *W.* by the widow and universal legatee of the owner of the *M. A.*,—

Held, that the *W.* was alone to blame, and that the plaintiff was entitled to recover.

2. Where the collision occurs on the high seas, and the provisions of sec. 419 of *The Merchant Shipping Act*, 1894, and the Imperial Regulations for Preventing Collisions at Sea are in force, the obligation is imposed on a vessel that has infringed a regulation which is *primâ facie* applicable to the case, to prove, not only that such infringement did not, but that it could not, by any possibility, have contributed to the accident; but where the collision occurs in Canadian waters, and the *Act respecting the Navigation of Canadian Waters* (R.S.C. c. 79), and the regulations for the prevention of collisions prescribed by the Governor-General in Council are in force, a vessel which contravenes one of them will not be held to be in fault unless such contravention has contributed to the collision. *The Cuba* v. *McMillan* (26 S.C.R. 661) referred to.

APPEAL from a judgment of the Local Judge of the Quebec Admiralty District.

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Judgment of Local Judge.

The facts of the case are fully set out in the reasons for judgment in the court of first instance, and on appeal.

The judgment of the court below (December 30, 1902) was as follows:

ROUTHIER, L. J.:— Il s'agit dans cette cause d'une collision entre une goélette appelée "Marie-Anne" et le steamer "Westphalia", de la Hamburg American Shipping Company. L'action est d'une extrême importance, tant à raison de l'intérêt en jeu, que de la gravité de la collision qui a causé des pertes de vie et des questions de droit qu'elle soulève. C'est un événement toujours dramatique qu'une collision de ce genre, qui cause soudainement la perte de deux marins dans toute la vigueur de l'âge et de la santé et qui fait sombrer un vaisseau avec toute sa cargaison; et l'on se demande comment un tel malheur a pu se produire, quand les deux vaisseaux se sont vus venir, et que rien, ni la mer, ni le vent, ni l'espace, ni l'obscurité, ni les écueils ne gênaient leurs mouvements. C'est pourtant ce qui est arrivé ici. Les deux vaisseaux se sont vus à distance amplement suffisante; ils avaient toute la largeur et la profondeur du fleuve Saint-Laurent pour évoluer et se rencontrer— rien ne pouvait gêner leurs mouvements et tous deux avaient intérêt à ne pas se toucher, et cependant on dirait qu'ils se sont cherchés, et qu'ils se sont jetés l'un sur l'autre comme deux vaisseaux de guerre ennemis.

Pour expliquer ce fait malheureux, il faut certainement que des fautes aient été commises par l'un ou l'autre, ou par les deux, et c'est au tribunal de décider d'après la preuve, d'après les circonstances, quelles fautes ont été commises et sur qui doit peser la responsabilité. Les deux vaisseaux s'accusent mutuellement, ce qui arrive généralement dans presque toutes les cau-

ses où il s'agit de collision. Ils s'accusent mutuellement d'avoir transgressé les règles édictées par la loi pour empêcher les collisions, et chacun prétend avoir fait ce qu'il devait faire.

Pour juger du bien ou du mal fondé de ces prétentions, il faut examiner les règles établies par la loi et la jurisprudence pour prévenir les collisions, et il faut en faire l'application aux faits de la cause. Afin de procéder avec ordre, nous verrons d'abord quelles sont les fautes que la demanderesse reproche au steamer "Westphalia" et nous examinerons ensuite les fautes reprochées à la goélette "Marie-Anne".

La règle vingtième de la loi est la première, je crois, qu'il convient d'invoquer dans une cause de cette nature. C'est la première règle applicable à cette cause-ci, et elle impose au steamer une direction ou une conduite d'une portée générale très étendue. Elle dit, en effet, ceci: "When a steam-vessel and a sailing vessel "are proceeding in such directions as to involve risk of "collision, the steam-vessel shall keep out of the way "of the sailing vessel".

On voit que cette règle imposait évidemment au steamer "Westphalia" l'obligation de se tenir en dehors (to keep out of the way).

La règle vingt-unième impose de son côté une obligation correspondante à la goélette "Marie-Anne", celle de ne pas changer sa course. En effet, la règle vingt-unième dit: "Where by any of these rules one "or two vessels is to keep out of the way, the other "shall keep her course and speed."

Voyons maintenant à quelles manœuvres a eu recours le steamer pour se tenir en dehors de la course de la goélette, c'est-à-dire pour remplir son devoir et l'obligation que la loi lui imposait. J'en extrais la preuve des témoignages du Capitaine Rantzau et du pilote Beaudet. Ce sont les seuls témoignages sur les-

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quels je vais m'appuyer en examinant cette première question, celle de savoir quelles sont les fautes commises par le steamer "Westphalia". Je ne m'appuie pas du tout sur le témoignage de Boisvert.

Le Capitaine Rantzau dit ceci: qu'il a vu à l'œil nu les deux lumières, la rouge et la verte, et puis qu'il a regardé avec sa lunette. Elles étaient à peu près à une demi-pointe (half a point to port bow). Comme dit le Capitaine, la goélette venait en droite ligne sur eux. Il dit encore: elle venait en droite ligne à l'endroit où nous étions, elle se dirigeait absolument sur nous (C'est à la page 4 de son témoignage que je trouve celà). Qu'a-t-il fait alors? Il dit: "I kept on my course a little further, and she was keeping on her course too." Le Capitaine Rantzau, par conséquent, dit: "J'ai continué ma course tout droit et la goélette aussi a continué la sienne, et cela a duré environ une minute et demie. (pages 4, 5 et 31 de son témoignage). Je dis qu'il y a là une première faute. C'était le devoir du steamer de changer immédiatement sa course sans attendre une minute et demie. Ceci est contraire à la règle 20. Pourquoi attendre une minute et demie? J'ai calculé que pendant cette minute et demie, le steamer qui allait neuf milles à l'heure avait parcouru six arpents et trois perches, et la goélette en a fait à peu près la moitié (la goélette allait quatre ou cinq milles à l'heure). En tout, cela forme à peu près un tiers de mille qu'ils ont parcouru tous les deux, c'est-à-dire qu'ils se sont rapprochés d'un tiers de mille lorsqu'ils se voyaient parfaitement, et le steamer n'a rien fait, n'a fait aucuns mouvements pour l'éviter. Environ deux tiers de mille les séparaient encore. Dans deux tiers de mille, ils avaient encore de l'espace tout à fait suffisant pour se rencontrer. Qu'a fait le steamer? Alors dit le Capitaine Rantzau, le pilote ordonna: *port the helm* (bâbord la barre), dirigeant par

là le steamer à *starboard*, tribord, à droite, vers le nord, ce commandement a duré une demi-minute. Une demi-minute après ce mouvement, dit le Capitaine, nous avons perdu de vue la lumière rouge et nous n'avons plus vu que la lumière verte. Aussitôt, dit le Capitaine, le pilote ordonna, de nouveau: *port the helm* ou, comme le dit le pilote *hard a port the helm*. Pourquoi ce commandement? Le Capitaine nous le dit et le pilote dit la même chose: "To give her some more room to pass." Qu'est-ce que cela veut dire? Evidemment cela signifie qu'ils voulaient absolument que la goélette passât au sud, et eux, voulaient passer au nord. Alors, il donne ce nouvel ordre: *port the helm* ou *hard a port the helm*, pour passer au nord et laisser plus d'espace à la goélette pour passer au sud. Eh bien! je dis qu'ils ont commis là une deuxième faute. Du moment qu'ils ne voyaient plus la lumière rouge de la goélette, le steamer devait aussi cacher la sienne, et lui montrer sa verte. Il ne voyait que la lumière verte de la goélette, il devait lui aussi montrer sa lumière verte, afin de rencontrer, comme disent les auteurs, *green to green*. Il devait donc commander: *starboard*, au lieu de *port*, et se diriger au sud. Au lieu de cela, il s'est dirigé au nord, à droite. C'est la pratique qui est recommandée par les auteurs qui ont écrit sur la science nautique. Je citerai là-dessus un auteur que m'a passé mon assesseur: *Todd & Whalt* "*Practical Seamanship*", p. 280. Voici ce qu'il dit a propos de deux vaisseaux qui se rencontrent: —

"So that if each held on her course, they would "pass clear of each other... For one of them to port his "helm and cross the opposite vessel's bow, thus show-"ing his red to the other's green, is a most lubberly trick "unworthy of anyone calling himself a seaman." Ensuite, il ajoute: "As regards starboarding the helm

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"for a red light, nothing need be said, as it would be "nothing short of madness to do so."

Naturellement, ce n'est pas cela qui a été fait ici, c'est l'inverse, mais la faute est la même: "Porting the helm," comme l'a fait le steamer "Westphalia," "to "a green light is the same fault, absolutely the same." C'est le contraire de ce qui doit être fait. Il faut montrer sa lumière verte du moment qu'on voit une lumière verte, et vice versa si on voit une lumière rouge, il faut montrer la rouge. C'est la seule manière de se rencontrer. C'est la grande faute qui a été commise dans cette cause. On se demande pourquoi le Capitaine et le pilote Beaudet persistaient à commander *port*, lorsqu'ils voyaient la verte, au lieu de la rouge. Le pilote nous dit qu'il croyait, et il le croyait encore lorsqu'il a été entendu comme témoin, que c'était la règle et même la loi (ce sont ses mots), de rencontrer à droite et qu'ils voulaient absolument forcer la goélette à prendre à gauche. C'était là leur idée fixe. Au lieu de présenter leur lumière verte à la lumière verte de la goélette, *green to green*, ils cherchaient la lumière rouge de la goélette afin de la rencontrer *red light to red light*. C'est une erreur impardonnable et qui dénote une insuffisance de connaissances; car ils appliquaient aux vaisseaux à voiles la règle 18 qui ne s'applique qu'aux steamers. La règle 18 impose, en effet, aux steamers—quand rien ne s'y oppose—l'obligation de se rencontrer à droite. On comprend que c'est facile pour des steamers de se rencontrer chacun sur sa droite pour la bonne raison qu'ils vont où ils veulent, mais le législateur ne pouvait pas imposer cette règle aux vaisseaux à voiles, et c'est pourquoi la règle relativement aux vaisseaux à voiles est toute différente. C'est la règle 20. Ici il ne s'agit plus ni de droite ni de gauche, mais le steamer doit de son côté faire tout ce qui lui est possible de faire pour se tenir en dehors

de la course du vaisseau à voiles et ainsi éviter de le rencontrer, le vaisseau à voiles n'étant pas libre de ses mouvements et n'allant pas où il veut.

Après ça, le Capitaine Rantzau dit : Nous avons donné un "coup de sifflet." Pourquoi ce coup de sifflet ? Toujours pour la même raison ; pour indiquer à la goélette, disent-ils, que le steamer se dirigeait à *starboard*, c'est-à-dire à droite, et par conséquent c'était pour commander à la goélette de passer à gauche. Ils voulaient absolument passer à droite et forcer la goélette de passer à gauche, la traitant absolument comme un steamer, et appliquant la règle 18 à la goélette comme ils l'auraient appliquée à un steamer. Ce coup de sifflet, Boisvert jure qu'il ne l'a pas entendu. On comprend très bien qu'il a pu ne pas l'entendre, parce que c'était contre le vent et qu'il faisait une grande brise du nord-ouest et par conséquent le vent a bien pu empêcher le sifflet d'arriver jusqu'à lui.

Alors apparaît, dit le Capitaine, à ce moment une lumière blanche, une lumière blanche qui les rend tous les deux perplexes, le pilote et le Capitaine Rantzau. J'expliquerai plus loin qu'elle est ma théorie au sujet de cette lumière blanche, et ce que ça pouvait être. Pour le moment, et sans rentrer dans les détails, je dis : En quoi cette lumière blanche pouvait-elle les embarrasser ? Cette lumière ne pouvait pas les tromper sur la marche de la goélette qui était parfaitement indiquée par la lumière verte qu'ils voyaient et la lumière rouge qu'ils avaient vue un instant auparavant. Par là, le marin le moins expérimenté devait comprendre quelle était la marche que suivait la goélette. D'ailleurs quelle que fut cette lumière blanche, elle ne pouvait pas être une invitation à courir dessus, à se jeter dessus, et cependant, c'est justement ce qu'ils faisaient. Ils courraient sur la lumière blanche. Leur mouve-

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ment se dirigeait là. La lumière verte, dit le Capitaine, se montrait en droite ligne dans notre course à ce moment-là ; ce qui prouve que, malgré les deux ordres de *port*, le steamer n'avait rien gagné sur la goélette. Elle tenait toujours sa course inclinant vers le nord, pendant que le steamer faisait la même chose et inclinait vers le nord lui aussi. Alors le pilote a compris enfin qu'il devait changer de direction. Il dit : Il n'y a pas moyen, elle va vers le nord, nous allons nous jeter sur elle ; il faut aller au sud au lieu d'aller au nord. Alors il a donné le commandement : *hard a starboard, in order*, dit le Capitaine, *to let the ship swing to port.* Il voulait aller à gauche ; il s'est décidé enfin de passer à gauche. De suite après, il a commandé : *full speed astern* presque au même moment ; le capitaine dit : les deux commandements se sont suivis : *hard a starboard*, et, *full speed astern.* Je dis que c'est là une troisième faute, et une faute des plus grave.

D'abord il était bien tard pour commander *starboard.* Il aurait dû le commander bien plus tôt. C'est un commandement qu'il aurait fallu donner auparavant. Il se serait dirigé vers le sud et aurait passé en arrière de la goélette au lieu de passer en avant, ce qui est encore une faute, comme je le démontrerai plus loin. S'il eût été possible encore à ce moment-là—et je le crois—de rencontrer la goélette sans la frapper, c'est au sud, c'est à gauche qu'il fallait se diriger, et le commandement de *starboard* seul aurait peut-être pu empêcher la collision ; je crois, moi, qu'il l'aurait empêchée. Il y avait encore assez d'espace—avec le seul commandement de *starboard*—et si le seul commandement de *starboard* n'avait pas suffi, il aurait pu ajouter le commandement *stop*, arrêtez les machines, et il se serait dirigé vers le sud, et il aurait eu le temps d'empêcher la collision. Mais le pilote a ordonné en même temps "*full speed astern.*" C'est là qu'il est en faute. Cet ordre nulli-

fiait l'autre. Les deux se contredisaient. Comme résultat, cette double manœuvre dirigeait encore le navire au nord, à *starboard*, au lieu de l'incliner à *port*, au sud. C'est l'opinion de mon assesseur, et je comprends que c'est l'opinion de la science nautique. En référant encore à *Practical Seamanship* p 23, à la section intitulée: " 'The Action of the wheel on the Rudder': The effect " of the helm on the steamship's head may be briefly " stated thus. When the vessel has headway, her head " goes the opposite way to which the helm is put. " When the vessel has sternway, port helm, head goes " to port. Starboard helm, head goes to starboard. " That is, with sternway, her head goes the same " way as the helm is put."

Par conséquent, en commandant *full speed astern* en même temps que *starboard*, le pilote envoyait encore le steamer à *starboard*. Cependant leur intention était d'aller à port. C'est assez curieux que le Capitaine Rantzau ne paraît pas avoir compris ça. Il ne s'en est pas rendu compte. Il a accusé son navire. Il a dit que le vaisseau n'avait pas obéi. Au contraire, le vaisseau a trop obéi au mouvement commandé, et il est allé à *starboard*. C'est là qu'il devait aller d'après la science nautique. Pourtant ils avaient l'intention, d'aller à *port*, mais ils n'y sont pas allés et ils disent que le vaisseau n'a pas obéi. Cela est assez curieux. Le Capitaine Rantzau dit cela aux pages 42, 43, 45 et aussi aux pages 9 et 11 de son témoignage. A la page 9 il dit, qu'il a donné un ordre pour permettre à la goélette de passer à *starboard* du steamer, c'est-à-dire à droite du steamer, mais il admet que le steamer est allé à droite. Il voulait que la goélette passât à droite, et cependant il se dirigeait lui-même vers la droite. Par ce dernier ordre, le steamer faisait justement ce qu'il fallait pour produire la collision. En vérité, tout le temps, le steamer a semblé poursuivre la goélette.

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Enfin, le Capitaine nous dit, qu'au moment du dernier ordre, il y avait encore un tiers de mille entre les deux vaisseaux. Ceci se trouve aux pages 8, 9 et 30 de son témoignage. Il dit à la page 35 que son steamer pouvait être arrêté dans un quart de mille. Il lui restait encore un tiers de mille. Pourquoi donc n'a-t-il pas commandé : *starboard* et *stop* ? Même simplement sur l'ordre de *stop*, il aurait pu arrêter son navire, d'après son propre témoignage. Il dit aussi qu'entre le dernier ordre et la collision il s'est écoulé deux minutes suivant lui, mais l'ingénieur, Peter Shau, jure que l'hélice a marché en arrière pendant quatre minutes, de neuf heures et trente-trois à neuf heures et trente-sept. Or, son témoignage fait foi, parce que, lui en a pris note immédiatement, et il avait l'horloge sous les yeux. Pendant ces quatre minutes, le steamer aurait certainement pu passer en arrière de la goélette s'il avait été dirigé à gauche au lieu d'à droite. Voilà donc quelles ont été, à mon avis, les fautes commises par le "Westphalia," et il me paraît impossible de soutenir qu'en manœuvrant comme ils l'ont fait, ils se sont conformés à l'article 20 des règles qui leur imposait l'obligation rigoureuse "to keep out of the way "of the sailing vessel". Loin de se tenir en dehors, il paraît tout le temps se diriger sur elle. Je crois aussi qu'il a péché contre l'article 22 qui est une règle nouvelle, toute différente de la pratique ancienne. Aujourd'hui en vertu de cette règle 22, voici le principe qui est posé : "Every vessel which is directed by "these rules to keep out of the way of another vessel "shall, if the circumstances of the case admit, avoid "crossing ahead of the other." Voici encore une règle qui imposait au steamer l'obligation, si les circonstances le permettaient et ici il avait tout le temps et tout l'espace voulu de passer en arrière du vaisseau qu'il rencontrait et non pas en avant. Je dis qu'ils ont

transgressé cette règle 22. Voici maintenant le commentaire de *Marsden* sur cet article. (*Marsden, On Collisions*, pp. 449 & 483). A la page 449 il dit "Article "22 of the existing regulations makes an important "alteration of the law in this respect. If the circum- "stances permit, she must avoid crossing ahead of the "other vessel. In other words, she must go now "under the other vessel's stern. The effect of this alter- "ation in the law is that if it is possible for her to go "under the other ship's stern, and she attempts to "cross her bows, she will be held in fault under the "statute." A la page 483, il ajoute: "This article is "entirely new. To cross another vessel's bow unne- "cessarily where a collision is probable or even possi- "ble, is an unseamanlike manoeuvre, and apart from "the regulations, will be held to be negligent in fact "and in law. The insertion of this article is probably "due to the fact that, under former regulations a ship, "whose duty it was to keep out of the way, was not, "in the courts, held to be in fault, merely because she "attempted to cross the bows of the ship with which "she came into collision. Expressions were used in "these cases which are capable of being misunder- "stood by seamen, as meaning that the ship had as "much right to cross the bows of another as to go "under her stern, and it was thought necessary to put "the matter beyond doubt." Le "Westphalia" par conséquent était tenu de passer en arrière de la "Marie Anne," et il est prouvé par Beaudet surtout qu'il a toujours manœuvré pour passer en avant. Ce dernier ordre, qui, dans son esprit devait changer sa course et le faire passer en arrière, a eu encore pour effet de le faire passer en avant et grâce à ce dernier ordre, il a frappé la goélette inévitablement, il l'a frappée près de l'arrière. Voyons maintenant quelles fautes

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on reproche à la "Marie Anne" et quelles règles elle aurait transgressées.

1o. Elle a, dit-on, changé sa course en violation de la règle 21. Je comprends qu'il ne s'agit pas, lorsqu'on lui fait ce reproche, de la manœuvre que Boisvert a faite au dernier moment, lorsque la collision était imminente. Le steamer arrivait sur elle, et Boisvert aurait mis sa barre à *starboard* dans l'espoir de diminuer la violence du choc. Il ne peut pas être question de cette dernière manœuvre au moment où la collision était pratiquement inévitable. Elle était parfaitement justifiable et de nombreux précédents le déclarent. Le steamer arrivait sur elle et il a fait une manœuvre pour tâcher de diminuer la violence du choc, pour que le s eamer ne la frappât pas directement en ligne verticale ; mais qu'il puisse glisser à côté d'elle, si c'était possible. Cette manœuvre est irréprochable. Il s'agit évidemment d'un fait antérieur. Quel est ce fait qu'on lui reproche ? Les officiers du "Westphalia" ont vu d'abord les deux lumières de la goélette, lorsqu'ils étaient à un mille de distance. Ils disent : un mille, et Boisvert dit un mille et demi. Dans tous les cas ce n'était toujours pas à moins d'un mille de distance, Elle était alors "half a point to their port bow" dit le capitaine, puis une minute et demie après ou deux minutes après, ils ont perdu de vue la lumière rouge quand la "Marie Anne" était plus proche, beaucoup plus proche, et ils en ont conclu qu'elle avait changé sa course et inclinait vers le nord. Je dis que cette conclusion n'est pas rigoureuse. Ce n'est qu'une conjecture. Remarquons bien qu'ils n'ont pas vu ce mouvement, mais par le seul fait qu'ils ont perdu de vue la lumière rouge, ils concluent que la goélette a dû changer sa course. C'est une conjecture plausible sans doute ; mais il me semble très possible, dans la position respective qu'avaient les deux vaisseaux quand ils étaient à un mille et demi de

distance et quand la " Marie Anne " se trouvait légèrement au sud, *half a point*, légèrement à gauche de la course alors suivie par le " Westphalia ", je dis qu'il est très possible que tout en inclinant un peu vers le nord, la " Marie-Anne " montrât ses deux lumières, et que suivant la même course, inclinant toujours vers le nord, elle ait caché sa lumière rouge lorsqu'elle est venue plus près du steamer. Lorsqu'elle était très éloignée et qu'elle était un peu au sud, naturellement on pouvait voir ses deux lumières, mais à mesure qu'elle s'est rapprochée, se dirigeant toujours vers le nord, après deux minutes de marche, la lumière rouge est disparue. Cela ne prouverait pas que la goélette ait changé sa course. Boisvert jure positivement que la goélette n'a jamais changé sa course, mais qu'il a donné seulement le commandement de *starboard* au moment de la collision. Il sait mieux que personne ce qui s'est passé à bord de la goélette. Ce n'est pas tout cependant. Son témoignage n'est pas isolé ; le témoignage de Thibeaudeau est formel et positif là-dessus et corrobore entièrement le témoignage de Boisvert. Ces deux témoignages, à mon avis, suffisent pour contredire une simple conjecture. Je conclus que cette première faute imputée à la " Marie Anne " n'est pas suffisamment prouvée.

Voici maintenant le témoignage de Thibaudeau, j'y réfère. Thibaudeau était à bord d'une goélette à l'ancre au Cap Rouge. Lui, montait, il allait de Québec à Montréal. Il était à l'ancre. Ni le vent ni la marée ne lui permettait de marcher et il était à l'ancre à deux arpents en bas de la " Marie-Anne " qui était à l'ancre aussi à ce moment-là. Vers les neuf heures et demie, il raconte qu'il a vu ce qui se passait à bord de la " Marie Anne " ; il a vu la " Marie Anne " hisser sa voile, lever l'ancre et tourner pour prendre la route de Québec. Il a vu quelqu'un (à deux arpents on peut

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bien voir ça) il a vu quelqu'un descendre la lumière blanche qui était au mât,—comme elle devait l'être, pour un vaisseau qui est à l'ancre,—il a vu descendre la lumière blanche et la porter dans la chambre. C'est ce que dit Boisvert aussi. Thibaudeau ajoute: "Il a "mis ensuite les deux lumières, rouge et verte, en place "là où elles devaient être pour la goélette, et ils sont "partis pour descendre. J'étais à ce moment-là environ "à deux arpents de la goélette."

Voici maintenant, quant à la course de la "Marie Anne", ce que dit Thibaudeau. On veut lui faire dire comment allait la goélette, dans quelle direction elle allait lorsqu'elle a passé près de lui, près de sa goélette à lui. "Ont-ils passé bien proche de vous autres? "R A peu près à un arpent et demi, un arpent peut-"être." C'est l'avocat des défendeurs qui le transquestionne. Il lui demande: "Quand la goélette à passé "près de vous autres, elle se dirigeait vers le sud? R. "Non, au nord. Mais avant ça, elle envoyait au sud? "R. Non, avant ça, elle envoyait à droite. Ils se sont "envoyés un peu au sud pour nous clairer, ensuite ils "se sont envoyés au nord. A quelle distance était-elle "de vous autres lorsqu'elle a fait ce changement pour "aller plus près du nord? R. Pas un arpent en bas de "nous autres. Elle a serré le nord un peu plus qu'elle "ne l'a serré lorsqu'elle nous a passés."

Voici un témoignage positif d'un témoin oculaire qui a vu la goélette lorsqu'elle se dirigeait vers le nord, lorsqu'elle a passé près de lui en se dirigeant plus au nord encore. Dans ce moment là le steamer était invisible. Thibaudeau n'a pas vu le steamer, il n'a pas vu la collision, ça s'est passé plus bas. Donc, avant que le steamer fut visible, la goélette suivait déjà cette course vers le nord. Nous avons là un témoignage positif qui corrobore complètement le témoignage de Boisvert. Par conséquent nous avons la preuve

que la goélette n'a pas changé sa course. Maintenant supposons le contraire, supposons qu'après avoir aperçu le steamer, la "Marie Anne" ait changé sa course en inclinant vers le nord. Il ne faut pas oublier en premier lieu, qu'en le faisant, elle laissait au steamer toute la largeur du chenal pour passer à gauche, au sud ; la distance était encore grande et le steamer avait tout l'espace et le temps nécessaire pour manœuvrer, pour remplir son devoir en vertu de la règle 20 et éviter la collision. Le "Westphalia" n'avait encore à ce moment-là fait aucune manœuvre. C'est le Capitaine Rantzau qui nous le dit, et les manœuvres qu'ils ont faites ensuite étaient des fautes et tendaient à produire la collision au lieu de l'éviter. Alors peut-on reprocher à la goélette d'avoir changé sa course pour se mettre hors de la ligne que suivait le steamer? Je suis convaincu que non. Donc je dis que la course de la "Marie Anne" n'a contribué en rien à la collision. Il n'est pas prouvé qu'elle ait changé sa course, mais supposons qu'elle l'eut changée, ça ne justifierait pas le steamer dans la ligne de conduite qu'il a suivie.

La seconde faute reprochée à la "Marie Anne" serait d'avoir porté une lumière blanche, ce qui serait contraire à la règle 5. Le capitaine et le pilote du steamer qui l'ont vue, nous disent que quand ils ont aperçu d'abord la lumière blanche, ils ont cru qu'elle appartenait à un autre vaisseau, probablement à un vaisseau à l'ancre, et de fait il est prouvé qu'il y en avait un, commandé par Omer Thibaudeau, qui était à l'ancre. Quand ils ont rencontré la goélette, Omer Thibaudeau était en haut de la "Marie Anne" qui avait passé Thibaudeau et les deux goélettes se trouvaient à peu près dans la même ligne. Par conséquent il peut très bien arriver, et je suis convaincu que c'est ça qui est arrivé; la lumière blanche qu'on a vue d'abord était justement la lumière de la goélette de Thibaudeau, qui paraissait

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naturellement au-dessus, et à côté de la lumière verte, puisque Thibaudeau était plus loin en haut. Le Capitaine Rantzau et le pilote Beaudet ont constaté que la lumière blanche qu'ils voyaient s'éloignait, tandis que la lumière verte se rapprochait. A un moment donné, on demande à Beaudet: enfin jusqu'à quelle distance s'est-elle éloignée comme ça? Il dit: "a un moment "donné je l'ai regardée et elle paraissait éloignée d'en- "viron cinquante pieds". Est-ce que cela est possible si la lumière blanche avait été à bord de la goélette "Marie Anne", que la lumière verte et la lumière blanche se fussent éloignées de cinquante pieds? Cela est absolument impossible. Donc la lumière blanche qu'ils voyaient alors n'était pas à bord de la goélette "Marie-Anne," mais était à bord d'un autre vaisseau, et, comme je l'ai dit, c'est ma théorie que la lumière blanche qu'ils ont vue dans ce moment-là était la lumière blanche de Thibaudeau qui était à l'ancre. Mais on dira cependant: le pilote Beaudet jure bien positivement que quand ils sont arrivés à la goélette, au moment de la collision, ils ont vu une lumière blanche. Je dis ceci: ou bien ils se sont trompés ou bien c'est vrai qu'il y avait alors une lumière blanche. Mais, je dis que s'il y avait une lumière blanche à ce moment-là, elle venait d'être mise. Par qui? Elle a pu être mise là par Boisvert qui dans son excitation du moment ne s'en est pas rappelé. Elle a pu être mise là par Vaudreuil, le matelot qui est noyé, et qui, voyant que le steamer arrivait sur la goélette et qu'ils ne paraissaient pas voir la lumière verte, se serait dit: je vais montrer une lumière blanche, peut-être qu'ils obéiront à la lumière blanche s'ils ne veulent pas obéir à verte, et il aurait hissé la lumière blanche pensant au dernier moment qu'elle pourrait servir à empêcher la collision. Vaudreuil n'est pas là pour nous le dire. Le Capitaine Boisvert n'y est pas non plus. L'autre Bois-

vert, le survivant, ne se rappelle pas avoir vu la lumière blanche. Il se rappelle bien qu'il a ôté la lumière blanche et qu'il l'a mise dans la chambre. S'il y a eu une nouvelle lumière blanche, elle a pu être mise par Vaudreuil ou par le Capitaine. Ou bien encore est-ce un reflet de la lumière blanche qui était dans la chambre et qui a été vue sur la voile. C'est encore une chose possible. Pour moi, ma théorie est celle-ci : Je crois que soit Vaudreuil, soit un autre a sorti la lumière blanche au dernier moment, de la chambre, il l'a hissée au mât, pensant que par ce moyen, il ferait manœuvrer le steamer de manière à éviter la collision. Dans tous les cas, il me semble que le témoignage du Capitaine Rantzau et de Beaudet, étant sur ce point contredits positivement par Boisvert qui a posé lui-même les lumières rouge et verte, et par Thibaudeau qui a vu la même chose, qui lui a vu mettre la lumière blanche dans la chambre, que ces témoignages étant ainsi contredits, la preuve n'est pas suffisante. Mais supposons encore le fait vrai, supposons qu'ils ont vu la lumière blanche. peut-on soutenir que la lumière blanche a égaré les officiers du " Westphalia" ? L'ont-ils dit, eux ? y en a-t-il un seul qui a osé dire que la lumière blanche l'a trompé, lui a fait prendre une direction qu'il n'aurait pas prise sans ça ? Aucun d'eux ne peut le dire. Ça n'a pas été une *misleading light*. En quoi pouvait-elle être *misleading* ? Ce sont les lumières verte et rouge qui indiquent la course du vaisseau et non pas la blanche. Mais la blanche, qu'indique-t-elle ? La loi le dit. La blanche, lorsqu'elle est seule indique que c'est un vaisseau à l'ancre. Mais, ici, d'abord, elle n'était pas seule. Il y avait la lumière verte aussi et les officiers du steamer ont cru eux-mêmes qu'il y avait un autre vaisseau à l'ancre qui avait un lumière blanche. Ont-ils cru et pouvaient-ils croire que la " Marie Anne " était à l'ancre ? Mais non puisqu'ils voyaient se mou-

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voir les deux lumières verte et rouge. Donc cela ne pouvait pas les tromper dans leur manœuvre pour la rencontrer. Supposons même qu'ils auraient cru que la "Marie Anne" était à l'ancre, était-ce une raison pour se jeter dessus? Maintenant la lumière blanche, accompagnée de la lumière verte ou de la lumière rouge, peut indiquer un steamer, car les steamers gardent un lumière blanche et ils peuvent avoir même plusieurs lumières blanches. Alors on dira, peut-être qu'ils ont pu croire que c'était un steamer. Eh bien, non, Beaudet, à la page 12 de son témoignage, dit ceci:

"Quand vous avez vu les deux lumières, vous avez "constaté que c'était un vaisseau à voiles qui descen- "dait? R. Oui.

"Avez-vous agi comme devant rencontrer un vais- "seau à voiles? R. Oui.

"Et comme devant rencontrer un vaisseau à voiles, "vous avez donné l'ordre de *port*? R. Oui.

"Pour vous incliner au nord? R. Oui.

"De combien de pointes vous êtes-vous déplacés vers "le nord sur l'ordre de *port*? R. Quand on est en col- "lision.....

"Non, non, vous avez donné deux ordres, parlons du "premier. De combien de pointes vous êtes-vous dé- "placés sur le premier ordre? R. A peu près une "demi-pointe.

"Et puis il y avait déjà une demi-pointe de l'autre "côté? R. Oui.

"Ça faisait par conséquent une pointe? R. Oui.

"Quand vous vous êtes déplacés une pointe vers le "nord, aviez-vous perdu la lumière rouge? R. Oui.

"Et c'est pour trouver la lumière rouge que vous "avez donné l'ordre: *hard a port*? R. Oui.

"Vous cherchiez la lumière rouge. R. Oui.

"Vous étiez tenu de trouver la lumière rouge? vous

"croyiez que vous étiez tenu de chercher la lumière "rouge? R. .....

"Répondez donc, vous cherchiez la lumière rouge? "R. J'avais donné ma réponse. D'abord, au premier "ordre de *port*, j'ai trouvé qu'il allait trop doucement; "ça fait que j'ai renvoyé encore plus, j'ai renvoyé *hard* "*a port.*"

"Quand vous avez donné l'ordre de *hard a port*, sur le serment que vous avez prêté, vous ne voyiez pas la lumière rouge? R. Non.

"C'est donc pour retrouver la lumière rouge que "vous avez donné l'ordre *hard a port*, vous la cher-"chiez? R. Certainement."

On voit qu'il dit qu'il a vu les deux lumières qui étaient sur le vaisseau et il dit qu'il a toujours manœuvré pour rencontrer un vaisseau à voiles. Donc il n'a pas été trompé par la lumière blanche. La lumière blanche n'a pas pu lui faire croire que c'était un steamer qu'il allait rencontrer. S'il avait cru que c'était un steamer, je dirais que la lumière blanche a été *misleading*. Il aurait voulu passer à droite. Cela s'expliquerait très bien. Donc, quant à la lumière blanche, ils n'ont pas pu être trompés, et elle n'a pas contribué à leur faire faire les manœuvres qui ont amené la collision.

Enfin la troisième faute qu'on reproche à la "Marie-Anne," c'est le défaut de vigie, de *look-out*. Il est admis des deux côtés que les deux vaisseaux se sont aperçus de loin et qu'ils ont suivi tous leurs mouvements. Dès lors, aucun inconvénient, aucun préjudice n'a pu résulter du défaut de vigie. Le steamer en avait une vigie. A quoi lui a-t-elle servi? Elle n'a servi absolument à rien du tout. Ce sont les officiers eux-mêmes qui ont vu les lumières avant le *look-out*. Une vigie à bord de la "Marie.Anne" n'aurait pas empêché les officiers du steamer de manœuvrer comme

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ils l'ont fait. Est-ce que cela aurait empêché le Capitaine Rantzau et le pilote Beaudet de commettre les erreurs qu'ils ont commises ? Evidemment non. Elle n'aurait rien appris aux deux Boisvert qui étaient à bord et qui ont vu le steamer à un mille et demi de distance. Le *look-out*, s'il eût existé, ne les aurait pas informé mieux qu'ils ne l'ont été eux-mêmes, par leurs propres yeux. Ce défaut de vigie est, à mon avis, la seule faute, pour la "Marie-Anne," qui soit certaine. Pour les raisons que j'ai déjà données, les deux autres fautes que l'on reproche à la "Marie-Anne" ne me paraissent pas suffisamment prouvées. Et il me semble absolument insoutenable que cette troisième faute, défaut de vigie, ait pu contribuer en quoi que ce soit à la collision.

Maintenant les défendeurs disent : Il n'est pas nécessaire pour engager la responsabilité de la "Marie-Anne" que sa faute ait vraiment contribué à la collision. Il suffit qu'elle ait pu y contribuer. Par conséquent il n'est pas nécessaire de prouver qu'elle ait de fait contribué à la collision ; il suffit de prouver que cette faute est de telle nature qu'elle ait pu contribuer à la collision. Une simple possibilité enfin suffirait pour engager sa responsabilité. Sur ce point les défendeurs ont cité trois précédents. Ces précédents sont ceux du *Talbot*, du *Ripon*, et du *Thyrza*. Ils sont cités dans la liste d'autorités que m'a passée l'avocat des défendeurs. Le premier cas, celui du *Talbot* est rapporté aux Rapports de *Probate* 1891, p. 184. Dans cette cause-là, Sir Charles Butt est allé aussi loin qu'il est possible d'aller, suivant moi, en décidant que le *Talbot* était en faute. Son opinion peut se résumer ainsi : "Quoique je ne sois pas absolu-"ment convaincu par la preuve que le *Stanley Force*, "l'autre steamer, a été trompé par une lumière blanche "additionnelle, je crois que le *Talbot* est en faute parce "que les officiers du *Stanley* disent qu'ils ont été trom-"pés, et que de fait ils ont pu l'être." On ne peut pas

aller plus loin que ça. Il n'avait pas été suffisamment prouvé dans ce cas-là que les officiers avaient été vraiment trompés, cependant, ils le disaient et il était prouvé qu'ils auraient pu l'être, dit le juge, et par conséquent le *Talbot* est en faute.

Dans la cause du *Ripon*, je vais citer les paroles mêmes du même juge, Sir Charles Butt, qui sont rapportées au Vol. 10, *Prob. Div.*, p. 68. Il s'agit encore d'une lumière *misleading*. Voici ce qu'il dit: "Now "could this infringement possibly have contributed to "the collision? It is impossible to say that it could "not. It was said by those on the *Essex* that the light "made them think that the *Ripon* was a vessel at "anchor, and that, therefore, they might have taken "some other measures, had they not been thus "misled. I find as a fact that they did make this "mistake. On the other hand I am also of opinion "that the lights were not so misleading as to exonerate "the *Essex* from blame for not keeping a better look-"out."

Ainsi on voit que dans ce cas-là, le juge est d'avis qu'ils ont été trompés, et il dit: "It is impossible to "say that it could not". Par conséquent, il y avait là évidemment *a misleading light*, et par conséquent il n'est pas étonnant que dans ce cas-là le juge Butt ait trouvé une faute. Le troisième cas est celui du *Thyrza*. Le *Thyrza* n'avait aucune lumière visible. Tout à coup il vient montrer sa lumière rouge au *Duke of Wellington* qui était tout près, et ce dernier n'a pu l'éviter. Ce dernier soutenait que c'était ce défaut de lumière qui l'avait trompé, qui avait causé la collision. C'était là une faute évidente. Le *Thyrza* n'avait pas de lumière du tout, et tout à coup il montre une lumière rouge lorsqu'il est trop tard. L'accident a eu lieu. Voilà le troisième précédent cité de la part de la défense; je suis d'avis qu'on peut bien admettre ces précé-

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dents sans y trouver un motif de condamner la "Marie Anne"; car je crois avoir démontré qu'aucune des fautes qu'on lui reproche n'ait pu tromper les officiers du "Westphalia" et nul d'entre eux ne peut dire qu'elle ait été trompée, et que sans cela, il aurait fait d'autres manœuvres.

Du côté du demandeur, on a cité plusieurs précédents, qui me semblent décisifs. En voici un. C'est le cas du *City of Antwerp*. La décision a été reproduite dans les *Quebec Law Reports*, vol. I, p. 217, par Sir Andrew Stuart. Voici cette autorité qu'il cite: "I "cannot do better than reproduce the words of "Lord Westbury: It is undoubtedly true in cases "of collision between a sailing ship and a steamer, "that although the sailing ship may be found to have "been guilty of misconduct or not to have observed "the sailing regulations, yet the steamer will be "held culpable if it appears that it was in her power "to have avoided the collision. It cannot be too "much insisted upon that it is the duty of the "steamer where there is a risk of collision, what-"ever may be the conduct of the sailing vessel, to do "everything in her power that can be done consis-"tently with her own safety to avoid the collision." Il ne saurait y avoir d'autorité plus forte. C'est l'autorité suivie, et c'est la doctrine qu'a adoptée Sir Andrew Stuart dans la cause que j'ai citée et son jugement a été confirmé par le Conseil Privé. On voit que la doctrine qui est maintenue là est une doctrine saine. Si l'on suppose qu'il y ait eu faute commise par le *sailing ship* et que cette faute n'ait pas contribué à la collision, on ne peut pas le rendre responsable. C'est évident. Il faut absolument qu'il ait contribué à la collision; c'est la doctrine générale en cas de délit qui entraîne la responsabilité Si vous commettez une faute et qu'il n'en résulte aucun préjudice, personne n'aura

une action contre vous pour vous faire condamner à des dommages. C'est le même principe. La demande a cité encore le précédent du *Lady Jocelyn*. On a cité aussi le précédent du *Hope*, rapporté au premier volume de *Wm. Robinson*, p. 154, et enfin une autre cause, celle de *Isaac Tillyer*. Il me semble évident qu'on ne peut rien trouver qui engage la responsabilité de la "Marie Anne" dans la présente cause.

J'ai eu l'avantage dans cette cause-ci d'avoir l'assistance d'un assesseur, un capitaine expert en navigation, et outre des réponses par écrit aux questions que je lui ai posées et qui sont au dossier, je puis dire qu'il partage entièrement ma manière de voir sur la cause de la collision et sur la responsabilité des défendeurs. Voici les questions que j'ai posées et les réponses qui ont été données par l'assesseur à ces questions.

J'ai posé trois questions.

La première est celle-ci ;—

"From your personal knowledge of the locality and "from the evidence made before you in this case, was "there in your opinion any fault in the schooner "Ma- "rie Anne" to steer a little northward when she was "sailing down from Cap Rouge to Quebec ?

La réponse à cette question est la suivante :—

"To your first question asking me if, from my per- "sonal knowledge of the locality and from the evi- "dence made before me in this case, was there in my "opinion any fault in the schooner "Marie Anne" to "steer a little northward when she was sailing down "from Cap Rouge to Quebec, I beg to state that from "my personal knowledge of the locality, when the "accident occurred between Cap Rouge anchoring "ground and Quebec, and from all evidence given in "this case, the officer in command of the schooner "Marie Anne" was justified in keeping on the north "side of the main ship channel.

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La seconde question est la suivante ;—

"As soon as the schooner was showing her green "light only to the "Westphalia," is it your opinion "that the pilot of the said steamer to keep her out of "the way of the schooner, should have starboarded, "instead of ported twice the helm.

La réponse est comme suit :—

"To this question, as soon as the said schooner was "showing her green light only to the "Westphalia," it "is my opinion that the pilot of the said steamer to keep "out of the way of the schooner should have starboard-"ed, instead of porting twice her helm. I beg to state "that in my opinion, the officer in command of the ""Westphalia" should have starboarded her helm ins-"tead of porting twice. By so doing he would have kept "out of the schooner's way and would have passed "green to green, thus complying with the Rule of the "Road, Art. 20. When a steam-vessel and a sailing "vessel are proceeding in such direction as to involve "risk of collision, the steam-vessel shall keep out of "the way of the sailing vessel."

Enfin la troisième question est celle-ci :—

"According to your experience and to the nautical "practice, please state whether the effect of starboard-"ing the helm and putting engines full speed astern "in the same time was to move the steamer's head to "starboard, rather than to port."

La réponse est la suivante :—

"According to experience and practice, I beg to state "that it is a well known fact, that to put the engines "full speed astern, a ship will cant her head to star-"board and her stern to port, this is well explained in "the *Pratical Seamanship* by Todd & Whall, pp. 282 "& 265."

Pour toutes ces raisons, je dois donc rendre jugement contre le "Westphalia" avec dépens. Je réfère la fixa-

tion des dommages au Régistraire, assisté de marchands, lequel devra faire rapport dans le délai d'un mois.

March 30, 1903.

The case on appeal was heard at Quebec.

L. P. Pelletier, K.C. and *A. H. Cook*, K.C., contended that the court of first instance was wrong in finding that the *Westphalia* was in fault upon the facts in evidence, and that the *Marie Anne* also in fault for the following reasons: First, for not keeping her course after she came in sight of the *Westphalia* and there was danger of collision; Secondly, in carrying a white light contrary to the regulations; and Thirdly, for not maintaining a proper look-out. It having been established by the evidence that the *Marie Anne* had infringed the Regulations for preventing collisions at Sea, she should be held in fault unless it appeared that her contravention of the regulation could not by any possibility have contributed to the accident. This was not shown, and therefore the *Marie Anne* was in fault.

They relied on the following regulations and authorities:

Articles 1, 21, 23 and 29 of the Imperial Regulations for preventing Collisions at Sea. *The Arklow* (1); *The Talbot* (2); *The Ripon* (3); *The Tirzah* (4); Marsden on Collisions (5); *The Jesmond* (6); *The Englishman* (7); *The Secret* (8).

C. P. Pentland, K.C. and *A. R. Angers*, K.C. for the respondent, argued as follows:

In a damage suit, brought by the owners of a sailing ship against the owner of a steamship, it is not incumbent on the plaintiffs to plead that the sailing ship,

(1) 9 App. Cas. 136.
(2) [1891] P. 184.
(3) 10 P. D. 65.
(4) 4 P. D. 33.
(5) 4th ed. pp. 391, 472, 485, 488, 538.
(6) L. R. 4 P. C. 1.
(7) 3 P. D. 18.
(8) 2 Stuart 133.

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after observing the steamship, kept her original course. The burden of proof and plea in this respect is upon the defendant to show that the course of the sailing ship was altered and the collision caused thereby, (*The West of England* (1).

It cannot be too much insisted upon that it is the duty of a steamer, where there is risk of collision with a sailing ship, whatever may be the conduct of the sailing ship, to do everything in her power, that can be done consistently with her own safety, in order to avoid collision. (Per Lord Westbury in *The City of Antwerp* (2); *The American* (3).

It is a rule in cases of collision between a steamer and a sailing ship that, although the latter may have been guilty of misconduct or may not have observed the general steering and sailing regulations, the steamer will be held culpable, if it appears that it was in her power to have avoided the collision. (*The City of Antwerp* (5).

Where a steamship is approaching a sailing ship, and does not know what course the sailing ship is pursuing, it is the duty of the steamship, whether the lights of the sailing ship are visible or not, to take no decisive movement until she can ascertain it. (*The Bougainville* (5).

If the master of a steamer observes the light of a sailing ship approaching and, owing to any cause is doubtful as to her course, it is his duty to slow his engines and stop his vessel, and to take no decisive movement, until he has thoroughly cleared up all his doubts and ascertained the other ship's position, and if a collision occurs from his neglecting to do so, he

(1) L. R. 1 A. & E. 308.
(2) L. R. 2 P. C. 30.
(3) 22 W. R. 645.
(4) L. R. 2 P. C. 25.
(5) L. R. 5 P. C. 316.

will be held partly, if not altogether, in default. (*The General Lee* (1); *The Bougainville* (2).

In a case of collision between a sailing ship and a steamship, if it is proved that they are proceeding in such directions as to involve risk of a collision, and that a collision did take place, the burden of proof is on the steamship to show some sufficient reason to justify her not getting out of the way. (*The Margaret* (3); *The Monsoon* (4).

A collision took place between a sailing ship and a steamship on a dark night. The wind was S.S.E. The sailing ship was sailing N.E. by E., the steamship S.S. W., so that the lights of the sailing ship were about four points on the starboard bow. The sailing ship, instead of keeping her course, ported her helm, and thereupon the helm of the steamship was put hard a port and her engines were reversed. It was held that the steamship was solely to blame for the collision. (*The Lady Jocelyn* (5).

A steamer was sighted by a sailing ship at a sufficient distance to have avoided a collision. The steamer took no steps until the vessels were very near each other, when she starboarded her helm, and the sailing vessel ported her helm to avoid a collision, which took place notwithstanding. It was held that the steamer was alone to blame, and it was the duty of a steamer to keep out of the way of the sailing vessel, provided she could do it, either by starboarding or by porting her helm, and that, on the other hand, it was the duty of the sailing ship to keep her course, and that she could only be excused from deviating from it, by showing that it was necessary to do so in order to avoid immediate danger. *The Velasquez* (6).

(1) 19 L. T. 750.
(2) L. R. 5 P. C. 316.
(3) Holt's Rule of the Road, p. 44.
(4) *Ibid.* 186.
(5) 12 Jur. N. S. 965.
(6) L. R. 1 P. C. 494.

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The impossibility of forming any correct estimate of time in cases of this kind and distance in the hurry, excitement and confusion which necessarily prevails is too well known to need comment. (*The Margaret* (1).

Both statements as to time and distance are probably more or less erroneous, and the almost impossibility of correctly estimating time in cases of excitement is universally commented upon by all authors, and time is always overrated. *The Ann Johanne* (2); *The Liberty* (3); *Wineman* v. *The Hiawatha* (4).

As to porting to a green light, see *The C. M. Palmer* and *The Larnax* (5); *The Lorne* (6).

Upon the point of responsibility for sudden peril. See *The Bywell Castle* (7).

As to close shaving and sudden peril, a vessel is not justified in delaying to take precautions until the last moment, or in trusting to be able to shave clear of the other. Marsden on Collisions (8); *The Columbia* (9). A vessel is not required to keep her course after the approach of the other is so near that the collision is inevitable (10).

It has been repeatedly held by the Supreme Court of the United States that a vessel, which, by her own fault, causes sudden peril to another cannot impute to the other as a fault a measure taken in extremis, although it was a wrong step, and but for it the collision would not have occurred. A mistake made in the agony of the collision is regarded as an error for which the vessel causing the peril is altogether responsible. (*The Nichols* (11); *The Carroll* (12); *The*

(1) 2 Stuart's Adm. at p. 21.
(2) 2 Stuart's Adm. at p. 48.
(3) *Ibid.* at p. 103.
(4) 7 Ex. C. R. 447.
(5) 2 Asp. M. L. C. 94.
(6) 2 Stuart's Adm. 177.
(7) 4 P. D. 219.
(8) 4 ed. p. 84.
(9) 9 Ben. (U.S.) 254.
(10) 16 Am. & Eng. Ency of Law, p. 234.
(11) 7 Wall. 656.
(12) 8 Wall. 302.

City of Paris (1); *The Lucile* (2); *The Favorita* (3); *The Falcon* (4); *The Sea Gull* (5).

There are decisions of the French courts to the same effect (6).

Starboarding to a red light on your starboard side will be unlawful, unless there is good reason to suppose that so doing would not take you across the bow of the other ship. (Todd & Whall's *Practical Seamanship* (7).

The keeping-away ship must go under the stern of the other vessel.

Though at the time of the collision a vessel is being navigated in an improper manner, she will not be held in fault for the collision if it is proved that the particular act of imprudence did not cause or contribute to the collision. (*The Hope* (8).

If the negligence of the party injured did not in any way contribute to the immediate cause of the accident, that negligence should not be set up as an answer to the action. (*Greenland* v. *Chaplin* (9).

A steamship infringed the rule or regulation which is *primâ facie* applicable to the present case, the burden of proof to show not only that such infringement did not contribute, but could not possibly have done so, was held to be upon such infringing ship. (*The Khedive* (10).

There is no difference between common law and admiralty as to what amounts to negligence.

The non-observance of a statutory rule by a vessel is not to be considered as a fact contributory to or occasioning collision, provided that the other vessel

(1) 9 Wall. 634.
(2) 15 Wall. 676.
(3) 18 Wall. 598.
(4) 19 Wall. 75.
(5) 23 Wall. 165.
(6) Abordage Nautique, Caumont, par. 134.
(7) P. 168.
(8) 1 W. Rob. 154.
(9) 5 Ex. 243.
(10) 5 App. Cas. 876.

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could, with reasonable care exerted up to the time of the collision, have avoided it (*The Bernina* (1).

As to the white light see *The Cuba* (2) ; *The Reliance* v. *Conwell* (3) ; *The Porter* v. *Heminger* (4) ; *The Inchmaree S. S. Co.* v. *S. S. Astrid* (5) ; *The N. Churchill & Normanton* (6).

It was proved at the trial that a fog-horn was blown on the *Z* but not heard on the *I;* Held: that this was not *primâ facie* evidence of negligence of those on board the *I.* (*The Elysia* (7).

The fact of a steam whistle, alleged to have been blown in a fog, not being heard by those on board an approaching ship is not necessarily proof that there was a bad look-out on the approaching ship, as the direction in which and the distance from which, the sound could be heard is uncertain. (*The Rosetta* (8).

In the case of *La Plata* (9) it was not enough it was said that the helm was ported; the ship must answer her helm.

As to a look-out we think it right to say, said Dr. Lushington, that there was a want of a proper look-out on board the *Jane* and *Ellen*, but that that want of a proper look-out did not contribute to this collision. (Lowndes, *Collisions at Sea* (10).

All these cases fall within the general principle that to render a ship liable for collision damage it is not enough that there shall have been a fault, that fault must have contributed to the collision. (*Roberts* v. *The Pawnee* (11).

As to weight of evidence the *Isaac H. Tillyer* (12) has this head note: "Testimony from a steamer clearly

(1) 12 P. D. 36.
(2) 26 S. C. R. 651.
(3) 31 S. C. R. 653.
(4) 6 Ex. C. R. 208.
(5) 6 Ex. C. R. 218.
(6) Cook's Adm. 65.
(7) 46 L. T. 840 ; 4 Asp. M. C. 540.
(8) 59 L.T. 342; 6 Asp. M.C. 310.
(9) Swab., 220.
(10) Pp. 68 & 69.
(11) 7 Ex. C. R. 390
(12) 101 Fed. Rep. 478.

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in fault for a collision with a sailing vessel, that the latter was guilty of contributing fault by changing her course, will be viewed with suspicion; and when the evidence from the sailing vessel is to the contrary, and accords with the probabilities, it will be accepted in preference.

F. E. Meredith, K.C., replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 20th., 1903) delivered judgement.

This is an appeal from the judgment of the Local Judge in Admiralty for the Quebec Admiralty District in favour of the respondent (the plaintiff in the action) in an action for damage by collision between the German screw steamship *Westphalia* and the schooner *Marie Anne*. The appellants are the owners of the *Westphalia*. The respondent is the widow and universal legatee of Francis Xavier Boisvert, who at the time of the collision was the owner and captain of the schooner. The collision occurred about 9.35 P.M. on the 4th of September, 1902, on the north side of the River St. Lawrence below Cap Rouge, and above the place where the piers for the railway bridge now in course of construction have been built. Besides the captain, there were on the schooner at the time his brother George Boisvert and a seaman named Vaudreuil. The schooner was so injured that shortly after the collision she sank, and the captain and Vaudreuil were drowned. George Boisvert was rescued by the crew of a boat sent by the *Westphalia* to the assistance of those on board the *Marie Anne*.

The learned judge found that the collision was occasioned by the fault of the *Westphalia*, and that the *Marie Anne* was not in fault in anything that contributed to the collision. He had the assistance of a nautical assessor who concurred in this view of the case. Judgment was pronounced in favour of the

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plaintiff in the action, and the defendants and their bail were condemned in an amount to be found due, and costs; and it was directed that an account should be taken by the Registrar assisted by merchants. From that judgment the appeal is taken.

The *Westphalia* on the night of the collision, and immediately before it, was proceeding from Quebec to Montreal. The wind was westerly—something north of west. The tide was ebbing. It had been raining, but the rain had ceased and the weather was clear. The night was dark, but lights were distinctly visible. The steamship was making about nine knots an hour through the water, and five knots or a little more over the ground. The master, chief officer, and the pilot who had been taken on board at Quebec, were on the bridge. It appears from the evidence of the master and pilot that soon after passing the piers of the railway bridge, now under construction across the River St. Lawrence, below Cap Rouge, they observed the red and green lights of a sailing vessel coming down the river, about one-half of a point on the *Westphalia's* port bow and about one mile distant. The sailing vessel turned out to be the *Marie Anne*. Her lights were first seen about 9.30 p.m. The collision occurred about 9.35. The combined speed of the two vessels was approximately twelve miles an hour, probably a little more, as, following the respective courses that they took, they jointly made in the five minutes that intervened something more than a mile that lay between them when the lights of the *Marie Anne* were seen from the steamship. Omitting for the present any reference to a white light, which they subsequently made out, and which will be referred to later, the order of events from this time to the collision, a period of about five minutes, was as follows: The *Westphalia* after making out the lights of the *Marie*

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Anne kept her course and speed for about one minute and a half, both the red and the green lights of the *Marie Anne* being visible. Then the helm of the *Westphalia* was ported with the intention of passing the *Marie Anne*, port light to port light. But after a half minute the *Marie Anne* shut out her red or port light, and the helm of the *Westphalia* was put hard to port. That was done, it is alleged, in the belief that the *Marie Anne* had changed her course, and in the expectation that she would resume it, and with a view to giving her more room to pass. The pilot also says that having lost the red light of the *Marie Anne* he was looking for it. When the order hard-a-port was given the *Westphalia* signalled by blowing her whistle once to indicate that her course was being changed to starboard. Still keeping her speed she proceeded with the helm hard a port for about one minute. At the end of that time the green light of the *Marie Anne* was approaching her course line, and at a distance of about one-third of a mile. Then three orders, one immediately after the other, were given and executed:—(1) The helm of the steamship was put hard a starboard; (2) the engines were stopped; (3) the engines were put full speed astern. The order to stop was given at 9.33. The collision occurred about two minutes later, and the engines were stopped at 9.37. They had been going full speed astern during the four minutes immediately preceding. Because of this the *Westphalia* did not answer her starboard helm. She had a right-handed screw, that is one which viewed from astern when the engines are going ahead revolves from left to right. When the engines are going astern the screw is reversed and revolves from right to left. That tends, more or less, according to other circumstances, to draw the stern of the ship to port and the bow of course goes to the starboard. The fact is stated,

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and the reason given by the master of the *Westphalia*. The effect of a reversed screw while the ship has headway, as the *Westphalia* at the time had, is explained in *Marsden on Collisions* (1). If a ship has sternway, a starboard helm will, as the learned judge pointed out, send the ship to starboard, and not to port. But Marsden further explains (2) that "whilst the ship has headway through the water and "the engines and screw are working astern, the action "of the rudder is the reverse of that which it has "whilst the engines and screw are going ahead. This "reverse action of the rudder" he adds "is always "feeble and is different for different ships and even for "the same ship under different conditions of loading." The course of a ship, until her way is stopped, is, he says, determined by the combined influences of the reversed screw, the wind and the rudder, severally acting in the manner that he describes; and to these influences one may, I think, add, as the master of the *Westphalia* did, the influence of the tide. In the present case the ship with her helm hard a starboard and her engines full speed astern, did not go to port, and that is what was to be expected.

The two vessels were at the time in Canadian waters, and subject to the rules and regulations for preventing collisions in Canadian waters prescribed by the Governor in Council on the 9th of February, 1897. (3) These rules are in conformity with regulations for preventing collisions at sea approved by an order of Her Majesty in Council of the 27th of November, 1896. In each case the rules came into force on the 1st of July, 1897. By the 20th Article of these regulations it is provided that when a steam vessel and a sailing vessel are proceeding in such direc-

(1) 4th Ed. pp. 503-505. (2) P. 504.
(3) Acts of Canada, 1896-7, Vol. 1, p. LXXXI.

tions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. The *Westphalia* came, I think, within the operation of this rule when the lights of the *Marie Anne* were first observed, and was never free from its operation from that time until the collision occurred. By Article 22 it is provided that every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other. There was nothing in the present case to prevent the *Westphalia* from complying with this rule, under the operation of which she came, it seems to me, at (if not before) the time when the *Marie Anne* shut out her red light. There can, I think, be no doubt that when that happened the steamship should have starboarded her helm and passed astern of the schooner, green light to green light, instead of putting the helm hard aport, as was done. Article 23 provides 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. The *Westphalia* became amenable to this rule when the vessels approaching each other it became necessary or reasonable to do one or more of the things mentioned.

The learned judge, who heard the case, found the collision to be occasioned by the non-observance in three particulars of the rules mentioned. First, he found those in charge of the *Westphalia* to be at fault in waiting for a minute and a half, after making out the *Marie Anne's* lights, before changing the course of the steamship; secondly, in putting the helm hard aport to a green light instead of starboarding; and thirdly in putting the engines full speed astern as

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mentioned, thereby preventing the ship from answering her starboard helm.

The *Marie Anne* had earlier in the evening been riding at anchor at Cap Rouge, waiting for the tide to turn. Below her, and not far from her, another schooner was at anchor, of which the witness, Omer Thibaudeau, was captain. With respect to what was done by the *Marie Anne* in getting under way to go to Quebec, her condition at that time, the lights she carried, the course she took on setting out, the evidence of Thibaudeau corroborates entirely that of George Boisvert, the survivor of the three men who were on the *Marie Anne*. Otherwise the case made for her depends principally upon the latter's testimony. Before leaving Cap Rouge the anchor light of the *Marie Anne* was taken down and put in the cabin; and her sailing lights were properly placed and in good order. She carried, on leaving Cap Rouge, no other light. Her jib and foresail were set; and having got under way she at first turned her head a little to the south to clear Thibaudeau's schooner, and then turned toward the north and took her course down the north side of the river. For what followed we have only the evidence of George Boisvert. The captain of the *Marie Anne* was at the wheel. George Boisvert and the sailor Vaudreuil were with him in the stern. The schooner was making three or four knots an hour. After proceeding, according to Boisvert, about ten minutes the white and green lights of a steamship were seen on the starboard side of the schooner and distant about one mile and a half. The steamship, which turned out to be the *Westphalia*, appeared at that time to be heading about three points to the south. In eight or ten minutes after seeing the steamship's green light he saw both her red and green lights, and she came right on them Up to this time and afterwards until

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the collision was imminent, the *Marie Anne* kept her course. Then to lessen the shock her helm was put to starboard. In three or four seconds the schooner was struck by the *Westphalia*. Boisvert, when he saw the steamship's red and green lights, called his brother's attention to her; but his brother thought there was no danger as steamships did not usually pass where the *Marie Anne* then was; that is that it was not usual for them to be so near to the north shore of the river. It was, by Article 21 of the Rules mentioned, the duty of the *Marie Anne* to keep her course from the time when there was risk of collision with the *Westphalia*. As to that there is a conflict of testimony. On the one hand Boisvert testifies that the course of the schooner was not changed until just before the collision, and when the collision was inevitable. The master and pilot of the *Westphalia* say that the course of the *Marie Anne* was altered at or about the time when the helm of the steamship was ported the first time. No blame is imputed to the *Marie Anne* for starboarding her helm at the last moment for the purpose mentioned (1). It was suggested in argument that the change of course by which it is alleged the *Marie Anne* hid her red light from the *Westphalia* took place when the former was passing to the south of Thibaudeau's schooner. But that suggestion cannot be accepted. That happened too early in the course of the events narrated, and at a point too far from the place of collision to afford a satisfactory explanation of what is said to have been observed from the bridge of the *Westphalia*. The learned judge found that it was not sufficiently proven that the course of the *Marie Anne* had been altered; and that even if it had been, that did not contribute to the collision or justify the action of those in charge of the steamship.

(1) *The Bywell Castle*, L. R. 4 P. D. 219.

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The *Marie Anne* is also accused of carrying a white light in contravention of Article 5 of the regulations for preventing collisions. After her red light became invisible to those on the *Westphalia*, a white light was observed a little to the left and about eight feet higher than the *Marie Anne's* green light. The distance between the two lights was increasing slowly and the white light could not be made out. It was not when first seen thought to be on the *Marie Anne.* Later when the vessels approached each other, it was found, according to the testimony of those on the *Westphalia*, that the schooner was carrying a white light behind her mainmast. The master of the *Westphalia* says that he saw it at the time of the collision; that it was hanging on the mainboom on the after part of the ship, or above the mainboom on the halyards; that it was the same white light that he had seen before; that when he first saw it the *Marie Anne* was a little more than a third of a mile distant; that he saw it continuously until the collision; that he saw it after the collision for more than five minutes; and that when the second officer went to the rescue of those on board the *Marie Anne* he pointed out the light to the latter and told him to steer by it. The evidence of the master of the steamship in respect of this white light is corroborated by that of the pilot and of the chief and second officers of the steamship. Boisvert's testimony is that no such light was carried by the *Marie Anne.* The learned judge's view on this aspect of the case is that either Vaudreuil, who was drowned, or some other person brought the white light from the cabin at the last moment and ran it up the mast, thinking by that means to get the steamship to manœuvre in such a way as to avoid the collision. On the whole he does not think the evidence that the *Marie Anne* was carrying a white light sufficient. I understand him in that

connection to have reference to her condition when leaving Cap Rouge. And with that I fully agree. On the other hand unless one is prepared to discredit the master, chief officer and pilot of the steamship—and I do not understand the learned judge to do that - one must, I think, come to the conclusion that the schooner was carrying a white light at the time of the collision and for a few minutes before it occurred. That, it seems to me, must be accepted as a fact, whatever the explanation may be. But assuming the fact to be as stated, the learned judge was of opinion that the white light did not mislead those in charge of the *Westphalia* or contribute to the collision.

The *Marie Anne* was found to be at fault in not having a proper look out; but it was held, and beyond question correctly held, that this did not contribute in anyway to the accident. The *Westphalia's* lights were seen and made out in due time by those on board the *Marie Anne*, and were never lost sight of until the collision, with which the want of a proper look-out on board the latter had no connection whatever.

Now for the appellant it is argued that, assuming the *Westphalia* to be to blame for the collision, the judgment pronounced in this case cannot be sustained unless it appears not only that the infringement of the regulations imputed to the *Marie Anne* did not contribute to the collision; but that they could not by any possibility have contributed thereto. And it is important to see how that, as a question of law may be.

The regulations for preventing collisions referred to as applicable to the present case were made by virtue of the authority given by section fourteen of *An Act Respecting the Navigation of Canadian Waters* (1). They apply to all ships in such waters whether foreign or not (2).

(1) R.S.C., c. 79. (2) R.S.C., c. 79, s. 9.

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By the sixth section of the Act it is provided that if any damage to person or property arises from the non-observance by any vessel or raft of the rules prescribed by the Act, such damage shall be deemed to have been occasioned by the wilful default of the person in charge of such raft, or of the deck of such vessel, unless the contrary is proved or it is shown to the satisfaction of the court that the circumstances of the case rendered a departure from such rules necessary. A similar provision (but without the clause as to a departure from necessity) is to be found in the 11th section of the Act of the late Province of Canada, 14 and 15 Vict., Chapter 126. But the provision as cited first occurs in a Canadian statute in the Act of the Province mentioned 22nd Vict, Chapter 19. It is to be found in the 13th section of that Act in substantially the same terms as are used in the Act now in force. It also occurs in the 13th section of Chapter 44 of the Consolidated Statutes of Canada; in the 7th section of the Act of the late Province of Canada 27th and 28th Vict., Chapter 13; and in the 7th sections of the Acts of the Parliament of Canada 31st Victoria, Chapter 58 and 43rd Victoria, Chapter 29. Since 1859 there has in Canada been no substantial change in the language in which the provision is expressed.

In the United Kingdom the course of legislation has been different. By the 25th section of the Act of the Parliament of the United Kingdom, 14th and 15th Vict. Chapter 79, after providing that the vessel at fault should not recover anything, it was enacted that in case any damage to person or property be sustained in consequence of the non-observance of any of the said rules, the same should in all courts of justice be deemed, in absence of proof to the contrary, to have been occasioned by the wilful default of the master or other person having charge of such vessel, and that such

master or other person should, unless it appeared to the court before which the case was tried, that the circumstances of the case were such as to justify a departure from the rule, be subject in all proceedings whether civil or criminal to the legal consequences of such default. The 298th and 299th sections of *The Merchant Shipping Act*, 1854 (1) through not in the same words were to the same effect. These sections were repealed in 1862, and other provisions substituted for them by the 28th and 29th sections of the Act 25th and 26th Victoria, Chapter 63. The effect of that enactment was to restore the Admiralty rule as to the division of damages where both ships are in fault; but there was no change in its provisions with respect to the question now under consideration. All these provisions dealt, as the provisions of the Canadian Act cited do, with cases in which the collision was occasioned and the damage arose from the non-observance of a regulation applicable to the case; and the question as to whether the infringement of the rule contributed to the collision had in every case to be tried. That state of the law was altered by the 17th section of *The Merchant Shipping Amendment Act*, 1873 (2) which is reproduced in the 4th clause of the 419th section of *The Merchant Shipping Act*, 1894 (3) in these words:—"Where in a "case of collision it is proved to the Court before whom "the case is tried that any of the collision regulations "have been infringed, the ship by which the regula- "tion has been infringed shall be deemed to be in "fault, unless it is shown to the satisfaction of the "Court that the circumstances of the case made depar- "ture from the regulation necessary."

This alteration of the law in 1873 was an important one. The occasion of it and its effect will be seen by

(1) 17th and 18th Vict. c. 104. (2) 36th and 37th Vict., c. 85.
(3) 57th and 58th Vict. c. 60.

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reference to the following cases: In *Tuff v. Warman* (1) the defendant was charged with having so negligently navigated a steam vessel in the River Thames as to run against and damage the plaintiff's barge. The case came before the Exchequer Chamber in 1858. The effect of the decision cannot, I think, be better stated than it was by Lord Blackburn in the case of *The Khedive* (2) decided by the House of Lords in 1880:—

"On the construction of this and similarly worded "enactments it had been held" he said "in *Tuff v.* "*Warman* that though the plaintiff had infringed the "rules, and by his neglect of duty brought the vessel "into danger yet if the defendant could by reasonable "care have avoided the consequences of the plaintiff's "neglect, but did not, and so caused the injury, the "plaintiff could recover, as under such circumstances "the collision was not occasioned by the non-obser-"vance of the rule." This, he adds, prevented the statute from producing the effect that those who framed it wished; but nothing was done until attention being apparently called to the subject by the case of the *Fenham* (3) section 17 of *The Merchant Shipping Act*, 1873 was enacted. One of the objects of the change made in the language of the enactment was, he thought, to take away what was the *ratio decidendi* in *Tuff v. Warman*, and another to render it unnecessary to have resort to an artificial rule as to the inference to be drawn from evidence, as in the *Fenham*. The effect of the statute is to impose on a vessel that has infringed a regulation which is *primâ facie* applicable to a case, the burden of proving, not only that such infringement did not, but that it could not by possibility, have contributed to the accident (4). That

(1) 2 C. B. N. S. 740; 5 C. B. N. S. 573.
(2) 5 App. Cas. 892.
(3) L. R. 3 P. C. 212.
(4) *Marsden on Collisions, 4th Ed.* p. 49; The *Hibernia*, 2 Asp. M.C. N.S. 454; The *Fanny M. Carvill*, 2 Asp. M.C.N.S. 422, and, on appeal, 565; The *Khedive*, 5 App. Cas. 876; and The *Cuba*, 26 S.C.R. 661.

is the rule for which the appellants contend, and it is no doubt the rule to be followed in Canadian Courts in cases of collision occuring on the high seas (1); but it is not applicable where the collision occurs in Canadian waters. Where that happens the rule to be followed is that established by the earlier cases (2). It is necessary then in considering the English authorities to distinguish between cases decided before (3) and those decided after (4) 1873 when the Act was passed. All the cases on which the appellants rely (5), excepting one, (6) fall within the latter period and are distinguishable for the reasons stated. The earlier case relied on (*The Jesmond*) is a decision with respect to the risk of collision being determined, and there is nothing in the judgment pronounced in this case contrary to anything thereby decided.

With regard to the doctrine of contributory negligence *Tuff* v. *Warman* (7) is still, where applicable, a leading case (8), and in this connection it is not unimportant to keep in mind that, as said by Lord Blackburn in the case of *Cayzer* v. *Carron Company* (9) "there is no difference between the rules

(1) The *Reliance*, 31 S.C.R. 658; (2) The *Cuba*, 26 S.C.R. 661; *The Ship Porter v. Heminger*, 6 *Ex.* C.R. 210, 211.

(3) The *Palestine* 13 W. R. 111; The *Lady Jocelyn* 12 Jur. 965; The *Velasquez* L. R. 1 P. C. 494; The *City of Antwerp* L. R. 2 P. C. 25; The *General Lee* 3 Ir. R. 155; The *Pennsylvania* 3 M. L. C. 477; The *Bougainville* L. R. 5 P. C. 316.

(4) The *Hibernia* 2 Asp. M. C. N. S. 454; The *Fanny M. Carvill* 2 Asp. M. C. N. S. 565; The *Englishman* L. R. 3 P. D. 18; The *Tirzah* L. R. 4 P. D. 33; The *Arklow* Stockton's Ad. R. & D. 66; 9 App. Cas. 139; The *Chusan* 5 Asp. M. C. N. S. 476; The *Ripon* L. R. 10 P. D. 65; The *Fire Queen* 12 P. D. 147; The *Arratoon Apcar* 15 App. Cas. 37; The *Talbot* [1891] P. D. 184; The *Duke of Buccleugh* [1891] A. C. 310; and The *Argo* 82 L. T. R. 602.

(5) The *Arklow* 9 App. Cas. 139; The *Talbot* [1891] P. D. 184; The *Ripon* L. R. 10 P. D. 65; The *Tirzah* L. R. 4 P. D. 33; The *Englishman* L. R. 3 P. D. 18.

(6) The *Jesmond*, L. R. 4 P. C. 1.

(7) 2 C. B. N. S. 740; 5 C. B. N. S. 573.

(8) Pollock on Torts, 6th Ed. 443.

(9) 9 App. Cas. 880.

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" of law and the rules of Admiralty to this extent " that where anyone transgresses a navigation rule, " whether it is a statutory rule, or whether it is a rule " that is imposed by common sense, what may be called " the common law, and thereby an accident happens " of which that transgression is the cause, he is to " blame, and those who are injured by the accident, if " they themselves are not parties causing the accident " may recover both in law and in Admiralty." And in the case of *The Cuba* (3) Mr. Justice King, delivering the judgment of the Court, referred to Lord Blackburn's opinion and stated the proposition as follows:—" Apart " from statutory definitions of blame or negligence " there seems to be no difference between the rules of ' law and of Admiralty as to what amounts to negli- " gence causing collision "; and applying the rule to the case then under consideration, he added: " As " applied to the case before us the principle is that " non-observance of a statutory rule by the *Elliott* " is not considered as in fact occasioning the collision " provided that the *Cuba* could, with reasonable care " exerted up to the time of the collision, have avoided " it." There is only one other matter that need to be referred to in this connection. *Tuff* v. *Warman* was decided in the Exchequer Chamber in 1858. The Act of the late Province of Canada 22nd Vict. chapter 19 was passed in the year 1859. In it and in the subsequent Acts mentioned, down to and including Chapter 79 of the *Revised Statutes of Canada* now in force, occur provisions which in respect of the question now under consideration are in substance the same as those of the statutes of the Parliament of the United Kingdom in force when that case was decided. And the construction that has been put by courts of appeal in England on the provisions of the earlier Imperial Statutes, of

(3) 26 S. C. R. 661.

which the Canadian law is in substance a re-enactment, is the construction that should be adopted here. That is a proposition that would, I think, be accepted without authority, but authority for it is not wanting. It was so held in the Privy Council in *Trimble* v. *Hill* (1).

Now when in the present case the question is asked: what wrongful act or omission of those in charge of the *Westphalia* occasioned the collision in this case? the answer it seems to me is that it was wrong and against the rules and good seamanship to put the helm of the *Westphalia* hard to port to the *Marie Anne's* green light. Not only was that a mistake, but it was, it seems to me, the cause of the accident. Neither can the excuses for the manœuvre that are set up be entertained. It is argued that the *Westphalia* having at a time when that course was open to her, elected to pass the *Marie Anne* port light to port light, the former was right in persisting in that course, and it is said that when the latter by changing her course hid her red or port light the steamship's helm was put hard to port to give the schooner more room to pass. But the *Westphalia* had no right of election and was wrong in persisting in a course that involved a risk of collision. It was her duty to keep out of the way of the *Marie Anne*. It is said however by those in charge of the steamship that as it was the duty of the schooner to keep her course, and she had changed it, they expected her to change again and go back on her original course. But what warrant had they for any such expectation; and on what grounds are they to be excused for doing a thing that was at the time clearly wrong on an assumption that the schooner would do something to make it right, instead of acting upon the fact as they saw it, and meeting in a proper way, as they should have met, the exigency that arose? For myself I see no good

(1) 5 App. Cas. 342.

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grounds of excuse. The pilot also says he was seeking or looking for the schooner's red light. The following question and answer occur in his cross-examination :—Q. " Vous cherchiez la lumière rouge?—R. Oui." The word was not of his own choosing, and may not express exactly what he meant. But whether the order "hard to port" was given with a view to finding the "Marie Anne's" red light, or only in the expectation of getting it again, it was a mistake. Her green light showed him plainly enough what at the time ought to be done, and done promptly, if a collision was to be avoided. A wrong order was given, and being executed caused the collision. This it seems to me is the turning point in the case.

With reference to the order that was subsequently given to put the engines of the steamship full speed astern it is clear of course that if the order was wrong, as the learned judge found it to be, it contributed to the accident. But on the question as to whether it was under the circumstances then existing a proper order or a wrong one I have come to no clear conclusion. I suppose the true answer to the question depends upon whether or not it was at the time more imperative to stop the headway of the steamer than it was to direct her course to port. The learned judge's opinion is entitled to great weight, and he had the assistance of an assessor who agreed with him. I should hesitate to differ from him, and I can of course see that the accident might possibly have been avoided if the order had not been given. But that does not necessarily show that the order was wrong. It seems to me, however, to make no difference in the result whether one comes to the conclusion that the order was right or that it was wrong. If the former, then the *Westphalia* had by a fault for which she is answerable here, brought herself into a position of peril from

which, doing the thing that was right, she could not extricate herself, and for the damage resulting from such fault she must answer. If the order was wrong she but added one fault to another, the first being of itself sufficient to render her liable.

With regard to the contravention of the rules alleged against the *Marie Anne* in changing instead of keeping her course I am inclined to the view that she did alter her course, at the time mentioned by the master and pilot of the steamship. That, I think, might have happened without Boisvert observing it; and one does not need to discredit his evidence to come to that conclusion. But it is very clear, I think, that those in charge of the steamship could with reasonable care have avoided the effect of this non-observance of the statutory rule. There was no difficulty as to that. The change of course happened at a time when it could have been met easily, and at a distance that left ample opportunity for the *Westphalia* to avoid its effect. In fact but for a subsequent mistake made by the steamship in porting to a green light the accident would not have happened; and the non-observance of the statutory regulation is not, under the authorities referred to, to be considered as occasioning the accident.

With regard to the white light that the *Marie Anne* was found to be carrying, I agree fully with the view expressed in the judgment appealed from that it did not in anyway contribute to the collision. It is said that it was at least distracting. But nothing was done or omitted to be done because of it, that would or might otherwise have been omitted or done; and nothing was, because of it, done sooner or later than it otherwise would have been. It had no influence on the movements that led to the collision.

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The question of the want of look-out has already been dealt with.

It was the duty of the steamship to keep out of the way of the sailing vessel. That was not impossible or even difficult to do. Nothing that the sailing vessel did prevented the steamship using reasonable care from keeping out of her way. The steamship failed to do what it was her duty to do, and must be held to be alone to blame.

Appeal dismissed with costs.

Solicitors for appellant: *W. & A. H. Cook.*

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

MEAGHER BROS. & CO.....PETITIONERS; 1903

May 4.

AND

THE HAMILTON DISTILLERY CO., LTD.....} RESPONDENTS.

Trade-Mark—"Maple Leaf"—Sale of Whiskey—Prior User.

Certain specific trade-marks to be applied to the sale of whiskey, consisting of the representation of a maple leaf and such words as "Old Red Wheat," "Early Dew," and "Grand Jewel," having been registered, registration of a specific trade-mark to be applied to the sale of whiskey, consisting of the words "Maple Leaf" and the device of a maple leaf on which was impressed the figure of a beaver used separately or in conjunction with the words "Fine Old" and the words "Rye Whiskey, bottled by Meagher "Bros. & Co., Montreal," was refused on the ground that it too closely resembled those already registered.

2. The respondents in July, 1892, sought to register a specific trade-mark to be applied to the sale of whiskey consisting of the words "Early Dew," the representation of a maple leaf, and the letters "R.V.O." Objection was raised by the Department of Agriculture that one J.C. had previously obtained registration of a specific trade-mark to be applied to the sale of whiskey, consisting of the monogram "J.C." surmounted by a maple leaf, with the words "Old Red Wheat" above, and "Whiskey Absolutely Pure, James "Corcoran, Stratford" below the monogram. Respondents then bought out J.C.'s rights in the mark last mentioned, and had it cancelled, whereupon they obtained registration of their own mark. The petitioners sought, inter alia, to have the respondents' mark expunged on the ground that the statement in their declaration that they were the first to use the said mark was untrue.

Held, That inasmuch as the declaration made by the respondents was that they believed the trade-mark was theirs on account of having been the first to use it, and that such declaration when made was true; and, further, that when they learned of J.C.'s registered trade-mark they purchased it from him, there was no ground for expunging their trade-mark.

3. In the year 1902 after the controversy between the parties had arisen, and without notice to the petitioners, the respondents obtained registration of another specific trade-mark to be applied

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to the sale of whiskey which consisted of the words "Maple Leaf" and the representation of a maple-leaf.

Held, That the registration of the last mentioned trade-mark of the respondents should be expunged.

PETITION to expunge certain trade-marks belonging to the respondents from the Register of Trade-Marks, in the Department of Agriculture, and to register one for the petitioners.

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

March 10th, 1903.

The case was heard at Ottawa.

M. Goldstein (*C. J. Brooke* with him) for the petitioners, contended that the declaration on which the respondents obtained their trade-mark of 1892 was untrue, and therefore ought to avoid the registration. The respondents were not the first to use the mark as they declared. Moreover by obtaining a cancellation of Corcoran's registered trade-mark they lost whatever benefit enured to Corcoran thereunder, and put the petitioner's in a better position as against the respondents. He cited *Kerly on Trade-Marks* (1).

P. D. Crearer K.C. (*A. Haydon* with him) for the respondents: The respondents made their declaration in good faith in 1892. As soon as they learned of Corcoran's mark they bought him out. As to the question of the cancellation of Corcoran's mark, probably the Department of Agriculture suggested the course taken by the respondents. At all events they are Corcoran's successors in title. Petitioners could not participate in any benefit arising from Corcoran's abandonment of his rights. To all intents and purposes Corcoran assigned his rights to the respondents. He cited *Sabastian on Trade-Marks* (2).

(1) 2nd Ed. pp. 33, 339, 344, 345. (2) 4th Ed. p. 110.

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Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (May 4th, 1903) delivered judgment.

This is a petition to have the registration of certain registered trade-marks of the respondents expunged from the Trade-Mark Register, and for a declaration that the petitioners are entitled to register their trade-mark, and for other relief.

On the 22nd of October, 1884, James Corcoran, of Stratford, in the Province of Ontario, obtained registration of a specific trade-mark to be applied to the sale of whiskey, which consisted of the monogram "J.C." surmounted by a maple leaf, with the words "Old Red Wheat" above and "Whiskey Absolutely Pure, James Corcoran, Stratford" below the monogram, as shown in the pattern and application annexed thereto.

Some time in the year 1887, or shortly before, the petitioners commenced to use in connection with the sale of whiskey bottled by them their trade-mark which they now seek to have registered as a specific trade-mark, and which consists of the words "Maple Leaf" and the device of a maple leaf on which is impressed the figure of a beaver used separately or in conjunction with the words "Fine Old" and the words "Rye Whiskey bottled by Meagher Bros. & Co., Montreal."

On the 14th day of July, 1892, the respondents (their corporate name then being "The Hamilton Vinegar Works Company, Limited") having purchased James Corcoran's interest in the trade-mark first mentioned, and the same having been cancelled, obtained registration of a specific trade-mark to be applied to the sale of whiskeys, which consisted of the words "Early Dew," the representation of a maple leaf and the letters "R.V.O."

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On the 3rd of September, 1896, the respondents obtained registration of another specific trade-mark to be applied to the sale of whiskeys, which consisted of the words "Grand Jewel" and the representation of a maple leaf, as shown in the pattern and application annexed.

Then on the 12th of March, 1902, after the controversy now existing between the parties had arisen, the respondents obtained registration of another specific trade-mark, to be applied to the sale of whiskeys, which consists of the words "Maple Leaf" and the representation of a maple leaf.

Now, it will, I think, be convenient to deal first with that part of the relief sought by the petitioners that has to do with the registration of their trade-mark They were the first, in connection with the sale of whiskeys, to use the words "Maple Leaf" as part of a trade-mark, but they were not, it now appears, the first to use a representation of a maple leaf in that connection. The words "Maple Leaf," it is obvious, appeal to and attract the attention of those only who read the English language, while the picture or representation of a maple leaf catches the eye of every one, no matter what language he speaks or reads or whether he can read any language. Where the representation of the maple leaf is used as a trade-mark in connection with the sale of whiskeys the tendency is that the whiskey will become known as maple leaf whiskey. That tendency will be greater no doubt if to such representation the words "Maple Leaf" are added; and where, as in the case of some of the trade-marks mentioned, other words such as "Red Wheat," "Early Dew" or "Grand Jewel" are used, the tendency mentioned will be lessened, and more or less limited to those who cannot read the English language. But the tendency would exist, and for that reason it seems to me that the

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registration of Corcoran's trade-mark, and of the respondents' trade-marks of July 14th, 1892, and September 3rd, 1896, stand in the way of the registration of the petitioners' trade-mark. It the petitioners were entitled, in connection with the sale of whiskeys, to the exclusive use of a trade-mark of which the representation of a maple leaf was a leading characteristic, there would be no difficulty. But they are not so entitled. Corcoran as to this was before them. It is true that he used the representation of a maple leaf in connection with words that to those who could read them suggested another and different thing, and thereby in a measure prevented the maple leaf from being as marked a characteristic as it otherwise would have been; and in this respect he was followed by the respondents in their trade-marks registered in 1892 and 1896. But there are many people in Canada who cannot read English words, and these at least would be liable to mistake the mark that the petitioners ask to register for those so registered by the respondents. The resemblance is, I think, too great to permit of the petitioners' mark being registered.

It is said, however, that Corcoran's trade-mark being cancelled, is out of the way, and part of the relief asked for is that the respondents' trade-mark of the 14th of July, 1892, should be expunged from the register, in so far as the representation of a maple leaf is concerned. The respondents' trade-mark of September 3rd, 1896, was not known to the petitioners when the petition was filed, and is not attacked in this proceeding. Now it is true that Corcoran's trade-mark was cancelled; but that was by arrangement with the respondents, the latter having purchased his rights in the trade-mark when they found that it stood in the way of the registration of their own; and instead of taking an assignment of it, they procured it to be cancelled, and so re-

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moved the objections that had been raised in the Department of Agriculture. At that time the use by the petitioners of their trade-mark was not known either to the respondents or to the Minister of Agriculture. The ground on which the court is asked to direct that this trade-mark be expunged from the register is that the declaration made by the respondents that they were the first to make use of it was not true. The declaration that they made was that they believed the trade-mark was theirs on account of having been the first to use it. That declaration when made was true. When afterwards they learned of Corcoran's registered trade-mark they purchased it from him; and I do not see any ground for expunging from the register the trade-mark they then registered.

The same cannot be said of the trade-mark they registered on the 12th of March, 1902. They knew at that time that the petitioners claimed to have used such a trade-mark for some fifteen years. That claim the latter have clearly sustained in this proceeding. But without notice to the petitioners, and without informing the Minister of Agriculture of the question that had arisen between them and the petitioners, they sought and obtained registration of the trade-mark. Whatever their belief may have been they were not in fact the first to use a trade-mark consisting of the words "Maple Leaf" and the representation of a maple leaf; and they had, it seems to me, no sufficient reason for thinking that they were. With respect to this trade-mark the prayer of the petition should, I think, be granted. But it may be asked what reason exists for expunging this trade-mark from the register when no direction is to be given for registering the petitioners' trade-mark? The reason is that the right to registration is not the only thing to be considered. The petitioners ask that an injunction be granted

restraining the respondents from using the petitioners' trade-mark. But that of course cannot be done before the mark is registered (1). Then the respondents counter-claim and ask that the petitioners be restrained from using the device of a maple leaf or the words "Maple Leaf" either alone, or in conjunction with such device, as a trade-mark for the sale of whiskeys. But, it being doubtful if a counter-claim could be set up in a proceeding such as this, the counter-claim was not pressed, the respondents' rights to bring an action being reserved. Now it may be—I express no opinion one way or the other—that the petitioners have by reason of what has taken place, acquired a right to continue the use of the mark they have been using, although they may not be able to obtain registration thereof, and thereafter to restrain others from using it. It does not follow as a matter of course, that because they are not entitled to registration the respondents may have an injunction against them any more than it would follow that they would be entitled to registration if the respondents could not get an injunction against them. In any event they have a right to have that issue tried out fairly without being embarrassed, as they would be, by the registration of the trade-mark of March 12th, 1902, which the respondents improperly obtained.

There will be a declaration that the entry in the Trade-Mark Register No. 34, Folio 8257, by which, on the 12th of March, 1902, the respondents registered a specific trade-mark to be applied to the sale of whiskeys and which consists of the words "Maple Leaf" and the representation of a maple leaf, and the registration thereof should be expunged from the Trade-Mark Register.

(1) R. S. C. c. 63, s. 19.

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The petitioners will have the costs of the issue on which they succeed, including the general costs of the proceeding.

Against such costs will be set off in favour of the respondents the costs of the issue as to their trade-mark of the 14th of July, 1892, and of the issue with reference to the registration of the petitioners' trade-mark.

Judgment accordingly.

Solicitors for the petitioners : *Carter & Goldstein.*

Solicitors for the respondents : *Crerar & Crerar.*

IN THE MATTER OF THE PETITION OF RIGHT OF

ANN SYMONDS, FANNIE SYMONDS, LOUISE R. SYMONDS, ELIZABETH S. NEALES, RICHARD JOHN SYMONDS, CHARTERS JAMES SYMONDS, IVY S. KELSEY AND J. ROY CAMPBELL..... SUPPLIANTS; 1903 May 4.

AND

HIS MAJESTY THE KING..... .....RESPONDENT.

Expropriation—Actual value—Compulsory taking—Compensation.

In expropriation cases where the actual value of lands can be closely and accurately determined, a sum equivalent to ten per centum of such actual value should be added thereto for the compulsory taking; but where that cannot be done, and where the price allowed is liberal and generous, nothing should be added for the compulsory taking.

PETITION OF RIGHT for compensation for lands on the harbour front of St. John, N.B., expropriated for the purposes of certain public works of Canada, and for damages arising from the severance of such lands.

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

April 15th and 16th, 1903.

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

G. C. Coster and *J. Roy Campbell* for the suppliants;

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

THE JUDGE OF THE EXCHEQUER COURT now (May 4th, 1903) delivered judgment.

The petition in this case is filed to recover compensation for certain lands of the suppliants, and others, situate on the harbour front of the City of Saint John

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in the Province of New Brunswick, which were on the 27th of April, 1899, taken by the Crown for the purposes of certain public works that have been constructed there, and for damages for the severance of such lands held by the suppliants in connection therewith.

On the property in question there was many years ago a wharf known as the Saint Helena wharf, which was carried away in 1868 or 1869 by what is known as the Saxby gale. At that time the wharf was out of repair, and since then and until the present year the property has been unproductive. It has, however, been held by those who controlled it at a figure of about eight thousand dollars; although there has in the meantime been no offer for it, that would establish or sustain any such price.

The property, as a whole, had a frontage on the harbour of Saint John of 304 feet. Its depth at the east end facing the Long Wharf Slip was 26½ feet; its depth at the west end was 94 feet; and the length of the other or inshore side was 308 feet. Of the property, a part on the westerly side of it, 70 feet wide, is by the agreement of the parties hereto, but for the purposes of this case only, to be taken as being subject to an easement in favour of an adjoining property that depreciates the value of the fee in that portion by one half; that is, it is agreed that the property as a whole is to be here dealt with as though the frontage on the harbour were 269 feet, instead of 304 feet; and as though its total area was 15,220 square feet instead of 18,220 square feet.

Of the frontage on the harbour of 269 feet the Crown has taken 64 feet; and of the area of 15,220 square feet 1,920 square feet have been taken.

On the advice of valuators appointed by the Crown the suppliants have been tendered the sum of seven

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hundred and twenty dollars ($720), of which amount the sum of four hundred and eighty dollars ($480) was understood to represent the value of the land taken, and the balance of two hundred and forty dollars ($240) the damages arising from the severance The amounts were arrived at in this way: The valuators came to the conclusion that the land was worth twenty-five cents per square foot, and they added fifty per cent. thereto to cover damages to what was left to the suppliants arising from the severance.

The question to be determined is whether the amount that was tendered is sufficient or not; and if not, what amount should be allowed?

From 1891 to 1898 the property was assessed at a value of $800; since then at $1,600, and no reduction has been made in the assessment because of the expropriation of part of it. In the present year the part of the property that was not taken has been let at a rental and upon terms that would, according to the rule followed by the assessors, give a value to that portion for the purposes of assessment of about $4,000. No one pretends to say that the property doubled in value in the year 1898, or that its value was not diminished by the expropriation of part of it; or that the present assessment judged by an actual transaction occurring in this year is not altogether too low. So that it may be taken that in this case at least the assessment affords no assistance in answering the question that has to be determined.

The valuators chosen by the Crown to value the lands in question and other lands, and to estimate the damages arising from their expropriation are men of standing and character whose opinions are entitled to great consideration. But they were acting for the Crown with a view to advising the responsible minister, and were not in the position of valuators chosen

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by both parties. Indeed in the present case it is not at all clear that they sought for and obtained any information from the suppliants about the value of the lands in question or the damages resulting from severance. They arrived approximately at their conclusions by reference to values that they put on adjacent lands. There is no objection to that if sufficient attention is given to differences of situation and condition. They allowed nothing for the compulsory taking; and they ascertained the damages by adding one half to the estimated value of the land taken. With regard to an allowance, which is now usually put at ten per centum, for the compulsory taking, I am of opinion that it should only be added in cases where the actual value of lands can be closely and accurately determined. Where that cannot be done, and where the price allowed is liberal and generous there is, I think, no occasion to add anything for the compulsory taking. In the present case, for reasons that will appear later, I think the value of twenty-five cents per square foot which the valuators put on the land taken was too low.

Then with regard to damages. I am ready to admit that they may sometimes be fairly enough estimated by adding, as the valuators did in this case, one-half to the value of the land taken, but the principle is wrong, and it it only by chance that in some cases the rule works out correctly and justly.

But the greatest mistake, which in the view that I take of this case, the valuators made was to ascertain the value of the land taken by reference to superficial area alone, and without reference to the frontage on the harbour. Mr. Grant, the chairman of the valuators, very frankly admitted that in ascertaining the value of a property such as that in question here, the area alone is not a fair criterion; and that frontage is the

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more important consideration, if the depth is sufficient to make the property available for wharf purposes; and he adds that the valuators looked at it in that way. But I cannot see that they gave any effect to any consideration of that kind. Of course a property might be so narrow that the frontage itself would be lessened greatly in value. But in the present case it appears that even at its narrowest point the width is sufficient to make the frontage available for wharf purposes. The property as a whole (taking it as it has been agreed that it should be taken for the purposes of this case) had one foot of frontage for every 56 square feet of area; the portion that is left to the suppliants has one foot of frontage to every 65 square feet of area; while the portion that was taken has one foot of frontage for every 30 square feet of area. Obviously if one gives, as I think he ought to give, some weight to the element of value derived from frontage the portion taken had relatively a greater value per square foot than the property as a whole, or the portion of it that is left. Then with regard to the valuators, it is, I think, fair to say that their opinion is not, because they were employed by the Crown as valuators, entitled to any greater weight than would otherwise attach to it, if they had had an opportunity or occasion to form a judgment on the matter. The value of their testimony given in this court under oath depends upon their character, good judgment, and the opportunity they had for forming an opinion in the matter. And the evidence that they gave and the opinions that they expressed have to be considered and weighed in connection with the opinion of the witnesses also given under the sanction of an oath, and whose characters, judgment and opinions may equally be entitled to the consideration of the court.

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Of that class of witnesses the suppliants have called three, all of whom are men of high character, good judgment and great business experience. That they should differ so widely from the valuators whom I have mentioned and from each other only goes to show how unsatisfactory the best opinion evidence may be in cases such as the present. Of these witnesses, Mr. John E. Moore put the value, in 1889, of the land taken at $1,000 ; and he did not think there were any damages resulting from severance. In that view he stands alone. All the other witnesses on both sides that spoke of the matter agreed that there were damages occasioned by the severance ; and there can, I think, be no doubt, that there were such damages. Mr. James S. Gregory put the compensation, including damages at $3,000, and Mr. W. H. Thorne at $4,000 at the least. The two estimates last given are based on an estimated value of the property in the year 1899 of $8,000 ; and although that was the price at which it had been held, it exceeded, I think, its fair value in the year mentioned. At the same time I do not fail to see how Mr. Gregory and Mr. Thorne, looking at the property from the standpoint of those who were financially strong enough to hold it for their price, might reasonably entertain the view that they held. It appears, however, that Mr. Coster, acting for the suppliants, made an offer to let the Crown take the whole property at the price of 37½ cents per square foot, which he understood the valuators had fixed as the value of that taken. That would give a value for the whole (limited as stated for the purposes of this case) of an amount between $5,500 and $6,000. On the whole I am inclined to think the smaller sum of $5,500 very fairly represented the value of this property in 1899 ; and that what was left to the suppliants had a value of about $4,000 ; the difference

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between these two sums giving for this case the fair measure of compensation for lands taken and for damages, viz. about $1,500.

Apart from the opinion evidence proof was made, as has been stated, of a transaction occurring in the present year with respect to the portion of the property remaining to the suppliants that would show its present value to be about $4,000. It also appears that since 1899 there has at Saint John been some advance in the value of property such as this is. It further appears that the property as a whole with 269 feet frontage would have brought a higher rent, and have been more valuable relatively than the portion which was the subject of the lease mentioned. That is, that the portion of the property left to the suppliants in 1899 was diminished in value by the severance that took place; but that it has more or less recovered its original value by the general advance in values arising from the increased business of the port and the works which the Crown has constructed. But there is nothing by which those two elements of value acting as they do in opposite directions may be measured; and it seems to me that the only course to adopt is to eliminate both as being approximately equal, though that probably is to the disadvantage of the suppliants. Disregarding then the two elements mentioned and taking the present lease as giving a value in 1899 for the portion not taken of $4,000, and applying that to the frontage and to the areas respectively, we get approximately a value per square foot of 30 cents; and per foot of frontage of $19.50. If we take area as a criterion we would get a value for the 1,920 square feet taken of $576.00. If we take frontage as the criterion we would find the value of the portion taken to be $1,248. But it would not, it seems to me, be fair to take either area or frontage alone, and the true value is to be found

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somewhere between these two amounts. If equal importance is attached to each of the two considerations, that is, if one-half of the sum of the amounts mentioned is taken, we get as the value of the land expropriated a sum of $912, and if to that we add ten per cent. for the compulsory taking we get approximately the amount at which Mr. Moore fixed the value in 1899, namely, $1,000. To that amount I would add a sum of $500 for damages for severance. That gives the same result as was arrived at by taking the value of the property, as a whole, in 1899, to be $5,500, and the value of what was left after the expropriation to be $4,000.

There will be judgment for the suppliants for one thousand five hundred dollars, with interest at six per centum per annum from the 27th day of April, 1899, and with costs.

It appears that all the parties having an interest in the compensation money to be paid in this case have not been joined as suppliants, and it was agreed that it should be a condition of the judgment that the amount thereof should only be payable to the suppliants upon giving to the Crown a sufficient release from any persons other than the suppliants having, at the date of the expropriation, any interest in or claim to the lands mentioned.

Judgment accordingly.

Solicitors for suppliant: *G. C. Coster and J. Roy Campbell.*

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

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HACKETT AND OTHERS .....PLAINTIFFS; 1903 Jan. 29.

AGAINST

THE SHIP *BLAKELEY.*

In re JONES.

Sale of ship by marshal—Purchaser refusing to complete sale—Re-sale—Judicial sales—Statute of frauds.

A ship was sold at auction by the marshal under an order of court in an action for seamen's wages. The ship was knocked down to J. for $2000. J. refusing to complete the purchase, the ship was re-sold by the marshal for $1900. Upon an application for an order to make J. pay the difference in price and the costs occasioned by his default,

Held, that J. was liable therefor.

2. Judicial sales are not within the *Statute of Frauds*, and therefore no memorandum in writing of the sale to J. was necessary. *Attorney-General* v. *Day* (1 Ves. Sr. 218) referred to.

3. For the purpose of establishing J's liability in this matter, it was not necessary that the marshal should have obtained an order for the re-sale.

MOTION to make a defaulting purchaser of a ship sold under an order of court pay the damages and costs arising out of his default.

The plaintiffs in this action recovered judgment against the ship for wages due and obtained an order for the sale of the ship. The ship was put up for sale by the marshal, and knocked down to one H. H Jones for $2000, but he refused to complete the purchase. The ship was subsequently re-sold by the marshal for $1900, and the plaintiffs then applied to make Jones responsible for the difference in price, and for the costs occasioned by his default.

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In re JONES.

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The motion came on for hearing before the local judge of the British Columbia Admiralty District on 22nd December, 1902.

L. Bond for plaintiffs;

F. Higgins for Jones.

MARTIN, L.J. now (January 29th, 1903,) delivered judgment.

On the evidence there is no difficulty in arriving at the conclusion that the ship was purchased at the marshal's sale on the 17th of October, 1902, by Henry Humphrey Jones for $2000, and that he subsequently, in writing, on October 28th, absolutely refused to complete his purchase, and repudiated all responsibility in regard thereto. Under such circumstances the marshal re-sold the ship, without obtaining an order for such re-sale, for the sum of $1900. The present application is by the plaintiffs to compel the defaulting purchaser to make good the difference in price, and pay the costs and expenses occasioned by and incidental to such default.

The application is resisted, first, on the ground that there was no memorandum in writing of the sale to satisfy the Statute of Frauds. Even if such were the case, the answer is that judicial sales are not within that statute (1).

In the second place it is contended that before the defaulting purchaser can be held liable there must be an order for a re-sale.

The analogous practice in chancery on this point is to be found in the cases of *Hodder* v. *Ruffin* (2); *Gray* v. *Gray* (3); *Harding* v. *Harding* (4); *Crooks* v. *Crooks* (5); and *Re Heeley* (6); and it is the fact that in those

(1) *Attorney-General* v. *Day*, 1 Ves. Sr. 218.
(2) 1 V. & B. 544.
(3) 1 Beav. 199.
(4) 4 Myl. & Cr. 514.
(5) 4 Gr. 376.
(6) 1 Chy. Cha. 54.

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cases an order for re-sale was made, but it is apparent to me, at least, that the reason for adopting that practice was to fix a limited time within which the purchaser might still have an opportunity to complete, and failing that, he should be, as it were, formally adjudged a defaulter and held liable as such. The object, in short, was to give him a certain time within which to make up his mind; and the clear distinction between those cases and this is that in none of them had the purchaser definitely repudiated his purchase, but had either taken steps in the direction of completion, or had simply done nothing towards carrying it out, while in this case he has under his own hand declared himself to be a defaulter. It would, under such circumstances, be going through an idle and expensive formality for the court to declare a purchaser to be a defaulter when he has himself already deliberately notified the marshal to that effect. It is only the possibility that the purchaser may be trying to complete that renders the application for the order necessary.

If the re-sale is otherwise regular, it is, as a matter of practice, just as convenient that the order directing a defaulting purchaser to be held liable should be made after the sale as before. Indeed, in such a case as the present wherein it is not necessary to ascertain by an order whether the purchaser may still at the eleventh hour wish to complete or not, it would appear to be the better practice to wait till after the result of the re-sale before applying for such order, because it might very well happen that on the re-sale a greatly increased price would be obtained.

There would in any event be a further reason why an application for an order for re-sale might be necessary in chancery without that being the case in this court, which is that sales in chancery are subject to

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the approval of the court, while such is not the practice in this court, sales of ships being conducted pursuant to an open and general commission of sale to the marshal. If one sale prove abortive there is no good reason why the marshal should not hold another sale at the earliest convenient date without further order.

The defaulting purchaser herein has caused a loss to the plaintiffs, and as the Lord Chancellor said in *Harding* v. *Harding* (1), "I do not know why a person purchasing under a decree of the court should not be held to his contract as much as a person purchasing in the ordinary way." There has been an attempt to play fast and loose with the court in this matter, and under the circumstances it would not be seemly that to obtain redress the plaintiffs should be sent to another tribunal when this court possesses ample power to speedily, and at less expense than elsewhere, afford relief

There will be an order, therefore, directing the said Jones to pay into court the deficiency in price, $100, and all costs, charges and incidental expenses attending the last sale, and incidental thereto, and occasioned by the default, which amount to $270, and also to pay to the plaintiffs or their solicitor the costs of the present motion.

Judgment accordingly.

Solicitors for plaintiffs: *Dumbleton & Bond.*

Solicitors for H. H. Jones: *Higgins & Elliott.*

(1) 4 Myl. & Cr. 514.

IN THE MATTER OF THE PETITION OF RIGHT OF

CHARLES EVERETT GRAHAM.....SUPPLIANT; 1902

AND Nov 17.

HIS MAJESTY THE KING.....RESPONDENT.

Injurious affection of land — Erosion — Acceleration by public work— Damages — Jurisdiction of official arbitrators — Transference to Exchequer Court.

Such jurisdiction as the official arbitrators were empowered to exercise in respect of any claim for alleged direct or consequent damages to property arising out of anything done by the Government of Canada, under section 1 of 33 Vict., c. 23, and also in respect of any claim for alleged direct or consequent damage to property arising from the construction or connected with the execution of any public work under sec. 34 of 31 Vict., c. 12, was, in substance, transferred to the Exchequer Court by the provisions of sections 16, 58 and 59 of 50-51 Vict., c. 16.

2. Where the erosion of land arising from the natural action of the waters of a river was accelerated and increased by certain works erected in the river, and some dredging done therein, by the Crown,—

Held, that a Petition of Right would lie for damages for the acceleration and increase of such erosion.

PETITION OF RIGHT for damages to land arising out of the construction of certain works in the Gatineau river, and certain dredging done therein, by the Crown.

The facts are stated in the reasons for judgment.

October 10th, 1902.

The case was heard at Ottawa.

H. Aylen, K.C., for the suppliant, contended that the gravamen of the action did not constitute a tort. It was rather an incident of the principle of eminent domain that where property of another was injured

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Argument of Counsel.

such injury was to be made good by the owner of the property for whose benefit the works injuriously affecting the other property were constructed. This doctrine was part of the law of expropriation under the Quebec Civil Code. He cited *Lefebvre* v. *The Queen* (1); *Tremblay* v. *Quebec North Shore Turnpike Trustees* (2); *Brown* v. *Holland* (3). Art. 407 C. C. L. C. (4).

There is no difference between the digging of a hole and the erection of a wharf in the conception of a public work. (*Nordheimer* v. *Alexander* (5).

The Crown cannot rely upon the defence of *force majeure* when they have made an accident possible. (C. C. L. C. Art. 17, sec. 24; *McLean* v. *Crossen* (6); *Currie* v. *Adams* (7); *Marcotte* v. *Henault* (8); *St. Jean* v. *Peters* (9); *Grenier* v. *City of Montreal* (10).

J. L. Dowlin, for the respondent, cited *City of Quebec* v. *The Queen* (11); *Hamburg & American Packet Co.* v. *The Queen* (12); *Martin* v. *The Queen* (13); and contended that there was nothing here to bring the case under sec. 19 (*c*) of 50-51 Vict.

F. H. Gisborne, followed for the respondent, and argued that the order in council waiving prescription did not waive any other defence, such as lack of jurisdiction. This was a matter in which there was no negligence of a servant of the Crown upon which to found jurisdiction under 50-51 Vict., c. 16. If there was negligence, it was not negligence by any officer or servant of the Dominion Government.

H. Aylen, K.C., in reply, cited C. S. C. c. 28. As to prescription, the statute 50-51 Vict. c. 16, is retro-

(1) 1 Ex. C. R. 121.
(2) 13 Q. R. S. C. 329.
(3) 11 L. N. 378.
(4) Sharp's C. C. p. 158, *et seq.*
(5) 19 S. C. R. 248.
(6) 33 U. C. Q. B. 448.
(7) 14 Q. L. R. 169.
(8) 13 Q. R. S. C. 453.
(9) 17 Q. L. R. 252.
(10) 3 L. N. 51.
(11) 24 S. C. R. 420.
(12) 7 Ex. C. R. 150.
(13) 2 Ex. C. R. 328.

active, being a matter of procedure. (*Hardcastle on Statutes* (1). Arts. 2227, 2265, C. C. L. C.)

The whole evidence shows that the pier built in 1874 facilitated the erosion by creating a cross-current, and the dredging undermined the support of the bank. There is negligence of a servant or servants of the Crown clearly demonstrated in this case.

THE JUDGE OF THE EXCHEQUER COURT now (Nov. 17th 1902) delivered judgment.

The suppliant is seized of certain lands known as lots Nos. 1 A and 2 A in the 5th Range of the Township of Hull in the County of Wright and Province of Quebec. These lands are situate upon the easterly shore of the Gatineau River, and a considerable portion of them adjacent to the river has been wasted by action of the waters of the river. The lands were from their situation liable to be washed away to some extent; but it is alleged, and I find, that the erosion to which they were exposed has been accelerated and increased by certain works erected in the river, and dredging done therein, by authority of the Crown. The original works, consisting of piers and booms for holding timber, were constructed many years before the union of the provinces; and since then have been maintained by the Government of the Dominion. The dredging was done in the year 1874 and since. In that year also a new pier was built and part of the booms enlarged. Prior to that time the erosion by the river of the suppliant's lands had not been considerable. He testified that up to that time the bank of the river had never, to his knowledge, been affected. Since then the erosion has been marked and a large part of the property has been washed away. Now, where a number of causes, some natural

(1) 3rd ed. p. 359, quoting Lord Blackburn.

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and others created by the act of man, concur to occasion damage, it is at times difficult to determine how far the damage is attributable to any one of such causes. In the present case it seems to be certain, and I find, that the works constructed, and more particularly and principally the dredging done in the Gatineau River, by authority of the Government of Canada in the year 1874, and since, have contributed in a large measure and degree to the injury and damage of which the suppliant complains. And I do not think it is a good answer to his claim to say that the damage has in part been occasioned by natural causes to the action of which the property was exposed. That is a matter to be taken into account in determining the value of the land that has been wasted away, and the damages that should be awarded. It must of course be conceded that land on the banks of a river, liable and exposed in its natural state to erosion, such as has taken place here, cannot be so valuable acre for acre as land that is not so exposed. The fact that apart altogether from the work done and works constructed, some portion of the suppliant's property might have been washed away, may well be taken into account in determining the amount of damages; but that consideration is not a good answer to the claim if the erosion was, as I think it was, due in a large measure to, and greatly increased by, the dredging done and the works constructed.

We come now to consider the question as to whether the petition of right will lie for the injury complained of. At the time when such injury was occasioned the official arbitrators had authority, among other things, to hear, and award upon any claim for alleged direct or consequent damages to property arising out of anything done by the Government of Canada (1).

(1) 33 Vict. c. 23, s. 1.

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And it was also provided that no such claim should be submitted to arbitration or entertained unless it was made within six months after the occurrence of the accident, or the doing or not doing of the act upon which the claim was founded (1). They had also jurisdiction with respect to any claim for alleged direct or consequent damage to property arising from the construction or connected with the execution of any public work (2); but such a claim was not to be entertained unless the claim and the particulars thereof were filed with the proper officer within twelve calendar months next after the loss or injury complained of (3). In 1879 an appeal was given from the official arbitrators to this court (4), and in 1887 their jurisdicton in respect to claims against the Crown was transferred to this court (5). That was in substance the effect of the Exchequer Court Act of that year; though the terms in which the jurisdiction of the court was expressed were, I think, in some matters not as general as those that had been used to define the jurisdiction of the official arbitrators (6).

The present claim was not brought before the official arbitrators. If it had been they would, I think, have had jurisdiction in respect of it, subject always to the statute of limitations that was applicable to it. But if that defence had been waived the arbitrators would, I think, have had jurisdiction in the matter. And the jurisdiction which they had, has, it seems to me, devolved upon this court, subject to the claim being defeated if the Crown should rely upon the defence of prescription. In this case the Crown has undertaken and agreed to waive the benefit of any statute of limi-

(1) 33 Vict. c. 23, s. 2.
(2) 31 Vict. c. 12, s. 34.
(3) 31 Vict. c. 12, s. 37. See also R. S. C. c. 40, ss. 6 and 8.
(4) 42 Vict. c. 8.
(5) The Exchequer Court Act, 50-51 Vict. c. 16.
(6) 50-51 Vict. c. 16 ss. 16, 58 and 59.

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tations, or any defence by way of prescription, which might or could be pleaded in answer to the suppliant's claim. The court has, I think, apart from any question of prescription, jurisdiction to hear and determine the matter. That question having been waived and abandoned the jurisdiction remains.

There will be judgment for the suppliant, and a reference to the Registrar of the court to inquire and report in respect to the amount of damages the suppliant has sustained in this matter.

Judgment accordingly.

Solicitors for suppliant : *O'Meara & Graham.*

Solicitor for respondent : *J. L. Dowlin.*

BETWEEN

THE ATTORNEY-GENERAL OF MANITOBA ..... } PLAINTIFF;

1903
June 29.

AND

HIS MAJESTY'S ATTORNEY-GENERAL FOR CANADA ..... } DEFENDANT.

Swamp lands — Revenues — Title — 48-49 Vict., c. 50 — Canada and Manitoba

By the first section of 48-49 Vict. c. 50, intituled "*An Act for the final settlement of the claims made by the Province of Manitoba on the Dominion,*" it is provided that all Crown lands in Manitoba which may be shown to the satisfaction of the Dominion Government to be 'swamp lands' should be transferred to the province and enure wholly to its benefit and uses. (See also R.S.C., c. 47, s. 4). This enactment became law on the 20th July, 1885. It was admitted that certain Crown lands in Manitoba have, under the said provisions, been shown to the satisfaction of the Dominion Government to be 'swamp lands,' and transferred to the province accordingly. It was further admitted that between the date when the statute above mentioned became law and the various dates when such transfers were made to the province, the Dominion Government received certain sums of money produced by the sale of timber, hay and other emblements off the lands so transferred, and that the Dominion Government had retained such sums of money to the use of the Crown for the purposes of the Dominion of Canada. Upon a claim by the province for an account and payment of these moneys as having enured to its benefit and use,—

Held, that, until the lands were so transferred, the Dominion Government were entitled to administer the lands in question and to apply the revenues thereof for the purposes of the Dominion of Canada.

2. When Crown lands are transferred by the Dominion Government to a Provincial Government, or by the latter to the former, there is no transfer of title. That remains all the time in the Crown.

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What is transferred is the right to administer such lands and the right to appropriate the revenues therefrom ; and the latter right will in general follow and co-exist with the former.

THIS was an action, by way of Statement of Claim, by the Province of Manitoba, to recover certain moneys from the Dominion of Canada alleged to be due to the Province under the Act 48-49 Vict., c. 50.

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

April 24th, 1903.

The case was heard at Ottawa.

T. M. Daly, K.C., for the plaintiff, contended that the effect of the Act 48 & 49 Vict., c. 50, was to transfer, upon the day it received the royal assent, not only the title but also all the rents, issues and profits in the swamp lands within the Province of Manitoba to the Government of that Province. It is clearly a grant *in presenti*, the passing of the title does not depend upon the recognition of the character of the lands by the Governor in Council. It was the intention of the Dominion Government to follow the course of the United States Congress in assigning swamp lands in the State of Arkansas, and other States, to the Government of such States, and the Dominion statute of 1885 is a close copy of the American statute of September 28th, 1850, (9 St. 519.) (He cited the *Official Debates of the House of Commons* (1). That being so, the court should adopt the construction put upon the American statute by the courts in the United States. He cited *Wright* v *Roseberry* (2); *Rutherford* v. *Greene* (3); *Lessieur* v. *Prince* (4); *Railroad Company* v. *Smith* (5); *Railroad Company* v. *Fremont* (6); *Shulen-*

(1) Vol. 3 (1885) p. 2420 ; Vol. 4, p. 2775.
(2) 121 U. S. at p. 495.
(3) 2 Wheat. 196.
(4) 12 How. 59.
(5) 9 Wall. 95.
(6) 9 Wall. 89.

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burg v. *Harriman* (1); *Missouri & Kansas Rd. Co.* v. *Kansas Pacific Rd. Co.* (2); *French* v. *Fyan* (3); *San Francisco Sav. Union* v. *Irwin* (4); *Railroad Company* v. *Baldwin* (5).

Under the English authorities, and on general principles, a fair reading of the Dominion enactment will show that it was the intention of the Dominion to pass the title by the Act itself. (He cited *Dart on Vendors* (6); *Crossley* v *Lightowler* (7); *Schofield* v. *Cahuac* (8); *Wheeldon* v. *Burrows* (9); *Canada Central Railroad* v. *The Queen* (10)).

Clearly the Crown in right of the Dominion is a trustee for the provincial government in this case *Lewin on Trusts* (11); *Ackland* v. *Gaisford* (12); *Clark & Humphrey on Sales of Land* (13); *Encyclopedia of Laws of England* (14); *Rafferty* v. *Schofield* (15); *Wilson* v. *Clapham* (16); *Ferguson* v. *Cadman* (17); *Holroyd* v. *Marshall* (18).

Dr. Travers Lewis, following for the plaintiff, contended that the Dominion statute both in its text and marginal notes contemplated a transfer of the title to the swamp lands contemporaneously with its passage. He cited *R.* v. *Milverton* (19); *Venour* v. *Sellon* (20); *Sheffield* v. *Bennet* (21); *Attorney-General* v. *Great Eastern Ry. Co.* (22); *The Interpretation Act* (23); *The Queen* v. *Farwell* (24); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (25).

(1) 21 Wall. 44.
(2) 97 U. S. 491.
(3) 93 U. S. 169.
(4) 28 Fed. Rep. 708.
(5) 103 U. S. 426.
(6) Pp. 232, 235.
(7) L. R. 2 Ch. 478.
(8) 4 DeG. & Sm. 533.
(9) 12 Ch. D. 42.
(10) 20 Gr. 273.
(11) 10th Ed. pp. 153, 223.
(12) 2 Madd. 28.
(13) P. 256.
(14) Vol. 12, p. 429.
(15) [1897] 1 Ch. 937.
(16) 1 J. & W. 38.
(17) 1 Sim. 530.
(18) 10 H. L. C. 191.
(19) 5 A. & E. 854.
(20) L. R. 2 Ch. D. 522.
(21) L. R. 7 Exch. 409.
(22) L. R. 11 Ch. D. 460.
(23) R. S. C. c. 1 sec. 7, ss. (3), and sec. 4.
(24) 14 S. C. R. 393.
(25) 14 A. C. 301.

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Argument of Counsel.

E. L. Newcombe, K.C. for the defendant, contended that the marginal or side notes of an enactment could not be held to control the body of the statute.

There is no parity between the Act of Congress of 1850 and the Dominion statute in question. Moreover the federal courts which have interpreted the American Act do not say that the particular States interested could recover profits for the period elapsing between the passing of the legislation by Congress and the actual grant. They merely say that the words used are apt to pass the title *in presenti*. (He cites *Thompson* v. *Prince* (1); *Keller* v. *Brickey* (2): *Rutherford* v. *Greene* (3); *The Queen* v. *Farwell* (4); *Railroad Company* v. *Smith* (5)).

T. M. Daly, K.C., in reply, cited *Langdeau* v. *Hanes* (6).

THE JUDGE OF THE EXCHEQUER COURT now (June 29th, 1903,) delivered judgment

By the first section of the Act of Parliament 48-49 Victoria, chapter 50, intituled "*An Act for the final settlement of the claims made by the Province of Manitoba on the Dominion*," it was provided that all Crown lands in Manitoba which may be shown to the satisfaction of the Dominion Government to be swamp lands should be transferred to the province and enure wholly to its benefit and uses This provision is re-enacted in section four, chapter 47 of *The Revised Statutes of Canada*. By an admission filed in this case, it appears that certain Crown lands in Manitoba have, in pursuance of the provisions cited, been shown to the satisfaction of the Dominion Government to be swamp lands and transferred to the Province accordingly; that between the 20th of July, 1885, when the

(1) 67 Ills. 281.
(2) 78 Ills. 133.
(3) 121 U. S. 495.
(4) 14 S. C. R. 393.
(5) 9 Wall. 95.
(6) 21 Wall. 521.

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Act 48-49 Victoria, chapter 50, received the royal assent, and the various dates when the above mentioned transfers were made to the Province, the Dominion Government received certain sums of money produced by the sale of timber, hay and other emblements off some of the said lands so transferred as aforesaid; and that the Government of Canada has retained such sums of money to the use of the Crown for the purposes of the Dominion of Canada.

For the Province of Manitoba it is contended that these sums of money enured to its benefit and use; and an account and payment thereof are demanded.

Now when the statute mentions a transfer of Crown lands from the Dominion to the Province the meaning is not that there is any transfer of the title to such lands. That remains all the time in the Crown. What is transferred is the right to administer such lands and the right to appropriate the revenues therefrom; and the latter right will in general follow and co-exist with the former. No doubt it might be provided by statute or agreement that one Government should administer certain Crown lands for the benefit and use of some other Government, but in the absence of any such statute or agreement the Government that has the right to administer Crown lands has a right also to take and appropriate the revenues arising therefrom.

The right of the Government of Canada to administer the lands in question here until they were from time to time transferred to the Province of Manitoba is not contested, and it seems to me that until the lands were so transferred the Government of Canada had a right also to the revenues accruing therefrom. The statute provides that all Crown lands in Manitoba which may be, or (as enacted in *The Revised Statutes of Canada*) are shown to the satisfaction of the Dominion

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Government to be, swamp lands shall be transferred to the Province and enure wholly to its benefit and uses. But when shall such lands enure to the benefit and uses of the Province? The answer, it seems to me, must be, when they have been shewn to the satisfaction of the Dominion Government to be swamp lands and have been transferred; and until they are so transferred the Government of Canada have, I think, not only the right to administer such lands, which, as has been said, is not disputed, but also the right to take the revenues arising therefrom to the use of the Dominion.

It was contended that a different construction, and one more favourable to the Province, should be given to the provision in question; because the courts of the United States had put a different construction on an Act of Congress dealing with a similar subject, the policy of which the Parliament and Government of Canada were supposed to have followed. I am not, however, able to adopt that contention. The two Acts are not identical in terms, and it would not, it seems to me, be safe to go afield to find reasons for giving a meaning to the Act of Parliament cited different from that to be drawn from the terms used therein.

There will be judgment for the defendant.

Judgment accordingly.

Solicitors for plaintiff: *Lewis & Smellie.*

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

NOVA SCOTIA ADMIRALTY DISTRICT.

SIR ROBERT BOAK.....PLAINTIFF

1903

May 23.

AGAINST

THE SHIP "*BADEN*."

Maritime law—Damage to wharf by ship—Negligence—Liability.

A ship was moored in her dock with her bow to the east. Her stern, being at the inner end of the dock, was partially protected by the wharf and stores to the south, while the bow and fore-part of the ship, extending eastwardly beyond any such protection, was exposed to the full force of a southeasterly gale. There was an anchor out, with 25 fathoms of chain, on the starboard bow of the ship; but it was not in a position to help the ship from swinging against the wharf in the event of such a gale. A gale from the direction mentioned having sprung up, the master of the ship ran out a small wire rope from the starboard side of the ship's stern to a wharf on the south of her berth; but the evidence showed that this rope had no effect in preventing the collision of the port bow of the ship with the plaintiff's wharf. During the gale this wharf was considerably damaged by the pounding of the ship against it from the force of the wind and waves.

Held, that the master of the ship had failed to exercise seamanlike care, forethought and skill in omitting to so place his anchor as to protect his ship from the force of the gale and prevent her colliding with the wharf, and that the damage was attributable to his negligence and not to inevitable accident.

ACTION for damages for injury to the plaintiff's wharf alleged to have arisen from the negligence of the master of the ship.

The facts are stated in the reasons for judgment.

July 17th, 1902.

The case came on for trial, at Halifax, before the Local Judge in Admiralty for the Admiralty District of Nova Scotia.

H. McInnis for the plaintiff;

R. L. Borden, K.C. and *T. R. Robertson* for the ship.

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MACDONALD (C.J.) L. J., now (May 23rd, 1903) delivered judgment.

The plaintiff is a merchant and wharf owner resident in the Port of Halifax. The *Baden*, a German ship, arrived in the Port of Halifax on the 28th day of May, 1902, with a cargo of salt from Lisbon, consigned to Mr. Whitman, a merchant of Halifax, and was on arrival docked at his wharf, where she discharged a part of her cargo. On the 17th June, the *Baden* was moved by her master from Whitman's wharf to that of the plaintiff, which lies a couple of wharves to the north of Whitman's. She was docked on the south side of the plaintiff's wharf (called the south wharf), having a smaller wharf of the plaintiff, known as the coal wharf, immediately south of her berth; but not entering as far into the waters of the harbour as the wharf at which the *Baden* was moored. The *Baden* was taken from Whitman's wharf to the dock at plaintiff's wharf by a tug, and was moored with her head E. by S. When taking the ship into dock her anchor was lowered with 25 fathoms of chain, that is a distance of 25 fathoms from the bow of the vessel when fastened in her dock. This anchor, as ascertained after the accident, was on a line about a point on the starboard bow of the ship, or on a course E. $\frac{1}{2}$ S. The ship was well and sufficiently fastened to the plaintiff's north and south wharf, or rather to the north and south sides of the same wharf; but had no fastening or lines from the ship to the southward until the evening of the day of the accident, when a wire rope from the starboard side of the ship and near the stern was fastened to the plaintiff's wharf, called the coal wharf, to the south. On the 26th May, in the afternoon, a severe storm from the southeast arose and ended in a heavy gale, blowing with full force on the starboard side of the ship, which by reason, as the

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plaintiff alleged, of insufficient and unseamanlike management on the part of the master and crew of the ship resulted in serious injury to the wharf by the force with which the *Baden* was driven on and against it. The defence on which the defendant relied at the trial was that the loss complained of resulted from inevitable accident and not from the carelessness, negligence, or incompetence of the master and crew of the ship. The negligence relied upon by the plaintiff was the want of care manifested in making no provision against the effects of a south-east wind. The south or rather perhaps the south-east side of the plaintiff's wharf from its situation is much exposed to, and almost entirely unprotected from, winds from that quarter, and while due care appears to have been exercised in securing the fastening of the ship to the wharf on the north side, the necessity of protecting the ship and wharf from the effects of a south-east gale does not appear to have been considered with seamanlike or reasonable care. It will be seen from a careful perusal of the evidence that the *Baden* was moored in her dock with her bow to the east. Her stern being at the inner end of the dock was partially protected by the wharf and stores to the south, while the bow and forepart of the ship extending eastwardly beyond any such protection was exposed to the full force of the south-easterly gale. The only precaution taken by the master to prevent the vessel being impelled with full force against the south dock to which she was fastened on her north side, was a wire rope from the ship's starboard stern to the small coal wharf to the south of her; and this measure of precaution was only taken after the wind had risen to a gale. I think it is quite clear from the evidence that this wire cable could have no effect in preventing the collision of the ship with the wharf. There was nothing to prevent the collision

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of the ship with the wharf especially on the port bow, and practically for the whole length of the ship. The rise and fall of the vessel consequent on the heaving sea, and the force with which under the impulse of such a wind and sea it was thrown against the wharf, indicate, it appears to me, a great want of judgment and skill on the part of the master, which of itself would create a liability on the part of this ship in favour of the plaintiff. But the plaintiff also relies upon the want of seamanlike care, forethought and skill on the part of the master in omitting to use his anchor as he should have done as a means of saving his ship from the effect of the gale and preventing her from pounding on the wharf as she did. It will be seen from the evidence of the experts and by the sketch showing the situation used at the trial, that the position of the anchor when let go was almost in a direct line with the dock, and the ship in the dock, and could not possibly have any effect in keeping the vessel from swinging against the dock under the influence of the gale, while had the anchor been placed at least 4 or 4½ points further south, it would have held the ship from the wharf. As to the negligence and want of skill charged in relation to the placing of the anchor, the defence or excuse of the master is first, that as he was not well acquainted with the wharf and harbour, had never in fact been here before, he left the matter in the hands of the master of the tug, and made no suggestion as to how the ship should be moved; and, secondly, that under the circumstances in proof the loss complained of was the result of inevitable accident. The learned counsel for the defendant cited a number of cases in which a definition of the phrase "inevitable accident" has been given by the courts; but I shall content myself with that given by the author of *Marsden on Collisions at Sea*, who says (1):

(1) 4th ed., p. 8.

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"To constitute inevitable accident it is necessary "that the occurrence should have taken place in such "a manner as not to have been capable of being pre- "vented by ordinary skill and ordinary prudence. "We are not to expect extraordinary skill or extra- "ordinary diligence, but that degree of skill and of dili- "gence which is generally to be found in persons who "discharge their duty" and Dr. Lushington defined "inevitable accident" to be "that which a party charg- "ed with an offence could not possibly prevent by the "exercise of ordinary care, caution and maritime skill."

In the *William Lindsay* (1) the court said: "Now "the master is bound to take all reasonable pre- "cautions to prevent his ship doing damage to "others. It would be going too far to hold his "owners to be responsible because he may have "omitted some possible precaution which the event "suggests he might have resorted to. The rule is "that he must take all such precautions as a man of "ordinary prudence and skill, exercising reasonable "foresight, would use to avert danger in the circum- "stances in which he may happen to be placed."

I do not think the master of the *Baden* can divest himself of responsibility as master of his ship by permitting the master of the tug, which towed his ship into her dock, to select and determine the manner in which the ship shall be secured in her dock. As to the anchor it appears to be quite clear that had it been dropped four or five points further south, or even further, and properly secured with a sufficient length of chain, it would be in the power of the crew of the ship at any time to heave the bow of the ship so far south of and away from the wharf as to make it highly improbable that the injury and loss complained of could have resulted. And apart from

(1) L. R. 5 P. C. at p. 343.

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the opinions of the experts on the trial, it appears to me that a glance at the chart and sketches, put in on the trial, is sufficient to convince one not an expert or seaman, first, that the anchor where it was dropped and left was manifestly useless for any purpose of protection of the wharf in a S. or S. E. gale; and secondly, that if the anchor had been placed four or five or six points further south the injury in all probability would not have happened. It appears to me, therefore, that in this point of the case the master of the *Baden* was clearly chargeable with want of judgment, ordinary care, skill and seamanship. I do not think the master can shelter himself under the excuse that he had never been in the harbour before. It was his duty to inquire and ascertain from his pilot or others whether any and what peculiar conditions of climate or weather existed against which it would be prudent for him to take precautions; and he was long enough in port before the accident happened to make himself informed on all these questions. While as to the exposure of his ship to danger from a southerly gale it is not possible to conceive that a seaman of the most ordinary intelligence would not observe this at a glance. I have for these reasons come to the conclusion that the damage to the plaintiffs was caused by the reason of the want of care and seamanship of the master of the *Baden*, and that the plaintiff is entitled to recover the compensation sought in this action with costs. It was agreed at the trial that if the evidence on the question of the extent of damage is necessary at a later date, the same may be taken before the registrar.

Judgment accordingly.

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

Solicitor for the ship: *H. C. Borden.*

IN THE MATTER OF THE GRAND TRUNK RAILWAY COMPANY; THE MUNICIPAL CORPORATION OF THE CITY OF KINGSTON; THE COUNTY OF FRONTENAC AND THE KINGSTON AND STORRINGTON AND KINGSTON MILLS CONSOLIDATED ROAD COMPANY. AND IN THE MATTER OF THE RAILWAY ACT, 51 VICTORIA, CHAPTER 59, CANADA.

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Nov. 23.

Railway Committee of the Privy Council—Construction of subway—County road and city street—Cost of construction—Ultra vires—Merits of order.

The Municipal Corporation of a city was one of the movers in an application to the Railway Committee of the Privy Council for an order authorizing the construction of a subway under a railway, by which one of the city streets was made to connect with a county road, the works being adjacent to a city street but not within the city limits.

Held, that the city was interested within the meaning of the term as used in the 188th section of *The Railway Act*, which provides that the Railway Committee might apportion the cost of such works as those in question between the railway company and "any person interested therein."

2. On an application to make an order of the Railway Committee of the Privy Council a rule of court, the court will not go into the merits of the order, or consider objections to the procedure followed by the Railway Committee.

Semble, that while the Railway Committee of the Privy Council has jurisdiction in such a case, to impose upon the party interested an obligation to bear part of the expense, it has no jurisdiction to compel a party or other than the railway company to execute the works.

MOTION to make three certain orders of the Railway Committee a rule of the Exchequer Court.

The orders were granted respectively on the 19th December, 1902, the 4th day of March, 1903, and the 16th day of June, 1903. Subjoined are copies thereof:—

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Statement of Facts.

ORDER OF 19TH DECEMBER, 1902.

The Municipal Council of the County of Frontenac having applied to the Railway Committee of the Privy Council of Canada for an Order directing that the present highway crossing, at rail level over the Grand Trunk Railway at Kingston Junction, and known as the "Montreal Road Crossing," be done away with, and in lieu thereof, that the said highway be diverted and carried under the railway by a subway to be constructed as shown on plan and profile submitted and annexed thereto.

The said committee, having this day heard counsel for the Corporation of the County of Frontenac, the Corporation of the City of Kingston and the Grand Trunk Railway Company of Canada, respectively, and duly considered the evidence submitted on their behalf, is of opinion that the said crossing known as the "Montreal Road Crossing" is a dangerous one, and therefore deems it necessary in the interest of the public safety that the said crossing be done away with, and the highway at that point diverted so as to pass under the railway by a subway to be constructed at the place shown above on the said plan, and subject to the sanction of the Governor in Council, hereby orders and directs as follows:

1. That the said Montreal Road be diverted so as to pass under the Grand Trunk Railway by a subway to be constructed at the place shown on the said plan.

2. The Corporations of the County of Frontenac and the City of Kingston, respectively, shall at their own cost, procure all the land and other property other than land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as hereby directed and shown on the said plan, and shall also bear and pay all the expense incurred in connection with all damages aris-

ing or payable by reason of the said diverted highway, including the cost of the excavation required for the said subway to be constructed upon or across the right of way of the Grand Trunk Railway Company of Canada, and shall thereafter assume the control of and at all times maintain the said diverted highway in a suitable and proper condition for the purpose intended.

All costs and expenses hereby imposed upon and all damages payable by the said corporation shall be borne and paid by them in equal proportions. The excavation required for the construction of the said subway under the tracks of the Grand Trunk Railway Company of Canada shall be made by the railway company and the cost thereof paid by the said corporations on presentation of properly certified accounts showing the amount thereof.

3. The Grand Trunk Railway Company of Canada shall at its own cost construct the overhead bridge required for the purpose of carrying its lines of railway across the said subway, together with the necessary abutments and other works appertaining thereto, and shall thereafter maintain the same.

4. All the said work shall be done in accordance with plans to be submitted to and approved by the Government Chief Engineer of Railways and Canals.

(Sgd.) ANDW. G. BLAIR,
Chairman.

ORDER OF 4TH MARCH, 1903.

Whereas by an Order of the Railway Committee of the Privy Council of Canada, dated the 19th day of December, 1902, upon the application of the Corporation of the County of Frontenac, it was ordered and directed as follows :—

1. That the said Montreal Road be diverted so as to pass under the Grand Trunk Railway by a subway to be constructed at the place shown on the said plan.

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2. The Corporations of the County of Frontenac and the City of Kingston, respectively, shall at their own cost procure all the said land and other property other than land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as hereby directed and shown on the said plan, and shall also bear and pay all the expense incurred in connection with all damages arising or payable by reason of the said diverted highway, including the cost of the excavation required for the said subway to be constructed upon or across the right of way of the Grand Trunk Railway Company of Canada, and shall thereafter assume the control of and at all times maintain the said diverted highway in a suitable and proper condition for the purpose intended. All costs and expenses hereby imposed upon and all damages payable by the said Corporations shall be borne and paid by them in equal proportions. The excavation required for the construction of the said subway under the tracks of the Grand Trunk Railway Company of Canada shall be made by the railway company and the cost thereof paid by the said corporations on presentation of properly certified accounts showing the amount thereof.

3. The Grand Trunk Railway Company of Canada shall, at its own cost, construct the overhead bridge required for the purpose of carrying its lines of railway across the said subway together with the necessary abutments and other works appertaining thereto and shall thereafter maintain the same.

4. All the said work shall be done in accordance with plans to be submitted to and approved by the Government Chief Engineer of Railways and Canals.

And whereas the Corporation of the City of Kingston having applied for leave to reopen the said application of the Municipal Council of the Corpora-

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tion of the County of Frontenac, and for a variation of the said order dated the 19th day of December, 1902, and the said Committee having this day heard counsel for the said Corporations of the City of Kingston, the County of Frontenac, the Kingston and Storrington and Kingston Mills Consolidated Road Company and the Grand Trunk Railway Company, respectively, and duly considered the evidence submitted on their behalf, hereby orders:

1. That the cost of the drainage of the said subway shall be borne in equal proportions by the said Corporations of the City of Kingston and the County of Frontenac respectively.

2. That a conveyance of that portion of the said diverted road not within the limits of the right of way of the Grand Trunk Railway Company shall be made to the Kingston and Storrington and Kingston Mills Consolidated Road Company, who shall at its own cost properly macadamize, maintain and keep in repair the whole of the said diverted road including that portion in the said subway and the approaches thereto.

3. As soon as the said subway and diverted road are completed and ready for public travel, that portion of the highway known as the Montreal Road used for crossing the tracks of the Grand Trunk Railway, at rail level, shall be conveyed by the Kingston and Storrington and Kingston Mills Consolidated Road Company, or the proper owner thereof, to the Grand Trunk Railway Company of Canada, who shall thereafter be entitled to occupy the same for the purpose of their railway, and that the said order dated the 19th December, 1902, be and the same is hereby amended accordingly.

And the said committee, in pursuance of section 22 of the Railway Act, further orders and directs that the Corporation of the City of Kingston shall pay to the

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Corporation of the County of Frontenac, within ninety days from the date hereof, fifty dollars as counsel fee and fifty dollars being the additional expenses of the counsel and county councillors in all, one hundred dollars, and the Kingston and Storrington and Kingston Mills Consolidated Road Company, the sum of fifty dollars, the said sum being in payment of all costs, charges and expenses which the Corporation of the County of Frontenac and the Kingston and Storrington and Kingston Mills Consolidated Road Company have incurred in and about the said application of the Corporation of the City of Kingston, and the said Committee in other respects confirms its said order of the 19th of December, 1902.

(Sgd.) ANDW. G. BLAIR,
Chairman.

ORDER OF 16TH JUNE, 1903.

Whereas by two Orders of the Railway Committee of the Privy Council, dated the 19th day of December, 1902, and the 4th day of March, 1903, respectively, among other things, it was ordered that the present highway crossing of the Grand Trunk Railway at Kingston Junction be done away with and a subway constructed in lieu thereof, and that the Corporations of the County of Frontenac and the City of Kingston, respectively, shall at their own cost procure all the land and other property, other than land belonging to the Grand Trunk Railway Company of Canada, required for the construction of the diversion of the highway referred to in the said orders.

And whereas the Municipality of the County of Frontenac having applied for leave to vary the said orders, so as to provide that all the land and other property other than the land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as

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directed by the said orders, shall be procured by the Grand Trunk Railway Company of Canada but at the expense, costs and charges of the Corporations of the County of Frontenac and the City of Kingston, and that all the work in connection with the said highway be done by the Grand Trunk Railway Company of Canada at the cost and expense of the said Corporations of the County of Frontenac and City of Kingston, and the said commmittee having this day duly considered the said application, hereby orders and directs, subject to the sanction of the Governor in Council, that all the land and other property other than land belonging to the Grand Trunk Railway Company of Canada required for the construction of the diversion of the said highway, as directed by the the orders dated the 19th of December, 1902, and the 4th of March, 1903, respectively, shall be procured by the Grand Trunk Railway Company of Canada but at the expense, costs and charges of the Corporations of the County of Frontenac and the City of Kingston, and that all the work in connection with said highway diversion be done by the Grand Trunk Railway Company of Canada at the cost and expense of the said Corporations of the County of Frontenac and City of Kingston, and the said Committee in other respects confirms its said orders of the 19th of December, 1902, and the 4th of March, 1903, and orders accordingly.

(Sgd.) ANDW. G. BLAIR,
Chairman.

June 1st, 1903.

An order *nisi* was obtained on the application of the Municipal Corporation of the County of Frontenac to make the two orders dated, respectively, the 19th of December, 1902, and 13th May, 1902, a rule of this court. On the return of the order *nisi*, which was

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supported by the Municipal Corporation of the County of Frontenac and by the Kingston and Storrington and Kingston Mills Consolidated Road Company, the City of Kingston opposed the application on the ground, *inter alia*, that the Railway Committee had no power under section 188 of *The Railway Act* to direct the city and county to construct the works. In view of this objection the applicants asked for, and obtained, an enlargement of this motion to allow them to apply to the Railway Committee for the amending order of the 16th June, 1903.

September 1st, 1903.

D. M. McIntyre, for the City of Kingston, showed cause.

Even with the amending order of June 16th, the application must fail, (1st) because the locus of the works ordered to be done is situated without the municipal limits of the City of Kingston; (2ndly) because it is an attempt by the Railway Committee of the Privy Council to enable a municipality to enlarge its power of taxing the ratepayers. The Dominion Parliament cannot legislate for this purpose, nor could it be seriously contended that the Railway Committee might enlarge the powers of the municipality in this regard. In the next place the procedure of the Railway Committee in granting the two last orders without the City of Kingston being represented at the hearing was irregular. (He cites *The Municipal Act* (R. S. O.) sec. 325; *Biggar's Municipal Manual* (1); *Grand Trunk Railway Company* v. *City of Toronto* (2); *Revised Statutes of Ontario*, chap. 193, sec. 145; *Madden* v. *Nelson and Port Simpson Railway Co.* (3)).

(1) 11 ed. pp. 321, 327. (2) 32 Ont. R. 120.
(3) [1899] A. C. 626.

J. McD. Mowat and *Glyn Osler*, for the County of Frontenac and the Kingston and Storrington and Kingston Mills Consolidated Road Company, *contra*.

The court has no jurisdiction to review the order of the Railway Committee. The Dominion Parliament has a paramount right to legislate as to railways, and what the Railway Committee have done here is absolutely within their jurisdiction. (*City of Toronto* v. *Metropolitan Railway Co.* (1); *Canadian Pacific Railway Co.* v. *County of York* (2).

Again, the City of Kingston cannot be heard against the orders because the order of 19th December, 1902, was made on its application.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1903) delivered judgment.

This was, when the motion first came before the court, an application on behalf of the Municipal Corporation of the Township of Frontenac that two certain orders of the Railway Committee of the Privy Council dated respectively the 19th day of December, 1902, and the 4th day of March, 1903, and approved by the Governor in Council on the 13th day of May, 1903, should be made a rule of this court.

On the return of the order *nisi* the application was supported by the County of Frontenac and by The Kingston and Storrington and Kingston Mills Consolidated Road Company, and opposed by the City of Kingston. Upon the argument that took place it appeared, among other things, that by the orders in question the City of Kingston and the County of Frontenac were directed to do certain things at their own cost, while the 187th section of *The Railway Act* gave the Railway Committee authority to direct that the railway company should execute

(1) 31 Ont. R. 367. (2) 27 Ont. R. 559.

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the works and take the measures that the Committee thought to be necessary, the Committee having by the 188th section authority to apportion the cost of such works and measures of protection between the railway company and any person interested therein as to the Committee might seem just and reasonable. It being, among other things, objected on behalf of the City of Kingston that the orders as made in this respect exceeded the jurisdiction of the Railway Committee, the application was, at the request of the applicants, enlarged to afford time to bring the matter again before the Railway Committee. Subsequently the two orders were amended by an order of the Railway Committee of the 16th of June, 1903, approved by the Governor in Council on the 25th of June, 1903. By the amending order the Grand Trunk Railway Company is directed to do the things that the City of Kingston and the County of Frontenac had been directed to do, but at the expense of the latter.

The present application is to make the three orders of the Railway Committee, mentioned, a rule of this court. To that application the City of Kingston maintains its opposition. The objections urged against the application are of three kinds or classes:—

1. Objections to the jurisdiction of the Railway Committee;

2. Objections to the procedure before the Railway Committee; and

3. Objections that go to the merits of the three several orders.

With objections that relate to the merits of the orders, or the procedure before the Railway Committee, the court has, I think, nothing to do. All that it has to be satisfied of is that the Railway Committee had jurisdiction to make the orders, as amended

The statute (*The Railway Act*, s. 188) provides, as has been stated, that the Railway Committee may

make such orders and give such directions respecting the works mentioned in section 187, and the execution thereof, and the apportionment of the costs thereof, and of any measures of protection, between the said company and any person interested therein, as appears to the Railway Committee just and reasonable; and the question of jurisdiction turns upon the proper answer to the question: Was the City of Kingston interested in the works that were directed to be done? If that question is answered in the affirmative the Railway Committee had jurisdiction to make the orders as amended. If it is answered in the negative then the Committee had no jurisdiction to impose upon the City of Kingston the obligation to bear any part of the costs of such works. I think the question should be answered in the affirmative. Although the works directed to be carried out, are not within the limits of the City of Kingston, they are in close proximity thereto and are intended to protect the public from the danger of crossing the Grand Trunk Railway by a level crossing on a road that within a short distance from the crossing connects with one of the city streets. In addition to this it appears that the City of Kingston was one of the movers in the application to the Railway Committee for an order to have the works in question undertaken. And it seems to me that one could not now with fairness say that the City of Kingston was not interested therein.

The three orders mentioned will be made a rule of this court.

Order made accordingly.

Solicitor for the County of Frontenac: *J. McD. Mowat.*

Solicitor for the Kingston, &c. Road Co.: *G. Osler.*

Solicitor for the City of Kingston: *D. M. McIntyre.*

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Dec. 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

OLIVER JOHNSON.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

Contract—Bailment—Hire of horses for construction of public work—Loss of horses—Negligence—Liability—Demise of Crown—50-51 *Vict. c.* 16, *sec.* 16 (*c*).

1. Where the suppliant's goods are in the possession of an officer or servant of the Crown under a contract of hiring made by him for the Crown, the obligation of the hirer in such a case is to take reasonable care of the goods according to the circumstances, and the hirer is liable for ordinary neglect. Where there is a breach of the hirer's obligation in such a case the Crown is liable under the contract of its officer or servant.

2. The suppliant entered into a contract with the Crown, through an officer of the Department of Public Works, to supply certain pack horses, with aparejos and saddles, for the purposes of construction of the Atlin-Quesnelle Telegraph line, at the sum of $2 per horse for each day the animals were so employed. It was not practicable, as the suppliant knew at the time of making the contract, to carry food for the horses along the line of construction, and it was necessary to turn the horses out to graze for food. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died or were killed to prevent them from starving to death. It appeared that the aparejos and saddles were not returned to the suppliant. There was a time during construction when the horses could have been taken back alive, and no prudent owner of horses would have continued them on the work beyond that time. The officer of the Crown in charge of the work, however, deemed that the interests of construction were sufficiently urgent to justify him in sacrificing the horses to the work.

Held, that having regard to the circumstances, the hirer had acted imprudently in continuing the horses on the work after the grazing failed, and the Crown was liable therefor.

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3. Wherever there is a breach of a contract binding on the Crown a petition will lie for damages notwithstanding that the breach was occasioned by the wrongful acts of the Crown's officer or servant. *Windsor and Annapolis Railway Co.* v. *The Queen* (11 A. C. 607) referred to.

4. The Crown is liable in respect of an obligation arising upon a contract implied by law. *The Queen* v. *Henderson* (28 S. C. R. 425) referred to.

5. An action arising out of a contract for the hire of horses to be used in the construction of a public work of Canada lies against the executive authority of the Dominion, and is not effected or defeated by the demise of the Crown.

Semble:—That the loss sustained by the suppliant in this case was an "injury to property on a public work" within the meaning of clause (c) of the 16th section of *The Exchequer Court Act.*

PETITION OF RIGHT for damages for an alleged breach of contract whereunder the Crown hired certain horses from the suppliant to be employed in the construction of the Atlin-Quesnelle Telegraph line.

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

October 12th and 13th, 1903.

The case was tried at Vancouver, B.C.

A. E. McPhillips, K.C. for the suppliant, contended that the contract entered into between the suppliant and the Crown was one of bailment for hire. The Crown as bailee was bound to take reasonable care of the horses and return them when the period for which they were employed was at an end. (Cites *Beal on Bailments* (1); *Oliphant on Horses* (2). It was not the conduct of a prudent man to continue the horses on the works, as Mr. Rochester, the Crown's officer, did, after the grazing failed. It was owing to this breach of contractual duty that the loss was sustained by the suppliant. The Crown must answer for the breach arising through the act of its officer or servant.

(1) P. 218. (2) 5th ed. pp. 246, 247.

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Argument of Counsel.

F. W. Howay, for the respondent, argued that the case was a simple one. If it were an action sounding in negligence, it did not come within the jurisdiction clauses of sec. 16 of *The Exchequer Court Act*. If, on the other hand, suppliant relies upon contract, there was no agreement to return the horses. The suppliant knew the hazardous nature of the work in which they were employed, and he must be presumed to have taken the risk of the loss of the animals when he agreed to hire them. The *gravamen* of the action is negligence or misconduct, and the doctrine of *respondeat superior* cannot be invoked.

A. E. McPhillips, K.C., in reply, said that the suppliant relied wholly upon the contract for relief.

THE JUDGE OF THE EXCHEQUER COURT now (December 7th, 1903,) delivered judgment.

The petition is brought by the suppliant to recover (1) money alleged to be payable by the Crown to the suppliant for the hire of certain horses, harness and sleighs by him let to hire to the Crown, for the purpose of transporting supplies for the construction by the Crown of the Atlin-Quesnelle Telegraph line; and (2) damages for the loss of certain horses, harness, sleighs, *aparejos* and saddles let to hire by the suppliant to the Crown for such purpose, and lost through the negligence of the Crown's servants.

That there was a contract for the hire by the Crown of the suppliant's horses for the purpose mentioned is not denied; though as will be seen, there is some conflict of evidence as to what the express terms of that contract were. The defences set up are in substance: First, with respect to the hire of the horses, that the suppliant's claim was satisfied and discharged by payment; Secondly, with respect to the harness and sleighs, that they were re-delivered to the suppliant;

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and Thirdly, with respect to the claim for the loss of the horses and other things mentioned through the negligence of the Crown's servants:—

(1) That the injuries complained of did not arise on a public work;

(2) That they did not result from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment;

(3) That if they resulted from such negligence, the negligence was that of the suppliant himself;

(4) That in any event the Crown is not liable for the negligence of its servants; and

(5) That the claim, if any, having arisen in the reign of Her late Majesty, is not maintainable against His Majesty the King.

On the 31st of March, 1900, the suppliant, by a letter addressed to Mr. J. B. Charleson, offered to furnish eight or more spans of horses, harness and sleighs to freight from the mouth of Pike river along the Atlin-Quesnelle Telegraph line for as long a time as required at the rate of six dollars per day for each team, from the 2nd of April until the return of the horses to Atlin. The board of the teams and teamsters and the wages of the latter were to be paid by Mr. Charleson; and the suppliant undertook to drive a team himself and to assume all responsibility for any accident that might happen to the horses. Mr. Charleson was at the time in charge of the construction of the public work mentioned, and the letter was delivered to Mr. John G. Rochester for him; Mr. Rochester being his assistant on the work. This offer was accepted, and the contract thereby created continued in force until the 28th of May following. After that date pack horses had to be used for transporting supplies for the work, it being no longer possible to use sleighs for that purpose. Such of the suppliant's horses as were

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not suitable for use as pack animals were sent back to Atlin with their harness and sleighs; and it was arranged between Mr. Rochester, acting for the Crown, and the suppliant that the remainder of the suppliant's horses should be employed thereafter as pack animals at two dollars per day. The suppliant contends that this was a mere modification of the existing contract of hiring with respect to the rate per day to be paid for the horses. Mr. Rochester on the other hand says that a new contract was made under new conditions, the terms of which were that the suppliant would be paid two dollars per day for each horse for each day that the horses worked as pack animals. I accept Mr. Rochester's evidence as giving the correct view of what took place, and find the facts to be as he stated. The harness and sleighs that had, while there was sleighing, been used with the horses that afterwards were let to hire as pack animals, were piled up and left on the line of construction; and thereafter, and until the 8th of September following, the suppliant was employed in looking after the pack trains, which included a large number of horses besides his own, some belonging to the Crown and others hired by the Crown from other persons.

The suppliant knew in a general way the conditions under which his horses were being used, and some of them would from day to day or from time to time come under his personal observation. It was one of the necessities of the case that the horses should, while employed as pack animals, be turned out to graze and in that way get their food. It was not practicable to carry food for them. That was known to the suppliant, and was no doubt in the contemplation of both parties at the time of hiring. Of the manner in which his horses were used, and of the conditions under which they worked and were fed, the suppliant made

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no complaint while he was on the work. Neither does it appear that there was during that time any good cause or ground of complaint, although a number of the horses died or were lost. On the 8th of September, on account of his wife's illness, the suppliant left the work, leaving such of his pack horses as were then alive, in Mr. Rochester's charge. At that time the country in which the horses were being used afforded grazing for the horses; but very soon thereafter the conditions changed greatly. As the season advanced and the character of the country in which the line was being constructed changed, the grazing failed, with the result that the horses died, or were killed to prevent them from starving to death. There was a time, it appears, though the exact time is not definitely given, at which the work could have been discontinued and the horses taken back alive. But Mr. Rochester thought that the work of construction was sufficiently urgent and pressing to justify him in sacrificing the horses to the work. He did that with the horses that the Crown owned, and he did it also with those that were hired of the suppliant

With reference to the hire of the horses and their outfits, I find that the suppliant has been paid all that he is entitled to.

With respect to the harness and sleighs used when the supplies were being forwarded by sleighs, we have seen that some of them were sent back to Atlin; and no doubt the suppliant had a right under the contract of the 30th of March, 1900, to have all of them taken back with the horses using them, and to be paid for the hire of the horses, harness and sleighs until they reached Atlin. But the suppliant saw fit to make a new arrangement that was not compatible with the return to Atlin of the harness and sleighs in question. He could not reasonably expect to let his horses to hire

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as pack horses, and at the same time have them go back to Atlin with the harness and sleighs. That was not practicable if the horses were to be used as pack animals on the work then under construction, and under the circumstances, there was, it seems to me, nothing to be done other than what was done, namely, to leave the harness and sleighs on the line of construction, and in that the suppliant must be taken to have acquiesced. He was, I think, a consenting party to what was done; and after he let his horses to hire as pack animals the harness and sleighs that had previously been used with them were, it seems to me, at his own risk, and the Crown is not liable for the value thereof.

With respect to the pack horses and the *aparejos* and saddles that were used with them, the responsibility of the hirer was to take reasonable care of them according to the circumstances, and he was answerable for ordinary neglect. It is suggested that as the Crown was in this case the hirer of the horses the case is different, but for the present it will be convenient to assume that there is no difference. Taking the case as it would stand between subject and subject, it was the duty of the hirer in the present case to see that the horses had such food as the circumstances admitted of, and not to continue them on the work when it was evident that the grazing would fail and the horses perish. No prudent owner would, under ordinary circumstances, do that. Nor as against the suppliant is it any answer to say that the work was pressing. That may justify the Crown's officer for sacrificing the horses to the urgency of the work, but it is not a good answer to the owner. If the horses had to be sacrificed it should be at the hirer's expense, not at the expense of the owner. The suppliant left the work before these conditions arose, and he was not a party,

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or consenting in any way, to what was done or omitted to be done, and he is in no respect responsible for the loss of the horses that died or were killed because they were kept at work on the line of construction after the grazing failed. For the damages that happened because that was done the hirer is, I think, responsible. It was suggested that the suppliant had been paid a large sum for the hire of his horses, so large presumably that he could well afford to lose them in the end. That may be, and it is no doubt the fact that considerable sums of money would have been saved if these or other pack horses had at the outset been bought instead of being hired. But these, it is needless to state, are considerations that in no way affect the case. The suppliant has been paid what was bargained for and no more; and it makes no difference that the bargain was to him a profitable one. That circumstance in no way releases the hirer from his duty or obligation to take reasonable care, according to the circumstances, of the thing hired. In this case there was, I think, a breach of that duty or obligation.

That brings us to one of the issues raised in the answer to the petition, namely:—Is the Crown answerable for the damage resulting from that breach of duty or obligation? And the answer to that question will be in the affirmative if one comes to the conclusion either, (*a*) that such breach constituted a breach of a contract binding on the Crown; or (*b*) that the injury complained of arose on a public work and resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment. Otherwise the answer should be in the negative.

The case of *Brown* v. *Boorman* (1), decided by the House of Lords in 1844, is an authority for the pro-

(1) 11 C. & F. 1.

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position that wherever there is a contract, and something is to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the party injured may recover either in tort or in contract; see also *Stevenson* v. *The Queen* (1). See also *Tattan* v. *Great Western Ry. Co.* (2); *Bigelow on Torts* (3); *Underhill on Torts* (4); and *Bullen on Leake's Precedents* (5). In the case of *The Coupé Co.* v. *Maddick* (6), an action to recover damages for injuries to a carriage and horse hired by the defendant, arising from the negligence of the defendant's coachman, it was held by Cave and Charles, JJ. that the plaintiffs' remedy was by action on the contract. But the authorities are not all one way; and a distinction is drawn between the breach of a general duty arising from the relations of the contracting parties, and a breach of an express term of the contract. *Corbett* v. *Packington* (7); *Legge* v. *Tucker* (8); *Turner* v. *Stallibrass* (9). And the difficulties presented in such cases are, I think, increased when one of the parties to the contract is the Crown, and the breach of duty or obligation arises from the negligence of its servant. In *Queen* v *McFarlane* (10), Mr. Justice Strong, citing *Gibbons* v. *U. S.* (11), *Seymour* v. *Van Slyck* (12), and *U. S.* v. *Kirkpatrick* (13), stated that the doctrine that the Government is not liable for the wrongs inflicted by their officers on citizens is not confined to an exoneration from liability for the torts of its agents and servants; but is carried so far as to exonerate the Crown or Government from

(1) 2 W. W. & A'B. 176.
(2) 2 El. & El. 844..
(3) (Ed. 1903) pp. 24 & 25.
(4) (7th ed.) pp. 51 & 62.
(5) (Ed. 1868) p. 170.
(6) [1891] 2 Q. B. 413.
(7) 6 B. & C. 268.
(8) 26 L. J. N. S. Ex. 71.
(9) [1898] 1 Q. B. 56.
(10) 7 S. C. R. at p. 242.
(11) 8 Wallace 269.
(12) 8 Wend. 403.
(13) 9 Wheat. 720.

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the non-performance of contractual obligations, when such non-performance or negligence consists in the omissions of public officers to perform their duties. And in *The Queen* v. *McLeod* (1) after referring to the reasons that he had given in McFarlane's case for holding that a petition of right will not lie against the Crown in respect either of tortious injuries or breaches of contract, caused by the negligence of its servants or officers, he adds that in the case of torts the maxim *respondeat superior* does not apply to the Crown, and in the case of contracts they are to be construed as though they contained an exception of the Crown for liability in respect of any wrongful or negligent breach by its servants. And again, in the case of *The Windsor and Annapolis Railway Co.* v. *The Queen* (2) in which a petition was brought for a breach of contract by reason of acts of the officers of the Crown done under its authority, that apart from such contract would have constituted a wrong only, he expressed the view that the Crown was not liable for the wrongful acts of its officers. But on the appeal in that case to the Judicial Committee of the Privy Council that view was not entertained, their lordships holding that in such a case a petition of right would lie, and that there is no distinction in that respect between breaches of contract occasioned by the omission of Crown officials and breaches due to their positive acts. This decision may, I think, be taken as determining that wherever there is a breach of a contract binding on the Crown a petition will lie for damages, notwithstanding that the breach was occasioned by the wrongful act of the Crown's servant. And it is clear, I think, that the Crown may be liable on an implied, as well as on an express, contract. In *The Queen* v. *Henderson* (3) the

(1) 8 S. C. R. 28.

(2) 10 S. C. R. 377.

(3) 28 S. C. R. 425.

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Crown was held liable to pay for goods purchased by its officer for the purposes of a public work, and it was pointed out how impossible it would be to carry on the public business of the country if the officers of the Government could not within their authority make contracts binding upon the Crown. In the present case neither Mr. Charleson's authority nor Mr. Rochester's to make the contract of hiring that has been referred to is called in question, and I am not, I think, going too far in concluding that such a contract involved all its usual terms and incidents, as well those that were expressed as those that arose by law upon the contract being entered into.

On the other branch of the case my first impressions were that the claim was not one of those defined in clause (*c*) of the 16th section of *The Exchequer Court Act*. The injury complained of resulted from the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment within the meaning of the provision referred to. But it seemed to me doubtful if the injury could with propriety be said to have occurred on a public work. On further consideration I am not satisfied that my first impressions were correct. For example, if the Crown hired a dredge to be used in dredging one of the canals that are public works of Canada, and while it was so in use on the public work it was injured through the negligence of the Crown's officer or servant acting within the scope of his duty or employment, would not the case come within the statute? Or if a steam shovel were hired by the Crown for use on a Government railway, and it was, through such negligence as has been referred to, injured or destroyed, would not a petition at the suit of the owner lie to recover such damages as he had thereby suffered. It seems to me that in such cases a petition would lie;

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and in what respect does such a case differ from the present where one hired his horses to be used in the construction of a Government telegraph line, and along the line of the work? On the whole it seems to me that one does not put too large an interpretation on the clause mentioned when he concludes that the injury to the suppliant's horses complained of in this case occurred or happened "on a public work" within the meaning of the statute.

Then with regard to the defence that the cause of action having arisen in the reign of Her late Majesty the petition is not maintainable against His Majesty the King, it seems to me that to give effect to such a defence would in a large number of cases defeat the intention and liberality of Parliament in providing the subject a remedy in such cases, and give rise to the anomaly that if the action had been commenced before Her late Majesty's demise, the petition would not be determined or abated (1), while if it had not been so commenced no petition could be maintained. The cause of action for which the petition is brought was in no sense personal to Her late Majesty; and the petition is brought against His Majesty for the reason only that the executive government and authority of and over Canada is vested in him. The action is, however, really against the Government of Canada, and any moneys that may become payable upon judgment on such petition is payable out of the Consolidated Revenue Fund of Canada (2). It is said to be a maxim in the English law that the King never dies; his political existence is never in abeyance or suspended (3). But the important consideration in the present case is, it seems to me, that the petition in reality lies against the executive authority of the Dominion, and

(1) 1 Edw. VII, c. 37. (2) 50 51 Vict. c 16, s. 47.
(3) Chitty's Prerog. of the Crown, p. 11.

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that there is no good reason of public policy or otherwise for holding that the subject's rights and remedies against that authority are affected or defeated by the demise of the Crown.

With respect to the damage it will be observed that while the suppliant lost some of his horses because they were kept on the work longer than was prudent, he received more for their hire than they would have earned if they had been sent out from the work in proper time; and that is a consideration that ought not to be wholly lost sight of. It is not, I think, possible to determine accurately from the evidence how many of the horses in question died or were lost from exposure to conditions which were in the contemplation of the parties to the contract of hiring; and how many were lost or destroyed because they were imprudently kept at work on the line of construction longer than they should have been. I think, however, if I take the number to be ten, and the value of each horse with its outfit to have been sixty dollars, making the damages six hundred dollars, the result will, under all the circumstances, be fair to both parties. With reference to the sum of sixty dollars for each horse and outfit, that is the price that Mr. Rochester, about the middle of September, paid to another person who had hired similar horses to the Crown for the same purpose, and who intending to return home proposed to take his horses with him.

There will be judgment for the suppliant for six hundred dollars and costs.

Judgment accordingly.

Solicitors for the suppliant: *McPhillips & Williams.*

Solicitor for the respondent: *F. W. Howay.*

Between

WILLIAM E. VROOM, TRUSTEE OF THE ESTATE OF EDMUND I. SIMONDS..... } SUPPLIANT;

1903
Dec. 7.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Petition of Right—Damage to lands—Subsidence—Release of claim—Liability.

In connection with the work of affording better terminal facilities for the Intercolonial Railway at the port of St. John, N.B., the Dominion government acquired a portion of the suppliant's land and a wharf, the latter being removed by the Crown in the course of carrying out such works. For the lands and wharf so taken by the Crown, the suppliant was paid a certain sum, and he released the Crown from all claims for damages arising from "the expropriation by Her Majesty of the lands and premises, or the construction and maintenance thereon of a railway or railway works of any nature." One of the effects of the removal of the wharf was to leave a wharf remaining on the suppliant's land more exposed than it formerly had been to the action of the waves and tides; but no sufficient measures were taken by the suppliant to protect his property or to keep it in a state of repair.

Held, that there was no obligation upon the Crown, under the circumstances, to construct works for the purpose of protecting the suppliant's property; and as the injury complained of happened principally because the suppliant had failed to repair his wharf the Crown was not liable therefor.

PETITION OF RIGHT for damages alleged to have been occasioned to the suppliant's property by certain works executed by the Crown in improving the shipping facilities of the Intercolonial Railway at St. John, N.B.

The facts are stated in the reasons for judgment.

May 26th, 27th, 28th, 30th and September 8th, 9th and 10th, 1903.

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The trial of the case proceeded at St. John, N.B. November 6th and 7th, 1903.

The case was now argued at Ottawa.

Argument of Counsel.

W. Pugsley, K. C., for the suppliant, contended that the cause of the damage to the suppliant's property was the negligent way in which the dredging had been done by the servants of the Crown, in the vicinity of the suppliant's property, for the purposes of the deep water terminus of the Intercolonial Railway in the harbour of St. John. The evidence showed that the angle of the dredging was two to one, and the witnesses produced by the Crown admitted that this was an improper and unsafe angle. This was the cause of the subsidence which undermined a wharf remaining on suppliant's property. The removal of lateral support caused this wharf to settle. The Crown is bound by the rules of law in this respect as well as the subject. The doctrine of *sic utere tuo ut alienum non laedas* applies to the Crown under the circumstances of this case.

The release given by the suppliant to the Crown does not exonerate it from the obligation we seek to enforce here. It was a release from all damages arising from "the railway or works of a railway nature." Dredging the bottom of the harbour for the purpose of accomodating ships cannot be said to be "works of a railway nature."

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

The injury done to the suppliant's property was caused by the natural action of the seas and tides. If he had protected his wharf after the removal of the other wharf which was acquired by the Crown, no injury would have occurred. He was bound to do this. The evidence as a whole shows that there was no subsidence arising from the works done by the Crown, and

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that what did happen was only the natural result of the action of the water there in washing away the silt and chips that had accumulated on the surface. He cited *Backhouse* v. *Bonomi* (1).

As to the release, it clearly covers the damages sought in this action. The suppliant in the expropriation proceedings received $28,000 for his property taken, and released all claims for damages arising from "works of a railway nature." Surely it is a work of a "railway nature" to provide a deep water terminus for the Intercolonial Railway.

THE JUDGE OF THE EXCHEQUER COURT now (December 7th, 1903) delivered judgment.

The petition is brought to recover damages in respect to certain lands and premises adjacent to the terminus of the Intercolonial Railway at the City or Port of St. John, in the province of New Brunswick, of which the suppliant is seized in fee, on certain trusts, and which are alleged to have been injuriously affected by the construction, by the Crown, of certain public works intended to afford better terminal facilities and conveniences for traffic to and from the sea. With that end in view a property known as the Long Wharf was acquired and improved, and the berths adjacent thereto were dredged out to afford accommodation for large steamships. In connection with these improvements the Crown expropriated a portion of the suppliant's lands, and valuators were appointed to assess the damages sustained as well by the suppliant and those for whom he holds in trust, as by the lessees of the lands and premises in respect of a term of which they were in possession at the date of the expropriation.

The valuators made their awards, the amounts awarded by them to the suppliant, and to the lessees

(1) 9 H. L. C. 502.

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respectively, were accepted and the amounts thereof paid to them, and all parties interested discharged and released the Crown "of and from all actions, cause "and causes of action, suits, claims and demands what-"soever, either at law or in equity or otherwise how-"soever which they or any of them may have, or ever "had, or might, could or would have against Her "Majesty the Queen for or by reason of the expro-"priation by Her Majesty of the lands and premises "or the construction and maintenance thereon of a "railway or railway works of any nature." Upon the lands expropriated, and afterwards conveyed by deed to Her Majesty, there were at the date of the expropriation certain wharves that were removed by the Crown in the course of the works that were carried out. There can, I think, be no doubt that the Crown had a right to remove these wharves, and that the suppliant has discharged the Crown from any injury or damage that has accrued or may accrue to adjoining property from their removal in a reasonable and careful manner, as to which there is no complaint. One of the effects of the removal of these wharves was to leave an inner wharf (the property now in question), more exposed than it formerly had been to the action of the waves and tides, but no sufficient measures were taken to protect this property or to keep it in a state of repair. It has fallen into decay and been damaged, and for the injury sustained the suppliant brings this petition.

Now there can, I think, be no doubt that the injury complained of happened principally because nothing was done to protect or repair this wharf; and as that was a matter for the suppliant or his tenants to look after, the Crown is not as to that liable for damages.

But it is said, and the fact is admitted, that in dredging a berth for steamships, the side of the prism

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near, but not actually adjoining, the suppliant's lands was left at a slope or incline of one to two, which it is said was too great, and not a prudent or reasonable thing to do having regard to the character of the soil in which the dredging was done. Since the work was finished the slope has, from natural causes, been lessened, until at present it is one to two and one-half in some places, and in other places one to three which is considered sufficient. It is further alleged that as a result of this, and the withdrawal of support to the adjacent land, a slide or subsidence occurred, the effect of which extended to the suppliant's wharf and caused it to settle, thereby occasioning in part at least the injuries complained of. There is no direct evidence of any such slide or subsidence having taken place. It is a matter of opinion. Some of the witnesses see, they think, indications of a slide having taken place. Others do not. To sustain the petition with respect to any portion of the relief asked for, one must come to the conclusion (1) that such a slide or subsidence has taken place; and (2) that it was to some extent at least the cause of the injuries complained of. I have not been able to come to that conclusion. On the evidence as a whole I am not satisfied that a slide or subsidence has taken place as suggested, and consequently I am not able to find that issue of fact in favour of the suppliant. But even assuming that it did occur, there is, it seems to me, no reason to think that its effect extended to that part of the soil on which the suppliant's wharf is built, causing the wharf to settle and thereby contributing to the injuries complained of. On the contrary, the weight of evidence leads, I think, to an opposite conclusion.

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The judgment will be that the suppliant is not entitled to any portion of the relief sought by his petition.

Judgment accordingly.

Solicitor for the suppliant: *A. G. Blair, Jr.*

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

TORONTO ADMIRALTY DISTRICT.

1902

Nov. 24.

In re THE SHIP *ISHPEMING*.

Maritime law—Arrest on telegram—Rescue—Contempt of court—Ignorantia legis neminem excusat—Practice.

It is competent for a deputy-marshal to arrest a ship in an action for wages upon a telegram from the marshal of the Admiralty District having jurisdiction of the action, informing him that a writ of summons and a warrant had been issued and mailed to him.

2. The master of the ship, although ignorant of the legal consequences of his act, was held guilty of contempt in permitting the ship to be moved after the deputy-marshal had gone on board, read to the master a copy of the writ of summons and of the marshal's telegram, informed him that the ship was under arrest, and tacked up a copy of the writ on the ship.

MOTION for an order of commitment for contempt of court in an action against a foreign ship for wages.

A warrant of arrest had been issued, at Toronto, and a telegram was sent by the marshal to his deputy at Port Stanley, where the ship then was, to arrest the ship, and informing him that a writ of summons and a warrant had been issued and mailed to him. The deputy, on receiving the telegram and before receiving the warrant, went on board, read a copy of the writ of summons and of the marshal's telegram, to the master of the ship, and informed him that the ship was under arrest, and tacked up a copy of the writ of summons on the ship. During the temporary absence of the deputy, the mate of the vessel, acting as he says on the advice of a solicitor, and of the United States consul, and without any orders from the master of the ship, and without his consent or knowledge, ordered the ship from the dock at Port Stanley and proceeded on the voyage.

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In re THE SHIP ISHPEMING.

Statement of Facts.

Judgment.

Plaintiffs then moved for an order against the master of the ship, directing the issue out of the court of a writ of attachment against him for his contempt of court in releasing and rescuing the said ship from arrest, after the same had been placed under seizure in the manner above described.

The master filed his affidavit in reply stating that he had given no orders to move the ship; but on the contrary had intended remaining at Port Stanley, although at heavy expense and loss, and was not aware that the mate had done so until the ship had reached the next port. He then suggested to the mate that the ship should return, but he thought the question at issue so trifling that the ship should not be delayed in her earnings. He further stated in his affidavit that in permitting the ship to continue her course he did not know he was committing any contempt of court.

On the motion, which after several adjournments, came on for argument, before his Honour Judge McDougall, local judge in Admiralty, on the 24th day of November, 1902, it was contended on behalf of the master that there was no valid arrest, the warrant not having arrived until after the ship had left the port, and that notice of the warrant was insufficient.

W. J. Tremeear, for plaintiffs.

H. J. Wright, for master of ship.

Per Curiam: The arrest upon the telegram was valid, and the master was guilty of contempt of court; but he now apologizing and bringing into court a sum sufficient to cover the claim and costs, an order was made that upon payment of the costs of the motion, the ship be released from arrest.

The *Seraglio* (1885) L. R. 10 P. D. 120, followed and applied. *Order accordingly.*

BETWEEN

THE SERVIS RAILROAD TIE PLATE COMPANY OF CANADA, (LIMITED)..... } PLAINTIFFS;

1904
Jan. 11.

AND

THE HAMILTON STEEL AND IRON COMPANY, (LIMITED)..... } DEFENDANTS;

Patent for invention—Railroad tie plates—Novelty—Patentability—Defence not raised in pleadings—Amendment—Costs.

S, the plaintiffs' predecessor in title, obtained Canadian letters patent No. 20,566, for certain improvements on wear plates for railroad ties which, according to the specification of the patent, consist in a flat, or comparatively flat body, portion provided at its opposite sides with depending flat-edge flanges adapted to enter the wooden body of the cross ties without injuring the same, which flanges are relatively parallel and lie in planes approximately at right angles to that of the said body portion. The inventor claimed (1) a wear plate for railroad ties consisting of a body having projecting flanges at its side edges; and (2) the combination with a railroad rail and supporting cross-tie of a wear plate consisting of a body having projecting side flanges; said plate being interposed between the rail and tie with its flanges entered into the tie longitudinally or parallel with the grain or fibres of the tie. The substance of the invention was the projecting or depending flanges at the edges of the plate adapted to enter the wooden body of the cross ties without injuring the same. S. had also obtained an earlier patent, in 1882, which only differed from the one above set out in having one or more flanges or ribs placed under the plate for insertion into the tie, its object being the durability of railway ties. Prior to S's alleged improvements, iron or steel plates had been used as tie plates, and it was common knowledge that the insertion of such a plate between an iron or steel rail and a wooden tie would give greater durability to the rail. It was also a matter of general knowledge that reduction of the weight of the plate without loss of strength could be effected by using channel iron or angle iron, or by having the plate made

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Argument of Counsel.

with flanges or ribs. It was equally a matter of common knowledge that if such flanges or ribs were sharpened they could be driven into the tie, and that such flanges or ribs would in that position assist in holding the plate in place.

Held, that there was no invention in either of the improvements for which S's patents were granted.

2. Costs were witheld because the judgment proceeded upon a defence not raised in the pleadings, but in respect of which defendant was allowed to amend the statement of defence after trial.

THIS was an action for the infringement of a patented invention.

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

September 11th and 12th, 1902.

The case came on for trial, and, after argument, was adjourned *sine die* at the request of the parties to permit of a proposed settlement being effected.

November 11, 1903.

The case not having been settled, was now heard by way of re-argument.

R. G. Code for the plaintiff contended that there was invention in the Servis patents.

The object of the invention is not only to strengthen but to preserve the tie. Thought and study are present in it. (He cites *General Engineering Company* v. *Dominion Cotton Mills Company*. (1). It is useful because it is employed on many railways today. The evidence of the experts shows that there was conception of the invention, first on the part of Servis. (He cites *Griffin* v. *Toronto Street Ry. Co.* (2); *Powell* v. *Begley* (3); *Summers v. Abell* (4); *Jones* v. *Pearce* (5); *Ridout on Patents* (6); *Merwin on Patentability* (7); *Frost on*

(1) 6 Ex. C. R. 309.
(2) 7 Ex. C. R. 411.
(3) 13 Gr. 381.
(4) 15 Gr. 532.
(5) 1 Web. P. C. 124.
(6) 2nd ed., p. 36.
(7) p. 29.

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Argument of Counsel.

Patents (1). Then the defendants cannot be heard to deny the validity of the plaintiffs' patent because the plaintiffs derive title through the defendants. We purchased our rights from a company in the United States which was practically composed of the same people as the defendant company here. They cannot, then, be heard to derogate from their own grant.

G. L. Staunton, for the defendants, contended there was no invention in the Servis patents. There was a pre-existing "Perkins" patent for tie plates, and Servis simply took out the wooden filler of this plate and applied the plate itself to the tie. The whole invention Servis claims is the flange at the edge of the plate. His invention amounts to nothing more than an application of a previously existing patent, and a mere application is not an invention. (He cites *Harwood* v. *Great Northern Railway Co.*) (2). Again, there was an open *bonâ fide* sale in Canada, by the plaintiffs, of the article covered by their patent before they obtained the statutory extension of their patent from Parliament, in 1900. Therefore, the extension is of no effect. Besides this, Jones obtained his patent, the one defendants claim to be protected by, in the interval between the expiry of the Servis patent and the passage of the Act which sought to extend the life of the latter patent; and this Act especially protects people who had undertaken to make plates in the meantime. This statute must be construed more strongly against the person benefited by the enactment. (He cites *La Compagnie pour l'éclairage au gaz de St. Hyacinthe* v. *La Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe* (3); *In re Bower—Barff Patent* (3)

THE JUDGE OF THE EXCHEQUER COURT now (January 11, 1904) delivered judgment.

(1) pp. 27, 28.
(2) 11 H. L. C. 654.
(3) 25 S. C. R. 168.
(4) [1895] A. C. 675.

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Reasons for Judgment.

The action is brought for the infringement by the defendant of certain patents of invention held by the plaintiff. Of these patents, one has been shown to have been infringed by the defendant, namely, letters patent numbered 20,566 granted on the 12th day of November, 1884, to The Servis Railroad Tie Plate Company "for an alleged new and useful improvement on wear plates for railroad ties," to which, for convenience, reference will herein be made as the Servis Patent of 1884. This patent expired on the 12th of November, 1899, and then under the authority of an Act of Parliament passed on the 7th of July, 1900, (63-64 Victoria, c. 121) it was on the 18th of August, 1900, extended for a term of three years from the date first mentioned; but subject to a provision that any person who had within the period between such expiry and extension acquired by assignment, user, manufacture, or otherwise, any interest or right, in respect to such patented article or improvement, should continue to enjoy the same as if the Act had not been passed, and that such extension should not prejudice any such right or interest so acquired.

In May, 1900, after the expiry of the patent and before its extension as mentioned, the defendant agreed with certain companies, doing business in the State of Illinois, in the United States of America, known respectively as The Railroad Supply Company, The Q. & C. Company, and the Q. & W. Company, to manufacture for them the tie-plates, the manufacture of which constitutes the infringement complained of. The terms and conditions of this agreement were settled and reduced to writing on the 26th day of May, 1900; but was not actually executed by the parties thereto until some time thereafter. The defendant company appears to have executed it prior to August 4th, 1900, and consequently before the extension of the patent in ques-

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tion, but of the other companies, parties thereto, one did not execute it at all, and the other two executed it at some time prior to September 11th, 1900, but after the extension mentioned had been granted. These companies were interested as assignees in a number of patents for improvements in tie-plates, and among others, in the United States patent for the invention covered by the Servis Patent of 1884; and during the period between its expiry and extension they exported to Canada, and sold here, a considerable quantity of plates that would have infringed that patent had it then been in force. After the extension of the Servis Patent of 1884 they appear to have made no further shipments of such tie-plates to Canada, but had them manufactured here by the defendant company.

In addition to the defences of want of novelty, utility and subject matter in the Servis Patent of 1884, the defendant company sets up that it had, under the Act authorizing the extension of the patent, and under the agreement referred to, and the circumstances of the case, a right after such extension to manufacture the plates, of the manufacture and sale of which the company plaintiff complains. As I have on other grounds come to the conclusion that there should be judgment for the defendant, it will be unnecessary for me to consider that question, or to determine whether or not the case falls within the statute.

At the hearing of this case, which took place in September, 1902, and when it was nearing a conclusion, I was asked to reserve judgment as the parties were negotiating for a settlement. After a considerable delay, during which the term for which the patent in question was extended expired, I received an intimation that the negotiations for a settlement had failed; and I was requested to give judgment in the

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matter. As a long time had elapsed since the hearing, a direction was given that the case be set down for argument with special reference to a question that had without objection been gone into at some length at the hearing, that is:—As to whether the patent relied upon was bad or not for want of subject matter, and also with reference to a further question that had not been raised or discussed, namely, whether or not that defence was open to the defendant upon the pleadings as they then stood.

At the argument of the case in November last, counsel for the defendant company moved to amend the statement of defence by adding thereto an allegation that the alleged invention is not subject matter for letters patent, as it did not involve invention. As the question had been dealt with at the hearing, and both parties had given evidence in respect to the issue the amendment was allowed, the plaintiff company setting up in reply that the defendant Company is estopped from relying upon any such defence. The grounds of the estoppel, as I understand them, are (1) that the companies to which reference has been made, or some of them, and who are said to be the real defendants in this action, are in respect of the United States Servis patent the assignees of the Servis Railroad Tie Plate company, from whom the plaintiff company acquired by assignment the Canadian Servis patent of 1884; and (2) that the plaintiff company derives title through one of the said companies to certain other patents set out in the statement of claim. But none of these other patents have been infringed, and no question of estoppel or otherwise arises in respect to them; and with respect to the Servis patent it is clear, it seems to me, that what has occurred does not create an estoppel. The plaintiff company's title to the Servis patent of 1884 came to it

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direct from the Servis Railroad Tie Plate Company and not through any of the said companies ; and therefore no question of estoppel can arise.

One David Servis was the inventor of the improvements on wear plates for railroad ties for which the Servis patent of 1884 was issued to the company last mentioned. The object of the invention is stated in the specification to be: to provide a wear plate for the cross ties of railroads, of such construction that it may be cheaply made, readily applied without injury to the wooden cross tie, and effectually operate as an elastic or cushioning support for the rail whereby a comparatively inexpensive provision is made against the shearing action of metal rails upon the cross ties, and the destructive effect of the vertical play of the rails, caused by the movements of rolling stock over them is wholly overcome. To these ends, it is stated in the specification, the improvements consist in a wear plate composed of a flat, or comparatively flat, body portion provided at its opposite sides with depending edge flanges that are adapted to enter the wooden body of the cross tie without injuring the same, which flanges are relatively parallel and lie in planes approximately at right angles to that of the said body portion. Then a claim is made for: A wear plate for railroad ties consisting of a body having projecting flanges at its side edges substantially as described and for the purposes set forth. There is a second claim to the alleged combination to which it is not necessary to refer, the substance of the invention being the projecting or depending flanges at the edges of the plate adapted to enter the wooden body of the cross tie without injuring the same. David Servis was also the inventor and patentee of an earlier improvement in wear plates for railroad ties, in which one or more flanges or ribs were placed under the plate. The patent

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for this invention was issued in 1882. The object of that invention was stated to be the durability of railroad ties. The iron or steel plate inserted between the rail and the tie prevented the rail from cutting or wearing the tie; the flanges or ribs strengthened the plate and allowed the latter, without loss of strength, to be of a lighter weight, and the flanges being inserted in the tie, helped to hold the plate in place. The office of the plate and depending flanges mentioned in the Servis patent of 1884 is the same; the only difference being that as the flanges or ribs are placed at the edge of the plate, there is less tendency for the plate to rock under the weight of an engine or train passing over the rail.

Prior to Servis's alleged improvements iron or steel plates had been used as tie plates; and of course it was common knowledge that the insertion of such a plate between an iron or steel rail and a wooden tie would keep the rail from cutting or wearing the wood of the tie, and so in that respect cause the tie to last longer. It was also a matter of general knowledge that if one wished to reduce the weight of the plate without loss of strength that could be done by using channel iron or angle-iron, or, which comes to the same thing, by having the plate made with flanges or ribs. It was equally a matter of common knowledge that if such flanges or ribs were made thin enough or wedge-shaped or sharpened they could be driven into any piece of wood to which it was desired to attach them, and that such flanges or ribs would in that position assist in holding the plate in place. So for my part I have been quite unable to see wherein there was any invention in either of the improvements for which the Servis patents were granted. And when the question is asked whether there is any invention to sustain the Servis patent of 1884, it makes

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no difference, it seems to me, whether we start out with a plain flat plate that any one was free to use, or with the Servis plate of 1882. Regarding the case from either standpoint I agree with the opinion of those witnesses who thought that there was no invention in the alleged improvements of 1884 to sustain the patent in question here.

As the judgment proceeds upon a defence which was not raised by the pleadings as they stood at the hearing, although such defence was without objection gone into and discussed at that time, and as an amendment has subsequently been allowed to enable the defendant to take advantage of such defence, there will be no costs to either party.

There will be judgment for the defendant, but no costs to either party.

Judgment accordingly.

Solicitors for the plaintiff: *Code and Burritt.*

Solicitors for the defendant: *Staunton and O'Heir.*

BETWEEN

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Jan. 11.

HIS MAJESTY THE KING..... } PLAINTIFF;

AND

THE QUEBEC NORTH SHORE TURNPIKE TRUSTEES..... } DEFENDANTS;

Debentures—Validity—Ultra vires—Breach of trust—Knowledge of breach by Crown's Officers at time debentures issued.

In an action for the recovery of interest upon certain debentures issued by the defendants and held by the Crown, it was set up by way of defence that the defendants had no authority to issue such debentures; that the application by the defendants of moneys received from the sale of debentures to the payment of interest on other debentures was a misapplication of the trust fund and a breach of trust; and that the Crown's advisers knew when the debentures were acquired by it that the proceeds thereof were to be so misapplied.

Held, that inasmuch as the defendants had authority to issue and dispose of the debentures in question, their acts in so doing were intra vires, and that complicity by the Crown in a breach of trust committed by them could not be relied on as a defence to the action.

INFORMATION by the Attorney-general for Canada seeking to recover certain moneys due to the Crown upon debentures.

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

June 4th and 5th 1903.

The case was heard at Quebec.

G. F. Shepley, K. C. appeared for the plaintiff;

L. J. Cannon, K. C., appeared in the interests of the Province of Quebec.

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Argument of Counsel.

G. G. Stuart, K.C., E. F. Lafleur, K.C., L. F. Burroughs, and C. E. Dorion, appeared for the defendants.

Counsel for the plaintiff having discussed at some length the points in issue on his opening of the case, the argument was begun by counsel for the defendants.

G. G. Stuart, K.C., for the defendants, contended that the debentures here sued on by the Crown were beyond the powers of the trustees to issue. The statute 4 Vict. (Can.) c. 17 did not authorize the issue of debentures for such purposes. What was contemplated by that Act was, that in case the trustee became short of funds to pay the interest on debentures thereby authorized to be issued, the Crown might have advanced the trustees moneys to pay such interest, and these advances might have been repaid out of the revenues of the trust and out of the revenues only. Nor does the statute 16 Vict. (Can.), c. 235 authorize the issue of the debentures here sued on. A careful examination of these statutes not only demonstrates that the trustees had no express or implied power to issue the debentures, but the right of the Crown to be paid in preference to other creditors is expressly denied. (He cites 12 Vict. (Can.) c. 115; 14 &15 Vict. (Can.) c. 132; 14 & 15 Vict. c. 133; C.C.L.C. Art. 1983.) He further contended that under the ninth sect. of 20th Vict.(Can.) c. 125, the trustees could only issue debentures for the purposes of the works; they could not issue debentures for the purpose of paying interest.

Again, the orders in council tendered in evidence show that the Crown was informed of the condition of the trust, and of the illegality contemplated by the trustees in the way of issuing these debentures here sued on. The Crown, therefore, having practically invited that illegality on the part of the trustees is prevented from recovering upon these securities. The real transaction between the trustees and the Crown

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was an advance by the Crown to pay interest; there was no purchase of debentures or bonds in the ordinary sense. (He cites *Belleau v. The Queen* (1). The trustees were a corporation, it is true; but it was a corporation of whom all the officers were persons named by the Crown, and under the orders of the officers of the Crown. The Crown. by the orders in council, invites the trustees to do something *ultra vires*; and then turns round and says nevertheless its claim to be paid on the debentures is as good as other creditors who have taken debentures legally and for the purposes for which they were authorized to be issued. I submit that this cannot be done. (He cites *Bank of Toronto v. Perkins* (2).

Then it is also clear upon the evidence that the transaction between the parties was one of loan, and not a a sale of debentures.

E. F. Lafleur, K.C., followed for the defendants:

There was a breach of trust by the trustees to the knowledge of the Crown as a creditor taking a security; and the creditor cannot profit by the illegal transaction. The Crown cannot be said to be in any better position in this matter than a private person. If the transaction is *ultra vires* no privilege is conferred by it.

As to the question of jurisdiction, I submit that this court ought not to entertain the claim. The distinction between this case and the case of *Yule* v. *The Queen* (3) is that in the latter the liability itself was created by the *British North America Act*, 1867. Now in this case it cannot be contended that any liability on the part of the trustees is created by that Act. The liability, if any, of the trustees does not arise under any "law of Canada"; and that being so, there is

(1) 7 S.C.R. 53. (2) 8 S.C.R. 603.
(3) 6 Ex. C. R. 103.

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want of jurisdiction in this court to take cognizance of the claim.

G. F. Shepley K. C., for the plaintiff: I submit that if the trustees had statutory power to create the charge the Crown is here seeking to enforce, no question of illegality could arise. Was the issue of debentures creating a charge upon the tolls *ultra vires* of these trustees? My contention is that, under the provisions of the various Acts cited by counsel for the defendants, there was undoubted authority conferred upon the trustees to issue debentures creating a charge upon the tolls. (He cites *Brice on Ultra Vires.* (1) But it is argued for the defendants that the transaction between the parties was *ultra vires* not because there was no competent legislative authority on the part of the trustees to enter into the transaction but because, to the knowledge of the Crown's officers, the trustees intended to misapply the trust funds. That position, I submit, is an untenable one.

As to the effect upon our claim here of any knowledge which the officers of the Crown at the time had of a possible breach of trust arising from the act of the trustees in creating this charge on the tolls, I submit that such a matter cannot enter into the consideration of the court in dealing with the case. It is the validity of the debentures in themselves that we are concerned with here. The crucial question here is: Was there power on the part of the trustees, under the statutes referred to, to create the charge in favour of the Crown? If that is decided in the affirmative, as I submit, it must be, all considerations of illegality and breach of trust fall to the ground. Upon the material before the court it is clear that the trustees had competent authority to enter into the transaction charging the tolls, and beyond that there can be no enquiry here.

(1) 3rd ed. p. 50.

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Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (January 11, 1904) delivered judgment.

The information is filed to obtain relief:—(1) In respect of certain debentures, amounting in all to fourteen thousand five hundred pounds and interest thereon since the year 1859, issued by the defendants and now held by the Government of Canada for the Governments of the Provinces of Ontario and Quebec, as part of what is known as the Common School Fund; and (2), also in respect of a certain bond bearing date of the 30th of December, 1861, whereby the defendants became bound to Her late Majesty, in the right of Her Province of Canada, for the payment of the sum of five thousand pounds with interest payable out of the first moneys which might come into their hands applicable to the purpose of such payment, within ten years from the date of the said bond.

With reference to this bond there is, I think, no present difference or controversy between the parties. There is not now, and there never has been, in the defendants' hands any moneys that could be applied to the payment of either the principal or interest thereof, and the contingency that there will ever be any funds available for that purpose is but a remote one. If ever in the future there should, after providing for all charges upon the tolls and revenues of the trust, be anything that could lawfully be applied to the payment of the interest or principal due upon this bond the amount should be paid to the Crown; and I understand that both parties are agreed that it should be so declared in the judgment to be entered in this case.

Of the debentures amounting to fourteen thousand five hundred pounds now forming, as mentioned, part of the Common School Fund, debentures to the amount of three thousand pounds were acquired by the Govern-

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ment of the late Province of Canada under the authority of an order in council of the 3rd of February, 1855; which, so far as relates to the questions in issue here, was in these terms :—

" On the petition of the trustees of the Quebec Turnpike Roads, representing that owing to the decreased revenue derived from tolls, and their want of means to meet the interest due on their Debentures, which became payable on the 1st of January ult., and other demands, they require the sum of three thousand pounds currency, which they pray may be advanced from the public funds to enable them to carry on the Trust.

The Hon. Inspector-General submits that the Receiver General be authorized to invest temporarily the sum of three thousand pounds of the Common School Investment Fund, in the debentures of the Quebec Turnpike Trust, such debentures being of the usual transferable character, bearing interest at the rate of six per cent. per annum, and to be retired by the trustees so soon as the increased tolls shall enable them to do so."

The report of the Inspector-General having been referred to the Attorney-General before the order in council was passed, the latter advised that the Government had not at their disposal any funds out of which they would be authorized by law to make the advances prayed for by the petitioners ; but that it was competent to the Government to come to the relief of the petitioners by investing any moneys, at the disposal of the Government, in the debentures that the petitioners were authorized to issue, leaving with them the responsibility as to the objects to which such moneys might be by them applied.

The balance of the debentures mentioned, amounting to eleven thousand five hundred pounds, were

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acquired under the authority of an order in council of the late Province of Canada, dated September 1st, 1857, which omitting the formal parts, was in the terms following:—

"On the application of John Porter, Esq. Secretary to the Quebec North Shore Turnpike Trust for aid to enable the Trust to meet the interest on its debentures and exhibiting a statement of account, shewing that the Trust will, for the future, be able to provide for all its arrangements.

"The Committee find that, by Ordinance 4 and 5 Vic. Cap. 72, the Governor is authorized to appropriate moneys from the public chest, to meet any deficiency of interest, to be replaced whenever the Trust should be in funds, and this authority was exercised by order in council of 3rd February, 1855, directing an investment in the debentures of the Trust, to the extent of £3,000, on account of the Common School Fund. They, therefore, recommend that the Receiver-General be authorized to invest, from time to time, in the debentures of the Trust a sum not exceeding in the whole £11,500, as sales of lands shall be effected, and payment made to the credit of the Common School Fund."

As a matter of fact the Committee were in error with respect to the Ordinance cited giving the authority mentioned, as also with respect to any such authority having been exercised by the order in council of the 3rd of February, 1855.

On these debentures no interest has been paid to the Crown since 1859. Other debenture holders have in respect of debentures, of which the Crown holds a part, been paid interest to date in some cases, and in other cases some twenty odd years more interest, than the Crown has received. On the hearing Mr. Shepley, for the Crown, limited the relief sought in the

proceeding in respect of these debentures to a declaration :—(1) That the Crown was entitled to share *pari passu*, with other holders of debentures of the same class, in any future payments or distribution of interest ; (2) In respect to a sum invested in certain debentures issued under 20th Vict. c. 125, s. 8, for the purpose of repairing the Montmorency bridge or building a new one, that the Crown is not only entitled to share *pari passu* with other holders of such debentures in future payments or distributions of interest, but to immediate payment of certain arrears of interest for which the defendants have, pending the present proceeding, made provision ; the tolls and revenues applicable to the payment of interest on these debentures having been sufficient to enable the defendants to pay interest to other holders in full to date.

To the relief to which the Crown thus limits its demand in respect to these debentures the defendants object :—

First, that the government of the late Province of Canada had no authority to invest any part of the Common School Fund in the debentures in question. By the second section of the Act 12th Victoria, chapter 200, it was provided that the capital of the said Fund should from time to time be invested in the debentures of any public company in the province, incorporated by an Act of its Legislature, for the construction of works of a public nature, and which company should have subscribed their whole capital stock, paid up one half of such stock and completed one half of such work or works, or in the public debentures of the Province, for the purpose of creating an annual income ; and it may, I think, be conceded that the debentures issued by the defendants were not within the terms of that provision.

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But making that concession, it is clear that neither the defendants nor the other holders of like debentures were in any way prejudiced by the government of the late Province of Canada investing a portion of the Common School Fund in such debentures without having express statutory authority therefor. That was a matter between the Government and the Legislature. No doubt the fact of such an investment having been made was brought to the attention of the Legislature in connection with the public accounts, although it may not have been asked to ratify by an Act of the Legislature what had been done. But whether that was so or not the absence of such statutory authority does not, it seems to me, afford a good reason for refusing the relief that the Crown now asks for.

Then in the second place, it is objected that the defendants had, with one exception to be noted, no authority to issue debentures to pay interest on other debentures; that the application by the defendants of moneys received from the sale of debentures to the payment of interest on other debentures was a misapplication of trust funds, and a breach of trust; and that the Crown's advisers knew when the debentures were acquired by it that the proceeds thereof were to be so misapplied. Now, assuming this to be true—and it would appear to be true—it does not follow that the Crown is not entitled to the relief which it seeks.

The defendants had authority to issue and dispose of the debentures in question. Their acts in so doing were *intra vires*, and the relief sought could only be refused on the ground that the Crown was a party to the breach of trust, and that is something that cannot, I think, be imputed to the Crown; and therefore it is not necessary to consider whether such an objection

ought to prevail against a person seeking like relief under like circumstances.

By the 9th section of the Act of the late Province of Canada 20th Victoria, chapter 125, assented to on the 10th of June, 1857, the defendants were empowered to issue debentures to pay, among other things, the interest that would be due on July 1st of that year on debentures theretofore issued by the defendants, and it was provided that the debentures so to be issued should have no preference over other debentures issued by them, nor should the issue thereof affect or impair any privilege or preference attached to any former debentures. Of this issue of debentures the Crown holds a portion; and it was suggested at the hearing that there should be some declaration as to the position these debentures occupied with reference to other debentures issued by the defendants under other authority. But that it seems to me would not be proper as all the parties interested are not before the court, or represented in respect of their rights by the defendants. I do not see how with propriety more can be said with respect to these debentures than is said in respect to other debentures in question here, namely, that the Crown is entitled to share *pari passu* with other holders of such debentures in any future payment or distribution of interest.

Then with reference to the Montmorency bridge debentures, the Crown is, I think, entitled to the arrears of interest for the payment of which the defendants have made provision, unless it should appear that such provision has been made out of funds not applicable to the payment of such interest, and that on a proper taking of the accounts the tolls and revenues of the bridge have not been sufficient to enable the defendants to make such provision therefrom.

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Reasons for Judgment.

There will be judgment for the Crown, and a declaration:—

1. That it is entitled in any future payment or distribution of interest on the debentures mentioned herein to share *pari passu* with other holders of debentures of the like class;

2. That with respect to the Montmorency bridge debentures held by the Crown, the Crown is also entitled to payment of the arrears of interest for which the defendants have, pending these proceedings, made provision, unless it should appear that such provision has been made out of funds not applicable to the payment of such interest, and that on a proper taking of the accounts the tolls and revenues of the bridge have not been sufficient to enable the defendants to make such provision therefrom.

3. With reference to the bond for 5,000 pounds, that the Crown is entitled to payment when there are funds available for that purpose after providing for other prior charges upon the tolls and revenues of the trust.

Judgment accordingly.

Solicitor for the plaintiff: *E. L. Newcombe.*

Solicitors for the defendant: *Caron, Pentland & Stuart.*

BETWEEN

THE GORHAM MANUFACTURING COMPANY ..... } PLAINTIFFS; 1904 Mar. 7.

AND

P. W. ELLIS & CO. ..... DEFENDANTS.

Trade-mark—Infringement—Sterling silver "hall-mark"—Right to register goods bearing mark on Canadian market.

If by the laws of any country the makers of certain goods are required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks are exported to Canada and put upon the market here, it is not possible thereafter, and while such goods are to be found in the Canadian market, for any one to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public.

Quaere: Whether any one would, in such a case, be precluded from acquiring a right in Canada to the exclusive use of such a trade-mark, where there was no importation into Canada of goods bearing the prescribed foreign marks?

2. The plaintiffs brought an action for the infringement of their registered specific trade-mark to be applied to goods manufactured by them from sterling silver which, it was thought, so resembled the Birmingham Hall-mark, or a hall-mark, as to be calculated to deceive or mislead the public, and it appeared that during the time that the plaintiffs' goods, bearing such mark, were upon the Canadian market, goods bearing the Birmingham Hall-mark were also upon the market here.

Held, that the plaintiff could not, under the circumstances, acquire the exclusive right to the use as a trade-mark of the mark that he had been so using.

ACTION for an injunction to restrain the infringement of the plaintiffs' trade-mark, and to expunge that of the defendants.

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Argument of Counsel.

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

January 18th, 19th, 20th and 28th, 1904.

The case was heard at Toronto.

A. B. Aylesworth, K.C., for the plaintiffs, contended that there was no doubt upon the evidence that the defendants registered their trade-mark with knowledge of the prior registration of that of the plaintiffs. As to the resemblance between the marks, that is for the court to decide in finding an infringement. *Bourne* v. *Swan* (1). The marks are so small here that it would need a glass to assist the eye to distinguish them. It is the average man, and not the expert, that the law contemplates as being deceived. *Sebastian on Trade-marks* (2).

It is not necessary to establish that defendants fraudulently imitated the plaintiffs' mark. An innocent imitation is an infringement. The whole question is: Is the defendants' mark calculated to deceive the public into buying their goods for those of the plaintiffs? *Millington* v. *Fox* (3); *Singer Machine Manufacturers* v. *Wilson* (4).

The question of the origin of the mark, and the length of time it has been used by the plaintiffs has nothing to do with the merits of the case between the parties. We are entitled to it by reason of prior registration. *Cope* v. *Evans* (5); *Somerville* v. *Schembri* (6). The burden is on the alleged infringer to show his right where he has taken part of a registered trade-mark. *Ford* v. *Foster* (7).

The matter of the Birmingham Hall-mark has nothing to do with the issue of infringement between these

(1) 51 W. R. 213.
(2) 4th ed. p. 127.
(3) 3 Myl. & Cr. 338.
(4) L. R. 3 A. C. 376.
(5) L. R. 18 Eq. 138.
(6) L. R. 12 A. C. 453.
(7) L. R. 7 Ch. 611.

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parties. The statute 13 Geo. III, c. 52 is limited in its operation to England; and a manufacturer in the United States using the Birmingham Hall-mark on silverware would not be liable to an action. Canada is a foreign country in the same sense. *Greeley on Patents and Trade-marks* (1); *Sebastian on Trade-marks* (2). The statute regulating the use of hall-marks in England is of purely local concern. It is to protect the English public only. *Paul on Trade-marks* (3). The plaintiffs are entitled to an injunction, a rectification of the register of trade-marks and damages.

G. T. Blackstock, K.C., for the defendants, argued that the plaintiffs were not entitled to ask for a rectification of the register in an action for infringement. The sole question here is the proprietorship of the mark in dispute.

It is not the public that would be deceived in such a case as this, but the retail dealers, who are really specialists, and not likely to be deceived. If any dealer makes a minute inspection, as he undoubtedly would in buying silverware, he would use a glass and so see the difference between the two marks. The maple leaf in the mark of the defendants affords a ready means of distinguishing it from that of the plaintiffs.

The plaintiffs have adopted as their trade-mark an imitation of the Birmingham Hall-mark, which was first used on $\frac{900}{1000}$ silverware. It was used on goods sold in Canada long before the plaintiffs obtained registration of their mark. This operates as a denial of the plaintiffs' right to register. *Partlo* v. *Todd* (4); *J. B. Bush Mfg. Co.* v. *Hanson* (5).

(1) Secs. 150, 151.
(2) 4th ed. p. 82.
(3) Sec. 89.
(4) 17 S. C. R. 196.
(5) 2. Ex. C. R. 557.

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There is no case here of passing off our goods as those of the plaintiffs, or of appropriating their business. There is clearly no infringement upon the whole case; *Provident Chemical Works* v. *Canada Chemical Mfg. Co.* (1).

Argument of Counsel.

A. B. Aylesworth, K.C., in reply, cited *Davis* v. *Kennedy* (2).

THE JUDGE OF THE EXCHEQUER COURT now (March 7th, 1904) delivered judgment.

The action is brought by the plaintiff company against the company defendant for relief against an alleged infringement by the latter of the former's registered trade-mark.

The plaintiffs were, in May, 1863, by an Act of the General Assembly of the State of Rhode Island, constituted a corporation for manufacturing goods made of gold, silver and other metallic substances and for the transaction of other business connected therewith. As silversmiths they succeeded to a business that is said to have been commenced in 1813, and which they have continued to carry on at Providence, in the State of Rhode Island. They employ in this business, one of the witnesses stated, from seventeen hundred to two thousand persons, and the value of the annual output is between four and six million dollars. Their trade is principally in the United States of America, but they find a market for some of their goods in South America, Germany and other countries. A statement is produced (Exhibit A. 16) showing the volume of their business in Canada for the years 1884 to 1903, both inclusive. In 1884 their sales in Canada amounted in value to $4,844, and in 1900 to $20,260. Since the latter year their business in Canada has been done through "The Gorham Company, Limited,"

(1) 4 O. L. R. 545. (2) 13 Gr. 523.

incorporated in February, 1901 under *The Companies Act* of Canada, the sales in Canada in the year 1903 amounting to $23,088. For some forty years the plaintiffs have in the course of their business impressed or stamped on silverware manufactured by them the following, among other marks:

This mark, which one or more of their witnesses spoke of as the "house mark", had been previously used in a similar way by the plaintiffs' predecessors in the business for a period of ten or twelve years. In their application to register their trade-mark in the United States Patent Office, to which reference will be made, they state that the trade-mark had been continuously used by them since about January 1st, 1853. As they did not come into existence as a corporation until 1863 that is not literally correct; but identifying them with their predecessors there would appear by the evidence given in this case to have been a user of the mark since about that time. Prior to 1868 the silverware on which the mark mentioned was placed contained nine hundred parts of pure silver out of one thousand parts, that is, it was of the same standard as United States coin. Since then they have manufactured no silver that was not equal in fineness to sterling silver, in which nine hundred and twenty-five parts out of one thousand are pure silver. On silverware of that quality they have placed the mark mentioned and the word "sterling." Some silver of a

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higher quality has been manufactured by them, and on this has been impressed in addition to the "house mark" the representation of an eagle.

Not only has the plaintiffs' mark been impressed or placed upon the silver goods manufactured by them, but it has been made a prominent feature in their advertisements. In the United States they have advertised widely and at great expense, and in Canada they have been advertising their goods for about three years. With reference to the sale in Canada of silver goods manufactured by the plaintiffs, the evidence of Mr. Henry Birks, of Montreal, goes to show that as early as 1857, or shortly thereafter, such goods were on the market at Montreal; and assuming, as I think from the evidence as a whole one ought to assume, that such goods bore the plaintiffs' mark, that would go to show a use in Canada of this mark as early as the year last mentioned, or within a year or two thereafter.

In 1895 the plaintiffs sought to protect in some measure their mark by registering in the Copyright Office at Washington "a photograph, the title or "description of which was in the following words, to "wit: Lion, Anchor, G." For reasons that are given by one of the witnesses, but which there is no occasion to repeat, no attempt was made to register the mark as a trade-mark until the year 1899. On the 19th of December of that year, the mark was registered in the United States Patent Office, as a trade-mark to be applied to silverware; and on the 10th of April, 1892, they obtained in Canada registration of the mark as a specific trade-mark to be applied to the sale of articles formed in part or wholly of silver. Underneath the central panel of the drawing, accompanying the statement and declaration by which the application for registration in the United States was made, is the word "sterling" in plain Latin text, as mentioned in

the statement, but it is added therein that this word may be omitted. In the Canadian certificate of registration the plaintiffs' trade-mark is stated to consist "of the representation of three raised panels placed "side by side." The central panel has the conventional shape of a heraldic shield on which is the representation of an anchor. The panel on the left of the central panel has on it the representation of a lion, and the panel on the right of the central panel has the capital letter "G" in old English, as per the "annexed pattern and application." An illustration of this pattern has already been given.

And this description of the trade-mark is to be found in the application mentioned:

"The said Specific Trade-mark consists of the representation of three raised panels. These have generally been arranged as shewn in the accompanying facsimile, in which the central panel has the conventional shape of a heraldic shield on which is the representation of anchor. The panels on each side of the central panel are inclosed by a series of straight lines, the points of inter-sections of the lines being within a circle. The panel on the left of the central panel has on it the representation of a lion, and the panel on the right of the central panel has the capital letter "G" in old English. When the trade-mark is required to be very small, the representations of the anchor, the capital letter "G" and the lion may be omitted without altering the character of the trade-mark, the essential feature of which is the representation of three raised panels placed side by side."

The defendant company have a factory and warehouse at Toronto where they carry on the business of manufacturing gold and silver goods and watch cases. The business was commenced in 1877 by Mr. P. W.

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Ellis in partnership with his brother and another person. In 1901 the company was incorporated. Their present business, judged by Canadian standards, is a large one. The value of the sterling silverware annually manufactured by them is between one hundred and fifty thousand and two hundred thousand dollars. Prior to the year 1885 they used on sterling silver goods manufactured by them a mark showing a lion and a crown. The same mark, with the addition of a quality mark, was used by them on goods made of gold. In the year last mentioned they registered a specific trade-mark to be applied to the sale of gold, silver and other jewellery which consisted of the representation of a maple leaf with the letter "E" superimposed thereon. Up to, and including the year 1899, they put on sterling silverware manufactured by them the word "sterling" and the trade-mark mentioned, and sometimes the figures $\frac{925}{1000}$. In 1900 they made another change, and adopted a mark for silverware that was afterwards (on the 13th day of May, 1902) registered as a specific trade-mark to be applied to the sale of sterling silver jewellery, flat and hollow ware, medals and other sterling silver goods, and which consisted of three panels bearing an anchor, a maple leaf with the letter "E" thereon, and a lion. The following is a reproduction of the sketch or pattern submitted with the defendants' application:

This mark was, it appears, first used by the defendants on some silver stampings imported from Birmingham during the summer of 1900, and which when

finished at Toronto, were offered to the trade about the first of August of that year.

It will have been observed that the plaintiffs' trade-mark was registered in Canada on the 10th of April, 1902, and the defendants' on the 13th of May of the same year. Prior to such registrations there had been some correspondence between the parties on the questions now in issue between them, which shows what the controversy was and how it originated. On the 19th of February, 1902 the plaintiffs' solicitors at Providence, Rhode Island, wrote to the defendants as follows:

"PROVIDENCE, R.I., Feb. 19, 1902.

"MESSRS. P. W. ELLIS & CO.,

"Toronto, Canada.

"GENTLEMEN,—We have, at the request of the "Gorham Manufacturing Company, examined "samples of, and the printed representations of, "your Richmond pattern sterling table ware, and "have compared the same with the different pieces "of the 'Lancaster' pattern of the Gorham Manu- "facturing Company. We find that your patterns "are exact copies of the original Gorham design, "the 'Lancaster'. The imitations are so exactly "like the original that it is evident the dies must "have been made from the original Gorham "pattern.

"Not only have you exactly copied the designs "in every detail, but you have so nearly imitated "the Gorham Manufacturing Company's trade- "mark, by the use of the representation of the "anchor and the lion, that the purchaser, giving "such attention as an ordinary purchaser usually "gives, will be deceived and purchase your goods "believing they are purchasing the well-kown

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" standard quality of goods manufactured by the " Gorham Manufacturing Company.

" Under the law preventing unfair competition in " trade, you are liable for damages to the Gorham " Manufacturing Company.

" We are instructed by the Gorham Manufac- " Company to proceed against you unless you " cease manufacturing and selling the goods.

" Please consider this matter carefully and let " us know at as early a day as possible what " action you propose to take in this matter, and " oblige,

" Very truly yours,

" (Sgd.) JOSEPH A. MILLER & CO."

" B.S.W.

On the 25th of February, 1902, the defendants' solicitors made the following reply to the plaintiffs' communication :

" TORONTO, Feb. 25th, 1902.

" JOS. A. MILLER & Co.,

" Solicitors of Patents, &c.,

" 435 Butler Exchange,

" Providence, R.I.

" DEAR SIRS,—Your letter of Feb. 19th to " Messrs. P. W. Ellis & Co. of this city has been " handed to us. We have gone over the matter " with our clients, and we beg to state that in the " first place the patterns to which you refer are " similar to what the Gorham Manufacturing " Company manufacture under the designation of " 'Lancaster'. The designs are by no means ori- " ginal, and in fact the same design is and has been " for a very long time for sale in this market in " plated ware ; and likewise, we observe from publi- " cations, is apparently for sale in the United States

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" in plated ware. There is indeed so far as we " can see nothing original in the design, the bead- " ing around the edge being a very old and familiar " pattern, the roses being obviously simply a copy " from the natural flower. In any case there is " and can be no property by your clients in such " a design. Further the design is not registered " under our Act.

" With reference to what you say as to imitation " of the Gorham Company's trade-mark, we beg " to say that our clients have so far from imitating " the Gorham Company's trade-mark distinctly " placed their own trade-mark, namely a maple " leaf with the letter 'E', their own registered " trade-mark, on their goods; and so far as the use " of the Anchor and Lion is concerned there " is nothing whatever original in that. On the " contrary that combination is one of the English " Hall-marks, placed particularly upon hall-marked " goods coming from Birmingham, and has been " coming into this country in that way for a very " large number of years. So far from attempting " to deceive the public into the belief that their " goods are those of your clients, our clients are " exceedingly anxious and desirous of having their " goods sold as their own goods. They are quite " well satisfied with their own reputation for " sterling goods, and quite satisfied to sell their " goods under their own name as evidenced by " the fact that they have given their goods a dif- " ferent name, also placed their own trade-mark " plainly upon it, and the goods are invariably " sold by them as under their own name and " being, as they are, their own manufacture.

" We beg, therefore, to state to you that our " clients do not propose to alter their method of

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" conducting their business and if your clients see " fit to take any action in the matter, we will " accept service of any process you may see fit to " issue.

" Yours very truly,

" BEATTY, BLACKSTOCK, NESBITT, FASKEN & RIDDELL."

" (Sgd.) ROBERT McKAY."

The plaintiffs, having first registered their trade-mark in Canada, instituted the present proceedings against the defendants for the infringement of such trade-mark. The statement of claim was filed on the 24th of October, 1902, and the statement in defence on the 22nd November following.

The defences are in substance: (1) That the trade-mark in question is not the plaintiffs'; and that they are not entitled to the exclusive use thereof; and (2) that the defendants have not infringed such trade-mark.

Before taking up the first of these grounds of defence, it may be convenient to state that the defendants have shown that they did not adopt the trade-mark that they have been using since the year 1900 for the purpose of unfair competition in trade, or with any view of obtaining any advantage from the reputation that the plaintffs' goods had acquired either in the United States or in Canada. They did not export their goods to the United States, and in Canada there would at least be nothing to gain by imitating the plaintiffs' trade-mark, as the volume of the defendants' business in Canada is much greater than the plaintiffs'. The resemblance between the two trade-marks results from the fact that both resemble to a greater or less extent the hall-marks that are, in Great Britain, applied to goods manufactured from

sterling silver, and more especially the marks that are used at the Birmingham Assay Office. The defendants and other Canadian manufacturers of silverware have very generally been accustomed to put on such ware certain marks that more or less resemble the British hall-marks; and it is in general admitted that some advantage was thought to be derived from such a use of such marks. Mr. Harry Ryrie, of Toronto, one of the witnesses examined for the defendants, stated that without any intention on the part of the manufacturers to deceive anyone they have very generally been putting on their silverware marks resembling such hall marks. And Mr. John Wanless, Jr., a retail dealer in silverware in Toronto, who was examined on the part of the plaintiffs, testified that at one time the word "sterling" was a better mark, but that unfortunately it is not to-day in as good repute as it was, because the "sterling" mark has been abused, especially in the United States, where it had often been stamped on goods only perhaps 500 fine. So that dealers are beginning to fall back more or less on the marks that are used by companies of recognized reputation; and that within late years the tendency was in that direction.

Mr. P. W. Ellis, on cross-examination, denied that the defendants had used such marks with the intention of giving their customers the impression that the goods were hall-marked, but to meet a demand by the public for something to shew that such goods were of real silver and not an imitation.

The defendants suggest that at the time when the plaintiffs' predecessors in business first used the mark now in question, it was equally to their advantage to adopt a mark resembling a British hall-mark, especially as they were applying it to goods that were not as fine as sterling; and that their adoption of the mark

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is to be accounted for in that way. The plaintiffs have a different explanation. Of the three symbols used in their mark, the letter "G" stands, it is said, for "Gorham"; the representation of an "anchor" is to be found in the official seal of the State of Rhode Island, and was, it is suggested, adapted therefrom; and the use of the figure of a "lion" is not explained. It is not necessary to come to any conclusion as to which of the two suggestions or explanations is the more probable. What has to be considered here is not the reasons or motives that led the plaintiffs' predecessors in business to adopt the mark in question, but the mark itself.

By reference to the description of the plaintiffs' trade-mark given in the extract that has been taken from their application in Canada therefor, it will be seen that it is stated that when the trade-mark is required to be small the representation of the anchor, the capital letter "G" and the lion may be omitted without altering the character of the trade-mark, the essential feature of which is the representation of three raised panels placed side by side. Now it does not appear to me to be possible to omit from this mark the letter "G" and the representations of the anchor and of the lion without altering its character as a trade-mark; and there is, I think, no evidence that in the use of it such an omission has ever been made or attempted. But assuming the features mentioned to be omitted, there would be left nothing but the representation of three raised panels placed side by side, which is said to be the essential feature of the trade-mark. And here I agree with Mr. Aylesworth that what is claimed is not three raised panels, but the representation of three raised panels; and that while the stamp, by which in practice the mark is placed on silver ware makes in the silver what are in fact sunken

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panels or shields, the effect produced may, at least to some eyes, appear to be a representation of raised panels or shields. But such a mark is none the less a representation as well of what it consists of, namely, sunken panels or shields. So that there is not in that respect anything distinctive in the use of a mark applied to silver in that way. And such stamps or punches have been used for that purpose, and with that or a like effect for so long a time and so commonly, and in such a variety of forms, that it is impossible, it seems to me, to sustain the plaintiffs' claim to an exclusive right to use as a trade-mark to be applied to silver ware the representation of three panels or shields placed side by side, whether to the eye such panels or shields have the appearance of being raised or sunken. But even if it were thought that such a claim could be sustained, it would be necessary to so limit it as not to interfere with the long established and general use by others of marks which made in the same way have a like or similar effect. So limiting the plaintiffs' trade-mark the defendants have not, I think, infringed it. Assuming for the moment that the latter have a right to stamp or impress upon silver goods made by them the three devices or symbols used by them, there is no objection to the manner in which that is done. They, in common with others, have a right to use for that purpose a stamp or punch, and it is no objection to such use that the sunken shield or panel which the stamp produces and on which such devices or symbols are shown, should to the eye of some persons appear to be raised panels or shields. Apart from the representation of a lion and of an anchor, and the letter "G" shown in the plaintiffs' trade-mark on the representation of the three panels, there would be no question of infringement here. It is only when one takes the trade-mark as a whole, as it has been used, that the

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question of infringement really arises. And when one does that he must of necessity, I think, take these symbols as they have been used and described as necessary or essential features or characteristics of the trade-mark. It might perhaps be sufficient to take the plaintiffs' own definition of the essential feature of their trade-mark, and so to dispose of the case; but I am inclined to go further, and, notwithstanding what they themselves have set up in their application to register the trade-mark, to give them the benefit of the mark they have used, and of which they registered a facsimile, if their right to the exclusive use thereof can be sustained.

Coming then to that question, the objections, urged against the plaintiffs' claim to a right to the exclusive use in Canada of the trade-mark represented by the facsimile registered by them, are:—(1) That they could not in Canada acquire a title to such trade-mark, and a right to its exclusive use, because it so closely resembled the British hall-marks, and more particularly the Birmingham hall-mark, on silver goods imported into Canada, as to be calculated to deceive or mislead the public; and (2) That two of the three symbols used, namely, the representations of a lion and of an anchor were in common and general use by silversmiths in Canada, as marks to be applied to silverware.

A reference to the statutes respecting the marking of gold and silver plate in Great Britain and Ireland will be found in *Sebastian's Law of Trade-Marks*, (1). Of the statutes applying to England, the present enquiry is principally concerned with those that have reference to the Birmingham Assay Office, of which Mr. Carslake, the solicitor of that office, has made mention. The earliest of these

(1) Appendix H. pp. 614-625.

is 13 Geo. III, c. 52 (1772) referred to at page 616 of *Sebastian*. As a result of these statutes there are to be found on silverware or plate made in England four or five marks, which consist of the following representations, symbols or letters:—(1) The standard mark which for sterling silver (that is silver 11 oz. 2 dwt. fine) is a lion passant, and for silver 11 oz. 10 dwt. fine, Britannia; (2) the date mark, that is, a letter to denote the year, which is changed annually; (3) the maker's mark, which consist of the initials of his name, or of the name of the firm; (4) the duty mark (disused since 1890, 53-54 Vict. c. 8) which was the sovereign's head; and (5) the Assay Town Mark, which for London is a leopard's head; and where the silver is of the higher fineness mentioned, a lion's head erased; for Exeter, a castle; Chester, a dagger and three sheaves; Newcastle, three castles; Sheffield, a crown; Birmingham, an anchor. In *Redman's Illustrated Handbook of Hall-Marks, Date Letters*, &c., (Exhibit B-47), at page 185, is given a list of the date letters used at the Assay Office, Birmingham, from the year 1773 to the year 1899. It would appear from the evidence of Mr. Westwood, the assay master at Birmingham, that while the list is, in respect of the letters used, in general correct, it cannot be implicitly relied upon with respect to any particular date, as the compiler has at least in one instance given a "j" that was not used. For example we find a capital "𝔍" in old English given for the year 1831-1832, when in fact that letter in that form was used the year previous, 1830-1831. But that is of no importance here, as nothing turns upon the year in which the letter mentioned was used, or in the view that I take of the case of the particular letter used. The use of this letter was, however, referred to frequently in the evidence and in argument, for the reason that omitting other

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marks, there will be found in the Birmingham Hall-mark of the year 1830-1831 and in the plaintiffs' trade-mark, representations of a lion passant, an anchor, and the capital letter "G" in old English. A reproduction of the plaintiffs' registered trade-mark has been given. The following is an illustration of the Birmingham Hall-mark for the year mentioned :—

In the Birmingham Hall-mark the lion faces to the left; in the plaintiffs' trade-mark it faces to the right. In the latter the form of the panels or shields has in use been uniform; in the former such panels or shields have, it appears, from time to time varied in form, and there are some differences between the form of the panels or shields used by the plaintiffs and those used at the Birmingham Assay Office. With regard to the capital letter "G", in old English, in the plaintiffs' trade-mark it would not, I think, be fair to limit the comparison to the use of that letter in old English in the hall-mark for the year 1830-1831, because in other years a different date letter has been used, and there is no evidence of the importation into Canada of any silver goods made at or near Birmingham in that year, or bearing that date letter. With reference to the use in the plaintiffs' trade-mark of this letter, I do not think more ought to be urged against the mark than that it contains a letter which, while it may stand for the word "Gorham", may also in the connection in which it is used be taken by many persons to be the date letter of a hall-mark. I do not put the objection on any higher ground than that. Then, as has been seen, there are to be found on English silverware other

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marks besides the hall-mark, such as the maker's mark or initials, and on plate made prior to the year 1890 the duty mark. In some cases it would appear that on silver goods manufactured by the plaintiffs other marks are placed; but this is not so uniform or so well understood as the use on English silverware of the maker's mark and the duty mark. So that it cannot, I think, be doubted, that anyone who was acquainted with the Birmingham Hall-marks, and with the plaintiffs' trade-mark, and who examined the same carefully, could distinguish the one from the other, and would not be liable to be deceived. But on the other hand there are others, and probably a considerable number of persons, who might, I think, mistake the plaintiffs' mark for the Birmingham Hall-mark, or for a hall-mark. Conceding that there are differences by which the two marks as they are respectively used on silverware may be distinguished, there is, it seems to me, such a resemblance between them that the plaintiffs' mark is liable to be mistaken for the Birmingham Hall-mark, or for a hall-mark, and is calculated to deceive and mislead the public.

It is argued, however, that the statutes under which silverware made in England is hall-marked are not in force in Canada, and with that I agree. If they were in force here there would be little or no room for argument. It is because the statutes referred to are not in force in Canada that the plaintiffs are enabled to use their mark here. But to use it, or to be allowed to use it, or even to have a right to use it, are different things from having an exclusive right to its use. While the statutes under which hall-marks are placed on British silverware are not in force in Canada, goods bearing such marks are exported to Canada and put upon the market here, and that constitutes a use of such marks in Canada. The marks are, it is true, not trade-marks,

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but they are marks used in trade to denote the standard or quality of the goods to which they are applied. As all makers of that class of goods have to use such marks, the use becomes general, and is not, as in the case of a trade-mark, confined in its use to one maker only, or to a limited number of makers. In that way such marks come to stand for the reputation for commercial honesty, not of one manufacturer only, but of the trade in general and of the country in which the goods are produced. And wherever such goods in the course of trade go, it is a matter of public interest that the public should be protected from imitations of such marks, or the use of marks that so closely resemble them as to be calculated to deceive or mislead.

In this connection it was also contended that in matters relating to trade-marks in Canada, the United Kingdom of Great Britain and Ireland is to be considered as a foreign country. And without expressing any opinion as to that one way or the other, I concede the contention for the purposes of the argument in this case. But that does not, I think, make any difference. If by the laws of France, or of the United States of America, or of any other foreign country, the makers of certain goods were required to put thereon certain prescribed marks to denote the standard or character of such goods, and goods bearing the prescribed marks were exported to Canada and put upon the market here, it would not thereafter, and while such goods were to be found in the Canadian market, be possible, I think, for any one to acquire in Canada a right to the exclusive use of such prescribed marks to be applied to the same class of goods, or to the exclusive use of any mark so closely resembling the prescribed marks as to be calculated to deceive or mislead the public. And the fact that such marks were not trade-marks, but marks used to comply with statutes

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of the country of origin would not in that respect in any way alter the case. Whether anyone would in such a case be precluded from acquiring a right in Canada to the exclusive use of such a trade-mark where there was no importation into Canada of goods bearing the prescribed foreign marks, is a question on which no opinion is expressed as it does not arise in this case. In the determination of the question at present in issue it is not necessary to go beyond the proposition as stated.

The Birmingham Hall-mark goes back to the year 1773, and has been continuously in use since that date. The plaintiffs have in the United States used their trade-mark since about the year 1853. With regard to the use of the latter mark in Canada, or in one or more of the Provinces now forming part of Canada, the evidence of Mr. Henry Birks, of Montreal, shows, as has been seen, that as early as the year 1857, or within a few years thereafter (I do not know that he intended as to that to fix the exact date) the Gorham goods were being imported by Savage & Lyman, of Montreal. With regard to the importation of English silverware, Mr. Birks, being asked if he knew where the greater part of it had since the year 1857 (when he went into Savage & Lyman's employment) come from, answered that during the last several years the purchases of his firm had been, by all odds, the largest from Birmingham; but whether he wished it to be understood that he knew of such importations as early as 1857 is not clear. With reference to the same question the evidence of Mr. Thomas H. Lee, of Toronto, who was a clerk with Mr. J. G. Joseph, of Toronto, in 1853, and afterwards, in 1857, a partner in the firm of J. G. Joseph & Co., shows that in the year 1859, when Mr. Joseph died, the firm had a large business in silverware with a branch at Birmingham. It is fair, I think, to assume

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that such a business could not be created in a day, and that such importations had been going on for a number of years previously. Of later importations of English silverware, the larger portions of which came, it appears, from Birmingham, there is ample evidence; but the evidence of such importations prior to 1857 or 1859 leaves, I think, something to be desired. No one, I suppose, doubts that such importations took place, and, as it is perhaps difficult after the lapse of so many years to get direct evidence thereof, one ought not to be too exacting; or if there is any real doubt about the matter the case is one perhaps in which leave might be given to adduce further evidence. The burden of proof, however, is in this respect upon the defendants, and it is for them to discharge that burden. Taking the evidence as a whole, I think this may with fairness be said, and I find, that during the time the Gorham goods have been on the Canadian market English silverware hall-marked at the Birmingham Assay Office has also been upon the same market. During that period, probably for a period considerably longer, Canadian silversmiths have very generally used as a silver mark the representation of a lion. Other marks, such as a representation of the sovereign's head, or a crown, have also been used. Of some fifty impressions appearing on a plate prepared by Mr. John Leslie, of Montreal, silversmith, to show the marks put on goods manufactured at Montreal by R. Hendry, R. Hendry & Co. and Hendry & Leslie, for different persons and firms who were customers of theirs, all show a lion, and all but one the sovereign's head. In two instances there is a crown, in two a beaver, and in one three castles. In ten cases, what would correspond with a date letter is shown; in some thirty instances the initials of the name of the customer or dealer appear;

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and in thirteen of such impressions the names of the dealers are shown in full.

With regard to the use in Canada of the representation of an anchor as a silver mark, such use has not been general, but has been limited to a few silversmiths. Nor is there any evidence that it has been so used in Canada for more than thirty or thirty-five years. Mr. Benjamin Pearsall's testimony shows that as long ago as that he used, at Toronto, as a silver mark the representation of a lion passant, an anchor and a crown. Now whatever may be said or thought of the use by silversmiths in Canada of marks so closely resembling English marks as those that have been mentioned, this at least is clear, that there is no greater objection to their use of them than to the plaintiffs' use thereof in Canada. The lion passant has for centuries been, with silversmiths, a mark for sterling silverware; and in the absence of any statutory regulation of its use in Canada there is, it seems to me, no objection to its honest use in Canada on goods of the requisite standard of quality. But no one silversmith can appropriate the mark to himself. To the use in Canada of a letter as part of a trade-mark to be applied to silver there is no objection, if it is made clear that the letter is not a date letter. If that is not shown its use suggests that the goods are hall-marked, and the suggestion is not true. Where, however, as in the defendants' trade-mark, the letter is placed upon something so distinctively Canadian as a maple leaf no one can be deceived, and the use of the letter is, I think, free from objection. But here again no one can acquire a right to the exclusive use as a silver mark of any such letter by itself. To the use on silverware made in Canada of any Town Assay Mark, such as an anchor, there is the objection that it suggests not only that the goods are hall-marked; but also that they were so marked at a particular place,

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and both suggestions are false. But it would not be possible for any silversmith who saw fit in Canada to use such a mark, even if its use were not objectionable, to gain a right to its exclusive use. And when a combination of all these marks is used on goods that are not in fact hall-marked, the danger of mistake and deception is increased, and the use thereof becomes more objectionable. No one can, I think, in Canada, acquire title to such a combination as a trade-mark to be applied to silverware. If I am right as to that, the plaintiffs' action fails, and there is no occasion to determine the question as to whether or not the defendants' present trade-mark is an infringement of the plaintiffs'.

There has been no application by the defendants to expunge the plaintiffs' trade-mark from the register of trade-marks. The objection to the plaintiffs' right to the exclusive use of the trade mark in question and of the title thereto is taken by the defendants, as it may be, as a defence to the action of infringement. There is no question in that respect as to the rectification of the register. But the plaintiffs, as part of the relief claimed, ask for an order directing the cancellation of the defendants' trade-mark in the register of trade-marks, and to expunge the same from such register. The ground upon which that relief is asked is that the defendants' registered trade-mark is an infringement of the plaintiffs', and so resembles the same as to be likely or calculated to deceive and mislead the public. But that ground, as we have seen, fails. It is possible,—however I express no opinion—but it is possible that the plaintiffs are otherwise aggrieved in that respect by the registration of the defendants' trade-mark, and that on other grounds they would be entitled to relief. I, therefore, reserve to them the right to apply for a rectification of the register of trade-

marks by expunging therefrom in whole, or in part, the defendants' trade-mark. With that reservation there will be judgment for the defendants and the costs will follow the event.

Judgment accordingly.

Solicitors for plaintiffs: *Barwick, Aylesworth, Wright & Moss.*

Solicitors for defendants: *Beatty, Blackstock, Nesbitt, Fasken & Riddell.*

BETWEEN

1904 SPILLING BROTHERS..... PLAINTIFFS;

Mar. 7.

AND

JAMES O'KELLY.....DEFENDANT.

Trade-mark—Infringement—Prior use—"King" cigars—Application to rectify register—Counter-claim—Title in trade-mark—Defence.

A manufacturer or dealer in cigars cannot acquire the right to the exclusive use, and be entitled to the registration, of a specific trade-mark, of which the term "King" forms the leading feature, and is used in combination with the representation of some particular king, while other manufacturers or dealers use the same term in combination with the likeness of other kings. *Spilling Bros.* v. *Ryall* (8 Ex. C. R. 195) explained.

2. An application to rectify the register of trade-marks cannot be made by counter-claim. (*Secus* now, under general order of 7th March, 1904.)

3. In an action for the infringement of a trade-mark the defendant may attack the legal title of the plaintiffs to the exclusive use of the trade-mark which they have registered. *Partlo* v. *Todd* (17 S. C. R. 196) referred to. *Provident Chemical Works* v. *Canadian Chemical Manufacturing Co.* (4 O. L. R. 545) approved.

ACTION for infringement of a trade-mark for cigars. Defendant filed a counter-claim asking for a rectification of the register of trade-marks by expunging therefrom the plaintiffs' mark (1).

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

(1) REPORTER'S NOTE.—The practice under which this counter-claim was dismissed is changed, being regulated by the following order:

IN THE EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions contained in the 55th section of "*The Exchequer Court Act*," as amended by 52 Vict. ch. 38, sec. 2, it is hereby ordered that the following rule in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. An application to have any entry in any register of copyrights, trade-marks or industrial designs

February 16th, 1904.

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Argument of Counsel.

The case was heard at Ottawa.

R. G. Code (*E. F. Burritt* with him) for the plaintiffs, contended that the trade-mark relied on by the plaintiffs in this case was a valid one, and the evidence showed that the plaintiffs have an exclusive right to it. *Apollinaris Company* v. *Snook* (1); *Lever* v. *Goodwin* (2). As soon as we obtain our certificate of registration we have an exclusive right to use the trade-mark.

W. R. White K.C., for the defendant, contended that upon the additional evidence touching the use of the term "King" as a label for cigars, which was produced in this case, *Spilling Bros.* v. *Ryall* (3) is of no avail to support the plaintiffs' contention. *Partlo* v. *Todd* (4); *Watson* v. *Westlake* (5); *Provident Chemical Works* v. *Canadian Chemical Manufacturing Co.* (6).

But if it were conceded that the plaintiffs' trade-mark is good, the defendant has not infringed it. A person who desires to buy Spillings' cigars will not be misled into buying those of the defendant.

A. W. Fraser, K.C., followed for the defendant, contending that the defendant acted in good faith and did not know of the plaintiffs' trade-mark until this action was threatened. The term "King" is a material part

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 some one 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.

Dated at Ottawa, this 7th day of March, A.D. 1904.

(Sgd.) GEO. W. BURBIDGE,
J. E. C.

(1) 7 Cutl. R. P. C. 474.
(2) 4 Cutl. R. P. C. 492.
(3) 8 Ex. C. R. 195.
(4) 17 S. C. R. 196.
(5) 12 Ont. R. 449.
(6) 4 O. L. R. 545.

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of the plaintiffs' trade-mark, and after being so long in prior use could not subsequently be made a subject of trade-mark by them. *Bass* v. *Dawber* (1); *Sebastian on Trade-marks* (2); *Rodgers* v. *Rodgers* (3); *Fulwood* v. *Fulwood* (4).

R. G. Code, in reply, contended that the defendant's counter-claim was bad, because he asks therein to have the Register of Trade-marks rectified by expunging therefrom the plaintiffs' trade-mark. This cannot be done in England by counter-claim, nor can it be done here. *Pinto* v. *Badman* (5). Nor can the defendant set up by way of defence that we have not the exclusive right to use our trade-mark. That can only be done by bringing in the Minister of Agriculture.

On the question of infringement he cited *Partlett* v. *Guggenheimer* (6).

THE JUDGE OF THE EXCHEQUER COURT now (March 7th, 1904) delivered judgment.

The action is brought for relief against an alleged infringement by the defendant of the plaintiffs' registered trade-mark hereinafter described. The same trade-mark was in question in the case of *Spilling Brothers* v. *Ryall* (7), and by agreement of the parties a portion of the evidence taken in that case was read on the hearing hereof.

From the year 1890 to the year 1901 the plaintiffs, who are manufacturers of cigars, put up cigars in boxes, on the covers of which were impressed the words "Our King Cigar." On the under side of the cover were the words in large letters "Royal Crown" surmounting a crown and other representations, below which appeared the words "The King of 10c. Cigars."

(1) 19 L. T. N. S. 626.
(2) 4th ed. p. 172.
(3) 31 L. T. N. S. 285.
(4) 9 Ch. D. 176.
(5) 8 Cutl. R. P. C. 181.
(6) 67 Md. 542.
(7) 8 Ex. C. R. 195.

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On the 5th of February, 1901, they registered as a specific trade-mark to be used in connection with the sale of cigars a label bearing in an "oval form a "vignette of King Edward VII., with a coat of arms "on one side and a marine view on the other sur- "mounted by the word 'Our King,' and with the "words Edward VII., underneath." This, as a whole, was, of course, a different mark from that which they had been using; but it appeared from the evidence, and it seemed reasonable, that where cigars were sold from boxes bearing either of such marks, the tendency was for the cigars to become known as "King Cigars." And so far as appeared in evidence in that case the plaintiffs were the first to use the word "King" as a leading feature or characteristic of a mark to designate cigars manufactured by them. On that ground the registered trade-mark was upheld. While the plaintiffs had added to, and changed the mark they had been using, they had retained that important feature. In the present case, however, it has been shown that the plaintiffs were not the first to use the word "King" with other words and designs as a mark to be applied to boxes in which cigars were put up and from which they were sold, and the ground upon which their registered trade-mark was in the case mentioned upheld fails.

The question, however, remains whether the manufacturer or dealer of cigars may acquire the right to an exclusive use, and be entitled to registration of, a specific trade-mark of which the term "King" forms the leading feature, if it is used in combination with the representation of some particular king; while other manufacturers and dealers use the same term with the likeness of other kings. May one manufacturer use a "King of the West", another a "King Special", a third a "King Oscar", a fourth a "King

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Bruce", and a fifth a "King Edward"? (to use illustrations afforded by the evidence) and each be entitled to registration of his particular label? If so, the list might be extended indefinitely, as there is no reason why it should be confined to the names of living kings. It is suggested that it would be proper to register any number of such marks. But with that view I cannot agree. Such a course of procedure would, I think, tend to confusion and deception in the particular trade or business. Where one maker had acquired a right to an exclusive use as a specific trade-mark, of which a prominent characteristic was for example a "star" or a "maple leaf", it would not be proper to allow some other maker to register for use with the same class of goods a mark having the same leading feature simply because he called his "star" by some other name, or used a "maple leaf" having a different form or shape. And if these things were in common or general use as marks applied to a particular class of goods, then no one could acquire a right to the exclusive use thereof in connection with the manufacture and sale of such goods. And the same rule should, I think, be applied in the present case, and I find against the plaintiffs' title to an exclusive use of the trade-mark on which they rely.

The defendant by a counter-claim asks that the plaintiffs' registered trade-mark be expunged from the register; but as to that the practice of this court is, I think, at present the same as that of the High Court of Justice in England, where it has been held by the Court of Appeal that an application to rectify the register of trade-marks cannot be made by counter-claim. *Pinto* v. *Badman* (1).

The defendant in the fourth paragraph of the statement of defence, among other things, alleges that the

(1) 8 Cult. R. P. C. 181.

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plaintiffs have no legal title to the exclusive use of the trade-mark that they have registered. For the plaintiffs, however, it is contended that this ground cannot be set up as a defence to the action of infringement, and that an application to rectify the register should first be made. The case of *Partlo* v *Todd* (1) is to the contrary of that contention, as *The Trade-Marks Act* stood when that case was decided; and I agree fully with the views of the learned Chief Justice of Ontario expressed in the case of *The Provident Chemical Works* v. *The Canada Chemical Manufacturing Co.* (2) that the amendments made to the statute since *Partlo* v. *Todd* was decided have not in that respect altered the law.

The action and the counter-claim will both be dismissed, and the costs as usual will follow the event.

Judgment accordingly.

Solicitors for the plaintiffs: *Code & Burritt.*

Solicitors for the defendant: *White & Williams.*

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(1) 17 S. C. R. 196. (2) 4 O. L. R. 545.

1904
April 5.

BETWEEN

EDMUND CONWAY.....PLAINTIFF;

AND.

THE OTTAWA ELECTRIC RAILWAY COMPANY..... } DEFENDANTS.

Patent for invention—Wing Snow-plough—Experimental public use—Limited interest of public invention—Defeat of Patent.

The use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection is not such a public use as, under the statute, defeats his right to a patent. But such use of the invention must be experimental, and what is done in that way must be reasonable and necessary, and done in good faith for the purpose of perfecting the device or testing the merits of the invention; otherwise the use in public of the device or invention for a time longer than the statute prescribes will be a dedication of it to the public; and when that happens the inventor cannot recall the gift.

ACTION for the infrigment of a patent for improvements in snow-ploughs for street railways.

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

February 3rd 1904.

The case was heard at Ottawa.

W. D. Hogg, K.C., for the plaintiff, contended that because the defendants had infringed plaintiff's invention before he had obtained a patent, but while he was working with it in its experimental stage, such fact could not be relied on as a defence to the action. The statute allowed an experimental user, and during such user the inventor was protected against infringement.

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Argument of Counsel.

As to the merits of the patent, the particular thing which results in this patent is the position of the scraper, and the vertical movement which it has along its whole length. The combination of pinion and rack-bar are parts of a combination presenting a novelty or new feature in snow-ploughs. The pith and marrow of this invention is the fact that by this combination, that is by a simple feature of the scraper resting on a rack-bar, a result is produced of scraping, for a width of eight or nine feet, a path along the streets, so that sleighs and vehicles have a smooth and level road-bed.

That is the pith and marrow of this invention. It may be contended that this is not an invention, not a patentable device by reason of its apparent simplicity; but there are many cases in which the very simplicity of the device makes it valuable and gives it utility, although the average mind wonders why it had never been thought of before, it is so simple. There is one thing that distinguishes the plaintiff's combination of devices from other snow-ploughs, and that is that where their mechanism is most intricate, involving wheels and pulleys and ropes, the plaintiff's is the perfection of simplicity. The expert called by the defendants was unable to say that the plaintiff's device did not produce a more favourable result than the others he had examined.

As to the question of anticipation, I submit that this combination was never before applied to snow-ploughs; and so the argument of anticipation falls to the ground. We have a new and useful device. We could have no better evidence of this than that given by Mr. Hutcheson, the Superintendent of the defendant company's railway; and he was convinced of its utility by this one feature of vertical motion. Mr. Hutcheson says that they have a small scraper or brush, that plays vertically on the rail, in use on the Ottawa

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Electric Railway; but that could not be seriously put forward as an anticipation of our vertical motion, because it is confined to the width of the rail, and no one would pretend that it was an adequate device to apply to the cleaning of streets. The best evidence of the novelty is that as soon as our device was seen it was imitated.

With regard to the experimenting by the plaintiff with his invention, we had a full year in which to make such experiments. We did make two ploughs in 1899, but those were merely experimental, and, proving unsatisfactory, were broken in the yards. In the winter of 1900 the plaintiff made two ploughs, one with one wing and one with two. But at that time he was still studying his invention, and he was repeatedly during the time in which they were in use improving the ploughs. And it must be borne in mind that by reason of the nature of the invention and the object for which it was intended, the experiments could only be made in public and could only be made by a street railway company. He could not make experiments in his back-yard, they had to be made in the face of the public; but I submit that under the cases in doing this he was not making public his invention within the contemplation of the statute. It must be remembered also that it was not with profit to himself that the Quebec Railway used his machines to scrape the road. All this time he was experimenting until his mind was convinced that his device was complete. It may be said that what he was doing all this time was in the way of repairs, and that adding weights to the top of the scraper was not improving the device; but in answer to that, I say, is that the object of the scraper was to clean the streets, and these experiments were with a view of making the scraper as wide as possible and ascertaining how

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it should be strengthened and weighted to make it effective for the greatest width. And so in making the wing heavier he was merely in the process of arriving at a conclusion as to how wide he could make the wing and conserve its success and utility. So I say that he had all the season of 1900 to experiment in and develop the complete idea, and within a year from that time he had applied for his patent and so was within the statute.

Now what is an experiment in view of the cases? I submit that experiments such as the plaintiff made are purely experiments and no public user. *Edmunds on Patents* (1). I say that the cases and authorities show that where the prior user is merely experimental there is no invalidity arising from the user. *Newell* v. *Elliott* (2); *Bentley* v. *Fleming* (3); *Smith* v. *Davidson* (4); *Hills* v. *London Gas Co.* (5); *Summers* v. *Abel* (6); *Frost on Patents* (7); *Ridout on Patents* (8). I submit that if he was using it in public for profit it would be another question; and the most that can be said against us is that there was public user, if any public user at all, by the Quebec Railway for less than a year before the patent was applied for.

A man making a device and exercising his ingenuity must arrive at some stage when he thinks it a success, and I say that in this case that stage was not reached before 1900. To determine the experimental character of the user we must ask what was he doing? Was he holding it out to the public as a completed machine? Or was he testing its sufficiency?

F. A. Magee followed for the plaintiff, contending that even if eighteen months has been taken by the

(1) 4th ed. p. 66 and cases then cited.
(2) 27 L. J. C. P. 337.
(3) 1 C. & K. 587.
(4) 19 C. B. 690.
(5) 5 H. & N. 312.
(6) 15 Grant, 532, at pp. 534, 537.
(7) 2nd ed. p. 105.
(8) P. 67.

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plaintiff to make these experiments he had not infringed the statute, because there was really but an experimental period of six or eight months out of the eighteen months. It was only three months of the winter season at the most that he could have carried on his experiments, and so the statute was not infringed. *Frost on Patents* (1); *Thomson* v. *American Braided Wire Co.* (2).

None of the American patents put in evidence contained an automatic action like this. Nor is it a feature of any of those patents to have a rack-bar supporting the wing of the plough.

F. H. Chrysler, K.C., for the defendants, contended that there was want of novelty in the particular combination claimed by the plaintiff. There is no novelty in the running gear or in the inclined wooden plane with a steel shoe. The wheel, pinion and pawl are common and public. They are in use for brakes on street cars everywhere. The wheel and pinion are as old as the Gravath (U.S.) patent of 1869.

But what is most fatal of all is the fact that the vertical play of the wing on the rod, which is claimed here as the pith and marrow of the invention, is not claimed in the patent of the plaintiff.

The (U.S.) patent of Matthews shows a vertical movement in the front hinge. As to the combination, we have not infringed the combination claimed by paragraphs 5, 6, 7, 8 and 9 of the patent. It strikes me that what is not claimed there is the vertical play of the runner which is relied on now. In regard to the hinge in front admitting of vertical movement and the supporting rack- bar, the latter in itself being or not being a new device, its relation to the plough is brought about by no new means.

(1) 2nd Ed. pp. 28, 33, 34. (2) 6 Cutl. R. P. C. 518.

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Argument of Counsel.

They claimed a combination of all these known things, and their claim is too large. *Clark* v. *Adie* (1).

Then with regard to the want novelty in the front hinge and its utility.

[BY THE COURT: We need have no difficulty about the question of utility, since you use it on your railway.]

As to the public user of the invention, section 7 of *The Patent Act* is so clear and free from ambiguity that no cases need be cited on that point. The facts of this case show clearly that there has been a public user of the plaintiff's invention for more than one year previous to his application for a patent. It was in use publicly on the Quebec Street Railway during the entire seasons of 1899 and 1900.

I submit that experimental use does not mean public use. What the plaintiff did was no limited imparting to the public which an inventor is obliged to do in order to perfect his invention. (*Summers* v. *Abell* (2); *Bonathan* v. *Bowmanville Mfg. Co.* (3); *Adamson's Patent* (4); *Carpenter* v. *Smith* (5). *Newall's* Patent, cited by the plaintiff, is a case that stands by itself. The nature of the invention demanded such a public use as was made of it. In conclusion I say that the two ploughs, one with one wing and one with two, were used by the Quebec Railway in 1900. They were used continuously, and so that a large number of walkaway ploughs were done away with. No change was made by the plaintiff by reason of his experiments during that season except adding weights, which had nothing to do with the patentable part of his invention. He has broken the statutory requirement that the invention should not be in use for more than one year.

(1) 2 App. Cas. 315.
(2) 15 Gr. at p. 539.
(3) 31 U. C. Q. B. 413.
(4) 6 DeG. M. & G. 420.
(5) 9 M. & W. 300.

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Argument of Counsel.

C. J. R. Bethune, followed for the defendants. One important fact distinguishes the cases cited by counsel for the plaintiff from this case, and that is that in those cases the patentees themselves were using the invention, and in this case it was not the patentee but a third party, the Quebec Street Railway Company. Therefore the case falls within the provisions of section 7 of *The Patent Act*. The Quebec Railway were using the machines in their ordinary business. *Worley* v. *Tobacco Co.* (1); *Smith & Griggs* v. *Sprague* (2).

The evidence does not show experimental use. In his examination for discovery nothing was said about experimental use by the plaintiff. The plaintiff's word cannot determine "experimental use"; there must be other evidence.

Then, why was no caveat filed by the plaintiff, if he were experimenting during all this time? Almost any man of common sense would have filed a caveat had it been his intention to apply for a patent. (*Frost on Patents* (3).

THE JUDGE OF THE EXCHEQUER COURT now (April 5th, 1904) delivered judgment.

The action is brought against the defendants for the infringement of letters-patent of invention numbered 73,623 issued to the plaintiff on the 29th day of October, 1901, for alleged new and useful improvements in snow ploughs.

For some years prior to July, 1901, the plaintiff was in the employ of the Quebec Railway Light and Power Company. That company operates at the City of Quebec a street railway, and during the winter it was the plaintiff's duty to superintend for them the removal

(1) 104 U. S. 340, at p. 344. (2) 123 U. S. 249.
(3) 2nd Ed. p. 36.

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of snow from the streets used by the company. Prior to the winter of 1899–1900 they had for that purpose used what is known as the walk-a-way ploughs drawn by horses. In November or December of 1899 the plaintiff devised and caused to be made at the company's shops a snow plough or scraper that in principle was the same as that for which he afterwards took out his patent. This plough or scraper was attached to a street car and operated by electric power. The first plough made had only one wing. Then later, during the same winter, another was made with two wings, the principle being the same in both ploughs. These ploughs were made without any attempt at secrecy, and were in the ordinary course of operating the railway used publicly to remove the snow adjacent to the company's rails on the city streets. They were made and operated at the company's expense, and used under the plaintiff's directions for their benefit. On the whole they did the work for which they were made with a reasonable degree of success. But as was to be expected they were not perfect; and the actual use suggested some changes and improvements. As for instance, the wing as first constructed was not found heavy enough and it had to be weighted. It was not quite large enough and had to be extended. The materials used for the wings and to attach them to the car were not strong enough, and from time to time repairs and renewals were necessary. But there was no change in the principle on which the ploughs were constructed. The combination and relation of the several parts remained the same.

The plaintiff, with the experience he had gained, in the winter of 1899–1900, had two new ploughs made in the autumn of 1900. As in the former case they were made at the company's expense, and were

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publicly used for their benefit. From the first they appear to have been capable of successful operation without further experiment, and have since been used by the company in the ordinary course of their business. The 1899–1900 ploughs were discarded, and cut or broken up, the materials of which they were made being used in part in constructing the two ploughs turned out in the autumn of 1900. The plaintiff in July, 1901, ceased to be employed by the Quebec Railway Company. In October of that year he applied for letters patent for his invention, and, as stated, these were issued to him on the 29th of that month. In November, 1901, Mr. Hutcheson, the superintendent of the defendants' street railway at Ottawa, was at Quebec, where he was shown one of the snow ploughs that had been made for the Quebec Railway Company; and after his return to Ottawa he caused to be made for use on the defendants' railway snow ploughs constructed substantially in accordance with the principle and combination used in the plough he had seen at Quebec. These ploughs so made for the defendants have since been used by them without the leave of the plaintiff; and they propose to continue such use against his protest and without compensation to him unless restrained from so doing.

In their statement in defence the defendants allege, (1) that they have not infringed the plaintiff's letters-patent; (2) that the alleged invention is not new; (3) that it is not the proper subject matter of letters-patent; (4) that the plaintiff is not the first and true inventor of the alleged invention; (5) that it is not useful; and (6) by an amendment made after the examination of the plaintiff for discovery, and a short time before the hearing, that the alleged invention was in public use at the City of Quebec with the con-

ent and allowance of the plaintiff for more than one year previous to the date of the plaintiff's application for his said letters-patent.

In the plaintiff's snow plough the wing is attached to the front of the car by a hinge that admits of a few inches of vertical play or movement. I do not think there is anything new in such a device considered by itself. Then a rack-bar with appropriate appliances is used for extending the wing and drawing it in again when necessary. That is not new. But the rack-bar in the plaintiff's plough has another office, namely, to support the wing; and it is so attached thereto as to admit of a few inches of vertical play or movement corresponding to that obtained with respect to the front hinge. So far as I have been able to appreciate the evidence it appears to me that the plaintiff was the first to use the rack bar for this purpose and in the way in which he has used it. But whatever may be said of the several parts or appliances used to make the plaintiff's plough, there can, I think, be no doubt so far as the evidence in this case goes, that the plaintiff was the first to arrange and combine them in the manner in which we find them described in his letters-patent and used in his plough. In the result he has succeeded in making a very useful plough, an important feature of which is that, within limits, it automatically adjusts itself when in use to the irregularities of the surface over which it is moved. There is no question about its successful use on the Quebec Street Railway; and the defendants themselves have by their conduct borne strong testimony to its utility. It appears to me, and I find, that there was in the alleged invention novelty, utility and subject matter, and that the plaintiff was the first and true inventor thereof.

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The issue as to the public use of the invention at the City of Quebec with the plaintiff's consent and allowance for more than one year previous to the date of his application, presents, I think, much greater difficulty. That the invention was used in public for a time longer than that allowed by the statute is beyond question. That is not denied. But it is said that the use made in the winter of 1899-1900 of the ploughs constructed under the plaintiff's instructions and in accordance with his invention, was experimental, and that such use though public, is not to be reckoned against him; that it does not defeat his patent; that he had a year after his invention was perfected, and the second ploughs were turned out, in which to apply for his patent; and that he made his application within that time. It is well settled, it seems to me, as well in Canada as in England and the United States, that the use of an invention by the inventor, or by other persons under his direction by way of experiment, and in order to bring the invention to perfection, is not such a public use as under the statute defeats his right to a patent (1). But there must be experiment, and what is done in that way in public must be reasonable and necessary, and be done in good faith for the purpose of perfecting the device or testing the merits of the invention (2), otherwise the use in public of the device or invention for a time longer than the statute prescribes will be a dedication of it to the public; and

(1) *Bentley* v. *Fleming*, 1 C. & K. 587; *Newall* v. *Elliott*, 4 C. B. N. S. 269; *Summers* v. *Abell*, 15 Gr. 532; *Elizabeth* v. *Pavement Company*, 97 U. S. R. 126; *Railway Register Manufacturing Company* v. *Broadway and Seventh Avenue Ry. Co.*, 22 Fed. R. 655; *The Useful Patents Company, Limited* v. *Rylands*, 2 Cutl. R.P.C. 255; *Harmon* v. *Struthers*, 43 Fed. R. 437.

(2) Re *Adamson's* Patent, 6 DeG. M. & G. 420; *Bonathan* v. *The Bowmanville Furniture Mfg. Co.*, 31 U. C. Q. B. 413; *Egbert* v. *Lippman*, 104 U. S. R. 333; *Hall* v. *Macneale*, 107 U. S. R. 90; *Smith & Griggs Mfr. Co.* v. *Sprague* 123 U. S. R. 249; *Root* v. *Third Avenue Ry. Co.*, 37 Fed. R. 673; *Thomson-Houston Electric Co.* v. *Lorain Steel Co.*, 117 Fed. R. 249.

when that happens the inventor cannot recall his gift, and no afterthought will avail him.

Neither will it make any difference if, as in the present case, the general public can have little or no interest in the matter; and that the gift will enure not to their benefit but to the benefit of a few or at most to a limited number of companies who may be able to save themselves some expense by using the invention.

Asked when he first thought of applying for a patent, the plaintiff answered that he first thought of it when he had the second ploughs completed. That answer taken by itself is not consistent with the view that in the winter of 1899-1900 he was experimenting with an invention that he was seeking to test by experiment. But later on he qualified that statement by saying that when he made the first two ploughs he had the intention to apply for a patent when they would be completed. The evidence on that point cannot, I think, be considered to be altogether satisfactory; and there is, it seems to me, a good deal to be said for the view that the principal object that the plaintiff and his employers had in view during the winter of 1899-1900 was the removal of snow from the streets used by them and not the making of experiments with a view to testing an invention that the plaintiff had made; that any experiment or test to which the snow ploughs that were then used were subjected was an incident of their use in public, and not that such use in public was a necessary incident of the experiments or tests that were being made. There is certainly that difficulty about the case, and I have found it a serious one. On the other hand that the use of these ploughs in the winter of 1899-1900 was in a way experimental, there can be no doubt. The ploughs used had not then got beyond the experi-

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mental stage. If nothing better had ever been made the invention would not, I think, have been really useful. There was no way of knowing whether they would ultimately prove successful or not, or of improving them except by using them for the purpose for which they were designed. and that could not be done in other than an open and public way. In that respect I do not think that more than what was reasonable and necessary was done. And it was not until the ploughs that were made in the autumn of 1900 had been completed and operated that the plaintiff was in a position to know with certainty that he had succeeded with his invention, and that he had a plough that would do its work successfully and not be constantly in need of repairs. In that sense and from that standpoint what had been done before was experimental, and so not such a public use of the ploughs as would defeat the patent that was afterwards issued to the plaintiff.

With respect to the issue of infringement the case does not, I think, present any serious difficulty. The defendants would be more fortunate than most persons who deliberately appropriate the leading features of another's invention, if they should escape on that ground. It is said for them that they have not taken or copied all that the plaintiff claims in his specification. And that is true. But they have, I think, taken all that is essential to the making of ploughs that may be operated successfully according to the plan or principle that the plaintiff adopted. The specification does not perhaps disclose as clearly as it might what the leading features of the plaintiff's invention are, or distinguish as fully as might be desired between things that are essential and those that may or may not be thought to be convenient. But there is no plea or defence as to the insufficiency

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of the specification, and taking it as a whole with the drawings attached thereto there is no real difficulty in ascertaining what the invention was.

There will be judgment for the plaintiff; the injunction asked for will be granted; and there will be a reference to the Registrar to enquire and report as to damages and such other relief as the plaintiff may be entitled to.

Judgment accordingly.

Solicitors for plaintiff: *Hogg & Magee.*

Solicitors for defendants: *Chrysler & Bethune.*

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Oct. 28.

ADMIRALTY DISTRICT OF BRITISH COLUMBIA.

THE VERMONT STEAMSHIP CO. LTD.

AGAINST

SHIP "*ABBY PALMER.*"

Shipping—Basis on which salved vessel is valued—Reference as to value before trial—Salvage—Value of res—Market value—Value to owner.

Where, in a case of salvage, there is no market value for the ship in the port where it is brought by the salvors the *res* should be valued not on the basis of a forced sale but as a "going concern" in the hands of a solvent owner using it for the particular purposes of his trade at the sum for which the owner, as a reasonable man, would be willing to sell it.

THIS was an action for salvage services rendered by the Steamship *Vermont* on the west coast of Vancouver Island.

The case was heard before the Local Judge for the British Columbia Admiralty District, on the 22nd and 23rd days of January, 1904. Commander F. J. Parry, N.R., and Commander H. G. G. Sandeman, R.N. sitting as Nautical Assessors.

E. V. Bodwell, K. C. and *J. H. Lawson, Jr.*, for the plaintiffs cited The *Clyde* (1); *Williams & Bruce's Ad. Practice* (2); The *William Beckford* (3); The *Industry* (4); The *Ella Constance* (5); The *Thomas Fielden* (6); *Kennedy on Salvage* (7); *Bird* v. *Gibb* (8); The *Edenmore* (9); The *Erato* (10); The *Glengyle* (11); The *Janet Court* (12).

(1) Swab. 23.
(2) 3rd. ed. p. 110.
(3) 3 C. Rob. 355;
(4) 3 Hagg. Adm. 203.
(5) 33 L. J. Adm. 191.
(6) 32 L. J. Adm. 61.
(7) P. 199.
(8) 8 App. Cas. 559.
(9) [1893] P. 79.
(10) 13 P. D. 163.
(11) [1898] App. Cas. 519.
(12) [1897] P. 59.

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Argument of Counsel.

W. J. Taylor, K. C. for the ship cited The *Amérique* (1); The *Glengyle* (2); The *August Legembre* (3); The *Inchmaree* (4); The *Janet Court* (5); The *Hestia* and the *Derwent Holme* (6); The *Cleopatra* (7); The *I. C. Potter* (8); The *Glenduror* (9); The *Chetah* (10); The *Scindia* (11); *George Dean* (12); The *Stella* (13); The *Georg* (14); The *Dwina* (15); The *Edenmore* (16); The *Accomac* (17); The *Rialto* (18); The *Mark Lane* (19); The *Monarch* (20); The *Werra* (21); The *Laertes* (22); The *Lancaster* (23); The *Kenmure Castle* (24).

MARTIN L. J. now (October, 28th, 1904,) delivered judgment.

This is an action for salvage, and though by the statement of defence the plaintiff's claim is disputed not only as to the amount, but also as to the seamanship displayed in the salvage operations, yet during the trial not only was the latter position somewhat tardily abandoned, but the defendants counsel in his argument said "we do not attack their seamanship, but compliment them on it."

In view of this admission and that contained in the 16th paragraph of the defence, that the ship was in danger, the main issue is reduced to settling the amount of the reward that the plaintiffs are entitled to.

Now while the defendants admit in said paragraph that the ship was in danger, they set up that she was

(1) L. R. 6 P. C. 468.
(2) [1898] P. 97.
(3) [1902] P. 123.
(4) [1899] P. 111.
(5) [1897] P. 59.
(6) [1895] P. 193.
(7) 3 P. D. 145.
(8) L. R. 3 Ad. & Ec. 292.
(9) L. R. 3 P. C. 569.
(10) L. R. 2 P. C. 205.
(11) L. R., 1. P. C. 241.
(12) Swa. 290.
(13) L. R. 1 A. & E. 340.
(14) [1894] P. 330.
(15) [1892] P. 58.
(16) [1893] P. 79.
(17) [1891] P. 349.
(18) [1891] P. 175.
(19) 15 P. D. 135.
(20) 12 P. D. 5.
(21) 12 P. D. 52.
(22) 12 P. D. 187.
(23) 8 P. D. 65.
(24) 7 P. D. 47.

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not in a hopeless condition and that even if she had not been rescued by the *Vermont* they would have been able to save the said ship from actual loss. On this point I am advised by the assessors, and I concur with them, that the ship was in such a dangerous condition, because of the wreckage, that having regard to the season of the year, the unsettled weather, and to the currents, she would have helplessly drifted ashore on that dangerous part of the coast and in the manner indicated by Captain Walbran; and that this could only have been avoided by the happening of extraordinary events which there is no ground for believing would have happened. And further, that the account of the master of the *Vermont* as to the position of his ship and his statements generally should be accepted seeing that they are corroborated by the speed and time of towage; but that on the contrary the story of the master of the *Abby Palmer* regarding the alleged eight mile drift backward, and his position, and otherwise, is unreliable. And further, that the master of the *Vermont*, though there was great danger and risk under the circumstances of fouling his screw with the hawser, which would have placed his ship and cargo (valued at $350,000) in a position of peril, performed the salvage services as a whole, and handled his ship throughout, in a highly creditable and seamanlike manner. And further, that the contention that the barque could have been relieved by the sailing ship, stated to have been signalled, is rejected.

Having regard to the foregoing findings, and those facts which are undisputed, what sum should he awarded? But before this can be arrived at the value of the property salved, here the ship only, must be determined, for it is an important ingredient in fixing the amount, and it is disputed, which raises a difficult

and, in this class of action, unusual question, which has necessitated a lengthy and careful investigation of the authorities.

And I pause here to say, for the future guidance of litigants, that this is a separate and distinct question which causes inconvenience and delay to enter into during the trial of a salvage action, as was done here, and for which no precedent has been found. One proper course to pursue on such a dispute arising is to direct a reference to the Registrar and Merchants as preliminary to the trial, or its further progress. This was the course decided upon by Dr Lushington in the case of the *George Dean* (1), where the point came up, but on his suggesting that an agreed value should be taken, as is usually done, that was ultimately acceded to and the trial proceeded. And it will be seen that a reference to fix the value was directed in *Dobree* v. *Schroder* (2). The most convenient and expeditious way, probably, would be to have an appraisement by the Marshal (3).

Up to a certain point the principle of valuation is clear. Thus in *Roscoe's Practice* (4), it is said: "If the value of the salved property is not agreed upon the usual practice is to assess it at the port of arrest; but, in strictness, the assessment should be the value as salved, at the place where, and the time when, the salvage service terminated, etc." And see *Williams & Bruce's Admiralty Practice* (5), to the same effect. "For the purposes of salvage the property saved is to be estimated at its value at the port where the services terminated."

But while it is clear that the value of the ship is to be taken as at the place and time above mentioned,

(1) Swab. 290.
(2) 2 My. & C., 489.
(3) Roscoe's Adm. Practice, 1903 p. 127, note (a).
(4) 1903 ed., p. 127.
(5) 1902 ed., p. 177.

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the question arises upon what basis is that value to be ascertained? Doubtless in an ordinary case of salvage, as in that of a total loss by collision, value means "market value", but does that mean and contemplate the proceeds of a forced sale? That is what the defendants contend for, but none of the cases cited by their counsel bears out that view. In fact in one of them, and a salvage case, *The Georg*, (1) the point was taken by counsel that "a subsequent forced sale is no proof that the estimated value of the property to the parties, at the time it was brought into safety, was incorrect;" and on this point the court says (2):

"The circumstance that the property sold for a comparatively small sum is not, I think, proof that the defendants were correct in stating the values of the ship and cargo to be less than the values at which they were appraised by the Marshal."

And as to the great weight to be attached to the Marshal's valuation, see *The Cargo ex Venus* (3).

There are three cases under certain repealed sections of *The Merchant Shipping Act* which are of some assistance: *Dobree* v. *Schroder* (4); *African Steamship Co.* v. *Swanzy* (5); and *Leycester* v. *Logan* (6).

In the first, a collision case with total loss, it was said by the Lord Chancellor "that a valuation and appraisement is the proper mode of ascertaining the value of the ship is clearly the meaning of the Act," and therefore that it was incorrect to base it on original cost and subsequent deductions in proportion to age. In the second case, one of total loss at sea, Vice-Chancellor Page Wood held, under the section in question (514th) that "the natural and obvious meaning of the term in question ('value') and that which

(1) [1894] P. 330.
(2) *Ibid.* p. 335.
(3) L. R. 1 A. & E. 50.
(4) 2 Myl. & C. 489.
(5) 2 K. & J. 660.
(6) 4 K. & J. 725.

under ordinary circumstances the court would attribute it, is what the ship would have fetched had she been sold immediately before the loss." But he goes on to point out some important limitations of that general rule in favour of resorting to original cost and depreciation under certain circumstances as follows (1):

"It is true, that the sum which the ship would have sold for, cannot, in all cases, be a true criterion of its value. Cases might arise, in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic, and for that alone; and that description of traffic might be entirely occupied by one company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the court to adopt some other criterion. One I venture to suggest might be, to ascertain the price given for the ship, and the subsequent deterioration. Some such criterion would have to be adopted; for otherwise the value of the ship would be what the ship would sell for to be broken up. Here, however, no one suggests that the value of this ship is to be taken at what she would have fetched to be broken up."

And in the third case, one of collision and total loss, the same learned judge, under the same section, said, after the ship in fault had been sold, "the value of the ship is what a purchaser is willing to give for her. That is to him the value of the ship."

This, it will be noted, is the value to the purchaser, not the owner, and the language will have to be taken in conjunction with, and in the light of, the remarks in the prior case and in the *George Dean* (2).

(1) 2 K. & J. at p. 664. (2) Swab. 290.

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It must be remembered that these three cases are in Chancery, and not salvage, and are decisions on a particular statute.

Turning again to the Admiralty Court, in the case of *The Clyde* (1), one of collision and total loss, Dr. Lushington says that:

"The value is the market price at the time of the destruction of the property, and the difficulty is to ascertain what would be the market price."

That is the difficulty which the court experiences in the case at bar.

And again at p. 25, after saying that "there are various species of evidence that may be resorted to—for instance, the value of the vessel when built," the same learned judge goes on to state:

"It is the market price which the court looks to and nothing else. It is an old saying 'the worth of a thing is the price it will bring.'"

Light is thrown upon the sense in which the expression "market price" is employed at p. 27, wherein the learned judge refers to it as "the ordinary price in the market of a vessel of this size and description at the time she was lost." That is a very different thing, to my mind, from a forced sale; a valuation on the basis of a forced sale is on the assumption that an "extraordinary price," and that a very low one, must be allowed for and provided against.

In the case of the *Ironmaster* (2) where there was a total loss following collision, the same learned judge lays down at p. 443 certain principles for ascertaining value as follows:

"The best evidence is, first, the opinion of competent persons who knew the ship shortly previous to the time it was lost; that evidence is manifestly entitled to most weight, because, assuming their competency

(1) Swab. at p. 24. (2) Swab. p. 441.

to form a just judgment, they had a personal knowledge of the state and condition of the vessel herself, whereas all other persons, however skilful, could only draw general inferences from their acquaintance with the prices of vessels somewhat similar about the same time. The second best evidence is the opinion of persons such as I have just described, persons conversant with shipping and the transfers thereof. In addition to testimony of this description, many other circumstances may be called in aid,—as the original price of the vessel; the amount of repairs done to her; the sum at which she was insured, and other circumstances of a similar nature. It is manifest that facts of this kind, though not to be wholly excluded, have a slighter bearing upon the case; for after a lapse of years the amount of price might, from a change of circumstances, have little bearing upon the question; so, to a certain extent, it would be with respect to repairs and insurances."

Again, on p. 444:

"I do not place great reliance upon the original price, because the value of ships is so constantly fluctuating."

On the other hand, however, he continues, p. 445:

"Moreover, though I do not consider the price given as a criterion of the value to be assessed, it is evidence, and strong evidence, too, when looking to the opinion of those gentlemen, that this identical ship did actually fetch £2,000."

The sum of £2,000 was her original cost, unmetalled.

In the case of *The Kate* (1), the decision in the *Clyde* was not adhered to in an important feature, viz.: that in a case of total loss the owners are only entitled to recover the market value of the vessel at the time of her loss. The learned President, Sir F. H. Jeune, dissents from this view and holds that a profitable

(1) [1899] P. 165.

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charter held at the time should be computed and added to her value. He says (1):

"The proper measure of damage in this case is the value of the vessel at the end of her voyage plus the profits lost under the charter-party."

That is but another way of saying, as is said elsewhere in the judgment, that her value is to be taken at the end of the voyage after she has earned her charter, and not at the time of her loss; indeed even if she had had no cargo on board interest would be given from the time of the collision (2).

Commenting upon this decision it is stated in *Williams & Bruce's Admiralty Practice* (3) that:

"The price which a ship would have fetched at a forced sale cannot be regarded as a fair test of her value."

And in *Roscoe's Admiralty Practice* (4), it is said that:

"The owner of a vessel totally lost, without cargo, and not under contract. is entitled to her value just prior to the collision; and if there is no market value, owing, for example, to her special construction, then the value to her owners as a going concern at the time of her loss."

In *Lowndes on General Average* (5), the question of value is treated in relation to contribution by various interests, and after pointing out that the first of those interests is the ship, the author proceeds as follows:

"To determine the actual value of a ship is not always very easy. On principle, a merchant ship being simply a machine for earning freights, the real value of a ship to her owner is the present capitalized value of all her future earnings, so long as she can be used as a

(1) [1899] P. 175.
(2) [1899] P. 174.
(3) p. 110, note (r).
(4) p. 197.
(5) pp. 305-6.

ship, after deduction of her working expenses; to which must be added the present value of the sum for which she may eventually be sold to be broken up. But, as the data for such a calculation do not exist, we have to adopt other tests, in the way of approximation. One of such tests is the value in the market, which represents the current opinions of ship-owners on the point. This test can be adopted when there is a market for ships of the kind, sufficiently extensive to give a fair approximation to the ship's real value. In the case of ships of a peculiar build, or exceptional size, or having qualities which specially adapt them to some one limited trade, the value in the market may not come near to the real value. In such a case it may be necessary to take account of the first cost; to make a deduction for age and wear and tear; to allow likewise, for changes that may have taken place, since the ship was built, in the cost of materials or the price of labour, or for later improvements in construction which may diminish her relative value. In short, no inflexible rule can be laid down beyond this; the principle is, the ship is to be valued at that sum for which the owner as a reasonable man would be willing to sell her; and this sum must be ascertained by the adjuster as well as he can."

These instructive observations afford the best guide that I have been able to find for determining the present question, because general average is based upon the duty of all to contribute towards what is sacrificed in time of danger for the good of all, and therefore is more akin to salvage, which arises from a voluntary act to preserve the ship or cargo, than to insurance, which arises *ex contractu*, or to collision, which arises *ex delicto*, and so rules of valuation in such cases have different bases. And Mr Lowndes' observations are also largely borne out, in addition

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to much that has been herein before cited, by the case of *Grainger* v. *Martin* (1), an insurance case, wherein it is said by Mr. Justice Crompton (p. 467):

"It is clear, therefore, that in this case the value of the ship in the market cannot be the true test."

And Mr. Justice Blackburn (p. 469) says that there was evidence that the value to be ascertained was the value of the ship to an owner wanting at that time such a ship for the particular purposes of his trade, and he goes on to say that:

"The ship being of a size and class for which there is no ordinary market, its value, as Mr. Mellish pointed out, is not to be tested by what it would sell for in the market where there are no buyers."

And see the note, at the foot of that case as reported in the Philadelphia Edition, from Baily's Essay in 17 *Law Magazine* (1864) 3rd series, 76, on the varying values of ships and different methods of computation.

There is a decision in an Admiralty Court of the United States, *Leonard* v. *Whitwill* (2), which throws light on this question of market value and is very applicable to the present case. Mr Justice Brown, after citing with approval the cases of the *Ironmaster* and *Dobree* v. *Schroder*, above mentioned, says that "those decisions recognize equally the competency of evidence of the cost and deterioration as bearing on the amounts to be allowed. "Where from stagnation in the market at the time of the loss there is difficulty in fixing the precise market value, a resort to other modes of ascertaining it, especially where the vessel has been built but a few years, is at least allowable to be taken into account in arriving at a conclusion. The evidence shows that in 1877, when this vessel was lost, the market for sailing vessels was in a state of stagnation, and it was almost impossible to

(1) 2 B. & S., 456. (2) 19 Fed. Rep., 547.

ascertain any actual sales which would furnish proper data or any criterion for the determination of the actual market value. The different values sworn to are after all but mere estimates, and not based on knowledge of similar sales in 1877. It is impossible in such cases to determine the amount to be allowed with mathematical certainty." (P. 548.)

And this principle that there must be a certain frequency in purchases and sales of ships to give a market value in the proper sense of that term is also recognized in the case of *La Normandie* (1).

And in ascertaining the value any special circumstance which adds to the vessel's desirability should be considered and given weight to; and it is on this principle that the owners of a French fishing vessel which had libelled, in the U. S. Admiralty Court, a British ship which had collided with and sunk the vessel off the Grand Banks of Newfoundland, were allowed her value at her home port in France, though much testimony was offered to show that a like vessel, which English and American fishermen considered superior for her purpose, could be built or purchased in the United States, or Canada, or Great Britain, for a considerably less sum. It was held that what the libellants were entitled to have restored to them was a French vessel of the kind used in France for the purpose, and where there was a regular price for them. *Guibert* v. *British Ship George Bell* (2). And similarly it was held in *The Blenheim* (3):

"If a foreign ship is destroyed in American waters, and if in such place her market value is low by reason of our navigation laws, the measure of damages for her loss would be her value in the home market."

(1) 58 Fed. Rep. 427, at p. 431. (2) 3 Fed. Rep. 581.
(3) 17 Fed. Rep. 608.

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And the converse of that would be, and is, that if the foreign ship is salved in the open sea and brought to British waters, and she has by reason of the navigation laws of her own country a high market value there, then her value would be that of her home market, less the cost of taking her to that market. This equitable principle is of much weight in the present case because the *Abby Palmer* has an United States register, and the operation of the navigation and coasting laws of that country are such as to give valuable trade privileges to the United States bottoms which are denied to those of foreign countries.

In reviewing the foregoing decisions it will be noticed that they result in this that there is no decision on what is meant by "market price" in cases of salvage, though in collision, insurance and general average cases there is a good deal of authority, and some of it difficult to reconcile. As the learned judge says in *The Clyde* (1), "the difficulty is to ascertain what would be the market price" in such a case as the present. The fact is that there is really no market, in the proper sense of the word, in this port for ships of her class, and, as Lowndes puts it (*supra*), the test of a market value can only be applied "when there is a market for ships of the kind sufficiently extensive to give a fair approximation to the ship's real value." Not one ship of the kind has been mentioned by the witness as having been sold of late years; an iron ship, *The Columbia*, still for sale here, was valued by one of the witnesses, Lloyd's agent, in April, 1903, but she has not as yet been sold, and in any event has not a United States register, and, moreover, is 21 years old—so for this and other reasons cannot be taken as a standard comparison. *The Abby Palmer*, therefore, must on the evidence and for the purposes of this action be regarded as a particular

(1) Swab. at p. 24.

class of ship, both as regards her class generally and the peculiar privileges of her foreign register in particular.

Such being the case, the court must resort to those other means of ascertaining value hereinbefore mentioned, and consider all the surrounding circumstances aided by the opinions of "persons conversant with shipping" and having special means of knowledge, and having regard to the original cost, age, depreciation, present condition rates of freight, and to local circumstances such as, in this case, the close proximity to this port of large ports on Puget Sound in the United States, where buyers at a fair price can reasonably be expected to be obtained if the ship be duly advertised. In short, as between the owners of the salved property and the salvers, the ship should be valued not on a forced sale basis but as a "going concern," as Roscoe puts it (*supra*), in the hands of a solvent and reasonable owner using her for "the particular purposes of his trade," as Mr. Justice Blackburn says, and then she should be valued, as Lowndes states, "at that sum for which the owner as a reasonable man would be willing to sell her." A ship such as this, which has a life of thirty years of which she has completed ten, must be valued on a different principle from a bale of merchandise, and somewhat akin to that adopted in the case of the less substantial, and therefore short-lived, class of house property in this country. A ship is not, in general, built or purchased like a stock of goods, but with an eye to an investment of relatively long duration, and having in contemplation the fluctuations of commerce during that time. It has, not unreasonably, been commented on by counsel that the defendants herein have made no effort to ascertain the value of their ship by calling for tenders, or advertising, or putting her up for sale with a reserved bid, or

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in any way ascertaining her value on that market which they contend exists and in which they assert she has only a very low price.

Applying the foregoing principles to the facts and turning to the valuations of the various witnesses, the usual striking difference of opinion is encountered, and several of those giving their estimates have little if anything to base them on. These estimates run all the way from $10,000 to $38,000, and I have found it far from an easy matter to arrive at what I consider a just valuation; but in view of all the circumstances I feel that I am safe in fixing it at $28,000.

On this valuation then, the award must proceed in the light of the circumstances hereinbefore set out.

It was pointed out by this court, in *Canadian Pacific Navigation Co.* v. *The C. F. Sargent* (1), that on the grounds of public policy the reward should be liberal, but "it varies very much according to the imminence of the danger to the ship on the one hand, and the skill and enterprise and danger of the rescuers on the other hand. But the question of the ship's danger is the first thing to be considered." (P. 335.)

The amount there awarded was $2,000, being 10 per cent. of the value of the ship, $20,000.

In the English courts all the leading cases on the subject will be found conveniently collected in Marsden's *Digest* (2), and in the books of practice of this court, chiefly in *Williams & Bruce* in Chapter VI, and in *Roscoe* in Chapter 1, wherein the rules and principles are clearly laid down, and it would be mere repetition to go into them. But each case has from the nature of things to be determined in the light of its own circumstances, and counsel have been unable to cite one which closely resembles the present. After giving weight to all those elements which are entitled to

(1) 3 Ex. C. R. 332. (2) Pp. 592 *et seq.*

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weigh with me, I have arrived at the conclusion that the award should be fixed at four thousand two hundred dollars, for which amount let judgment be entered with costs.

Judgment accordingly.

Solicitors for plaintiffs: *J. H. Lawson, Jr.*

Solicitor for ship: *H. B. Robertson.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1904
April 13.

THE VERMONT STEAMSHIP COMPANY..... PLAINTIFF;

VS.

THE SHIP "*ABBY PALMER*".....DEFENDANT.

Salvage—Arrest of ship—Release—Payment into court—Appeal—Foreign owner.

1. An application by defendant to pay money out of court which was paid in by him to obtain the release of his ship arrested to answer a claim for salvage will, if the defendant be a foreign resident, be stayed, wholly or partially, pending an appeal to the Exchequer Court to increase the salvage award.
2. Observations upon the scope of bail bonds and the retention of security pending appeal.
3. It is an improper practice, and one which the court will discourage, to arrest property to answer extravagant claims.

MOTION to pay out of court to defendant the excess of security paid into court, $25,000 over and above the amount of the judgment, $4,200, and costs to be taxed.

April 12th 1904.

W. J. Taylor, K.C. for the motion: Judgment has been recovered against us for $4,200 and costs, and the balance of our $25,000 now in court should be paid out.

J. H. Lawson, contra: We are appealing to the Exchequer Court and the hearing is fixed for the 27th of April. The security, or a large proportion of it, should be retained in court to answer whatever final judgment may be given. We do not appeal from the portion of the judgment determining the principle of valuation, or the valuation itself, but we say that the award is inadequate for the services rendered.

[*Per Curiam:* The question is one of importance and had better stand till tomorrow so that some authority may be cited.]

April 13th.

J. H. Lawson continues: See sec. 33 of Admiralty Court Act, 1861, in *Howell's Adm. Practice* (1), and *Roscoe's Adm. Practice* (2); *Williams & Bruce's Adm. Practice* (3); *Browne's Adm. Practice* (4); the *St. Olave* (5). Therefore if the ship here had put up bonds the bail would have stood to answer the judgment. The whole policy of Admiralty law is that the property should be preserved to answer plaintiff's demand, and defendants are resident out of the jurisdiction and we cannot recover against them without delay and extra expense if we succeed on the appeal. I am agreeable that the security in court should be reduced, as it is perfectly apparent now that the bail is too high.

[*Per Curiam:* Your claim for $25,000 has turned out to be a preposterous one, and there are some very strong remarks by the judges to the effect that the process of this court must not be used as an engine of oppression by arresting ships for extravagant claims; in future this course must not be followed.]

The claim was made *bonâ fide*, though mistakenly, at such a high figure.

W. J. Taylor, K.C. in reply: We are entitled to payment out of the surplus as asked. See the remarks in *Williams & Bruce* (3); which show the practice. The security there is given under an order 30th December, 1903, for the release from arrest on filing bond to the satisfaction of the Registrar and the cash was deposited as bail for the ship instead of a bond. (See *The Helene* (6), on form of bond, which shows that its form has never

(1) P. 201.
(2) P. 508.
(3) P. 544.
(4) P. 1145.
(5) L. R. 2 A. & E. 360.
(6) P. 544.

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Argument of Counsel.

been altered despite the Act of 1861; the authority to make new this form has not been exercised.) The *St. Olave* case has nothing to do with the point as it turns on the making of repairs; and the observations of Phillmore, J., have nothing to do with this question—a dictum merely and not correct, on face of the decision. An appeal is not a stay of proceedings (2). Mr. Lawson should have some case in support of his application. I refer to the principle of *Marsh* v. *Webb* (3). This is an appeal to the Exchequer Court from the Admiralty Court —see Admiralty Rule 158—different courts, though under same name, a different and distinct branch of jurisdiction. The old form of bond is still in force, and is subject to the decision in *The Helene* (*supra*). It has never been altered. See *Williams & Bruce's Adm. Practice* concerning this (4.) And see *The Berlin* (5). According to this we would have to give a bond if we appealed. We stand ready to pay the judgment recovered against us and having done so it is our right to have our property released; it is a hardship to make us give security for plaintiffs' chance of success in an appeal of a most unusual and speculative kind for which no precedent has been cited; we have lost the use of this $25,000 paid into court in December last to answer a most excessive demand.

J. H. Lawson refers to *Browne's Adm. Practice* (6), and the *St. Olave* (7). *Sheffield* v. *Ball* (8), is before sec. 33 of 1861. See *Pritchard's Digest* (9).

[*Per Curiam:* See *The Annot Lyle* (10), which says that exceptional facts should be shown for a stay. And see *The Ratata* (11).]

(1) Brown & Lush. 426.
(2) Williams & Bruce p. 544; Roscoe, p. 311, Or. 58 R. 16.
(3) 15 Ont. P. R. at p. 67.
(4) Pp. 383, 384.
(5) Pritch. Ad. Dig. vol. 1, p. 368.
(6) P. 115.
(7) L. R. 2 A. & E. 360.
(8) 2 Lees Ecc. 291.
(9) Vol. 1, p. 368.
(10) 11 P. D. 114.
(11) [1897] P. 131.

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W. J. Taylor, K.C. refers to Bowen, J. at p. 118 of the *Annot Lyle*. We are successful parties to the extent of the balance of our security.

Per Curiam: The form of bond authorized by form 17 in our Rules is in its operative parts practically identical with that given in the *Helene* (1), and the Lords of the Privy Council there say that it "must be construed as it always has been." The judgment is on the question of costs, and if the *St. Olave* case conflicts on this point, the former must prevail. And in this respect sec. 33 is stated never to have been acted upon (1), nor in fact does Sir Robert Phillimore say it has been acted on but merely gives his *obiter dictum* on what the object of it was *i.e.* to allow the scope of the bail bond to be widened if the court saw fit to take advantage of the power given it by the statute. The fact is, however, that the bond has not been materially altered, either in England or in Canada.

It is argued that the appeal, under sec. 14 of *The Admiralty Act*, 1891, is still in this court, and therefore the bail bond (or its substitute here, the money in court) is wide enough, since it is conditional, to pay "what may be adjudged * * * in the action," and that the adjudication in appeal is part of the action. But though the present appeal is to the Exchequer Court, and not, as it might be, direct to the Supreme Court, it is in essence an appeal to another tribunal as appears by the discriminating language of rule 158. "Any person who desires to appeal to the Exchequer Court, from any judgment or order of a local judge in admiralty of the said court, shall give security," etc. And by section 9 of *The Admiralty Act* "every local judge in Admiralty shall, within the Admiralty District for which he is appointed, have and exercise the jurisdiction, and the powers and

(1) Williams & Bruce, p. 544.

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authority relating thereto, of the judge of the Exchequer Court" in respect of the Admiralty jurisdiction of that court. And though the jurisdiction of the old Colonial Courts of Admiralty is for the convenient administration of justice conferred upon the Exchequer Court of Canada, just as there is in England a Probate, Divorce and Admiralty Division of the High Court of Justice, yet the admiralty principles, procedure and practice are, as might be expected from the history of the court, quite distinct from the jurisdiction in Exchequer, which indeed primarily appears from the rules and orders specially relating to Admiralty procedure.

One tribunal may well possess and exercise two distinct jurisdictions without in any way merging them; a striking example of which is to be found in this province wherein the Supreme Court thereof exercises, in Canada, the unusual jurisdiction of the old Court for Divorce and Matrimonial causes. In all the circumstances I should feel disposed to hold that while in a strictly technical sense it may be said that the appeal to the Exchequer Court, and not to the Supreme Court of Canada is a proceeding in this court, nevertheless there is no essential difference between such an appeal and the usual appeal in England from the High Court of Admiralty But no case has been cited as to what the practice should be in regard to the retention in court, pending appeal, of more than the sum for which judgment has been given, and doubtless from the fact that an appeal to increase a salvage award is a very rare thing; the plaintiffs' counsel admits he has not been able to find a precedent but simply bases his application on the broad principle that as the practice of this court is singular in seizing the *res* at the beginning of the action to answer the

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claim, that distinctive feature should be maintained by preserving the *res* till all litigation is at an end.

The point is a nice one and I feel some difficulty about it, though inclined to hold, should I be forced to give a ruling on it, that in the special circumstances of this case at least, the application should not prevail on this ground.

But it may be entertained on another and safer ground which is, that a stay of procedings may be ordered under Rule 173 pending appeal, and the ordering of a stay "is a pure matter of discretion depending on the particular circumstances of each case" (*The Ratata*, *supra*). And it was said by the Court of Appeal in the *Annot Lyle*, *supra*, that though a stay of proceedings should not be granted in the absence of special circumstances, yet "if in any particular case there is a danger of the appellants not being repaid if their appeal is successful, either because the defendants are foreigners, or for other good reason, this must be shown by affidavit, and may form a ground for ordering a stay."

It being admitted in the case at bar that the defendants are foreigners and resident out of the jurisdiction, in the exercise of my discretion I think the proceedings to pay out would have to be stayed, if the plaintiffs make substantive application therefor, though if there is no objection I shall proceed to deal with this application on the basis of its including a counter request to stay. (This having been agreed to, His Lordship proceeded). The stay should be a partial one only and not extend to more than the additional sum it may appear proper to retain in court pending the appeal, but in fixing any amount I wish it to be clearly understood that I only intend to retain in court any excess over the judgment simply from abundance of caution and as evidencing a wish not to consider myself infallible, but not as in any way meaning that I think

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the judgment should be increased. I feel bound to say that I find myself placed in an unusual position and one of some delicacy by reason of the appeal from me being to a single Judge only, for the Exchequer Court is at present so constituted. In view of what had been said the order will be that the sum of $6,000, be retained in court pending the appeal and the balance will be paid out to the defendant's solicitor. Costs of this motion will be reserved till after the appeal is disposed of.

Order accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

THE VERMONT STEAMSHIP COMPANY ..... } PLAINTIFFS.

1904
Jan. 16.

AGAINST

THE SHIP "*ABBY PALMER.*"

Shipping—Salvage—Assessors—Practice.

1. Assessors will be appointed in salvage cases where necessary.
2. The proper time to apply for assessors is on the application to fix date of trial.

MOTION in Chambers to appoint nautical assessors in a salvage case under rule 112, Admiralty rules.

January 16th, 1904.

J. H. Lawson in support of the motion, cited rule 112 and referred to two salvage cases in which assessors had been appointed and asked that two be appointed herein. (*Bird* v. *Gibb* (1); *The Princess Alice* (2).

W. J. Taylor, K.C., contra: I do not particularly oppose the application, but see no necessity for it; the case is one of salvage and the only question is what amount we should pay. We were in danger but nothing more.

J. H. Lawson, in reply. Despite counsel's contention that the only question is one of amount, there are upon the record questions of seamanship in the conduct of the salvage operations which the court will have to consider, to pass upon, and for that purpose the services of the assessors will be necessary to advise the court. The cases above cited show that.

(1) 8 App. Cas. 559. (2) 3 W. Rob. 138.

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Per Curiam: In view of the issues raised, and of counsel's statement of the necessity therefor, an order will be made for two assessors.

As a matter of practice and for future guidance of litigants in this admiralty district, it is opportune to state that application for assessors should be made as early as possible so that there may be ample time to make the necessary arrangements with the Commander-in-Chief of the Royal Navy for this Pacific Station for their attendance. A convenient time to apply, and that at which such applications have generally heretofore been made, is upon the application to fix the date of trial.

Order accordingly.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

1904

Jan. 22.

THE VERMONT STEAMSHIP COMPANY.

AGAINST

THE SHIP "*ABBY PALMER.*"

Practice—Service of process—Time.

In the service of its process, as well as in its sittings and in the public hours of its registry, the court will be guided by the civic time in use in the town where the court sits, unless it is made to appear that such time is in fact incorrect.

AT the trial of this salvage case, on the 22nd January, 1904, before Martin, L.J., assisted by Commander John F. Parry, R.N., H. M. S. *Egeria*, and Commander Sandeman, R.N., H. M. S. *Grafton*, as nautical assessors for the plaintiffs,

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Argument of Counsel.

E. V. Bodwell, K.C. (with him *J. H Lawson*) proposed to read evidence of certain witnesses taken *de bene esse;* and he read an affidavit proving that they were *ex jurisdictione.*

W. J. Taylor, K.C., for the ship objected as there was no notice of this application.

E. V. Bodwell, K.C.: The order for it, dated November 30th, 1903, stands and has never been objected to. By that order evidence taken under it may be used at the trial on an affidavit of the solicitor stating his belief that the witnesses are absent from the province.

W. J. Taylor, K.C.: But even supposing the order has been made regularly it has not been properly served. It provides that the plaintiff's witnesses should be examined at 12 o'clock, noon, but the defendants had no notice of this till after that hour; at that time no appearance had been entered for the defendants.

E. V. Bodwell, K.C.: Notice of application was served before order on the master of the *Abby Palmer* and upon Messrs. Eberts & Taylor. The appointment was duly obtained and was served on defendants' master and Messrs. Eberts & Taylor before 12, though I was not aware of the service having been effected, and so on attending at 12 I took an adjournment till 2.30 as a matter of precaution, and though we could not serve the master personally we did serve the solicitors as they now appear to be, though I admit no solicitor was then on the record and did not appear on the examination.

W. J. Taylor, K C.: The service upon Eberts & Taylor before appearance is an absolute nullity, and they are not now and never were the solicitors upon the record. As regards service on our captain, that was too late. I read affidavit of our master, Johnson, and of Captain Cox to prove this.

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E. V. Bodwell, K.C. urged that this issue of fact as to the service be now disposed of, and asked that the various witnesses on each side be examined on the point. He offered for examination in support of his contention one Charles McDougall, who was examined and cross-examined, as were likewise, on behalf of the defendants, their master (Johnson) and Captain Cox.

After hearing these witnesses,

Per Curiam: On the evidence it is found as a fact that the service was effected before twelve o'clock. McDougall is positive that he heard the City Hall clock strike the hour after he served Johnson, and though Johnson (whose evidence is not of a satisfactory nature) and Cox say that by their watches this was not done till a few minutes after twelve, yet neither of them states that his watch agrees with the civic time, and therefore there is no real contradiction of McDougall's statement. In such case, as between the time kept by private individuals and that kept by the civic corporation, I shall in the absence of evidence to the contrary presume the latter to be correct; for it is that which generally regulates public and private affairs within the corporate limits; and is and has long been in practice accepted by this court as correct in the holding of its sittings, and in keeping open its registry. If on any particular day the civic time were shown as a fact to be incorrect, that would be another matter, but there is no such suggestion as regards the day in question. Therefore let the evidence be read.

Objection overruled

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APPENDIX.

APPENDIX.

RULES OF PRACTICE IN THE EXCHEQUER COURT OF CANADA MADE AND PUBLISHED DURING THE PERIOD COVERED BY THIS VOLUME.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions contained in the 55th section of *The Exchequer Court Act*, as amended by 52 Vict. ch. 38, sec. 2, it is hereby ordered that the following rule in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. 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 some one through whom he claims, and the plaintiff is aggrieved thereby; or

(2.) By the defendant by counterclaim, 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.

Dated at Ottawa, this 7th day of March, A.D. 1904.

(Sgd) GEO. W. BURBIDGE,
J. E. C.

IN THE EXCHEQUER COURT OF CANADA.

GENERAL ORDER.

In pursuance of the provisions of *The Colonial Courts of Admiralty Act*, 1890 and of *The Admiralty Act*, 1891 (Canada) it is ordered that clause (*b*) of Rule 37 of the General Rules and Orders regulating the Practice and Procedure in Admiralty cases in the

Exchequer Court of Canada be rescinded and the following substituted therefor:—

"(*b*) In an action for necessaries the national char-
" acter of the ship and that to the best of the depo-
" nent's belief no owner or part owner of the ship is
" domiciled in Canada at the time of the institution
" of the action."

Dated at Ottawa, this 6th day of April, A.D. 1903.

(Sgd.) GEO. W. BURBIDGE,
J. E. C.

EXTRACT *from a Report of a Committee of the Honourable the Privy Council, approved by His Excellency on the* 21*st April*, 1903.

On a report dated 9th April, 1903, from the Minister of Justice, submitting that by the effect of *The Admiralty Act*, 1861 (24 Victoria, Chapter 10), and *The Colonial Courts of Admiralty Act*, 1890, jurisdiction is given to entertain actions for necessaries supplied to any ship elsewhere than in the port to which she belongs, upon it being shown to the satisfaction of the court that at the time of the institution of the cause no owner or part owner of the ship is domiciled in Canada.

The Minister further states that the Judge of the Exchequer Court has recently called attention to the fact that one of the rules of procedure is not in line with the provisions of the law, since it requires the affidavit leading to the warrant to state "that to the best of the deponent's belief no owner or part owner of the ship was domiciled within Canada at the time the necessaries were supplied" and that the Judge has accordingly made and submitted the rule, a copy of which is hereto annexed, correcting this error.

The Minister recommends that it be approved under the provisions of section 25 of *The Admiralty Act*, 1891.

The committee advise that the Governor General be moved to forward the same to the Colonial Office with a request that it be approved by His Majesty in Council under section 7 of *The Colonial Courts of Admiralty Act*, 1890.

All which is respectfully submitted for approval.

(Sgd.) JOHN J. McGEE,
Clerk of the Privy Council.

DESPATCH.

AT THE COURT AT BUCKINGHAM PALACE,

The 25th day of June, 1903.

PRESENT:—The King's Most Excellent Majesty in Council.

WHEREAS there was this day read at the Board a Memorial from the Right Honourable the Lords Commissioners of the Admiralty, dated the 22nd day of June, 1903, in the words following viz.:

"Whereas by an Order in Council of Her Late Majesty bearing date the fifteenth day of March, 1893, the Rules of Court thereto annexed were established as the Rules of Court for the Exchequer Court of Canada in its Admiralty jurisdiction, and whereas it appears to us expedient that rule thirty-seven of the aforesaid Rules of Court, whereby it is amongst other things required that, in an action for necessaries supplied to a ship elsewhere than in the port to which she belongs, the affidavit leading to the warrant shall state that to the best of the deponents' belief no owner or part owner of the ship was domiciled within Canada at the time the necessaries were supplied, shall be

amended so as to conform to the provisions of *The Admiralty Act*, 1891 (as extended to the Exchequer Court of Canada by *The Colonial Courts of Admiralty Act*, 1890,) whereby jurisdiction is given to entertain such actions for necessaries upon it being shown to the satisfaction of the court that at the time of the institution of the cause no owner or part owner of the ship is domiciled in Canada.

"We beg leave humbly to recommend that Your Majesty will be graciously pleased by your Order in Council to direct that the present clause (*b*) of rule thirty-seven of the Rules of Court for the Exchequer Court of Canada shall be rescinded and that the following clause which has been duly prepared by the proper authority as required by the said *Colonial Courts of Admiralty Act*, 1890, and by *The Admiralty Act*, 1891, (Canada) shall be substituted therefor:—

"(*b*) In an action for necessaries the national char-
"acter of the ship and that to the best of the depo-
"nents' belief no owner or part owner of the ship is
"domiciled in Canada at the time of the institution of
"the action."

Your Majesty's Principal Secretary of State for the Colonies has signified his concurrence herein.

His Majesty, having taken the said Memorial into consideration, was pleased, by and with the advice of His Privy Council, to approve of what is therein proposed. And the Right Honourable the Lords Commissioners of the Admiralty are to give the necessary directions herein accordingly.

(Sgd.) A. W. FITZROY.