REPORTS

OF THE

EXCHEQUER COURT

OF

CANADA.

CHARLES MORSE, LL.B., BARRISTER-AT-LAW,

REPORTER.

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JUDGES

OF THE

EXCHEQUER COURT OF CANADA

DURING THE PERIOD OF THESE REPORTS.

(1875 TO 1887.)

CHIEF JUSTICES.

The Honourable SIR WILLIAM BUELL RICHARDS, Knight.

" " SIR WILLIAM JOHNSTONE RITCHIE, Knight.

JUDGES.

" " SAMUEL HENRY STRONG.

" " JEAN THOMAS TASCHEREAU.

" " TÉLESPHORE FOURNIER.

" " WILLIAM ALEXANDER HENRY.

" " HENRI ELZÉAR TASCHEREAU.

" " JOHN WELLINGTON GWYNNE.

ERRATA.

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

Page 31, line 3 from bottom, for *admitted* read *omitted.*

" 68, line 1 in head-note, for 1885 read *1875*.

" 224, line 6 from top, for *Deposit* read *deposition.*

" 243, line 18, and throughout the case, for 1887 read *1888*.

NOTE.

This volume contains all the leading Exchequer Court cases hitherto unreported.

The appendix comprises short notes of all the Exchequer Court cases which have been published from time to time in the Reports of the Supreme Court of Canada.

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A. LACOSTE

CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

Coram GWYNNE, J.

1881
Sept. 14.

THE MERCHANTS BANK OF CANADA..SUPPLIANTS;

AND

HER MAJESTY THE QUEEN .... RESPONDENT.

Slide and boom dues—C. S. Can. c. 28—31 Vic., c. 12—Chattel mortgage —Parol agreement between Crown and mortgagor in possession—Agency of Mortgagor—Ratification by mortgagees.

S., who was engaged in the lumber business, becoming indebted to the suppliants in a large sum of money, mortgaged to them by two separate instruments certain lumber, logs, and timber as security for the repayment of such indebtedness. The first mortgage was executed on the 18th December, 1876, and the second on the 11th May, 1877. By a collateral arrangement made at the time the first mortgage was executed, and by a proviso contained in the second indenture, S. was allowed to remain in possession of the property, and to attend to its manufacture and sale for the benefit of the suppliants. On the 15th day of May, 1878, S. became insolvent, but prior to such insolvency the suppliants had taken possession of the lumber, logs, and timber, and thereafter obtained a release of S.'s equity of redemption from his assignee. On the 6th June, 1877, while S. was in possession of the property in the manner above mentioned, by a letter addressed to the Minister of Inland Revenue he offered and agreed to pay the Government the sum of $2 per 1,000 ft. b.m. on all lumber to be shipped by him through the canals during the then current season, and also the whole amount of his indebtedness for canal tolls and dues then in arrears. This offer was accepted by the Government, and the agreement was acted upon by S. during the season of 1877.

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In 1878, after the suppliants had taken possession of the property and began to ship the lumber for themselves without paying the sum agreed upon between S. and the Government, the collector of slide dues refused to allow such lumber to pass through the canals, and caused the same to be seized and detained until the amount due upon it in respect of said agreement was fully paid.

Held:—(1). Under the provisions of the 7th section of the Petition of Right Act of 1876, the Dominion Government, in enforcing a parol agreement, is entitled to whatever rights any subject of the Crown would have in respect of such an agreement in an action between subject and subject.

(2). Inasmuch as the provisions and enactments relating to tolls in 31 Vic., c. 12, are in substance and effect the same as those contained in chapter 28 of the Consolidated Statutes of Canada, under which the present regulations relating to timber passing through the slides were made, in virtue of the provisions of sec. 71 of 31 Vic., c. 12 such regulations are in effect to be construed as having been made under the later statute.

(3). There being no re-demise clause or proviso in the mortgage of the 18th December, 1876, whereby the mortgagor might have remained in possession until default, the judge, sitting in the Court of Exchequer not as a court of appeal but in an Ontario case to administer the law of Ontario, was bound by the decisions in *McAulay* v *Allen* (20 U. C. C. P. 417), and *Samuel* v *Coulter* (28 U. C. C. P. 240), to hold that, upon the execution of such mortgage, the suppliants were entitled to immediate possession of the property granted thereby, and might, if they had pleased, at any time have exercised their right to sell thereunder without the mortgagor's intervention or consent. But, while the terms of the second mortgage reserved to the suppliants the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale thereof might be entered into, and to whom upon sales it should be consigned, it was expressly provided therein that the business of such manufacture and sale should be transacted through the intervention of the mortgagor for the benefit of the suppliants. The effect and intent of the second mortgage, therefore, was to make the suppliants principals and S., the mortgagor, their agent in carrying on the business thereafter with their property, and for their sole benefit, until the property should be sold or they were paid their claim.

(4). As such agent S. must be held to have had sufficient authority to bind the suppliants by his agreement with the Government, which, under all the circumstances, was a reasonable and proper one and made in the interest of the suppliants.

(5). But whether S. was, or was not, authorized to make such an agreement with the Government, the suppliants adopted, ratified, and confirmed the agreement by acting under it and advancing moneys to pay the Government in accordance with its terms after they must be held to have had full knowledge of the nature and effect of it.

Statement of Facts.

PETITION OF RIGHT for the release of certain lumber, logs, and timber seized on behalf of the Dominion Government for alleged non-payment of slide and boom dues, and for the repayment of certain moneys alleged to have been paid under duress and in excess of any amount owed by the suppliants in respect of such dues.

In their petition of right the suppliants allege, *inter alia*:

" 1. The suppliants the said "The Merchants Bank of Canada" are a duly incorporated banking corporation, authorized by statute to carry on the business of bankers in the Dominion of Canada.

" 2. For twenty years prior to his insolvency, James Skead, of the city of Ottawa, lumber merchant, carried on very extensive lumbering operations on the Ottawa river and its tributaries, and at the said city of Ottawa.

" 3. For the purpose of conducting the said lumber operations, the said James Skead became the owner of divers timber licenses to cut timber and logs on the timber lands of the Crown, bordering on the said Ottawa river and its tributaries.

" 4. The said James Skead from time to time cut timber and logs under the said licenses, and floated the same down the said Ottawa river and its tributaries in the usual manner.

" 5. The said timber and logs, in the course of their transit from the said timber lands of the Crown down the Ottawa river, passed through certain slides, booms and river improvements belonging to the Crown.

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Statement of Facts.

" 6. Under the Consolidated Statutes of Canada, chapter 28, and the Act passed by the Parliament of Canada in the 31st year of Her present Majesty's reign, chaptered 12, and under certain orders-in-council and regulations passed in pursuance and under the authority of the said statutes, the Crown was and is entitled to exact payment of certain tolls or dues (generally known as slide and boom dues) from the owners of all timber and logs passing through the said slides, booms, and river improvements, and to demand payment of the same in advance. Under the said statutes the Crown also appears entitled to certain special remedies for the collection of the said tolls or dues.

" 7. By an indenture dated the 18th day of December, A.D. 1876, and made between the said James Skead of the first part, and the suppliants of the second part, the said James Skead granted and mortgaged to the suppliants certain lumber, logs, and timber therein particularly described to secure the repayment of his then indebtedness to the said suppliants, amounting to $136,560.

" 8. By another indenture, dated the 11th day of May, A.D. 1877, and made between the said James Skead of the first part, and the suppliants of the second part, the said James Skead granted and mortgaged to the suppliants the lumber, logs, and timber therein particularly described to secure the repayment of his then indebtedness to the said suppliants amounting to $334,147.66.

" 10. On or about the 15th day of May, A.D. 1878, the said James Skead became insolvent within the meaning of the Insolvent Act of 1875, and amending acts, and at the instance of the Union Bank of Lower Canada, a creditor of the said James Skead for $500 and upwards, a writ of attachment in

insolvency was duly issued against him out of the County Court of the County of Carleton, the proper court in that behalf, duly directed to Daniel Sutcliffe Eastwood, of the said city of Ottawa, one of the official assignees of the county of Carleton, including the city of Ottawa, the proper official assignee in that behalf, and thereupon such proceedings were duly had and taken under the said writ and acts, and at a meeting of creditors of the said insolvent James Skead, duly called and holden at the said city of Ottawa, on the 6th day of June, A.D. 1878, the said Daniel Sutcliffe Eastwood was, by the said creditors, duly elected creditor's assignee to the estate and effects of the said insolvent under the said acts, and thenceforth became and continued to be, and now is the duly appointed creditors' assignee to the estate and effects of the said insolvent under the said acts.

"11. The said insolvent, at the time of his said insolvency, was indebted to the said suppliants in the sum of $286,027.59, which said indebtedness was then collaterally secured by the indentures aforesaid, and the chattel property included therein. No part of the said indebtedness has since been paid or satisfied.

"12. Prior to the said insolvency, the suppliants took possession of all the lumber, logs, and timber in and about the Nepean mills and premises, and remained in possession thereof until, and were in possession thereof, at the time of the seizure hereinafter set forth.

"13. The suppliants duly proved for their said indebtedness against the estate of the said insolvent under the said insolvency, and duly valued their securities under the provisons of the said insolvent acts at the sum of $160,000.

"14. On the 9th day of July, A.D. 1878, the creditors of the said insolvent at a meeting thereof, duly called for that purpose, duly authorized the said creditors' as-

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Statement of Facts.

signee to consent, and the said creditor's assignee did thereafter duly consent to the retention by the suppliants of the securities mentioned in their said proof (including the indentures aforesaid) at the valuation aforesaid, under the provisions of the said insolvent acts.

"15. By virtue of the said indentures and of the said consent, all the said lumber, logs, and timber in, around, and about the said mill and premises in the township of Nepean, known as the Nepean Mills, became, and are, the absolute property of the suppliants in equity as well as at law.

"16. Instead of exacting payment in advance of the said tolls and dues, payable by the said insolvent for the timber and logs from time to time passing through the said slides, booms, and river improvements, the Crown suffered and permitted the said timber and logs to pass through the said slides, booms, and river improvements without payment of the said tolls or dues, and suffered and permitted the said tolls or dues to fall greatly in arrears, and gave time to the said insolvent for the payment of the same, and charged the said insolvent interest for the forbearance of the payment of the same, and from time to time took security from the insolvent for the payment of the same, and suffered and permitted the said insolvent to sell and dispose of vast quantities of the said timber and logs, and the lumber whereinto the same had been converted, without requiring payment of the said tolls or dues.

"17. According to a statement furnished since the said insolvency, to the suppliants by Alexander J. Russell, who is the collector of slide dues and the Crown officer in charge of the Crown timber office at the said city of Ottawa, the Crown claimed that the said insolvent, at the date of his insolvency, was indebted to the Crown in the sum of $20,315, for arrears of the said

slide and boom dues and interest thereon. By a subsequent statement furnished to the suppliants by the said Alexander J. Russell, the said claim of the Crown was reduced by the sum of $4,879.69, and after deducting payments made since the said insolvency, the Crown now claims that there is due to the Crown for the said slide and boom dues the sum of $8,533.01.

"18. The suppliants aver that the proper slide and boom dues on lumber, logs and timber floated down through the slides, booms and river improvements on the Ottawa River and its tributaries, through which the said lumber, logs and timber now lying in and about the said Nepean Mills and premises were floated down, amount to the sum of 4⅓ cents per saw log; or, when reduced to board measure, the sum of 26 cents per 1000 feet.

"19. Shortly after the said insolvency the said collector of slide dues on behalf of the Crown demanded from the suppliants the sum of $2 per 1000 feet, board measure, for said slide and boom dues on all lumber, logs, and timber in, about, and around the mill premises aforesaid; and refused to allow the same, or any part thereof, to be moved unless this excessive charge was paid, and from time to time detained certain portions of the same, which the suppliants were desirous of moving and disposing of.

"20. Under protest and by compulsion and to avoid the further stoppage of the said certain portions of lumber by the crown officers, the suppliants from time to time paid to the credit of the Receiver-General a sum of $6,054.69, being for slide and boom dues on said portions of said lumber at the excessive rate aforesaid of $2 per 1000 feet board measure.

"21. Without any further warning, on or about the 12th day of July, A.D. 1878, the said collector of slide dues on behalf of the Crown seized the whole of the

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v.
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Statement of Facts.

said lumber, logs, and timber in and about the said mill and premises, and thenceforth took possession of and detained and still keeps possession of and detains the same and every part thereof.

"22. The Crown has now under detention certain quantities of lumber, logs, and timber belonging to the suppliants," [shewn in detail in a schedule annexed to the petition] " and refuses to permit the suppliants to remove or dispose of the same or any part thereof.

"23. In order to avoid litigation and delay, on the 22nd August, A.D. 1878, the suppliants tendered to the said Alexander J. Russell, the said collector of slide dues and the officer in charge of the Crown timber office, at the said City of Ottawa, for the use of the government of the Dominion of Canada for the use of Her Majesty, the sum of $1,500, being more than the proper dues which could have been demanded on the said lumber, logs and timber seized and detained as aforesaid, and demanded the release of, and the removal of, the embargo upon the said lumber, logs and timber seized and detained by the said collector on behalf of Her Majesty, but the said collector on behalf of Her Majesty, refused and neglected and still refuses and neglects to release or remove the embargo upon the said lumber, logs and timber or any part thereof, until payment by the suppliants of the said sum of $8,533.01.

"24. The suppliants submit that under the circumstances the Crown ought forthwith to release and remove the embargo upon the whole of the said lumber, logs, and timber now seized, detained and held possession of by the Crown as aforesaid.

"25. The suppliants submit that they ought to be repaid the sum of $5,267.59, being the amount overpaid by them on the said sum of $6,054.69 paid under protest and involuntarily as aforesaid.

"26. The suppliants understand that the Crown claims a general lien on the said lumber, logs, and timber seized and detained as aforesaid, for the whole of the said arrears of slide and boom dues and interest thereon alleged to be due to the Crown by the said insolvent at the time of his insolvency, but the suppliants submit that the Crown is not entitled under the said statutes, and under the said orders-in-council and regulations, so far as the said orders-in-council and regulations are *intra vires* of the powers conferred by the said statutes, to any lien or right of detention under the circumstances above set forth.

"27. The suppliants further submit that under the said statutes and the said orders-in-council and regulations, and the facts as above set forth, the Crown had no right to seize and take possession of the said lumber, logs, and timber in the manner afore described for any slide or boom dues whatsoever.

"28. The suppliants further submit that if the Crown had a lien or right of detention on the said lumber, logs and timber for any arrears of slide and boom dues, the amount tendered to the said collector was more than sufficient to satisfy the same; and from thenceforth the said seizure, detention and possession thereof by the Crown was unlawful and inequitable.

"The suppliants therefore pray:

"(1) That Her Majesty should be advised that under the said statutes and under the said orders-in-council and regulations, so far as they are authorized by the said statutes, the Crown is not entitled to a general lien on the said lumber, logs and timber at the said mill and premises aforesaid, the property of the suppliants and now in possession of and detained by the Crown officers on behalf of the Crown as aforesaid, for the said arrears of slide and boom dues alleged to be due to the Crown from the said insolvent.

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"(2) That the Crown may be pleased to order the release and delivery up of the possession to the suppliants of all the said lumber, logs and timber now detained and held possession of by the Crown as aforesaid.

"(3) That the Crown may be pleased to repay to the suppliants the said sum of $5,267.59 overpaid as aforesaid.

"(4) That the Crown may be pleased to grant the costs of this suit and such further and other relief in the premises as the circumstances of the case may require, and as to the Crown seemeth just and equitable.

(5) The suppliants hereby offer to pay to the Crown the tolls or dues, if any, which Her Majesty's Court of Exchequer may determine are properly payable to the Crown by the suppliants under the circumstances."

The Attorney-General for Canada, on behalf of Her Majesty, in his answer to the petition admitted the allegations contained in the 1st, 2nd, 3rd, 4th, 5th and 10th paragraphs thereof, but alleged, *inter alia* :—

"7. That upon the Ottawa River and its tributaries Her Majesty the Queen for many years past has owned, as public works of the late Province of Canada and of the Dominion of Canada, certain slides, booms, and river improvements.

"8. That under the statutes in that behalf the Governor-in-Council was empowered by order-in-council to impose and authorize the collection of tolls and dues, upon the said public works, and for the due use and proper maintenance thereof, and to advance the public good, to enact from time to time such regulations as he might deem necessary for the management, proper use, and protection of the said public works, and for the ascertaining and collection of the tolls, dues and revenues thereon, and by such orders and regulations to provide for the non-passing, or detention and seizure, at the risk of the owner, of any timber or goods on

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which tolls or dues might have accrued and not been paid, or in respect of which any such orders and regulations might have been contravened or infringed, and for the sale thereof if such tolls or dues were not paid, and for the payment of such tolls or dues out of the proceeds of such sale.

"9. That under the said statutes all such dues and tolls are made payable in advance and before the right to the use of the public work in respect of which they are incurred accrues, if so demanded by the collector thereof.

"10. That before the time the timber and logs referred to in the said petition passed through the said slides, booms, and river improvements the Governor, under the authority of the said statutes, duly made, issued and published an order-in-council, which was in full force at the time the said timber and logs so passed through, and which among other things provided that no raft or parcel of timber should be permitted to enter any slide for the purpose of passing through without the owner or person in charge of such raft or parcel of timber first giving notice thereof to, and obtaining permission from, the superintendent, slide master, deputy slide master or other officer, as the case may be, duly appointed as aforesaid, under a penalty of not less than $4, and not more than $20, currency.

"Also that the owner or person in charge of any raft &c, previous to entering any of the provincial cribs or slides, for the purpose of passing such raft &c., through the same, shall make a full and complete report of such raft, containing an account of the number of cribs and the description of timber composing the raft, &c., the name and designation of the owner or owners and of the supplier or furnisher thereof, together with marks and all other particulars relating thereto, under a penalty

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of not less than $20, and not more than $200, for refusing or neglecting to make such report.

"Also that the owner or owners or person in charge of any raft, &c., shall before removing the same from any slide, boom or public work connected therewith, subscribe and deliver to the said superintendent, &c., an acknowledgment in duplicate certifying the number and description of cribs or of timber so passed, and shall pay the slide dues, or secure the same to the satisfaction of the collector of slide dues, under a penalty of not less than $20, and not more than $200, and shall further pay double the amount of dues which would otherwise be payable on any raft, &c., passing such slide without such acknowledgment.

"Also that it shall be competent for the collector of slide dues, his deputy, &c., to enter upon, seize and detain at the risk, costs and charges of the owner or owners thereof, any raft, &c., which shall have been moved away from any of the provincial slides, booms or works, without the slide dues therefor, the amount awarded for damages or the fines and penalties, if any, being first paid or secured to his satisfaction.

"Also that rafts, cribs and all descriptions of timber shall be held liable for the dues, damages, and penalties imposed under these regulations; and the slide master or other duly appointed officer is authorized and required to seize and detain any such raft, crib, or parcel of timber until payment of such dues, damages, or penalties is made, or until the owner, or person in charge shall have given satisfactory security for the payment thereof.

"11. That owing to the great inconvenience and loss which the said James Skead would have suffered if a strict compliance with the provisions of the said order-in-council were enforced on behalf of Her Majesty, the said James Skead was permitted, in order

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to avoid such inconvenience and loss, to pass his timber and logs through the said slides, &c., without first giving notice thereof to, and obtaining permission from, the proper person in that behalf, and without previously making a full and complete report thereof, with the marks and other particulars, and without subscribing and delivering to the proper officer the required acknowledgment as above mentioned, and without paying the tolls and dues upon the said timber and logs, but upon the understanding and agreement that the said timber and logs and lumber, and other stuff, manufactured therefrom should be, and continue liable, for the payment of said dues and tolls, and to seizure and detention on behalf of Her Majesty until payment thereof.

"12. That the timber and logs passed by the said James Skead through the said slides, &c., were so passed upon the understanding and agreement above mentioned, and the said timber and logs, and the lumber and other stuff manufactured therefrom were at all times liable to seizure and detention on behalf of Her Majesty until the dues and tolls due to Her Majesty were paid.

"13. That previous to the year 1873, the said James Skead paid to Her Majesty the dues and tolls in respect of the timber and logs which he had so passed through, but in the year 1873 he made default in payment thereof, and requested Her Majesty, through Her servants, to give him time for the payment of the same, and not to seize and detain the said timber, &c.

"14. That Her Majesty, by Her servants, did refrain for a time from enforcing payment of said tolls and dues and from seizing and detaining the said timber, &c., upon the understanding and agreement that her position with respect thereto, and her right to seize and

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detain the same, should not be prejudiced, but no definite time for payment was specified.

"15. That the said James Skead having continued to make default during the years 1873, 1874, 1875, 1876 and 1877 in payment of the said tolls and dues, or part thereof, upon the understanding and agreement above mentioned, Her Majesty, by Her servants, called upon him for payment of the arrears, and would have seized and detained the timber, logs, lumber and other stuff, pursuant to Her powers in that behalf, but for the importunities of the said James Skead who represented his inability to pay the same at once in cash and requested further time for payment thereof, and upon the understanding and agreement that Her Majesty should have the right to seize and detain all the timber, logs and lumber and other stuff in and about the Nepean mills and premises in the petition referred to, as security for the payment of the said arrears of tolls and dues, Her Majesty did refrain from enforcing immediate payment thereof, and inasmuch as the said James Skead desired to be allowed to ship the lumber and other stuff manufactured by him from the timber and logs which had passed through the said slides, booms and river improvements, he made to Her Majesty's Minister of Inland Revenue, the minister charged with the collection of the said tolls and dues, the following proposition:

"OTTAWA, June 6th, 1877.

"The Hon. R. LAFLAMME,
&c., &c., &c., Ottawa.

"DEAR SIR,—I am indebted to your Department for slide dues, &c. I herewith propose to pay $2.00 per 1,000 feet B.M. on all shipments made during the season. I have now on hand about eight million feet of lumber and as I propose manufacturing say from twelve to fourteen millions more this season, I expect

during the season to pay the whole amount of my indebtedness to your Department, including the dues of 1876,—shipments will be made from present date, say to the 10th of November, next. I trust this proposal will be found satisfactory and would feel obliged for an early reply.

"Yours respectfully,
"(Signed) JAMES SKEAD."

"16. Her Majesty was willing to refrain, and did refrain, from enforcing payment of the said tolls, &c., and from seizing and detaining the said timber, &c., so long as the said $2 per 1,000 feet, board measure, were paid on all shipments made during the season as proposed by the said James Skead, but in so refraining it was understood and agreed that Her Majesty's right to enforce payment of the said arrears, and to seize and detain the said timber, logs, lumber and other stuff as security for payment thereof, should not be prejudiced or affected but should continue as before the said proposition was made."

"17. Pursuant to the arrangement referred to in the last preceding paragraph, the said James Skead, from time to time before the proceedings in insolvency were taken against him, paid to the proper officer of Her Majesty on that behalf the sum of two dollars per thousand feet, board measure, on the lumber shipped by him, and the said James Skead was not allowed by the officers of Her Majesty to remove any of the said lumber without first paying the said $2 per 1,000 feet, board measure, on the quantity which he desired to remove.

"18. Shortly before or about the time of the insolvency of the said James Skead, the suppliants claimed to have taken possession of the lumber, logs, and timber in and about the mills of the said James Skead and assumed the control and management of the same."

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"19. That the suppliants when they so claimed to have taken possession of the said lumber, logs, and timber were well aware of the said proposal and arrangement made by the said James Skead to pay $2 per 1,000 feet, board measure, on all lumber shipped, and of the rights claimed by Her Majesty in respect of such lumber, logs and timber, and they acquiesced in and ratified said proposal and arrangement, and paid to Her Majesty's officers, in pursuance thereof, $2 per 1,000 feet, board measure, on many shipments of lumber made by them before making such shipments after having so assumed the control and management of the same.

"20. That Her Majesty was at all times willing to carry out the said proposal and arrangement and receive payment of the tolls and dues due in respect of the said lumber, &c., but the suppliants wrongfully, and without the knowledge or consent of Her Majesty's officers, removed a quantity of lumber, and shipped the same without paying the said sum of $2 per 1000 feet, board measure.

"21. That so soon as Her Majesty's officers became aware of such action on the part of the suppliants, they caused the said lumber, so wrongfully removed, to be seized and detained, and also caused all the lumber, &c., in and about the Nepean mills to be seized and held to answer for the said dues and tolls due with respect thereof; and there is now due and unpaid a large sum for such tolls and dues.

"22. After the execution of the alleged mortgages to the suppliants they allowed the said James Skead to continue in possession of the said lumber, &c., and to manufacture lumber from such logs, and sell and dispose of the same, and in all respects to deal therewith as his own property, and in making the said proposal and arrangement for the payment of the said $2 per 1000

feet, board measure, as above mentioned, and in entering into the various understandings and agreements above mentioned with Her Majesty, or Her officers, respecting the said tolls and dues and the rights of Her Majesty with respect to the said lumber, &c., the said James Skead acted with the knowledge, approval and authority of the suppliants, and the suppliants were and are bound by the acts of the said James Skead with respect thereto.

"23. That the amount paid by the suppliants with respect to said tolls and dues was not paid involuntarily or under protest, and that under any circumstances they are not entitled to repayment of the same."

The suppliants joined issue upon the answer, except in so far as it admitted their petition, and alleged in their reply:—

"That up to and until the month of June, A.D. 1878, the suppliants had no notice or knowledge of the said alleged understandings and agreements in the said answer set forth.

"That the payments of $2 per 1000 feet, board measure, made by the suppliants to Her Majesty's officers, as alleged in the 19th paragraph of the said answer, were made by inadvertence and in ignorance that the same were excessive or exorbitant charges, and in the belief that the same were the proper and usual tolls and charges; and immediately your suppliants discovered that the said charge of $2 per 1000 feet, board measure, claimed by Her Majesty, was in excess of the usual tolls and charges, the suppliants protested against payment of the said charge, and never paid the said excessive charge afterwards except by compulsion and under protest to get possession of a portion of the said lumber, logs, and timber seized and detained by Her Majesty as aforesaid."

The case was heard before Mr. Justice Gwynne.

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Bethune Q.C. and *Gormully* for suppliants;

Lash Q.C. and *Hogg* for respondent.

GWYNNE, J. now (September 14th, 1881,) delivered judgment.

This is a proceeding by petition of right at the suit of the suppliants as mortgagees of certain logs and lumber mentioned in two indentures by way of chattel mortgage, dated respectively the 18th December, 1876, and the 11th May, 1877, made by the Honourable James Skead, since become insolvent, whose equity of redemption in the chattels so mortgaged has been released to the mortgagees under the provisions of the Insolvent Act then in force. The object of the petition is to recover possession of the logs and lumber which were seized by the Dominion Government on the 12th July, 1878, upon a claim for slide and boom dues. The suppliants, by their petition, pray the release and delivery up to them of the logs and lumber so seized, and repayment of a sum of $5,267.59 which they allege had been paid by them, under duress, in excess of any claim, if any, that the Government had for such slide and boom dues; and they offer to pay to the Dominion Government the tolls or dues, if any, which the Court may determine to be properly payable under the circumstances set up in the petition.

The Honourable James McDonald, Her Majesty's Attorney-General for the Dominion of Canada, has filed his answer to this petition wherein he justifies the seizure of the logs and lumber for the purpose of obtaining payment of certain slide and boom dues alleged to have been due by Mr. Skead; and he rests the right of the Dominion Government to seize them partly upon the statute in force relating to public works, and certain tolls established in pursuance thereof, and partly

upon a special arrangement in that behalf made by Mr. Skead with the proper officer of the Government having control of the matter.

The suppliants reply, joining issue upon this answer and further alleging that up to and until the month of June, 1878, they had no knowledge of the agreement set forth in the answer as made with Mr. Skead, and they further say that the payments of $2 per M. feet b. m. made by the suppliants to Her Majesty's officers, as alleged in the 19th paragraph of the said answer, were made by inadvertence and in ignorance that the same were excessive or exorbitant charges and in the belief that the same were proper and usual tolls and charges, and that immediately the suppliants discovered that the said charge of $2 per thousand feet, board measure, claimed by Her Majesty, was in excess of usual tolls and charges, they protested against payment of the said charge, and never paid the same afterwards, except by compulsion and under protest to get possession of a portion of the said lumber, logs, and timber seized and detained as aforesaid. In the 19th paragraph of the answer here referred to, the Attorney-General had averred that the suppliants, when they claimed to have taken possession of the said lumber, logs, and timber, were well aware of the said proposal and arrangement made by the said James Skead to pay $2 per 1,000 feet, board measure, on all lumber shipped, and of the rights claimed by Her Majesty in respect of such lumber, logs, and timber, and they acquiesced in and ratified said proposal and arrangement, and paid to Her Majesty's officers in pursuance thereof $2 per 1,000 feet, board measure, on many shipments of lumber made by them before making such shipments, after having so assumed the control and management of the same.

By the 7th section of the Petition of Right Act, of

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1876, it is enacted that the statement in defence may raise, besides any legal or equitable defences in fact or in law available under that act, "any legal or equitable defences which would have been available had the proceeding been a suit or action in a competent court between subject and subject." In addition, then, to any defence which the Dominion Government, represented by their Attorney-General, may have in virtue of the right to seize, asserted upon the authority of the statute law relied upon, and the regulations thereunder relating to slide dues, I must give them the same benefit of any defence set up by the Attorney-General as any private individual would be entitled to if the action were one of trespass *de bonis asportatis* against such individual at the suit of the present suppliants. I cannot, therefore, give any weight to an objection which was urged by the suppliants, *viz.*—that the Crown can acquire title only by record, and that, therefore, no claim on behalf of the Dominion Government can be asserted in virtue of the agreement relied upon in the answer of the Attorney-General as made with Mr. Skead in the terms of his letter of the 6th June, 1877, therein pleaded. The Dominion Government must, under the provision of the act above quoted, be entitled to whatever benefit may accrue therefrom equally as any subject of the Crown if the proceeding were an action against such subject.

The suppliants also raised an objection to the defence that any regulations which were made under c. 28 of the Consolidated Statues of Canada, fell through upon the repeal of that statute by 31 Vic., c. 12, and, there having been no new regulations made since the passing of 31 Vic., c. 12, that no tolls were at all leviable for logs passing through the Government slides; but the 71st section of that act provides that the enactments in the act, so far as they are the same in

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effect as those superseded, namely, those in the 28th chapter of the Consolidated Statues, shall be construed as declaratory, and as having been in force from the time when the enactments of c. 28 became law. Now the provisions and enactments relating to tolls in 31 Vic., c. 12, are in substance and effect the same as the provisions in c. 28 of the Consolidated Statutes, under which the regulations relating to timber passing through the slides were made, and therefore, under the provisions of sec. 71 above quoted, we must read these sections as having been in force since the passing of the 28th chapter of the Consolidated Statutes, and, therefore, the regulations made under that statute are in effect regulations to be construed as made under 31 Vic., c. 12. There is, therefore, nothing in this objection. The suppliants further object that, by the regulations referred to, the charge for all timber passing through the slides is to be levied *per the crib*, and that saw logs do not come down in cribs, and that, therefore, there is no toll chargeable in respect of saw logs. The answer given to this objection, if there be anything in it, I think sufficient, namely, that the suppliants cannot be heard to make it in view of the allegations contained in the 6th and 18th paragraphs of their petition, by the former of which they aver that

> Under the Consolidated Statutes of Canada, c. 28, and the Act passed by the Parliament of Canada, in the 31st year of Her Majesty's reign, c. 12, and under certain orders-in-council and regulations passed in pursuance of, and under the authority of, the said statutes, the Crown was and is entitled to exact payment of certain tolls or dues (generally known as "slide and boom dues") from the owners of all timber *and logs* passing through the said slides, booms, and river improvements, and to demand payment of the same in advance under the said statutes;

and by paragraph 18 they aver that

> The proper slide and boom dues on lumber, *logs*, and timber floated down through the slides, booms, and river improvements on the Ottawa, and its tributaries, through which the *logs* and tim-

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ber now lying in and about the said Nepean mills and premises were floated down, amount to the sum of $4\frac{1}{3}$ cents per saw log, or when reduced to board measure to the sum of 26 cents per 1,000 feet.

All these preliminary objections being removed and disposed of, the case must be determined upon the merits, and with that view I propose to consider it 1st, as if Mr. Skead still owned the logs and lumber in question unaffected by any mortgage thereon, and that the question arose between the Dominion Government and him; and 2ndly, as one between the Government and the suppliants claiming as mortgagees under the provisions of the mortgages which have been pleaded and produced.

By the regulations made in 1865, under the provisions of c. 28 of the Consolidated Statutes of Canada, to secure the due payment of slide dues and for the protection of the provincial slides, it was among other things, provided, in short substance, that—

Sec. 2. Persons in charge of timber shall give notice to the superintendent, slide-master or deputy slide-master and obtain permission from him to pass through any slide, under a penalty stated.

Sec. 3. That all rafts or parcels of timber shall be reported before entering the provincial slides.

Sec. 4. That the owners or persons in charge shall not allow any description of timber to accumulate at the head of any slide, but shall immediately pass the same through the slide.

Sec. 6. That the owner or person in charge before removing any parcel of timber from any slide, boom, or other work connected therewith shall subscribe and deliver to the said superintendent, slide-master, &c., &c., an acknowledgment in duplicate of the timber and description of the timber so passed, and shall pay the slide dues and secure the same to the satisfaction of the collector of such dues under a penalty.

Sec. 9. That it shall be competent for the collector of slide dues or any person duly authorized by him to detain, at the risk and cost of the owner, any parcel of timber which shall be moved from any slide without the slide dues being first paid or secured to his satisfaction.

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Sec. 10. That rafts, cribs *and all descriptions of timber* shall be held liable for the dues, etc., etc., imposed under the regulations, and the slide-master or other duly appointed officer is authorized and required to seize and detain any such raft, crib, *or parcel of timber*, until payment of such dues, etc., etc., is made, or until the owner or person in charge shall have given satisfactory security for the payment thereof within thirty days after the same shall have been declared to have been incurred, or shall have been demanded—and in default of such payment being made within the said term of thirty days, then the said slide master, etc., may proceed to sell by public auction any such raft, crib, or parcel of timber; but at least two weeks notice of the day of the intended sale by auction shall, in the meantime, have been given and inserted in one or more of the public newspapers published at the nearest place from the said works, and a copy of such notice shall also have been placarded during the same time (two weeks before the intended sale), in a public and conspicuous place, at or near the said works where the raft, crib, or timber is lying.

At the time of the making of these regulations there were, as appears by the evidence, only a few slides and these at Ottawa. Afterwards a number of slides were constructed higher up the river Ottawa and its tributaries, several being on the Madawaska, down which river all the logs in question came; some of the slides being located 200 miles up that river in places where there are no inhabitants or slide-masters. Since those slides have been constructed, from the fact of some of them being in such remote places, and also because logs belonging to different owners and being destined for different points, came down loose, by night as well as by day, carried by the current of the river without any person in charge, it became practically impossible to apply the regulations to the collection of slide dues, &c., on logs coming down the Madawaska; acting as a juror, I find this as a fact from the evidence. I, in like manner find as a fact, that in consequence of this impossibility, and in the interest of the log owners, and for the purpose of enabling them beneficially to conduct their

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business, an arrangement was come to between the department of the Government having supervision of the matter and the persons getting out logs, whereby it was arranged that the owners should, at the end of the season upon the arrival of their logs at their respective mills, make a return to the Government officials of all logs so come down, which return was checked by returns previously received by the Government, through their wood-rangers, of all logs cut in the woods by each log owner; and, upon the quantity being thus determined in the case of each log owner, the slide dues were agreed to be paid by the log owners, such dues being estimated at 4½ cents per log. For the benefit of the log or mill owners, also, arrangements were from time to time made between such log owners and the Government officials, whereby time for payment of such dues was extended upon the mill owners satisfying the Government officials that they had logs and sawed stuff at their mills out of which the Government could, at any time, by sale thereof, realize the dues if the mill owners should not keep the terms agreed upon by them as to the mode and time of payment, upon the time for payment being extended to them. I find this to have been the constant practice of the department of the Government having charge of the matter at the time when Mr. Skead first became a mill owner, and owner of logs coming down the Madawaska, and thence continually until the present time. I find also, as a fact, that from Mr. Skead first becoming the owner of logs coming down the Madawaska until the month of June, 1877, he settled with the Government for his slide dues only under the above arrangement, and that from 1873 until June, 1877, he became largely in arrears for slide dues, the time for payment of which was repeatedly, from time to time at his request, ex-

tended under and subject to the terms of the above arrangement, which, in fact, had become the constant and invariable practice of the Government, established in the interest of and for the benefit of all mill owners. I find, moreover, as a fact that on the 6th June, 1877, the said Mr. Skead being largely in arrears to the Government for slide dues upon logs of his floating down the Madawaska to his mills, called the Nepean Mills, addressed a letter to the Minister of the Dominion Government having charge of the matter in the words following:—

OTTAWA, June 6th, 1877.

The Honorable R. LAFLAMME, &c., &c.,
Ottawa.

DEAR SIR,—I am indebted to your Department for slides dues, etc. I herewith propose to pay $2 per 1,000 feet b. m., on all shipments made during the season. I have now on hand about eight million feet of lumber and as I purpose manufacturing, say, from twelve to fourteen million more this season, I expect during the season to pay the whole amount of my indebtedness to your Department, including the dues of 1876, shipments will be made from the present date, say to the 10th of November next. I trust this proposal will be found satisfactory, and would feel obliged for an early reply.

Yours respectfully,
(Sgd.) JAS. SKEAD.

And I further find that as a fact on the same 6th day of June the said Mr. Skead addressed a letter to Mr. A J. Russell, the officer who, as Crown Timber Agent, had immediate control of the matter under the Minister to whom the above letter was addressed, which letter to Mr. Russell is as follows:—

OTTAWA, June 6, 1877.

A. J. RUSSELL, Esq.,
Crown Timber Office,
Ottawa.

DEAR SIR,—I have made a proposal to the Minister of Inland Revenue to pay upon all shipments of lumber from my yard, during the season, $2 per M. b. m., with a view to liquidating my indebtedness. I have about eight (8) million feet of old lumber now on hand and am now cutting from (12) to (14) twelve to fourteen million feet. I enclose you a check for $216, being $2 per M. b. m. on a barge load

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which left yesterday containing 108,000 feet, odd. The barge "C. S. Morse," Capt. S. M. Hoadley. I will feel obliged if you will send me a permit for same, or telegraph the canal authorities to pass the vessel.

Yours very truly,

JAMES SKEAD.

At the same time Mr. Russell, at Mr. Skead's request, went with him to his mills for the purpose of satisfying the former that the statement made by the latter as to the stuff he had at his mills was correct, and that it afforded abundant security to the Government for payment of the arrears in the manner proposed. Upon a thorough inspection by Mr. Russell, with this end in view, of the stuff at Mr. Skead's mills, the former (to whom the letter of the latter to Mr. Laflamme, of the 6th June, was referred for a report) reported recommending the proposition of Mr. Skead to be acceded to, which was accordingly done, and the acceptance of it was communicated to Mr. Russell, for his guidance, by a letter of the 5th July, as follows:

INLAND REVENUE DEPARTMENT,

OTTAWA, July 5, 1877.

SIR,—Adverting to reference No. 21159, being the proposition of Mr. Skead as to the payment of arrears of slide dues, and to your report thereon, I have to inform you that:—1. The Minister consents that if Mr. Skead makes regular payment of two dollars ($2) per thousand feet on all lumber shipped by him, your recommendation may be carried out. 2. If it shall appear that payments so made are likely to be sufficient to extinguish Mr. Skead's liabilities within a reasonable time, no further immediate action will be taken for the recovery of such dues.

I have the honor to be, sir,

Your obedient servant,

A. BRUNEL, Commissioner.

A. J. RUSSELL, Esq.,

Crown Timber Agent, Ottawa.

And I find that the arrangement thus made with Mr. Skead continued to be acted upon by him, he paying $2 per M. b. m. on each shipment as agreed upon, until the month of July, 1878, when sawn lumber was

shipped by railway to Brockville without payment of the stipulated $2 per M., and without the knowledge or permission of the department, and I find that although nothing was expressly said as to the rights of the Government to realize out of the stuff at Mr. Skead's mills, in case he should violate the agreement so entered into with him by shipping lumber without payment of the $2, and without the knowledge and permission of the Department, yet, from the rules and practice in the Crown Timber Agent's Office, with which Mr. Skead was thoroughly conversant, and to conform with which the agreement was intended, it was the intention of Mr. Skead in making the above arrangement not only that the Government should secure themselves by refusing permits for vessels to pass through the canals until the stipulated rate of $2 per 1,000 feet on each shipment by water should be made, but also, by seizing and selling the stuff at the mills, to realize the arrears in case lumber should be removed by land, in prejudice of the agreement, without payment of the stipulated rate, and without the knowledge and permission of the department; and this I find to have been in substance and effect the purport and intent of the agreement made by Mr. Skead with the Government, upon the basis of the former's letter of the 6th June, 1877.

I come, therefore, to the conclusion that if Mr. Skead were the suppliant, asserting a claim against the Government based upon a seizure of the lumber, made for the purpose of realizing thereout the arrears of slide dues, he would, under the circumstances above detailed, be entitled to no relief unless, nor until, he should pay the arrears. To such a claim the defence that what was done was done by the leave and license of Mr. Skead, and in pursuance of an agreement to that effect made by him, would have been sufficient.

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Between subject and subject placed in the like position, such a defence would be abundantly good; and, therefore, under the terms of the Petition of Right Act, it would be equally good if set up by the Crown as a defence to the claim of a subject; and that it should be so is consistent with reason and justice. The extent to which the courts go in modern times, wholly independently of the above provisions of the statute, to enforce, both in favor of and against the Crown, oral contracts made between individuals and officers of the Government as representing the Crown, may be seen by reference to the *Attorney-General* v. *Contois* (1). There, letters patent of certain land granted by the Crown were set aside at the instance of the Attorney-General upon the ground that they were issued improvidently, but the learned Chancellor of Ontario, giving judgment, expresses his opinion to be that relief could, under the circumstances, be properly afforded in equity upon the same ground as relief could be afforded between subject and subject, namely, that the applicant for the patent obtained it upon the faith of its being left open to the grantor of the patent to grant a license to cut timber, and that being so it was a fraud on his part to do anything in contravention of that in faith of which he obtained it. The case was, that while a lot of Crown land was subject to a timber license terminating upon the 30th day of April then next, the lot was sold to a purchaser, and the commissioner endorsed upon the letters patent a memorandum to the effect that if the license should be renewed for one year from its expiration on the 30th April then next, the letters patent should be subject to such renewal although the statute authorizing the issue of licenses to cut timber did not authorize any license to be issued affecting lands after they should be granted by the Crown; but

(1.) 25 Grant 346.

whether or not in such a case the relief under the ordinary principles of the doctrine of equity, as suggested by the learned Chancellor, could have been granted in the above case, there can be no doubt that, in view of the provision above quoted from the Petition of Right Act, whatever could be relied upon as a defence to an action in a similar case between subject and subject, may with equal effect be relied upon by the Government to the suit of a suppliant by a Petition of Right.

I may, however, here say that from Mr. Skead's evidence, it is quite apparent that no such claim as is here made would ever have been asserted by him, for the reason that in his opinion it would not have been fair or honorable in him to make such a claim in view of the fact that the time and mode of payment arranged by him with the Government, was altogether in the interest of, and for the benefit of the business he was carrying on. Indeed the Department of Public Works would become an intolerable nuisance if it should be so administered that no relaxation of the strict regulations of the department should be permitted at the instance and in the interest of the commercial community having dealings with it, unless at the peril of the sacrifice of the rights and interests of the public whose agent only the department is.

I come therefore, secondly, to the consideration of the case as one between the suppliants, claiming as they do through Mr. Skead, of the one part, and the Government, of the other. The suppliants insist that as the agreement of June, 1877, was entered into by Mr. Skead after the execution of the indentures under which they claim, they cannot be affected by that agreement however much Mr. Skead personally might have been if the indentures had not been executed, and they contend that under the statute affecting public works,

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and independently of the above agreement, the logs having passed the slides, the Government has lost all claim upon the logs or their produce for the recovery of the dues, and that the claim of the Government was one only in the nature of an action for debt against Mr. Skead personally.

By indenture, bearing date the 18th December, 1876, Mr. Skead granted, bargained, sold and assigned to the suppliants, their successors and assigns, all the lumber and logs situate at his mills and booms in the indenture particularly described, situate on the Ottawa River, in the Township of Nepean, to have and to hold the same to the only proper use and behoof of the suppliants, their successors and assigns forever; with covenant of warranty, subject to a proviso that if he, his executors or administrators, should pay to the suppliants the amount of certain promissory notes in the indenture mentioned, to the amount of $136,560, and all renewals thereof with interest not extending beyond the 15th December, 1877, then the said indenture should be void; and Mr. Skead thereby covenanted that if default should be made in payment of any of the said promissory notes, or of any renewals thereof, or in case he should attempt to sell or dispose of, or in any way part with the possession of the said goods, chattels and property, or any part thereof, otherwise than in the usual course of business, or to remove any part thereof out of the County of Carleton, without the consent of the suppliants, their successors, or assigns to such removal, it should be lawful for the suppliants either to sell the said goods, chattels and property, or at their option, that they should peaceably and quietly have, hold, possess and enjoy the said goods, chattels and property without the let, molestation, eviction, hindrance or interruption of Mr. Skead, his executors, administrators or assigns. This indenture contained

no redemise clause or proviso, that until default the grantor should continue in possession of the goods and chattels so granted, bargained and sold, or of any part thereof.

Now, upon the authority of *McAulay* v. *Allen* (1), the suppliants by this indenture, by reason of there being no re-demise clause or proviso as to grantor retaining possession until default inserted in it, became entitled both to the property and possession of the property granted, bargained and sold by the indenture, and being so entitled might, if they had pleased, at any time have exercised their right to sell therein contained without subjecting themselves to any action, suit, claim or demand by the grantor—and that without waiting for the maturity of the notes. Whether that decision be right or wrong, that is to say, whether a right in a grantor to retain possession until default may or may not arise by implication from the terms of an indenture, without what is called the re-demise clause or proviso for retaining possession until default being inserted therein, sitting in this court, not as a Court of Appeal, but in an Ontario case to administer the law of Ontario, I am bound by that case, which has since been confirmed and followed in *Samuel* v. *Coulter* (2).

Moreover, assuming even that a Court of Appeal should, if the point came before it, hold, that such a right to retain possession might arise by implication from the terms of an indenture, although there should be no such re-demise clause inserted in it, I should be of opinion that this case should be governed by the decision in *McAulay* v. *Allen* for two reasons: 1st, because the proper inference to be drawn from the fact of the re-demise clause being admitted is, I think, that the parties entered into the arrangement, for carrying out which the indenture was executed, in

(1) 20 U. C. C. P. 417. (2) 28 U.C.C.P. 240.

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view of the decision in *McAulay* v. *Allen*, and in contemplation of the rights of the grantees being as is therein laid down; and 2dly, because I find, as a matter of fact, that by a collateral arrangement made at the same time as the indenture was executed, it was agreed that sales of lumber should be made only by Mr. Skead upon the condition that the proceeds of all sales should be paid to the suppliants, who were to supply the cash necessary to enable him to carry on the business, and who were to have control of the sales. Upon these terms the business was conducted, so that the proper inference to be drawn from the fact of the re-demise clause being omitted is, in my opinion, that the intention of the parties to the indenture was that the suppliants were to have such absolute control of the property granted, bargained and sold to them by the indenture as would enable them to sell the property themselves, using Mr. Skead as their agent for that purpose, and irrespective of all default as to the payment of the promissory notes. I am confirmed in this opinion by the terms of the indenture of the 11th May, 1877, in which the terms of the arrangement are set out at large. By this indenture, after reciting that Mr. Skead was then indebted to the suppliants in the sum of $334,147.06, for $136,560, part of which, they held the property conveyed by the indenture of the 18th December, 1876, and other property conveyed by other indentures, he granted, bargained and sold to the suppliants 60,000 saw logs then in the woods, not yet brought down to Ottawa, to have and to hold the same to the suppliants, their successors and assigns, to and for their own use for ever, subject to a proviso that if Mr. Skead, his executors or administrators, should pay certain promissory notes mentioned in a schedule annexed to and made part of the indenture, representing the whole of the

said debt of $334,147.66, and including the notes secured by the indenture of the 18th December, 1876, or renew the said notes, the whole, however, to be paid and satisfied before the 20th day of December then next, and also should (in the event of the suppliants having to pay or advance any money to get the said logs down the streams to the mills to be manufactured, or for the purpose of causing the same to be manufactured for market in order to their realizing their claims,) repay the same, and all moneys the suppliants might be obliged to pay to get the said timber to market, in order to realize their money or part thereof thereout, together with interest, and if he, Mr. Skead, should observe, perform and keep all the covenants upon his part therein contained, then the said indenture should be void; and the said Mr. Skead thereby warranted the said goods and chattels to the said suppliants, their successors and assigns. This indenture contained no re-demise clause or proviso that the grantor should retain possession of the said goods and chattels until default, but in lieu thereof it was provided, and Mr. Skead thereby covenanted, that he should and would, with all reasonable despatch, that season, if possible, drive or cause to be driven the said saw logs to his mills aforesaid, and then would, with like despatch, manufacture the same into lumber of such description as should be approved by the suppliants through their manager at Ottawa, and that he would, in like manner, with all reasonable despatch, drive and get to market all the square timber covered by that indenture; that all sales of the sawn lumber made on time should be subject to the approval of the suppliants, which approval should be first had through the suppliants' manager for the time being at Ottawa, and no sale on time should be made without such approval; that if the lumber should be shipped to

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any consignee or consignees for sale, the suppliants should first approve of such consignees and no lumber should be shipped without such approval; that when lumber should be sold otherwise than for cash in the mill yard, all bills, notes, and bills of lading taken therefor, should be handed over to the suppliants at once, and should be applied as follows: the proceeds of all cash sales should be handed over to the suppliants, and with all other the proceeds of said lumber should be applied first to pay off and discharge all sums of money which the suppliants might have paid out, or have advanced, to secure the getting of said logs to the mills and their conversion into lumber, and getting the same to market and the like, and all interest and charges in respect thereof, and that the balance should be applied in reduction of the said debt due to the suppliants. That the said Mr. Skead in all respects in getting the saw logs to his mills, and in the manufacturing *of said stuff, should in all things carry on the work in a proper and efficient manner to the satisfaction of the suppliants, and as they might require in order to the efficient and rapid realization of the said debt and to the greatest advantage.*

Now upon the authority of *McAulay* v. *Allen* (1), and of *Samuel* v. *Coulter* (2), the suppliants were by this instrument possessed of the right of property and of the right of possession in all the chattel property at Mr. Skead's mills, and of the logs in the woods cut in the winter of 1876–77 not yet come down. There being no proviso that until default Mr. Skead should remain in possession of the property, he could not have maintained any action against the suppliants if they had taken possession of what sawn lumber then remained at the mills and had sold it, or if they had sold the logs not yet come down as logs before being manufac-

(1) 20 U. C. C. P. 417. (2) 28 U. C. C. P. 240.

tured into lumber, if it had not been for the special provision in the indenture qualifying that right. I must then read the provision in that behalf in the indenture as inserted designedly to supply the place of the omitted proviso, and to control the manner in which the business should be carried on at Mr. Skead's mills so as to enable the suppliants in the most efficient manner, and in the mode most satisfactory to themselves, to realize the payment of their debt. The substance and effect of the indenture, therefore, and the intent of the parties to it, was that the suppliants, being possessed of the right of property and of possession in the goods in question, should prepare the lumber for market and make all sales and ship the lumber, so being their property, through the intervention of Mr. Skead as their agent for that purpose. Mr. Skead was to cause the logs not yet brought down to be brought down to his mills, doing whatever might be necessary for that purpose, and was to manufacture them only into such description of lumber as the suppliants might require. So likewise no sales on time were to be made by him, nor was any lumber to be shipped or consigned to any person without the consent and approval of the suppliants for that purpose first obtained. No sales for cash were to be made by him except upon condition that the moneys arising from such sales should be forthwith handed over to the suppliants; and in like manner it was provided that all bills and notes received by Mr. Skead in payment of lumber sold on time should be delivered to the suppliants, such moneys to be applied 1st, in discharge of all moneys to be advanced by the suppliants in payment of the expenses attending the getting down the logs not yet brought down and attending the manufacturing the same into lumber, the getting the lumber to market, and all interest and all charges in respect thereof; and 2ndly, in

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reduction of the suppliants' debt. All the work, in fact, was to be done with the property, which was the suppliants', through Mr. Skead's intervention, to the satisfaction of the suppliants and as they might direct and require; he receiving whatever moneys should come to his hands as the proceeds of the sale of such property solely to the suppliants' use, and they supplying all the funds necessary to carry on the business, adding the amount to their claim against Mr. Skead.

Here then we find all those particulars provided for, the absence of which was relied upon in *Mollwo, March & Co.* v. *The Court of Wards* (1) as establishing the non-existence of the relations of principal and agent in that case. The property is conveyed to the suppliants who expressly reserve to themselves the right to dictate into what description of lumber the logs shall be manufactured, with whom alone contracts for the sale of the lumber may be entered into, to whom upon sales it shall be consigned. All this is provided for being done through the intervention of Mr. Skead, but for their sole benefit They assume to deal with the property as their own, in fact as it was in law by the terms of the indenture, but so to deal with it as is provided specially in the indenture, through the intervention of Mr. Skead, who covenants to act only under the direction of, and to the satisfaction of, the suppliants. There can be no doubt, it appears to me, that the effect and the intent of the agreement contained in this indenture was to make the suppliants principals and Mr. Skead their agent in carrying on the business, in which he had theretofore been engaged, in future for the benefit of the suppliants and with their property, until it should be sold or they should be paid their debt.

It was while conducting the business under the

(1.) L. R., 4. P.C., p. 419.

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terms of this indenture, that Mr. Skead made the agreement involved in his letter of the 6th of June and the acceptance thereof of the 5th July, 1877. It will be observed that as to the 60,000 logs cut in 1876-7, it was plainly the interest of the suppliants that those logs should be brought down to the mill to be manufactured into lumber for the suppliants' benefit. From the terms of the agreement it is apparent that it was contemplated that the suppliants should advance whatever sum might be necessary to secure their being brought down. The suppliants also were aware at the time that this indenture of May, 1877, was being prepared, and when it was executed, that Mr. Skead was in arrears to the Government for slide and boom dues accrued due in previous years' upon logs brought down and already manufactured into lumber. Mr. Skead's only doubt is whether they were not aware of this at the time of the execution of the indenture of December, 1876; but it is quite certain that they were aware of it in May, 1877, and that is sufficient for my present purpose, for, between December and May, there does not appear to have been anything done with the property mentioned in the indenture of December. The logs mentioned in that indenture still remained as logs, and the sawn lumber still remained at the mill, in May, 1877, when the indenture of the 11th May was executed, and that indenture was executed not merely to give to the bank security upon the 60,000 logs cut in the winter of 1876-77, but to make arrangements for the sale of all the sawn lumber then at the mill, and for the manufacture into lumber of all logs covered by the indenture of December, 1876, as well as by that of May, 1877.

Mr. Skead says that Mr. Hague, the general manager of the bank, when one of those indentures was being prepared, asked him "if any person had any lien upon

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this lumber?" Whereupon Mr. Skead asked in reply whether he meant the sawn lumber or the logs? Mr. Hague answered "both." To which Mr. Skead replied that "there was none but the Government lien for slidage and boomage." He adds also that on one or two occasions the bank had statements made out from his books by his book-keeper, who is now dead, and that his books would have shown the amounts of the arrears; and, finally, he says he has every reason to believe that the suppliants must have known the terms of the agreement because he was giving cheques on the bank for the amounts from time to time payable under the agreement. Mr. Hague not having been called to disprove his having had the knowledge thus imputed to the bank through him, I must find as a fact that undoubtedly at the time of the execution of the indenture of May, 1877, if not at the time of the execution of that of December, 1876, the bank had knowledge that Mr. Skead was in arrears to the Government for slide and boom dues on logs previously brought down to the mills and then already manufactured into lumber.

It would not, perhaps, be too much to infer that as business men they had taken the means which were in their power to inform themselves of the amount of those arrears, which they could have done by applying to Mr. Skead's book-keeper, to whom as appears they did apply upon some occasions for some purposes. Mr. Skead himself appears to have had no means whatever to pay those arrears, all his means being, as he says, in the business in which the bank had become interested in the manner provided by the indenture of May, 1877. Now the suppliants being interested in having the logs cut in 1876-7 brought down to the mill and manufactured into lumber, and Mr. Skead being bound by the in

denture of May, 1877, to take such measures as should most effectually secure the logs being brought down and manufactured into lumber such as the suppliants should require, and having in fact covenanted with the suppliants to carry on the business for their benefit under the terms of that indenture, he may, for the purpose of making arrangements with the Government which should secure the safe conduct of the logs to the mill without any interference upon the part of the Government, and for the purpose of providing for payment of the arrears of slide and boom dues, fairly, I think, be held to have been invested by the suppliants with sufficient authority to make such an arrangement with the Government as to him would seem reasonable and proper, and as he should make if still carrying on the business wholly and solely for his own benefit; and that, therefore, he had sufficient authority to bind them by the terms of the letter of June, 1877, which, under all the circumstances, must, I think, be admitted to have been reasonable and proper, and, indeed, in the interests of the suppliants; for I conclude from Mr. Skead's declared inability to pay the amount due to the Government, that if the Government had refused to comply with Mr. Skead's proposal, and had in any way proceeded to enforce their claim (whatever may have been their legal right) in that case, Mr. Skead's insolvency, which subsequently took place, would inevitably have been precipitated at a time when it would have been prejudicial to the suppliants' interest, unless they had come forward to pay the amount.

But whether it may, or may not, be a fair conclusion to draw that Mr. Skead was invested by the suppliants with sufficient authority, as their agent, to enter into the agreement made by him with the Government, it is not necessary to decide. It is not

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necessary to rest the case upon his having had such previous authority, for I am unable to arrive at any other conclusion from the evidence than that as a matter of fact the suppliants adopted, ratified and confirmed that agreement by acting under it, and advancing moneys to pay the Government in accordance with its terms, after they must be held to have had full knowledge of the nature, purport, tenor and effect of it.

I have already drawn attention to the fact (which acting as a juror, I find to be established by Mr. Skead's evidence, which is not contradicted) that at the time of the execution of the indenture of May, 1877, the bank who are the suppliants, had notice that Mr. Skead was in arrears to the Government for slide dues upon logs then already received by him.

Mr. Ritchie, who gave his evidence in that cautious manner which would naturally be expected from a truthful and conscientious witness, when interrogated as to the details of conversations after the lapse of some years, has, by his evidence, strongly impressed my mind with the conviction, and I therefore find it to be a fact, that upon some occasions in the summer of 1877, when presenting to the bank a cheque or cheques of Mr. Skead for slide dues calculated upon the basis of the letter of June, 1877, he gave to Mr. Kirby, the agent of the suppliants at Ottawa, and who, by the indenture of May, 1877, had control of Mr. Skead's business, the information that the cheque or cheques so presented was or were for arrears of slide dues at the rate of $2 per 1,000 feet, and that the Government was exacting and receiving at that rate from all parties in arrears for slide dues, of whom Mr. Skead was one. Further, that upon an occasion in the year 1877, or in the beginning of 1878, of Mr. Kirby making enquiries at the office of the Minister of Inland Revenue in relation to these slide dues, the witness exhib-

ited to him Mr. Skead's account with the Government for slide dues, showing him to be in arrears, and that witness then gave Mr. Kirby a pencil memorandum of that account as appearing in the ledger shown to him, which Mr. Kirby took away with him. Indeed Mr. Kirby's own evidence is, to my mind, quite conclusive, wholly irrespective of Mr. Ritchie's evidence, to affect the suppliants with knowledge of the contents of the agreement resulting upon the letter of the 6th June, 1877, before they made any of the payments made by them for slide dues in the year 1878.

Mr. Kirby, who was the suppliants' manager at Ottawa, from some time in 1870 unto some time in 1878, says:

The usual intimacy between a banker and his customer existed between Mr. Skead and myself, as manager of the suppliants. I did not know the *amount* of arrears of dues owing by Mr. Skead to the Government *at the date of the chattel mortgage.* I was very much in ignorance of the indebtedness of Mr. Skead to the Dominion Government for slide dues. Mr. Skead never told me the *amount* he was in arrears. *He only told me of being in arrears for dues when he wanted me on behalf of the suppliants to make payment of such arrears.* From the date of the chattel mortgage of the 11th May, 1877, if any payments were made by Mr. Skead on account of slide dues, they must have been paid by Mr. Skead's cheques.

Then speaking of the agreement or proposal contained in the letter of June 6th, 1877, he says:

I *believe* I first became aware of this proposal or arrangement *in the close of the year* 1877 *or in the beginning of the year* 1878. The way I became aware of this *proposal or arrangement* having been made was by finding it recorded in the books of the Crown Timber Office at Ottawa, when searching there in reference to other matters. I found in said books that there was a large arrear due by Mr. Skead for slide dues amounting to about $16,000. I then made enquiries at the Crown Timber Office as to the nature of this indebtedness, and was informed by the officials in the Crown Timber Office, *and others,* that Mr. Skead, as well as several other lumbermen, were *then* in arrears to the Dominion Government for slide dues and *were petitioning* or *applying* to the Government for an extension of time for payment of such arrears. *I also found at that time that the purport of the application* by such lumber-

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men, including Mr. Skead, for such extension *was to be allowed to pay such dues by paying to the Government the rate of two dollars per thousand feet, board measure, on all lumber shipped by them.* I was not *then* made aware, nor did I know till some time afterwards, that Mr. Skead had, previous to that time, been paying at the rate above described of $2 per one thousand feet, board measure, on all lumber shipped on account of said arrears of dues. I may have seen at that time just referred to, in the books of the Crown Timber Office, that some such payments had been made by Mr. Skead, and I think that the books in said office did show some such payments. After discovering that there was an indebtedness by Mr Skead for arrears of dues, I reported it to the suppliants, and called upon Mr. Skead's book-keeper shortly afterwards for a statement of the amounts paid by Mr. Skead under the above described *pro rata* proposal or arrangement. I remember asking Louis Belanger, Mr. Skead's book-keeper, for a memorandum of the amounts so paid. I got this memorandum and found that it showed payments on account of those dues of which I had not previously been *correctly* informed. *I must have known at that time that the pro rata arrangement for payment of the arrears was in existence, and I must thus have known all about it.*

He adds:

I must have had interviews with Mr. Skead about this *pro rata* arrangement, but I do not remember any special conversation with Mr. Skead about the matter. The suppliants [he adds] were very much incensed at the fact of there being the large arrears of slide dues mentioned when I reported same to them.

It appears, then, that the witness reported to his principals, the suppliants, the contents of this memorandum furnished to him by Mr. Skead's book-keeeper; and it may reasonably be inferred that he forwarded it to them.

He had had also a memorandum previously furnished him by an officer of the Crown Timber Office, but he neither gives us, with any degree of preciseness, the date of his acquiring the information which he admits he did acquire, nor do the suppliants, who must have in their possession the communication or report upon the subject made to them by their agent, and which, as he says, so much incensed them, produce the report, or furnish the Court with any information as to its date.

Under these circumstances it would not be unreasonable to take Mr. Kirby's evidence in a sense most strongly against the now contention of the suppliants, and that evidence, if criticised closely, would justify the conclusion that Mr. Kirby's enquiries at the Crown Timber Office, and the information which he admits he obtained there, was obtained while Mr. Skead's proposal as contained in the letter of the 6th June, 1877, was as yet under the consideration of the Minister, that is, before the 5th July, 1877; and that the payment previously made by Mr. Skead upon the basis of that proposal, which the witness admits that he thinks he saw in the books of the department, may have been the payment made accompanying the letter of the 6th June, which was a payment calculated upon the basis of the proposition contained in that lètter. The witness says:—

The way I became aware of this proposal or arrangement having been made, was by finding it recorded in the books of the Crown Timber Office at Ottawa when searching there in reference to other matters. I found in said books that there was a large arrear due by Mr. Skead for slide dues, amounting to about $16,000. I then made enquiries at the Crown Timber Office as to the nature of this indebtedness, and was informed by the officials in the Crown Timber Office, *and others,* that Mr. Skead, as well as several other lumbermen, were *then* in arrear to the Dominion Government for slide dues, and were petitioning or applying to the Government for an extension of time for payment of such arrears. I also found at that time that the purport of the application by such lumbermen, including Mr. Skead, for such extension, was to be allowed to pay such dues by paying to the Government at the rate of two dollars per thousand feet, board measure, on all lumber shipped by them.

From this language it would seem that the time when the bank, through their agent, Mr. Kirby, became acquainted with the terms of the proposal contained in the letter of the 6th June, 1877, was while that application was under the consideration of the Government and before it was acceded to, and this

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view would accord with Mr. Ritchie's recollection that it was in the summer of 1877, when presenting some or one of Mr. Skead's cheques to cover the agreed rate of $2 per M. feet, that he gave Mr. Kirby information of the purport of the agreement under which the cheque was given.

But however this may be, I can have no hesitation in finding upon this evidence that the suppliants had all the information spoken of by the witness and relating to the subject, prior to the payment made by them for slide dues on, and subsequently to, the 25th May, 1878; and, therefore, long before the payment made by them of the amounts now claimed to have been paid under protest upon and subsequent to the 22nd June, 1878.

I can come to no other conclusion than that the payments made by the bank upon, and subsequently to, the 25th May, and prior to the 22nd June, 1878, were made by the suppliants with full knowledge of the terms of the agreement made in adoption of the proposal contained in Mr. Skead's letter of the 6th June, 1877, and in ratification and confirmation of that agreement; and that the protest accompanying the payments made upon, and subsequently to, the 22nd June, 1878, was merely designed, in consequence of Mr. Skead's insolvency, to evade and defeat the agreement, of which up to that date the suppliants had been willing to take, and did take, the benefit.

The petition must, therefore, in my opinion, be dismissed with costs. As the suppliants have submitted and have undertaken to pay what the court should determine to be properly payable under the circumstances, I think they should pay the arrears according to the account as appearing in the books of the Crown Timber Office, the correctness of which has not been disputed; together with simple interest on the amount

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from time to time remaining due, and that it should be referred to the registrar of this court to determine the amount in case the parties shall differ about the same; which is ordered accordingly.

Having taken the view which I have above expressed of the case, it has not been necessary for me to consider whether, if the mortgages had been ordinary chattel mortgages with provisions for the mortgagor retaining possession and carrying on his business in the ordinary manner until default, it would, or not, have been in his power *in the interest of his business* to have made the arrangement with the Government contained in the letter of 6th June, 1877, so as to bind the suppliants equally as he himself would have been bound thereby if he had continued to carry on the business and had made no default; whether in fact the arrangement was or not proper and expedient to be made by him in the ordinary conduct of his business; and if so, whether it was, or not, one which would be proper for a mortgagor, under a chattel mortgage framed in the ordinary way, to make so as to bind the mortgagees of the property.

*Petition dismissed with costs.**

Solicitors for suppliants: *Stewart, Chrysler & Gormully.*

Solicitors for respondents: *O'Connor & Hogg.*

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June 22.

*On appeal to the Supreme Court of Canada by the suppliants, the judgment of Gwynne, J. in the Exchequer Court was reversed.

PRESENT: Sir W. J. Ritchie, C. J., Strong, Fournier, Henry and Taschereau, JJ.

SIR W. J. RITCHIE, C. J.—The question I am called upon to discuss in this case is one between the Dominion Government and the appellants, the Merchants Bank of Canada, (the suppliants in the court below) claiming as mortgagees under two chattel mortgages, which have been pleaded and produced herein.

The first mortgage, dated the 18th day of December, 1876, contains this provision:

[His Lordship here recites so much of the said mortgage as is stated in the judgment of the Exchequer Court on page 30].

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The learned judge in the court below found, as a matter of fact, that a collateral agreement was made between the parties at the same time the first mortgage was executed, whereby the mortgagor was to remain in possession of the property and carry on the business of its manufacture and sale for the benefit of the appellants, and as their agent, but I have been unable to discover any evidence of such an agreement.

The second mortgage dated 11th May, 1877, contains the following provisions:

[His Lordship here recites so much of this mortgage as is stated in the judgment of the Exchequer Court, on pages 32-34].

Upon the dates when the mortgages were executed it is undisputed that Skead was indebted to the appellants in the amounts intended to be secured thereby, that he was carrying on the business as usual, and that he was in the sole possession of the property granted by such mortgages. It is also established by the evidence that Skead continued to carry on his business for and on his own account without change, until he was made a bankrupt by the proceedings in bankruptcy.

I can find no evidence, whatever, in this case, of any contract, express or implied, creating a general lien or charge on the lumber in question so as to bind third persons to whom the same has been conveyed for valuable consideration.

With reference to the agreement entered into between Skead and the Crown upon the terms contained in his letter to the Minister of Inland Revenue on the 6th June, 1877, and relied upon by the Crown in support of the seizure herein, I find that Skead had no authority, express or implied, from the appellants, after the execution of the mortgages, to interfere with their rights under such mortgages by pledging the property covered thereby for the payment of any arrears of Crown dues; or to impose on such property any lien, charge or burden, other than the law had attached thereto, for the slidage and boomage of that specific property.

Nor does the evidence establish the fact that the bank knew that there were arrears other than on the lumber mentioned in the mortgages, or that the Crown claimed any lien or charge other than for the slidage and boomage on the logs in dispute. But, even if the bank did know there were arrears for slide or boom dues on logs previously brought down and manufactured into lumber, such knowledge would not create a charge or attach a lien for such dues on other lumber than that for the slidage and boomage of which they became due. Moreover, if Skead did propose, by any arrangement with the Crown, to give the Crown a charge or lien for arrearages due upon other lumber, I can discover no sufficient evidence of any adoption, ratification or confirmation of any such arrangement by the appellants.

I find nothing in the law, or in the regulations, giving the Crown any general lien for arrears or general balances, or any lien except on the specific lumber for the amount due for its passage or boomage, viz.: $4\frac{1}{3}$ cents per log, equal to 26 cents per 1,000 ft. b.m.

As to usage in respect to collecting dues, it appears the regula-

tions have become inoperative from the fact that, as Mr. Russell says, it is impossible to collect the dues at the slides. On account of this impossibility of enforcing the regulations, the Government appear to have generally allowed logs to pass through the slides without a compliance with any of the provisions of the regulations in that behalf. With respect to Skead's logs, Mr. Russell says that they were allowed to pass without the dues being demanded in advance for the reason above mentioned. He explains that the regulations were made without reference to the further development of the slide system, and that he had recommended new regulations to meet the requirements of the extended system, but they appear never to have been adopted by the Government. Now, the officers of the Crown who were examined in this case appear to have been under the impression that so long as there was sufficient lumber in the possession of the mill-owner to satisfy the claims of the Government for dues against him, the Government was secured; but I can discover no proof of any understanding or arrangement by which, in consequence of logs being allowed to come through the slides without the regulations being complied with, any general lien should attach to them at the mills. Nor do I find any instance where the Government asked, or that the mill-owners generally, or any one of them in particular, agreed that any such lien should attach to lumber manufactured at the mills; and no evidence was given of any occasion where such a general lien was claimed by the Government and submitted to by the mill-owners, or enforced by the Government.

The only evidence as to usage in respect of Skead's logs is found in Mr. Russell's evidence:

"Q. Did you ever press Mr. Skead for payment of arrears?

A. Decidedly I did.

Q. By letter?

A. By letter and verbally.

Q. Was that in 1873?

A. It was every year.

Q. From 1873?

A. Yes; and before. The accounts are regularly rendered and they are dunned.

Q. In answer to these duns or pressures did Mr. Skead see you himself?

A. He comes in casually.

Q. Did you give him time for the payment on some of his arrears?

A. They all got time that way during the bad times.

Q. You say that he has seen you with reference to the demands which have been made upon him?

A, Yes.

* * * *

Q. You charged these dues against Mr. Skead personally?

A. Yes.

Q. You charged these dues as an ordinary debit, did you not?

A. Yes; from the beginning.

* * * *

Q. After June, 1887, did he continue his business up to the time of his bankruptcy?

A. Yes.

Q. Had he made shipments of lumber during that time?

A. I am not aware. I have no record of them. The railway takes away lumber. I think there were arrangements for sales made in 1877, some of them were carried

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out afterwards, I know. I do not know whether they were all or not.

Q. Up to Mr. Skead's bankruptcy, or the time that the bank took possession, did he carry on his business as he had previously done?

A. Apparently as usual, he gave cheques and these cheques were received.

Q. Were you aware of the mortgages which the bank had obtained?

A. Not then.

Q. When did you first become aware of the mortgages of the bank?

A. I forget.

Q. Was it after the bankruptcy?

A. Yes; I think so.

Q. The only arrangement that you had with Mr. Skead was that contained in the letter of the 6th June?

A. It was the only explicit arrangement as to what he was to pay.

Q. You had no other arrangement except that one?

A. No other special arrangement.

Q. Had you any other arrangement at all?

A. No; except a perfect understanding that the timber was liable to seizure. That was the reason that all the lumberers always showed me that they had plenty left.

Q. Was there anything said between you and Mr. Skead about the timber being liable to seizure?

A. It would not be discussed by any lumberer. When they give me memoranda showing there is enough left to cover all their indebtedness, it means that there is enough there to seize.

Q. But there was nothing said to Mr. Skead about it?

A. We talked about the quantity there. We would not be so strict in his case as in others.

Q. You have already stated:—

"The letter dated 6th June, 1877, was received by me from Mr. Skead. This letter contains the terms of the only arrangement proposed by Mr. Skead for the settlement of his arrear dues to the Crown, and this arrangement was agreed to by the Crown, having been first reported favorably on by me, as appears by my letter of 2nd July, 1877, now marked as exhibit 'G.' That letter is now filed as petitioners' exhibit, number eleven." You continue:—

"I do not know of any other arrangement having been made by Mr. Skead as to the payment of his arrears, and no other arrangement was made with me in reference to the said arrears."

That is correct is it not?

A. Yes; that is the only special arrangement made.

Q. I will read further:—

"I did not consider that Mr. Skead had made any special arrangement to pay those dues apart from his obligation to pay under the regulations, until his arrangement already referred to with the Minister of Inland Revenue."

A. That is what I have been saying to you.

Q. Then you say here:—

"Mr. Skead never made any verbal arrangement with me for the payment of dues."

A. I would not admit any verbal arrangement.

Q. You understand your duties too well for that; you would not do anything so unofficial?

A. No; there would be a great

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deal said backward and forward, of course.

Q. But when you got to the basis of an agreement you would, of course, put that in writing?

A. It was not for me to decide upon. We would talk about the usual business, and there would be the fact that there was plenty there to secure the Government that we could, in my opinion, take possession of. The quantities of timber that they had on hand were always made the basis of delay in cases of that kind,—the fact that there was enough for the Government to take its arrears upon.

Q. Was a seizure made to enforce arrears immediately, or was it left in abeyance?

A. It had been left in abeyance on various grounds.

Q. Will you state what was the arrangement with Mr. Skead, or the understanding with him, with reference to the security of the Crown for the payment of arrears?

A. Mr. Skead desired me to go up and look at the timber and see if there was ample security there. He drove me up, and I saw that there was ample security. Taking into consideration the state of his business and the number of logs that he had, I believe that he was justified in saying that, if the business had gone on, he could have met all his obligations.

Q. When was this? On more than one occasion?

A. Not more than one occasion specifically that way, though I have often been there. I was satisfied that the proposition which he made was a reasonable one.

Q. (By the Court). When was this?

A. Before recommending Mr. Skead's proposition to the Commissioner.

Q. What proposition?

A. The proposal of June, 1877. The matter was referred to me for report.

Q. That is the one in which he is to pay two dollars per thousand feet?

A. Yes, *pro rata*.

Q. You went to the mills to see if there was sufficient security?

A. Yes.

Q. Security for what?

A. For the whole sum due on the whole material sawn and unsawn. The rate at the *pro rata* would cover his indebtedness.

Q. Was there anything said or understood between you and Mr. Skead with reference to rights of action of the Crown in case he made default in payments?

A. It was never talked of. All that was asked was that they should have enough stock on hand to cover the demand of the Crown."

What does all this go to show but that so long as Skead appeared to have sufficient property on hand to cover the demand of the Government, the officers of the Crown were willing to trust him upon the understanding that the timber arriving at different times at the mills was liable to seizure for the specific amount of dues payable thereon? Certainly it is no evidence of any understanding or usage that the timber at the mills at any given time was liable for the arrears of dues for timber passed in years gone by.

But, if Mr. Russell's evidence is to be relied on, the Crown officers, as a matter of fact, did not, in this case, act on the supposition that any charge on the lumber existed

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because he says (*ante* p. 47) these dues were charged against Skead personally, and as an ordinary debt from the beginning; and he makes it clear that the timber w. s not seized under, or by virtue of, any claim or lien arising from any understanding, usage or contract, for he distinctly says that he had no authority for making the seizure except the authority contained in the regulations and statutes.

Upon this point Mr. Russell speaks as follows in his direct examination :—

"Q. If Mr. Skead had not made this arrangement to pay two dollars per thousand on the arrears due by him, what course would the Government have pursued with reference to his stuff?

A. If he had deferred too long I would have taken possession of his lumber anywhere in the Province. I have done it in other cases.

Q. Mr. Skead was aware of that?

A. Yes. I had been in the habit and practice of doing so. I have seized lumber on the Richelieu, going out of the country. I held myself justified on account of the law and regulations to seize for the slide dues."

And in cross-examination upon this point :—

"Q. You say that you thought those regulations enabled you to seize for slide dues in any part of the Province?

A. Yes.

Q. You say that those regulations gave you the same powers as to dues to be collected for the Ontario Government?

A. No; I said I thought inasmuch as there were statutes of the Board of Works which provided for timber being seized anywhere within the Province where timber, or the owner of it, was to be found —it is all in the statutes.

Q. I should like to see the statute which you think gave you the right?

A. There are the old Consolidated Statutes and the new act, 31 Victoria, chapter 12, section 61, sub-section 3.

Q. Is that all?

A. Yes; that is all the act mentions about slide dues."

Whether the Government, in proceeding to enforce their claim (whatever may have been their legal rights), assuming their refusal to comply with Mr. Skead's proposal as to payment of slide dues, would have precipitated Mr. Skead's insolvency or not, and whether such an event would have been so prejudicial to the appellants as to warrant Skead in making the arrangement he did in their interest, as suggested by the learned judge in the court below, are matters of mere surmise, and matters concerning which I have no right to speculate. But even if we accept the learned judge's conclusions in this behalf, they cannot affect the question upon which the whole case turns. Either Skead had, or had not, authority to bind the appellant's property by the agreement he entered into with the Government. If he had not, the agreement is not available to the Crown. I think it is clear from the evidence that he had no such authority, and, such being the case, we have no right to say that he ought to have had, or that what was done was for the appellants' benefit, and, therefore, they must be bound by it.

I am of opinion that the fair in-

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tent and meaning of the second mortgage, and of the special provisions contained therein, was to enable Skead to carry on his business as usual in a proper and efficient manner to the best advantage to himself, and in order to secure the rapid realization of funds for the liquidation of his indebtedness, and not as the agent of the appellants. It appears to me that the transaction was in no sense that of principal and agent, but of debtor and creditor, in which the debtor by mortgage, by way of collateral security, transferred property to his creditor, and agreed to retain possession thereof and so deal with it that its value should be realized in such a manner as to secure to the creditor the proceeds in payment of his debt; the surplus, if any, being for the benefit of the mortgagor.

I can find nothing in the evidence to justify me in saying that the appellants, in the business carried on by Skead in connection with this lumber, were trading as principals and put forward Skead as the ostensible trader, when, in reality, he was only their agent.

I cannot understand how Skead, having mortgaged certain property to the bank, could afterwards, without the consent of the bank, give any other lien or security thereon to the Crown for arrears of slidage dues upon other property, in respect of which the indebtedness to the Crown was his own and not that of the bank, and where the effect of such lien would be simply to give the Crown a preferental claim against the property, and so cut out the bank's security. Having transferred his property in the lumber by way of mortgage, surely he was not in a position to create, by agreement or otherwise, a charge on such lumber to take precedence of the mortgages. The Chattel Mortgage Act would be of little avail if the agreement put forward by the Crown in this case should prevail to cut down a security in reference to which all the provisions of that act had been complied with.

I am of opinion to allow the appeal with costs.

Per HENRY, J.—There is nothing in the evidence to show an intention on the part of either Skead or the officers of the Crown that there should be any substitution of logs subsequently coming down to the mills for the logs upon which a lien would have rested in virtue of the original agreement between them; and in the absence of an express contract or stipulation to that effect, the court on appeal is bound to hold that no lien attached to other than the specific property in respect of which such lien was created.

Per FOURNIER, J.—Without giving any decided opinion upon the effect of sec. 71 of 31 Vic., c. 12, in respect to continuing in force under that statute regulations made under chapter 28, Consolidated Statutes of Canada, such regulations might be looked at in order to ascertain the amount of dues which could be claimed under them; because the appellants could not, at the same time, admit and deny the validity of such regulations. The offer made by them to pay to the Crown the sum of $1,500, as being the only amount of dues owned to the Crown on the lumber in question, is cer-

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tainly incompatible with their contention that the regulations, in virtue of which this sum was due, were no longer in force. But, admitting this contention to be well founded in law, the logs in question having passed through slides which are the property of the Government, there would still be due to the Government the value of the services rendered. In tendering the sum of $1,500, the appellants virtually admitted that something was justly due to the Government, if not legally due, in virtue of the regulations.

STRONG and TASCHEREAU, JJ. dissented.

Appeal allowed with costs.

Coram FOURNIER, J.

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Jan. 23.

DAVID McPHERSON, (CLAIMANT)........APPELLANT;

AND

HER MAJESTY THE QUEEN.........RESPONDENT.

Damages to property arising from the construction and operation of a railway—Loss of business profits—Increased risk from fire—31 Vic. (D.), c. 12, s., 34-40—8 & 9 Vic. c. 18 s. 68 (Imperial Lands Clauses Consol. Act).

Held :—(1). That section 34 of 31 Vic. (D.) c. 12, (The Public Works Act) which provides for the reference to the Board of Official Arbitrators of claims for damages arising from the construction, or connected with the execution of any public work, only contemplates claims for direct or consequent damages to the property, and not to the person or to the business of the claimant.

(2). That the phrase "injury done" in 31 Vic. (D.) c. 12, s. 40 is commensurate with, and has the same intendment as, the phrase "injuriously affected" in 8 & 9 Vic. c. 18, s. 68 (Imperial Lands Clauses Consolidation Act), and, in so far as the similarity extends, cases decided under the Imperial act may be cited with authority in construing the Canadian statute.

(3). That although the claimant was entitled to reasonable compensation for the damage sustained in respect of the injury to, and depreciation in value of, his property arising from the construction and operation of a railway in its immediate vicinity, he was not entitled to damages for loss and injury to his business consequent thereon; nor for extra rates of insurance it might become necessary for him to pay upon vessels in course of construction in his shipyard by reason of increased risk from fire from the operation of the railway.

Metropolitan Board of Works v. *McCarthy* (L. R. 7 H. L. 243) followed.

APPEAL from an award of the Official Arbitrators.

McPherson, a ship-builder by trade, was owner in fee of a certain lot of land situate in the city of Halifax, upon which a small wharf and some buildings adapted for shipbuilding purposes had been erected.

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Statement of Facts.

Prior to the extension of the Intercolonial railway from Richmond depôt to North street, McPherson had free and uninteruped access to his ship-yard through Young street, which lay to the north of the yard.

In extending the railway from Richmond to North street, a portion of the track was laid across Young street and the grade of that street raised several feet to make it correspond with the grade of the track. In consequence of this alteration and obstruction, and the frequent running of trains and engines along the railway, it became tedious and dangerous for McPherson, who had no other access with teams to his ship-yard than by Young street and across the track, to haul to the yard timber and other materials required in the prosecution of his business.

During the progress of the work of extension, by the direction of the Government engineer, an embankment was built across the road bed, through which a culvert was constructed. This culvert was carried from the embankment a distance of 120 feet upon the claimant's property. Before the termination of the works in question, the culvert gave way in consequence of the pressure of water accumulated and detained by the embankment; McPherson's ship-yard becoming inundated thereby, and a quantity of lumber, tools, and other materials being damaged and destroyed by the water. Under these circumstances McPherson was unable to carry on his business.

Owing to the great danger of fire from passing trains and engines, it would have been impossible for the claimant to obtain insurance upon vessels in course of construction in his ship-yard without having extended it some 80 feet into the harbor, in order to bring the stems of such vessels 100 feet distant from the east side of the railway. Upon that condition alone could

insurance have been secured, and only then by paying extra rates therefor.

Upon these facts, McPherson put forward a claim for damages against the Government amounting to $7,200. of which the particulars are as follows:

(*a*) For loss and injury to his business, at $1,200.00 per annum.

(*b*) For injury to and depreciation of his property, $6,000.00.

This claim was referred to the Official Arbitrators, who awarded McPherson the sum of five hundred dollars in full satisfaction and discharge of all claims arising in the premises. From this award the claimant appealed to the court.

The appeal was heard before Mr. Justice Fournier.

Gormully for appellant;

Lash Q.C. for respondent.

FOURNIER, J. now (January 23rd, 1882) delivered judgment.

Par leur sentence, en date du 18 septembre 1880, les Arbitres Officiels, auxquels l'honorable Ministre des Travaux Publics de la Puissance avait référé la réclamation du pétitionnaire McPherson, lui ont adjugé la somme de $500, comme compensation des dommages lui résultant des travaux de l'extension du chemin de fer Intercolonial dans la cité d'Halifax.

Se croyant lésé par cette sentence, le pétitionnaire en a appelé à cette cour, en vertu de l'acte 42 Vic., c. 8. Les griefs d'appel sont en substance,—que la sentence en question est contraire à la loi et à la preuve, et que le montant des dommages accordés est insuffisant.

La validité de la sentence est encore attaquée pour la raison que le nom de l'un des Arbitres, qui n'a pas entendu la cause, se trouve mentionné dans la sentence, comme l'un de ceux qui l'ont rendue.

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Ce dernier grief a été abandonné lors de l'argument. Cette sentence, comme toutes celles des Arbitres Officiels, ne fait mention que du montant accordé au pétitionnaire, sans indiquer les motifs de la décision ni même les items de la réclamation admis ou rejetés. Cette adjudication générale, encore autorisée par le statut, bien que depuis un appel ait été accordé des sentences des Arbitres, m'oblige à faire un examen complet et détaillé de tous les faits de la cause, sans avoir l'avantage de pouvoir comparer les motifs des Arbitres avec les raisons qui peuvent m'engager à tomber d'accord ou à différer d'opinion avec eux. Je me permettrai de faire observer, qu'en accordant ce droit d'appel, je suis persuadé que non seulement l'exécution du devoir imposé à cette cour eut été rendu plus facile; mais que les intérêts de la justice n'en eussent été que mieux servis, en exigeant au moins des Arbitres Officiels l'énumération, dans leur sentence, des items admis ou rejetés par eux.

La propriété, à l'occasion de laquelle le pétitionnaire a fait sa présente réclamation, est située dans la cité d'Halifax et bornée à l'ouest par la partie du chemin de fer Intercolonial, entre le dépôt de Richmond et la rue North de cette cité. Elle mesure cent cinquante pieds sur la ligne du chemin de fer et s'étend sur l'est environ deux cents pieds, jusqu'à ce qu'elle atteigne les eaux du havre d'Halifax. Il s'y trouve un quai et des bâtisses employés à la construction des vaisseaux. Pendant plusieurs années, le pétitionnaire a exploité ce terrain comme chantier de construction et y a fait des affaires tellement profitables, par la construction de navires, que pour être plus à portée de surveiller ses travaux, il s'est construit dans les environs une résidence coûteuse.

L'exploitation de cette industrie, sur ce terrain en question, se faisait avec toutes les facilités désirables

—rien n'en gênait l'accès par la rue Young sur le côté sud; le voisinage ne lui causait pas de dangers particuliers par les risques d'incendies. Mais, cet état de chose a entièrement changé par suite de l'extension de l'Intercolonial par la rue Young, dont le niveau a été élevé de deux pieds et demi à cinq pieds, afin de le faire correspondre avec le reste de la voie de l'Intercolonial.

Cette élévation du niveau de la rue Young, le passage fréquent, à peu près toutes les dix-huit minutes, des trains de chemin de fer, leur organisation et composition, qui exigent l'allée et venue des locomotives à presque tous les instants (*shunting*), ont rendu difficile et dangereux, pour ne pas dire impossible, le transport du bois de construction et autres matériaux nécessaires à l'exercise de son industrie, en passant pardessus la voie ferrée qui maintenant obstrue la rue Young, par laquelle il avait son accès ordinaire à son chantier. En front de sa propriété, du côté sud-ouest, le niveau du chemin de fer est de dix-neuf pieds au-dessus de son terrain.

Dans le cours des travaux, il a été fait sous la direction des ingénieurs employés par le Gouvernement à travers le remblai du dit chemin de fer, un canal (*culvert*) qui a été continué, sur le terrain du pétitionnaire une distance de cent-vingt pieds, tel qu'indiqué sur le plan de la propriété produit en cette cause.

Avant la fin des travaux en question, la pression des eaux accumulées et retenues par le remblai en ayant causé la rupture, le chantier du pétitionnaire s'est trouvé inondé et couvert des débris du remblai. Par suite de cet accident, des bois de construction et autres matériaux ont été détériorés et emportés par les eaux.

Le pétitionnaire se plaint que les changements apportés à la jouissance et exploitation de sa propriété, par la construction des ouvrages en question, l'ont

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mis dans l'impossibilité de continuer l'exercice de son industrie dans son chantier; que ses boutiques, son outillage, ses matériaux de construction sont endommagés; sa propriété est devenue improductive et il est lui-même mis dans l'impossibilité d'exercer une industrie dont il tirait honorablement sa subsistance et celle de sa famille.

Pour se mettre à l'abri du danger d'incendie, résultant du passage fréquent des locomotives, il lui faudrait s'éloigner de la voie ferrée; mais alors, pour se procurer l'espace nécessaire, le pétitionnaire serait obligé de faire, du côté du hâvre, une chaussée s'étendant au moins quatre-vingts pieds dans les eaux du hâvre,—ouvrage dont le coût ne serait pas moins de cinq à six mille piastres.

La plupart des compagnies d'assurance ont déclaré, par leurs agents, qu'elles ne prendraient aucune assurance quelconque sur les vaisseaux en construction dans son chantier, en conséquence des risques trop considérables d'incendies depuis l'extension du chemin de fer; quelques-unes ont, cependant, déclaré qu'elles en accepteraient à des taux extras, à la condition que la proue (*stem*) du vaisseau fut à la distance d'environ cent pieds du côté est du dit chemin de fer. Ce qui exigerait la construction de la chaussée (*embankment*) mentionnée plus haut. Construction qu'il ne peut faire, faute de moyens.

Pour toutes ces causes, il réclame une juste compensation pour le temps qu'il a été empêché d'exercer son industrie, la diminution de valeur de son chantier, perte de profits dans ses affaires, pour le passé et pour l'avenir, et pour tous dommages causés, comme pour ceux qui pourront ci-après survenir et qui pourraient lui être causés, dans son industrie et à sa propriété par les travaux de construction de l'extension du dit chemin de fer et sa mise en opération.

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Il estime à douze cents piastres par année le tort causé à ses affaires, et le dommage (*injury*) et la dépréciation de sa propriété à six mille piastres.

Le pétitionnaire a fait entendre plusieurs témoins pour établir les allégations de sa requête et le montant de ses dommages.

De son côté, la Couronne a fait une preuve tendant à diminuer le montant des dommages, mais sans produire de défense régulière en réponse à la réclamation du pétitionnaire. Je crois que les procédés suivis dans ce cas sont conformes à la pratique du tribunal des Arbitres Officiels. Ce n'est donc que par l'argument, devant cette cour, du savant conseil de la Couronne, que l'on peut voir quels sont les moyens de défense opposés aux griefs du pétitionnaire. Ils sont au nombre de trois, ce sont les suivants :

1° La perte résultant soit de l'impossibilité d'assurer, soit de l'augmentation des primes d'assurance, en conséquence des risques plus considérables résultant des passages fréquents des locomotives le long du chantier du pétitionnaire, ne donne en loi aucun titre à une compensation.

2° Les inconvénients du passage pardessus le chemin de fer lui-même, étant communs au public et au pétitionnaire, ne donnent à ce dernier aucun droit à une compensation.

3° Les dommages résultant de l'élévation du niveau de la rue Young, indépendamment de la difficulté d'accès à la propriété du pétitionnaire et le dommage qui en est résulté pour son industrie comme constructeur de vaisseau, ne peuvent non plus former le sujet d'une demande en indemnité.

Quant aux autres griefs du pétitionnaire, savoir :

1° Dommages qui peuvent résulter de la construction du chemin de fer, quoique aucune partie de la propriété du pétitionnaire ait été prise pour le chemin,

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et aussi de la construction d'un canal (*drain*) fait sur sa propriété pour faciliter l'égout des eaux accumulées par la chaussée du chemin de fer ;

2° Les dommages résultant de la rupture de la chaussée du chemin de fer (*embankment* ;

3° Les dommages que le pétitionnaire peut avoir soufferts en conséquence du changement de niveau de la rue Young.

Le savant conseil a déclaré qu'il ne niait pas l'existence du droit à une compensation pour les dommages résultant de ces diverses causes. La question pour ces griefs se réduira donc à savoir si l'indemnité accordée est suffisante. La sentence n'indiquant aucun montant en particulier, ce n'est que par l'examen de toute la preuve, sur ces divers griefs, qu'il est possible d'arriver à une conclusion sur la suffisance ou l'insuffisance du montant accordé.

L'enquête a pleinement justifié les allégations du pétitionnaire, quant aux diverses causes des dommages dont il se plaint, mais elles ne sont pas toutes reconnues en loi comme donnant droit à une indemnité.

Les questions de droit soulevées en cette cour ont été fréquemment débattues devant les cours en Angleterre, et la jurisprudence sur ces divers points est bien établie.

Si les précédents sont fondés sur une loi analogue à celle qui règle la question des dommages résultant de la construction des travaux publics dans ce pays, ils sont parfaitement applicables à la cause actuelle. Mais le savant conseil du pétitionnaire prétend que tel n'est pas le cas. La 31e Vic., (D.) c. 12, sur laquelle est fondée la présente réclamation, est, dit-il, beaucoup plus étendue que la loi anglaise ; elle ne contient pas, suivant lui, comme cette dernière, les mots "*injuriously affected*" du "*Lands Clauses Consolidation Act*," 8 et 9

Vic. c. 18 s. 68, qui ont tant de fois fait le sujet des décisions des plus hautes cours d'Angleterre.

Il en conclut que les dommages personnels et d'autres résultant de certains inconvénients de la construction d'un chemin de fer n'ont été restreints, par la jurisprudence anglaise, que par suite de l'insertion de ces mots "*injuriously affected*" qui, dit-il, ne se trouvent pas dans notre loi.

Cette assertion est elle correcte ?

Pour l'appuyer, le savant conseil a cité la sec. 34 de la 31 Vic., (D) c. 12:

If any person or body corporate has any claim for property taken, or for alleged, direct or consequent damage to property arising from the construction, or connected with the execution of any public work, &c.

Cette partie de la section, qui est la seule qui puisse affecter la réclamation du pétitionnaire, n'a évidemment rapport qu'au dommage, soit direct, soit indirect (*consequent*) à la propriété et non à la personne ni aux affaires de l'exproprié.

La section 40 du même acte, qui indique aux Arbitres la règle à suivre dans leur estimation des dommages; est encore plus formelle et contient sinon les mêmes termes, du moins en substance, la même restriction que l'acte impérial Elle est ainsi conçue:

The Arbitrators, in estimating and awarding the amount to be paid to any claimant *for injury done to any land or property*, and in estimating the amount to be paid for lands taken by the Minister, under this Act, or taken by the proper authority under any former Act, shall estimate or assess the value thereof at the time when the injury complained of was occasioned, and not the value of the adjoining lands at the time of making their award.

Les expressions "*injuriously affected*" de l'acte impérial et "*injury done*" dans la 31 Vic., (D) c. 12, peuvent certainement être considérées comme parfaitement équivalentes. Ainsi les décisions rendues sur l'interprétation de l'acte impérial peuvent être citées, avec à propos, pour l'interprétation de notre statut.

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Les deux parties se sont appuyées sur la cause du *Metropolitan Board of Works* v. *McCarthy*, (1) et chacune l'a invoquée dans la partie qu'il croyait favorable à ses prétentions.

En effet, cette cause a beaucoup de similitude avec la présente, il serait inutile d'en donner une analyse, elle est trop bien connue.

Les principes affirmés, dans l'argument, sont d'autant plus applicables à cette cause, qu'il y a plus de ressemblance dans la situation des propriétés faisant l'objet des réclamations en indemnité. Comme dans le cas de McCarthy, la propriété du pétitionnaire était, avant la construction des ouvrages dont il se plaint, accessible de deux manières ; par le hâvre d'Halifax dont elle est riveraine, et par la rue Young qui la borne au côté ouest, et qui servait de moyens de communication ordinaire pour arriver à la propriété du pétitionnaire ; mais à la différence du cas de McCarthy, qui avait accès à sa propriété par une rue et par un *dock*, ce n'est pas la communication par eau, mais l'accès par la rue Young que l'on a obstrué.

La construction de la chaussée du chemin de fer, dont l'élévation à cet endroit varie de deux pieds et demi à cinq pieds, le passage très fréquent des locomotives à cet endroit ont l'effet de rendre encore plus difficile et plus dangereux le transport du bois de construction par la rue Young et diminue si considérablement la facilité d'accès à son chantier, que le pétitionnaire a été en conséquence forcé d'abandonner la construction des vaisseaux.

Si, d'après les décisions rendues en pareilles matières, le pétitionnaire ne peut réclamer d'indemnité par rapport au dommage fait à son industrie, par le nouvel état de chose, il n'en est pas moins certain que sa propriété, à quelque destination qu'il pourra maintenant

(1) L. R. 7 H. L. 243.

l'employer, a considérablement diminuée de valeur réelle. Quoiqu'elle soit bien située pour la construction des quais, elle ne pourrait pas même être avantageusement exploitée de cette manière, à cause des difficultés de faire des transports par la rue Young.

La construction du canal (*drain*), fait pour l'écoulement des eaux accumulées par la chaussée du chemin de fer, a également l'effet de diminuer la valeur de cette propriété en y amenant une plus grande quantité d'eau que celle qui, auparavant, s'y écoulait naturellement.

Ce canal est aussi un obstacle aux constructions qui pourraient être plus tard érigées à cet endroit.

Toutes ces circonstances réunies sont-elles suffisantes pour justifier une demande en indemnité? Je le crois, d'après les principes qui forment la base de la décision dans la cause du *Metropolitan Board of Works* vs. *McCarthy* (1).

Lord Cairns résume ainsi les faits de cette cause, qui, comme je l'ai dit plus haut, ont beaucoup d'analogie avec la présente :

Now, my Lords, divesting the present case of the more precise description which I have read from the Case, it appears to me to amount to this:—The occupier or tenant of a house has got, in front of his house, two highways, the one highway being a road or a street, and the other, immediately beyond and abutting upon the road or the street, being a highway by water. The highway by water is taken away from him—the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever, or for whatsoever purpose, that property may be occupied.

The case appears to me to be extremely analagous to a case decided by the Court of Common Pleas before the present case, the case of *Beckett* v. *The Midland Railway Co.*, (2) in which there was, in front of the premises in question in that case, one single highway, the farther half, or the farther third portion of which was taken off and blocked up by the execution of the Defendant company's works. It was there held

(1) L. R. 7 H. L. 243. (2) L. R. 3 C. P. 82.

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that that was an injury which permanently and injuriously affected the premises in question: and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and the part of the highway which consists of water is blocked up and destroyed.

L'application de cette doctrine à la présente cause est évidente. La seule différence, c'est qu'au lieu de la communication par eau, c'est celle par la rue Young qui a été obstruée. D'après l'opinion de Lord Cairns, il est tout-à-fait indifférent que ce soit l'une ou l'autre, le dommage n'en est pas moins réel et permanent et la propriété, comme propriété indépendemment de l'industrie qui peut y être exercée, est diminuée de valeur. Lord Chelmsford dit, dans la même cause, (1) discutant la cause de *Ricket* v. *The Metropolitan Ry. Co.* (2):

After adverting to the opinion of Chief Justice Erle in *Chamberlain's* case (3) which proceeded entirely upon the facts founded by the umpire, that the value of the houses was depreciated, because the highway was stopped up and the easy access which before existed to them was taken away, I observed (4) that the case must be classed with the preceding cases where the house or land of the person claiming compensation was itself injuriously affected.

Un peu plus loin, le noble Lord s'exprime ainsi sur les conséquences de l'obstruction à l'accès de la Tamise:

Now, it is stated as a fact in the special case here, that, by the access given by the dock to and from the river Thames, the Respondent's premises were rendered more valuable as premises to sell or to occupy with reference to the uses to which any owner might put them; in other words, that the access to and from the Thames by means of the dock was a valuable appendage to the Respondent's premises; and that, by the stopping up and destruction of the dock, the premises became and were permanently damaged and diminished in value. Is not this an injury and damage to the Respondent distinct from what would be sustained by the public generally, though probably shared in by other occupiers of premises in the neighborhood of the dock? And what conclusion could fairly be drawn from the statement, but that the Respondent's house was injuriously affected?

(1) L. R. 7 H. L. 257.
(2) L. R. 2 H. L. 175.
(3) 2 B & S. 617.
(4) L. R. 2 H. L. 191.

Comme il serait trop long de citer toutes les parties de ce jugement qui sont applicables à la présente cause, je réfère particulièrement à l'opinion de Lord O'Hagan, (1) où il discute la question de savoir si, pour avoir droit à une compensation, le dommage doit être causé aux constructions ou au fond même de la propriété (*structural damages*), me contentant de donner sa conclusion, qui est d'une application parfaite à la présente cause, car, dans le cas actuel, aucune partie du terrain du pétitionnaire n'a été prise pour la construction du chemin de fer. Il n'y a eu d'intervention directe avec sa propriété que par la construction du canal (*drain*), sans expropriation aucune du terrain dans lequel il a été construit. Cette conclusion est comme suit :

In my judgment, therefore, whilst an injury common in kind and in degree to the claimant and all the public, or merely personal to him, and not arising from the deterioration of the premises, or so remote as to be difficult or impossible of reasonable appreciation, may probably be held to form no claim to compensation, when, as here, the injury is particular, consists in the diminution of the value of a holding, is perfectly appreciable, and, in the particular case, has actually been appreciated to a considerable amount, I am strongly of opinion that it gives a clear title to compensation under the statute.

Appuyé sur ces autorités, je suis d'avis que les obstructions, causées par les travaux du chemin de fer en question, en rendent beaucoup plus difficile l'accès à la propriété du pétitionnaire, ainsi que la construction du canal, ont eu pour effet d'endommager, d'une manière permanente, la valeur de sa propriété, indépendemment de toute considération particulière concernant l'industrie que le pétitionnaire y exerçait.

Cette diminution de valeur a été estimée par plusieurs témoins dont l'évaluation varie de vingt à quarante-cinq par cent. Le pétitionnaire et quelques uns de ses témoins l'ont même estimée à la moitié de la valeur

(1) L. R. 7 H. L. 267.

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totale de la propriété, qui est de dix mille piastres. Je crois qu'en l'estimant au tiers de cette valeur, ce serait prendre une moyenne raisonnable, d'après les diverses évaluations faites par les témoins. C'est à cette estimation que je m'arrête et je porte, en conséquence, à la somme de trois mille trois cent trent-trois piastres la diminution de valeur réelle et permanente de la propropriété du pétitionnaire.

Le pétitionnaire a seul fait l'évaluation des dommages causés à sa propriété, motivés par la rupture de la chaussée du chemin de fer. Il dit avoir fait un compte de ces dommages, mais il ne l'a pas produit. La responsabilité pour les dommages est admise par le savant conseil de la Couronne. Comme il n'y a pas d'autre preuve que celle faite par le pétitionnaire, je les porte à la somme de trois cents piastres, somme à laquelle il les a évalués.

Il est indubitable, d'après la preuve, que le pétitionnaire, qui, avant les travaux en question, exerçait d'une manière très profitable l'industrie de construction de vaisseaux, a été, en conséquence de ces travaux, forcé d'abandonner cette industrie. Les dommages qui lui en sont résultés sont certainement considérables; mais, malheureusement, la jurisprudence ne m'autorise pas à venir à son secours. Les dommages causés à l'industrie ou au commerce exercé par un propriétaire dans sa propriété, n'étant pas, d'après l'interpretation admise et consacrée par la cause ci-dessus citée et plus spécialement par celle de *Ricket* vs. *The Metropolitan Railway Co.* (1), de ceux qui peuvent être compris dans le statut.

Dans cette dernière cause, où cette question est amplement discutée, la Chambre des Lords a adopté le principe que, le Lands Clause Act et Railway Clause Act ne donnaient pas le droit d'obtenir une indemnité

(1) L.R. 2, H. L. 175.

pour les dommages causés au commerce d'un hôtelier, en conséquence des obstructions dont il se plaignait.

Ce principe est affirmé dans la cause ci-dessus citée, *Metropolitan Board of Works* v. *McCarthy* (1). Lord Penzance en parlant de la cause de *Beckett* et de quelques autres du même genre, s'exprime ainsi (2) :

> There is another rule, which is, I conceive, well settled in these cases, namely, that the damage or injury, which is to be the subject of compensation, must not be of a personal character, but must be a damage or injury to the "land" of the claimant considered independently of any particular trade that the claimant may have carried upon it. This was decided in *Reg* v. *Metropolitan Board of Works* (3).

Par une application de ce principe à la présente cause, je ne puis accorder au pétitionnaire les dommages, si certains et considérables qu'ils soient, qu'il a soufferts par suite de l'impossibilité, où il a été mis par la construction des travaux en question, de pouvoir continuer la construction des vaisseaux dans son chantier.

Il en est de même de sa réclamation pour l'augmentation des risques d'incendies causés par le passage des locomotives et de la difficulté d'obtenir des assureurs, si ce n'est à des taux très élevés.

La jurisprudence n'a pas, non plus, admis le droit à une compensation pour ces sortes de dommages, qu'elle considère comme ayant un caractère personnel et comme étant trop éloignés et indirects pour donner droit à une compensation.

Appeal allowed.

Solicitors for appellant : *Stewart, Chrysler & Gormully.*

Solicitors for respondent : *O'Connor & Hogg.*

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(1) L. R. 7 H. L. 243. (2) P. 262.
(3) L. R. 4 Q. B. 358.

1882
Mar. 6.

Coram TASCHEREAU, J.

PATRICK KENNEY..........................SUPPLIANT;

AND

HER MAJESTY THE QUEEN,...........DEFENDANT.

Contract for carrying rails, breach of—Employment of persons other than contractor to do work covered by contract—Representations prior to formation of contract—Evidence—Measure of damages.

On the 9th August, 1885, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from sea-going vessels upon the wharves in the harbor of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory.

Sometime in the month of September, and when the suppliant had only carried a small quantity of rails, the Government, without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract.

It was alleged by suppliant that M., who had acted on behalf of the Government in making the contract with the suppliant, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination.

Held:—(1). The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract.

(2). That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875, for the purpose men-

tioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract.

Statement of Facts.

PETITION OF RIGHT for damages arising out of a breach, by the Dominion Government, of a contract for the carriage of goods.

The suppliant in his petition alleged as follows:—

"1. That on or about the fourteenth day of July, in the year of our Lord one thousand eight hundred and seventy-five, there appeared in the issue of a newspaper published in the city of Montreal called *The Sun*, an advertisement in the words and figures following, that is to say:—

"MOVING OF STEEL RAILS.

"TO BARGE OWNERS, FORWARDERS, &C.

"Tenders will be received by the undersigned until Monday noon, 19th July, for the removing, handling and piling of the steel rails of the Canadian Pacific Railway from the wharves of the harbor of Montreal to the Rock Cut at Lachine.

"Full particulars can be obtained on applying at the office of

"MORIN & CO.,

"*Agent for the Minister of Public Works of Canada.*
"10 St. Nicholas St."

"2. That in response to said advertisement your suppliant being, at the time of the publication of said advertisement the owner of barges and engaged to some extent in the forwarding business, applied at the office of said Morin & Co. for full particulars of the nature and extent of the work to be done in respect of said removing, handling and piling of steel rails as mentioned in said advertisement; and upon the strength of the information and particulars so obtained, in addition to that contained in the said advertisement, your sup-

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pliant tendered in writing to the said Morin & Co. for the execution of the work referred to in the said advertisement.

"3 In the early part of the month of August of said year, your suppliant was duly notified of the acceptance of his tender for said work, and, in compliance with a notice to that effect from said Morin & Co., your suppliant at the said city of Montreal, before M. François Joseph Durand, a notary public for the Province of Quebec, entered into and executed a notarial deed of contract between your suppliant and said Morin & Co., representing in that behalf your Majesty's then Minister of Public Works for Canada, for the execution of said work, and which deed of contract was in the words and figures following, that is to say:—

"On this ninth day of the month of August, in the year one thousand eight hundred and seventy-five.

"Before M. François Joseph Durand, the undersigned notary public, duly commissioned and sworn in and for the Province of Quebec, heretofore called Lower Canada, in the Dominion of Canada, and residing in the city of Montreal, in the district of Montreal, in the province aforesaid, came and appeared Louis Edouard Morin of the city of Montreal, broker, esquire, and herein acting as agent for the Minister of Public Works of the Dominion aforesaid in the said city of Montreal, for receiving, sending and shipping the rails for the Pacific Railway of Canada, of the one part; and Patrick Kenny of the same city of Montreal, wood-merchant and trader, of the other part; which parties hereto have agreed and covenanted between themselves as follows to wit: The said party of the second part hereby undertakes to remove and to carry for the Government of the Dominion of Canada all the steel rails that are actually, or that will be, landed from seagoing vessels on the wharves of the harbor of Montreal

during this season of navigation, and deliver and lay on the ground the said steel rails at the place commonly called the Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned, to wit:

"1st. The contractor shall take and receive the rails within twenty-four hours after he shall have been notified to take the delivery of the same.

"2nd. The said rails are to be taken either from ship's tackles or on the wharves, wherever they may have been landed.

"3rd. Should the rails require to be drawn from the place of landing to the barge or vessel employed by the contractor of their transportation, the moving to be done entirely at the said contractor's expense.

"4th. All canal dues, if any, to be at the expense of the said contractor.

"5th. The ton for the purpose of regulating the price of the carrying of the said rails is to be for the long ton of 2,240 pounds each.

"6th. The rails are to be delivered, as aforesaid, at the place called the Rock Cut, near Lachine. The locality where they are to be delivered and laid shall be pointed out by the agent of the Minister of Public Works of Canada, or his authorized representative.

"7th. The rails are to be piled by the contractor in rows of 80 to 100 rails, piled chequered way" (as per diagram annexed to contract,) "the same having been first duly signed *ne variatur* by the parties hereto and the subscribing notary public; the foundation for receiving the rails to be supplied by the agent of the said Minister; the said rails to be so piled to the height that shall be indicated and ordered by the said agent.

"8th. The price hereinafter agreed to for carrying the said rails will be considered and taken as including all labor for handling, receiving, delivering, piling, &c.,

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the said rails either in the harbour of Montreal, or at the place of delivery aforesaid.

"9th. Payments for the present contract are to be made by the Minister of Public Works aforesaid on the production of the agent's or his representative's certificate, or receipt, that the quantity delivered in the harbor of Montreal will have been delivered at the Rock Cut aforesaid according to the present contract.

"10th. However, twenty per cent of the contractor's money is to remain in the hands of the Minister of Public Works, or his agents at Montreal, pending the fulfilment of the contract.

"11th. The contracting party of the second part in these presents to pay the expenses hereof as also of two copies for the Minister of Public Works and his agent.

"The price of the present contract, subject to all the foregoing clauses, conditions, and stipulations, is to be eighty cents per ton (80 cts.) of rails delivered and piled as aforesaid at the Rock Cut above mentioned.

"This done and passed at the said city of Montreal, in the office of the said F. J. Durand, on the day, month and year hereinabove firstly written under the number five thousand six hundred and forty-one of the Repertory of the notarial deeds of the said F. J. Durand, who has kept these presents of record in his office; and these presents having been first duly read to the said parties hereto, they have signed in the presence of the said notary who has also signed.

"4. That it was represented to your suppliant by the said Morin & Co., acting as the duly authorized agents in that behalf of your Majesty's then Minister of Public Works of Canada, as well in answer to your suppliant's inquiries for the particulars referred to in said advertisement for tenders, as after said contract had been awarded to your suppliant as aforesaid, and both

before and after said notarial deed of contract had been executed by your suppliant, that your suppliant would have, as the contractor for the said works, the removing, carrying, handling and piling of all the steel rails belonging or consigned to the Government of Canada, or to anyone on their behalf, for the Canadian Pacific Railway that then were landed and lying on any of the wharves of the harbor of Montreal, or that would thereafter be landed at said harbor of Montreal during the season of navigation of said year of our Lord one thousand eight hundred and seventy-five, and that the same would amount in quantity to between twenty-five thousand and thirty thousand tons of said rails.

"5. That your suppliant, acting upon the representations of said Morin & Co., as agents of your Majesty's said Minister of Public Works, taken in connection with said notarial contract, and its being distinctly agreed to between your suppliant and said Morin & Co., that your suppliant was to have the removal, handling, carrying and piling of all the said rails then, at the date of said contract, landed, or to be thereafter during said season landed, at the port of Montreal, belonging or consigned to your Majesty's Canadian Government, for said Canadian Pacific Railway, your suppliant undertook the said work, and immediately after the execution of said notarial contract entered upon the execution of said work.

"6. That the said Morin & Co. were, for the purposes of the matters hereinbefore mentioned, the duly authorized agents of your Majesty's then Minister of Public Works for Canada, and as such advertised for tenders, made the above mentioned representations as to said work to your suppliant, and entered into the contract with your suppliant above set out and referred to, and the said contract was accepted, adopted and acted upon by the said Minister, and by your Majesty's

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officers in that behalf, and payments were made thereunder from time to time on behalf of your Majesty to your suppliant, on account of said works contemplated in said contract.

"7. That in order to carry out the works contemplated by said notarial contract, as interpreted by the said representations of said Morin & Co. to your suppliant in reference thereto, your suppliant necessarily either abandoned or sub-let, at a great pecuniary loss to himself, several undertakings or contracts with other parties which he then had on hand, and engaged eight barges, with their crews, in addition to his own usual number of craft and men, of all which facts your Majesty's Minister of Public Works had due notice and knowledge through his said agents.

"8. That your suppliant, relying upon said notarial contract and upon the representations of, and agreement with, said Morin & Co., as agents as aforesaid of your Majesty's said Minister, as to the quantity of rails to be dealt with by your suppliant under said contract, incurred considerable extra expense in the erection of derricks on the Lachine Canal for the purposes of said work, which would have been unnecessary except for the large quantity of rails contemplated to be removed, handled and piled by him as aforesaid under said contract, and which, in consequence of the cancellation of said contract as hereinafter mentioned, were rendered useless, and the expense thereof lost to your suppliant.

"9. That your suppliant supplied all the necessary vessels, materials and men for the prosecution of said works contemplated under said contract, and continued to perform all the work required of him thereunder in a manner quite satisfactory to the said Morin & Co. as agents as aforesaid, and to the officers of your Majesty's then Minister of Public Works for Canada, having to do with the execution of said work; and was always

ready and willing during the whole of said season of navigation to carry out said contract if he had been allowed so to do; but in or about the latter end of the month of September of said year of our Lord one thousand eight hundred and seventy-five, and when your suppliant had removed, handled and piled only a small quantity of said rails, your Majesty's said Minister of Public Works for Canada, without any reason or ground whatsoever, and without any previous notice to your suppliant, summarily cancelled and put an end to the contract hereinbefore mentioned with your suppliant, and entered into a new contract with other contractors for the removal, handling and piling of the balance of the said steel rails contemplated to be done by your suppliant under his said contract.

"10. That there were in addition to said quantity of said rails so removed, handled and piled by your suppliant, a very large quantity of rails landed at the harbor of Montreal during the season of navigation of said year of our Lord one thousand eight hundred and seventy-five, but the work in connection therewith which your suppliant was entitled under his said contract to do, namely, the removing, handling and piling of said rails was given to other contractors as mentioned in the last paragraph hereof, and your suppliant consequently lost the profits which he would have made on his contract prices in respect thereof if he had been allowed to do the whole of said work.

"11. That through the cancellation of said contract your suppliant, in addition to the loss of profits above referred to, sustained pecuniary loss by eleven of his barges, with their crews, numbering about fifty men, employed specially for the purposes of said contract, and who had to be paid by your suppliant for the whole balance of said season of navigation, being thrown out of employment; and also in consequence of

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the facts alleged in the seventh, eight and ninth paragraphs hereof.

"12. That your suppliant never in any way signified to the said Minister any unwillingness on his part to continue said work, or any want of preparation so to do, but, on the contrary, was always ready and anxious to proceed therewith, of which said Minister was well aware, and up to the time of the cancellation of said contract had done and performed every act and thing necessary on his part of said contract to the entire satisfaction of said Minister and his officers in that behalf, and has always been ready and willing to continue to carry out said contract on his part.

"13. That your Majesty's then Minister of Public Works, as your suppliant is informed, gave as a reason for his cancellation of said contract that it had been determined by him shortly before said cancellation to have the balance of said rails carried to and piled at Kingston, in the Province of Ontario, instead of at Rock Cut, Lachine, as contemplated under said contract; and that, therefore, a new contract was made with other contractors. But your suppliant submits that before a contract was entered into with other contractors for said work, as changed, your suppliant should have been requested to transport to, and pile, said rails at Kingston, according to said new determination of said Minister, which your suppliant would have done after being remunerated fairly in addition to his prices under said contract, and upon also being reimbursed his loss and damages sustained by breach of said notarial contract; but your suppliant was never requested or given an opportunity so to do.

"14. That the moneys necessary for the payment of your suppliant for the execution of the said contract, as originally contemplated to be done, and at the prices therein mentioned, had been duly voted by Parliament,

and your suppliant has been paid from time to time under said contract for work actually done by him thereunder.

"15. Your suppliant submits that he was entitled to the work of removing, carrying and piling, in the manner and at the prices mentioned in said notarial contract, of all the steel rails belonging or consigned to the Government of Canada, or to any one on their behalf, for the Canadian Pacific Railway, lying on the wharves of Montreal harbor, on the day of the date of said contract, or delivered or landed at any place in said harbor, after said date, during the season of navigation of the year of our Lord one thousand eight hundred and seventy-five; and that by reason of the cancellation of said contract by your Majesty's said Minister, before all said rails had been so removed by your suppliant, and by your Majesty's said Minister giving said work to other contractors, your suppliant has sustained serious actual loss and damage; and has besides been thereby wrongfully deprived of his profits in said work, for all which he is entitled to be paid by your Majesty.

"16. That in all the matters aforesaid in which your Majesty's said Minister of Public Works for Canada acted or dealt with your suppliant, either directly or through his said lawfully authorized agents, in reference to said contract and work to be done thereunder, the said Minister acted on behalf of your Majesty, and as representing your Majesty in that behalf.

17. That your suppliant has made several applications to your Majesty's Government for the Dominion of Canada, through the proper department in that behalf, for a settlement of his claim above mentioned, and has furnished particulars thereof and asked that the same should either be paid or submitted to your Majesty's Official Arbitrators for the Dominion of

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Canada for award thereupon, but he has been unable to obtain compliance with any of his requests.

"Your suppliant therefore humbly prays:—

1. That it may be declared that your suppliant was under the circumstances set forth in this petition, by virtue of the said notarial contract, entitled to do and perform all the work of removing, carrying, handling, and piling the steel rails mentioned in the 15th paragraph of this petition, at the prices, upon the terms, and in the manner in said notarial contract set forth.

"2. That it may also be declared that in consequence of the cancellation of said contract, as in the 9th paragraph of said petition set out, your suppliant is entitled to be paid the actual damages sustained by him directly and indirectly in consequence of the breach of said contract by your Majesty's said Minister of Public Works, and also the profits which your suppliant would have earned had said contract not been cancelled and put an end to as aforesaid.

"3. That the sum of ten thousand dollars, or such other sum as may be found proper under the circumstances, may be paid to your suppliant by your Majesty for the direct and indirect loss and damages, as in this petition set forth, sustained by him by reason of the said breach and cancellation of said contract on behalf of your Majesty, and for loss of profits which your suppliant would have earned upon said work, and for interest on both damages and profits from the first day of October in the year of our Lord one thousand eight hundred and seventy-five.

"4. That, if necessary, an account may be taken of said damages, and of the profits which your suppliant would have earned if said contract had not been cancelled, and also of interest upon both damages and profits from the date above mentioned.

"5. That your suppliant may be paid what, upon said account being taken, shall be found due to your suppliant, and interest as aforesaid.

"6. That your suppliant may be paid his costs of this suit.

"7. That your suppliant may have such further and other relief as in the premises may seem just.

"The following defence was pleaded by the Attorney-General for the Dominion of Canada, on behalf of Her Majesty, to the petition of right:—

"1. The facts set forth in the first and second paragraphs of the suppliant's petition of right are believed to be true.

"2. The suppliant entered into a written contract of the character mentioned in the third paragraph of the said petition, but for greater particularity leave is asked to refer to the said contract at the trial of this cause.

"3. The said Morin & Co. had no authority to make the representations alleged to have been made by them in the fourth paragraph of the said petition; they did not make such representations to the suppliant, and it is submitted that even if such representations were made by the said Morin & Co. they would not affect the terms of the written contract between the suppliant and Her Majesty, nor control the rights of either party thereunder

"4. The said Morin & Co. had no authority to enter into any agreement other than the written agreement mentioned in the third paragraph of the suppliant's petition of right; no such agreement as that referred to in the fifth paragraph of the said petition of right was made or entered into between the suppliant and the said Morin & Co.

"5. The said Morin & Co. were not the agents of Her Majesty's Minister of Public Works for any purpose other than to receive tenders and enter into the written

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contract for the execution of the work therein specified. They had no authority from Her Majesty's said Minister of Public Works to make any representations with respect to such work, as alleged in the sixth paragraph of the said petition of right.

"6. Her Majesty's Attorney-General knows nothing of the facts set out in the seventh and eighth paragraphs of the suppliant's petition of right, and therefore denies the same.

"7. As to the ninth paragraph of the suppliant's petition of right, Her Majesty's Attorney-General believes that the suppliant performed his work under the said contract in a satisfactory manner. He denies that the said contract was cancelled and put an end to as alleged, and that a new contract with other contractors was entered into for the removal, handling and piling of the balance of the said rails contemplated to be done by the suppliant under the said contract, and he says that the suppliant was allowed to perform all work under said contract which he was entitled to perform thereunder.

"8. Her Majesty's Attorney-General denies the facts and statements set forth and alleged in the tenth paragraph of the said petition.

"9. Her Majesty's Attorney-General has no knowledge of the facts set out in the eleventh paragraph of the suppliant's petition of right, and denies the same.

"10. As to the thirteenth paragraph of the said petition, Her Majesty's Attorney-General says that subsequently to the making of the contract in the third paragraph mentioned and set out, it was found necessary in the public interests that certain steel rails which arrived at the harbor of Montreal during the navigation season of the year 1875, intended for use upon the Canadian Pacific Railway, should he carried to and piled at Kingston in the Province of Ontario;

that the said rails were carried to and piled at Kingston aforesaid, by persons employed by Her Majesty's then Minister of Public Works, or his agent; but it is denied that in so doing Her Majesty committed any breach of the said contract with the suppliant, and no obligation rested upon the said Minister of Public Works to request the suppliant to transport to and pile the said steel rails at Kingston, as the said rails formed no portion of the rails that it was contemplated or intended by the said contract should be carried and removed by the suppliant.

"11. As to the fifteenth paragraph of the suppliant's petition of right, Her Majesty's Attorney-General says, that the suppliant was not entitled under the terms of the said contract to remove, carry and pile any steel rails belonging, or consigned, to the Government of Canada from the wharves of the harbor of Montreal, other than such steel rails as the suppliant was notified to take and remove; and it is denied that the suppliant was entitled to remove, carry and pile all the steel rails which were delivered or landed at any place in the said harbor during the season of navigation of the year 1875.

"12. With the exception that the said contract in writing was entered into on behalf of the said Minister of Public Works for Her Majesty, the statements contained in the sixteenth paragraph of the said petition are denied."

The suppliant joined issue upon these pleas.

The case was heard before Mr. Justice Taschereau.

Ferguson and *Hall* for the suppliant;

Davidson Q.C. and *Hogg* for the respondent.

The facts of the case are fully stated in the judgment

TASCHEREAU, J. now (March, 6th 1882) delivered judgment.

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On the 14th of July, 1875, the Government of Canada, through one Louis Morin, whose agency in the matter is admitted, advertised for tenders for the removal of Canadian Pacific Railway rails from the harbor of Montreal to the Rock Cut at Lachine in the following terms:—

MOVING OF STEEL RAILS.

To Barge Owners, Forwarders, etc.

Tenders will be received by the undersigned until Monday noon, 19th July, for the removing, handling and piling of the steel rails of the Canadian Pacific Railway, from the wharves of the Harbour of Montreal, to the Rock Cut at Lachine.

Full particulars can be obtained on applying at the office of

MORIN & CO.,
Agents for the Minister of Public Works of Canada.
10 *St. Nicholas Street.*

The suppliant put in a tender according to the said advertisement, and, his tender having been accepted, entered into and executed a notarial deed of contract with the Government of Canada, represented in that behalf by the said Morin, for the removal of the said rails.

This contract is in the following words:—

On this ninth day of the month of August, in the year one thousand eight hundred and seventy-five;

Before M. François Joseph Durand, the undersigned Notary Public, duly commissioned and sworn in and for the Province of Quebec, heretofore called Lower Canada, in the Dominion of Canada, and residing in the city of Montreal, in the district of Montreal, in the province aforesaid, came and appeared Louis Edouard Morin, of the said city of Montreal, broker, esquire, and herein acting as agent for the Minister of Public Works of the Dominion aforesaid in the said city of Montreal for receiving, sending and shipping the rails for the Pacific Railway of Canada, *of the one part*; and Patrick Kenny of the same city of Montreal, wood merchant and trader, *of the other part*; which parties hereto have agreed and convenanted between themselves as follows, to wit:—

The said party of the second part hereby undertakes to remove and carry for the Government of the Dominion of Canada, all the steel rails that are actually, or that will be, landed from sea-going vessels on

the wharves of the harbor of Montreal during this season of navigation, and deliver and lay on the ground the said steel rails, at the place commonly called the Rock Cut, on the Lachine Canal, subject to the terms and conditions hereinafter mentioned, to wit :—

1st. The contractor shall take and receive the rails within twenty-four hours after he shall have been notified to take the delivery of the same.

2nd. The said rails are to be taken either from ships' tackles, or on the wharves, wherever they may have been landed.

3rd. Should the rails require to be drawn from the place of landing to the barge or vessel employed by the contractor for their transportation, the moving to be done entirely at the said contractor's expense.

4th. All canal dues, if any, are to be at the expense of the said contractor.

5th. The ton for the purpose ot regulating the price of the carrying of the said rails is to be the long ton of two thousand two hundred and forty pounds each.

6th. The rails are to be delivered as aforesaid at the place called the Rock Cut, near Lachine. The locality where they are to be delivered and laid shall be pointed out by the agent of the Minister of Public Works of Canada, or his authorized representative.

7th. The rails are to be piled by the contractor in rows of eighty to one hundred rails, piled chequered way [as per diagram annexed to contract], the same having been first duly signed *ne variatur* by the parties hereto and the subscribing notary public; the foundation for receiving the rails to be supplied by the agent of the said Minister; the said rails to be so piled to the height that shall be indicated and ordered by the said agent.

8th. The price hereinafter agreed to for carrying the said rails will be considered and taken as including all labor for handling, receiving, delivering, piling, etc., the said rails either in the harbor of Montreal or at place of delivery aforesaid.

9th. Payments for the present contract are to be made by the Minister of Public Works aforesaid,on the production of the agent's, or hisrepresentative's, certificate, or receipt, that the quantity delivered in the harbor of Montreal will have been delivered at the Rock Cut aforesaid according to the present contract.

10th. However, twenty per cent. of the contractor's money is to remain in the hands of the Minister of Public Works, or his agents at Montreal, pending the fulfilment of the contract.

11th. The contracting party of the second part in these presents to pay the expenses thereof, as also two copies for the Minister of Public Works and his agent.

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The price of the present contract, subject to all the foregoing clauses, conditions and stipulations, is to be eighty cents per ton (80 cents) of rails delivered and piled as aforesaid at the Rock Cut above mentioned This done and passed at the said city of Montreal, in the office of the said F. J. Durand, on the day, month and year hereinabove firstly written, under the number five thousand six hundred and forty-one of the repertory of the notarial deeds of the said F. J. Durand, who has kept these presents of record in his office ; and these presents having been first duly read to the said parties hereto, they have signed in the presence of the said notary, who has also signed.

Upon a breach of this contract by the Crown, the suppliant bases the claim for damages contained in his petition of right.

There are counts in the petition wherein the suppliant alleges that the said Morin. acting for the Crown, represented to him that a quantity of not less than 25,000 to 35,000 tons would have to be removed under the said contract; and that, acting under such representations, the suppliant entered upon the said contract and made a large outlay in preparing to execute the same, which he would not have done if such representations had not been made to him. He also alleges that he removed and carried only a small proportion of the quantity so represented by Morin ; and that he consequently suffered damages, which he now claims from the Crown.

On this part of the case, I am against the suppliant; and I hold that the representations alleged to have been made by Morin, (had they been proved, which is more than doubtful as I view the evidence,) were unauthorized, and do not bind the Crown. The parties having entered into a written contract, the written instrument must be held to contain a complete record of their conventions and agreement. If the suppliant desired from the Crown a covenant or stipulation that not less than 25,000 or 35,000 tons would have to be removed, he should have seen that it was inserted in the written instrument. The fact that such a stipulation

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is not to be found in the instrument is evidence that it was not made part of the contract. Again, if, as the suppliant alleges, this condition that not less than a certain given quality of rails should be removed by the suppliant had formed part of the negotiations between the parties antecedent to the execution of the deed of contract, and was, consequently, present to the mind of the suppliant at the time of the said execution, it must be presumed that such a condition has been left out of the instrument embodying the obligations and covenants of the parties either because the suppliant thought that if he mentioned it then the Crown would not consent to the contract at all, or because he, of his own accord, abandoned the condition, or because he tried to get it inserted in the deed and the Crown refused to agree to it.

On the other part of the case, I am with the suppliant. I do not attach much importance to the verbal evidence produced in the case, except, of course, as to the amount of damages. I am of opinion that the written instrument in its very terms supports the contention of the suppliant, and that under it he was entitled to have the removal of *all* the rails landed in Montreal in 1875 for the Canadian Pacific Railway. The Government having taken away from him the removal of a part of the said rails, is answerable in damages for this breach of contract on their part. The very first clause of the contract shows this clearly, in my opinion. The contention on the part of the respondent is that after the removal of, say, only ten tons of rails, and after only twenty-four hours work, the Crown could have cancelled the contract with the suppliant and have given the work to any one else ; the Crown even going so far as to say that a new contract in precisely the same terms as that of the suppliant, that is to say, a contract to carry the rails to Lachine, might

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have been entered into with third persons, notwithstanding the fact that it is admitted that the suppliant performed his work satisfactorily. I cannot adopt this interpretation of the contract.

Now, as to the question of damages. It is proved that the suppliant carried 11,000 tons of rails (in round numbers), and that 17,000 tons is the quantity that arrived in 1875, besides what had been sent to Thunder Bay and Duluth before the contract was made with the suppliant, the right to have carried which, of course, cannot be claimed by him. Out of these 17,000 tons, one thousand tons never were landed at Montreal, but were delivered at Quebec for the Intercolonial Railway; leaving 16,000 tons landed at Montreal during the season for the Canadian Pacific Railway, the removal of which the suppliant had a contract for. This leaves 5,000 tons (in round numbers) in respect to the carriage of which the suppliant can claim damages. By the evidence in the case these damages are established at 30 cents per ton, making $1,500.

Accordingly, I give judgment for the suppliant for $1,500, with interest from the seventh day of April, 1881, and costs.

Petition allowed with costs.

Solicitor for suppliants: *A. Ferguson.*

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

Coram TASCHEREAU, J.

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May 15.

JOHN C. BURTON, DOUGLAS B. WOODWORTH AND JOSEPH E. WOODWORTH .... (SUPPLIANTS) APPELLANTS;

AND

HER MAJESTY THE QUEEN ....RESPONDENT.

Expropriation of land for purposes of a railway gravel pit—31 *Vic., c.* 12, *secs.* 25-40—*Basis of valuation.*

B. & Co. were owners of a lot of uncleared land in the Parish of St. Paul, Province of Manitoba, upon which certain agents of the Dominion Government had entered at different times, under the provisions of sec. 25 of 31 Vic., c. 12, and taken therefrom large quantities of sand and gravel for the purposes of the Canadian Pacific Railway, amounting in all to some 82,000 cubic yards. For the sand and gravel so taken the Government offered B. & Co. $72.50, which they refused to accept. The claim was then referred to the Official Arbitrators, who valued the property as farm land and awarded B. & Co. $100 in full compensation and satisfaction of their claim.

On appeal from this award,

Held:—That the Official Arbitrators were wrong in assessing the damages in respect of the agricultural value of the land; and that such assessment should have been made in respect of its value as a sand and gravel pit.

Semble—Where lands are taken which possess capabilities rendering them available for more than one purpose, under sec. 40 of the Public Works Act (31 Vic., c. 12), compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value.

APPEAL from an award of the Official Arbitrators.

The appeal was heard before Mr. Justice Taschereau.

Ferguson for the appellants;

Hogg for the Crown.

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

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TASCHEREAU, J. now (May 15th, 1883) delivered judgment.

Section 25 of 31 Vic. c. 12, an act respecting the public works of Canada, enacts in substance that the Minister of Public Works and his agents may enter upon any uncleared or wild land, and take therefrom all timber, stones, gravel, sand, clay or other materials necessary for the Public Works of the country, for which compensation shall be made at the rate agreed on, or appraised and awarded, as provided for in the subsequent sections of that statute. The provisions of this statute are extended by 33 Vic., c. 23 to any claim against the Government of Canada, or against any of the departments of state.

The Government, by its agents, in the exercise of the powers thus conferred upon them, entered upon lot 93 in the parish of St. Paul, Manitoba, at different times before the year 1881, and took away from the said lot of land a large quantity of sand and gravel required for the construction of the Canadian Pacific Railway.

This, as well as the claimant's property in the sand and gravel so taken, is admitted. The quantity of said sand and gravel so taken away is also now admitted on both sides to have been 82,000 cubic yards.

The Government offered the claimants $72.50 in all for the 82,000 yards of material taken. Upon the claimants refusal to accept that sum, a reference to the Official Arbitrators was made by the Minister of Railways, under the statute, and upon that reference the Official Arbitrators awarded the claimants the sum of $100 as full compensation for their claim. The claimants, dissatisfied with the award, then appealed to this court from the decision of the Arbitrators, under the act 42 Vic. c. 8, which gives them the right to such appeal.

The only question to be now determined is the amount

of compensation to be paid to the claimants for the sand and gravel so taken. Fifteen witnesses were examined before the Arbitrators. Woodworth, the first witness, proves nothing as to the value of the gravel. John C. Burton, the second witness, and one of the claimants, swears that since 1880 he has sold over 46,000 yards of gravel at twenty-five cents per yard.

James G. McDonald, the next witness is a building contractor at Winnipeg, and, as such, uses a large quantity of sand, and also deals in sand and gravel. He sells sand and gravel at a pit situated four miles further from Winnipeg than the claimants' pit, at $5 a carload of ten yards. He swears that if he owned the claimants' pit, he would not sell the gravel for less than ten cents a yard, but that if there were no railway and no city in its neighborhood, the pit would be worth nothing at all. Elijah Griffith, the next witness, is a manufacturer of artificial stones at Winnipeg, and, as such, uses a great quantity of sand and gravel. He knows the claimants' pit, and would not sell the gravel and sand for less than twelve or fifteen çents per yard, if he owned it. Good sand and gravel, he says, are scarce in Winnipeg. Alex. T. McLean is the next witness, and a very important one from the fact that he was the Government's engineer in charge of the pit in question when the gravel was taken, and is, moreover, said by Mr. Schreiber, the Government Chief Engineer, (who was examined in this case), to be a reliable man and a good engineer; by Joseph Kavanah, of Ottawa, merchant, he is also said to be a faithful, honest and respectable man. McLean swears that ten cents a yard for the sand and gravel taken from that pit, is a very reasonable charge. Being examined before the court, *de novo*, he says, on the question of value:

The sand and gravel there is of a superior quality. Supposing that no railway had been built there, that gravel and sand in the years

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1879, 1880, 1881 and 1882 would have been worth, lying there in its natural state, not less than eleven cents per cubic yard. I would not have taken that price for it had I owned the land. I was eight years in Manitoba. I would have valued that gravel at fourteen cents per cubic yard. It is the finest quality I ever saw. There is considerable gravel in the vicinity there, but of inferior quality than that on lot No. 93. There is not an inexhaustible quantity. The Bird's Hill ballast pit in question is situate and lying at about seven and three-quarters miles east of Winnipeg. There is no sand or gravel to be easily got for the Pembina Branch of the Canadian Pacific Railway in the vicinity of said line of railway.

I know that for different purposes gravel was sold at twenty-five cents per cubic yard to private parties for building purposes, and for cement pipes in the city of Winnipeg.

Q. How do you arrive at the calculation that the sand and gravel was worth eleven cents a yard in its natural state in the bed without the railway? Ans.—As Winnipeg required it, it would have built a tramway to get sand at that pit. I mean the persons interested to get the sand.

Without a railway at all there, that sand would have been of an additional value to the land, but I cannot say to what extent. I do not consider that the value of the land was considerably increased by the building of the railway. On lot 92 there is a good deal of sand and gravel, but not lot 91. I do not know how far the Bird's Hill ranges, but it is not all good quality. I have seen test pits made for the purpose of ascertaining the quality of gravel at different places in that hill. If I owned that pit I would have taken, for a very large quantity of sand, perhaps a little less than fourteen cents a yard."

Joseph Kavanagh, who was the next witness examined, is a merchant in Ottawa, and has often been in Manitoba, says :—

Know the gravel pit in question, its location and value. I am not interested there. Owing to the proximity of that gravel pit to the city of Winnipeg, and the fact that it is the only good gravel pit in the vicinity of Winnipeg, I consider that it is worth a good price. Taking the sand and gravel in its natural state, I should average its value in the pit at 15c. per cubic yard; but without a road there I should value it at 10 cents a yard, at least.

That gravel was necessary for Winnipeg. It was of a superior quality. The running of the road has increased the value of the land in that neighborhood, and it has also increased the value of that sand and gravel from 10 to 15 cents a yard.

And on cross-examination he says :—

Q. What was the land worth prior to the opening of that ballast pit? A. I cannot say, the gravel is more valuable there than it is here. That is my reason to value it at ten cents per yard without a railway.

G. C. Brophy, who is a civil engineer in the employ the Government, and who, Mr. Fleming, another witness in the case, says is a good man, was the engineer of that part of the road where this very gravel was used, and when it was used, says :—

I was in Winnipeg in 1879 employed by the Government. I know Bird's Hill Gravel Pit. Without any railway there at all, in my opinion gravel and sand at that pit would be worth from ten to twelve cents per cubic yard; it is of a superior quality, one of the finest gravels I have ever seen; well located for different purposes. That gravel was worth more in 1879, 1880, 1881 and 1882, than ten or twelve cents a cubic yard. I was the engineer in charge of the construction of the Pembina Branch, and the ballast taken at Bird's Hill was used on the road under my direction. Bird's Hill is about six or seven miles from Winnipeg. I have lived in Winnipeg. With the road now constructed and in operation, I value the gravel at Bird's Hill at fifteen or sixteen cents a cubic yard at least. For the railway purposes we cannot get elsewhere as good gravel as that at Bird's Hill; and this pit is of easy access. That gravel is also very convenient for Winnipeg.

On cross-examination he says :—

" Q.—What was the sand or gravel worth in large quantities in its natural state in the ground, without any railway; the same having to be removed by carts or vehicles, about 1879? Ans.—From ten to twelve cents per cubic yard. The Red River runs between Winnipeg and the Bird's Hill. There was no bridge on that river in 1879.

Q.—Did the building of this railroad and the construction of the bridge across the Red River increase the value of that gravel at Bird's Hill, and to what extent? Ans.—Yes; and in my opinion from four to five cents per cubic yard. No doubt the opening of the gravel pit and the running of a spur would have enhanced its value. In reference to the scarcity of gravel I speak of my own experience in 1879, and I know nothing of my own personal knowledge of any other pits being open since I left Manitoba.

Q.—Do you base your opinion of the value of the sand and gravel, in its natural bed, at from ten to twelve cents per cubic yard on account of its scarcity and proximity to the city of Winnipeg in 1879?

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Ans.—Yes ; and this irrespective of any railway running there, and also on account of its quality.

Q.—In speaking of the value of gravel and sand at ten to twelve cents at Bird's Hill, do you apply that rate or price to the large quantities, say, 80,000 cubic yards taken away in 1879 and 1880?

Ans.—Yes ; if that quantity was taken for any other purpose than than that of ballasting I would still consider that it would be worth ten or twelve cents. For the purpose of ballasting I consider that it was worth more. By this I mean that as compared with any other gravel used for ballasting purposes, either on the Pembina Branch or Section 14 adjoining, up to the fall of 1879, at the time of the closing of the ballasting in that year, it was worth at least twenty cents per cubic yard in its natural state in the pit. I saw the gravel used and taken from the pits on the line of Section 14.

Hugh Sutherland who is member of the House of Commons for Selkirk County, Manitoba, says :—

Have lived in Winnipeg since ten years. Knew the ballast pit in question, it is of a very good quality of gravel and sand. Without any railway at all running there it would be a valuable gravel pit on account of the quantity of gravel and its proximity to the city of Winnipeg.

Cross-examined :—

The building of the railway has increased the value of gravel and sand at Bird's Hill ; it has materially added to the value of all gravel and sand there. From the first time I heard of the pit in question, I have always attached a great value to it ; more so on account of its proximity to the city.

A. W. Ross, member of the House of Commons for Lisgar, Manitoba, corroborates Mr. Sutherland's evidence. Without a railway running there at all, he says, the claimants' pit would be a very valuable property.

H. S. Westbrook, of Winnipeg, testifies to the same effect, and corroborates Sutherland's and Ross' testimony, which he heard.

This closes the evidence adduced by the claimants.

Thomas Nixon, was the first witness examined on the part of the Crown. He merely testified that about 1876 he bought some of the land for a gravel pit from the neighboring lots for five dollars an acre.

William Crawford, the next witness for the Crown, says that in 1876 the value of this land was from two to five dollars an acre.

On cross-examination he says :—

In this valuation I do not take into account the value of the gravel. My valuation was based on its value for agricultural land. I know the gravel pit in question ; I would consider from the look of it that the gravel and sand there is of a very good quality, but I do not know the price of such gravel per cubic yard.

The pit at Bird's Hill and the pit at Little Stony Mountain are the only gravel pits near Winnipeg that I know of.

To Mr. Simard :

If there were no railway I do not think that gravel would have been of much value."

James Rowan, the next witness, says nothing as to the value of the gravel.

Mr. Schreiber, the Government Chief Engineer, is next examined for the Crown. He does not say if he ever has seen the locality in question, or if he has a personal knowledge of the facts he speaks of. In the Dominion City ballast pit, he says, the Government had paid from forty to sixty dollars an acre for ballasting purposes. He was aware that a part of Bird's Hill ballast pit could have been purchased at five dollars an acre. He says that ten cents a yard for that gravel is a very large price, and that he considers the value given to claimant's property by the construction of the railway far in excess of any possible damages to the property by reason of the removal of gravel by the Government.

Mr. Fleming is the fifth and last witness called for the Crown. Ten cents per yard for that gravel, he says, is absurd ; and that the value Bird's Hill possesses over and above ordinary farming lands there is due to the railway. The rest of his evidence seems to me immaterial. This closed the evidence.

I must say that after reading these depositions it is, it seems to me, impossible to say that the claimants have not overwhelmingly established that

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the sum of ten cents claimed by them for the gravel is a very moderate price indeed; in fact, all the witnesses, leaving aside Mr. Schreiber and Mr. Fleming, are one way on this point. The two last named witnesses are honorable men, certainly, and their evidence is entitled to consideration. They, no doubt, have said what they sincerely think of the claim; but they have not the personal knowledge of the value of this gravel that the witnesses examined on the part of the claimants have. Their opinions are formed from reports of measurements by their officers, or inferences that they draw from facts to them more or less personally known. But such witnesses as McLean, Brophy, Griffith, McDonald, Kavanagh, Sutherland, Ross and Westbrook speak of actual facts, and of facts they have personal knowledge of. Some of them personally deal in gravel and sand in the Province of Manitoba; others were the Government engineers employed on the railroad when this gravel was taken, and actually saw it used. Brophy is still in the Government employ; and Sutherland, Ross and Westbrook live in Manitoba, and are in a position to actually know whether this gravel pit is valuable or not.

They all swear that the gravel and sand taken by the Government from lot 93 in question was very valuable, and all of them who fix a price upon it, that is to say: McDonald, McLean, Brophy, Griffith and Kavanagh, swear that it was worth in 1880 more than, or at least as much as, ten cents per yard; whilst Burton, one of the claimants, proves that he has sold such materials from the land, since, at 25 cents per yard.

The Official Arbitrators, in this case, have evidently acted under a wrong impression and upon a false basis. They have taken it for granted that only 2½ acres of the claimants' land had been taken by the Government; and taking $40 per acre as the highest price

proved for such land, they have allowed the claimants $100.

The evidence given of the value of this lot as agricultural land does not militate against the conclusion I have arrived at that such value does not constitute the proper basis of compensation in this case. It is just because the land is nothing but gravel and sand that its value as such is far above any value it may have as agricultural land, from the very fact that in that locality the gravel and sand required for building purposes are not easily available.

But, first, there is no proof whatever that this gravel has been taken from 2½ acres only of claimants' land. Then, it is not the land that the Government took. They might have expropriated the land itself, but they did not do so. The claim in this case is not for land, but for so many yards of sand and gravel. The reference to the Official Arbitrators by the Minister of Railways is, in its very terms, a reference of a claim in respect of certain sand and gravel taken; and the award of the arbitrators itself, though the fact seems to have been lost sight of in the amount awarded, professes to be an award not for so many acres of land but in compensation for this claim for sand and gravel. The Arbitrators evidently were misled in this matter, and I have no doubt did not intend to report that these 82,000 yards of sand and gravel were worth only $100, when the evidence establishes so clearly that, even without the railway, they were worth at least ten cents a yard.

The evidence is clear that, notwithstanding the fact that the railway has greatly increased the value of the gravel and made it worth much more now than it was at the time of the taking, it was, in 1880, worth at least the value of ten cents a yard as put upon it by the claimants; and would have been worth that without a

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railway; and, consequently, I am relieved from considering at length the effect of sections 25 and 40 of 31 Vic., c. 12, upon claims of this nature.

These sections read as follows:

25. The Minister and his agents may enter upon any uncleared or wild land, and take therefrom all timber, stones, gravel, sand, clay or other materials, which he or they may find necessary for the construction, maintenance and repair of Public Works or buildings under his management, or may lay any materials or things upon any such land, for which compensation shall be made at the rate agreed on or appraised and awarded as herein provided; and the Minister may make and use all such temporary roads to and from such timber, stones, clay, gravel, sand or gravel pits, required by him for the convenient passing to and from the works during their construction and repair, and may enter upon any land for the purpose of making proper drains to carry off the water from any public work, or for keeping such drains in repair, making compensation as aforesaid.

40. The Arbitrators in estimating and awarding the amount to be paid to any claimant for injury done to any land or property, and is estimating the amount to be paid for lands taken by the Minister, under this Act, or taken by the proper authority under any former act shall estimate or assess the value thereof at the time when the injury complained of was occasioned, and not the value of the adjoining lands at the time of making their award.

I will merely say that these enactments do not, in my opinion, mean that if, for instance, a man has 100 acres of land worth one dollar which, by a railway built by the Government, rise in value to two dollars an acre, the Government would therefore have the right to take fifty acres of that man's property without paying for them. The disadvantage that this man would suffer from the fact that the Government requires his property is evident, since his neighbour, whose property the Government does not require, but which has received the same increased value by reason of the construction of the railway, would get the full benefit of it.

That, clearly, is not what the statute intended. Upon that construction of the statute the Government could

have got one-half at least of all the conceded lots in the North-west Territories without paying for them. They could have got for nothing all the Hudson's Bay lands required for public works or railways.

These statutes are all based on the assumption that full compensation will be paid to the parties whose property the Government, in the public interest, is authorized to appropriate and expropriate. Anything so monstrous as the proposition that the Government could say to a man—"Your land is wanted; we take it whether you are pleased or not, and, as you would not have found another purchaser, we will not pay you a cent for it," was never intended. These enactments of 31 Vic., c. 12, are nothing but a continuation of similar enactments in c. 28, Consol. Stats. Can., and under the provisions of the said c. 28 it has never been contended that the Crown could take the property of any person without fully compensating him for the same. The intention of these statutes, obviously, is that the real value at the time of the expropriation should be paid for property taken by the Crown. Here, for instance, though it has been proved that the claimants could now get at least fifteen cents a yard for their gravel, yet they are not entitled to get more than ten cents, the value of it when so taken by the Crown.

I do not lose sight of the fact that the claimants have paid only $1,920 for the lot: but in view of the evidence on the record, I can only infer from it that they have made a pretty good speculation on a small scale; a speculation, however, in which I can see nothing in the least reprehensible.

I have referred to the case *In re The Canada Southern Railway Company and Norvall, et al* (1), and other cases cited by Mr. Hogg for the Crown, and whatever appli-

(1) 41 U. C. Q. B. 195.

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cation can be made of them to the present case, they do not lead me to any other conclusions than those I have arrived at and expressed at length herein.

Judgment will go against the Crown for $8,200., with costs. The Arbitrators have allowed claimants interest on the $100 they awarded from the 12th Nov. 1881, the date of their purchase of this claim, but I cannot see how I can maintain such allowance.

Appeal allowed with costs.

Solicitor for claimants: *A. Ferguson.*

Solicitors for respondent: *O'Connor & Hogg.*

Coram FOURNIER, J.

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

VS.

2 CASKS OF ALCOHOL, 3 PUNCHEONS OF RUM, 104 BOXES OR CASES OF GIN, 21 CASES OF CASSIA WINE, 1 CASK OF RUM, 6 HALF BOXES OF TOBACCO, 11 BOXES OF TOBACCO, 1 CADDIE OF TOBACCO, 1 CASK OF RUM,

AND

WILLIAM F. MACDONELL, (CLAIMANT)-DEFENDANT.

Customs laws—40 Vic., c. 10, s. 12, interpretation of—Entering port for shelter—False statements of master as to cargo and voyage—Recovery of penalties—Procedure.

Held:—(1). Where there has been nothing done by the master to show an intent to defraud the Customs, a vessel entering a port for shelter, before reaching a place of safety there, has not "arrived" at such port within the meaning of 40 Vic., c. 10, s. 12 so as to justify seizure of her cargo for not reporting to the Customs authorities.

(2). Where false statements are made by the master regarding the character of the cargo and port of destination of his vessel, which would subject him to a penalty under sub-sec. 2 of s. 12, 40 Vic., c. 10, they cannot be relied on to support an information claiming forfeiture of the cargo for his not having made a report in writing of his arrival as required by sub-sec. 1, s. 12 of the said act.

(3). That sec. 10 of 44 Vic., c. 11 (amending secs. 119 and 120 of 40 Vic., c. 10), merely provides a procedure to be followed when the Customs' Department undertakes to deal with questions of penalties and forfeitures, and does not divest the Crown of its right to sue for the same in the manner provided by secs. 100 and 101 of 40 Vic., c. 10, even where departmental proceedings have been commenced under the said provisions of 44 Vic., c. 11, s. 10.

(4). That even if secs. 100 and 101 of the said act 40 Vic. c. 10 had

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been repealed by the later statute, the Crown could proceed by information *in rem* at common law, and this right could not be taken away except by express words or necessary implication.

THIS was an information *in rem*, filed by the Attorney-General for the Dominion of Canada on behalf of the Crown, for the condemnation of certain goods seized by the Customs' authorities for an alleged infraction of 40 Vic., c. 10, s. 12.

By the information the Court was informed as follows :—

"That by sec. 12 of the Act passed by the Parliament of Canada in the 40th year of Her Majesty's reign, chaptered 10 and intituled 'an Act to amend and consolidate the Acts respecting Customs,'" it is among other things enacted that "the master of every vessel "arriving from any port or place out of the Dominion "of Canada, or coastwise in any port in Canada, "whether laden or in ballast, shall come directly and "before bulk is broken, to the Custom House for the "port or place of entry where he arrives, and there "make a report in writing to the collector, or other "proper officer, of the arrival and voyage of such vessel, "stating her name, country and tonnage, the port of "registry, the name of the master, the country of the "owners, the number and names of the passengers (if "any), the number of the crew, and whether she is "laden or in ballast, and if laden the marks and num-"bers of every package and parcel of goods on board, "and where the same was laden, and the particulars "of any goods stowed loose, and where and to whom "consigned, and where any, and what goods, if any, "have been laden or unladen, or bulk has been broken "during the voyage, what part of the cargo is intended "to be landed at that port, and what, at any other port "in Canada, and what part (if any), is intended to be "exported in the same vessel, and what surplus stores

" remain on board, and any goods not reported found " on board or landed, shall be forfeited unless it ap- " pears that there was no fraudulent intention."

" That on the 4th day of November, 1881, a schooner " called the 'M. L. White' arrived from a port out of " Canada at the port of Barrington, N.S., with certain " goods on board to wit:—2 casks of alcohol, 3 pun- " cheons of rum, 104 boxes or cases of gin, 21 cases of " cassia wine, 1 cask of rum, 6 half boxes of tobacco, " 11 boxes of tobacco, 1 caddie of tobacco and 1 cask of " rum, and the master of the said vessel, with intent " and design to defraud Her Majesty's revenue, did not " come directly to the Custom House at the said port " of Barrington, being the port where he so arrived " with the said vessel, and there make the report in " writing to the collector or other proper officer at the " said port as required by the 12th section of the said " statute whereby, and by reason of the said goods " being found on board of the said vessel and not re- " ported as aforesaid, the said goods became and are " forfeited to Her Majesty."

" That by section 76 of the said statute first above " mentioned, as amended by the Act passed by the " Parliament of Canada in the 44th year of Her Majes- " ty's reign, chaptered 11, it is provided amongst other " things, that if any person knowingly and wilfully " with intent to defraud the revenue of Canada, smug- " gles, or clandestinely introduces, into Canada, any " goods subject to duty without paying or accounting " for the duty thereon, the said goods shall be forfeited."

" That a certain person or persons unknown, in the " month of November, A.D., 1881, knowingly and wil- " fully, and with intent to defraud the revenue of " Canada, smuggled or clandestinely introduced into " Canada, at Barrington, N.S., certain goods subject to " duty" (naming them as before), " without paying or

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"accounting for the duty thereon, whereby the said "goods became and are forfeited to Her Majesty."

"That Daniel Sargent, then being a Collector of "Customs, authorized and employed by Her Majesty, "and attached to the port of Barrington, on the 5th "day of November, A.D., 1881, at Barrington aforesaid, "did, as such officer of Her Majesty as aforesaid, seize "and take, and did cause to be seized and taken at "Barrington aforesaid, the said goods before mentioned, "imported as aforesaid, as forfeited for the causes "aforesaid."

The information concluded with the usual prayer for condemnation.

The defendant pleaded to the information, in substance, as follows:—

1. That the said schooner "M. L. White" did not arrive at the port of Barrington within the meaning of the statute recited in the information.

2. That the said schooner while on a voyage to the port of Boston, U.S.A., owing to stress of weather and other causes of a like character, was obliged to approach the port of Barrington for shelter, with intent to proceed upon her said voyage to Boston as soon as practicable, and not with the intent to defraud Her Majesty's revenue.

3. That the said goods were not smuggled, or clandestinely introduced into Canada as alleged.

4. That Her Majesty's Attorney-General for Canada is not entitled to take the proceedings which have been taken, nor to proceed further herein, because the provisions of the act 44 Vic., c. 11, sec. 10, have not been complied with.

Issue was joined upon these pleas by the plaintiff.

The following are the facts of the case appearing upon the record:—

On the 3rd November, 1881, the schooner "M. L.

White," being on a voyage from St. Pierre, Miq., to Boston, Mass, with a cargo of tobacco and liquors belonging to M., the claimant, and consigned to B., of the latter place, put into the harbor of Barrington, N. S. for shelter from stress of weather, and ran aground on a ledge at the mouth of the harbor. As soon as the collector of Customs at Barrington became aware of this, which was on the day following, he proceeded on board the schooner and called upon the captain to produce the papers of his vessel. To this demand the captain replied that the papers were locked up in the mate's trunk in the forecastle, which was also locked, the key of which the mate (his son) had taken with him to Pubnico, where he had gone to procure assistance to get the schooner off the ledge. The collector thereupon left the vessel, but returned on board about 6 or 7 o'clock the same evening with a number of his officers or assistants. He then repeated his demand for the papers and received from the captain the same answer as before,—that they were in his son's possession, who was still absent; the collector, however, being requested by the captain to await his son's return, and to place a guardian or watchman on board in the meanwhile. On being threatened by the collector to have his vessel, as well as the cargo, seized, the captain endeavored to open the padlock on the forecastle door with a small iron crow-bar, but was unable to do so in consequence of an injury to his right arm received while at sea. Finding his single efforts unavailing, he asked the only one of his crew left on board to help him break the lock; but, as the sailor was also suffering from injuries received while at sea, their joint efforts were unsuccessful. The captain then offered the collector the use of the crow-bar to open the door, but the collector refused, saying it was not his business to do that, but that it was the captain's

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duty to produce his papers. Receiving this reply, the captain called upon those accompanying the collector to effect an entrance into the forecastle, but they declined to do so. The collector then, without waiting for the mate to return from Pubnico, which he did a few hours after the collector's second visit to the vessel, seized the cargo and brought the vessel to a wharf in Barrington.

There was evidence to the effect that the captain had falsely stated to the collector at Barrington that his vessel was in ballast, and that she was on a voyage from Halifax to Yarmouth, N.S. But this, it appears, was before he was informed of the official position of the collector; and it was well established by several witnesses that after the seizure the captain declared that he was on his way to Boston with a cargo of liquors.

On the mate's return from Pubnico, he was met by one of the collector's officers on the wharf, and together they proceeded on board the vessel. The mate then opened the forecastle and gave up the vessel's clearance and manifest.

After the officer had compared the manifest with the cargo, everything was found correct with the exception of one article which appeared to have been added to the manifest in a different handwriting from the rest of the document, and at a later date. There was, however, no positive evidence to show that this alteration had not been done before the manifest had passed the Customs at the port of clearance; and on the other hand, the mate swore that the alteration was not in his handwriting, and that there was no one else on board the vessel who knew how to write.

The information was exhibited in the Exchequer Court on the 8th March, 1882, and notice thereof given in the manner provided by 40 *Vic.*, *c.* 10, *s.* 108, on the 17th March, 1882. No claim having been previously

filed to the goods against which condemnation was sought by the information, on the 18th May, 1882, Sir W. J. Ritchie, C.J., sitting in the Exchequer Court, ordered judgment for condemnation to be entered against the goods, and in pursuance of such order judgment was so entered up by the Registrar on the same day. On the 19th of June, following, an order was granted by Mr. Justice Henry, in the Exchequer Court, setting aside the judgment so entered, and allowing the defendant McDonell to come in and file his claim to the said goods.

The defendant's claim and answer to the information having been filed and issue joined thereon, the case came on for hearing before Mr. Justice Fournier.

White, Q. C. and *Harris* for plaintiff; *Bingay*, Q. C., *Pelton*, Q.C. and *George Bingay* for the defendant.

FOURNIER J., now (June 16th, 1883,) delivered judgment.

La procédure en cette cause a été commencée par le Procureur-Général, au nom de Sa Majesté, par une information *in rem* pour faire prononcer la confiscation de certains articles saisis à bord de la goëlette "M. L. White," le 4 novembre 1881, dans le port de Barrington, Nouvelle-Ecosse, pour contravention aux lois concernant les Douanes.

L'information, après avoir récité la section 12 du c. 10, 40 Vic., amendant et consolidant les lois concernant les Douanes, laquelle prescrit au commandant de tout vaisseau qui arrive dans un port du Canada, de se rendre directement, et avant d'avoir rompu sa charge (*broken bulk*), au bureau de la Douane de ce port, et là, d'y faire rapport par écrit, au collecteur ou à tout officier compétent, du voyage de son vaisseau, en donner le nom et toutes les autres informations exigées par cette section.

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Il est allégué qu'en contravention à cette clause et avec l'intention de frauder le revenu de Sa Majesté, le commandant de la goëlette " M. L. White " ne s'est pas rendu à la Douane du port de Barrington, où son vaisseau était arrivé et qu'il n'a pas fait le rapport requis, en vertu de la susdite section 12, et qu'en conséquence, les articles saisis, à bord de son vaisseau, sont devenus confisqués en faveur de Sa Majesté.

Par le second chef d'information, il est allégué qu'en vertu de la section 76 de la 44 Vic., c. 11, que tout article (*knowingly*) volontairement et sciemment introduit en contrebande ou clandestinement, sans que les droits imposés aient été payés, sera confisqué en faveur de Sa Majesté.

Qu'en contravention à cette dernière section, le 4 novembre 1881, les articles saisis en cette cause ont été volontairement et sciemment introduits, en contrebande clandestinement et en fraude du revenu des Douanes, au port de Barrington, et qu'ils sont en conséquence devenus forfaits et confisqués au bénéfice de Sa Majesté.

William F. Mcdonnell, réclamant la propriété des effets saisis, a été admis à défendre à la dite information. Comme premier moyen de défense, il allègue que la goëlette " M. L. White " n'est pas arrivée au port de Barrington, qui n'était pas son port de destination, de manière à tomber sous l'opération de la section 12.

2. Que la dite goëlette, étant en route pour Boston, E.-U., a été obligée, par le mauvais temps et par d'autres accidents de la mer, à chercher un refuge temporaire dans le port de Barrington, avec l'intention de continuer, aussitôt que possible, son voyage pour Boston, et sans aucune intention d'enfreindre les lois du revenu.

3. Que les effets saisis n'ont été introduits ni clandestinement ni en contrebande.

Par son dernier plaidoyer, il prétend que le Procureur-Général de Sa Majesté n'a pas droit de procéder par la voie d'information qu'il a adoptée en cette cause, ni de procéder ultérieurement dans cette affaire, parce que la procédure aurait dû être faite en conformité de la 44e Vic., c. 11, et que les formalités qu'elle prescrit n'ont pas été observées.

Les questions à décider sont donc : 1. De savoir, si, dans les circonstances particulières de cette cause, le capitaine de la goëlette "M. L. White" est justifiable de ne s'être pas immédiatement rapporté au collecteur de Barrington 2. S'il y a eu contrebande. 3. Si après la saisie de la goëlette "M. L. White" et le rapport qui en avait été fait au commissaire des Douanes, à Ottawa, conformément aux dispositions de la 44e Vic., c. 11, les procédés ne devaient pas être continués en vertu de cet acte, ou, s'il était encore loisible à Sa Majesté d'abandonner la procédure indiquée en cet acte, pour recourir au mode d'information *in rem* admis en pareils cas par la loi commune.

Il a été entendu un grand nombre de témoins de part et d'autre sur cette contestation ; pas un seul, cependant, n'a fait preuve que les effets provenant de la dite goëlette aient été introduits en contrebande ou clandestinement. A l'argument de la cause au mérite, il n'a pas même été question de ce chef d'information, la preuve manquant absolument. Il doit en conséquence être rejeté de suite, faute de preuve. Il ne reste donc à considérer, sur cette contestation, que la justification offerte par le capitaine du vaisseau, pour ne pas s'être immédiatement rapporté, et la question du mode de procédure adopté.

La saisie a été faite dans les circonstances suivantes : Le cinq, et non le 4 novembre ainsi qu'allégué, Daniel Sargeant, collecteur de Douane au port de Barrington, ayant été informé qu'il y avait un vaisseau dans le port,

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partit, en compagnie de son fils et de M. D. Trefrey, pour se rendre à bord de la goëlette " M. L. White " qui se trouvait alors échouée sur les battures, à l'entrée du port. Trefrey se rendit seul à bord et dans la conversation qu'il eut avec le capitaine, celui-ci lui aurait dit qu'il venait d'Halifax, sur lest, et qu'il était en route pour Yarmouth ; que son fils, second à bord, était allé à Pubnico pour se procurer les secours nécessaires pour sortir de l'endroit. Trefrey ayant rejoint le collecteur, lui fit rapport de son entretien avec le capitaine et tous deux se rendirent, quelques minutes après, à bord de la goëlette. Dans la conversation qui eût lieu entre eux et le capitaine Godet, commandant du vaisseau, celui-ci aurait encore dit, en réponse au collecteur, qu'il était d'Halifax, sur lest, en route pour Yarmouth.

Le collecteur rapporte, comme suit, ce qui s'est passé à propos de diverses demandes des papiers du vaisseau :

> He said he could not show them to me as they were locked up. I said the captain should have access to all his papers, and that I must see them. The captain said that he supposed that I was the Custom House officer. I asked him several times for them, when he gave the same answer that they were locked up. Mr. Trefrey said to him that the forecastle doors were open 15 minutes ago, and that he must have the key ; and the captain looked at him and said "I don't know you." I said to the captain that you must have the key, open the doors and get me the papers, but he still declined to do so.

Le témoin D. S. Trefrey corrobore ce récit, mais ajoute une circonstance importante omise par le collecteur, c'est l'excuse donnée par le capitaine pour ne pas produire les papiers. Le capitaine a plusieurs fois répondu, à la demande de produire les papiers, qu'il ne le pouvait pas, parce qu'ils étaient sous clé dans le coffre de son fils, dans le *forecastle* (gaillard d'avant) qui était aussi fermé à clé, et il demande de mettre un gardien abord en attendant le retour de son fils. Le collecteur et ceux qui l'accompagnaient se rendirent à terre et en revinrent, entre six et sept heures du soir,

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avec du renfort. Dans cette occasion, le collecteur demanda encore les papiers, et, à maintes reprises, il reçut la même réponse, qu'ils étaient en la possession de son fils qui était alors absent. Le capitaine demanda d'attendre son retour en disant au collecteur de mettre un gardien. Sur les menaces du collecteur de saisir le vaisseau, la cargaison, si les papiers n'étaient pas produits, le capitaine essaya de briser, avec une petite pince, le cadenas qui fermait le *forecastle*. Etant, par suite d'un accident éprouvé pendant le voyage, en essayant de sauver sa chaloupe, incapable de faire usage de son bras droit, il ne put réussir, avec sa main gauche, à rompre le cadenas. Son matelot, McManus, aussi blessé en aidant à sauver la chaloupe, fut appelé par le capitaine pour briser le cadenas. Il n'y réussit pas non plus. Il paraît que ce dernier était atteint de paralysie. Les efforts qu'ils firent étaient sérieux, tous deux le jurent positivement, et sont confirmés en cela par plusieurs témoins de la Douane.

Après ces efforts inutiles, le capitaine fit l'offre au collecteur de se servir de la pince pour ouvrir le *forecastle*; celui-ci refusa en disant que ce n'était pas son affaire, et que c'était le devoir du capitaine de produire ses papiers. Alors celui-ci s'adressant à tous ceux qui étaient là, s'écria : "*For God's sake some one come and take the crow-bar.*" Si le collecteur croyait qu'il était audessous de sa dignité de se servir du *crow-bar* à la demande du capitaine, ne pouvait-il pas le faire faire par quelqu'une des huit personnes qu'il avait amenées pour saisir un bâtiment en détresse, à bord duquel il n'y avait alors que deux estropiés ? Ce refus serait inexplicable, si par ses réponses évasives au sujet de ses motifs, le collecteur ne nous en avait donné lui-même la clef.

Comme il doit participer dans le produit de la saisie,

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il craignait que la production des papiers n'eut l'effet d'empêcher la saisie. Voici ce qu'il dit à ce sujet :

Q. Why did you not break the lock when he wanted you to?

A. Because I knew he had the key. The officer Trefrey had told me he had it.

Q. Was it not the true reason why you did not break the lock, that you were afraid you would not be able to make a seizure?

A. No.

Q. Will you swear to that?

A. No, I will not say that was not a part of the reason.

Il réalisa son objet,—fit la saisie et fit ensuite conduire le vaisseau au quai. S'il eut attendu le retour du fils du capitaine, qui arriva vers onze heures du soir, il n'aurait pu atteindre son but, car la production des papiers vint justifier les déclarations faites par le capitaine, après qu'il eut connu la qualité officielle de Sargeant.

Il y a au sujet de ces déclarations, beaucoup de contradictions ; le collecteur, (Sargeant,) Trefrey, et quelques autres témoins sont d'accord à dire que, avant la saisie, le capitaine aurait dit qu'il était d'Halifax en route pour Yarmouth. Trefrey dit qu'il a répété la même chose après la saisie. Quelles qu'aient été ses réponses avant de connaître les qualités officielles de Sargeant, il est constaté par plusieurs témoins, qu'après la saisie et avant la production des papiers, le capitaine a déclaré qu'il venait de Saint-Pierre et qu'il était en route pour Boston, avec un chargement de liqueurs. Dans le cas même où la preuve aurait établie qu'il a donné de fausses réponses, aux questions qui lui ont été faites, quelle en aurait été la conséquence? Ce ne pouvait pas être la saisie du chargement ; de telles réponses, il est vrai, exposaient le capitaine, en vertu de s.s. 2 de la section 12, du c. 10, 40 Vic., à une pénalité de $400. Mais il n'est pas en cause pour avoir encouru une telle pénalité, il ne s'agit ici que de savoir s'il est coupable de ne pas avoir fait le rapport, par écrit, exigé par la première partie de cette section.

De retour de Pubnico, le fils du capitaine, ayant été rencontré sur le quai par Trefrey, se rendit à bord avec lui, ouvrit le *forecastle* et lui remit les papiers consistant dans la clairance du vaisseau et dans l'état de charge.

Trefrey a prétendu qu'il avait vu le capitaine passé à son fils quelque chose, qu'il avait pris pour une clef; quelques autres témoins en disent autant. Le capitaine et son fils nient positivement tous deux ce fait. Il est tout probable que ce sont eux qui ont raison ; car, si une clef a été passée, par le père au fils, la chose aurait été faite dans la conversation entre eux sur le quai et non en présence de plusieurs personnes. Leurs témoignages doivent donc l'emporter sur ceux de Trefry et des autres qui ne rapportent que leur impression. D'ailleurs, ils ont pu facilement se tromper, car cela se passait, (suivant leur récit), au milieu de la nuit et sans lumière. Trefrey a aussi essayé de prouver que le capitaine se serait mis en travers de la porte du *forecastle* et de la cabine, comme pour l'empêcher d'y pénétrer. Ceci est positivement contredit par le capitaine, dont le témoignage, à cet égard, est confirmé par plusieurs témoins qui disent qu'il n'a fait aucun mouvement à cet effet.

Après comparaison de l'état de charge avec la cargaison, tout fut trouvé correct, à l'exception d'un article au sujet duquel il y a encore contradiction directe et positive entre le fils du capitaine et Trefrey.

Ce dernier qui avait pris copie de l'état de charge, s'aperçut, plus tard, que sa copie ne s'accordait pas avec l'état de charge, dans lequel il prétend qu'on avait ajouté une barrique (cask) de rhum. En examinant l'original, on voit en effet que cet article n'a pas été inséré de la même main ; mais quand l'a-t-il été, et par qui ? cela n'est pas prouvé.

Le fils du capitaine jure positivement que ce n'est

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pas de son écriture et que personne, autre que lui à bord, ne savait écrire.

Quoiqu'il en soit, cette circonstance est peu importante, car le capitaine avait le droit de faire rectifier une omission dans son état de charge.

Il est évident, d'après tout ce qui s'était passé avant le retour du fils, que si on l'eut attendu quelques heures de plus, la saisie n'aurait pas eu lieu.

Le collecteur Sargeant retourna le lendemain matin à bord, et après avoir été informé de ce qui s'était passé et examiné les papiers, il aurait dit, en présence du fils du capitaine, qu'il savait qu'il avait eu tort ; mais, que le Gouvernement le supporterait. Le matelot McManus jure la même chose. Interrogé à ce sujet, le collecteur dit qu'il ne croit pas avoir dit cela, qu'il ne s'en souvient pas. Ce témoignage est bien faible comparé aux deux affirmations positives citées Cependant, il n'est pas nécessaire de s'appuyer sur cette admission pour faire voir que la saisie n'était pas justifiable, les circonstances qui ont forcé le capitaine de s'arrêter à Barrington et l'état désespéré de son vaisseau suffisent pour cela.

On a essayé de tirer parti du fait qu'il y avait une ouverture entre la cabine et la cale et que la cloison du *forecastle*, communiquant ainsi avec la cale, était en mauvais ordre, pour en tirer une preuve d'intention de disposer frauduleusement de la cargaison.

Il y a encore contradiction flagrante à cet égard.

Quant à l'ouverture entre la cabine et la cale, les uns disent qu'elle n'était que de douze ou quinze pouces de largeur et que le poële, qui se trouvait auprès, aurait empêché d'y passer ; les autres disent qu'elle était beaucoup plus large et qu'un homme pouvait y passer facilement.

Le capitaine et son fils disent que cette ouverture existait lorsque le bâtiment a été acheté.

Quant au *forecastle*, il est à remarquer que le dérangement de quelques planches, dans la cloison qui la sépare de la cale, n'a été observé, pour la première fois, que deux jours après la saisie. Au surplus, cette circonstance est fort peu importante, car l'équipage entier jure qu'il a été fermé pendant tout le temps du voyage, à partir de Saint-Pierre jusqu'à Barrington. Il est en outre bien prouvé que l'état de charge a été trouvé d'accord avec la cargaison. Rien n'en avait été enlevé et aucune tentative n'avait été faite dans ce but.

La Douane a fait encore preuve de quelques autres faits dans le but d'établir l'intention de fraude.

La cargaison composée de tabac et de liqueurs sortis des entrepôts d'Halifax pour l'exportation, sans avoir payé de droit, mais après l'accomplissement de toutes les formalités, voulues par les lois de Douane, avait été expédiée à l'Ile Saint Pierre, à Hondun et Cie. Le prix en avait été payé par le réclamant pour Hondun et Cie, desquels, plus tard, il acheta des effets du même genre, qu'il fit expédier à Boston, à l'adresse de Brockwell Brothers, par la goëlette "M. L. White," où ils ont été saisis.

La demande a cherché à établir que les effets saisis étaient identiquement les mêmes que ceux provenant de Halifax, afin d'en tirer une preuve d'intention de les entrer dans la Puissance en fraude des lois de Douane ; mais cette identité n'a pas été établie d'une manière satisfaisante et, d'ailleurs, l'eût-elle été, cela ne pouvait modifier les circonstances qui ont forcé le capitaine Godet à chercher un refuge à Barrington ; mais pour repousser cette intention de fraude, il y a preuve que la destination de la cargaison était sérieusement pour Boston. Le réclamant explique, dans son témoignage, que dans le mois de juin de la même année (1881), il avait eu, avec Brockwell Brothers, une conversation au sujet de la vente d'articles de cette nature.

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Le témoin Baker, commerçant de Boston, déclare qu'il connaît Brockwell Brothers, de Boston, marchands à commission, qu'il les avait vus en juin (1881), et que les effets saisis, dont une partie était pour lui, devaient être livrés à Boston ; il jure qu'il en avait reçu avis.

Il n'y a aucune preuve que le capitaine Godet connaissait la provenance de son chargement, ni qu'il avait d'autres instructions que celle de le rendre à Boston. Ces faits, d'ailleurs, ne peuvent aucunement modifier les circonstances qui ont fait échouer son bâtiment sur les battures de Barrington.

Le réclamant a fait entendre plusieurs témoins, pour expliquer les raisons du retard du capitaine Godet à se rapporter à la Douane. Le capitaine lui-même est le premier témoin. Il était alors un résident de Reading, Massachusetts, E.-U., et propriétaire de la goëlette "M. L. White." Il ne sàit ni lire ni écrire. C'est ce qui explique pourquoi il avait remis à son fils, qui agissait comme son second, les papiers du bâtiment. Il s'était rendu à Saint Pierre avec un chargement de bois et aussi dans l'espoir d'y vendre sa goëlette ; là, il prit du lest et la cargaison qui a été saisie ; quand celle-ci fut mise à bord, il avait déjà sa clairance,

En route, il s'arrêta à Halifax pour y déposer un pilote. Après avoir repris sa course, le vent s'éleva fortement et une brume épaisse survint. Dans les efforts que lui et son matelot McManus firent pour sauver la chaloupe du bâtiment, tous deux furent blessés, de manière à ne pouvoir faire que difficilement un peu de manœuvre. Il se décida alors de se diriger vers le premier port qu'il pourrait atteindre, afin de faire des réparations, devenues nécessaires, à son grand mât (*main-mast, new gear,*) et aussi pour se procurer deux hommes, pour continuer sa route vers Boston. Il entendit alors le sifflet du Cap Sable ; ne pouvant voir la terre, il se servit de la sonde pour se diriger sur

Barrington. Il envoya son fils à terre pour reconnaître l'endroit où ils étaient; mais celui-ci ayant rapporté que l'endroit était dangereux et la brume ayant disparue peu de temps après, il se dirigea sur le phare flottant de Barrington: mais son bâtiment échoua sur les battures avant de pouvoir y arriver. Là, il fut obligé de laisser un de ses ancres, parce qu'il ne pouvait, sans aide, le remettre abord. Il fut obligé deux fois de mettre son pavillon à mi-mât, en signe de détresse. Ayant été abordé par Kinney, commandant du phare flottant, il s'adressa à lui pour l'aider à mettre son vaisseau en sûreté. Le capitaine avait un bras en écharpe et l'autre homme disait avoir les mains paralysées.

Ils essayèrent de sortir le vaisseau de sa position; mais il ne purent que l'avancer un peu, il s'échoua de nouveau, parce qu'ils n'étaient pas assez d'hommes pour faire la manœuvre. Il faisait encore une forte brise et il y avait de la brume. Kinney laissa alors le bâtiment pour aller chercher du renfort. Avec l'aide du capitaine O'Brien et trois autres hommes, après avoir pris deux ris dans la grande voile et l'avoir réparée aussi bien qu'ils purent, ils parvinrent, vers le soir, à mettre le vaisseau dans un endroit qu'ils croyaient sûr pour la nuit, à condition d'avoir de bons ancres; mais le capitaine avait été forcé d'en laisser un.

Le lendemain, Kinney et Lyons retournèrent à bord et trouvèrent que la goëlette avait dérivée, sur son ancre, à un demi-mille de l'endroit où ils l'avaient mise la veille.

Le témoin Kinney est tout à fait désintéressé—, il ne pouvait avoir aucune part aux bénéfices de la saisie,—c'est un ancien marin, de 35 ans d'expérience.

A la question de savoir si, jusqu'au moment où il a laissé le capitaine Godet, celui-ci aurait été justifiable de laisser son bâtiment,—il répond:

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I don't believe he could have gone ashore at all. I broke the mast of my own boat in getting to the vessel. I have been 35 years master, and I don't think I would go from my vessel if she was in such a position.

Lorsque le témoin Lyons se rendit à bord, le capitaine lui dit qu'il voulait mettre son batiment en sûreté. Lyons lui dit, "nous le mettrons au quai. C'est ce que je désire," répondit le capitaine. Ce n'est pas d'ordinaire la position que recherche un contrebandier.

Le témoin confirme le récit de Kinney sur l'état du bâtiment et déclare que le capitaine ne pouvait laisser son bâtiment dans cette position.

Ils ne réussirent pas dans leurs efforts pour mettre le bâtiment au quai, ils l'échouèrent auparavant. Il ventait fort alors. Après le départ de ces hommes, le capitaine, qui ne trouvait pas encore son vaisseau en sûreté, envoya son fils à Pubnico pour se procurer de l'argent, pour payer les services qu'il avait eus, faire les réparations nécessaires et se procurer des hommes pour faire la manœuvre, afin de continuer sa route.

Il n'y avait que peu de temps que le fils du capitaine était parti pour Pubnico, lorsque Trefry aborda le bâtiment pour la première fois et revint peu de temps après avec le collecteur, comme il a été dit plus haut. Le fils du capitaine fit son voyage, dont toutes les circonstances sont rapportées par le témoin O'Brien. Il rapporta $50 avec lesquelles son père paya les services reçus, et il amenait en même temps un homme pour aider à la manœuvre.

Comme il avait les clés du *forecastle* et de son coffre, dans lequel étaient les papiers du vaisseau, de là l'impossibilité, pour son père, de produire les papiers, lorsqu'ils furent demandés.

L'excuse donnée était vraie. L'absence du fils avait été nécessaire, et le capitaine n'était pas en position de laisser son bâtiment pour aller à terre. Il eut certainement été imprudent pour lui, de laisser alors son vais-

seau avec une cargaison du genre de celle qu'il avait. Dans ces circonstances, le premier devoir du capitaine était de voir à la sûreté de son bâtiment qui n'était pas assuré, ainsi qu'à celle de la cargaison, ensuite de faire son rapport, comme le dit l'autorité *Abbott on Shipping* (1) :

> When the ship has arrived at the place of her destination, the master must take care that she be safely moored or anchored,and report his ship and crew, and deliver his manifest and other papers, according to the law and custom of the place.

Il n'avait pu encore réussir à mettre sa goëlette en sûreté, lorsque la saisie en fut faite. Il est vrai que la loi exige que, lorsqu'un vaisseau arrive dans un port, le commandant doit se rapporter (*directly*) de suite à la Douane ; mais celui-ci ne faisait pas un arrivage à Barrington dans le sens ordinaire ; c'était pour lui un refuge pour son bâtiment en détresse, et il n'avait pas encore pu s'y mettre en sûreté lorsqu'il a été saisi. Si, après avoir pourvu à la sureté de son bâtiment, il eut procédé à d'autres affaires, au lieu de se rendre tout droit à la Douane, il eut sans doute été en défaut de ne pas s'être rapporté ; mais il n'est guère possible de le trouver coupable de cette offense, d'après la preuve faite. Après avoir relu la preuve, depuis que je l'ai entendue, et après l'avoir examinée attentivement, j'en suis venu à la conclusion, que, dans les circonstances où elle a été faite, la saisie en cette cause n'était pas justifiable ; que la goëlette en question était réellement en détresse, lorsqu'elle a été forcée de se diriger sur Barrington, non comme port d'arrivage, mais comme port de refuge. Que la saisie en a été faite avant que le capitaine ait eu le temps de la mettre en sûreté, et sans qu'il eut fait la moindre chose dénotant une intention de frauder la Douane, depuis son départ de Saint Pierre jusqu'au moment de la saisie.

Le réclamant a prouvé la propriété des effets saisis et cette preuve n'a été nullement contredite.

(1) 12 ed. p. 317.

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La prétention du réclamant, que le Procureur Général n'avait pas le droit de procéder, en cette cause, par voie d'information *in rem*, est évidemment erronée. La section 10 de la 44me Vic., c. 11, sur laquelle il se fonde pour établir cette proposition, n'a rien changé aux dispositions contenues dans les sections depuis 100 jusqu'à 118, inclusivement, de la 40me Vic., c. 10, concernant la compétence des tribunaux et le mode de procédure à suivre, pour le recouvrement des pénalités imposées par cet acte, non plus que pour faire prononcer les confiscations encourues par sa violation.

Le Procureur Général possède encore le pouvoir, qui lui est reconnu par la section 101, de 40 Vic, c. 10, dans ces termes :

All penalties and forfeitures imposed by this Act or by any other Act relating to the Customs or to trade or navigation, shall, unless other provision be made for the recovery thereof, be sued for, prosecuted and recovered with costs by Her Majesty's Attorney-General of Canada, or in the name or names of some officer or officers of Customs, &c.

Les seules sections, concernant la procédure, qui avaient été amendées par la 44me Vic., c. 11, sec. 10, sont les 119me et 120me concernant les pouvoirs du Ministre et du collecteur des Douanes, en matière de saisies. Ces deux sections ont été remplacées en vertu de la section 10. La 120me section, (substituée en vertu de la sec. 10 à celle de la 40e Vic.,) établit une procédure pour faire décider administrativement les cas de saisie, de pénalité ou de confiscation encourues.

Elle décrète que dans ces cas, le collecteur ou autre officier en fera immédiatement rapport au commissaire des Douanes, qui devra de suite en donner avis aux parties intéressées, en leur communiquant les particularités de l'offense dont elles sont accusée, avec avis d'avoir à y répondre, sous trente jours, de la manière indiquée.

Le commissaire, après examen de la preuve, fera rapport, de sa décision sur la matière, au Ministre des

Douanes qui la confirmera ou modifiera, selon qu'il lui paraîtra juste et légal de le faire—et cette décision sera finale *en ce qui concerne le Département* des Douanes.

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Si la partie impliquée accepte cette décision, elle n'aura aucune action en conséquence de la saisie ou détention, et il ne sera pris aucun procédé pour faire prononcer une condamnation contre elle. Et la décision pourra être mise à exécution de la part de la Couronne; mais, en tels cas, la partie impliquée peut, dans les trente jours après telle décision, donner avis par écrit, au Ministre des Douanes, qu'elle n'accepte pas la décision rendue, et alors le Ministre des Douanes procèdera, devant une cour compétente, à faire mettre en force toutes les formalités de la loi, tel que pourvu par cet acte.

Le collecteur de Barrington ayant fait rapport, au commissaire des Douanes, de la saisie des articles dont il s'agit en cette cause, le réclamant prétend, qu'il était alors du devoir du commissaire de lui donner avis, suivant la section 120me, d'avoir à faire sa preuve—et qu'après l'avoir entendu, c'était au commissaire de prononcer sa décision, sujette à la ratification du Ministre des Douanes. Aucun avis n'a été donné par le commissaire et aucun des autres procédés mentionnés dans la section 120me n'a été adopté, et il n'a été fait aucun rapport de la saisie au commissaire.

Le réclamant prétend que la procédure ayant été commencée, suivant cette clause, par le rapport qui a été fait de la saisie, il était obligatoire de la continuer; que toutes les dispositions, étant impératives, devaient être régulièrement observées, et que l'on ne pouvait plus abandonner cette procédure, pour en adopter une autre.

Cette procédure, suivant lui, est exclusive de toutes les autres. Cette prétention n'est pas soutenable; il est évident que cette section 10 (120 substituée) ne

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s'adresse qu'aux collecteur, commissaire et Ministre des Douanes. Elle leur trace, il est vrai, impérativement le mode à suivre, lorsqu'il est procédé, dans le Département, à la décision des cas de violation des lois de Douanes ; mais on ne trouve, dans cette section, aucune expression déclarant qu'ils exerceront ces pouvoirs, à l'exclusion du Procureur Général et des tribunaux qui sont aussi chargés, par les sections 100 et 101 de la 40me Vic., c. 10, de faire mettre la loi à exécution dans ces mêmes cas. Il n'y a pas une seule expression révoquant ces pouvoirs.

Il est clair qu'ils ne peuvent pas être considérés comme ayant été implicitement révoqués par l'adoption du mode établi par la section 10 (120 substituée) ; l'eussent-ils été, que le pouvoir du Procureur Général de procéder par la voie de l'information *in rem* existerait encore ; car le mode étant établi par la loi commune, il faudrait, pour l'abolir, une disposition spéciale ou tout au moins l'adoption d'autres dispositions qui pourraient être considérées comme équivalentes à une révocation explicite.

Comme il ne se présente rien de semblable ici, l'objection faite à la procédure est tout à fait sans fondement.

En conséquence de ce qui précède, j'ordonne la restitution des effets saisis, et à défaut, leur évaluation par le régistraire, ou le *précis-writer*, suivant la règle de cette cour.

The goods having been converted by the Crown, there was a reference to the registrar to ascertain the value of the goods so converted, and judgment was entered upon his report for $2,042.05 and costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendant: *Stewart, Chrysler & Gormully.*

Coram FOURNIER, J.

1884
Feb. 4.

EDWARD LEFEBVRE (CLAIMANT)........APPELLANT;

AND

HER MAJESTY THE QUEEN.. ....RESPONDENT.

Direct and consequent damages from the construction of a public work—31 Vic., c. 12, s. 34.—Prospective capabilities of property—Immoveables by destination—Mill machinery—Arts. 379 *&* 380 *C.C.L.C.—Loss of profits to business.*

Where the Crown in the construction of a public work had forever destroyed the milling capabilities of a property and deprived the owner of future income derivable from the property as applied to such a use, and had rendered useless certain mills situate thereon, together with the machinery in the mills, upon a special case claiming damages in respect of these matters being submitted to the Official Arbitrators they dismissed the claim as not recoverable at law.

On appeal from the award of the Official Arbitrators,

Held:—(1.) In assessing compensation in respect of damage to property arising from the construction, or connected with the execution, of any public work under the provisions of 31 Vic. c. 12, s. 34, the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value. *The Mayor, etc., of the City of Montreal* v. *Brown, et al* (L.R. 2 App. Cas. 168) referred to.

(2.) The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom.

(3.) Under the provisions of Arts. 379 and 380 C.C.L.C., machinery in mills becomes immoveable by destination and forms part of the realty.

(4.) The loss of profits derivable from the prosecution of a certain business is of a personal character, and cannot be construed as a direct or consequent damage to property within the meaning of sec. 34 of the statute above referred to.

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Statement of Facts.

APPEAL from an award of the Official Arbitrators.

In the year 1865, Lefebvre, the appellant, became owner of lots 38, 39 and 40 in the 2nd range of the township of Chichester, in the county of Pontiac, P.Q., upon portions whereof he erected two saw-mills soon after acquiring the lots.

The Ottawa river flows from west to east in front of these lots, and, in the natural state of the river there was a rapid which began at a point beyond lot 40 and continued beyond lot 38, making a fall or head-way of about 16 feet.

One of the mills, that situate on lot 40, was driven by water-power obtained from the said river by means of a channel cut by Lefebvre upon his property so that a fall or head of water from 9 to 12 feet could be applied to the machinery of the mill. The other, situate on lot 38, was driven by water-power obtained from an unnavigable stream which flowed through the last mentioned lot and emptied itself into the Ottawa river. In the year 1873, the Dominion Government, for the purpose of improving the navigation of the Ottawa river, built a dam and canal, with locks opposite one of the lots, which had the effect of raising the water in the river to such an extent above high-water mark as to overcome the rapids in front of the appellant's property and stop the fall of water at the mill on lot 40; and also raised the water in the stream on lot 38 so much above its natural level as to destroy the fall at the mill situated thereon. A portion of the appellant's land was also expropriated for the purposes of the canal, and he sustained injury from the flooding of some 17 acres of the land remaining to him. He thereupon claimed damages against the Government (1) for the value of the land expropriated; (2) for damages to 17 acres of land, caused by the flooding thereof; (3) for rendering useless the mills and building improve-

ments on the said lots of land; (4) for the destruction of water privileges; (5) for rendering the said lots of land unsuitable for milling purposes, and making it impossible to create water privileges thereon at any future time; (6) for destroying the machinery in the said mills; and (7) for the loss of profits derivable from the business of the appellant as owner of the mills on the said lots of land, up to the date of claim, and for the loss of future income which he would have derived from the said mills but for the expropriation and the damages consequent upon the construction of the said river improvements by the Dominion Government.

In a special case submitted to the Official Arbitrators it was declared that the Crown admitted the appellant's claim in respect of the land expropriated, and of the damage resulting from the flooding of a portion of his land, as well as for the actual value of the mills on the said lands, and the buildings and improvements connected therewith (except the machinery in said mills); and had made full compensation to the appellant therefor. The Crown, however, in the special case, expressly denied any liability to indemnify the appellant for the machinery in the mills; or in respect of the destruction of his water privileges and the future milling capabilities of the property; or for the loss of profits and future income from his business.

The Official Arbitrators found that the appellant was not entitled to damages upon the grounds set forth in the special case, except those for which he had already received compensation, and made their award accordingly. From this award Lefebvre appealed to the Court.

The appeal was heard before Mr. Justice Fournier.

O'Gara Q.C. for appellant;

Burbidge and *Hogg* for the respondent.

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FOURNIER, J. now (February 4th, 1884,) delivered judgment:

Le présent appel est d'une sentence rendue, le 27 avril dernier, par les Arbitres Officiels, rejetant une réclamation en indemnité pour expropriation et pour dommages résultant de la construction de certains ouvrages publics ordonnés par la Puissance.

L'appelant, propriétaire des lots 38, 39 et 40, dans le deuxième rang du canton de Chichester, dans le comté de Pontiac, Province de Québec, contenant environ deux cent soixante et onze acres, fut exproprié, par le gouvernement de la Puissance, d'une partie de ses propriétés dans les circonstances et pour les motifs mentionnés, comme suit, dans l'admission de fait signée par les parties :

The Ottawa river flows from west to east in front of said lots, and, in its natural state, there was a rapid in the river which commenced opposite lot 41, and continued beyond lot 38, making a fall or head-way of about 16 feet.

The level of the water in the bay, opposite lot 40, was in its natural state about 9 to 16 feet higher than the level of the water in the river, near the boundary between lots 39 and 40; and in order to obtain a mill site or head of water, the said Edward Lefebvre, or those through whom he claims, cut a channel from the said bay to the river in front, near the boundary between lots 39 and 40, and thus obtained in the said channel a fall or head water of about 9 to 11 feet, which fall or head-way the said Edward Lefebvre used to drive a saw mill erected over, or near to, said channel.

The said saw mill was operated by the said Edward Lefebvre, by means of said fall or head of water until the building of the dams and locks as hereinafter mentioned.

The bay above mentioned was and is used by lumbermen and others using the said river as a place for mooring their boats and logs. In the natural state of the river, there was a portage from the shore of said bay to the shore of the river at the foot of said rapids, and persons using such portage made use of said bay to embark or disembark, as the case might be.

The cutting of the channel above referred to caused no injury to the navigation of the said bay or river.

Through part of lot No. 38 flowed a stream, not navigable, which

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emptied itself into the Ottawa river near the boundary between lots Nos. 38 and 39. On this stream, a short distance from its mouth, and on lot No. 38, there was a fall or head of water about 9 to 12 feet, over which a mill had been erected, capable of being driven by the said fall or head of water at certain periods of the year, and capable of being used as a saw or grist mill.

In or about the year 1873, the Government of Canada, for the purpose of improving the navigation of the said river in front of said lots Nos. 38, 39 and 40, and of rendering the same navigable for large boats, built a dam and a canal with locks on the said river, opposite lot No. 38. The effect of said dam and canal was to improve the navigation of the river and render the same navigable for large boats. Its effects were, also, to raise the water in the river opposite said lots Nos. 38, 39 and 40 over high water mark to such an extent as to overcome the rapids there, and to stop the fall or head of water which the said Edward Lefebvre used for driving the saw mill erected over the channel above mentioned; and also to raise the water in the stream on lot No. 38 to such an extent as to stop the fall or head of water there, which was used, as above mentioned, for driving the mill erected over such stream, and also to flood part of said lots along the front thereof and over high water mark, and to render the residue thereof less capable of drainage.

On account of stopping the said falls or heads of water, the said Edward Lefebvre sustained damage, and made a demand on the Government of Canada therefor as follows:—

First.—For the value of the said land so expropriated for the purposes of the said Culbute Canal Works.

Secondly.—For the damage to about seventeen acres of land by the flooding thereof.

Thirdly.—By rendering useless the mills and building improvements on the said lots of land.

Fourthly.—By the destruction of two water privileges.

Fifthly.—By making the said lots of land unsuitable for milling purposes, and making it impossible to create other water privileges thereon, which, it is alleged, could be created if such Culbute Canal Works were not constructed.

Sixthly.—By rendering useless and destroying the mill machinery in said mills.

Seventhly.—For the loss of profits of the business of the said Edward Lefebvre, as owner of the mills on the said lots of land, destroyed as aforesaid, up to the present time, and for the loss of future income which he would have had from said mills if same were not so rendered useless as aforesaid.

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The Government of Canada admitted the claims of the said Edward Lefebvre, for the expropriation of the two acres of land, for the flooding of about seventeen acres of the said land, and also for the actual value of the mills on the said lands and buildings and improvements connected therewith, except the machinery in use in said mills, and have made full recompense therefor, except for the said machinery; but the Government of Canada deny all liability for the other grounds above mentioned.

And all such matters for which compensation has not been made, as aforesaid, are referred, in pursuance to the statute in that behalf, to the award, final end and determination of the Dominion Arbitrators. Either party may appeal from the award made by the said Arbitrators in pursuance of the statute in that behalf.

On behalf of the Crown, I agree to the foregoing statement of facts, 20th March, 1883.

(Signed) Z. A. LASH,
Counsel for Crown.

On behalf of the Claimant, I agree to the foregoing statement of facts, 20th March, 1883.

(Signed) M. O'GARA,
Counsel for Claimant.

L'expropriation a eu lieu, comme on le voit, pour cause d'utilité publique, dans le but de rendre navigable cette partie de l'Ottawa qui passe en front des propriétés de l'appelant. La demande de celui-ci contre le Gouvernement, basée sur les faits ci-dessus exposés, contenait d'abord sept chefs différents ; les trois premiers, savoir :—le 1er, concernant la valeur du terrain approprié, le 2me, le dommage causé par l'inondation de dix-sept acres de terrain, et le 3me, l'inutilité des moulins et autres constructions faites sur les dits lots de terre, ont été réglés, ainsi que l'appelant l'a reconnu dans l'admission de fait. Il ne reste à statuer que sur les quatre autres, savoir :—

4° La destruction de deux pouvoirs d'eau.

5° Pour avoir rendu les dits lots impropres à l'exploitation des moulins, et pour avoir rendu impossible, par la construction des travaux du canal de la Culbute, la création d'autres pouvoirs d'eau sur les dits terrains.

6° Pour avoir rendu inutile et détruit les mécanismes des dits moulins.

7° Pour la perte des profits de l'industrie du dit Edward Lefebvre, comme propriétaire des moulins sur les dits lots de terre, jusqu'à présent, et pour la perte, à l'avenir, du revenu qu'il aurait perçu des dits moulins, s'ils n'avaient pas été rendus inutiles.

L'appelant ayant obtenu, du Ministre des Travaux Publics, un ordre de référence aux Arbitres Officiels, sa cause leur fut soumise sur l'admission de fait en partie récitée ci-dessus et sur les divers documents qui forment le dossier devant cette cour.

Il ne manquait à l'appelant, pour compléter sa preuve, que la production de témoins pour établir le montant de ses dommages; mais, par leur sentence, les Arbitres refusèrent de recevoir cette preuve, sur le principe que les quatre chefs de sa demande, sur lesquels ils étaient appelés à juger, n'étaient pas fondés en loi. Leur sentence est motivée comme suit :

We are of opinion, after having read the statement produced, that the claimant is not by law entitled to any damages on any of the grounds set forth in this case, for which he has not been already compensated by the Crown; and we decline receiving any evidence on these grounds, and we dismiss the claimant's case.

Tous les faits de la cause ayant été admis, cette sentence ne porte donc que sur le droit de l'appelant de réclamer une indemnité, pour les quatre derniers chefs de sa demande.

Le droit de propriété de l'appelant sur les lots en question est absolu et admis par Sa Majesté en ces termes :

The said Edward Lefebvre is to be considered, for the purposes hereof, as if the patents of said lots from the Crown had been issued to himself under the circumstances and with the intention, on his part, to use the land for the purposes set forth in Exhibit No. 4, and as if the mills and improvements hereinafter mentioned were all erected by the said Edward Lefebvre.

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Comme propriétaire du lot 38, sur lequel se trouvaient les deux pouvoirs d'eau qui ont été détruits, l'appelant n'a-t-il pas droit à une indemnité pour les dommages qui lui en sont résultés ? Malgré la décision contraire des Arbitres Officiels, il est certain qu'en loi l'appelant a droit d'être indemnisé. Les pouvoirs d'eau en question se trouvent, d'après l'admission de fait, situés dans des eaux non navigables, faisant partie de la propriété du lot 38. Ce droit de propriété est reconnu par les articles 408 et 503 du C. C. de la province de Québec et par le c. 51 des Statuts Consolidés, Prov. du Bas-Canada ; *Daviel—Des cours d'eau* (1) :

Celui dont un cours d'eau traverse l'héritage le possède par droit d'accession. (2)

Il est à sa disposition exclusive dans l'intervalle qu'il parcourt au milieu de ses fonds.

Sans doute cette nature de propriété est nécessairement subordonnée à certaines conditions, à certaines modifications qui dépendent de l'essence même de la chose sur laquelle elle s'exerce. C'est propriété moins absolue ; mais c'est toujours propriété. Le fluide, renouvelé à chaque instant, se précipite sans cesse vers les fonds inférieurs : voilà son éternelle loi. Le droit sur les eaux courantes ne dure donc qu'autant de temps qu'on est réellement en pleine jouissance.

Du moment que la possession de A cesse, celle de B commence, pour faire bientôt place à celle de C, et ainsi de suite, chacun à son tour a un droit égal à convertir l'eau à son propre usage.

La proposition de droit, contenue dans ce passage, admettant le droit du propriétaire à la propriété des eaux, n'est susceptible d'aucune contestation. Tous les auteurs sont d'accord à ce sujet, il en est de même dans le droit anglais, comme le font voir l'autorité de *Angell on Water Courses* (3), et les nombreuses décisions judiciaires qu'il cite à l'appui de ce principe :

The right to the use of the flow of the water, in its natural course, and to the momentum of its fall on the land of the proprietor, is not what is called easement, because it is inseparably connected with, and inherent in, the property in the land ; it is a parcel of the inheritance, and passes with it.

(1) Vol. 1 p. 18 n° 14.

(2) *Portio agri videtur aqua viva,* *l. 2 ff. Quod vi aut clàm.*

(3) p. 91.

(Voir les nombrenses autorités citées dans la note 2.)

Il est évident, d'après les autorités, que les pouvoirs d'eau en question faisaient partie de la propriété de l'appelant et, qu'en conséquence, il a droit à l'indemnité réclamée par le quatrième chef de sa demande pour leur destruction.

Le droit de propriété dans les pouvoirs d'eau, qui se trouvent sur sa propriété, étant reconnu comme fondé en loi, s'en suit-il que l'appelant a aussi droit d'être indemnisé pour les raisons mentionnées dans le cinquième chef de sa demande? Il se plaint que la construction des travaux du Gouvernement a rendu sa propriété moins avantageuse pour l'exploitation de moulins, et que la création d'autres pouvoirs d'eau, qu'il était facile d'y faire auparavant, est devenue impossible en conséquence de ces travaux. La nature de ces dommages est sans doute difficile à établir, on ne peut pas s'appuyer sur des faits positifs pour les préciser et en déterminer le montant. Il faut nécessairement recourir à des probabilités, à des possibilités, existantes lors de l'expropriation, de tirer parti de ces pouvoirs d'eau; cependant, si indéfinis que puissent être les calculs qu'il faut faire pour fixer leur valeur, ils sont toutefois de nature à être pris en considération, lorsqu'il s'agit de l'estimation de la propriété.

Un particulier, en vendant une propriété de ce genre, n'en bâserait pas le prix seulement sur la valeur des pouvoirs d'eau actuellement en exploitation, il ne manquerait pas de faire valoir la possibilité qu'il y a d'en créer d'autres sur sa propriété et augmenterait son prix en conséquence. Cette possibilité, bâsée sur le caractère de la propriété, aurait dû être prise en considération dans l'évaluation qui a été faite.

La loi, en vertn de laquelle ont eu lieu les procédés en expropriation, 31 Vic. c. 12, sec. 34, contient une disposition très étendue au sujet de ces réclamations

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pour dommages résultant d'expropriation en pareils cas.

Elle reconnaît, à l'individu exproprié, le droit aux dommages incidents. A la sec. 34, elle s'exprime comme suit :

Si quelque personne ou corps politique a quelque réclamation à faire valoir pour des propriétés à elle prises, ou pour des dommages pretendus, directs ou indirects, provenant de la construction ou se rattachant à l'exécution de quelque ouvrage public, entrepris, commencé ou exécuté aux frais de la Puissance, etc., etc., telle personne ou tel corps politique pourra donner avis par écrit de sa réclamation au ministre, etc., etc.........

Le reste de cette section, ainsi que les trois suivantes, pourvoient au mode de procéder devant les Arbitres Officiels pour faire décider ces réclamations.

Les termes de cette section sont assez amples pour justifier le quatrième chef de la réclamation de l'appelant ; mais s'il pouvait y avoir doute à cet égard, la décision du Conseil Privé de Sa Majesté, dans la cause du *Maire, Echevins et Citoyens de la cité de Montréal* v. *Brown & Springle*, (1) le ferait bientôt disparaître.

Afin de mieux faire voir avec quelle force le principe énoncé dans ce jugement doit s'appliquer dans le cas actuel, je citerai la clause du statut soumise à l'interprétation du Conseil Privé.

La cité de Montréal, ayant, en vertu de la 27me et 28me Vic. c. 60, obtenu les pouvoirs nécessaires pour l'acquisition et l'expropriation de terrains nécessaires pour l'élargissement des rues et pour autres améliorations publiques, la section 11 du statut lui conferrait entre autres, les pouvoirs suivants :

The Council of the said City of Montreal shall have full power and authority.................to purchase, acquire, take and enter into any land, ground or real property whatsoever within the limits of the said city, either by private agreement or amicable arrangement between the Corporation of the said city and the proprietors or other persons interested, or by complying with all the formalities herein-

(1) 2, App. Cas. 168.

after prescribed, for opening streets, public squares, markets or other public places, or for continuing, enlarging or improving the same, or a portion of the same, or as a site for any public building to be erected by the said Council.

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En comparant cette section avec la 34me du c. 12, 31 Vic., ci-dessus citée, on voit, de suite, que cette dernière contient une disposition plus libérale que l'autre, en reconnaissant le droit à l'indemnité pour dommages incidents; dans l'autre, il n'en est nullement question, il n'y est fait aucune mention de dommages, même directs.

Cependant, dans l'interprétation de cette clause, le Conseil Privé a été d'avis que, dans l'évaluation de la propriété expropriée, on devait prendre en considération les possibilités qu'il y avait d'en tirer meilleur parti.

Ce principe est énoncé comme suit, dans le jugement de leurs Seigneuries :

The Superior Court were of opinion that in valuing such land the prospective capabilities of it are not to be taken into consideration ; that this is not a legal element in the calculation ; that you are to look at the land and what is upon it at the time that the valuation takes place ; and that you are not to go into what they are pleased to term hypothetical or speculative inquiries as to what purposes the land might advantageously be applied to. Their Lordships are of opinion that the prospective capabilities of land may form, and very often are, a very important element in the the calculation of its value, and therefore they cannot concur in the view of the Superior Court, which seems to have supposed that that consideration was to be absolutely excluded in a valuation under the Act of Parliament (1).

Pensant que le principe doit s'appliquer, avec encore plus de force, à la section 34 de l'acte des travaux publics, je suis d'avis que l'appelant a droit à une indemnité pour les motifs mentionnés dans le cinquième chef de sa réclamation.

Les mécanismes qui se trouvaient, lors de l'expro-

(1) 2 App. Cas., pp. 184-185.

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priation, dans les moulins de l'appelant faisaient indubitablement parti de la propriété. Ils étaient devenus immeubles par destination, conformément aux arts. 379 et 380 C. C. En conséquence, leur destruction ou diminution de valeur aurait dû être prise en considération, dans l'estimation de l'indemnité à laquelle l'appelant avait droit.

Par le septième et dernier chef de sa réclamation, l'appelant demande des dommages pour la perte des profits dans son industrie (*for loss of profits of the business, &c., &c.*), jusqu'au moment de sa réclamation et aussi pour l'avenir.

Cette perte, qu'il subira probablement, étant d'un caractère personnel et n'étant pas un dommage fait à la propriété, ne donne pas lieu à l'indemnité.

Ayant eu occasion d'examiner cette question dans la cause de *McPherson* vs. *La Reine* (1), dans la cour d'Echiquier, je ne la discuterai pas de nouveau. Comme la cause n'est pas encore rapportée, je ne donnerai, ici, que les autorités sur lesquels je me suis appuyé, pour en arriver à cette conclusion: *Ricket* v. *Directors, &c., of Metropolitan Railway Co.* (2) *Metropolitan Board of Works* v. *McCarthy* (3). Conformément à la décision que j'ai déjà rendue sur cette question, je rejette la réclamation en indemnité contenue dans le septième chef de la demande, comme n'étant pas fondée en loi.

Pour ces motifs, je suis d'avis que la sentence rendue en cette cause, le 27 avril dernier, par les Arbitres Officiels, doit être infirmée en ce qui a rapport aux quatrième, cinquième et sixième chefs de la demande, et confirmée seulement quant au septième. En conséquence, j'ordonne qu'il soit procédé, par-devant un

(1) The case was not reported when this judgment was delivered, but may now be found at page 53 of this volume.

(2) L. R. 2, H. L. p. 175.

(3) L. R. 7, H. L. p. 243.

officier de cette cour, à la preuve des réclamations contenues dans les quatrième, cinquième et sixième chefs de la demande en indemnité, de l'appelant, pour être plus tard adjugé sur le montant de la dite réclamation, suivant la preuve qui en sera faite.

Le tout avec dépens du présent appel contre Sa Majesté.

Appeal allowed with costs.

Solicitors for appellant: *O'Gara & Remon.*

Solicitors for respondent: *O'Connor & Hogg.*

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July 19.

Coram HENRY, J.

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

AND

CHARLES WHITEHEAD, HENRY N. RUTTAN AND JOHN RYAN.... } DEFENDANTS.

Demurrer—Claim for timber unlawfully cut on Dominion lands—Pleading set-off against the Crown—Running accounts—Practice.

An information was filed on behalf of the Crown seeking judgment against the defendants for entering upon certain Dominion lands and cutting thereon and converting to their own use a quantity of timber and railway ties, contrary to the provisions of 46 Vic., c. 17, s. 60; and also for money owing to the Crown for dues in respect of the timber and ties so cut by the defendants. The defendants specially denied the allegations of the information, and in their 12th plea substantially alleged that the claims sought to be maintained by the Crown arose out of, and were connected with, certain contracts between them and the Crown, in respect of which the Crown was indebted to them in an amount greater than the sum claimed from them in the information; and in their 13th plea substantially alleged that the Crown was then also indebted to them in an amount of money other than that above mentioned, which last mentioned sum was larger than the amount claimed from defendants; and that, before the information was filed it was agreed between the Crown and the defendants that in consideration of the defendants forbearing to sue the Crown until their claims could be investigated, the Crown would not, before such investigation had been made, demand from the defendants, or sue them, for the claims set out in the information. It was further alleged by the defendants in their 13th plea that the Crown had never caused such investigation to be made, although they had theretofore been, and were then, ready and willing that such investigation should be had; and that the amount thereupon found due to them from the Crown, or a proper proportion thereof, should be applied by way of set-off towards payment and satisfaction of the alleged claims of the Crown.

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To these pleas the plaintiff demurred on the ground that set-off cannot be pleaded against the Crown.

Held:—(1) That the rule in such a case is not to set aside the plea demurred to unless it is clearly bad.

(2) That, inasmuch as the claim against the Crown set out in defendants' 12th plea arose out of the same contracts between the parties in respect whereof the claims sought to be enforced in the information had arisen, and as the dealings of the parties thereunder were so continuous and inseparable that the claims on one side could not properly be investigated apart from those of the other, the rule against pleading a set-off to a declaration for money due to the Crown did not apply, and the demurrer to said plea should be over-ruled.

(3) That, as there was no allegation to the contrary, it must be presumed that the claim set up in the first part of the 13th plea was one unconnected with, and distinct from, the transaction in respect of which the claims sought to be enforced in the information arose; and that so much of the plea as dealt therewith, being simply a matter of set-off, was bad in law.

(4) That a promise of forbearance to sue, such as that alleged in the concluding portion of defendants' 13th plea, could not be successfully pleaded in bar of an action between subject and subject, nor would such a defence be available against the Crown.

THIS was a case on demurrer.

By an information filed by the Attorney-General for the Dominion of Canada, on behalf of the Crown, the court was informed as follows:—

"1. That the defendants, contrary to the form of the statute in that behalf made and provided, did without authority cut and cause to be cut certain timber and tamarac trees, to wit: 16,389 lineal feet of timber and 100,000 tamarac ties upon certain lands belonging to Her Majesty the Queen, within the Dominion of Canada, and known as Dominion lands, and the said timber and ties have been removed out of the reach of the Crown timber officers, and it has been found impossible to seize the same; whereby the defendants have forfeited a sum not exceeding three dollars for each tree, which, or any part of which, they so cut, but have not paid the same.

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"2. That the said defendants, contrary to the form of the statute in that case made and provided, did, without authority, remove and carry away, and employ others to remove and carry away, certain timber and tamarac ties, to wit: 16,389 lineal feet of timber and 100,000 tamarac ties, the produce of trees belonging to Her Majesty and growing and being upon certain the belonging to Her Majesty the Queen within lands Dominion of Canada, and known as Dominion lands, and which timber and ties had been, without authority, cut on such lands, and said timber and ties have been removed out of the reach of the Crown timber officers, and it has been found impossible to seize the same; whereby the defendants have forfeited a sum not exceeding three dollars for each tree which, or any part of which, they so carried away, but have not paid the same."

"3. That the defendants did cut and cause to be cut and carried away certain timber and tamarac ties belonging to Her Majesty the Queen, and being the produce of certain trees then growing and being upon certain lands in the Dominion of Canada belonging to Her said Majesty, and known as Dominion lands, and the said defendants promised Her Majesty the Queen to pay, and became liable to pay, the Crown dues upon the timber and ties so cut and carried away, yet they have not paid the same."

"4. That the defendants converted to their own use and wrongfully deprived Her Majesty the Queen of certain timber and tamarac ties, to wit: 16,389 lineal feet of timber and 100,000 ties belonging to Her Majesty."

"5. That the defendants did agree with Her Majesty the Queen, that in consideration of Her Majesty permitting the defendants to cut timber and railway ties upon certain lands belonging to Her Majesty and

known as Dominion lands, they would pay to Her Majesty the sum of one cent per lineal foot for the timber, and the sum of three cents for each tie eight feet long so cut; and Her Majesty did permit the defendants to cut, and the defendants did cut, upon the said lands, a large quantity of timber, to wit: 16,389 lineal feet, and a large number of ties, to wit: 100,000 tamarac ties, but the defendants did not pay the said sums therefor."

"6. The defendants are indebted to Her Majesty for money payable by the defendants to Her Majesty the Queen for Crown dues upon certain timber and railway ties, belonging to Her Majesty, which had been growing upon certain lands in the Dominion of Canada belonging to Her Majesty and known as Dominion lands, and which timber and ties were cut and caused to be cut and carried away by the defendants, and for money paid by Her Majesty for the defendants at their request, and for money received by the defendants for the use of Her Majesty, and for interest upon money due by the defendants to Her Majesty and forborne at interest by Her Majesty to the defendants, at their request, and for money found to be due by the defendants to Her Majesty on accounts stated between the defendants and Her Majesty."

"Whereby Her Majesty the Queen is entitled to demand judgment against the defendants:"—

"1. Judgment against the defendants for a sum not exceeding three dollars for each tree, which, or any part of which, they cut, as in the first count mentioned."

"2. Judgment against the defendants for a sum not exceeding three dollars for each tree, which, or any part of which, they carried away, as in the second count mentioned."

"3 Judgment against the defendants for the sum of $4,000, being the Crown dues upon the timber and

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ties cut and carried away, as in the third count mentioned.

"4. Judgment against the defendants for the sum of $10,000, being the value of the timber and ties converted by the defendants to their own use, as in the fourth count mentioned."

The defendants, in their answer, after denying all the allegations in the information, pleaded as follows:—

"And for a twelfth plea, the defendants as to the said third, fifth and sixth counts of the said information further say, that the said alleged claims were incurred by the defendants and arose out of, and were connected with, certain contracts between Her Majesty and the defendants, for the performance of work and the erection of bridges on Her Majesty's Canadian Pacific Railway, and for the manufacture and delivery of material for use on the said railway; and the defendants say that before the filing of the said information herein, Her Majesty was and still is indebted to the defendants in the sum of one hundred thousand dollars, and upwards, for work done and materials provided by the defendants for Her Majesty in pursuance of the said contracts, and which said sum is greater than the claims and demands of Her Majesty against the defendants mentioned in the said counts; and the defendants say that the said claims of Her Majesty against them and their said claim against Her Majesty are one continued transaction, and that the one cannot be properly investigated without the other; and the defendants say that they were always ready and willing, and they do hereby offer, that a sufficient portion of their said claims against Her Majesty should be set off and applied towards the satisfaction and payment of the said claims of Her Majesty against them, and the defendants for that purpose, pray that an account may be taken of all their said claims against

Her Majesty; and if necessary, that the amounts found due, or proper proportions thereof, may be set off against, or applied in satisfaction of, the said claims of Her Majesty against them."

"And for a thirteenth plea, the defendants, as to the said third, fifth and sixth counts of the said information, further say that before the filing of the information herein, Her Majesty was and still is indebted to the defendants in the sum of one hundred thousand dollars, and upwards, as a balance for work done and materials provided by the defendants for Her Majesty, and which said amount is greater than Her Majesty's said claims against the defendants; and before the commencement of this suit it was agreed between Her Majesty and the said defendants that, in consideration of the defendants forbearing to sue Her Majesty for the said claims until Her Majesty's officers should investigate the said claims of the defendants against Her Majesty, Her Majesty would not, until such investigation by Her Majesty's officers of the defendants' said claims, demand from the defendants, or sue them, for the said alleged claims in the said counts mentioned, and that after such investigation of the defendants' said claims, the amount found due to the defendants from Her Majesty on such investigation, or a proper proportion thereof, would be applied by Her Majesty towards satisfaction and payment of Her Majesty's said alleged claims in the said counts mentioned; and the defendants say that Her Majesty's officers did not, before the filing of the information, nor have they yet, investigated the said claims of the defendants against Her Majesty, and that the defendants, in pursuance of the said agreement have not sued Her Majesty for their said claims against Her Majesty, or for any part thereof, and the same are still unpaid and outstanding, and Her Majesty is still indebted to the

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defendants therefor in the sum of one hundred thousand dollars, and upwards, and the defendants say that they were always ready and willing, and they hereby offer, that their said claims against Her Majesty should, in pursuance of the said agreement,be investigated and the amount found due to the defendants therefor, or a proper proportion thereof, applied towards satisfaction and payment of the said alleged claims of Her Majesty in the said counts mentioned; and the defendants now pray that an account may be taken by this Honourable Court of all such accounts, respectively, and that the sum, or a proper proportion thereof, respectively, may be set off, one against the other, so that right may be done."

To these two pleas a demurrer was filed on behalf of the Crown, as follows: —

"1. As to the twelfth plea:—

"Set-off cannot be pleaded against Her Majesty, and the said plea, while admitting that the defendants are liable to Her Majesty, shews no defence to the claim.

"2. As to the thirteenth plea:—

"That the said plea amounts to a plea of set-off, which cannot be pleaded against Her Majesty, and the said plea while admitting that the defendants are liable to Her Majesty, shews no defence to the claim."

The demurrer was argued before Mr. Justice Henry.

Hogg in support of demurrer.

O'Gara, Q.C. *contra*.

HENRY J. now (July 19th, 1884) delivered judgment.

The demurrer in this case was argued before me. It was to the twelfth and thirteenth pleas. The action was brought by information. The first count charges that the defendants, without any authority, cut and caused to be cut, timber and railway ties upon certain lands belonging to Her Majesty, within the Dominion of Canada, known as Dominion lands.

The second count charges that the defendants removed and carried away certain timber and railway ties, the produce of trees belonging to Her Majesty within the Dominion of Canada, and known as Dominion Lands.

The third is for the recovery of Crown dues, which it is alleged the defendants promised to pay on certain timber and ties produced from timber growing on the Dominion lands.

The fourth is for the alleged conversion of timber and ties belonging to Her Majesty.

The fifth is to recover for certain timber and ties which Her Majesty is alleged to have permitted the defendants to cut on Dominion lands at the rate of one cent per lineal foot for the timber, and three cents for each tie eight feet long.

The sixth alleges that the defendants are indebted to Her Majesty for money payable by them to Her Majesty for Crown dues upon certain timber and ties cut and carried away by the defendants, for money paid by Her Majesty for the defendants, for money had and received for the use of Her Majesty, and for money due on accounts stated.

The defendants, in answer thereto, filed thirteen pleas I need only refer to those which have been demurred to,—the twelfth and thirteenth.

The twelfth is to the third, fifth and sixth counts of the information, and alleges that the claims of Her Majesty arose out of and were connected with certain contracts between Her Majesty and the defendants for the performance of work and the erection of bridges on the Canadian Pacific Railway, and for the delivery of materials for the railway. It further alleges that Her Majesty was indebted to the defendants for work done and materials provided by them for Her Majesty, under the contract, to a greater extent than the amount of the claims and demands of Her Majesty against them ;

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that the claims of Her Majesty against them and their claim against Her Majesty are one continual transaction, and that the one cannot properly be investigated without the other; that the defendants were always ready and willing that a sufficient portion of their claims should be set off and applied towards the satisfaction and payment of the claims of Her Majesty against them; and prays that an account may be taken of all the defendants' claims against Her Majesty in order that the amounts found due, or a proper proportion thereof, might be set-off against, or applied in satisfaction of, the claims of Her Majesty against them.

Issue was taken upon all the pleas, and, as to the twelfth plea, the demurrer is that:

Set-off cannot be pleaded against Her Majesty, and the said plea, while admitting that the defendants are liable to Her Majesty, shows no defence to the claim.

The rule in such a case is not to set aside the plea demurred to unless it is clearly bad.

The set-off provided for by the statutes in England was of independent debts or claims, but running accounts of debit and credit were treated differently. *Snell on Equity*, (7th Ed.) at page 524 says:—

As regards connected accounts of debit and credit, both at law and in equity, and without any reference to the statutes 4 Ann c. 17, sec. 11; 2 Geo. II, c. 22, sec. 13; 8 Geo. II, c. 24, sec. 4, the balance of the accounts only is recoverable; which is, therefore, a virtual adjustment and set-off between the parties. *Dale* v. *Sollet* (1).

The plea shows that the claims on each side were under contracts, and that they are not independent. It alleges this fact, which is admitted by the demurrer, and also alleges that the claims on both sides were one continued transaction, and that the one could not properly be investigated without the other. It appears to me that the claim of the defendants is not an independent one, but that it comes within the rule applicable to connected accounts. The contracts are not set out in the pleadings, and I have therefore no

(1) 4 Burr. 2133.

guide on the point except what I find in the plea, by which I have been governed. Entertaining the views I have expressed, the demurrer to the plea in question must be over-ruled.

The demurrer to the thirteenth plea is :

That the said plea amounts to a plea of set-off, which cannot be pleaded against Her Majesty, and that the said plea, while admitting that the defendants are liable to Her Majesty, shows no defence to the claim.

The first part of the plea is a plea of set-off, and as the contrary is not alleged, it must be presumed to apply to a claim independent of that for which the information was filed to recover.

The Sovereign not being named therein, is not affected by the statutes relating to set-off, and I can find no authority for a plea of set-off against the Crown. I, therefore, think the plea in question bad in that respect.

The concluding part of the plea, however, raises another issue on an alleged agreement on the part of Her Majesty to forbear bringing a suit for the claim now sought to be established, as therein stated, in consideration that the defendants would forbear to sue Her Majesty for their claims against Her, pending an investigation thereof. The consideration of forbearance to bring a suit against a third party for a stipulated period is a sufficient consideration for a promise to pay money ; but I know of no such agreement as the one here put forward ever having been successfully pleaded in bar of an action between subject and subject, nor can I conclude that such a defence is available against the Crown. I consider the plea bad also in that respect.

Demurrer to the twelfth plea over-ruled, and that to the thirteenth plea sustained, without costs on either side.

Solicitor for plaintiff : *D. O'Connor.*

Solicitor for respondents : *O'Gara, Lapierre & Remon.*

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Jan. 13.

Coram FOURNIER, J.

JOHN JACKSON AND PETER JACKSON (CLAIMANTS) APPELLANTS;

AND

HER MAJESTY THE QUEEN..........RESPONDENT.

Damages arising from expropriation of land—Right of action—Compensation paid to claimants' grantor (auteur)—31 Vic., c. 12, sec. 34.

Prior to the construction of the Lachine Canal, farm lots (cadastral) nos. 3617 and 3912, situate in the parish of Côte St. Paul, in the county of Hochelaga, P.Q., were drained, each in its own line, by a natural water course on their northern boundary. In constructing the Lachine canal the Dominion Government destroyed the natural drainage of the lots, and, as it was impossible to effect drainage into the canal on account of the height of the embankments, the Government built several culverts under such embankments to answer that purpose. To conduct the drainage from the four neighbouring farms west of lot 3617, as well as from lot 3617 itself and the two farms immediately east of it, to a culvert situated on lot 3912, the Government provided the said farms with a drain-ditch leading to the culvert. This system of drainage appears to have worked satisfactorily when not interfered with.

For the purposes of the canal, the Government expropriated a portion of lot 3617 while it was in possession of P. J., the father of the claimants, and from whom they derived title thereto. In pursuance of an award of the Official Arbitrators, the Government paid the then proprietor $2,320.33, with interest from the date of expropriation, for the area of land so taken, and a further sum of $4035.10, for all damages resulting from the expropriation.

After lot 3617 came into the possession of the claimants, the occupant of one of the farms adjoining it obstructed the passage of water through the said drain-ditch and caused the said lot to become overflowed, whereby the claimants' barns and their contents were injuriously affected.

Some time in the year 1853, and before lot 3912 came into the possession of P.J., one of the claimants, the Government of Canada had paid for and obtained from the then owner certain easements and servitudes for the purposes of the said canal, and, in the exercise of the rights so acquired by the Crown, damage resulted to

the lot and buildings erected thereon after they came into the possession of the last named claimant.

Upon a claim against the Dominion Government for compensation for damage and loss of profits sustained by the claimants in respect of the use and occupation of the two lots being submitted to the Official Arbitrators they found against and dismissed the same.

On appeal from the award of the Official Arbitrators,

Held :—(1) That in respect to lot 3617, inasmuch as compensation for all future damages arising from the expropriation had been paid to claimants' grantor (*auteur*) while he was in possession, no right of action for such damages accrued to the claimants unless (as was not the case here) another expropriation had been made, or some new work performed, causing damages of a character not falling within the limits of those arising from the first expropriation. Moreover, if such new damages had arisen prior to the said claimants coming into possession of the lot, any right of action therefor could only have been exercised by the claimants' grantor (*auteur*).

(2) That in respect to lot 3912, the claimant must abide by the easements and servitudes over and upon the property created by his grantor (*auteur*), and that the claim for damages arising out of the exercise of such rights by the Government was not well founded.

APPEAL from an award of the Official Arbitrators.

John Jackson and Peter Jackson, the claimants (appellants), were joint owners of the farm lot known as lot (cadastral) no. 3617; and Peter Jackson, one of the said claimants, was sole owner of lot (cadastral) no. 3912, both being situated in the parish of Côte St. Paul in the county of Hochelaga P.Q., both of which, as alleged by the claimants, had suffered damage from the Lachine Canal. Upon a claim for compensation in respect of such damage being made by the said claimants against the Dominion Government, it was referred to the Official Arbitrators for investigation and award.

The following is the claimants' statement of claim as submitted to the Official Arbitrators :—

"Detailed account of the claims of John and Peter Jackson for damages caused to their properties nos. 3617 and 3912, of Côte St. Paul, through the excavation of ditches and flooding of said properties.

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Claim for lot No. 3617—

1. Loss of hay during two spring floods since the making of the Government ditch........................	$85 00
2 Damages and repairs to 2 stables and barns, each spring during 5 years, at $20.00 per year at least....	100 00
3. Destruction and loss of about 150 loads of manure of the best quality, worth at least $1.00 per load........	150 00
4. Loss of revenue on the portion of the ground flooded, being garden soil, very valuable, at least $50.00 per year..............................	250 00
	$585 00

Claim for lot No. 3912—

5. Loss of revenue on portion of the ground occupied by the old ditch, 5 arpents in length by 20 feet wide; cost of bridges over said ditch and additional expenses to work this property, being cut in two, at least $50.00 per year, during 4 years.....	200 00
6. Loss, decrease of rent on house situated on said lot no. 3912, through damage caused by water, at least $100.00 per year, for 4 years......................................	400 00
7. Loss of all revenue on the land occupied by the deposit of clay (stuff) put there by the Government contractors 4 years at $50.00 a year....................................	200 00
	$800 00
	$1,385 00

Chagnon for the appellants;

Hogg for the respondent.

The Official Arbitrators, upon hearing evidence in support of the claim, found against and dismissed the same.

The claimants then appealed to the Court; the appeal being heard before Mr. Justice Fournier.

The facts appearing on the evidence are sufficiently et out in the head-note and judgment.

FOURNIER, J. now (January 13th, 1886,) delivered judgment.

Les réclamants en cette cause ont appelé à cette cour, en vertu de l'acte 42 Vic., ch. 8, de la sentence rendue par les Arbitres Officiels de la Puissance, le 10 novembre 1884, renvoyant leur réclamation, contre le Département des Travaux Publics, pour dommages leur résultant de l'insuffisance de la construction des fossés que le Gouvernement a fait construire à la côte St. Paul, dans les environs du canal Lachine, pour l'égout de certaines propriétés et entre autres de celles des réclamants. Les propriétés sont désignées et connues comme les nos. 3617 et 3912 du cadastre officiel et livre de renvoi de la paroisse de la côte St. Paul.

Les dommages réclamés, pour le lot n° 3617, se montent à la somme de $585, pour perte de foin causée par deux inondations, réparations à deux étables et granges, destruction de fumier et perte de revenu sur le terrain inondé.

Le dommage, pour le lot n° 3912, est aussi pour perte de revenu sur le terrain occupé par un ancien fossé, frais de ponts sur ce fossé, etc., perte par la diminution du loyer d'une maison située sur ce lot, et perte de revenu sur un terrain couvert de terre glaise déposée par le contracteur du Gouvernement.

Le droit à une indemnité, soit pour expropriation, à

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la demande du Département des Travaux Publics de la Puissance, soit pour dommages occasionnés par la construction de quelques ouvrages par le Département, est réglé par l'acte 31 Vic., ch. 12, sec. 34, dans les termes suivants :

Si quelque personne ou corps politique a quelque réclamation à faire valoir pour des propriétés à elles prises, ou pour des dommages prétendus, directs ou indirects, provenant de la construction de quelque ouvrage public, entrepris, commencé ou exécuté aux frais de la Puissance, etc., etc., telle personne ou tel corps politique pourra donner avis par écrit de sa réclamation au ministre, etc.

Le reste de la section et les trois suivantes prescrivent le mode de procéder devant les Arbitres Officiels qui doivent décider les réclamations. Les prescriptions ont été observées et la réclamation des pétitionnaires a été dûment référée aux Arbitres Officiels, qui ont été appelés à l'examiner et à la décider.

Après avoir entendu et examiné dix témoins de la part des requérants et trois de la part de la Couronne, les Arbitres ont, par leur sentence du 10 décembre 1884, renvoyé la réclamation comme non fondée.

Les requérants allèguent, dans leur requête en appel, qu'ils n'ont pu faire, à leurs témoins, toutes les questions qu'il était de leur intérêt de faire et qu'ils n'ont pu, non plus, en faire entendre d'autres en conséquence du refus des Arbitres.

Leur plainte, à cet égard, est libellée comme suit :

And for a further and more special reason of appeal, your petitioners allege that, before the said Board, they have been prevented by the Arbitrators from putting to the witnesses a good many questions, which might, and which certainly would, have brought answers very material to the making out of their claims ; and that the said Arbitrators have refused to hear the witnesses' evidence on many important facts of this case, and generally have not given to the present case that hearing and inquiry necessary to the ends of justice ; that even what witnesses have been allowed to prove before the said Board, touching the matters of the case, is far from being truly and completely, or even intelligibly, reported by the notes of the evidence as taken down by the secretary of the said Board.

That, under these circumstances, petitioners cannot but pray that they be allowed to examine *de novo* the more important witnesses in this case.

Ces reproches qui, s'ils étaient fondés, seraient très graves, ont été répétés à l'argument par le conseil des appelants. L'entendant se plaindre de l'insuffisance de sa preuve et des difficultés qu'il aurait eu à la faire, la cour lui a offert d'user de la discrétion accordée au juge ou à la cour, par la sec. 4 de l'acte 42 Vic., ch. 8, de permettre et même d'ordonner, *proprio motu*, l'audition de nouveaux témoins en appel. Mais le savant conseil, ne jugeant pas à propos de se prévaloir de cette offre, a plaidé sa cause au mérite et il a bien fait ; car je suis persuadé, d'après l'examen que j'ai fait de la cause et comme on le verra ci-après, qu'il ne pouvait améliorer sa preuve. Alors, il aurait dû retirer ses allégations qui constituent un acte d'injustice à l'égard des Arbitres ; pour suppléer à son défaut de ce faire, je les rejette comme tout-à-fait dénuées de fondement.

La question qui se présente, en cette cause, est moins de savoir s'il y a eu des dommages que de savoir, si, dans la position particulière où se trouvent les réclamants, ils ont droit d'en réclamer.

Quant au n° 3617, appartenant ci-devant à Peter Jackson, père des réclamants, et maintenant la propriété de ces derniers, le Département des Travaux Publics ayant eu besoin d'une partie de ce lot, en 1877, pour l'élargissement du canal Lachine, référa aux Arbitres Officiels l'évaluation du terrain requis, ainsi que celle des dommages résultant de l'expropriation. Une première sentence rendue sur cette référence n'ayant pas donné satisfaction, les dits Arbitres reçurent, du Département, instruction de reconsidérer leur décision et rendirent, le 31 janvier 1880, une autre sentence par laquelle ils adjugèrent en ces termes :

Do adjuge and determine that the sum to be paid for the absolute purchase of the tract or parcel of land therein above described, is two

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thousand three hundred and twenty dollars and thirty three cents ($2,320.33), being at the rate of eight and one half cents per foot, with interest to be computed from the first January 1877;—and for the forest and fruit trees, the currant bushes and garden crops, the fences, sheds, stone dwelling house and the well thereon, *together with the damages resulting* from the position of the two barns above mentioned, the further sum of $4,035.10, without interest.

Bien que le père des pétitionnaires ait été indemnisé pour le dommage qui pouvait résulter de la position des deux granges, ni lui, ni ceux-ci, n'ont fait aucun changement dans la position de ces granges. L'indemnité accordée à leur père, couvrait tous les dommages prévus alors comme pouvant résulter de l'expropriation. Aucun dommage résultant des mêmes causes ne peut plus être accordé.

Il ne pouvait y avoir lieu à de nouveaux dommages, que s'il y avait une nouvelle expropriation ou de nouveaux ouvrages, construits depuis l'élargissement du canal, causant des dommages qui n'auraient pas été compris dans la première évaluation.—En ne changeant pas la position de leurs étables et granges, au sujet desquelles leur père avait reçu une indemnité, les pétitionnaires ont préféré courir les risques des inondations, plutôt que de faire les dépenses nécessaires pour s'en mettre à l'abri.—Etant restés volontairement exposés au danger, ils doivent en subir les conséquences et n'ont, pour ces motifs, aucun droit à une indemnité.

La réclamation de $585, pour dommages sur ce lot 3617, a été dûment renvoyée par les Arbitres.

La réclamation de $800, pour le lot n° 3912, n'est pas mieux fondée.

L'item n° 5 (le 1° de cette réclamation) pour "perte du revenu sur la partie de terrain occupé par le fossé ancien, 5 arpents de long sur vingt pieds de largeur, frais des ponts sur ce fossé et dépenses additionnelles que fait encourir l'exploitation de la propriété ainsi coupée en deux."

Ce fossé ne fait point partie de la propriété de Peter Jackson, n° 3912, achetée en 1879 à la vente faite par

licitation des héritiers Desève. Les auteurs de ceux-ci en avaient distrait et vendu le terrain occupé par ce fossé, par acte authentique, passé à Montréal, par-devant Mtre Doucet et collègue, notaires, le 26 octobre 1853, dans lequel acte, le terrain en question est décrit comme suit :

> Tout le terrain renfermé dans les lignes coloriées en rouge sur le plan ci-annexé, le dit terrain étant enclavé dans la terre appartenant aux dits vendeurs dans les proportions et de la manière ci-dessus énoncées,–située à la Côte Saint-Paul, en la dite paroisse de Montréal, et bornée en front par le chemin, etc. etc., le dit terrain contenant en superficie totale, cinquante-trois perches et cinquante-trois cinquantièmes de perche, et servant aux dits travaux publics pour un fossé pour égoutter les eaux venant du canal de Lachine sur certaines terres de la dite Côte Saint-Paul, au sud-est du dit canal de Lachine.

Ce terrain est le même que celui au sujet duquel le pétitionnaire fait sa demande de dommages contenue dans l'item 5. Quant aux frais additionnels de culture et frais de construction de ponts, sur le dit fossé ; c'est à lui à le faire, suivant le droit que s'en sont réservé ses auteurs, par l'acte ci-dessus cité, où l'on trouve cette clause :

> Il est convenu entre les parties que les vendeurs, leurs hoirs et ayant-cause auront le droit de construire deux ponts sur le dit fossé pour communiquer avec les deux morceaux de terre qui leur restent, entre le dit fossé et Jean-Baptiste Lenoir dit Rolland et Peter Jackson en ne faisant toutefois aucun dommage quelconque.

Cela suffit pour disposer de ses prétentions au sujet des frais de construction de ponts.

La propriété de ce fossé appartenant au Gouvernement, en vertu d'un titre inattaquable, la prétention à des dommages doit être rejetée comme absolument erronée.

L'item 6 de la réclamation de Peter Jackson, de $400 de dommages causés par les eaux, pendant quatre ans, à compter de 1879, à raison de $100 par année, est aussi sans fondement.

Peter Jackson est devenu acquéreur de l'immeuble

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n° 3912, par une vente faite par licitation dans la cour supérieure, pour le district de Montréal, le 25 septembre 1879.—Entre autres conditions de la vente, on trouve celle-ci :

1° De prendre les dits immeubles et rentes foncières dans l'état où ils se trouvent actuellement, *avec les charges et servitudes* dont les dits immeubles et rentes foncières peuvent être légalement sujets, sans que l'adjudicataire ou les adjudicataires puisse ou puissent répéter aucune indemnité ou diminution de prix, et sans aucun recours en garantie contre les dites parties, demandeurs, défendeurs, intervenants et requérants pour grosses ou menues réparations, dégradation, *défaut de contenance*, changement ou fausse description des dits immeubles et rentes foncières ou aucune autre cause quelconque.

Son titre, comme on le voit, l'oblige à souffrir toutes les servitudes existantes, lors de son acquisition ; il doit prendre l'immeuble dans l'état où il se trouve lors de la vente, même subir les défauts de contenance, si le fossé, appartenant au Gouvernement, pouvait être considéré tel. A moins de travaux publics nouveaux, depuis son acquisition, ou de changements faits dans ceux qui existaient alors, Peter Jackson n'a aucun sujet de se plaindre du Département et il est bien établi, par la preuve, qu'il n'en a été fait aucun. Quels que soient les dommages qui aient pu lui être causés, par l'inondation dont il se plaint, ayant acheté la propriété dans l'état où elle était lors de la vente, et le Gouvernement n'ayant rien fait qui pût en modifier la position, Peter Jackson ne peut avoir de recours contre le Gouvernement pour ces dommages. Le dernier item :

Perte de tout revenu sur le terrain occupé par le dépôt de la glaise fait par le contracteur du gouvernement sur le dit n° 3912, etc., $200.00,

doit subir le même sort que les autres.

Ce dépôt de glaise ayant été fait avant son acquisition, et prenant la propriété dans l'état où elle se trouvait, il n'a aucun recours pour les dommages qui ont pu en résulter.

Si quelqu'un avait un droit d'action à ce sujet, ce

serait les auteurs de Peter Jackson qui ont laissé faire ce dépôt, assez probablement, avec leur permission. Dans tous les cas, il n'en peut résulter un droit d'action pour Peter Jackson dont la réclamation a été bien et dûment rejetée.

En conséquence de ce qui précède, je suis d'avis que la sentence arbitrale rendue en cette cause, le 10 novembre 1884, doit être confirmée—et le présent appel est renvoyé avec dépens.

Appeal dismissed with costs.

Solicitor for appellants: *J. E. Chagnon.*

Solicitors for respondent: *O'Connor & Hogg.*

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Mar. 15.

Coram STRONG, J.

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

AND

THE BANK OF MONTREAL.................DEFENDANTS.

Government cheque on deposit account with bank—Rights of payee endorsing for collection—Credit entry in payee's books, reversal of—Presentation by post—Sufficiency of notice of dishonor—Liability of drawer on non-payment.

The Dominion Government, having a deposit account of public moneys with the Bank of P.E.I., upon which they were entitled to draw at any time, the Deputy Minister of Finance drew an official cheque thereon for $30,000 which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at O., at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof endorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of P.E.I. for collection, but was not paid by the latter bank which, subsequently to the presentment of the cheque, suspended payment generally.

Held:—(1). That the Bank of Montreal were mere agents for the collection of this cheque, and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonor of the cheque to reverse the entry in their books and charge the amount thereof against the Government. *Giles* v. *Perkins*, (9 East. 12); *Ex parte Barkworth*, (2 De G. & J. 194) referred to.

(2). That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. *Heywood* v. *Pickering*, (L.R. 9, Q.B. 428); *Prideaux* v. *Criddle*, (L.R. 4 Q.B. 455) referred to.

(3). That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been endorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonor. *Clode* v. *Bayley*, (12 M. & W. 51); *Brown* v. *L. & N. W. Ry. Co.*, (4 B. & S. 3) 26 referred to.

(4). That the defendants, whether considered as mere agents for the collection, or as holders, of the cheque for value, were, as regards the drawer, only called upon to show that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque.

In a letter from the manager of the Bank of Montreal at Ottawa to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonor of the cheque by the drawees—the Bank of P.E.I., the fact of non-payment was stated as follows:—"I am now advised that it has not yet been covered by Bank of P. E. Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department."

Held:—That the words "not covered," as used in this letter, were equivalent to "not paid" or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonor. *Bailey* v. *Porter*, (14 M. & W. 44); *Paul* v. *Joel*, (27 L. J. Ex. 380) referred to.

THIS was an information filed by the Attorney-General for Canada, on behalf of the Crown, to recover the sum of $30,000, alleged to be due from the defendants.

The Dominion Government had a deposit account of public moneys with the branch of the Bank of Montreal at Ottawa, and, at the same time, had an account with the Bank of Prince Edward Island at Charlottetown, upon which they were entitled to draw on demand at any time by the usual official cheques,—some $80,000 remaining to the credit of the Government on the 14th November, 1881. On that date, an officer of the Finance Department, drew an official cheque, in the usual form, on the Bank of Prince Edward Island for the sum of $30,000, in favor of the branch of the Bank of Montreal

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at Ottawa, and sent it on the same day by post to the manager of the said branch. The letter was received by him on the following day, and, after being endorsed by him in blank and placed to the credit of the Government on the books of the bank, it was immediately forwarded by him to the head office of his bank at Montreal. On the 16th November, two days after the cheque was sent from the Finance Department, it reached the head office of the Bank of Montreal. There upon the manager at Montreal, having also endorsed the cheque, sent it to the cashier of the Bank of Prince Edward Island at Charlottetown, where it arrived in due course of post on the 18th November, and was delivered to the cashier of the Bank of Prince Edward Island on the 19th November. On the same day the cashier of the Bank of Prince Edward Island made a draft upon the head office of the Bank of Montreal for the sum of $30,420.54, in payment of this cheque and some other small items due to the Bank of Montreal by the Bank of Prince Edward Island, but this draft was not mailed until the 22nd November, and did not reach Montreal until the 25th November. At the time this draft was drawn the Bank of Prince Edward Island was indebted to the Bank of Montreal in the sum of $7,000. This being the case, the latter bank would not accept the draft, and, the same day it was received, the manager at Montreal notified the manager of his bank at Ottawa, by post, that the cheque had not been paid, and instructed the latter to immediately notify the Finance Department that such was the case. As soon as these instructions were received by the manager at Ottawa, he, on the 26th November, wrote to the Deputy Finance Minister, who had drawn the cheque, advising him of the non-payment thereof, and stating that in case the cheque were returned to him unpaid he would send it back to the Department, and reverse the entry which had been made whereby the amount of the

cheque had been placed to the credit of the Government on the books of the bank. This letter was received by the Finance Department on the same day it was mailed. On Monday, the 28th November, and while the cheque was still in their possession, the Bank of Prince Edward Island suspended payment,—the fact of such suspension becoming known to the Finance Department on the same day. Upon a refusal by defendants to make good to the Crown the amount of the said cheque, action was brought.

The case was heard before Mr. Justice Strong.

Hogg and *Ferguson* for the Crown;

Robinson Q.C. and *Gormully* for defendants.

STRONG, J. now (March 15, 1886) delivered judgment.

This is an information filed by the Attorney-General for the Dominion against the Bank of Montreal, to recover the sum of $30,000. The information, in substance, states the following case:—

That on the 14th of November, 1881, the Receiver-General of the Dominion had a deposit account of public moneys with the branch of the Bank of Montreal, at Ottawa; that at the same date the Receiver-General had also an account with the Bank of Prince Edward Island, at Charlottetown, upon which he was entitled to draw on demand, at any time, by the usual official cheques, and in respect of which there was then upwards of $80,000 at his credit; that on the day before mentioned the Receiver-General caused to be drawn an official cheque, in the usual form, on his deposit account with the Bank of Prince Edward Island, in Charlottetown, which cheque was signed by the Deputy Minister of Finance, and was for the sum of $30,000, payable to the order of the defendants; and that, on the same day, this cheque, together with other cheques, were deposited with the defendants at Ottawa.

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It is further alleged that the defendants received this cheque for $30,000 as cash, and at once placed the amount thereof to the credit of the Receiver-General's account in the Ottawa branch; and that the defendants thereupon became the holders and beneficial owners of the cheque; that the defendant's manager or agent at Ottawa, Mr. Drummond, afterwards forwarded the cheque to the defendants in the City of Montreal, and it was thereupon charged by the defendants, in the books of the Bank of Montreal, at Montreal, to the Bank of Prince Edward Island, and then forwarded to that bank at Charlottetown; that the Bank of Prince Edward Island received the cheque and paid the same by charging the Receiver-General's account therewith, and forwarded the cheque itself, marked paid, to the Receiver-General at Ottawa, and such cheque is now in the possession of the Receiver-General; that the Bank of Prince Edward Island credited the defendants with the amount of the cheque, and sent to the defendants the necessary authority to charge their account with the Montreal Branch with the amount thereof; that the Bank of Prince Edward Island, shortly after the happening of the before mentioned circumstances, suspended payment, and the defendants now claim not to be liable to account for the proceeds of the cheque.

Upon this statement of facts the information claims judgment against the defendants for the sum of $30,000, and interest. The defendants, by their statement of defence, admit that for some time prior to the 15th of November, 1881, the Receiver-General of Canada had an account current with their branch at Ottawa to the credit of which very large deposits of public moneys were constantly being made; they further admit that on the last mentioned day they received from the Receiver-General the cheque for

$30,000 mentioned in the information, but they deny that they received the same otherwise than as agents for the collection thereof, although they admit that, in accordance with their practice and usage, they at once credited the Receiver-General's account current with the amount thereof; they further say that on the same day, the 15th of November, their agent at Ottawa duly sent forward this cheque for collection to the head office of the defendants at Montreal, where it was received in due course of post, and that the defendants, with due diligence, transmitted it to their agents in Prince Edward Island for collection; that the Bank of Prince Edward Island did not pay the cheque, which still remains unpaid and dishonored; that the defendants gave due notice of the non-payment and dishonor, and thereupon debited the before mentioned account with the amount thereof, according to the usage and understanding upon which they received that, and all other cheques, for collection, and they submit that they are not liable to the claim of the Crown.

Upon this statement of defence the Attorney-General took issue.

Evidence was taken in the case under commission at Charlottetown, and also *viva voce* at the trial; and the examination of the defendants' agent at Ottawa, Mr. Drummond, taken previous to the hearing, was read on behalf of the Crown, and a similar examination of the Deputy Finance Minister, Mr. Courtney, was read by the defendants. From this evidence I find the following facts to be proved :—

The cheque in question, which was sent by Mr. Courtney, as Deputy Minister of Finance, and countersigned by the Assistant Auditor-General, is as follows :—

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FINANCE DEPARTMENT, CANADA,
OTTAWA, 14th November, 1881.

$30,000.

Bank of Prince Edward Island, Charlottetown, P. E. I. Pay to the order of the Bank of Montreal, at Ottawa, thirty thousand dollars.

(Signed) J. M. COURTNEY,
Deputy Minister of Finance.

(Countersigned).
W. ALLISON,
Asst. Auditor-General.

The cheque was endorsed by the manager of the Ottawa branch of defendant Bank and by the manager of the Montreal office. This cheque, according to the evidence of Mr. Courtney given at the trial, was drawn and signed on the 14th November, the day on which it bears date, and was on that day sent through the post, together with other cheques, in a registered letter addressed to Mr. Drummond, defendants' agent or manager at Ottawa. This letter, according to Mr. Courtney's own admission, and according to Mr. Drummond's statement in his examination, would not have been, in due course of post, and was not in fact, received at the bank in Ottawa until the morning of the 15th of November, on which day it was transmitted by Mr. Drummond to the head office of the defendant bank at Montreal, having previously been endorsed by him in blank ; it would, therefore, have been received at the office in the Montreal bank on the 16th, by the post of which day the manager at Montreal, having previously also endorsed the cheque, sent it forward in a letter addressed to the cashier of the Bank of Prince Edward Island, at Charlottetown, where it arrived in due course of post on the evening of Friday the 18th November, between the hours of 9 and 10 o'clock, and was delivered to the cashier of the Bank of Prince Edward Island on the morning of Saturday the 19th ; that on the same day, the 19th, the cashier of the Bank of Prince Edward Island (Mr. Brecken) drew a draft on the bank of Montreal, at Montreal, for the sum

of $30,420.54 which was made up of the amount of this cheque and some other small items due to the Bank of Montreal by the Bank of Prince Edward Island in respect of collections This draft was not, however, forwarded on the day on which it is dated, 19th November, but remained in the possession of the cashier who had signed it. On the morning of Monday, 21st November, the cashier, Mr. Brecken, left the Island for the ostensible purpose of visiting one of the neighbouring provinces, or the United States, on private business, but in fact, as afterwards appeared, absconded to avoid the consequences of his mal-administration of the affairs of his bank, and the improper abstraction of its funds.

The draft, which had been drawn as a mode of payment of this cheque, was not remitted to the Bank of Montreal until Tuesday the 22nd of November, when it was sent forward by the assistant-cashier by post, enclosed in a letter addressed to the manager at Montreal. This letter, which left Charlottetown by the mail of Wednesday the 23rd, reached Montreal early on the morning of the 25th, and came to the hands of the manager of the defendant Bank at that place on the opening of business on that day.

At the time the draft, which was sent in payment by the Bank of Prince Edward Island, was drawn, that bank, so far from having effects to meet their draft in the hands of the Bank of Montreal, were debtors on an overdue balance of their account with that bank to an amount exceeding $7,000. This being so, it was of course that the manager of the defendants' Montreal branch should not accept the proposed mode of payment by this unauthorised draft, which would have been in effect a mere grant of a further credit of some $30,420.54 to the Bank of Prince Edward Island. The manager, accordingly, on the same day (the 25th) on which he received the letter enclosing the draft, posted

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a letter addressed to the manager at Ottawa, giving him notice that the cheque had not been paid, and instructing him forthwith to give notice to that effect to the Deputy Finance Minister, the drawer. This letter was received at Ottawa by the manager there on Saturday, the 26th of November, and he immediately sent to the Deputy Finance Minister a letter in the words following : —

BANK OF MONTREAL,
OTTAWA, 26th November 1881.

J. M. COURTNEY, Esq.,
Deputy Minister of Finance.

DEAR SIR.—On the 15th inst. we received from you for credit, as usual, Receiver-General's cheque $30,000 on the Bank of Prince Edward Island. This was forwarded for account to our Montreal Branch by whom I am now advised that it has not yet been covered by Bank of Prince Edward Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department.

Yours truly,
(Signed) ANDREW DRUMMOND, *Mgr.*

This letter, as is admitted by Mr. Courtney, was received by him on the same day, the 26th November. On Monday, 28th of November, the fact of Brecken having absconded becoming known to the directors of the Bank of Prince Edward Island, that bank, being embarrassed and unable to meet its liabilities, suspended payment. The cheque, in the meantime, remained in the possession of the Bank of Prince Edward Island, at all events until after the failure of the bank, when, by some means not satisfactorily explained, either by the officials of the bank, or by the officials of the Government in Prince Edward Island, it was improperly and irregularly transferred from the possession of the bank there, to that of Mr. Pope, the Provincial Auditor-General and Deputy Receiver-General at Charlottetown, who immediately forwarded it to Ottawa. The fact of the bank's suspension and insolvency became known to Mr. Courtney, the Deputy Finance

Minister, by telegraphic communication, on the morn- of the 28th.

I also find that the Bank of Montreal were mere agents for the collection of this cheque; and that, although the proceeds of the cheque were credited in account as before mentioned, it never was the intention of the bank, nor of the Finance Minister, to treat the cheque as having been discounted by the bank; and that the bank did not acquire the property in the cheque and, consequently, were never holders of it for value, but were entitled upon its dishonor to reverse the entry and debit the amount to the account current kept with the Receiver-General. I further find, and this finding I rest upon the evidence of Mr. Lockhead, the assistant-cashier of the Bank of Prince Edward Island, that the letter enclosing the draft was posted at Charlottetown on the 22nd of November, and that it reached Montreal on the morning of the 25th of November, and that notice was given as before stated. I also find that the Bank of Prince Edward Island was insolvent, and unable to pay this cheque from the time it first came into the hands of the cashier on Saturday, the 19th of November.

It is to be observed, in the first place, that the case presented by the information is not a question of negligence on the part of the bank, as an agent of the Government to collect the cheque, but a case of discount of the cheque by which the bank became holders thereof for value, and liable before presentment, to account for the proceeds to the Crown. The question of the real relation between the bank and the Crown arising out of this particular transaction, is not a question of law, but one purely of fact (*Giles* v. *Perkins* (1), and *ex parte Barkworth*) (2); and as a question of fact, it is not concluded by an entry in the books,—such entry being susceptible of explanation, and being, as I hold, in the

(1) 9 East. 12. (2) 2 De G. & J. 194.

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present case sufficiently explained by the evidence of the defendants' late manager, Mr. Drummond, and of Mr. Gundry, the present manager, and by the attendant circumstances, and therefore to be construed in the way already indicated.

Then considering the bank as a mere agent for collection, what were its obligations and liabilities as such? Although, as I have said, I consider the defendants not to have been holders for value in whom the property in this cheque had vested, but only agents for its collection, yet the obligations which rest upon a holder for value as regards presentment for payment in order to make the drawer of a cheque liable, may, I think, be regarded as a fair test to apply to the case of an agent for collection on behalf of the drawer, in order to ascertain if due diligence has been used. The law is well established to be that the drawer of a cheque is liable to a holder for value at any time within six years, notwithstanding any delay which may have occurred in its presentment, unless such delay is unreasonable and the drawer is actually prejudiced by it; and in such case it is held that the question of reasonable time is entirely one of fact. *Serle* v. *Norton* (1).

In a case of *Ramchurn Mullick* v. *Luchmeechund Radakissen, et al.* (2), Parke, B., in delivering the judgment of the Judicial Committee of the Privy Council, thus speaks of the liability of the drawer of a cheque:—

The authority on which reliance is placed on the part of the appellant, in support of the doctrine contended for, is that of *Robinson* v. *Hawksford* (3), which is the case of a cheque presented some days after it was drawn, to the banker, and not paid in consequence of the countermand of the drawer; and the court held, that if the drawee continued solvent, and no damage has arisen from delay of presentment, the drawer continued liable. If this had been a decision on a regular

(1) 2 Moo. & Rob. 401. (2) 9 Moore's P. C. Cas. at p. 69.
(3) 9 Q. B. 52.

bill of exchange, payable on or after sight, it would have been a strong authority for the plaintiff in error. It is not, however, the case of a bill of exchange, but of a banker's cheque, which is a peculiar sort of instrument, in many respects resembling a bill of exchange, but in some entirely different. A cheque does not require acceptance ; in the ordinary course it is never accepted ; it is not intended for circulation, it is given for immediate payment ; it is not entitled to days of grace ; and though it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet, in the ordinary understanding of persons, it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being much in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place. There is a very good note on this subject in the case of *Serle* v. *Norton*, as to the difference between cheques and bills of exchange. We do not think that the case of a cheque is similar to that of regular bills of exchange, inland or foreign, drawn payable at or after date.

The reporter's note appended to the case of *Serle* v. *Norton* (1), of which Baron Parke expressed approval, concludes as follows :—

Although the holder of a cheque, who does not present it within a reasonable time, is guilty of laches, the consequences of such laches may vary according to the circumstances of each case.

It is also there said :

As between the drawer and the payee of the cheque, the question of reasonable time can scarcely arise unless some damage has arisen in consequence of the non-presentment.

In the case of *Heywood* v. *Pickering* (2) the law is also stated by both Blackburn, J. and Quain, J , to be in accordance with the foregoing extracts. To these authorities may be added references to *Robinson* v. *Hawksford* (3) and *Serle* v. *Norton* (4) cited by Baron Parke *ut supra*, and to *Chitty on Bills* (5), *Chalmers on*

(1) 2 Moo. & Rob. at p. 404.
(2) L. R. 9 Q. B. 428.
(3) 9 Q. B. 52.
(4) 2 Moo. & Rob. 401.
(5) 11 ed. p. 361.

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Bills and Notes (1), and to *Grant on Banking* (2), where it is said:

> As between the payee and the drawer the rule is that the drawer is not discharged, that is, the payee does not lose his remedy against the drawer by reason of non-presentment within any prescribed time, short of six years after taking the cheque, unless by his delay the drawer has been prejudiced or his position altered for the worse, as for instance, by the insolvency of the banker in the interval.

In the Imperial statute, 45 and 46 Vic., c. 61, by which the existing law as to bills, notes and cheques is codified, the 74th section enacts the rule to be precisely as before stated.

Assuming then, for the present, that the bank, although in truth mere collection agents, were bound to use the same diligence as a holder for value, let us see if they were sufficiently diligent to meet the requirements of the law applicable to such holders as against the drawers of cheques. If it should appear that the cheque was presented sufficiently early to comply with the rule applicable to the case not of a drawer, but of an endorser or transferror of a cheque, which is identical with that as to endorsers of bills and notes, and far more strict than that before stated as applicable to drawers of cheques, it will follow *a fortiori* that the presentment was sufficient to charge the drawer. By the law applicable to holders for value, as against the endorser, of a cheque they are bound to transmit the cheque drawn upon a bank in a place other than that in which they themselves reside or have their own house of business, for presentment, by the morning of the day after they received it. *Grant on Banking* (3), *Heywood* v. *Pickering*, (4) *Hare* v. *Henty* (5), *Bond* v. *Warden* (6).

The evidence shows that Mr. Drummond received

(1) 2 ed. p. 231.
(2) 4 ed. p. 49.
(3) 4 ed. p. 51.
(4) L. R. 9 Q. B. 428.
(5) 30 L. J. C. P. 302.
(6) 1 Coll. 583.

the cheque on the 15th of November; that he forwarded it the same day to Montreal, and that it was dispatched from Montreal by the mail of the next day, the 16th, being the same mail as that by which it would have left if it had been posted at Ottawa on the 16th, addressed in the same way as the letter from Montreal was addressed, to the cashier of the Bank of Prince Edward Island. It is quite true that the bank had, on the assumption that it was bound to prove that it had used the same diligence as a holder for value in order to charge an indorser, no right to enlarge the time for presentment by circulating the cheque among its own branches. *Grant on Banking* (1). *Heywood* v. *Pickering*, *supra*; *Chalmers on Bills* (2). But there was here, in point of fact, no additional time taken consequent upon the indorsement and transmission of the cheque to the Montreal Branch. If it had been forwarded directly by the manager, Mr. Drummond, from the Ottawa Branch, it would have gone by the mail which left Montreal on the evening of the 16th, by which mail it was actually forwarded.

Next comes the question, was this transmission by mail a proper mode of presentment? On the authorities there can be no doubt that it was. The evidence of Mr. Drummond, and of Mr. Gundry, shows that it is the usual practice of bankers in Canada to present in this way cheques drawn, as this cheque was, on one of their own correspondents; and the evidence shows that there was no suspicion of the credit or solvency of the Bank of Prince Edward Island, which, if it had existed at the time the cheque was forwarded, might have made this an improper and negligent mode of presentment. I am of opinion, therefore, that this mode of presenting a cheque on a banker, by transmitting it to the drawee by mail, was a legal, and on the evidence, a customary

(1) 4 ed. 52. (2) 2 ed. 230.

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mode of presentment. *Prideaux* v. *Criddle* (1). *Heywood* v. *Pickering, supra*; *Bailey* v. *Bodenham* (2). *Grant on Banking* (3). When this course is adopted, the bank to whom the cheque is transmitted although themselves the drawees, are also considered, for the purpose of presentment, as agents for the holders of the cheque; and as such, are, I assume, entitled to be allowed the same time for presentment and giving notice of dishonor as if they had been independent agents for presentment, and in no other way connected with the transaction. This cheque was therefore presented in due time, and sufficient notice of its dishonor was given, if such presentment and notice were within the same time as would have been sufficient in case the cheque had been sent to another bank in Charlottetown instead of to the drawees themselves. *Heywood* v. *Pickering, supra*; *Prideaux* v. *Criddle, supra*. This last case, it is to be remarked, was not an action against the drawer but against the indorser or payee of the cheque, and, therefore, one in which the holder was bound to use the same diligence as in the case of a bill.

As before stated, in summarizing the evidence, the letter enclosing the cheque must have been (as appears from the depositions of Mr. McDonald, Postmaster at Charlottetown, and of the Honourable Mr. Davies), received at that place on the evening of Friday, the 18th of November. Its receipt on the evening of the 18th, after business hours, would, for the purpose of computing the time of the presentment, enure as a receipt on the next day, namely, on Saturday, the 19th of November:—*Bond* v. *Warden* (4); *Grant on Banking* (5), where it is said: "Where the cheque is not received till after banking hours, the time allowed the payee

(1) L.R. 4, Q.B. 455.
(2) 16 C.B., (N.S.) 288.
(3) 4 ed. 52.
(4) 1 Coll. 583.
(5) 4 ed. p. 51.

to present it does not commence to run till the first day after that on which he actually received it."

Therefore the presentment on Monday, the 21st of November, the first business day after the day of such receipt, was in sufficient time,—the rule being that where a cheque is drawn on a bank in a different place from that in which the payee resides, or has his place of business, the agent to whom the cheque is sent for presentment has all the next day after that on which he receives it to make the presentment. *Grant on Banking* (1); *Bond* v. *Warden*; *Heywood* v. *Pickering*; *Prideaux* v. *Criddle*; *Hare* v. *Henty*, *supra*; *Rickford* v. *Ridge* (2).

The next consideration which presents itself is, upon what day must we fix as that to which the actual presentment in the present case is to be attributed? There is not, of course, in a case like this, where a cheque is forwarded by mail to the drawees, a formal presentment as in the case of a cheque sent to an independent agent who presents it at the counter. When, therefore, under circumstances like the present, is presentment to be considered as taking place? In my opinion the drawee, being also the holder's agent, is at liberty to hold the cheque and treat it as unpresented as long as an independent agent could do so; and it is clear from the authorities before stated that another bank, or any other third party, could safely have held over this cheque for presentment until the first business day after that on which they received it, which would have been Monday the 21st, and this view of the law I think, receives countenance from both the cases of *Heywood* v. *Pickering* and *Prideaux* v. *Criddle* before cited. It therefore follows, that there having been a presentment on the 21st, which was in due time, notice of dishonor, if notice of dishonor is requisite in the case of a

(1) 4 ed. p. 51. (2) 2 Camp., 537.

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drawer, was in sufficient time if sent on the day following, namely Tuesday the 22nd, on which day, as appears from Mr. Lockhead's evidence, the letter from the Bank of Prince Edward Island to the Bank of Montreal, enclosing the draft on the latter, was actually posted, since it was received in Montreal on the morning of the 25th, which made it requisite that it should have been mailed at Charlottetown not later than the 22nd.

It is so familiar a principle in the law relating to negotiable instruments that a holder has the whole of the next day after due presentment to forward notice of dishonor, that it is not necessary to refer to authorities in support of that proposition.

The nature of the communication by the Bank of Prince Edward Island to the Montreal branch of the defendant bank, amounted in effect to a refusal, or admission of inability, to comply with the demand for payment which had been made, for no other interpretation can be placed upon the act of the drawees of the cheque in sending instead of funds to an amount sufficient to cover it what was, under the circumstances, a worthless draft. Then, although it is clear that the holders, or collecting bank, cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been so transmitted and endorsed, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonor. *Chalmers on Bills* (1); *Clode* v. *Bayley* (2); *Brown* v. *L. & N. W. Ry. Co.* (3); *Grant on Banking* (4).

So that the Bank of Montreal having received notice on the 25th had, according to this rule, the whole of the 26th to give notice to the manager at Ottawa, who,

(1) 2 ed. p. 163, and cases cited.
(2) 12 M. & W. 51.
(3) 4 B. & S. 326.
(4) 4 ed. p. 429.

if this had been done, would have received the notice on the 28th of November (the 27th being a Sunday), and would therefore have been in good time if he, in turn had given notice to the Deputy Finance Minister on the 29th. Instead of notice being postponed to the last mentioned day it was, as before mentioned, given to the Receiver-General, through the Deputy Finance Minister, on the 26th, three days earlier than he was entitled to it, if the time is computed making due allowance for all the delays, the respective parties were entitled to take advantage of.

I must, therefore, determine that the cheque was presented in due time, and that due notice of dishonor was given, provided this notice was sufficient in form. This notice, as already stated, was given by the letter from Mr. Drummond, the defendants' agent or manager at Ottawa, to Mr. Courtney, the Deputy Finance Minister, the contents of which have already been stated. I construe the words "not covered," as used in this letter, as equivalent to "not paid" or to "unpaid" and being so construed, it appears to me clear beyond all question that this was a sufficient legal notice of dishonor. See *Bailey* v. *Porter* (1); *Chalmers on Bills* (2): and cases there collected, particularly *Everand* v. *Watson* (3); also *Paul* v. *Joel* (4), (per Bramwell B., in which case *Solarte* v. *Palmer* (5) is treated as a decision on a mere question of fact.) In the text book just quoted (*Chalmers on Bills*) (6) it is said that no notice of dishonor has been held bad in England for defect of form since 1841.

So far I have considered the case as though it were an action by the holder for value of a cheque against the payee, but this is a question of the liability, not of the payee or of an endorsee, but of the drawer,

(1) 14 M. & W. 44.
(2) 2 ed. p. 167 and cases there cited.
(3) 1 E. & B. at p. 804.
(4) 27 L. J., Ex. at page 384.
(5) 1 Bing. N. C. 194.
(6) 2 ed. at p. 168.

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which stands on a very different footing, and moreover, the contest here is, or rather should be as I hold, not as to the liability upon the cheque, but whether the Bank of Montreal, as agents for collection, are liable for negligence. The difference between the liability of the drawer of the cheque, and that of the drawer of a bill, or of an endorser or party transferring a cheque, is pointed out by Parke, B. in the extract from the judgment of the Privy Council already given. It follows, therefore, that even if we consider this cheque as having been held by the bank as holders for value, which is putting it in the strongest possible way against the defendants, the question to be decided is not whether due notice was given by the bank according to the rules established as regards bills and notes and parties to cheques other than the drawers, but whether the Government as drawers of the cheque were actually prejudiced by some omission of the defendants. This principle is laid down generally, and must apply, so far as I can see, as well as to notice of dishonor as to presentment.

I can find no English case in which it has been held that notice of dishonor is essential to entitle the holder of a cheque to recover against the drawer The point was raised in the case of *Heywood* v. *Pickering*, before cited, (1), but the objection was at once met by the answer that it had not been taken at the trial. In the extract I have before given from the judgment of the Privy Council in the case of *Ramchurn Mullick* v. *Luchmeechund Radakissen, et al.* (2) it is said that the drawer of a cheque is in the same position as the maker of a promissory note or the accept or of a bill payable at a particular place and "not elsewhere," who is not liable unless the note or bill has been presented at the place indicated, but who is clearly

(1) L. R. 9 Q. B. 428. (2) 9 Moore's P.C. Cas. at p. 70.

not entitled to notice of dishonor. This would seem to imply that such a notice was not required in order to charge the drawer of a dishonored cheque. Upon principle, too, it would seem doubtful whether there is such an analogy between the drawer of a bill and the drawer of a cheque as to make notice to the latter requisite. By drawing a cheque the drawer, as is said in the case last referred to, appropriates so much money in the hands of his agents, the bankers, to the payment of the payee of the cheque. In such a case it may well be that, in the absence of any settled rule of the law-merchant, or any proved usage to the contrary, it is incumbent upon the drawer to be himself vigilant, and to watch the solvency of his banker. I shall not, however, in the present case, venture to lay down that notice is not necessary; but I feel compelled to hold that delay in giving it, in order to constitute a defence, is subject to the same conditions as laches in presentment, namely, that it is in every case a question of fact dependent on the particular circumstances of the case whether there has been unreasonable delay; and further, that no delay or laches alone is sufficient to disentitle the holder to recover, but that in order that laches in this respect be fatal, it must be shown that the drawer has suffered actual prejudice from the holder's default.

In the case of bills and notes, and probably as regards cheques also, where the question involves the liability of the payee who has transferred the cheque, the rule is that presentment must be made and notice given within the time ascertained by well known rules, originally fixed by mercantile usage, but so long recognized by the courts that they have become well established rules of law; but this, as before pointed out, does not apply to the case of a drawer of a cheque which has been dishonored.

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If I am right in the opinion already expressed, that there was such promptitude in presenting the cheque and giving notice as would, according to legal rules, have been sufficient to charge an endorser, then of course the question of reasonable notice and prejudice to the Crown does not call for any further consideration. But, assuming that I have taken too favourable a view of the defendants' case in this respect, in order to give the case the fullest consideration, I proceed to discuss the questions of fact which on this hypothesis become material.

In the case of bills of exchange, if notice is given to a subsequent indorser at a day earlier than the holder was bound to give it, this does not excuse the endorser so receiving notice in delaying notice (which he is bound to give in order to charge subsequent parties) beyond the usual time, that is, beyond the next day after that on which he himself received notice; and is not a sufficient excuse for any laches in this respect that, though notice was not given by him in due time, yet, owing to the holder not having availed himself of all the delay to which he was entitled, the drawer, or first endorser, has in fact received notice within the same time as he would have received it if the holder had availed himself of all the time to which he was legally entitled. As regards the drawer of a cheque, who, as already shown, is liable unless there has been undue delay in giving him notice of dishonor, by reason of which he has suffered prejudice, no such rule applies; and it may well be said that he has reasonable notice if he receives it as early as he would have been strictly entitled to it if he had stood in the position of an indorser instead of a drawer, although some of the intermediate parties may not have been sufficiently prompt. The forwarding of presentment and the actual prement of this cheque, whether it is to be con-

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strued as having been made on Saturday, the 19th of November, or on Monday, the 21st, was, as it appears to me, in due time according to the strictest rules applicable to the presentment of a bill. I have already stated that I consider the presentment to have been made on Monday the 21st November, in which case there could be no doubt but that the notice of dishonor sent on the 22nd was also sufficiently early; but supposing I am wrong in determining that presentment is to be considered as having been made on the 21st instead of on the 19th November, and that it is to be ascribed to the latter date, does it follow that the notice sent on the Tuesday was even then too late, having regard to the obligation which is imposed on the drawer of showing undue delay by which actual prejudice has been caused? To establish such undue delay and actual prejudice, the Crown must be able to show from the evidence that if notice of the dishonor of the cheque on the 19th had been sent in due course of post, with allowance for the usual interval between the receipt and the repetition of the notice by the intermediate endorsers at Montreal, they would have been able to take some steps or proceedings which would have enabled them to withdraw from the Bank of Prince Edward Island funds to the amount of the cheque; and that when they received the notice sent them on the 26th, they were too late to take such steps to protect their interests as might have been taken if the notice had been received one day earlier. It is, I think, a fair inference from the evidence that the bank was equally as insolvent on the 19th as on the 21st; if this was not so, it was incumbent on the Crown to prove it; they may have resorted for this purpose to the books of the Bank of Prince Edward Island, now in the hands of the official liquidators, to which they could have had access, and the production of which, for

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the purposes of evidence in this cause, they could have enforced. This the Crown solicitors have not done; and the court is consequently left in ignorance of the precise state of the affairs of the bank on both these material days, the 19th and 21st. No question was asked as to the position of the bank as regards solvency on these particular days, either of Mr. Lockhead the assistant-cashier, or of the president, or of Mr. Haviland, a director, all of whom gave testimony on other points. I have no doubt, however, that the learned advisors of the Crown exercised what, from their point of view, was a wise judgment, in not putting the books in evidence; for the circumstances of this case make it impossible to suppose that they would not if produced, have disclosed a state of insolvency and inability to meet this cheque existing as early as the 19th of November. Then, assuming that the cheque was dishonored on the 19th, and that the regular notice, consequent on that dishonor, had been given to the Crown, such notice (allowing the endorsers, the bank at Montreal, and the payees, the branch at Ottawa, the usual time for giving notice) would not have reached the Deputy Minister of Finance until Monday, the 28th of November. That this is so, is plain by the simple computation of time, making all allowances for the delays allowed by law in the stricter case of bills of exchange. Notice consequent upon the dishonor on the 19th would have been in due time if posted at Charlottetown on Monday the 21st of November, from which place it would have been dispatched by the mail leaving early on the morning of the 22nd, which would have made it due at Montreal on the morning of the 24th; the defendant bank, receiving it on that day, would have had until the next day, the 25th, to give notice to the payees, the branch at Ottawa, where it would have been received on Satur-

day the 26th; thus making it the duty of the manager at Ottawa to give notice to the Deputy Minister of Finance on Monday, the 28th, the day of the actual suspension of the bank. Again, if it were obligatory on the branch at Montreal to give notice to the branch at Ottawa on not receiving payment by the return mail after the receipt of the cheque by the Bank of Prince Edward Island on the 19th of November, it would still appear that there was no undue delay which could have caused actual prejudice to the Crown, inasmuch as even in that case, the strictest which can be put against the defendants, the notice actually given reached the Deputy Finance Minister as soon as he would have been entitled to receive it if the bank at Montreal and the manager at Ottawa had chosen to take advantage of all the time they were entitled to. The return mail from Charlottetown to a letter received there on the 19th was that which left Charlottetown on Monday the 21st (no mail leaving that place on Sunday) and was due at Montreal early on the morning of Wednesday the 23rd, so that notice by the bank there to the Ottawa branch would have been in due time if sent on the 24th; this notice would have been received at Ottawa on the 25th, and the manager there would have had until the next day, the 26th, to give notice to the drawer, on which day notice was actually given to and received by Mr. Courtney, the Deputy Minister of Finance. I cannot see, therefore, that there was any undue delay in giving notice to the officers of the Crown which can be considered as prejudicial, having regard to the comparison before made between the time at which notice was in fact received by the Deputy Minister, and that in which, in the strictest view which can be taken against the defendants, they would have been bound to give it. For I consider in

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a case like the present the court is only called upon to ascertain if there was, between the day of the dishonor and the day on which notice was actually given to the drawer, any undue delay, and without regard to any intermediate notices as in the case of bills; and in order to ascertain this, it is a fair test to apply to the actual facts to inquire if the notice was actually received within such time as it would have been required to be given in the case of a bill sent for payment in this way, to the demand for payment of which no answer had been received by return mail, allowing for such delay in respect of intermediate indorsers as the holders would, in the case of a bill, have been by law entitled to, if they had, in fact, availed themselves of it. But if I am wrong in this, it by no means concludes the case against the defendants, for it lay on the Attorney-General to show not merely that there had been undue delay, but that by such delay the Crown had been prejudiced in fact; and this is not to be presumed, as in the case of a bill, or as regards the indorser or transferror of a cheque. Of this fact I can find no evidence, but the just inference from all the circumstances stated in the depositions is, that the Bank of Prince Edward Island was insolvent on the 19th, the day on which the worthless draft by which the absconding cashier of that bank sought to shift the payment of this cheque upon the defendants themselves, already then their creditors to a large amount, was drawn. No bank officer, unless his bank were in desperate straits, would have resorted to such a hopeless operation as this, which almost involved a confession of insolvency; and, in the absence of all evidence or explanation to the contrary, we may conclude from it that the Bank of Prince Edward Island had no means on that day, the 19th of November, of paying this cheque.

This is further confirmed by the flight of the cashier, whose misconduct had brought about the ruin of the bank, on the morning of the following Monday, the 21st of November. The only evidence found in the depositions bearing upon the fact of the ability of the Bank of Prince Edward Island to pay on the 19th of November, is that of Mr. McLean, the cashier of the Merchant's Bank of Prince Edward Island, who says, in his examination-in-chief, that he thinks he could have obtained payment of a cheque on the Bank of Prince Edward Island for this amount of $30,000. upon the 19th. But this is only a mere opinion of a person not personally conversant with the state of the affairs of the Bank of Prince Edward Island; a mere outsider who could have known nothing of these matters except from rumour and his own dealings with the bank, as to the latter of which he says nothing. This statement of Mr. McLean amounts to nothing more, therefore, than a conjecture on his part, and cannot be regarded as sufficient evidence when more conclusive and direct evidence could have been obtained by the Crown from the books of the bank, which must have shown the position of affairs on the 19th of November, 1881. A further observation to be made on the statement of this witness is, that on cross-examination when called upon to explain how he thought such a payment could have been obtained on the 19th, he says that he believes he could on that day have obtained payment of the amount of this cheque, not in cash, but by means of a draft drawn by the Bank of Prince Edward Island on some of its correspondents; but this is not to say that the bank itself could have paid this cheque in cash, or that it had a credit with any correspondents which would have authorized such a draft, which is the point to be proved. This witness therefore fails to establish any material fact.

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Then, so far as appears from the testimony and the documentary evidence in the case, the Crown, if it had had notice of the failure of the Bank of Prince Edward Island to pay the cheque on the very day it was received at Charlottetown, that is on the 19th of November, could have taken the proceedings preliminary to the issue of an extent, and thus secured a lien on the assets of the bank, and also asserted its right to priority of payment over other creditors; but this it could equally well have done on the 28th of November, and, for all that appears to the contrary, with the same effect as on the 21st. That the Crown would have been entitled to priority in the distribution of the assets of the bank, has been already determined by the Supreme Court of Canada in the case of *The Queen* v. *The Bank of Nova Scotia* (1), a decision which is not in any way affected by the recent judgment of the Judicial Committee of the Privy Council in the appeal of the *Exchange Bank of Canada* v. *The Queen* (2), the latter decision proceeding entirely upon the peculiar law of the Province of Quebec with reference to the priority of Crown debts.

On the whole therefore, my conclusion is that the information fails, and must be dismissed. The reasons for this conclusion may be summarised as follows: first, I find that the cheque never was paid; secondly, that the defendants, whether considered as mere agents for collection, or as holders of the cheque for value, are, as regards the drawer, only called upon to show that there was no unreasonable delay in presentment and in giving notice of non-payment, and that in any event the Crown, as drawer, is not discharged from liability unless some actual prejudice or loss was caused to it by the omission of the defendants in these respects; thirdly, I find that there was a presentment of the

(1) 11 Can. S. C. R. 1.
(2) 11 App. Cas. 157.

cheque on the 21st November, which was in due time, and that due notice of dishonor to bind an endorser on non-payment on that day was given with sufficient promptitude; and lastly, even if wrong in assuming that the cheque was dishonored on the 21st, and not on the 19th, and that it should be considered as having been presented on the earlier of these days, I find, as facts, that reasonable notice of that presentment and dishonor was given to the proper officers of the Crown, and that it is not proved that any actual prejudice or loss was caused to the Crown by omission to give notice at an earlier day than that on which it was given.

The dismissal of the information must of course be with costs.

Solicitors for Plaintiff: *O'Connor and Hogg.*

Solicitors for Defendants: *Stewart, Chrysler and Gormully.*

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June 14.

Coram SIR W. J. RITCHIE, C. J.

HENRY JOSEPH CLARKE..............SUPPLIANT;

AND

HER MAJESTY THE QUEEN...........DEFENDANT.

Dominion Lands—33 Vic. c. 3, s. 32—38 Vic. c. 52—Mandatory remedy sought by petition of right.

A petition of right will not lie to compel the Crown to grant a patent of lands.

PETITION OF RIGHT for an order to compel the Crown to issue to the suppliant letters-patent to certain Dominion lands in the Red River Settlement in the Province of Manitoba.

In his petition of right, the suppliant, after alleging his right to obtain an estate of freehold in the said lands under the provisions of 33 Vic. c. 3, and 38 Vic. c. 52, concluded such petition with the following prayer:—

"1. That it may be declared that the Government of Canada is bound to fulfil the obligations, and to carry out the trusts, on which the said land was transferred to the said Government by the said statutes.

"2. That it may be declared that your suppliant is entitled under the circumstances aforesaid, and by force of the said statutes, to have his title of occupancy to the said lot of land converted into an estate of freehold by grant from the Crown; and that he is entitled to letters-patent granting to him the said lot of land absolutely in fee simple, and that the Government of Canada be ordered to issue such letters-patent, or grant from the Crown, to your suppliant."

The Crown demurred to the petition.

The case on demurrer was heard by Sir W. J. Ritchie, C.J., on the 14th June, 1886.

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Burbidge, Q.C. in support of demurrer;

McDougall, Q.C., *contra*.

Per curiam: A petition of right will not lie to compel the Crown to make a grant of lands; and the demurrer must, therefore, be allowed.

Demurrer allowed with costs.

Solicitor for suppliant: *Frank McDougall.*

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

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June 21.

Coram SIR W. J. RITCHIE, C. J.

THE ATTORNEY-GENEARL FOR THE PROVINCE OF ONTARIO.............. } PLAINTIFF;

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.............. } DEFENDANT.

Appeal from order of judge in chambers—Insufficiency of statement of claim—Practice.

Where an order had been granted by a judge in chambers discharging a summons to fix the time and place of trial or hearing because the statement of claim did not disclose a proper case for the decision of the court, a motion by way of appeal therefrom to to the court was dismissed by the presiding judge on the ground that he was not prepared to interfere with the order of another judge of the same court.

A STATEMENT of claim was filed in the court by the Attorney-General for the Province of Ontario, praying " that it may be declared that the personal property of persons domiciled within the Province of Ontario, dying intestate and leaving no next of kin or other person entitled thereto, other than Her Majesty, belongs to the province or to Her Majesty in trust for the province." The Attorney-General for the Dominion of Canada, in answer to the statement of claim, prayed that " it be declared that the personal property of persons who have died intestate in Ontario since Confederation, leaving no next of kin or other person entitled thereto, except Her Majesty, belongs to the Dominion of Canada, or to Her Majesty in trust for the Dominion of Canada."

No reply was filed, and upon an application by way of summons to MR. JUSTICE GWYNNE in chambers, on the 9th June, 188.;, for an order to fix the time and place of trial or hearing, the summons was discharged

on the ground that the pleadings did not present a proper case for the decision of the court.

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THE ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO. v. THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA.

Reasons for Judgment.

On the 21st June, 1886, (SIR W. J. RITCHIE, C. J. presiding) *Irving*, Q. C., moved, by way of appeal from the order of MR. JUSTICE GWYNNE so granted in chambers, for an order to reverse such chambers' order and to fix the time and place of trial.

Per curiam: The presiding judge declines to interfere with the order of another judge of the same court, and the motion will be dismissed.

*Appeal dismissed, without costs.**

Solicitors for Plaintiff: *O'Gara & Remon.*

Solicitors for Defendant: *O'Connor & Hogg.*

*On appeal to the Supreme Court of Canada,

Held, affirming the decisions appealed from, that the pleadings did not disclose any matter in controversy in reference to which the court could be properly asked to adjudge, or which a judgment of the court could affect.

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April 7.

Coram HENRY, J.

ANDREW BOYD, TRUSTEE OF THE ESTATE AND EFFECTS OF ALEXANDER MORTIMER.................................. SUPPLIANT;

AND

HER MAJESTY THE QUEEN..........RESPONDENT.

Breach of contract for book-binding—Loss of profits—Measure of damages.

M. entered into a contract with the Dominion Government to do parliamentary and departmental binding for a period of five years. During the continuance of the contract the Government employed other persons to do portions of the work which M. was entitled to do, and in consequence of this M. (through his trustee in insolvency) brought an action by petition of right, claiming damages against the Government for breach of contract.

The breach was admitted by the Crown, and the case was referred by the court to two referees to ascertain the amount due M. for loss of profits in resp.ct to the work that was withheld from him and given to other persons. The referees found that the work done by persons other than M. amounted to $25,357.79, and that the cost of performing such work amounted to $10,094.74 leaving a balance for contractor's profit of $15,263.05. From this balance the referees made deductions for "superintendence generally, wear and tear of plant, building, &c., rent, insurance, fuel and taxes," amounting in the whole to $3,637.71, and recommended that M. be paid a sum of $11,625.34 as representing the contractor's profit lost to M. by the breach of contract.

On appeal from the referees' report,—

Held:—That the referees were wrong in making such deductions, and that M. was entitled to be paid the difference between the value of the work done by persons other than himself during the continuance of his contract, and the amount it would have actually cost him, as such contractor, to perform that work.

PETITION of right for damages arising out of a breach of contract by the Crown.

The effect of the contract, in respect of the breach whereof the petition of right was filed, is fully set out in the judgment. The pleas filed on behalf of the

Crown admitted the contract, but denied the breach thereof as alleged in the petition. Issue was joined upon these pleas, but, subsequently, the Crown admitted the breach of contract, and, by consent of parties, the matter was referred to two referees to ascertain and report the amount of loss the suppliant, as assignee of M., the contractor, was entitled to be indemnified for.

The referees awarded the suppliant the sum of $11,625.34 as sufficient to cover all loss resulting from the breach of the said contract. From this report the suppliant appealed to the court, on the ground that the referees had made improper deductions from the amount representing the actual loss of profits sustained by the contractor by virtue of the said breach.

The motion by way of appeal from such report was heard before Mr. Justice Henry.

McVeity for suppliant;

Hogg for Crown.

HENRY J. now (April 7th, 1887) delivered judgment.

This is an action brought by the above named appellant, by petition of right, to recover for damages alleged to have been sustained by Alexander Mortimer for breaches of a contract entered into with him on behalf of the respondent for the binding, from time to time, of all the statutes of Canada, Imperial statutes, Orders-in-Council, treaties and other similar matter, and all the binding required to be done by the several departments of the Government of Canada. The contract was entered into on the 1st of October, 1874, and was to run for five years from that date; the contractor to be paid as provided in certain schedules and specifications annexed to, and forming part of, the contract. The grounds upon which damages are claimed in the petition of right are: 1st., that although the contractor was called upon to do, and did, large portions of the work,

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and was always ready and willing to perform the whole, the balance was done by others and not given to him; 2ndly., that his contract was profitable, and that he lost the profits from such portions of the work as were given to others. The suppliant's right to claim damages was admitted by the Crown, and, by consent, the matter of such loss was referred to two referees to investigate and report upon.

The report of the referees was made on the 22nd day of December, 1886, whereby the appellant was awarded the sum of $12,625.34 damages. From this report the appellant appealed to this court, on the ground that the referees had made deductions improperly from the amount of the loss of profits to which he was entitled.

The subject-matter of these deductions was recently argued before me, and I will now proceed to deal with them.

By a very elaborate and carefully prepared detailed statement, returned with the report of the referees, it is shown that the work done by others amounted to $25,357.79, and that the cost of performance to the contractor would have been $10,094.74, which would leave for the contractor a profit of $15,263.05. From this balance the referees made, however, deductions for "superintendence generally, wear and tear of plant, building etc., rent, insurance, fuel and taxes," estimated by them at $3,637.71, which would leave a balance of $11,625.34. By a mistake, however, the referees made the sum $12,625.34, and this award was therefore, if the deductions were properly made, $1,000 too much. This error I will correct.

In a memorandum showing the amount of net profit arrived at, returned by the referees, they say:—

"If Mr. Mortimer did work to the extent of $167,408 in 5 years, he would do $25,357.79 in 9 months, the latter amount being the gross cost of the work done outside at schedule rates.

Upon that basis they make the deductions as by the memorandum appear. I cannot, I must say, understand or admit that the loss to the contractor could be determined or influenced by such a calculation.

There is nothing in the evidence to sustain such a mode of calculation. On the contrary, it is clear from the evidence of Mortimer that the work was withdrawn from time to time during the running of the contract, which he continued to perform for the term contracted for. He shows most conclusively, to my mind, in his evidence, that he had a sufficient staff of operatives always on hand, many of them hired by the year, and sufficient plant and materials to have done the work. He had to keep up his establishment so as at all times to be able to fulfil his contract; he had the same insurance, rent, fuel, &c., to pay as if he had performed the whole of the work; he acted as his own superintendent; and, therefore, without any additional loss of time or money, could have included the performance of the work not done by him.

The items which go to make the deductions are as follows:—

Additional superintendence	$2,000.00
Average value of machinery $5,577, 65 p.c. (off).	209.16
Rent to include depreciation of buildings, valued at $11,327.51, say 10 p.c. (off)	849.57
Insurance on building	41.48
Machinery	37.50
Fuel, say	200.00
Taxes and water rates	300.00
	$3637.71

It will thus be seen that the whole of the deductions were made upon the theory (which is wholly unsustained by the facts in evidence) that the work given to outside parties was to have been done within a period of nine months, whereas it was withdrawn at different periods during the entire continuance of the

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contract. During all this time the contractor had the necessary superintendence of the work, as well as the necessary plant, and there is no evidence to show that he would have had any more to pay for the additional work,—in fact the opposite is shown, and there is no evidence of any depreciation of the plant. How the five per cent. deduction in the value of the machinery was sustained I have been unable to ascertain.

The rent and depreciation of buildings was not in any way affected by part of the work having been transferred to other parties. The contractor would have paid no more rent, nor would the buildings have been depreciated any more if he had done the whole of the work. The same may be said as to the insurance, fuel, taxes and water rates. As far as the evidence shows, the contractor would not have paid any more than he did for any of these things, under the circumstances, if he had performed the whole of the work. The cost of the extra labour and materials required is, of course, included in the estimate of the cost of production stated by the referees, as before mentioned, at $10,094.74.

Under the evidence the appellant is entitled to be paid the difference between the value of the work not done by contractor, amounting to.................$25,357.79
and the amount it would have actually cost
him to perform it.......................... 10,094.74

$15,263.05

My judgment, therefore, is for the appellant for the sum of $15,263.05, with all costs.

Appeal allowed with costs.

Solicitors for appellant: *McVeity & Code.*

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

Coram TASCHEREAU, J.

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June 16.

TELESPHORE PARADIS.................... APPELLANT;

AND

HER MAJESTY THE QEEEN............ RESPONDENT.

Expropriation of land—Imperial Lands Clauses Consol. Act, and Railways Clauses Consol. Act—"The Government Railways Act, 1881"—Right to compensation under the law of the Province of Quebec—Damage to claimant's business—Interest—Valuation of property on municipal assessment rolls.

On appeal from an award of the Official Arbitrators,

Held:—(1.) In so far as "The Government Railways Act, 1881," re-enacts the provisions of the Lands Clauses Consolidation Act, 8–9 Vic. (Imp.) c. 18, and the Railway Clauses Consolidation Act, 8–9 Vic. (Imp.) c. 20, where the latter statutes have been authoritatively construed by a court of appeal in England such construction should be adopted by the courts in Canada.

Trimble vs. *Hill*, (5 App. Cas. 342) and *City Bank* vs. *Barrow* (5 App. Cas. 664) referred to.

(2). Apart from any legislation of the Dominion parliament, where lands have been expropriated for any purpose, a right to compensation obtains under the law of the Province of Quebec in the same way as under the law of England.

(3). Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation; but where land has been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works.

(*Jubb* vs. *The Hull Dock Co.* (9 Q. B. 443), and *Duke of Buccleuch* vs. *The Metropolitan Board of Works.* (L. R. 5 Ex. 221, and L. R. 5 H. L. 418) referred to.

(4). Under the law of the Province of Quebec, where interest has been allowed on an award by the Official Arbitrators, a claim for loss of profits or rent cannot be entertained by the court on appeal, as such interest must be regarded as representing the profits.

(*Re Fouché—Lepelletier*, Dalloz 84, 3, 69) and *re Pechwerty*, (Dall. 84, 5, 485, No. 42) referred to.

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(5). The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based, where such valuation is made arbitrarily and without consideration of the trade carried on upon the property, or the profits derivable therefrom.

(6). In an expropriation matter the court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation.

APPEAL from an award of the Official Arbitrators.

Prior to the building of the St. Charles Branch of the Intercolonial Railway, Paradis, the appellant, was the owner of a saw-mill at Lévis which he was operating with considerable profit. This mill was built between a street, or public highway, and the river. Between the highway and the mill there was an area of ground used by Paradis for the purposes of piling lumber and loading carts, which was not fenced off from the road,—carts having free access to it all along the frontage.

In 1883 the Government caused the railway to be laid along the whole front of Paradis' property, expropriating some 2,975 superficial feet from the said piling and loading ground between the highway and the mill.

The Government tendered Paradis the sum of $2,975. in full compensation for the land taken, under the provisions of "The Government Railways Act," 1881. This tender Paradis declined to accept, and put forward a claim amounting to $96,441,67, for the right of way expropriated and damages to his property and business.

This claim was referred to the Official Arbitrators, who made an award in favor of Paradis for $17,542. in full satisfaction of his claim, with interest from the date of the expropriation.

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From this award Paradis appealed to the court.

The appeal was heard before Mr. Justice Taschereau., who ordered evidence to be adduced in addition to that taken before the Official Arbitrators.

Bossé, Q.C. for claimant;

Hogg for the Crown.

TASCHEREAU, J. now (June 16, 1887), delivered judgment.

It is settled law, upon the authority of *Trimble* v. *Hill* (1) in the Privy Council, and *City Bank* v. *Barrow* (2) in the House of Lords, that where a colonial legislature has re-enacted an Imperial statute, and the latter has been authoritatively construed by a court of appeal in England, such construction should be adopted by the courts of the colony.

Now our statute is but a re-enactment of the Imperial statutes on the subject; and, where lands are taken, it is settled law in England that the compensation which the owner, besides the value of what is actually taken, is entitled to recover from the railway company, has to be assessed upon the same basis as it would be if he had been forcibly evicted by the company without their statutory power so to do (*Lloyd on Compensation*) (3), and that the right to compensation always exists, though not exclusively, perhaps, where the action, but for the statute, would have lain. This being so, it is obvious that there may be cases in the province of Quebec, where the right to compensation would lie though it would not in other parts of the Dominion, and *vice versa*, as the right of action may or may not lie in that province in cases where it does or does not in the other provinces. The first

(1) 5 App. Cas. 342. (2) 5 App. Cas. 664.
(3) 5th ed. pp. 66 and 144.

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question to be solved here then is, would the claimant but for the statute have an action? That, of course, in Quebec, would have to be determined by the civil law of the province. In the present case, however, there is no controversy in that respect, for here the case is one where land of the claimant has been taken, and in such a case, either under the French or English law, an action would lie at the suit of the claimant, but for the statute; and the right of the claimant to compensation is not, and could not be denied by the Crown. The amount of that compensation, the principles upon which it has to be assessed, the basis of determination of the particular damages which the claimant is entitled to are the only matters in contestation.

I think it better to first briefly refer to the civil law of the Province of Quebec, and the French cases on the question.

"In cases in which immovable property is required "for the purposes of public utility," says article 1589 of the Civil Code, "the owner may be forced to sell or be "expropriated by the authority of law in the manner "and according to the rules prescribed by special "laws;" and says article 407, "no one can be com-"pelled to give up his property except for public "utility and in consideration of a just indemnity pre-"viously paid." There is nothing in these articles that is not law in all the Dominion. In fact, by the very statute, under which the award now under consideration was made, it is enacted that, where land has been taken, the expropriated owner has the right to be indemnified for all the damages which have been occasioned by reason of the works authorised by it. In France, as in England, however, though the law is clear on the right to compensation in such cases, there is no uniformity in the decisions, as to the mode of assessing the amount thereof. That the damages, as

in England, must be direct and actual is a well established rule. I need refer on this point but to a very few cases.

L'indemnité d'expropriation ne doit comprendre que le dommage actuel, suite directe de l'expropriation.

Chemin de fer de Clermont v. *Magne* (1).

L'indemnité accordée à l'exproprié doit se mesurer sur la valeur des parcelles expropriées et sur la moins ou plus-value du surplus de la proprieté, (2).

Elle ne peut s'étendre au dommage incertain et éventuel qui ne serait pas la conséquence directe, immédiate et nécessaire de l'expropriation.

Re Maillard (3). See also *Re Commune de Mounier* (4).

So much for the general principles. I will refer to the following cases and quotations from the commentators to demonstrate what application these principles have in practice generally received.

In *re Cordier*, the court of Brussels held that where a factory had been expropriated, the owner could not prove the profits of his trade to fix the value of the property. The commentator on that case (*Dalloz* : *Répertoire de Jurisprudence*) (5) very properly remarks that as to this a distinction must be kept in view. Of course, he says, the profits that the owner made from his factory are not to be considered, inasmuch as they were the result of his personal qualifications, and of his energy and intelligence ; but they should be considered as to the result they bore upon the monetary value of the factory. In the same work, (6) to demonstrate that the idemnity must consist, not only in respect of the value of the part actually expropriated, but also of the amount of the depreciation

(1) Cass. 21 Juillet, 1872 ; S.V. 75, 1, 427.

(2) Cass. 21 Juillet, 1875 ; S.V. 75, 1, 428.

(3) Cass. 5 Mai, 1873 ; S. V. 73, 1, 476.

(4) S. V. 77, 1, 277, and cases ; Dall. 84, 1, 192, and Dall. 85, 1, 80.

(5) Verb. *Expropriation p. c. d'ut. pub.*, 23, No. 572.

(6) Nos. 582, 585.

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in value of the rest of the property caused by the works, the author cites a number of cases. The only one I will refer to is the *Charrin* case, reported at length in the same volume, (1) where it was held that the indemnity must be determined on the double ground of the value of the part expropriated, and of the loss that the owner may suffer as to the part not expropriated, either by its depreciation in value, or by the expense he will be put to in order to render the property co-ordinate with its destination.

In a later case (*Dalloz*) (2), it was held :

L'indemnité doit comprendre, indépendamment de la valeur des immeubles expropriés, la dépréciation des parties conservées et les dommages de toute nature qui sont la conséquence directe et immédiate de l'expropriation.

I may add the case, to the same effect, of *Hanaire et Appay*, cited in *Dalloz*, (3) where the Court of Cassation enumerates as follows the different heads upon which the assessment of the indemnity must be made :

The value of the property taken, and the expenses of demolition and of reconstruction which will be necessary to render co-ordinate the rest of the property with its ulterior destination, or to re-establish it so as to be profitably used or worked.

In *Herson* : *De l'Expropriation pour cause d'Utilité Publique*, (4) the author also puts, as part of the amount the owner must be paid for, the value of the works rendered necessary on the property left to the owner. *Sabattier* : *Traité de l'Expropriation pour cause d'Utilité Publique* (5), expounds the law in the same sense. So, he says, if the expropriation obliges the owner to demolish and rebuild a mill, he will be entitled to claim the expense of it. I may refer also to *Cadaveine et Théry* : *Traité de l'Expropriation* &c. (6), and *Dufour* : *de l'Expropriation*, &c. (7). In re *Ville de Cherbourg* (8),

(1) P. 652.
(2) 83, 1. 391 (2 *et* 3).
(3) *Rep. de Jurisprudence* v. *Expropriation*, 23, N. 1, p. 641.
(4) P. 184.
(5) P. 325 et seq.
(6) Ss. 307-321.
(7) Ss. 118, 261, 263, 264.
(8) Dall. 84, 1, 344.

the Court of Cassation held that the necessity imposed upon a lace factory, by an expropriation, of purchasing another property for the purpose of its trade, is a fair consideration in the assessment of the indemnity. In another case the same court held that the damage caused to the owner of a property severed by a railway, which consisted in the additional expense occasioned by the works to watch his herds and flocks, gave rise to an indemnity. In three cases of a recent date (1), it is true, the Court of Cassation held that damages which are not the direct result of the expropriation, but would be the result of the construction of the works, cannot give rise to an indemnity for the expropriation. These cases, however, have no application under our statute, which clearly provides for both these grounds of compensation.

Now, as to the English cases: they are far from being harmonious, and this has been the occasion of strong comment from the Bench.

Lord Chancellor Chelmsford, in the case of *Ricket* v. *The Metropolitan Railway Co.*, (2), says:—

It appears to me to be a hopeless task to attempt to reconcile the cases upon the subject.

Lord Westbury, in the same case, after referring to the diversity of judicial opinions on the question, says (3):—

It is a matter of regret that our judicial institutions should admit of these anomalies. It is also painful to observe the number of conflicting decisions on the law of compensation by railway companies. It is impossible to reconcile these decisions by any sound distinctions, and the result is, that, to a great extent, they neutralise each other. Moreover, it is distressing to be told (as we are in the judgment before us) that the Court of Exchequer, in *Senior* v. *Metropolitan Railway Company* (4), and the Court of Common Pleas, in *Cameron* v. *The Charing Cross Railway Company* (5), founded their judgments on the supposed effect of the judgment given by the Court of Exchequer Chamber, so recently as in

(1) Dall. 84, 1, 306.
(2) L. R. 2 H. L. 187.
(3) p. 201.
(4) 2 H. & C. 258.
(5) 16 C. B. (N. S.) 430.

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the year 1863, in the case of *Chamberlain* v. *The London & Crystal Palace Railway Co.* (1), but that both the Common Pleas and the Court of Exchequer did not understand the judgment on which they so relied. It is a striking example of the uncertainty of the law which rests on judicial decisions.

The subsequent case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (2) and in the House of Lords (3) shows what diversity of opinions continue to exist on the subject. In a later case (1882), *Caledonian Railway Co.* v. *Walker's Trustees* (4), the Chancellor (Lord Selborne) and Lord O'Hagan thought that the cases in the House of Lords could be reconciled, though not without difficulty. Lord Blackburn did not see that he could reconcile *McCarthy's* case (5) with *Ogilvy's* case (6)

An attentive examination of the cases, however, has led me to the conclusion that this conflict of authority is limited to the case of a claimant whose land has been injuriously affected by the construction of the works, but of which land no part has been expropriated. And keeping in view the distinction between such a claim and the claim of an owner whose land has been expropriated, and also remembering that, as remarked by Lord Selborne, in the *Walker's Trustees'* case (7) :— " the reasons which learned Lords [judges] who con- " curred in a particular decision may have assigned for their " opinions, have not the same degree of authority " with the decisions themselves," I feel confident in saying that, where land of the claimant has been taken, it is well settled law that he is entitled to all the direct and immediate damages he suffers from the expropriation and from the construction of the works. I need hardly say that, upon every principle of justice, a contrary law would be most unjust and iniquitous.

(1) 2 B. & S. 605.

(2) L. R. 3 Ex. 306, and L. R. 5 Ex. 221.

(3) L. R. 5 H. L. 418.

(4) 7 App. Cas. 259.

(5) L. R. 7 H. L. 243.

(6) 2 Macq. 229.

(7) 7 App. Cas. 275.

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I will now review the cases where land of the claimant has been expropriated, referring occasionally to the distinction to be made between the two classes of claims.

In *Jubb* v. *The Hull Dock Co.* (1846), (1) the jury had awarded £400 for the premises and £300 as compensation for the damage, loss or injury which the claimant would sustain by reason of his having to give up his business as a brewer, until he could obtain suitable premises in which to carry on his said business.

The company attacked this last part of the award on the ground that it was given for injury to trade and not to the land, but the court (Lord Denman, C.J.) held the award good. The learned judge said (2) :—

> In the case of *Rex* v. *The London Dock Co.*, (3) this court held that the tenant of a public house, whose custom had been affected by the cutting off of communication by reason of the works of the company, was not entitled to compensation : but in that case no part of the premises had been taken or touched by the company.

This case is approved in the case of *Ricket* v. *The Metropolitan Railway Company* in the Court of Exchequer Chamber, by Erle, C.J., (4) and by Lord Blackburn in the case of *The Duke of Buccleuch* v. *The Metropolitan Board of Works* (5), in the Exchequer Court. In *Bourne* v. *The Mayor of Liverpool* (1863) (6), the plaintiffs who were brewers, were the owners of a public house, which was let for an unexpired term of seven years, and there was in the lease a covenant by the tenant not to sell on the premises any beer other than that purchased of the plaintiffs. The defendants, under a statute expropriated the premises. The arbitrators awarded, first, £3,900 for the house itself and "£400 for all loss, damage or injury to be sustained by the claimants by reason of the loss of trade there-

(1) 9 Q. B. 443.
(2) Ib. p. 457.
(3) 5 A. & E. 163.
(4) 5 B. & S. 156.
(5) L. R. 5 Ex. 241.
(6) 33 L. J. Q. B. (N.S.) 15.

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after to arise to them from the determination of the aforesaid covenant in the said lease." The defendants objected to this item of £400, but the court (Wightman, Crompton and Blackburn, JJ.) unanimously held it good. Blackburn, J. said :—

> It is not disputed, and it could not be disputed, that in giving compensation for the value of the land, the arbitrator is to give compensation for the value of the land such as it was to the plaintiffs. I can see no reason why the covenant should not be taken into account in estimating the value of the premises to the plaintiffs.

In *Senior* v. *The Metropolitan &c., Ry.* (1863) (1), though no part of the clamiant's land had been taken, the court, on the verdict of the jury that no structural damage to the plaintiff's premises had been sustained by the construction of the defendant's railway, but that the plantiffs had suffered £60 damages for loss in their trade by the obstruction to their premises, during the construction of the defendant's works, gave judgment for the plaintiff on the ground that loss of profits or a decrease in trade are an injury to the premises themselves, and that the evidence of the loss of profits is admissible and a fair item for consideration in assessing the compensation for the damage done to the land or premises. In *Cameron* v. *Charing Cross Ry.* (1864) (2), the claimant, a baker, claimed damages for the loss of trade caused by the access to his premises having been rendered more difficult by the company's works. His claim was allowed on the authority of *Senior* v. *The Metropolitan.* Willis, J. said :—

> It appears to me, that a business which a person carries on upon land is an advantage which he derives from having the land, and his interest consists of a reasonable expectation of getting profits by using such land in carrying on his business there ; and if that expectation was taken from him by the works of the company, I do not see why he should not recover damages for such loss.

That case would be a doubtful one now, perhaps,

(1) 32 L. J. Ex. (N. S.) 225. (2) 33 L. J. C. P. (N. S.) 313.

(no land of the claimant having been taken), since the decision in *Ricket's* case in the House of Lords, (1) if it is taken as holding that compensation is due for loss of trade. But I do not think it bears that interpretation. The plaintiff, it must be remarked, specially alleged damages and injury to his premises ; and his counsel, in the course of the argument, had said that the mere loss of trade was not the ground on which the plaintiff's right was put, but was referred to only for calculating the measure of damages. In that case, the claim was rejected only because the jury had found that there was no injury to the land. There, none of the claimant's land had been taken. And in *McCarthy's* case, (2) ; though none of the claimant's land had been taken, the claim was admitted because the plaintiff's premises had been depreciated in value by the works of the company. In this last case, Lord Chelmsford draws special attention to the difference between the *Ricket* case and the case then under consideration, in view of the fact that McCarthy's land had been injuriously affected, whilst Ricket's had not. And this distinction had been also taken by the judges in the same case in the lower courts (3). In the case *re Stockport, &c. Railway Co.* (4), (a case not only not overruled, notwithstanding the severe criticism it received at the hands of the Master of the Rolls in *The Queen* v. *Essex* (5), but, on the contrary, supported in the House of Lords, in the *Duke of Buccleuch's* case,) the distinction between the case where land has been taken from the claimant, and where land has not been taken but injuriously affected, is also clearly laid down.*

(1) L.R. 2 H.L. 175.
(2) L.R. 7 H.L. 243.
(3) L. R. 7 C. P. 508 ; L. R. 8 C. P. 191.
(4) 33 L. J. Q. B. (N. S.) 251.
(5) L.R. 17 Q.B. Div. 447.

*REPORTER'S NOTE.—Since this judgment was delivered the *Stockport* case has been expressly approved by the House of Lords in the case of *Cowper Essex* v. *The Local Board for Acton*, reported in 14 App. Cas. 153.

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The jury had found an injury to the premises, of which a part had been expropriated for the railway, by reason of the risk of fire to the plaintiff's cotton mill being so much increased by the proximity to the railway as to render it less fit and convenient for the purpose of a cotton mill, and to make the mill not insurable except at a greatly increased premium, and so to render the property of less value to a purchaser. The damage on that head had been assessed at £300.

Mr. Russell, counsel for the defendant, had argued that no compensation was due, and in support of his argument had cited *Penny* v. *The South-Eastern Railway Company* (1), *The Caledonian Railway Company* v. *Ogilvy* (2), and *Broadbent* v. *The Imperial Gas Company* (3), upon which Mr. Manisty, counsel for the claimant, had said :—

There is a clear distinction between the cases cited and this. In the instances referred to no land of the claimant had been taken.

Then Crompton, J., in delivering the judgment of the court, said :—

On the part of the company, it was not denied that the premises were rendered less convenient and fit for the purposes of a cotton-mill, and that the saleable value of the mill was diminished by reason of what had been done by virtue of the provisions of the act. But it was asserted that no action would have lain against any proprietor for damage from fire arising from the proximity of the works or engines carried on and managed without negligence ; and, therefore, that the case fell within the well-established rule, that compensation is only given by such acts of Parliament when what would have been unlawful and actionable but for an act of Parliament, is permitted by the act of Parliament, and compensation therefore allowed in lieu, and by reason of such right of action being taken away. I adhere entirely to this rule as laid down by my brother Willes in *Broadbent* v. *The Imperial Gas Company* (cited *ante*), and in many other cases. But the question here is, whether such rule is at all applicable to cases where part of the land is taken and compensation is given, not only for the value of the part taken, but for the rest of the land being injuriously affected, either by

(1) 26 L.J. Q. B.(N.S.) 225.
(2) 2 Macq. 229.
(3) 26 L. J. (N.S.) Ch. 276 ; 7 H. L. Cas. 600 ; 29 L.J. (N.S.) Ch. 397.

severance or otherwise; and I am of opinion that the distinction pointed out by Mr. Manisty is correct, and that the rule in question does not apply to such cases. Where the damage is occasioned by what is done upon other lands which the company have purchased, and such damage would not have been actionable as against the original proprietor, as in the case of the sinking of a well and causing the abstraction of water by percolation, the company have a right to say, we have done what we had a right to do as proprietors, and do not require the protection of any act of Parliament; we, therefore, have not injured you by virtue of the provisions of the act; no cause of action has been taken away from you by the act. Where, however, the mischief is caused by what is done on the land taken, the party seeking compensation has a right to say, it is by the act of Parliament, and by the act of Parliament only that you have done the acts which have caused the damage; without the act of Parliament, everything you have done, and are about to do, in the making and using the railway, would have been illegal and actionable, and is, therefore, matter for compensation according to the rule in question. I think, therefore, that the distinction between cases where the land is taken and the cases of obstruction of light, rights of way, etc., etc., by acts done on other land is well-founded.

In *Eagle* v. *Charing Cross Railway Co.* (1867) (1), where no land was taken, the award was as follows:—

I find and award that the said company have in and by the execution of their works occasioned a diminution of light to the said messuages and premises in which the said G. C. Eagle claims to be interested as aforesaid, and that the said messuages and premises are consequently rendered less convenient and suitable for the purposes and requirements of the trade or business of a wool-warehouse keeper, carried on therein by Eagle as aforesaid, than they otherwise would have been, and that Eagle has sustained and will sustain damage in his said trade or business by reason of such diminution of light; and I find and assess the amount of the compensation to be paid to Eagle by the company for and in respect of such damage at the sum of £656: and I find and award that, notwithstanding such diminution of light as aforesaid, the saleable value of the interest so claimed by Eagle in the said messuages and premises as aforesaid, is not diminished; and that except the said damage in his said trade or business, Eagle has not sustained and will not sustain any damage in the premises; and that except the compensation to which Eagle is or may be by law entitled in respect of his trade or business as aforesaid, and the

(1) L.R. 2 C.P. at p. 639.

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amount whereof I have hereinbefore found and assessed, he is not entitled to any compensation in the premises.

An action was instituted upon that award, and demurred to upon the ground that it did not appear that compensation was awarded in respect of any injury done to the land of the plaintiff, or to his interest therein. But the court, Bovil, C.J., Keating and Montague Smith, J.J., unanimously dismissed the demurrer, and held that the diminution of light was an injury to the plaintiff's interest in the premises, which entitled him to compensation under the statute; and that it was no answer that, by reason of accidental circumstances, the saleable value of the premises was not diminished.

It was argued by the defendant that loss of trade is not a subject for compensation, and that the finding of the umpire, that the saleable value of the house had not been diminished, was a finding that there was no injury to the premises.

But, said Bovill, C. J. (1):

> The diminution of light is clearly an injury to the premises. * * * The amount of compensation the plaintiff is entitled to for the diminished light to his premises is not to be estimated with reference to what they will sell for. The plaintiff is not bound to sell.

And Montague Smith, J., after stating that the injury must be to the land itself, goes on to say (2):

> I think that is shown upon the face of this award. It finds in effect that the light to the plaintiff's premises has been obstructed, and that, by reason of that obstruction, the premises have been rendered less convenient and suitable for the purposes and requirements of the plaintiff's trade. It seems to me that this is a damage to the plaintiff's interest in the premises immediately flowing from the act of the defendants. If it could be successfully contended that the obstruction of light to the premises is not an injurious affecting of the land, the same argument might equally apply to a case where the flow of water to a mill was obstructed. In either case, the injury is not limited to the trade: it is a permanent injury to the tenant's interest in the land itself. It is impossible that such an argument can be allowed to prevail.

(1) L. R. 2 C. P. p. 648. (2) Ibid. p. 649.

The learned judge then goes on to distinguish *Ricket's* case, (1) and adds:—

That the saleable value of the premises has not been diminished is not the only, and certainly not a conclusive, test. A man is not to be driven to sell his property. He may choose to continue his business.

In *Knock* v. *The Metropolitan Railway* (2) compensation was given for damages to a stock-in-trade on a property injuriously affected by the construction of certain works, though no land of the claimant had been taken. Bovill, C.J., in the course of his remarks, says (3):—

According to my experience which has extended over a considerable period, no doubt has ever been suggested,—and indeed it has always been one of the most serious heads of compensation,—that where premises are damaged or injuriously affected, by the exercise of the powers vested in the company, the claimant is entitled to compensation for damage done to his stock-in-trade or other property thereon.

In the case of *White* v. *The Commissioners of Public Works* (1870) (4), Kelly, C.B., Channel and Cleasby, B.B., gave compensation for loss of profits and the good-will of a business, in a case where land had been taken from the claimant.

In the *City of Glasgow* v. *Hunter Union Railway Co.* (1840) (5) the head-note to the report says:—

Statutory compensation cannot be claimed by reason of the noise or smoke of trains, whether part of the claimant's lands be taken or not.

But that is wrong; for Lord Chelmsford said:—

But the claim in the present case does not arise out of anything done on the land taken, nor in respect of any property of the respondent connected with the land so taken. * * * As no part of the respondent's property has been injured by anything done on his land over which the railway runs, his right to compensation for damage appears to me to be precisely the same as if none of his land had been taken by the company.

Lord Westbury said:—

I concur with the respondent's counsel that where a part only of

(1) 5 B. & S. 149.
(2) L. R. 4 C. P. 131.
(3) Ibid. p. 135.
(4) 22 L. T. (N. S.,) 591.
(5) L. R. 2 H. L., (Sco. App.) 78.

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certain premises is taken, the residue being left to the owner, all the inconvenience sustained by the owner of the residue in consequence of the user made by the railway company of that which is taken is a legitimate subject of consideration when a jury is directed to address itself to valuing the property so taken.

In *Hammersmith* v. *Brand* (1) Lord Colonsay said :—

No land belonging to the plaintiffs, or in which they were interested, was taken or touched by the railway ;

and the claim was in that case dismissed on that distinction. I shall cite presently what Lord Chelmsford said of *Hammersmith* v. *Brand*, in the *Duke of Buccleuch's case.* Erle, C. J. delivering the judgment in the Exchequer Chamber, in *Ricket* v. *Metropolitan Ry. Co.* (2) said :—

As to the argument that compensation is in practice allowed for the profits of the trade *where land is taken*, the distinction is obvious, the company claiming to take land by compulsory process expels the owner from his property, and are bound to compensate him for all the loss caused by the expulsion, and the principle of compensation then is the same as in trespass for expulsion. * * * The general conclusion which we draw from this review [of the cases] is that there is no precedent of compensation for an injury to goodwill or for a loss of profit in the business carried on upon the land where no land has been taken ; that the compensation for the goodwill of business carried on upon land actually taken is granted expressly on the ground that the occupier is expelled therefrom, and is distinguished thereby from a claim by an occupier from whom nothing has been taken.

In *The Duke of Buccleuch's* case (1871), (3) the great difference that exists between the compensation due to a claimant whose land has been expropriated and the claimant whose land by its proximity to the railway may have been injuriously affected by the construction or usage thereof, but from whom no land at all has been taken, was clearly admitted by the House of Lords. Mr. Justice Hannen, when giving his opinion before the House, said :—

It may well be that there is a hardship in awarding no compensation

(1) L. R. 4 H. L. 171.
(2) 5 B. & S. at pp. 163-167.
(3) L. R. 5 H. L. 418.

to a person who sustains loss for the public benefit unless his lands are taken; but there is a manifest difference between the position of a person whose lands are taken and that of one whose lands are not. The former was possessed of something without which the proposed public purpose could not be accomplished; he could have prevented the carrying out of the undertaking if he had not been deprived of this power by Act of Parliament, whereas the person whose lands are not taken had no such power, and could not have hindered the appropriation of lands not his own to any purpose not amounting to a nuisance.

Mr. Baron Martin also clearly recognized this difference between the owner whose land has been expropriated and him whose land has not. Then, in delivering his judgment, Lord Chelmsford said:

In *Hammersmith Railway Company* v. *Brand* (1), it was held that a person whose land had not been taken for the purposes of a railway was not entitled to compensation from the railway company for damage arising from vibration occasioned (without negligence) by the passing of trains after the railway had been brought into use. And in *City of Glasgow Ry.* v. *Hunter* (2) it was held that compensation could not be claimed, by reason of the noise or smoke of trains, by a person no part of whose property had been injured by anything done on the land over which the railway ran. In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of these cases, lands had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by reason of vibration, or smoke, or noise, occasioned by passing trains.

In the more recent case of *The Queen* v. *Sheward* (1880) (3), though not the gist of the decision, an award of £6,000, which included a large sum for loss in respect of the claimant's business, was maintained. The three judges, Bramwell, Bagallay and Brett, L. JJ., recognize the distinction between the two kinds of claims. In *Wadham, et al* v. *The North-Eastern Railway Company* (4), though no land had been

(1) L. R. 4 H. L. 171.
(2) L. R. 2 H. L. (Sco. App.) 78.
(3) L. R. 9 Q. B. Div. 741.
(4) L. R. 14 Q.B. Div. 747.

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taken, compensation was awarded. This last case, however, has no application to the present claim.

In the *Queen* v. *Essex* (1) Day, J., said :—

> The great exception, and one which, in my mind, ought to be upheld, is, that where any portion of a man's land is taken he shall have full compensation for the injury that is done to him, although, if his land is not taken * * * he must submit to bear the loss, and can obtain no compensation whatever for it.

Although this case was reversed on appeal (2), the distinction so made was not questioned by the court of appeal.

In *Ford* v. *The Metropolitan Railway Company* (1886) (3), Lord Esher, M.R., says :—

> If a building cannot be used as a business building to the same advantage as it was before, it is an injury to the building as a business building.

The court also held in that case that the contention that damage is not to be compensated because it is merely a temporary one during the construction of the works, is unfounded in law.

In *re Penny and The South-Eastern Railway Company* (1857) (4), where no part of the claimant's land had been taken, it was held that the over-looking of the claimant's premises from the railway was no ground for compensation. In France, the law is similar to the rule laid down in the last mentioned case, and it has been there held :—

> The fact that by the construction of a road the garden of a convent previously secluded is rendered exposed to the view of the public using the road, gives no right to compensation (5).

These two decisions, however, have no application to the present case. I cite them together to show there is no difference under the two systems of jurisprudence in the general principles on the subject.

(1) L. R. 14 Q.B. Div. 753.
(2) L. R. 17 Q.B. Div. 447.
(3) L. R. 17 Q. B. Div. 12.
(4) 7 El. & Bl. 660.
(5) S. V. 80, 2,308.

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I close here my review of the cases on the general principles by which courts and arbitrators are to be guided in the determination of the assessment of compensation where land is expropriated. They fully bear out what is said in *Woolf and Middleton on Compensation* (1), in the following passage :—

There is a broad distinction between cases where land is actually taken and cases where land, without being taken, is injuriously affected, as regards the principle guiding the assessment for compensation. When land is actually taken, and mischief is caused by what is done on the land taken, everything is matter for compensation, inasmuch as everything done would, but for the Act (8 Vic., c. 18, s. 68), have been illegal and actionable. * * * In other words, in a case where lands are taken for the execution of works, the principle of compensation is the same as in trespass for expulsion, and in such a case the company are bound to make compensation to the owner for all the loss caused by the expulsion.

The decisions under section 68 of the Imperial *Lands Clauses Consolidation Act* (2),to which I have been referred by Mr.Hogg, have no application in the present case. They relate to claims as to land injuriously affected, but no part of which had been expropriated. It is exclusively to this class of cases that apply the dicta and decisions that a mere personal obstruction or inconvenience, or damages occasioned to a man's trade or business, are not grounds for compensation, but that the damage must be a damage or injury to the land itself, independently of any particular trade the claimant may carry on upon it. See *Lloyd on Compensation* (3).

I now come to the proposition, put forward on the part of the Crown, that the claim must be limited to damages not of a speculative character, and cannot be extended to future damages ; and that the claimant is bound to wait till the damages occur before seeking compensation. I cite on this point the following cases. In delivering the judgment of the court in *Chamberlain*

(1) P. 117.
(2) 8 Vic. c. 18, s. 68.
(3) 5th ed. p. 109.

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v. *The West End of London Crystal Palace Railway Co.* (1863) (1), Earle C.J., said:—

A person seeking to obtain compensation under these acts of Parliament must once for all make one claim for all damages which can be reasonably foreseen. * * * The party claiming compensation must bring forward his claim in unity, as far as he can foresee the damages which will arise, estimating them as having as much permanency as the railway.

In *Croft* v. *The London and North-Western Railway Co.* (1863) (2), Cockburn, C.J , on an action claiming damages accrued since the arbitration, said:—

So far as we can gather from the language of the various enactments relating to the assessment of compensation, the Legislature contemplated that compensation should be settled once for all.

And Crompton J said (3):—

These injuries must have been in the contemplation of the parties and are foreseen damages; and, as far as such damages are concerned, there is to be one enquiry, and compensation is to be given once for all. * * * When the damage can be ascertained at the time of the enquiry, there can be no further compensation.

In that case a tunnel had been built for the railway under the plaintiff's land. The plaintiff, who, when the tunnel was built, had been awarded compensation under arbitration, complained that since the opening of the railway his house over it was injured by the vibration, and that this was an unforeseen damage at the time of the arbitration for which he had not been paid. But this action was dismissed. In *Whitehouse* v. *Wolverhampton, etc., Railway Company* (4); it was held that compensation was rightly awarded for losses or expenses not then actually sustained or incurred, but which would necessarily be sustained or incurred, and which were capable of being immediately estimated with reasonable certainty.

In *Great Laxey Mining Company* v. *Clague* (1878) (5),

(1) 2 B. & S. 638-39.
(2) 3 B. & S. 453.
(3) Pp. 455-56.
(4) L. R. 5. Ex. 6.
(5) 4 App. Cas. 115.

in the Privy Council, the award was to enable respondent to erect 540 yards of permanent stone fencing (costing £144.15s.) around the reservoir which the company had built on claimant's land under their special act. The Privy Council held that award good, although it was argued against it that it was not for past damages.

In *Todd* v. *The Metropolitan &c., Rail. Co.*, (1871) (1), Bovill, C.J., said:—

The custom has always been to assess the compensation once for all, and not only for the land actually taken, but also for the adjoining property. I do not remember any case in which probable subsequent damage was not claimed for.

In *The Queen* v. *Essex* (2), land had been expropriated for a sewage farm. The claimant declared that his premises near by were injuriously affected by the location of such works in his vicinity. One of the grounds taken by the defendants to resist the claim was that the injury done to the claimant was not occasioned by the construction of their works, but would be occasioned only by the subsequent user of the land. But all the judges, although against the claimant on another ground, were of opinion that there was nothing in this contention, and that the depreciation of the claimant's land was caused by the dedication of the land taken to the erection of the sewage works, and not by the intended subsequent user. The case of *Lee* v. *Milner* (3), cited by Mr. Hogg for the Crown, is distinguished in one of the above cases. Now, before I pass on to the consideration of the statute under which the present claim has been made—*The Government Railways Act*, 1881—I will cite two cases on the principles by which courts must be guided in the interpretation of legislative enactments of this class.

(1) 24 L.T. N.S. 437. (2) L.R., 17 Q.B.D. 447.
(3) 2 M. & W. 824.

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In *East and West India Docks* v. *Gattke*, (1850), (1) the Lord Chancellor said:—

The rules of construction which have been applied to railway acts and other acts of the same nature are, that they are to be liberally expounded in favour of the public, and strictly against the company.

In *The Queen* v. *The Eastern Counties Railway Co.*, (2) Lord Denman said:—

Before we advert to the provisions of this particular act (3), we think it not unfit to premise that, where such large powers are entrusted to a company to carry their works through so great an extent of country, without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just that any injury to property, which can be shown to arise from the prosecution of those works, should be fairly compensated to the party sustaining it.

Now as to our own statute. By the interpretation clause the word "lands" is given a more extended meaning than it had under the previous statutes, and than it has under the Imperial *Lands Clauses Consolidation Act* of 1845, 8 Vic., c. 18, or under the *Railways Clauses Consolidation Act*, 8 Vic., c. 20. Previous statutes of the Dominion legislature deal with claims in respect of "all real estate, messuages, lands, tenements and hereditaments of any nature,"—*see* 31 Vic. c. 68 (D.); 42 Vic. c. 9 (D.) Under the provisions of *The Government Railways Act*, 1881, sub-sec. 6 of s. 3, the word "lands" shall be taken to include:

All granted or ungranted, wild or cleared, public or private lands, and all real estate, messuages, lands, tenements and hereditaments of any tenure, and all real rights, easements, servitudes and damages, and all other things for which compensation is to be paid by the Crown, &c.

This extended meaning to the word "land" is given in England by more recent statutes, such as *The Thames Embankment Act*, 25-26 Vic. c. 93. By sec. 5, subsec. 15, of our statute of 1881, the Minister of Railways

(1) 3 McN. & G. 163.
(2) 2 Q.B. 359.
(3) 6 & 7 W. IV. c. 106.

is authorized to purchase, at such price as may be agreed upon, any land or other property necessary for the construction, maintenance and use of the railway; and also to contract and agree with his vendors on the amount of compensation to be paid for any damage sustained by them by reason of anything done under the authority of the statute. If no agreement can be reached the Minister may tender what he thinks is the reasonable value of the land or property, with a notice that the question will be submitted to the Official Arbitrators; and three days after such tender and notice he is authorized to take possession.

Section 15 enacts that whenever the Minister fails to agree with the owner as to the value to be paid for the land taken or for compensation as aforesaid, the Minister may tender what he thinks the reasonable value of the same, with a notice that if the offer be not accepted, the question will be submitted to the Arbitrators.

Section 16 reads as follows:

> The Arbitrators shall consider the advantage, as well as the disadvantage of any railway, as respects the land or real estate of any person through which the same passes or to which it is contiguous, or as regards any claim for compensation for damages caused thereby; and the arbitrators shall, in assessing the value of any land or property taken for the purpose of any railway, or in estimating and awarding the amount of damages to be paid by the Department to any person, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by reason of such work.

The provision that the Arbitrators are to take into consideration, in the assessment of the compensation, the advantages that may have accrued, or that are likely to accrue, by reason of the railway, to any land, or to any person, is not in the Imperial act; and in *Senior* v. *The Metropolitan &c., Rail. Co.* (1), Bramwell, B. and

(1) 32 L. J. Ex. (N.S.) 225.

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Wilde, B. held that in assessing compensation in these cases, the company are not entitled to set off any benefit accruing to the claimants by the construction of the railway.*

Wilde, B. said (1):

I desire to prote-t against the idea that in assessing compensation a railway company can claim a set-off by reason of the benefit their works may have done to the neighbourhood. No doubt a railway does improve a neighbourhood, and everybody is entitled to the advantage of that improvement; but if any individual has a portion of his land taken, he is entitled to be paid for it. It is the first time such a question of set-off was ever mooted.

And Bramwell, B. said (2):

Suppose a man has two houses, one injured by the company's works, and the other benefited. Is he to get no compensation for the one injured?

However, our statute is clear; and here, as in France, the plus value resulting from the works has to be taken into consideration. By the operation of the said sec. 16, read in conjunction with section 5, sub-sec. 15, and with sec. 15, it is clear that the owner of land expropriated is entitled to compensation: 1st., for the value of the land taken from him; and 2ndly., for any damage or injury occasioned by reason of the railway, or sustained by him by reason of the expropriation and of the construction and maintenance of such railway. A reference to sections 27 and 30 of the act is unnecessary. They do not apply to the present case.

I will not enter into a detailed comparison between our statute and the Imperial enactments *in pari materia*,—secs. 21, 49, 63, and 68, of the *Lands Clauses Cons. Act*, 8-9 Vic. c. 18, and secs. 6 and 16 of the *Railways Clauses Cons. Act*, 8-9 Vic. c. 20. I may remark however, that under section 21, of 8-9 Vic. c. 18 (Imp.), the owner whose land is taken is to be indemnified "for any damage that may be sustained by him by

(1) 32 L. J. Ex. (N. S.) 230.
(2) Ibid.

reason of the execution of the works," whilst our statute gives compensation for "any damage sustained by reason of anything done under the Act," being in this more like sec. 6 of 8-9 Vic. c. 20, which gives compensation for "all damage sustained by the owner by reason of the exercise, *as regards such lands*, of the powers by this Act vested in the railway company." The words "as regards such lands" have given rise to some difficulty in England. Fortunately, they are not in our statute.

I now pass to the claim in controversy in the present case, and to the review of the voluminous evidence (1200 MSS. pages) comprising that adduced by the parties before the Arbitrators, and that produced before this court under an order of April last:

Amount of claim	$96,441.75
Land expropriated	2,975 feet
Amount tendered	2,975
Reference to Arbitrators, August 6, 1883.	
Award, 26th February, 1886.	
Amount of award	17,542
With interest from date of expropriation, August 18th, 1882.	

Against this award there is an appeal by the claimant asking that it be increased, and a cross-appeal by the Crown asking that it be reduced.

The claimant's bill of particulars is as follows:

I.—To Right of Way.

1. 2,975 square feet expropriated by the engineers for the railway, at $5.00	$14,875.00
2. 720 square feet additional, also expropriated for the under road and steep exit, at $5.00	3,600.00
3. Loss of time during blasting for the removal of lumber to clear ground required for said railway and for the piling of lumber from one place to another	1,000.00
4. Building of a temporary wharf to pile lumber to give space for ground required for said railway	1,500.00
	$20,975.00

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II.—COSTS AND DISBURSEMENTS.

5. Foundations for saw mills, engine-room and chimney, 70 ft. x 75 ft. x 21 ft.; depth, 110,250 ft. at 10 cts.	$11,025.00
Construction of the planing mill............................	2,800.00
" " saw mill................................	3,900.00
" " engine room..........................	950.00
" " chimney..............................	800.00
" " slip.......................................	300.00
Putting up and placing machines, boilers, engine, etc., in new mills..	3,500.00
Wharves,—building of new wharves to replace the ground expropriated by the Government, and the area of ground necessary for the construction of the new mills. The extension is 100 ft. x 40 ft. x 30 ft.; depth equal to 120,000 ft. at 10 cts..................	12,000.00
	$35,275.00

III.—DAMAGES TO BUSINESS AND EXTRA EXPENSES.

6. Loss during the construction of the mills and wharves, 120 days, at $38.75 per day..................................	$ 4,650.00
7. The removal of the buildings eighty feet further to deep water will leave almost no space to boom logs and square timber; consequently the claimant will be compelled to purchase an adjoining lot. With the possession of said lot the capacity to boom will be considerably less than the actual space occupied by the booms. The purchase of said lot will cost at least $4,000, for which the claimant requires an indemnity of..	2,000.00
8. The necessity of constructing new wharves to deep water will reduce the space to boom logs and square timber, even with the lot to be purchased as mentioned above, consequently it will necessitate extra labour and extra expenses for steamboats, etc. What was done by two trips by steamboats will now take three trips, a trip of about a week at $10 each, during 30 weeks, representing a capital of............	5,000.C0
9. Loss of time to men caused by the construction of the road, also to vehicles,—say 40 men at ½ hour each 20 hours, 2 days at $1 to $2 a day or $600 per year. To cover expenses it requires a capital of..................	10,000.00

10. The steep exit which has been made by order of the engineers of the road will necessitate the complete

removal of the snow during the winter on the under road and steep hill, which has never been done before. The said removal of snow will occupy one man and a vehicle for at least 75 days during winter; 75 days at $1.50 per one man, and vehicle $112.50 capitalised.. 1,875.00

11. The mill was formerly insured against loss by fire for $5,000 only, at least for the last six years. The claimant thought he was sufficiently covered, because the buildings were so much isolated from other properties. The crossing of the railway will increase considerably the damages of a conflagration by sparks, &c. It will become a necessity to keep the buildings fully covered at least for the sum of $20,000 at 6 per cent.,—$1,200 per year, from which deduct 5 per cent. on $4,000 as before, or $200 per year, equal to capital of.................................... 16,666.67

$40,191.67

RECAPITULATION.

1. Right of way..$20,975.00
2. Costs and disbursements.......................... 35,275.00
3. Damages to business and extra expenses..... 40,191.67

$96,441.67

This is certainly a most extraordinary statement of claim. Its gross exaggerations are only equalled by its striking illegalities. I will proceed to discuss its details.

As to the 1st item (2,975 square feet), for value of the land actually expropriated, the evidence would not justify me to give more or less than $1 per foot, the amount tendered by the Crown. There was evidence on the part of the Crown that it was not worth more than 25 cents per foot. But this amount of $1 I cannot reduce, as it is the value fixed by the Crown's special agent for the acquiring of this property. I refer to Mr. Demers' evidence taken before this court. Upon the right of way, the value of $1 a foot is fully established.

The 2nd item, 720 feet (at $5 per foot) for the

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road, I must reject. There is no expropriation of these 720 feet, and the claimant must have had a road or used part of his property for a road before the railway. What there is in this item may form an element in ascertaining the amount of depreciation of the property, and that is all.

As to the 3rd item ($1,000 for loss of time during blasting, and for the removal of lumber from the ground expropriated and the re-piling of it at another place), the claim is allowable if proved. But as to the blasting, I do not see any evidence. Atkinson, on the part of the Crown, disproves it, and as to the removing of lumber and re-piling, I cannot find any other reliable evidence than that of Piton, who had charge of clearing the ground for the railway, and who swears that what use Paradis made of it was not worth more than $12. Lortie swears that it was worth $1,000, but he had no personal knowledge of it whatever.

The 4th item ($1,500 for building temporary wharf), is proved at $1,500, but I cannot allow it. The claimant cannot get both the price of the property expropriated, and the amount necessary to replace it by other property.

The 5th item ($35,275 for re-building wharves and mills), I pass over for the present.

The 6th item ($4,650 for loss during re-construction of mill), I could not under any circumstances allow. The Arbitrators rightly, under the law of Province of Quebec, allowed the claimant interest on the amount awarded from the date of the expropriation. Now the claimant cannot get both that interest and the loss of profits. The interest represents the profits. I find two cases precisely in point (1) where it was held that the interest on the indemnity covers the loss of profits

(1) *Re Fouché-Lepelletier* Dall. 84, 3, 69 ; and *re Pechwerty* Dall. 84, 5, 485. No. 42.

and loss of rent during the reconstruction necessitated by the construction of the works.

The 7th item I reject upon the same reason that I gave concerning item 4.

The 8th, 9th, and 10th items are items to be considered in determining the diminution of value of the property by the works, but are not allowable in the shape they are presented.

Item No. 11 ($16,666 for insurance), is also to be considered determining the depreciation of the value of the property, but not allowable as made. It is a preposterous claim. If I gave the claimant $16,666, he would not have to insure at all in the future. He would be getting the amount of his insurance, not only before the fire, but without a fire. He would, moreover, get hereafter the interest on that large sum. Such a claim must have been inserted without reflection.

I now come back to the 5th item ($35,275), for the reconstruction of the mill and the wharves necessary for that purpose.

That this mill cannot remain where and as it is, at a distance of ten feet from the railway fence, which, though not yet made, the railway company has the right to make when they please, is admitted by all the witnesses; the difference on the subject between the claimant's witnesses and the Crown's being that the latter are of opinion that an extension of 36 feet towards the river would be sufficient, leaving the front part of it as it is, at a distance of only ten feet from the railway ground; whilst the former are of opinion that the mill should be entirely taken down and reconstructed at a distance of 70 to 80 feet from where it now stands. Were I to base the amount of the compensation on the cost of either the enlargement or the entire reconstruction of the mill, I would adopt the claimant's witnesses' theory. From the evidence,

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I cannot see that the Crown witnesses' theory of a simple enlargement of 36 feet would give the claimant the same room and advantages he had before the railway. At the same time I would say that he is not entitled to have more ground in the future between his mill and the railway fence—67 feet—than he had before between his mill and the main road. I hesitate, however, to adopt this basis at all in this case, though the authorities might support it, for the reason that, in the shape this item of the claim is made and proved, were I to adopt it I would perhaps make the claimant a richer man than he was before, for if he was to get $35,275, and remain with all his property as it now stands, besides getting the $2,975 for the ground expropriated, in all $38,250, and the property with mill complete, he might be in a better position than he was before, although I must say that upon the evidence, when the railway is fenced in, his mill will not be worth much where it now stands. One way of reaching the amount he is entitled to has been suggested. That is, by ascertaining by the loss of trade alone, the depreciation in value of the property. The loss of trade proved by Paradis himself is from $1,500 to $2,000 a year. This evidence is corroborated by other witnesses, and the Crown witnesses, having no personal knowledge of the claimant's business, were not in a position to contradict it. It is evident, however, that though loss of trade is a fair element of consideration to ascertain the depreciation in value of the property, the claimant cannot get the capital sum representing the amount of his annual loss of trade. Supposing, for instance, that he has lost since the railway $1,500 a year, the Crown is justified to argue that, upon this alone, he is not entitled to claim $25,000. That would be giving him a life insurance, a fire insurance, an accident insurance, and an insurance

against the fluctuations of trade and the risks that necessarily attach to any business. On the other hand, the claimant can justly argue that when the railway is fenced in, his loss of profits will be more than doubled; and the evidence fully justifies that contention. Under these circumstances, the only fair and legal way of establishing the amount of compensation in the case, it seems to me, is purely and simply by ascertaining the depreciation in value of the property, as regards the claimant, by the construction of the railway, supposing it fenced in, and, taking into consideration the severance of the property, the loss of trade and profits that the claimant would suffer if his mill remained where it is, the increased risk of fire, and the extra expense entailed by having to cross the railway to carry his lumber to or from the main road, as well as the more difficult egress from the lower mill to the main road. I do not lose sight of the loss of profits that the claimant has suffered since the construction of the railway, but I consider that covered by the interest from the date of the expropriation, for the reasons that I gave concerning item No. 6. A few remarks before I review the evidence on the question of depreciation in value.

Mr. Hogg, for the Crown, argued that, upon Marceau's evidence, the claimant's business has not decreased since the construction of the railway. Now, admitting this to be so, it does not follow that his profits have not decreased.

The claimant, whom I saw in the box and thought to be a very respectable witness, swears that they have decreased. He is the only one who really knows anything about it. Then, if the business has not decreased, or even if the profits had not, it must be borne in mind that, up to this, the railway has not been fenced in, and that the claimant has been suffered to use,

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as much as practicable, the ground belonging to the railway. When the fences are put up, it is proved by all the witnesses that no long-timber sawing—which is a profitable, if not the most profitable, part of the claimant's business—will be possible, and that the other branches of his business will be greatly interfered with.

The Crown has examined and cross-examined many witnesses to prove that the timber trade of Quebec is a thing of the past; that there is no more ship-building in its harbour; that Bennett's mill, Ritchie's mill, Benson's mill, Charland's mill, and others have shut down; that Drum's cabinet factory is in financial difficulties. But for what purpose all this evidence is, I fail to see. It is conclusively proved that the claimant's mill, partly because all the larger mills have closed, but more especially because of its situation in the business centre of Lévis, is in a flourishing condition. Though there is no more, or very little, building of large ocean ships, there is in a port like Quebec, every year, a certain number of ships that come to it requiring repairs. Then there is the building, every year, of a few steam-boats, market-boats, tug-boats, ferry-boats, schooners and yachts. All this feeds the claimant's long-timber business; and his trade in smaller timber and deals is carried on with the people of the locality for house-building, etc., etc.,—a trade which the situation of his mill gives him almost command of. As an instance of the advantage of its location, I notice that from the sale alone of the refuse, slabs and saw-dust, which to other mills are a source of expense to carry away, he receives from $1,000 to $1,200 a year.

I now come to the evidence bearing more directly on the depreciation in value of the property by the construction of the railway. What was the value of

this property before the railway, and what is its value since the railway? have to be first ascertained.

By the Municipalities' valuation roll, the property was valued, in

1882	at	$10,000
1883	"	10,000
1884	"	15,000
1885	"	15,000

To this evidence, however, I attach no importance: first, because it gives the actual supposed value of the premises, without consideration of the trade carried thereon, and its profits; secondly, Mr. Demers, the Government's agent, proves, what is of public notoriety in the province, that property in Lévis, as elsewhere in the province, is not rated at its real value on the municipal rolls. The increase on the roll from 1882 to 1885 has likewise no significance, as property on these rolls is increased or decreased in value with the requirements of the municipal treasury. It is a way supposed to be less obnoxious to the ratepayers of increasing taxation. Neither do I attach any importance to the sale of this property, with right of redemption, for $25,000 by the claimant to Davie. It was merely done to secure the payment to Davie of the sum of $25,000 that the claimant owed him. This is satisfactorily proved. I may as well remark just here that the advantage to the property resulting from the building of the railway amounts, from the weight of the evidence, to very little, if anything. The claimant's trade is a local trade. He is not a shipper by rail to any extent, and cannot get his logs, or unmanufactured lumber, by rail. It would be a ruinous business for him to do so. Then, before the construction of the present works, he had, as well as now, this railway at his disposal, the station being within one mile of his mill.

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I now turn to the oral evidence before the Arbitrators on the question of value of the property before the railway. I summarize it as follows:

Claimant's witnesses:

James Tibbitts	$80,000
2nd Deposit	50,000
Hubert Paradis	60,000
C. Baillargé	63,000

Claimant himself says it cost him $40,000. It must be remarked, however, that he bought this property long ago, and in different lots which have increased in value, not only with the general increase of all property in the locality, but also and mainly, perhaps, from the fact of being put together to form one lot and one property.

Respondent's witnesses:

Simon Peters, and witnesses to his report	$22,000
Augustin Matthieu	20,000
John Wilson	16,000
Theoph. Boulanger (without foundations)	10,000

I must say that I cannot adopt the low estimate put upon this property by the Crown's witnesses. They clearly speak of the actual market value, not of the value of it as it stands to the claimant. And then, is it likely that Davie, a neighbour, a man who knows the property as well as the claimant himself, would have lent $25,000 on it if it had not more value than the Crown witnesses give to it? There are for the Crown two reports, or statements, filed in this case. (Exhibits 3 and 4.) The first, signed by Berlinguet, Peters, Ritchie, Richard Walsh, V. C. Coté, Archer, Staveley and Maurice Walsh. The second, by Matthieu, Gingras, Lachance, Lavoie, Lemelin and Samson. All of these persons have been brought forward as witnesses

for the Crown. The witness Berlinguet drew up the first report. He acted as the Government whip in the matter; marshalled the witnesses, and got their signatures to the report. Each of them swore that the report is true; but each of the eight knows personally but one-eighth of the facts it contains. For the other seven-eighths, he swears to it because he believes what the other seven said of it. The same remark applies to report number two. Now that kind of evidence carries no weight, however respectable each and every one of the witnesses may be. Each of them swears to what he believes to be the truth; but he believes it because the others have given it as a true report. Then, these witnesses are all brought forward for a particular purpose, and with a preconceived plan. Their common function is to undervalue the property. They are biased. Now the most respectable men, when brought to the witness box under such circumstances, not only are liable to, but will almost surely, form a wrong or exaggerated opinion; and I must say, without intending to convey anything disparaging to the character of these witnesses, that I do not attach much weight to their testimony. Their depositions bear intrinsic evidence of the unreliable nature of their statements. I find a striking example of it, for instance, in the deposition of Simon Peters, a man of undoubted respectability and unimpeachable character, who, alone of all the witnesses in the case, swears that the claimant's property has not been injured by the railway. The depositions of the other witnesses, in this report, are also full of flagrant contradictions, not due to bad faith or improper motives, but to the wild and erratic manner they swear to matters of opinion. To the same causes are due the exaggerations and contradictions of many of the claimant's witnesses,—Hubert Paradis, Lortie and H. G. Marceau, particularly. As to Tibbits,

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Rosa, Rattray, Lavoie, Seraphin Marceau, Dion, Baillargé and Duclos, I do not feel justified to call them biassed witnesses, but they certainly do not at all seem to know on what basis their opinion as to value or amount due to the claimant is to be formed. I am surprised, for instance, to see a man like Baillargé swear that the claimant is entitled to $3,333 for being deprived of the use of the public road to pile his lumber or saw his long-timber, or say that the claimant is entitled to an indemnity of $63,000. Lortie goes further: He swears that the claimant is entitled to $96,441.75. And what for? Why, purely and simply, because that is the amount of the claim which he (Lortie) has prepared upon the claimant's data. To the testimony of all the witnesses examined before me, however, I attach great weight, as well from their well known respectability as from their demeanour in the box. The fact that Davie has an interest in the result of the case does not detract from the weight I attach to his evidence. I consider his evidence unimpeachable, under whatever circumstances given. To the testimony of the claimant himself I attach full credence, and the impression he made upon me, when he gave his deposition in court, I cannot but take into consideration when weighing the evidence he gave before the Arbitrators. I ordered these witnesses out of court, and they gave their evidence out of the presence of each other.

Now what is, upon the evidence, the diminution of value caused by the expropriation and the construction of this railway? On the part of the claimant, Hubert Paradis proves 50 per cent. James Tibbits, supposing this property worth $50,000 before railway, puts it at $20,000 now. G. T. Davie says the property would be ruined, if the mill were to remain where it is. C. Baillargé puts depreciation at 33 per cent.; Narcisse Rosa at 75 per cent. David Rattray, N. Lavoie, N.G. Marceau,

Calixte Dion, Pierre Duclos, prove large depreciation; and when the railway is fenced, they say the mill cannot properly be worked where it now stands.

On the part of the Crown, the witnesses put the depreciation of the property at the following figures:

Simon Peters	25	per cent.
V. T. Côté	25	"
A. Matthieu	25	"
Joseph Archer	25	"
John Wilson	15 to 25	"
Berlinguet	15	"

As a rule, I notice, these last named witnesses do not take into consideration the fact that the railway authorities can fence in their ground when they please; and they have also spoken of the actual value of the premises, not of what the depreciation is, to the claimant himself in his business.

Now, the result of these figures would be as follows:—

Crown admits by factum that the claimant is damaged to the extent of $10,693, to which I add the difference between the amount allowed therein for land taken, and the amount I allow, viz., $2,232= $12,925.

Supposing the property worth $50,000.

15 per cent.	$ 7,500 × 2,975	$10,475
25 "	12,500 × 2,975	15,475
30 "	15,000 × 2,975	17,945
33 "	16,666 × 2,975	19,641
50 "	25,000 × 2,975	27,975
James Tibbit's		30,000
75 per cent.	37,500 × 2,975	40,475

I cannot lose sight of the fact, apart from these figures, that the profits, as appears by the evidence and as conceded by the Crown in the factum, were at least from $7,000 to $8,000 per annum, and that if

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the mill remains where it is the claimant will suffer a clear loss, when the railway is fenced in, of at least $3,000 a year. The witnesses Davie, Rattray, Lavoie. N. G. Marceau, S. Marceau, Dion and Duclos, all agree that when the fences are put up, the property will be worth very little to the claimant. Yet, I cannot give to the claimant $50,000,—a capital that would represent his actual profits. I cannot insure him for the future.

I have great difficulty in coming to a conclusion I cannot make this man richer than he was, yet the Crown not only must not ruin him by this expropriation, but must not make him lose a farthing by it. He has been forcibly ejected from his property, and is entitled to full indemnity for all loss and injury he suffers thereby.

It is not merely the depreciation in the actual market value of the property that he must be indemnified for. A man is not to be driven to sell his property,—as was said by Bovill, C.J., in *Eagle* v. *Charing Cross*, cited *ante* (1). It is the depreciation in the value of the land such as it was to the claimant that I must be governed by, as held in *Bourne* v. *The Mayor of Liverpool*, *Senior* v. *Metropolitan*, and *Cameron* v. *Charing Cross*, cited *ante* (2); and, as said by one of the witnesses (Rattray), it would not be fair to base the value of the claimant's land on the value of lands in the vicinity. Moreover, it is not merely the land that I have to take into consideration. The claimant is entitled to all the damages he suffers from the expropriation and from the construction of the railway, and I have to assess these damages as a jury would do in an action for forcible eviction. *Ricket* v. *The Metropolitan Railway Co.*; *Jubb* v. *Hull Dock Co.*, cited *ante* (3).

(1) P. 204. (2) Pp. 199, 200.
(3) P. 199

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I allow $25,000 damages, with interest from the date of expropriation.

*Appeal allowed with costs.**

Attorney for appellant; *J. G. Bossé.*

Attorney for respondent: *O'Connor & Hogg*,

1889 Jan. 15.

*On appeal to the Supreme Court of Canada by the Crown, so much of the judgment of Taschereau, J. as dealt with the amount of compensation to be paid to the appellant in the court below and increased the same above the amount awarded by the Official Arbitrators, was reversed, and the award of the said Arbitrators restored.

PRESENT: Sir W.J. Ritchie, C.J., Strong, Henry, Fournier and Gwynne, JJ.

The following judgment was delivered by

SIR W. J. RITCHIE, C.J.—Two questions are raised in this case—one as to the value of the property and the other as the damage to be given.

Charles Baillargé, a witness called by the plaintiff, Paradis, and afterwards examined again by the judge says:—

(Questions posées par l'honorable juge Taschereau.)

Q. Vous êtes le même témoin qui a déjà été entendu devant les arbitres?

R. Oui.

Q. Je voudrais savoir de vous quelle a été la dépréciation de valeur de cette propriété par la construction du chemin de fer? Est-ce que cela a diminué de la moitié, d'un tiers ou d'un quart? En prenant en considération que le chemin de fer serait cloturé des deux cotés—le chemin de fer prend vingt cinq pieds—en supposant qu'il serait cloturé des deux cotés, quelle est la dépréciation de valeur?

Je crois avoir déjà dit dans mon témoignage que c'était un tiers de dépréciation du terrain. Je suis de la même opinion encore aujourd'hui. Il y a déjà un an de cela, je ne me rappelle pas exactement, mais toujours, c'est à peu près cela, un tiers.

Les procureurs du réclamant et de l'intimé déclarent ne pas avoir de questions à poser au témoin.

With respect to this witness respondent's factum thus speaks:—"Under these circumstances we submit the testimony of such a man as Mr. Baillargé should preponderate. Having no interest in the matter, barely knowing the respondent, his impartiality is above suspicion. For over twenty years he has had for the city of Quebec superintendence of all its works, buildings, wharves, of expropriations made for city purposes, and of purchases of materials of all kinds."

So far as I can judge this would seem to be a fair and reasonable percentage of the loss and damage

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which this property has suffered by reason of the construction of the railway. Mr. Baillargé is the Engineer of the city of Quebec and would seem from his experience as a valuator of property to be as well, if not better, qualified to give an opinion than the other witnesses called by the respondent. The claimant himself by his own witness Lortie, who made up the claim, has fixed the value of the property at forty thousand dollars. One-third of this amount would be $13,333.33. If to this is added land taken, and if Mr. Baillargé's evidence is adopted, viz: 50 cts. a foot, 2,975 feet at 50 cents would amount to $1,487.50; and if $1.00 a foot is allowed, viz. $2,975 and added to the damages $13,333.33 the amount, viz., $16,308.33 would still be less than the award, viz., $17,-542.

Taking into consideration the speculative character of the value of the property, taking into consideration the different estimates which have been put upon this property, and taking into consideration the language of Chief Justice Hagarty in the case *re Macklem and The Niagara Falls Park* (1), where the award of certain commissioners was under consideration, and the question of whether the amount allowed by the commissioners was sufficient or not, which is as follows:—

"The estimate finally arrived at must necessarily involve many speculative considerations; unfortunately any estimate which this court can make must be at least as speculative, and without the great advantages possessed by those whose deliberate conclusions we are now asked to question.

"We are to hear this appeal on any question of law or fact.

"On this branch of the case we cannot see any departure from the rules of the law. We are left then to say is there any error or miscarriage of fact?

"To warrant an interference we must be satisfied beyond reasonable doubt that there has been this error, that an award of value necessarily largely speculative, is either too much or too little.

"If we refer it back to the referees it must be on the ground that it is too high or too low. I cannot possibly see my way to naming any sum, on my own opinion of the evidence, which would be a more just and reasonable compensation than that awarded. If I ventured to do so I would have the very unpleasant idea in my mind that I was interfering; to the prejudice of justice, with the opinion of those who had far better opportunities of ascertaining the truth than I enjoy. I am unable, therefore, to see my way to interfere."

Again, Mr. Justice Patterson in *Re Bush* (2):—

"An appeal lies, it is true, on questions of fact as well as on questions of law. But when the fact for decision is a matter so peculiarly depending upon estimates and opinions of values as it is in this case, and when the award represents the conclusion of the persons who have had means of forming an estimate of the reliance that ought to be placed on the testimony adduced, which we do not possess, as well as of exercising their own judgment, which they have a perfect right to

(1) 14 O. A. R. p. 28

(2) 14 O.A.R., p. 81.

do, bringing to the task whatever knowledge they may have of the locality and the properties, and their general acquaintance with the subject, as to which we are not expected to deal as experts and are not likely to be better informed than they, or more capable of forming a correct judgment; it is obvious that we cannot interfere unless we find that some wrong principle has been acted on, or something overlooked which ought to have been considered;"—taking, then, into consideration the several matters to which I have referred, under the circumstances shown in this case it would require the strongest possible evidence to satisfy me that the award of the Arbitrators should be interfered with by the court.

The other judges present on the hearing of the appeal (with the exception of Henry, J., who had died in the interim) concurred.

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June 27.

Coram SIR W. J. RITCHIE, C.J.

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

VS.

4,349 DOZ. BOTTLES AYER'S SARSAPARILLA, ETC.,

AND

THE J. C. AYER COMPANY (CLAIMANTS).......................DEFENDANTS.

29-30 *Vic.* (*Can*) *c.* 6, *s.* 11—*"The Customs Act,* 1883" (*D.*) *secs.* 68 *and* 69—*Construction—Importing constituent parts of proprietary medicines—" Market value."*

Some time before the Dominion of Canada was constituted, the J. C. A. Co., manufacturers of proprietary medicines in the United States, established a branch of their business in St. John's, P.Q., and commenced to import from the United States certain articles required in the preparation of their medicines. These articles were in the form of liquid compounds, and were valued for duty under the provisions of the act 29-30 Vic. (Can.), c. 6, s. 11, then in force, at the aggregate of the fair market value of the several ingredients entering into the compounds so imported, with the addition of all costs and charges of transportation. These ingredients after arrival in Canada were mixed, bottled and sold under various names. The import entries were made under the rates of duty fixed by the Customs authorities in virtue of the provisions of the said act, they being fully aware of the purposes to which the articles imported were to be applied.

The company continued to import such goods in this way for upwards of twenty years, except some alterations they were called upon to make in the valuation for duty of certain liquids in 1883, when, on the 22nd May, 1885, the Dominion Customs authorities seized large quantities of their manufactured medicines, and caused an information to be laid against the company for smuggling, evasion of the payment of duties, undervaluation, and for knowingly keeping and selling goods illegally imported, contrary to the provisions of " The Customs Act, 1883."

Held:—(1.) That there was no importation of goods as compounded medicines ready for sale, and that the duty having been paid upon the fair market value, in the place of exportation, of the ingredients of which the liquids in bulk were composed, there was no foundation for the seizure.

(2.) Where the constituent parts or ingredients of a specific article are imported, their value for duty within the meaning of sections 68 and 69 of "The Customs Act, 1883" is not the fair market value of the completed article in the place of exportation, but is simply the fair market value there of the several ingredients. The form in which the material is imported constitutes the discriminating test of the duty.

(3.) Notwithstanding the interpretation clause in "The Customs Act, 1883," which provides that Customs laws shall receive such liberal construction as will best insure the protection of the revenue, &c., in cases of doubtful interpretation the construction should be in favour of the importer.

(4.) Where an importer openly imports goods and pays all the duties imposed on them at the fair market value thereof in the place of exportation at the time the same were exported, he has not imported such goods with intent to defraud the revenue simply because he had the mind to do something with them, which, had it been done in the country from which they were exported would have enhanced their value, and, consequently, made them liable to pay a higher rate of duty, but which in fact was never done before the goods came into his possession after passing the Customs.

THIS was a case arising out of two informations filed by the Attorney-General for the Dominion of Canada, on behalf of Her Majesty the Queen,—one *in rem* asking for condemnation of goods, the other *in personam* seeking recovery of a statutory penalty and other moneys due to the Crown.

By the information *in rem* the court was informed in substance as follows:—

1. "* * * * * That by the 153rd section of the Act passed by the Parliament of Canada in the 46th year of Her Majesty's reign, chaptered 12, and intituled: "An Act to amend and consolidate the Acts respecting the Customs," it is provided, amongst other

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things, that if any person, with intent to defraud the revenue of Canada, smuggles or clandestinely introduces into Canada any goods subject to duty, the said goods shall be seized and forfeited.

"That a certain person or persons, to your informant unknown, on the 23rd day of May, A.D. 1882, and on many days and times since that date up to the 22nd day of May, A.D. 1885, did, with intent to defraud the revenue of Canada, smuggle and clandestinely introduce into Canada, to wit: at the Port of St. John's, in the Province of Quebec, from the United States of America, certain goods, portion of which consisted of to wit: 4,349 dozens of bottles of Ayer's Sarsaparilla; 2,822 dozens of bottles of Ayer's Cherry Pectoral; 4,446 dozens of bottles of Ayer's Hair Vigor; 936 dozens of bottles of Ayer's Ague Cure, and 1,926 dozens of packages of Ayer's Pills, whereby the said goods became and are forfeited to Her Majesty.

"2. That by the said section 153 of the statute in the first count herein mentioned, it is amongst other things in effect enacted, that if any person with intent to defraud the revenue of Canada makes out, or passes, or attempts to pass, through the Custom House, any false, forged or fraudulent invoices of any goods subject to duty, the said goods shall be seized and forfeited.

"That a certain person or persons unknown did, on the 23rd day of May, A.D. 1882, and on many days and times since that date up to the 22nd day of May, A.D. 1885, with intent to defraud the revenue of Canada, make out and attempt to pass, and did pass through the Custom House at the Port of St. John's, in the Province of Quebec, false and fraudulent invoices of certain goods subject to duty, imported from the United States of America by the person or persons unknown into Canada, at the said Port of St. John's,

whereby the said goods became and are forfeited to Her Majesty.

"3. That by the said section 153 of the said statute, if any person attempts to defraud the revenue of Canada by evading the payment of the duty, or of any part of the duty, on any goods subject to duty or introduced or imported into Canada, such goods shall be seized and forfeited.

"That a certain person or persons unknown did, on the 23rd day of May, A.D. 1882, and on many days and times since that date and up to the 22nd day of May, A. D. 1885, attempt to evade and did evade the payment of part of the duties on certain goods imported by the said person or persons unknown, from the United States of America at the port of St. John's, (naming goods as before) by entering the said goods at the Custom House of said port at a value much below their proper value to wit: at the value of $38,428.00, and the said entries were so made with the intent and design of defrauding the revenue of Canada of the duties properly payable upon the said goods at the proper value thereof, by reason whereof the said goods above described became and are forfeited to Her Majesty.

"4. That by section 155 of the said Act, if any person knowingly harbors, keeps, conceals, purchases, sells or exchanges any goods illegally imported into Canada (whether such goods are liable to duty or not), or whereon the duties lawfully payable have not been paid, such person shall, for such offence, forfeit treble the value of such good as well as the goods themselves.

"That a certain person or persons unknown did, on the 23rd day of May, A.D. 1882, and on many days and times since that date up to the 22nd day of May, A. D. 1885, knowingly keep and sell certain dutiable goods (as stated in the 1st paragraph), which had been illegal-

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ly imported into Canada, and whereon the duties lawfully payable have not been paid, whereby the said goods became and are forfeited to Her Majesty.

"5. That by section 108 of the said Act if any goods are found upon an entry of goods which do not correspond with the goods described in the invoice or entry, or if the description in the invoice or entry has been made for the purpose of avoiding payment of the duty, or of any part of the duty, on such goods, or if any entry of any goods has been undervalued for such purpose as aforesaid, such goods shall be seized and forfeited.

"That a certain person or persons to your informant unknown did, on the 23rd day of May, A.D. 1882, and on divers days and times since that date up to the 22nd day of May, A.D. 1885, make entries at the Custom House, at the Port of St. John's, of certain patent medicines and medicinal goods (as stated in the 1st paragraph), and in the entries the said goods were described and represented to be the crude drugs or materials in bulk of which the said patent medicines and medical goods are composed, by which description the said person or persons unknown sought to pass, and did pass, the said goods through the said Custom House at a rate of duty lower than the duty payable upon such goods if the same had been properly described as the medicines and medicinal preparations hereinbefore mentioned and described, and with the view and for the purpose of avoiding the payment of part of the duty on such goods, whereby the said goods became and are forfeited to Her Majesty.

"6. That by the 109th section of the said Act, if the oath made with regard to any entry is wilfully false in any particular all the packages and goods included, or pretended to be included, or which ought to have been included in such entry shall be forfeited.

"That a certain person or persons to your informant

unknown did, on the 23rd day of May, A. D. 1882, and on many days and times since that date up to the 22nd day of May, A. D. 1885, import and introduce from the United States of America into Canada, at the Port of St.John's, a large quantity of patent medicines and medical goods (as stated in the 1st paragraph), and the said person or persons unknown with intent and design of defrauding the revenue of Canada, made the oaths with regard to the entries of the said goods as required by the said act and therein represented and stated that the said goods so imported, including the portion thereof particularly described as aforesaid, consisted of crude drugs or materials in bulk, of which the said patent medicines and medical goods are compounded, then well knowing the said representations and statements to be wilfully false and untrue, whereby the said goods above particularly described, being part of the goods so described, became and are forfeited to Her Majesty.

"That William J. O'Hara, then being a clerk of Customs, and Julien Brosseau, then being a landing waiter and searcher, both authorized and employed by Her Majesty and attached to the Port of Montreal, on the 22nd day of May, A. D. 1885, at the Ports of Hamilton, London and Toronto, in the Province of Ontario, and at the Port of Montreal, in the Province of Quebec, and at the Port of St. John, in the Province of New Brunswick, and at the Port of Halifax, in the Province of Nova Scotia, did, as such officers for Her Majesty, aforesaid, seize and take and did cause to be seized and taken the said goods before mentioned, as forfeited for the causes aforesaid."

The information *in personam* claimed judgment against the defendants, under the provisions of the 155th section of the said act, for the sum of $237,302 being treble the value of the goods specified in the

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first paragraph of the information *in rem*, and also for the sum of $148,011. for duty payable by reason of undervaluation of the said goods, together with costs of suit.

The defendants, in answer to the two informations, pleaded as follows:—

"1. That the J. C. Ayer Company of Lowell, Massachusetts, are and were, at the dates of the seizures effected in the present cause, the true and lawful owners and proprietors of all and every the said: 4,349 dozens of bottles of Ayer's Sarsaparilla, 2,822 dozens of bottles of Ayer's Cherry Pectoral, 4,446 dozens of bottles of Ayer's Hair Vigor, 936 dozens of bottles of Ayer's Ague Cure, and 1,926 dozens of packages of Ayer's Pills referred to in the information [*in rem*] and alleged to have been seized and taken by the said William J. O'Hara and Julien Brosseau; the said contestants not admitting, but, on the contrary, expressly denying that the quantities of the said patent medicines alleged in said information to have been seized, are correctly enumerated, and reserving to themselves the right to contest the said allegations as to quantity, or otherwise.

"2. That the said goods were seized in the possession of divers persons and commercial firms at different places in Canada, who held the same as the agents of claimants.

"3. That none of the said goods were imported into Canada on the 23rd day of May, A.D. 1882, or since that date up to the 22nd day of May, A.D. 1885, but, on the contrary, the said goods and each and every of them were manufactured, bottled and labelled at St. John's, in the Province of Quebec.

"4. That the said William J. O'Hara and Julien Brosseau took possession of said goods without any

legal right or authority, and no legal seizure of said goods was ever made.

"5. That said goods are not subject to condemnation by reason of the breach of any of the Customs laws of Canada in respect of them.

"Wherefore said claimants, the J. C. Ayer Co., pray that they be declared to be, and to have been, at all the times aforesaid, the only true and lawful owners and proprietors in lawful possession of the said 4,349 dozens of bottles of Ayer's Sarsaparilla, 2,822 dozens bottles of Ayer's Cherry Pectoral, 4,446 dozens of bottles of Ayer's Hair Vigor, 936 dozens of bottles of Ayer's Ague Cure, and 1,926 dozens of packages of Ayer's Pills, and that the said goods be restored to the custody and possession of the claimants; that the said pretended seizure be set aside and the said goods be released and delivered to claimants, and that the said information be dismissed with costs, and claimants pray that a recommendation may be made that Her Majesty should pay claimants' costs."

The defendants also filed a claim to the said goods, alleging, *inter alia*:

"1. That none of the goods seized were imported into Canada, but, on the contrary, were manufactured, bottled and labelled at St. John's.

"2. That all their importations and entries had been made openly and with the knowledge of the officers of the Customs at the port of entry, and that they had not been guilty of any infraction of the Customs Acts of Canada, or of any attempt to evade the requirements of the same.

"3. That during the year 1883 the question of the proper duty payable on said importations was considered by the Customs authorities, and that the decision of the Minister of Customs that all entries previous to the 28th day of December, 1883, should be

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allowed to stand as made, was communicated to the defendants.

"4. That Her Majesty had thereby formally waived all right to dispute or question said entries made prior to said last mentioned date, and has also waived all actions and claims in respect of the said importations."

"5. That from the said last-mentioned date until the 23rd day of May, 1885—the date of the seizure of the goods—the defendants had entered for duty all goods imported by them at the rate of duty fixed by the Department of Customs of Canada, and valued the same for duty at a valuation acceptable to, and accepted by, the Customs authorities.

"6. That all the importations were duly and regularly entered at the true and fair value for duty of each and every of them; but in most cases the articles so entered had not, as imported into Canada, a market value or wholesale price in the United States; and in such cases the full, true and fair market value, or wholesale price, of the several ingredients entering into the compound, with the cost of compounding and all other expenses of production, was in good faith given by defendants as the true and fair value for duty.

"7. That proper and true invoices of the same were produced, and the descriptions of the said goods contained in said invoices were the true and correct descriptions of the same.

"8. That during the times and periods mentioned in the informations the defendants imported certain supplies, consisting of crude drugs and raw materials, both separately and in combination, and upon each and every of such importations the full and lawful duties were paid.

"9. That these importations were made openly, regularly and in good faith, and with the full know-

ledge of the collectors, appraisers and other Customs officers at the port of entry."

The Attorney-General joined issue upon the claim and answer of the defendants.

It appeared upon the evidence adduced at the trial of the case that the J. C. Ayer Co., who are manufacturers of patent and proprietary medicines at Lowell, Mass., some years ago established a factory at St. John's, P.Q., for the manufacture of their medicines in Canada. In order to carry on their business in this country, it was necessary for them to import from the United States certain articles which entered into the composition of their medicines. Before commencing to so import, their agent called upon the Collector of Customs, at St. John's, with a view to ascertaining the rates of duty payable upon such articles. He was informed that the duties could not be fixed until the goods were presented for entry. When the first shipment of goods arrived at St. John's, the agent took the invoices to the Collector and explained the nature of the several articles imported. Thereupon the Collector communicated with the Customs authorities at Montreal, who sent down a special officer to examine the goods. After this officer had made his examination, and had been informed by the agent of the company to what purposes the goods were to be applied, the rates of duty payable thereon were assessed under the provisions of 29-30 Vic. (Can.), c .6, s. 11 (1).

(1) By 29-30 Vic. (Can.) c. 6, s. 11, it is enacted as follows: "The fair market value for duty of goods imported into this Province shall be the fair market value of such goods in the usual and ordinary commercial acceptation of the term at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is by universal usage considered and known to be a cash article, and so *boná fide* paid for in all transactions in relation to such article, and no discounts for cash shall in any case be allowed in deduction of the fair market value as herein-

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The several articles imported were compounded with other ingredients, at the factory, at St. John's and there bottled, labelled and sent out for sale as completed medicines.

The company continued to import goods in this way for upwards of fifteen years, observing perfect good faith in valuing the goods for duty and complying implicitly with the demands of the Customs authorities.

On the 11th August, 1882, the Commissioner of Customs at Ottawa, by a circular addressed to the Collector at St. John's, instructed him that different and higher rates of duty than those theretofore paid by the company were chargeable upon such importations, specifying therein the increased rates of duty which were to be so charged. The instructions contained in this circular were never acted upon; but in December, 1883, the Customs authorities demanded, in addition to the *ad valorem* duty paid by the company, an excise duty of $1.90 per gallon on the liquid compounds imported.

before defined; and all invoices representing cash values, except in the special cases hereinabove referred to, shall be subject to such additions as to the collector or appraiser of the port at which they will be presented, may appear just and reasonable to bring up the amount to the true and fair market value as required by this section."

By 46 Vic. ch. 12 ,s. 68 ("The Customs Act, 1883,") it is enacted: "Where any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada."

By s. 69 thereof it is provided: "Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptation of the term, at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is, by universal usage, considered and known to be a cash article, and so *bonâ fide* paid for in all transactions in relation to such article; and all invoices representing cash values, except in the special cases hereinbefor referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented may appear just and reasonable, to bring up the amount to the true and fair market value, as required by this section."

After that date the Customs authorities, for two years, received the entries of these liquid compounds upon the company paying the *ad valorem* duties and the excise tax of $1.90 per gallon.

On the 22nd May, 1885, Customs authorities seized large quantities of goods belonging to the company, at various places in Canada, on the ground that the ingredients used in their manufacture should have been valued for duty at the wholesale value of the finished article, less the cost of such ingredients as were supplied in Canada and labour performed here, instead of at the market value of the several ingredients at the place of exportation.

The case was heard before His Lordship the Chief Justice.

Hogg and *Ferguson* for plaintiff;

McMaster, Q.C., for defendants.

Sir W. J. RITCHIE, C.J., now (27th June, 1887) delivered judgment.

The Attorney-General of Canada, on the 2nd October, 1886, informed the court that by section 53 of 46 Vic, c. 12, it is provided, *inter alia*, that if any person, with intent to defraud the revenue of Canada, smuggles or clandestinely introduces into Canada any goods subject to duty * * * the said goods shall be seized and forfeited.

[Here His Lordship recites the information *in rem*, which will be found on pages 233-237.]

The seizure was made by W. J. O'Hara, a clerk of Customs, and Julien Brousseau, a landing waiter, who seized and took possession of the goods mentioned in the first paragraph of the information *in rem*. This information asks for the condemnation, as forfeited to Her Majesty, of 4,349 doz. bottles Ayer's Sarsaparilla, 2,822 doz. bottles Ayer's Cherry Pectoral, 4,446 doz.

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bottles Ayer's Hair Vigor, 936 doz. bottles Ayer's Ague Cure, and 1,926 doz. packages of Ayer's Pills; and the information *in personam* asks judgment against the defendants for the sum of $237,302., being treble the value of the goods mentioned in the 2nd paragraph of the information, and for a judgment against defendants for $148,011., namely, the amount payable for duty by reason of the undervaluation of the goods imported, and for the costs of this suit.

It is admitted that there is no controversy, or claim, on the part of the Crown as to the Hair Vigor, or Ague Cure. The contestation remains as regards 4,349 doz. bottles Ayer's Sarsaparilla, 2,822 doz. bottles Ayer's Cherry Pectoral, and 1,926 doz. packages Ayer's Pills.

To understand aright the position of the Ayers in relation to their business operations with the Customs authorities at St. John's, and in justice to the Ayers as well as to the Custom House officers, I think it important and right to refer to the evidence of an, apparently, most creditable witness, Mr. Mansfield, who started the business at St. John's, and the strong corroborative testimony in relation thereto of the Customs officers at St. John's, and their uniform dealing with the entries of the goods of Ayer & Co. for a period of about twenty-one years.

Mr. Mansfield was sent by the Ayer Company to St. John's, and started the factory there. The following is his evidence in regard to his operations there:

Q. What did you do there? A. Upon my first visit to Canada, I called upon the Customs House officer, Mr. Wilson, to make enquiries in regard to putting up our goods in St. John's. Mr. Wilson was the Customs officer at that time. Before shipping any goods there I asked him if we could ship goods, either manufactured in whole or in part; he said he could not give any information in regard to the case until the goods were presented for entry, and that when the goods were presented for entry he had to act upon them. Then I went to Lowell and had goods prepared for shipment to St. John's and brought the invoices, and explained what the goods were. When the goods arrived at St.

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John's, Mr. Wilson did not feel confident to pass on the goods, and he took my invoices and sent them to Montreal. He brought from Montreal a gentleman who, it was stated, was from the Customs Department. I explained to him all that we wished to do, that the goods we wanted to send theremigh tbe manufactured, or partially manufactured. I could not tell who the officer that accompanied Mr. Wilson was.

Q. You gave them every opportunity to see what you were importing? A. Yes.

Q. He took his means of examining? A. Yes; either that officer or Mr. Wilson. I know an officer of the Customs took samples of the goods. I explained just exactly what they were.

Q. You made full enquiries as to how the Customs would treat your medicines? A. Yes.

Q. You explained everything? A. Yes.

Q. And gave them samples? A. Yes; and told them what the goods were, and our purpose.

Q. What you did was in accordance with your instructions from your principals? A. Yes.

Q. In entering these goods did you consult with the Customs House officer as to the proper rates of duty payable upon them? A. Yes.

Q. You did that fully? A. Yes.

Q. And they were entered at the rates he thought right? A. Yes.

Q. Did he ever at a later date make any representations of changes? A. Not to me. That was in eighteen hundred and sixty-four and eighteen hundred and sixty-five.

Q. You say you were the originator of this business. Did you enquire about the rates they would impose, and how the Customs authorities would treat your products before you put up your factory? A. Yes.

Q. Before you commenced your business you went to the Customs to find out how they would deal with you.? A. Yes; I made enquiries before I ever shipped a dollar's worth to Canada; they gave me the answers I have heretofore explained.

Q. Was there any attempt to conceal what you brought in, or to conceal the mixing process at St. John's? A. Not at all; it was done openly. We had nothing to fear, nothing to suspect.

* * * * *

Q. In your day, do you know that all the medicines that were brought in were mixed up together? A. Yes. All the time I was there.

Q. What did you do with the things you bought in Montreal and elsewhere in Canada? A. I brought them from Montreal to St. John's.

Q. What did you do with them there? A. I united the drugs I pur-

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chased with the material imported from Lowell in order to complete the article.

Q. So that in that early day, from the operations that you carried on there, and the components you carried them on with, there could be no claim that the Customs officers did not know what you were doing? Everything that was done was open to the eyes of the officers of the Customs? A. Mr. Wilson has been with me when I came to Montreal and purchased goods. He knew I purchased the goods.

Q. Had he been in and seen you working? A. Fifty times. The doors were open and he visited our establishment at will.

Q. Were those additions that you made in St. John's essential additions to the medicines? A. Yes.

Q. And were they things required by the formula? A. Yes.

* * * * * * * *

Q. When you brought these articles into St. John's you say you saw the Customs officer, and his name is Wilson? A. Yes.

Q. You do not know what he was in the Customs? A. I only know he was the officer there to whom we paid our duty.

Q. What explanation did you give Wilson as to what the article in the barrels was? A. I told him it was Cherry Pectoral, with the addition of morphia to be added.

Q. What were you going to do with it in Canada? A. Bottle it and fix it up in the regular form, having the name of the Ayer company on it.

Q. You say you showed samples of this to the Customs officers. A. Yes.

Q. Where did you get the samples? A. From the barrel.

Q. You showed it to Mr. Wilson? A. They were both together when I got out the sample. One or the other took it; I do not remember which one.

Q. So that when this article, with so much iodide, was put up in bottles it was put on the market and sold for so much per bottle: how much was that? A. Somewhere about $7.50 and $8.00 per dozen to the wholesale trade. I cannot recollect our prices of that date.

* * * * * * * *

Q. You said, I think, that the medicines to which you added iodide of potassium and morphia in St. John's were incomplete? You told that to the Customs officer? A. Yes; and Mr. Wilson has been present fifty times when we were at work at them. I explained everything to him.

Mr Wilson, the Custom House officer, it is admitted, is dead, but Mr. Mansfield's evidence is fully corroborated by the practice continuously pursued at St.

John's, by the evidence of the Customs officers here, and by the conduct of Underhill, himself, during all the time he was in charge of the business, which, from his evidence, was from 1868 to 1884.

The evidence of Mr. Perchard, the Collector of Customs at St John's, is as follows :—

Q. You are the Collector of Customs for the Port of St. John's? A. Yes.

Q. That is where this factory of Ayers' was? A. Yes.

Q. How long have you been Collector? A. Since March, 1884.

Q. And before March, eighteen hundred and eighty-four, you occupied some office there in the Customs? A. I was Acting Collector from December, eighteen hundred and eighty-two, up to March, eighteen hundred and eighty-four. Previous to December, eighteen hundred and eighty-two, I was Chief Clerk.

Q. When did you enter the public service at St. John's? A. In eighteen hundred and sixty eight.

Q. During all these years you were aware of the existence of this factory the Ayers had at St. Johns? A. Yes.

Q. You used to go in and out there? A. Only very seldom.

Q. You saw them importing these liquids and pills spoken of? A. I did.

Q. Will you now produce copies of the entries that were made in the Custom House during the years referred to here? A. Exhibit "A," produced by the Crown and examined by me, now contains true copies of all entries of importations of goods made at St. John's, and also original invoices of the goods therein referred to, from the end of 1881 to the end of eighteen hundred and eighty-four. There were no entries or importations made in eighteen hundred and eighty-five.

Q. During all that time, I think, according to what you have already stated, you were either Acting Collector or Collector? A. Yes; or clerk.

Q. In these positions it would be your duty and privilege to inspect and examine all goods entered there? Yes.

Q. Then, as regards these entries, you had full opportunities to examine the goods? Yes.

Q. Was every opportunity you expected, or desired, given to you to thoroughly examine these goods to ascertain their quality and character, so as to ascertain what would be the proper rate of duty to impose upon the goods? A. It was.

Q. Was the business there conducted openly and publicly by them, so that you or other officers could have an opportunity to examine the goods? A. Yes.

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Q. Did they always supply you with samples for inspection? A. Yes.

Q. They afforded you every facility? A. Yes.

Q. Did you or your officers draw the samples from the barrel? A. My officers did.

Q. Was the stock that was brought in, that was imported, brought in bottled and marked as indicated here—so many bottles of Ayers Sarsaparilla, so many bottles of Cherry Pectoral, so many bottles of Hair Vigor, so many bottles of Ague Cure, and so on; was it brought in bottled and labelled and ready for the market? A. No, it was not.

Q. None of what was brought in was brought in in that way? A. No.

Q. How was it brought in? A. In bulk.

Q. Was it in barrels, or what? A. In barrels, containing about 40 gallons.

Q. You saw the stuff yourself? A. I have seen the samples only.

Q. And you have seen the stuff that is put up in bottles? A. Yes, I have.

Q. I think you misunderstood my previous question. You saw the barrels in the Custom House which contained the stuff? A. Yes, I saw the barrels, but not the contents.

Q. Except when drawn by sample? A. Yes.

Q. In eighteen hundred and eighty-three, I do not know if you remember, but you may have heard it read here to-day, there was a letter addressed to the Ayers, in which it was stated that in future they would have to pay the correct duties. In eighteen hundred and eighty-three, did you receive any instructions from the Customs Department with regard to what would be the correct duties to impose upon Ayers' goods? A. I did.

This is again corroborated by the evidence of Wolff, the Inspector, as follows:—

Q. You knew that this firm of Ayer & Co. had been importing these medicines into this country for many years? A. I was aware of that from the records.

Q. They brought in their stuff openly and publicly on the railway trains? A. Yes.

Q. All the gauger or appraiser, or any other officer had to do, was to go to the stuff and examine it? A. That was all that was necessary.

Q. And I suppose you came in contact with their agents, or somebody representing them there, who imported their goods and entered them at Her Majesty's warehouse? A. Yes, a Mr. Underhill.

Q. You had some officers under you, I suppose? A. Four or five men.

Q. St. John's is not a very big place? A. No.

Q. You were there yourself and you had a staff fully competent to investigate everything brought into it? A. I was there with the usual staff allowed to a port of that kind.

Q. Which was ample? A. In numbers.

Q. I suppose, at any rate, the chief was competent? A. I should not like to say.

Q. Did you take any samples of these medicines? A. Yes; I drew samples as required by the regulations of the Department.

Q. What was done with those samples? A. They were submitted to the Board of Appraisers at Ottawa.

Q. Who were the members of the Board of Appraisers? A. The Commissioner of Customs was chairman, the late Mr. Fraser was one of the members, and David Sinclair, at present of Montreal, was also a member at that time, I think,—I am not quite sure—and they had a secretary there who also acted on the Board.

Q. Did they freely and readily supply you with the samples? A. I am under the impression I took them. It was my place to take them, and not ask for them.

Q. What samples did you take? A. That I cannot state now.

Q. Was it liquid stuff? A. Yes, some liquid.

Q. You took more than one sample? A. Various samples.

Q. Of the different liquids they imported? A. Of the various goods imported by them, and others, at the port of St. John's. Anything that was new to me I would submit.

Q. So you took those samples and forwarded them to the Board of Appraisers at Ottawa? A. Yes.

Q. When was that? A. While I was Acting Collector at the port of St. John's, which, I think, was in eighteen hundred and eighty-one.

Q. Did they send you any reply to your submission of samples, or send you any instructions with regard to them? A. There was some correspondence, which the letter-books at the port will show. I cannot, from memory, state what the result was.

Q. Did it result in any changing of the duties which were imposed upon these articles? A. Not any change of duties. I think there was one case in which the values were raised, but I am not positive.

Q. Will you say whether, during your experience there with your staff at St. John's, there was not every facility given to you and your officers to make the fullest investigations into the materials that were imported there? A. We had everything in our own hands, and it was our duty to investigate. The matter of facility did not come in at all.

Q. There never was any obstruction or impediment put in the way of the fullest investigation? A. No.

Q. Did you send any samples to chemists in Montreal, or to any

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chemist? A. Not what you would call chemists. I either sent, or directed, that one sample of a liquid should be sent to the Appraiser at Montreal. I cannot say I sent it, but I directed it to be sent.

Q. What was the name of the Appraiser? A. I do not know whether Appraiser Ambrose was on the staff or not, but at that time I sent a sample into Montreal.

* * * * *

Q. Was the Appraiser you refer to Mr. Gabler? A. I cannot state whether Mr. Gabler was the Appraiser, or Mr. Ambrose. However, the sample was sent in for appraisement as to the quantity of spirits contained in the compound.

* * * * *

Q. Is it not the case that all importations of the Ayers, to St. John's came in sealed cars, and could not be opened or interfered with without the intervention of an officer? A. I might answer, yes. They should come in that way. If they did not, it was not the fault of the Ayers; it was the fault of the Customs officers at the frontier, and the railway companies.

Q. (By the Court). The regular mode for the merchandize to come would be in sealed cars? A. Yes.

Q. And the regular mode of getting to them would be through the medium of Customs officers? A. Yes.

Q. So, as you stated in the beginning of your examination, it was not a matter of facility at all. The Customs have the whole thing in their own hands? A. Yes.

Cross-examined:

Q. Did you ever go into this factory or place of business the Ayer Company had in St. John? A. Yes.

Q. While you were Acting Collector? A. I should like you to understand that I was in St. John's for a long time while I was not Acting Collector, and many things occured while I was not Acting Collector which I might think to-day occurred while I was Acting Collector.

Q. I am asking you whether, while you were Acting Collector, you ever visited this factory? A. I did while I was at St. John's and representing the Customs Department.

Q. I am asking you, while you were Acting Collector? A. I cannot answer.

Q. Were you ever in their place of business? A. Yes; frequently.

Q. Had they always the same place of business? A. No.

Q. What year were you in it first? A. In 1881, I think, or in 1882.

Q. How did you come to go there? A. I went in for the purpose of looking at some of their compounds, the manner of bottling and packing and mixing.

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Q. What did you see when you got there? A. I saw a lot of their goods there.

Q. Put up in packages? A. Some of it in packages and some of it they were running through cotton to clarify it—either cotton or some process they had.

Q. You did not examine the process? A. Not closely.

Q. What was there in the establishment besides the goods and this cotton they were running liquor through? A. There were some long tables at which girls were working.

Q. You remember there were some girls there? A. Yes.

Q. What were the tables for? A. For their bottles, and rolling them up.

Q. Was there any sort of machinery or apparatus there in the building in St. John's,—any steam engines or machinery? A. No; there were some little hand machines.

Q. Connected with the bottling? A. Yes. It was not a very elaborate establishment.

Q. Was there any machinery at all of any kind? A. Not what is generally known as machinery.

Q. Can you tell us if there was anything more than what you have already told us? A. There were some mixing tubs or barrels.

Q. Do you remember anything about mixing tubs being there? A. I remember the barrels, I think, they were running the liquor through. I am not positive, but I think they were running through Cherry Pectoral when I was there.

Q. What were they running it through? A. Cotton, or a strainer of some kind.

Q. You do not recollect very well? A. No.

Q. That is about all you saw there? A. Yes.

Q. You do not remember what the process was? A. I could not describe it now.

Q. What you saw the people principally engaged at was putting this stuff up in bottles, packing and labelling? A. Yes.

Q. Did you examine any material you saw there? A. Not there.

Q. In their factory? A. I think not. I had already had samples; I think I drew one or two samples.

Q. You did not draw off any of the liquids? A. I think so.

* * * * *

Q. You spoke about samples having been sent to Montreal, and you think to Ottawa, of the liquors imported by the Ayer Company at St. John's. Were these samples sent to Ottawa? A. They were sent to Ottawa.

Q. Do you know as a matter of your own knowledge that they

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were sent? A. I submitted samples to Ottawa while I was Acting Collector at St. John's.

Q. Samples of what? A. Of the goods that passed under my notice.

Q. Do you mean to say of all Ayers' goods? A. That includes Ayers'.

Q. What goods did you submit samples of? A. I cannot specify the goods.

Q. Can you specify any particular goods you submitted samples of to Ottawa while you were there, at St. John's, as Acting Collector? A. I cannot.

Q. How did you submit them? A. In samples.

Q. Did you send them, or take them? A. I sent them by mail, possibly by express.

Q. You do not remember by which? A. No.

Q. Did you receive any reply to the transmission of your samples? A. In some cases.

Q. Do you remember that, or are you only speaking from what you expected you received? A. I am afraid I cannot answer that.

Q. Were you requested to send these samples? A. It was a general regulation.

Q. Were you requested particularly? A. We were directed to send all samples.

Q. Were you requested to send samples at that particular time? A. No.

Q. Do you know what particular subject was under discussion at that time with reference to the importations of the Ayers': was it not a question about the duties on spirits? A. Yes. It arose out of the samples I submitted, I believe, at that time.

Q. That was the question that was then up for discussion? A. Yes.

Q. And in consequence of that a change was made in reference to the duties, as far as the spirits were concerned? A. Correspondence went on for some time, when the Department ordered the imposition of the non-enumerated clause of the tariff, that they should pay one dollar and ninety cents.

Q. That was as to Ayers' importations? A. Certain importations—red liquor—sarsaparilla, or some of the kind, I forget exactly which.

Q. But you have no recollection what the samples were that you sent up? A. No.

Q. Do you remember any pills being brought in? A. I do not know if there was any brought in while I was Acting Collector. I remember pills having come into St. John's while I was there.

Q. Were they finished pills? A. They were finished pills in bulk.

Q. That is to say, large quantities; and all that had to be done was

to put them up in bottles and boxes? A. Yes; I was instructed at the time to inquire into that.

Q. You do not remember any other liquors? A. No; not by name.

Q. Did you say that you had ever drawn from the casks in the factory samples yourself, to taste them? A. No; they were drawn in my presence.

Q. When was that? A. When I was at St. John's as Acting Collector.

Q. On more than one occasion. A. I cannot say.

Q. Who drew them off for you? A. That I do not remember.

Q. What did you do with them? A. I suppose I submitted them to Ottawa.

Q. Do you know? A. I won't swear to that particularly.

Q. Did you ever examine them yourself? A. Yes.

* * * * *

Q. During the time you were there, had you any great doubts as to whether Ayer & Co. were paying proper duties on the goods they were bringing in—were there any doubts raised in your mind?

A. As regards the proper rates of duties they paid on pills, I do not say that occurred while I was Acting Collector, but during my stay at St. John's I was instructed to look into the matter of pills.

Q. Anything else? A. I think not as to the rate and as to the quantity of spirits. Of course I enquired into the pills, but I do not remember what the result was. I was told to ascertain how many pills went to a pound.

The witness Boivin, a Custom House officer at St. John's, also gives evidence as to taking samples, and his evidence is corroborated in this respect by Mr. French, the Customs Broker, who filled the blank entries.

It is worthy of observation in this connection that, although the samples of Ayers' goods could have been produced on the trial of this cause, they were not produced nor their absence accounted for; and also that Mr. Ambrose, who is mentioned in the evidence just read as one of the appraisers, was not called upon to give evidence, although it was said, and not denied, that he was present in court during the trial.

This mode of transacting the business of the Ayers at St. John's, and the dealings there of Underhill with the Customs House officers, was carried on without any interruption (except with reference to the spirit duty and the circular issued on the 11th August, 1882,

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but never acted on,—to be hereafter more particularly referred to), without any objection, remonstrance or complaint of undervaluation or mis-description, and without notice or intimation of any irregularity or impropriety on the part of the Ayer Company by the Customs authorities at St. John's or at Ottawa, from the time the business was started until the month of May, 1885. Then these officers, O'Hara and Brousseau, seized, in the principal cities of the Dominion, that is to say, London, Ont., Hamilton, Ont., Montreal, Que., Halifax, N.S., and St. John N.B., the goods now sought to be condemned in the hands of their agents and customers; thus paralyzing and destroying the company's business, of the extent of which some idea may be formed by their purchases and expenses in Canada in making and completing the goods and conducting such business, in addition to the importations from Lowell,—amounting during the three years previous to the seizure, for the purpose of enabling the goods to be completed and made fit to be put on the Canadian market as a merchantable article, to the sum of $30,590.78,—and the enormous amount paid during the same time for advertising the goods throughout the Dominion, amounting to $50,760.96—in all, $81,352.74. This will more fully appear from the subjoined statement.

As to amounts expended in completing the preparations in Canada, the claimants in their statement (Exhibit B.S.) put them as follows :—

From May 22nd, 1882, *to May 22nd*, 1885.

Cost of glass, drugs, boxes, sugar, etc., purchased in Canada.......	$12,789.86
Expenses paid in St. John's for mixing and completing............	11,594.49
Newspaper, card advertising, &c ..	50,761.96
Estimated cost of conducting the business (5 p.c.)......	6,206.43
	$81,352.74.

It must also be considered that the seizure made involved the goods put up at St. John's for three years only, and that the counsel for the Crown claimed, at the hearing, that the Crown, though only seeking forfeitures and penalties in the present case for three years, yet they had the right to recover for all the forfeitures and penalties of all preceding years. Be this as it may, I feel it the bounden duty of this court to investigate the matters connected with this case with the greatest possible care, to ascertain if it can be possible, in view of the action of the Customs authorities and on a fair construction of the revenue laws applicable to this case, that mercantile and business men in the Dominion stand in such jeopardy as they would be in if the contentions of the Crown can be sustained. If the law is so, I must so administer it; but, before I can or will declare such to be the law I must be satisfied, beyond any doubt, that such is the law. I am bound to say it is not easy to understand how honest business men, desirous of making honest importations in carrying on their business in the Dominion, could do more than it appears was done in this case, viz., to apply to the Customs officers to ascertain on what terms, and at what rate of duty, their proposed goods could be imported into the Dominion; nor can I conceive what honest and cautious Customs officials could do more than was done in this case, in reply to such application, viz., to state that, when imported, the goods would be duly examined by the Customs officers and the correct rate of duty then fixed.

It would appear that when the goods were imported they were examined, samples taken and transmitted to the Board of Appraisers at Montreal and at Ottawa, the duty fixed, and the business commenced and continued thenceforward for a period of twenty odd years until the seizure,—that, too, without the slightest com-

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plaint of any irregularity, undervaluation or misdescription.

Considering the principles involved and the amount at stake in this case, I have felt it my duty carefully to examine the invoices and entries of the goods imported and shipped by Ayer & Company from Lowell, Mass., to St. John's, in the Province of Quebec. The first invoice and entry on the record appears to be that of October 29th, 1881. This invoice explains very clearly the articles used in the business carried on at St. John's. It comprises: sarsaparilla directions and wrappers, cherry pectoral directions, ague cure directions and wrappers, labels, pills, circulars, cherry pectoral cards, hair vigor cards, ague cure cards, sarsaparilla cards, hair vigor lithographs, pill cards, white sealing wax, red sealing wax, a package of labels, cherry pectoral wrappers, hair vigor wrappers, pill box labels, corkscrews, wrappers, strawberry top cards, felt paper packing, upholsterers' twine, pills, pill directions, labels on same, brown sealing wax, bronze wrappers, stencil ink, pill labels for hardware paper, felt filter cloths, boxes of corks, barrels of sarsaparilla syrup, barrels of red syrup, oil of bitter almonds, etc.

The invoice specifies particularly the articles imported, their value for duty in dollars, their quantity, the rate of duty, and the duty.

Annexed to this entry is the following affidavit or oath of E. Underhill:

I, E. Underhill, do solemnly and truly swear that I am owner of the goods mentioned in the invoice now produced by me, and hereunto annexed and signed by me, and that the said invoice is the true and only invoice received by me, or which I expect to receive, of all the goods imported as therein stated for account of myself; that the said goods are properly described in the said invoice and in this entry thereof; and that nothing has been, on my part, nor to my knowledge, on the part of any other person, done, concealed or suppressed, whereby Her Majesty the Queen may be defrauded of any part of the duty

lawfully due on the said goods; that any goods included in this entry as paying a lower rate of duty for specific purpose than would otherwise be chargeable upon the same, are to be, and will be, used for such specific purpose only. And I do further solemnly and truly swear that the prices named in the said invoice, of the goods mentioned in this bill of entry now presented by me, are net prices, and exhibit, to my personal knowledge, the fair market value of the said goods for consumption at the time and place of their exportation to Canada, without any deduction or discount for cash, or because of the exportation thereof, or for any other special consideration whatever. So help me God.

Sworn before me this 3rd day of November, 1881. (Sgd.) E. UNDERHILL.

(Sgd.) H. G. PERCHARD,
Collector.

The duties on this invoice, the total of which is $3,817.29, amount to $1,333.15.

The next invoice is dated November 3rd, 1881, and contains 12 barrels of glycerine and one cask of white sugar of lead, on which the duties amount to $339.40. A similar affidavit by Underhill is attached to this entry.

Some question, I may state in passing, was raised as to whether there was not some irregularity in the manner in which these affidavits of Underhill were taken. Mr. Perchard stated that it having come to his knowledge that Mr. Underhill did not believe in the truth of the scriptures, he did not put the book in his hands but accepted his affirmation. Without inquiring whether this was regular or irregular, which might fairly come up if perjury were assigned on the affidavit, so far as the conduct of Underhill is concerned nothing could be more clear or distinct than his declarations in passing these entries; and, of course, if they were all untrue, as he now says they were, nothing could be more reprehensible than the turpitude of his conduct in making the affidavits in this way.

The next entry is dated November 11th, 1881. It comprises one box containing lead pipe, in use, and

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one box of sage leaves and directions. A similar affidavit is attached to this.

The next entry is that of November 17th, 1881, and contains sage leaves, labels, lithographs, 16 barrels and 21 lbs. of oil of citronella, gallon of golden syrup, certificates, renewal cards, lithographs, circulars, Sarsaparilla, Sarsaparilla wrappers, corkscrews, coated pills, and Ague syrup. The golden syrup is entered as patent liquid; essential oil is entered as such: labels and circulars entered as before; barrel of corkscrews, hardware, boxes of sugar-coated pills as before; barrels of Ague syrup as patent liquid. The whole amount of the invoice was $1,703—and the duty paid on it was $655.52.

The duty levied on the Sarsaparilla syrup and the red liquor, patent medicine liquid, was 50 per cent. On the coated pills, 25 per cent. On the Sarsaparilla syrup and red liquor, (patent medicine liquor) 50 per cent. On the glycerine, 20 per cent. On the casks of white sugar of lead, 20 per cent. In the entry of Nov. 22nd, 1881, golden syrup, as a patent liquid, is charged at 50 per cent; boxes of sugar-coated pills 25 per cent. In the second entry of the invoice of Nov. 22nd, 1881, are 10 barrels of glycerine at 20 per cent. The third entry on this invoice is printed labels, 30 per cent. All these have similar affidavits attached to them.

Then on Nov. 3rd, 1881, printed labels were entered at 30 per cent. Second invoice, Dec. 10th, 1881, 10 barrels glycerine, 20 per cent. Dec. 13th, 1881, printed circulars and directions, coated pills, twine, wrapping paper, cards, Sarsaparilla syrup and proprietary medicines (at 50 per cent.) amounting on the proprietary medicines, to $762.50. Dec. 31, 1881, cards and labels, were entered at 30 per cent. Jan. 5th, 1882, printed wrappers and directions at 30 per cent, and brown wax at 20 per cent. Jan. 13th,

1882, 22 barrels Sarsaparilla syrup, and 1 barrel red syrup at 50 per cent., duty amounting to $711. Jan. 14th, 1882, package of printed labels at 30 per cent. Jan. 27th, 1882, 5 boxes coated pills at 25 per cent., duty amounting to $62. Feb. 1st, 1882, boxes containing advertising cards and labels at 30 per cent. One box of corks at 20 per cent. May 22nd, 1882, advertising cards at 30 per cent. To this entry an affidavit, in the same form as before given, is made by Geo. French as the duly authorized agent, or attorney, of E. Underhill, and to this affidavit no objection or charge of irregularity is made.

In the entry of Nov. 13th, 1882, the goods were consigned to A. J. Wright, and an affidavit similar to that made by Underhill is made by him without objection. It contains boxes of printed cards and advertisements entered at 30 per cent. The next is Dec. 27th, 1882, consigned to A. J. Wright and entered by him (he making the affidavit as consignee), containing 2 boxes advertising matter, at 30 per cent. March 3rd, 1883, imported by A. J. Wright, 2 boxes of printed matter at 30 per cent., he making the usual affidavit without objection. March 6th, 1883, A. J. Wright entered, as consignee, 20 boxes printed matter at 30 per cent., and made the usual affidavit without objection. On the 11th of April, 1883, A. J. Wright entered one box of printed matter at 30 per cent. May 15th, 1883, A. J. Wright entered 5 boxes banner advertising cards at 30 per cent. July 7th, 1883, Underhill entered 10 barrels glycerine at 20 per cent., and made and signed the affidavit. On the 12th July, 1883, an entry was made of similar goods, among which were 8 barrels (287 gallons) red syrup (patent medicine), entered at a rate of duty of 50 per cent., and valued for duty at $447, the duty thereon being $223.50. The whole amount of the invoice was

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$2,739.88, that of the value for duty $2,740, and of the duty $872.15.

The invoice for this entry, Mr. Perchard, the Collector, certifies, was sent to Ottawa in 1883, and has not since been returned. The usual affidavit was made by Underhill to this.

On July 13th, 1883, Underhill entered 12 barrels of glycerine at 20 per cent., and made the usual affidavit. On July 26th, 1883, Underhill entered 50 boxes of glass bottles at 30 per cent. duty, and made the usual affidavit. On July 30th, 1883, Underhill entered 60 boxes of glass bottles at 30 per cent. On July 30th, 1883, Underhill entered 30 barrels syrup of Sarsaparilla (medicinal preparation), at 50 per cent. Mr. Perchard, the Collector, certifies that the invoice for this entry was sent to Ottawa in 1883, and not returned.

On Aug. 3rd, 1883, Underhill entered 5 bundles of wrapping paper at 20 per cent. Mr. Perchard, Collector, certifies that the invoice for this entry was sent to Ottawa in 1883, and not returned. The usual affidavit was made.

Aug. 7th, 1883, Underhill entered 6 boxes containing advertising matter, namely, circulars, cards, directions, etc., at 30 per cent.; 4 boxes of sugar-coated pills (proprietary medicines), amounting, currency of invoice, to $206.80, value for duty, in dollars, $207.,—duty, at 25 per cent., $51.75; 3 boxes of glass bottles at 30 per cent.; and 2 casks and 1 box of pill-boxes, wood manufacture, at 25 per cent. Mr. Perchard, the Collector, certifies that the invoice for this entry was sent to Ottawa in 1883, and not returned.

Aug. 11th, 1883, Underhill entered 2 boxes of advertising cards at 30 per cent., and made the usual affidavit. Aug. 15th, 1883, Underhill entered 1 box of advertising matter, namely, labels, at 30 per cent., and made the usual affidavit. On Aug. 15th, 1883, a second entry was

made by Underhill; in which, among other items, there were sugar coated pills (proprietary medicines) valued at $100, quantity 250 lbs., at 25 per cent., duty $25; and 42 barrels Sarsaparilla syrup (medicinal preparation), value, $2,519, 1,527 gallons, at 50 per cent., duty, $1,259.50; 5 barrels medicinal preparations (no syrup), value $278, gals. 179, at 50 per cent., duty $139. The whole value of this entry was $3,353.85, value for duty, $3,384, and duty, $1,555.30.

The invoice for this entry, Mr. Perchard certifies, was sent to Ottawa in 1884, and not returned. It has the usual affidavit.

Aug. 18th, 1883, Underhill entered 67 boxes of glass bottles at 30 per cent., making the usual affidavit. Aug. 24th, 1883, Underhill entered 30 boxes of glass bottles at 30 per cent., and 1 box of corks at 20 per cent., making the usual affidavit. Aug. 30th, 1883, Underhill entered 55 boxes of glass bottles at 30 per cent., and 2 boxes of advertising cards at 20 per cent., with the usual affidavit. Sept. 11th, 1883, Underhill entered 1 box of advertising directions, labels, &c., with the usual affidavit. Sept 12th, 1883, Underhill entered 4 barrels of glycerine at 20 per cent., with the usual affidavit. Sept. 13th, 1883, Underhill entered 1 package containing 1 set of electrotype plates for advertising purposes at 20 per cent., and 1 box containing perfumed oil at 30 per cent., making the usual affidavit. September 17th, 1883, Underhill entered 6 boxes of advertising matter, namely, wrappers, directions, labels, etc., at 30 per cent.; 3 boxes of packing felt, and 1 piece and bundles of wrapping paper, at 20 per cent. Oct. 9th, 1883, A. J. Wright entered 3 boxes of advertising cards at 30 per cent., and made the usual affidavit. On Jan. 10th, 1884, James McPherson entered 2 boxes of country doctors' banner cards at 30 per cent., subject to amendment if required by the Customs

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Department,—the entry containing this indorsement: "See post entry 1157, 29-2-1884.." By this post entry the entry by Jas. McPherson was amended, as follows, on Feb. 29th, 1884: "Entry of 2 boxes country doctors' banner cards, 30 per cent., should be: 2 boxes doctors' advertisements, 20 per cent., and 6 cents per pound."

Jan. 21st, 1884, McPherson entered 1 box of printed cards and circulars, advertising matter, at 30 per cent., subject to amendment if required by the Customs Department. Jan. 21st, 1884, McPherson entered 1 box printed matter, advertising cards, at·30 per cent. Feb. 29th, 1884, McPherson entered 2 boxes of advertising cards at 30 per cent. March 24th, 1884, McPherson entered 3 cases containing advertising cards and circulars. On the 24th of June, 1884, he was directed to amend the entry of the 24th of March in accordance with the departmental decision of the 18th of April and 16th of May. The entry, 3 cases, &c., should have been: 3 cases pictorial advertising cards, 20 per cent. and 6 cents per lb.; circulars, advertising matter, 20 per cent. and 10 cents per lb. This very plainly shows that the entries made were scrutinized at Ottawa, and corrected when deemed incorrect.

April 2nd, 1884, McPherson entered 3 boxes advertising cards and circulars. He subsequently made a post entry in accordance with the departmental instructions of the 18th of April and 16th of May; the entry should have been: 2 cases pictorial advertising cards, 20 per cent. and 6 cents per lb.; advertising pill circulars, 20 per cent. and 10 cents per lb. July 12th, 1884, on the invoice it is stated the entry, in cases of pictorial advertising cards, was made at 20 per cent., subject to amendment if required by the Customs Department. It appears by the amendment on the invoice in this case, that samples

were sent by post to Ottawa on the 14th June, 1884, enclosed in a letter to the Commissioner of Customs.

On June 11th, 1884, McPherson entered 9 boxes pictorial cards and Sarsaparilla cards for duty at 20 per cent. and 6 cents per lb. July 31st, 1884, the invoice for entry specifies (*inter alia*) perfumed oil, brown sealing wax, oil bitter almonds, machinery, mattress twine, Sarsaparilla flavoring, acetate of lead, cask of lac sulphate, 1 barrel iodide of potassium, 4 barrels red syrup, 15 barrels liquorice liquor, 1 bag corks, 50 cases Sarsaparilla bottles. These appear to have been entered as perfumed oil, brown sealing wax, oil bitter almonds, quassia for mixing, mattress twine, flavoring extract containing spirits, acetate of lead, iodide of potassium, mixed tinctures containing spirits, bag of corks, 50 cases glass bottles.

On the perfumed oil the duty is 30 per cent.; sealing wax 20 per cent.; oil of almonds 20 per cent.; machinery 25 per cent.; twine 25 per cent.; flavoring extract $1.90 per gallon and 20 per cent.; acetate of lead 5 per cent.; iodide of potassium 20 per cent.; mixed tinctures $1.90 and 20 per cent.; corks 20 per cent.; glass bottles 30 per cent.; 1 cask lac sulphate, free. The usual affidavit was made by Underhill in respect of this invoice.

August 2nd, 1884, Underhill entered 11 barrels of glycerine at 20 per cent. August 12th, 1884, he entered 55 boxes of glass bottles, which in the invoice were specified as 25 boxes Pectoral bottles, 30 boxes of Vigor bottles, (7 oz. bottles), and on the entry described as subject to amendment if required by the Department at Ottawa. This entry shows that the Customs Department knew well the purposes for which the bottles were supplied

August 25th, 1884, Underhill entered barrels of mixed tinctures, containing spirits, at 50 per cent. and

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$1.90 per gallon. In the invoice they were described as 25 barrels liquorice liquor. September 3rd, 1884, Underhill entered 15 boxes glass bottles at 30 per cent. September 9th, 1884, Underhill entered 1 box pictorial advertising cards at 20 per cent. and 6 cents per pound. Sept. 9th, 1884, a further entry of 1 box pictorial advertising cards, at 20 per cent. and 6 cents per pound, was made by Underhill. September 17th, 1884, Underhill entered 2 boxes corks at 20 per cent., and 49 barrels of mixed tinctures, containing spirits, at 20 per cent. and $1.90 per gallon. In the invoice the 49 barrels are described as 1,987 gallons of liquorice liquor and 171 gallons red syrup. Sept. 20th, 1884, Underhill entered 30 boxes glass bottles at 30 per cent. The invoice shows that there were 17 boxes of Sarsaparilla bottles and 13 boxes Pectoral bottles. Oct. 1st, 1884, Underhill entered 1 box printed Sarsaparilla labels and wrappers at 30 per cent., and 1 box of corks at 20 per cent. Oct. 1st, 1884, second entry, Underhill entered 5 boxes containing printed labels, wrappers and directions, at 30 per cent.; twine, 25 per cent.; advertising pill cards, 20 per cent. and 10 cents per pound.; sealing wax, 20 per cent. Oct. 21st, 1884, Underhill entered 21 barrels, mixed tinctures containing spirits, and 1 box iodide of potassium,—the tinctures at 20 per cent. and $1.90 per gallon; the iodide of potassium at 20 per cent.; the invoices furnished show that the 21 barrels contained 932 gallons of liquorice liquor, the box containing 77 pounds iodide of potassium, 1½ gallons of Sarsaparilla flavoring. Oct. 22nd, 1884, Underhill entered 1 box containing printed wrappers and directions. Oct. 28th, 1884, Underhill entered 1 box printed directions, 30 per cent., and 1 bundle hardware paper, 20 per cent.

With reference to the entries of July and August,

1883, above referred to, the Collector at St. John's thus wrote to Underhill:—

CUSTOM HOUSE, ST. JOHN'S, P.Q.,
1st October, 1883.

E. UNDERHILL, Esq.,
Agent J. C. Ayer & Co.,
St. John's, P.Q.

SIR,—I have been instructed by the Commissioner of Customs to call upon you to amend your entries passed in July and August last for Sarsaparilla and Red Syrup, it having been ascertained that they both contain spirits, the former 16 6-10 and the latter 49 2-10 degrees per cent., and therefore coming under that clause in the tariff which imposes a duty on such mixtures of $1.90 per Imp. gall. and 20 p.c., whereas they were entered as proprietary medicines at 50 p.c. You are also requested to amend the entries passed for sugar coated pills, they having been entered at 40 cts. per lb., instead of the wholesale price as required by law, which has been found to be $19.00 per gross, less $3.00 allowed for putting up, making $16.00 per gross as "fair market value" in the United States, and on which duty has to be paid here.

The amount thus claimed by the Government is distributed as follows:—

Invoices from Lowell, 2nd July, Red Syrup, 344 galls.	$ 447 20
26th July, Sarsaparilla, 1,322 galls.	1,817 75
8th Aug. do 1,832 galls.	2,519 00
do Red Syrup, 278 galls.	278 21
Total	$5,062 15
3,712 Colonial gallons are equal to 3,093 Imperial, at $1.90 per gall., and 20 p.c. on $5,062.00 amounting to	6,889 10
Less 50 p.c. already paid	2,531 00
Leaving balance to be paid	$4,358 10

Coated pills:

Invoices from Lowell, Aug. 2nd, 517 lbs., at 40 cts.		206 80
Aug. 8th, 250 lbs. at 40 cts.		100 00
	767 lbs.	$306 80
767 lbs. are computed to make 510 gross, which, at $16.00 per gross, amounts to $8,160, and this at 25 p.c. makes		2,040 00
Less paid, $307.00, at 25 p.c.		76 75
Leaving balance of		$2,963 25

Duty on pills:

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The total amount thus due the Customs would be :

On Red and Sarsaparilla syrup	$4,358 10
On coated pills	1,963 25
Total	$6,321 35

which I have to request you to meet by passing post entries in accordance with the instructions of the Department of Customs, Ottawa.

I am, Sir,

Your obedient servant,

(Signed) H. G. PERCHARD,

Acting Collector, Port of St. John's, P.Q.

These entries having been corrected in reference to the spirit duty, Ayer & Co., feeling that they could not afford to pay the duty on the pills as claimed by the Customs authorities, by permission of such authorities, returned the great bulk of the pills to Lowell; and, after this, the materials containing spirits were entered as before, with the addition of the spirit duty of $1.90 per gallon.

On the 11th August, 1882, the Commissioner of Customs appeared to have issued a circular as follows :—

Circular No. 315. *No.* 21.

CUSTOMS DEPARTMENT,

OTTAWA, 11th August, 1882.

SIR,—I have to request your special attention to importation of patent or proprietary medicines, in bulk, under invoices representing but a fraction of the "fair market value" of the same preparations when put up for sale. The pretence is, usually, that they are not in a a finished state, and, consequently, should be regarded as material for their manufacture, while, generally, the whole work to be performed in Canada consists of bottling and attaching labels, etc., in the case of liquids, and putting in paper or other boxes, and also labelling, in the case of pills and other dry preparations. This practice is purely an evasion of the provisions of Customs law and must not be allowed.

To ascertain the "fair market value for duty" you should find the wholesale price when sold for consumption in the United States in a finished or merchantable state, and deduct therefrom the value of bottles, boxes, labels, corks and cost of labour in putting up the various compounds. You may also deduct the cost of the United States' internal revenue stamps. The balance will then be the proper value

for duty in Canada at the rates prescribed for such preparations in the tariff, viz.: Liquids, 50 per cent., and pills and other dry preparations, 25 per cent.

The same remarks will equally apply in all respects, except as to rates of duty, to toilet and all other proprietary preparations.

This matter is highly important, and this and other circulars are supposed to be properly filed in each Custom House in some convenient form for reference, and not contemptuously thrown aside.

I am, Sir,
Your obedient servant,
(Signed) J. JOHNSON,
Commissioner.

The Collector of Customs,
Port of———.

If Underhill is to be believed, it would seem that the Ayers were aware of the issuing of this circular.

Under what authority this circular was issued did not appear. I find by the 5th section of 40 Vic. c. 10 (1877), in force in 1882, in reference to duties and exemptions from duty there is the following enactment:

And inasmuch as doubts may arise as to whether any or what duty is payable on particular goods, more especially when such goods are of a new or unusual kind, or compounded of various kinds of materials, or imported in an unusual manner or under unusual circumstances: Therefore, for removing such doubts and avoiding litigation, if in any case any doubt arises as to whether any or what duty is, under the laws then in force, payable on any kind of goods, and there is no decision in the matter by any competent tribunal, or there are decisions inconsistent with each other, the Governor-in-Council may declare the duty payable on the kind of goods in question, or goods imported in the manner or under the circumstances in question, or that such goods are exempt from duty; and any Order-in-Council containing such declaration and fixing such duty (if any) and published in the *Canada Gazette*, shall, until otherwise ordered by Parliament, have the same force and effect as if such duty had been fixed and declared by law; and a copy of the said *Gazette* containing a copy of any such order shall he evidence thereof.

It was not shown or contended on the part of the Crown, and it was strenuously denied on that of the claimants, that, in relation to this matter, any order-in-council had ever been made; and the circular may, for

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that reason, have been thrown aside. Whether this was so, or not, it never was acted on, either by the Customs House officers at St. John's or the Department at Ottawa, in respect of the entries of the Ayers at St. John's; and the entries continued to be made in precisely the same way they had been for the preceding twenty years.

The first entry after the promulgation of this circular, viz., on the 7th of July, 1883, was 10 barrels glycerine, which formed an ingredient in the manufacture of some or one of these compounds, and was entered at 20 per cent.; the invoice of July 12th, 1883, clearly shows a great variety of articles, used in relation to the putting up of medicines, at the several rates of duty on such articles, respectively, at their respective values, thus: 8 bbls. Red Syrup (patent medicine) value $44., quantity 287 gallons, rate of duty 50 per cent., amount of duty $223.50. This invoice was transmitted to Ottawa, and never returned or repudiated.

The entry of the 18th July, 1883, contained materials for filtering, etc., for putting up medicines, and 8 barrels Red syrup (patent medicine). The invoice for this entry was likewise sent to Ottawa, and not returned or repudiated. So, also, the entry of the 30th July, 1883,—30 barrels syrup of Sarsaparilla (medicinal preparation). This invoice was sent to Ottawa, and never returned or repudiated. Then comes the entry of the 3rd August, 1883. That invoice was sent to Ottawa, and not returned. The entry of 7th of August, 1883, contained 4 boxes sugar-coated pills (proprietary medicines): invoice sent to Ottawa, and never returned or repudiated. The entry of the 15th August, 1883, contained boxes sugar coated pills (proprietary medicines), labels, etc., 42 barrels Sarsaparilla syrup, 5 barrels Red syrup: the invoices for this entry were sent to Ottawa in 1884, and not returned or repudiated. And so the entries continued to be

made, notwithstanding the circular, until the 29th December, 1883, when the following letter was sent to the Collector of Customs at St. John's:

[Copy.]

CUSTOMS DEPARTMENT, OTTAWA,
29th Dec., 1883.

SIR,—I have to inform you that Messrs. J. C. Ayer & Co. have been notified that their entries of the past may be allowed to stand, and your especial attention is directed to future importations by this firm, that all proprietary medicines containing spirits must be assessed at the spirit rate, and that pills and other dry medicines are 25 p.c., according to the fair and ordinary market value as given in circular 315, No. 21.

As heavy undervaluations have taken place on the part of this firm, you are instructed to submit the invoices with information to this Department when in doubt as to value or rate of duty.

I am, &c., &c,
(Sgd.) J. JOHNSON.

The Collector of Customs,
Port of St. John's, P.Q.

[A true copy.] (Sgd.) H. G. PERCHARD,
Collector.

Previous to this time all the entries appear to have been submitted to the authorities at Ottawa, and, after that, the entries show that the proprietary medicines containing spirits were entered as usual with the addition of the spirit rate of duty, and, in obedience to directions, the invoices appear to have been transmitted to Ottawa, and, with the exception of the spirit duty, the practice which had prevailed since 1882 was continued, and no objections raised as to misdescription or undervaluation of liquid material. In short no difficulties were raised until 1885, when Underhill, having been discharged by the Ayers for alleged misconduct, came to Montreal, and, combining with O'Hara and Brousseau, appears to have concocted a scheme to procure the confiscation of all the goods entered from 1882 to 1885, inclusive, from which, together with the forfeitures thereon, amounting to $385,313.00, they doubt-

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less anticipated the realization of enormous gains. These two officers appear, by the evidence of the Commissioner of Customs, to have acted on their own responsibility in making the seizures, and undertook, with the assistance of the discreditable witnesses Underhill and Flint, for their joint pecuniary benefit, to cause this large amount of property to be seized, and now seek to have it condemned, and enormous forfeitures adjudged against this unfortunate firm, who, from the start of their business in 1862, up to its close in 1884, so far as I can gather from the evidence, appear to have dealt with the Customs Department, and acted throughout, in an open, fair and businesslike manner, without concealment or fraud.

Notwithstanding this conduct on the part of the Ayers, which, in my opinion, should exculpate them, if not legally, certainly morally, from any imputation of fraud, they are now specifically charged with the disgraceful offence of smuggling,

The term "smuggling" has been defined to be the importation of prohibited articles, or the defrauding of the revenue by the introduction of goods into consumption without paying the duties chargeable thereon. It is a technical word having a known and accepted meaning. It implies illegality, and is not consistent with innocent intent (1). It is a secret introduction of goods with intent to avoid payment of duty.

Let us proceed to inquire whether, in point of law the Ayers have been guilty of any breach of the revenue laws of this country.

In the first place, let us see how the revenue laws are to be interpreted. There is a general provision in "The Customs Act, 1883"(2) that all the terms of that act,

(1) *United States* v. *Claflin*, 13 Blatch 178.

(2) 46 Vic. c. 12, s. 4.

or of any Customs law, shall receive such fair and liberal construction and interpretation as will best insure the protection of the revenue and the attainment of the purpose for which that act, or such law, was made, according to its true intent, meaning and spirit. But I do not understand from this that laws imposing duties are to be construed beyond the natural import of their language, or that duties or taxes are to be imposed upon terms of vague or doubtful interpretation.

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Maxwell on the Interpretation of Statutes (1) says:—

Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction. It is presumed that the Legislature does not desire to confiscate the property, or to encroach upon the rights of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt.

(See per Bramwell L.J. in *Wells* v. *London, Tilbury &c., Rail. Co.* (2); per Mellish, L.J. in *re Lundy Granite Co.*, (3); per James, L.J. in *ex parte Jones* (4); per Kelly, C.B. in *Randolph* v. *Milman* (5); *Green* v. *The Queen* (6); *ex parte Sheil* (7)).

No doubt revenue laws are to be construed as will most effectually accomplish the intention of the legislature in passing them, which simply is to secure the collection of the revenue. But it is clear that the intention of the legislature, in the imposition of duties, must be clearly expressed, and, in cases of doubtful interpretation, the construction should be in favour of the importer. This rule was adhered to by Lord Cairns in *Cox* v. *Rabbits* (8), and it was said by the same learned judge in *Partington* v. *The Attorney General* (9):

(1) 2nd Ed. p. 346.
(2) 5 Ch. D. at p. 130.
(3) L. R. 6 Ch. 467.
(4) L. R. 10 Ch. 665.
(5) L. R. 4 C. P. 113.
(6) 1 App. Cas. 513.
(7) 4 Ch. D. 789.
(8) 3 App. Cas. 478.
(9) L. R. 4 H. L. 122.

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I am bound to say that I myself have arrived, without hesitation, at the conclusion that the judgment ought to be affirmed.

I do so both upon form and also upon substance. I am not at all sure that in a case of this kind—a fiscal case—form is not amply sufficient; because as I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

The act of the Province of Canada, 1866, 29–30 Vic. c. 6, was the act in force when the Ayers commenced business in St. John's; and section 11 thereof provided that the fair market value for the duty on goods imported into the Province should be the fair market value of such goods in the usual and ordinary commercial acceptation of that term at the usual and ordinary credit, and not the cash value, &c.; and schedule "B" thereof fixed on patent medicines, and medicinal preparations not elsewhere specified, 25 per cent., and on drugs not otherwise specified 15 per cent.

And 46 Vic. c. 12 (the act under which this seizure was made) by sections 68 & 69, enacted that:

68. Where any duty *ad valorem* is imposed on any goods imported into Canada, the value for duty shall be the fair market value thereof, when sold for home consumption, in the principal markets of the country whence and at the time when the same were exported directly to Canada.

69. Such market value shall be the fair market value of such goods in the usual and ordinary commercial acceptation of the term, at the usual and ordinary credit, and not the cash value of such goods, except in cases in which the article imported is, by universal usage, considered and known to be a cash article, and so *bonâ fide* paid for in all transactions in relation to such article; and all invoices representing cash values, except in the special cases hereinbefore referred to, shall be subject to such additions as to the collector or appraiser of the port at which they are presented may appear just and reasonable, to bring up

the amount to the true and fair market value as required by this section.

Now as to the fair market value of these goods, in the usual and ordinary acceptation of that term, when sold for home consumption at the time when they were imported directly into Canada, the evidence appears to me to be overwhelming, and has not been contradicted. I need only refer to the evidence of Frederic Humphreys, which is fully corroborated by John A. Gilman, Jacob S. Farrand, Charles C. Goodwin, Erastus H. Doolittle, George C. Osgoode, David Dewar, Stanley Mansfield, W. V. Lawrence and Solomon Carter, all persons peculiarly conversant with the value of the bulk article as imported into Canada, to show that the Ayers' goods were never sold in bulk, and had no market value beyond the value of the ingredients of which they were composed.

This evidence shows that the Sarsaparilla and other preparations in bulk could not be sold in the United States, and would be worthless to any one but the manufacturers, and more especially would this be the case if such preparations were incomplete in themselves; that the cost of ingredients and labour was from 10 to 12½ per cent. of the selling value of the completed article as put on the market,—which was $7.75 a dozen with 10 per cent. off; that the preparations could be manufactured at $1.25 per gallon with a large profit,—the witness Mansfield putting cost of manufacture as follows:

Sarsaparilla 79 cents, and 4 cents for labour, 83 cents.
Sarsaparilla syrup .... 73 cents.
Liquorice liquor.................................... 86 cents.

and these values are expressly corroborated by Gilman and Dewar.

In fact, the bottling, wrappers, directions, trademark and advertising, together with a certain mdei-

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cinal value in the preparations themselves, went to make up the value of the completed article in the market.

[Here His Lordship read the evidence of the witnesses Humphreys and Gilman taken at the trial.]

The evidence clearly shows that the fair market value, in the usual and ordinary commercial acceptation of the term, of Ayer's Sarsaparilla, or Ayer's Cherry Pectoral, as placed on the markets of the United States, was the aggregated article as put up for sale, composed of the completed liquid in bottles with Ayer's name on them, corked and sealed with Ayer's trade-mark, with wrappers and directions surrounding them, considered in the market, in the ordinary course of trade, as one article, as opposed to the article in bulk, which was never placed on the market for home consumption and which we have seen, according to the evidence in this case, had no market value beyond the value of the ingredients of which the liquors in bulk were composed. The putting up of these, in the manner in which they are placed on the markets of the United States, as merchantable commodities, are accessories of the goods and enter into the price, and are not merely meant for the transportation of the goods to the market, but form an element of the intrinsic value of the commodity; and it is only with reference to the article thus put up, that there is a market value of $7.50 a dozen; therefore, it is the form in which the article is imported that regulates the market value for duty at the time the same is imported, and with reference to form we have seen what Lord Cairns says in *Partington* v. *the Attorney General* (1).

During the course of the argument, in suggesting the case of a party importing wine or ale, assuming there should be a higher duty on the article when imported in bottles (as, in fact, there is now on the articles of ale

(1) *Ante*, p. 272.

and beer and porter (1)) I asked the counsel for the Crown if a party imported a cask of ale, and entered the goods truly and paid the duty imposed by law on ale imported in casks, if, when the goods were so imported the importer subsequently bottled the ale, could the Customs officer step in and seize the goods on the ground that they were illegally imported with intent to defraud the revenue? The counsel contended that if the importer were a manufacturer or dealer in liquors, and had the intention to bottle when the importation was made, the forfeiture was complete. Then I asked how it would be if a private individual should import a cask of ale for his own use, to bottle in his own cellar, and did so: could it be contended on the part of the Crown that, by reason of the intention to bottle at the time of the importation, the forfeiture was complete? But the counsel would not go so far as that, but drew the line between the manufacturer, or dealer, and the private individual; but I fail to see why the latter, having the same intent as the former, should escape with his ale, and the unfortunate manufacturer, or dealer, have his goods forfeited. Thus, to use a common expression, making fish of one and flesh of the other. But I am clearly of opinion that, if the ale were duly imported in cask, and the legal duty were paid on it, it would be legally imported, and the Customs officers would have no right to inquire what the importer intended to do with it,—whether to drink it in whole or in part, to bottle it in whole or in part, or to sell or dispose of it in bulk or in bottle, as the importer's exigencies, or inclinations, or business, should prompt. I am satisfied no authority can be found to justify the condemnation of an article, which, in the Customs' entry, has been properly described, and on which the legal duty has been paid at the time of importation.

(1) Customs Tar. 1886-7, Sched. A, Nos. 9-10.

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Since the argument, I find in *Elmes on Customs Laws* a reference made to this very illustration. He says (1):—

The term *ad valorem* as used in the customs laws does not always dĕnote the actual or intrinsic value of the article. The goods often derive a value from the mode in which they are put up for the market. For instance, wine in bottles has a market value exceeding the value of the wine by the quantity of gallons when put up in casks. In that condition, the bottles truly represent a part of the value. In fact, the wine in bottles acquires a market value of its own, distinct from wine by the measure and in casks. This is the more evident from the fact, that, while wine put up in bottles is thus practically subject to greater duty on the quantity than that imported in casks, yet the tariff laws impose a distinct and separate duty on the bottles as bottles. *United States* v. *Clement* (2). Manifestly, therefore, the enhanced amount of duty based on the additional value because contained in bottles is not because of the value of the bottles, but of the special market value of the wine put up in that condition for the market. Other articles may readily be called to mind, the market value of which is derived in a special sense because of the manner of preparation for sale. Many articles are not sold in bulk at all, and have no usual selling price apart from their packing or covering. The packing or covering therefore becomes substantially a part of the thing itself. By device of the importer, in order to lessen the duties, some of these articles may be invoiced by the pound, or measure, or in bulk, but such an invoice would not truly represent the market value.

It seems to me only necessary to test this practically to see what, I humbly think, is the absurdity of the proposition. In the supposed illustration, if the ale is imported from England, the bottles from the United States, and the corks from Spain or Portugal, and all duties on such, as provided by the tariff, are duly paid with the full intent, when they respectively reach this Dominion, of bottling the ales in this country and putting it on the market as bottled ale, upon which of these articles does the full duty on bottled ale attach? Is it on the importation of the bottles or the corks, if they should be valued and duty paid, or would the importer be obliged to say to the Customs House officers " we

(1) § 503 p. 209.

(2) 1. Crabbe, 499 : Syn. Treas. Decis. (1884) 5706, 7642.

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intend to use these bottles and corks for bottling ale we expect to receive from the United States"? And would the officer be justified in saying "if that is the case you must pay 18 cents a gallon, because you intend to defraud the revenue of the duty on bottled ale."? Or, "I will seize it by reason of your intention to use the bottles and the corks at some future time in bottling ale you intend to import"? Or, is the duty to be imposed on the ale itself when it arrives, as on bottled ale? The duty, in the case suggested, on the bottles or corks having been already paid, I think the importer would naturally ask: under what provision of the tariff do you claim this duty, on the bottles or the corks which have already paid duty, or on the ale as bottled ale which was never imported as such? And unless the Customs officers are much more astute than I am, I think they will search in vain for any authority to justify such unreasonable pretensions.

The simple answer to the whole question is, in my opinion, that there never having been any importation of ale in bottles, and the importer having entered them as bottles, corks and ale in casks, as in truth the articles really were, and the duties imposed by law having been paid and the revenue laws having thus been complied with, there could be no intention of evading them. And so in this case, these proprietary medicines having been imported in bulk, and all duties having been imposed on the various articles imported with them, and the importer having paid the duties prescribed by law, and the goods having been put up, with the material so imported and with the articles purchased in the Dominion, in bottles, the greater part of which were procured in Canada, and the articles having been largely added to and mixed, or manufactured in the Dominion, they were not liable to seizure.

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The case of the *United States* v. *Breed, et al* (1) puts very strongly the way in which revenue laws should be construed, and the importance of the form in which an article is imported. The Customs laws of the United States are very similar to ours.

In the case I have just referred to, loaf sugar was brought in crushed, on which the Customs authorities sought to make the importer pay as if the article had been brought in in loaves.

STORY, J. said: Revenue and duty acts are not in the sense of the law penal acts; and are not, therefore, to be construed strictly. Nor are they, on the other hand, acts in furtherance of private rights and liberty, or remedial; and, therefore, to be construed with extraordinary liberality. They are to be construed according to the true import and meaning of their terms; and when the legislative intention is ascertained, that, and that only, is to be our guide in interpreting them. We are not to strain them to reach cases not within their terms, even if we might conjecture, that public policy might have reached those cases; nor, on the other hand, are we to restrain their terms, so as to exclude cases clearly within them, simply because public policy might possibly dictate such an exclusion.

* * * * *

That the sugars in controversy were, at the time of their importation, in form and appearance, white, clayed, or powdered sugars; that is, that they were white, and clayed, and in powder, is disputed by no one. The whole testimony proves this; and the whole argument admits it. But on the part of the United States it is contended, that, though this was the form of the sugar at the time of the importation, it was in fact British loaf sugar, highly refined, and that it had been crushed from the loaves and then imported by the defendants, not fraudulently, but *bonâ fide*, openly and without disguise, having been bought by them in its crushed state. And the argument is, that the change of form does not change the thing; it is still loaf sugar; and the change of form is a mere evasion of the act.

* * * * *

Nor is there anything extraordinary in Congress taking articles according to their colors, or forms, or any other peculiarity. Sometimes the tax is levied upon a thing with reference to the country of its origin; sometimes according to its colors; sometimes according to its predominant component material; sometimes in its raw shape;

(1) 1 Sumn. pp. 160—166.

sometimes in its manufactured shape; and sometimes, with reference merely to its form or mode of manufacture, or the vehicle in which it is. Thus by this very act of 1816, ale, beer, and porter in bottles pay different duties from that in other vessels. Wines are taxed differently according to their origin, as Madeira, Sherry, Champagne, Burgundy; and differently, in some cases, when imported in bottles or cases, from what they are in other vessels. So, raisins in jars and boxes pay a higher duty than those in casks. Green teas pay a higher duty than black. The form of a material is also a ground for a discriminating duty.

* * * We see that here, the form of the material constitutes the discriminating test of the duty. Doubtless in many of these cases the descriptive terms indicate the quality; not as quality, but as being usually found combined with a particular form or a particular vehicle. It would be absurd to say, that iron did not pay a duty according to its form as designated in the tariff; and that, if the same quality was imported in bars and bolts, and in sheets, and rods and hoops, all must pay the same duty. So that, however true it may be that the substance may be the same though the form is changed, it does not follow that the form of the substance may not be the very groundwork of the duty.

Here, the article is in a state exactly such as may be dutiable by law under a particular description. Its form is precisely that indicated by the law. And it is assuming the whole question, to say the change of form is an evasion of the act, much more that it is a fraudulent evasion. If the legislature has made the form, or descriptive appellation, the basis of the discriminating duty, then the change of form to meet the discrimination is no evasion, and no fraud.

* * * To constitute an evasion of a revenue act, which shall be deemed, in point of law, a fraudulent evasion, it is not sufficient that the party introduces another article, perfectly lawful, which defeats the policy contemplated by the act, or which supersedes or diminishes the use of the article taxed by the act. There must be, substantially, an introduction of the very thing taxed under a false denomination or cover with the intent to evade or defraud the act.

And in *Cobb* v. *Hamlin* (1), Clifford, J. says:—

Some descriptions of goods are purchased and sold in the foreign market in bulk, and are subsequently to the purchase and sale put into boxes, packages, or coverings, by the purchaser, for the preservation of the merchandise and the convenience of shipping. Other descriptions are put into boxes, packages, or coverings by the producer, manufacturer, or wholesale merchant in the foreign country, and merchandise

(1) 3 Cliff. Rep. at p. 200.

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is there purchased and sold for exportation in the boxes, packages, or coverings in which it is so placed by the producer, manufacturer or wholesale merchant. The actual market value, in the former case, does not include the cost of the box,package, or covering within the meaning of that act of Congress (1), as the boxes, packages or coverings in such cases are purchased by the shipper, as the means of preserving the goods and for the convenience of shipment. But no doubt is entertained that the words "actual market value," without more, would include the cost of the box, package, or covering in all cases where the merchandize in question was actually purchased in the box, package, or covering, and is usually so purchased and sold for shipment in the foreign market, and where the price includes the box, package, or covering as well as the goods therein contained. *Bernard, et al* v. *Morton* (2); *Grinnell* v. *Lawrence* (3); *Belcher* v. *Linn* (4); *Knight, et al* v. *Schell* (5); *Wilson* v. *Maxwell* (6).

It seems to me monstrous to say that an importer, having openly and legally imported the goods, and duly paid all the duties imposed on the articles imported at the fair value thereof at the time when the same were imported, in accordance with the terms of the tariff, can be declared to have imported such goods with intent to defraud the revenue because he had the mind to do something with them which, had it been done in the country from which they were exported, would have enhanced their value, and consequently made them liable to pay duty on such enhanced value, but which was, in fact, never done, and so the value never was increased at the place of exportation at the time of such exportation. The importer, having paid the duty on the several articles, as named and described in the tariff, at their value in the place of exportation, has the right to deal with, use and dispose of the articles so imported as the exigencies of his business may prompt him.

The question, then, in this case seems really to resolve itself into this: were the Ayers bound to pay

(1) 14 Stat. at Large, 330.
(2) 1 Cur. 412.
(3) 1 Blatch. 350.
(4) 24 How. 535.
(5) 24 How. 530.
(6) 2 Blatch. 35.

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duty on the value of Ayer's Sarsaparilla and Cherry Pectoral as put up at Lowell for the United States market, or only on the value of the respective articles imported in bulk, namely, the market value of the ingredients of which the imported articles were composed, and of the wrappers, bottles, corks and other articles required to put them on the market as Ayer's Sarsaparilla and Cherry Pectoral, where a large portion of such articles, particularly the bottles, essential to their becoming a merchantable article and having a merchantable value, were not imported at all, but were procured in Canada? I do not understand that the goods respectively named in the invoices were claimed to have been undervalued; on the contrary, the evidence very clearly shows that they were rather overvalued than otherwise. But were the Ayers bound to enter these goods and describe them as so many bottles of Ayer's Sarsaparilla and Cherry Pectoral, as bottled, corked, labelled with directions in Lowell, and ready to be put on the United States market, and which, if the same had been so put up, would have had a certain market value in the United States, but which, when in bulk as exported, as we have seen, had no market value beyond the value of the ingredients composing the article in bulk and the labor of compounding them? And if described as contended for, it is clear that such description would have been entirely inconsistent with the truth. In point of fact, in the invoices the goods were correctly described and valued, and the duties paid on the respective articles, so entered, in accordance with the express terms of the tariff. I have already enumerated the several articles so entered, and the respective rates of duty imposed on each, and it is unnecessary to repeat them.

The bottling and putting up and the trade-mark, as detailed, were part of the preparation for sale, and an

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integral part of the value of the whole as a unit, ready for home consumption or sale. Therefore, the market value of Ayer's Sarsaparilla consisted in the liquid being found combined in a particular manner and in a particular vehicle, in the form in which it is presented on the market; and, until so put up, it is not in the form or in the condition in which it can be sold, and has no market value. The liquid imported may, or may not, be the same (and in many cases, at any rate, it was not so) as that put up for home consumption ; the form in bulk is not the same, and this is the very foundation of the market value. The articles as imported have been correctly described in the invoices and entries, and as, in truth, they only could be described, and the duty on its actual value, as proved, has been paid. Had they been entered as described in the information, they would have been clearly misdescribed

By way of testing this a little further : what would be the position of the Crown, or a purchaser from the Crown, supposing, on entry, the goods had been seized in bulk, and that, under the 103rd and 104th sections of "The Customs' Act, 1883," the Customs Department had elected to take the goods as imported, by adding 10 per cent. to the invoice price: could they have completed the goods by adding the ingredients necessary to do so, or, if the liquids were completed, in either case could the Customs authorities, or a purchaser from them, have bottled the goods with Ayer's name on them, corked and sealed them with Ayer's trade-mark, covered them with Ayer's labels and directions, and put them on the market as Ayer's goods? I am aware of no authority which would enable the goods to be so dealt with. If not, does not this show that, until dealt with as they were in Canada, they had no market value at the place of exportation beyond the value of the ingredients of which they were composed?

I am satisfied from the evidence that, during the course of the dealings with the importations, and the entry and passing of these goods through the Custom House, there was no question in the minds of Underhill or the Ayers in relation to any irregularity connected with the Customs, unless, indeed, they feared the goods might be considered liable to the spirit duty, and endeavored to escape it. Indeed, I think that Underhill, in his dealings with the Custom House in regard to the valuation of the goods, was a much more honest and truthful man than he would now have us believe he was, and that it was not until the spirit duty was disposed of, that, to gratify his revenge and, at the same time, secure the many thousand dollars he evidently anticipates receiving if he can secure the condemnation of these goods and the infliction of the forfeitures, that he raised the question of undervaluation. Notwithstanding Underhill's repudiation of the honesty and truthfulness of his own conduct in connection with the entering of the goods, during the long period he conducted the business of the Ayers, at St. John's, I am inclined to think better of him during that long period; and I am inclined to think, also, that it was not until he desired to revenge himself on the Ayers, and had the prospect placed before him of doing so, and at the same time realizing thousands of dollars by the operation, that he became alive to the fact of his own alleged turpitude. I am of opinion that the only doubt entertained by the Ayers, or Underhill, was in relation to the spirit duty; and it was that duty, and that duty alone, the Ayers, or Underhill, feared and were desirous of escaping. I am of opinion that, with reference to the entries in every other respect, the conduct of the Ayers was open and above board, and that every facility was afforded to the Customs officers to examine, appraise and establish the rate of duty to

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which the goods were liable; and that the officers of the Customs House availed themselves of such facilities; and that the said goods were passed by the Customs after repeated examination and reference to the appraisers, with full knowledge of the nature, and, it must be presumed, with like knowledge of the value of the goods.

A question having arisen as to the spirit duties, the Minister of Customs investigated the matter and considered it in view of the way in which the entries of the goods had been treated. Having done this he made the following order:

OTTAWA, 24th Nov., 1883.

DEAR SIR,

I have your favour of 22nd inst., *re* J. C. Ayer's importations.

I have to inform you that the decision of the Department is that no action will be taken relative to past transactions so far as they affect the spirit duty, errors having partly arisen from the action of the Customs officers; but all future importations will be rated at the correct duties.

The collector will be instructed accordingly.

Yours truly,
(Signed) M. BOWELL.

John Black, Esq.,
St. John's, P. Q.

The following letter was also sent by the Commissioner of Customs to the Ayers:

CUSTOMS DEPARTMENT,
OTTAWA, 28th Dec., 1883.

SIRS,

In reply to the letter of your Mr. E. A. Bigelow, requesting that past entries of your goods may be allowed to stand as they are, I have the honour to inform you that the Honourable the Minister of Customs has complied with your request; but in all future entries the correct rate of duty, on the fair and ordinary market value, will be enforced.

I have the honour to be, Sirs,
Your obedient servant,
(Signed) J. JOHNSON,
Commissioner of Customs.

Messrs. J. C. Ayer & Company,
Lowell, Mass., U.S.A.

This appears to me to have been the only controversy at that time, and it having been disposed of, and this ground of complaint having been so removed, and the subsequent entries having continued as formerly, (with the exception of the imposition of spirit duties) and there having been no order-in-council under the section of the act referred to, I am of opinion that the idea of the goods not having been entered at their market value, or of there having been fraudulent undervaluation with intent to defraud the revenue, was an after-thought, and a scheme concocted by O'Hara, Brousseau, Underhill and Flint, when the spirit duty was ignored and settled as to the past by the Minister, and the duty afterwards duly paid, to secure the condemnation and forfeiture of goods as to which no question had arisen for twenty odd years.

There are two or three other matters which came under my notice on the hearing of this cause which I dare not, without a dereliction of duty, pass over in silence.

The books of the Ayers's business kept by the agent Underhill at St. John's, having been surreptitiously obtained through the instrumentality of one Flint, without, as Underhill states, his knowledge, and having come into the possession of the Customs House authorities at Montreal, an order of one of the judges of the Supreme Court of Canada was obtained, directing that the claimants should be allowed to inspect these books and the papers and documents in the possession and custody of Mr M. P. Ryan, Collector of Customs, at the Port of Montreal, specifying particularly the books kept by one Underhill,—as to which it appeared in evidence that the Assistant-Commissioner of Customs, in a letter to the Deputy Minister of Justice, says "the books and documents procured from Mr. Underhill are, I understand, in the private keeping of

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the Collector at the Port of Montreal, and of course, will be forthcoming when required."

Though these books were the property of the Ayer Co., the claimants, and though it was ordered that they should be allowed to inspect them, and although they were duly applied for under this order, and the order was served on the Collector with the knowledge of O'Hara, instead of being forthcoming when required by the order, as most certainly they should have been, they never were produced, and the claimants were never allowed access to, or inspection of them; and, from the evidence of O'Hara, they were evidently kept secreted in the safe of the Customs House, at Montreal, for the express purpose of preventing the access and inspection so ordered.

It appeared, also, that efforts were made to effect service of a subpoena on Underhill; and, instead of assisting the claimants to accomplish this object, or remaining quiescent in the matter, O'Hara and Brousseau aided the witness to keep out of the way,—O'Hara by suggesting to the Collector, to be communicated to the solicitor of the claimants, what he, O'Hara, knew to be false,—and Brousseau, as he admits, by down-right untruths.

The conduct of O'Hara in thus conniving at the concealment of the books, and setting at defiance the order of the judge, the aiding of a witness to keep out of the way of the service of a subpœna by the claimants, the false suggestion of O'Hara (who, as to this false suggestion, when asked if it was not made to deceive, he says: "I suggested that because the witness did not wish to come into court until called by the Crown, and I did not wish to afford any information to the other side"), and the downright untruths admitted by Brousseau himself; the conduct of Brousseau in trafficking, or endeavoring to traffic, in the proceeds

which he had evidently made up his mind he and Underhill, beyond all peradventure, were to make out of this seizure, and the equivocating and discreditable manner in which both these officers gave their testimony, are open, in my opinion, to the gravest censure.

I regret, in the interests of justice, and of the business community of the Dominion who may have controversies with the Customs officials, to be compelled to make these observations in reference to persons, holding responsible positions in the Customs Department, at Montreal, whose duty it most certainly was to have obeyed the order of the Supreme Court, instead of setting it at defiance, and, if not to have aided, certainly not to have thrown obstacles, by false suggestions and false statements, in the way of effecting service of subpœnas on witnesses the claimants desired to have examined. With reference to the conduct of these witnesses, considering the peculiar position in which they stood, it should have been marked by the greatest propriety, and with the same desire and disposition to answer all questions, as well those on the part of the claimants as those on the part of the Crown, with fairness, honesty and truthfulness,—which, I very much regret to say, was far from being the case. In other words, they should have acted as public officers in the discharge of a public duty, desirous only that justice should be done alike to the Crown and to the claimants. Surely, the public, having controversies with the Customs, are entitled to this measure of justice; and certainly the Customs officers should not act, as their conduct would seem to indicate in this case, as partizans having a deep pecuniary interest in the result, and with an apparent determination to effect, at all hazards, a condemnation.

In conclusion, then, I find that a large amount of material was purchased in Canada to complete the

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articles, and that the principal part of the bottles, stamped with the name of Ayer & Co., and of the medicines and boxes for the pills, were bought in Canada.

I find, as a fact, that the goods mentioned in the first count of the information *in rem* were never smuggled nor clandestinely introduced into Canada, at the Port of St. John's: that no bottles of Ayer's Sarsaparilla, Cherry Pectoral, Hair Vigor or Ague Cure were ever introduced or brought into Canadá, as alleged.

As to the second count, I find as a fact that, between the 23rd May, 1882, and the 22nd May, 1885, there was no proof that any person, with intent to defraud the revenue, did make out and attempt to pass, and did pass, through the Customs House, at the Port of St. John's, any fraudulent invoice of certain goods consisting of 4349 doz. of Ayer's Sarsaparilla, etc., [as specified in the information *im rem*, *ante* p. 234] that no such goods were passed, or attempted to be passed, through the said Customs House.

As to the third count, I find as a fact that, between the 23rd May, 1882, and the 22nd May, 1885, no attempt was made to evade, nor was there evaded, the payment of part of the duties on certain goods which consisted of 4349 doz bottles Ayer's Sarsaparilla, etc., by entering the said goods much below their proper value, with the intent of defrauding the revenue of the duties properly payable upon the said goods, at the proper value thereof: that no such goods as 4349 doz. bottles of Ayer's Sarsaparilla, etc., were entered at the Customs House as alleged in the said third count.

As to the fourth count, based upon section 155 of "The Customs Act, 1883," which enacts that:

If any person knowingly harbours, keeps, conceals, purchases, sells or exchanges any goods illegally imported into Canada, (whether such goods are dutiable or not), or whereon the duties lawfully payable have not been paid, such person shall, for such offence, forfeit treble the value of the said goods, as well as the goods themselves.

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I find that it is not proved that certain persons, between the 23rd of May, 1882, and the 22nd of May, 1885, did knowingly keep and sell certain dutiable goods consisting of 4349 doz. Ayer's Sarsaparilla, etc., which had been illegally imported into Canada, and whereon the duties lawfully payable had not been paid, because I find, as a fact, that no such goods have been imported into Canada.

As to the fifth count, under section 108, to the effect that if any goods are found upon an entry of goods which do not correspond with the goods described in the invoice or entry, or if the description in the invoice or entry has been made for the purpose of avoiding payment of the duty, or of any part of the duty, on such goods, or if in any entry any goods have been undervalued for such purposes, such goods shall be forfeited : I find as a fact that, between the 23rd May 1882, and the 22nd May, 1885, no entries were made of 4349 doz. bottles Ayer's Sarsaparilla, etc., but that the goods entered corresponded with the goods described in the invoice or entry, and that the invoice or entry was not made for the purpose of avoiding payment of the duty, or any part of the duty, on the goods so entered, nor was the entry of the goods undervalued for such purpose.

And, as to the sixth count, under section 109 which enacts, in effect, that if the oath made with regard to any entry is wilfully false in any particular, all the packages and goods included in such entry shall be forfeited : I find as a fact that, between the 23rd May, 1882, and the 22nd May, 1885, there was not imported and introduced, for use in Canada, patent medicines and medicinal goods consisting of 4349 doz. bottles Ayer's Sarsaparilla, etc., with intent and design of defrauding the revenue ; and, therefore, that no person, with intent and design of defrauding the revenue of

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Canada, did make, or could have made, oaths with regard to the entries, therein representing that portions of the said goods consisted of crude drugs and materials in bulk of which the said patent medicines were compounded, they well knowing the said representations and statements to be wilfully false and untrue.

The Crown, therefore, has failed to establish the charges in the informations against the Ayer Co., i.e., that the goods seized were illegally imported, or that they were undervalued, or that the entries did not correspond with the invoices, and that the oaths or affirmations made in entering them were untrue. There being, therefore, no foundation for the seizure of the said goods, I order and adjudge that they be forthwith restored to the claimants, and the information *in rem* dismissed with costs.

Furthermore, the charge of undervaluation not being sustained, it follows that there were no goods illegally imported into Canada, and that there are no unpaid duties for which the claimants are liable; the information *in personam*, therefore, must also be dismissed with costs.

After the evidence had been gone through, the counsel for the Crown applied for leave to amend his pleadings so as to charge the claimants with illegally importing medicinal preparations in bulk, but I was of opinion that, under the peculiar circumstances of this case, I should not allow this amendment, but that the case should be decided on the informations, pleadings and evidence as they appeared at the hearing. I am now of opinion that had I allowed the amendment, in the view I take of the case, it would not have altered the result of the judgment I am now delivering herein.

Informations dismissed with costs.

Solicitors for plaintiff: *O'Connor & Hogg.*

Solicitors for defendants: *McMaster, Hutchinson & Weir.*

Coram TASCHEREAU, J.

1887
June 16.

WILLIAM CHARLAND (CLAIMANT)......APPELLANT;

AND

HER MAJESTY THE QUEEN............RESPONDENT.

Expropriation of land for the purposes of a Government railway—Potential advantage of railway to remaining property.

On appeal from an award of the Official Arbitrators, the court, in assessing the amount of compensation to be paid to the owner, declined to take into consideration any advantage that would accrue to the property if a siding connecting the property with the railway were constructed, as there was no legal obligation upon the Crown to give such siding, and it might never be constructed.

APPEAL from an award of the Official Arbitrators.

The claimant, a portion of whose property had been expropriated for the purposes of the St. Charles Branch of the Intercolonial Railway and the residue thereof injuriously affected by its construction, put forward a claim against the Dominion Government for damages so sustained by him, amounting to the sum of $37,273.00. This claim was referred to the Official Arbitrators for investigation and award, and, having taken evidence on behalf of both parties, they awarded the claimant $4,155.61 with interest from the date of expropriation.

From this award the claimant appealed to the court.

The appeal was heard by Mr. Justice Taschereau upon the evidence before the Arbitrators and new evidence taken before himself.

Belleau, Q.C., for claimant;

Hogg for respondent.

TASCHEREAU, J. now (June 16th, 1887,) delivered judgment.

In this case the claimant, owner of a ship-yard at

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Lévis, had 31,776 feet of his land expropriated for the use of the Intercolonial Railway.

The amount claimed is $37,273, the amount tendered was $1,898. The reference to the Arbitrators is dated 26th May, 1884, and on the 16th May, 1885, the suppliant was awarded $4,155.61 with interest from date of expropriation, viz.: August 1st, 1883.

The present appeal is by the claimant.

There were in all three lots (A, B and C) expropriated. The following is a summary of the evidence on behalf of the claimant:—

Narcisse Rosa testifies that lot A contains 11,481 feet, of which 7,761 were expropriated,—leaving 3,780 feet south of the railway of no use to the claimant. On this lot there was a reservoir which was destroyed by the railway. There is difficult access to the property since the railway was built. He estimates $1.20 per foot for land expropriated.

As to lot B, he says 4,436 feet were expropriated on which a shed has been demolished, value $650. He estimates the land in this lot at 45 cents per foot.

As to lot C, this lot has a total area of 42,258 feet, whereof 16,639 feet have been expropriated; leaving on the north an irregular lot of 17,621 feet, and one to the south of 8,828 feet. He values the land expropriated here, including damages, at 42 cents per foot.

On cross-examination this witness values the whole property at 18 cents per foot.

As to the tannery, he says it was worth $10,000 at the time of the expropriation, and he estimates the damages at $8,000 or $9,000.

The value of the reservoir, in his opinion, is from $1,800 to $2,000; and the damages resulting from the obstruction of three streets, he puts at $3,000. He thinks the fire risk has been increased.

H. Moore values lot A at 90 cents a foot, of which

2,250 feet are rendered valueless by the expropriation, loss 90 cents. On the hill he says, 1,530 feet are left which were worth, prior to the passing of the railway, 90 cents, now only worth 12 cents. The loss of the reservoir he puts also at $2,000.

Lot B, he values at 50 cents per foot, and the shed at $500 or $600.

He has known lot C for a long time, having been foreman in the adjoining yard. This lot he values at 40 cents a foot, especially on account of the stream. The damages to the tannery he puts at $9,000.

Joseph Jolicœur of Lévis, carpenter, says he would value lot A at 90 cents before the railway, and what is left south is now almost useless. It would cost $2,000 to replace the reservoir on lot C. Two streets, viz.: Couillard and Joliette, are completely blocked, and he estimates the damage arising therefrom at $2,200.

Lot B, at the time of the expropriation, he says, was worth 50 cents per foot, a shed destroyed thereon was worth $600.

Lot C, he values at 40 cents to 45 cents per foot. What is left to the south is now worth nothing. The difference in value between what is left north is, that what was worth 45 cents is now only worth 15 cents.

The damages to the tannery he estimates at $9,000; and the actual cost of such tannery he puts at $16,000.

Mr. Charland, sr. values lot A at 90 cts. per foot; loss of reservoir he puts at $700. Lot B, he values at 50 cts. per foot, and shed at $700. Lot C, at 45 cts. per foot. Damage to the tannery he puts at $7,000.

Clément Giguère, ship carpenter, knows the property, having worked on it for years. Lot A, he values at $1.00 per foot; the loss of reservoir at $2,000. Lot B, 50 cts. per foot; the shed $600.

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Lot C, he puts at 45 cts. per foot, including damages. As to tannery, he says the railway has caused it serious damage.

Rigobert Bourget's evidence may be summarized as follows:

Lot A valued at......................$	1.00	per foot.
Lot B " "......................	.50	"
Lot C " "......................	.45	"
Damages caused by obstruction of streets............................	2,000.00	

Charles Napoléon Robitaille's as follows:

Lot A....................................$	1.20	per foot.
Lot B....................................	.50	"
Lot C....................................	.50	"
Reservoir................................	2,000.00	
Streets..................................	2,000.00	

Henry Black's as follows:

Lot A....................................$	1.00	per foot.
Lot B....................................	.75	"
Lot C....................................	.95	"
Streets..................................	10,000.00	
Tannery..................................	8,000.00	
Reservoir................................	2,000.00	

Antoine Rousseau's as follows:

Lot C at 35 to 40 cts. per foot.

Shed $450.

Street obstruction, he says, makes access difficult.

Raymond Blakeston values lot A at 75 cts. per foot, lot B at 40 cts. per foot. Shed on lot B at $600, and lot C generally at 25 cts. per foot, but 40 cents per foot generally for expropriated land. The damages caused by obstruction of streets he puts at $100 per year.

In his estimate he did not include fire risks, and has no knowledge of the reservoir. He was receiving $10 a day from the Government.

Joseph Gingras gives evidence as to the decrease of ship-building. He thinks there is lots of room for the tannery, but puts no valuation upon it; and he knows little about the property, except what knowledge he has acquired in his visit for the purposes of this case.

Arthur Levesque proves that the shed is worthless; he values it at $30, and says the means of egress are not as good as before.

J. B. Bélanger states that the shed is worth but $100; and Herménégilde Bourassa was heard as a witness to prove the valuation rolls of the corporation.

Isidore Bégin, a farmer, states that the railway is no disadvantage, and values land at 10 cts. a foot. Roads are better since the railway. He compares this property with other properties abandoned for ship-building purposes, he admits he does not know as much of the value of a ship-yard as he does of building lots. He considers the railway an advantage because he thinks the Government will give claimant a siding.

He does not know about risks from fire.

Joseph Lavoie says the railway is no nuisance, but he had never been on the property before the week prior to giving his evidence.

Amable Savard thinks the railway no nuisance. He gives no figures.

Alphonse Demers puts lot C at 6 cents per foot. He does not know much of the value of such properties.

George Lemelin, a store keeper of St. Roch, Quebec, but who was formerly a ship-builder, says he visited the property twice for the purpose of giving evidence. He thinks the yard is now large enough for a tannery, and values the damages at $630 for all. He was brought as a witness by Berlinguet. He thinks the railway an advantage with a siding.

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Olivier Rochette, tanner, says the railway does not interfere with claimant's tannery, and would consider it an advantage with a siding.

Louis Julien, tanner, corroborates the last witness.

Gaspard Germain, tanner, says he visited the ground with Rochette and Julien, and that, with a siding, the railway should be considered an advantage. Joliette street is bad and steep; he says lot C, in his opinion, would have been good land to dry leather on.

Benjamin Bilodeau says the reservoir is covered by railway embankment. The shed he values at $100. He says the ground east of the tannery is swampy.

Désiré Guay, tanner, visited the property in company with other tanners. He says the railway is no interference with the tannery.

George Delisle, tanner, speaks to the same effect, as preceding witness.

Onésime Beaudoin visited the property twice for the purpose of giving evidence. He values ground expropriated at 5 cents a foot. Whole property worth $12,000 to $15,000. He thinks the railway an advantage, provided a siding is put in.

Edouard Demers, the agent for the Crown, says he made a tender of 6 cents per foot to claimant for the land expropriated, amounting to $1,863.66 for property taken in that locality for the railway.

W. B. Mackenzie proves the tender of $1,836.12.

Charles Guillaume Charland, and Guillaume Charland were called, but their evidence has no bearing on the case.

François Robitaille was also examined as to condition of the hills, and says they are good. The Jolliette one was improved lately by Government.

Arthur Samson and Godfroi Bégin give similar evidence, but add that the railway might be considered a slight inconvenience.

In rebuttal, witnesses Germain Richard and Napoléon Marquis were examined as to swampy nature of the ground east of the tannery.

William Lambert says since the hill has been repaïred by the Government it is much better, but he is still of opinion that claimant suffers inconvenience from the crossing of the railway.

Joseph Jolicœur corroborates what the last witness says, and says a sum of $200 a year would compensate claimant, but on cross-examination his estimate vanishes.

John Hugh Powell says that with the hills as at present, the claimant is damaged some $300 or $400 a year.

Upon this evidence, I have come to the conclusion that claimant is entitled, on lot A, to 7,701 feet at 50 cents............................$3,850.50
Reservoir destroyed.............................. 500.00

$4,350.50

In the 50 cents I include damages to 3,970 feet of land rendered almost worthless, also damages from the crossing of the railway track and risks of fire.

As to lot B, I allow 4,436 feet at 25 cents....$1,109.00
Shed destroyed.................................... 100.00

$1,209.00

And on lot C, I allow 19,639 feet expropriated at 20 cents...................................$3,927.80
Damages to 26,549 feet at 5 cents............. 1,327.45

$5,255.25

This includes damages to tannery.

The total therefore is $10,814.75. As to any advantage arising to the property from the railway, all the witnesses who express the opinion that the railway is an advantage do so upon the condition that the rail-

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way authorities will give a siding to claimant on his property. Now he is not entitled to it, the railway has never offered it, and he will probably never get it.

It must be remembered that he had the benefit of the railway before this expropriation, although the station was then one mile further away than the new one.

As to the valuation rolls and the law points raised in this case, I refer to what I said in the *Paradis* case (1).

The appeal will therefore be allowed with costs. The award will be increased to $10,824.75 with interest from date of expropriation (15th August, 1883), and the claimant will have the costs of arbitration.

*Appeal allowed with costs.**

Solicitors for claimant: *Belleau, Stafford & Belleau.*

Solicitors for respondent: *O'Connor & Hogg.*

1889
April 30.
Patterson, J. on Appeal.

*On appeal to the Supreme Court of Canada by the Crown, the judgment of the Exchequer Court was affirmed.

PRESENT: Strong, Fournier, Taschereau, Gwynne and Patterson, JJ.

The following judgment was delivered by PATTERSON, J.

This appeal, like the appeal of *Guay* (2), is entirely upon the evidence. We are concerned with the judgment of the Exchequer Court, which increased the award of the Arbitrators from $4,155.61 to $10,824.75.

It cannot be said that the judgment is not fully supported by the evidence.

The estimates of the witnesses on one side and the other differ very widely, and consistently with the evidence before the court, the amount awarded might have been very much less or very much more. The grounds on which the witnesses based their judgment also differed. I do not think there has been shewn any matter of principle in which the judgment is fairly open to blame, or any oversight of material consideration. In my opinion, we should dismiss the appeal.

STRONG and FOURNIER, JJ. concurred in the above judgment.

The following dissentient opinion was delivered by GWYNNE, J.—I have been unable to see in the evidence, in this case, sufficient to

(1) Reported *ante* p. 191.

(2) 17 Can. S. C. R., p. 30.

justify me in saying that I am satisfied that the Official Arbitrators have not, by their judgment, awarded to the claimant sufficient compensation for the land taken from him for the railway which has been constructed through his property, and for the damage done thereby to the land not taken. I do not know anything more difficult than for judges sitting on appeal to pronounce damages awarded in a case of this kind, by competent persons who have had an opportunity of inspecting the premises and extending the weight to be attached to the evidence of the several witnesses examined before them *vivâ voce*, to be insufficient. My experience leads my mind to the conviction that arbitrators in these cases of expropriation, always lean, as I think is natural that they should, in favor of rather than against the owner of the property taken; and I think that their decision upon a question of the amount of compensation payable to such owner, is entitled to as much weight as would that of a jury be on a similar question; and I confess that I feel myself no more justified in increasing the damages awarded in the former case than I would in the latter.

The quantity of land taken in the present case from the claimant was in the whole about ¾ths of an English acre, out of a property containing about 8¾ acres, used as a ship-building yard, on the shore near Lévis, in the Province of Quebec. The claimant, as is usual in cases of expropriation of land for public purposes, demanded the exorbitant sum of $37,273.00, as the amount to be paid to him for the ¾ths of an acre taken and the damage done thereby to the land not taken, such amount being much more than double the value of the claimant's whole property there situate, with all buildings thereon, as the same was assessed for municipal purposes. The Arbitrators awarded the claimant $4,155.61 in full. Upon appeal to the Court of Exchequer, that court increased such sum to $10,824.75; and from this latter judgment this appeal is taken.

Before the construction of the railway, the claimant's property from which the ¾ths of an acre was taken, was assessed at $13,500, and, after the construction of the railway, at $15,000. This increase in the assessed value, immediately upon the construction of the railway, would seem to afford some evidence that the railway had not depreciated the market value of the property. The witnesses, however, which were produced by the claimant, supported the claimant's demand; as is also customary in these cases, by placing upon the land taken and upon the depreciation alleged to be caused to the land not taken, not only an exorbitant value, but one which, from the variation in the estimates of the several witnesses, appears to be wholly speculative and not founded upon any substantial basis. This evidence, I confess, appears to me to be much less reliable than that arrived at by the yearly assessments made for municipal purposes. The latter may, it is true, not be always up to the full value of the property, but the experience, I think, of most persons, if put upon their oath, would be that the assessed value is more frequently too high than too low, and that the municipal authorities never do assess property so low as at half its par value, much less at ¼ or ⅕ or ⅙ of

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Gwynne, J. on Appeal.

what the claimant's witnesses declare to be the value of his property at its fair market value. It is said, on the other hand, that the evidence on the part of the Government is wholly unreliable and depreciatory of the claimant's property. That may be so, whether it be so or not I cannot say; but however this may be, I do not think it can be said to err on the side of depreciation as much as the evidence of the claimant's witnesses does on the side of exorbitant excess. The Arbitrators, however, were, I think, the proper persons to estimate this evidence, which they had the advantage of doing upon inspection of the premises; and, for my part, I can only repeat that I can see nothing which satisfies my mind that the judgment they have pronounced is erroneous. I am of opinion that our judgment in the present case should be similar to that pronounced by us in *Paradis* v. *The Queen* (1), between which and the present case I can see no substantial difference.

The appeal, in my opinion, should be allowed with costs, and judgment given for the amount as awarded claimant by the Official Arbitrators.

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(1) Reported *ante* p. 191.

Coram HENRY, J.

1887
Oct. 10.

MICHAEL STARRS, JOHN HEBERT, AND JOHN LAWRENCE POWER O'HANLY (CLAIMANTS)..................APPELLANTS;

AND

HER MAJESTY THE QUEEN............RESPONDENT.

Contract for construction of a public work—31 Vic., c. 12, s. 7—Material change in plans and specifications—New contract—Waiver.

The appellants entered into a contract with the Dominion Government to construct a bridge for a specified sum. After the materials necessary for its construction according to the original plans and specifications had been procured, the Government altered the plans so much that an entirely new and more expensive structure became involved. The appellants were then given new plans and specifications by the Chief Engineer of Public Works, the proper officer of the Government in that behalf, and were directed by him to build the bridge upon the altered plans, being at the same time informed that the prices for the work would be subsequently ascertained. They thereupon proceeded with the construction of the bridge.

Under the provisions of the written contract, the Chief Engineer was required to make out and certify the final estimate of the contractors in respect of the work done upon the bridge; and upon the completion of the bridge, a final estimate was so made and certified, whereby the appellants were declared to be entitled to a certain amount. The appellants, however, claimed to be entitled to a much larger amount, and their claim was ultimately referred by the Government to the Official Arbitrators, who awarded them a sum slightly in excess of that certified to be due in the final estimate.

On appeal from this award,

Held:—(1.) That sec. 7 of 31 Vic., c. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the Department [of Public Works], or shall he held to be acts of the Minister [of Public Works] unless signed and sealed by him or his deputy, and countersigned by the Secretary," only refers to executory contracts, and does not affect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him.

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(2.) That the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim before the Arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants.

APPEAL from an award of the Official Arbitrators allowing the appellants the sum of $44,279. as due by the Crown upon a contract for the construction of a bridge over the Ottawa River, at Des Joachims.

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

The appeal was heard before Mr. Justice Henry.

O'Gara, Q.C. for appellants ;

Hogg for respondent.

HENRY, J. now (October 10th, 1887,) delivered judgment.

This is a case brought by appeal from an award made by the Official Arbitrators, which, after certain necessary recitals, is as follows :—" Now therefore we the " said James Cowan, William Compton, Joseph Simard " and Henry Muma, the Official Arbitrators aforenamed, " having taken upon ourselves the charge of the said " arbitration, appraisement, determination and award, " and having heard and considered the allegations and " evidences of the parties and their witnesses, do hereby " make and publish this our award of, and concerning, " the said claim. We do adjudge and determine that " the said Michael Starrs, John Herbert, and John " Lawrence Power O'Hanly, claimants, be paid the " sum of forty-four thousand two hundred and seventy-" nine dollars, in full satisfaction of their claim, and we " do further adjudge that the respondent pay the costs " of this arbitration." From that award and finding the appellant appealed to this court. This award was construed differently by the counsel for the respective

parties,—the counsel for the appellant contending that the award was made as for a balance due to the appellants, whilst the counsel for the respondent contended that it was no more than an award of the value of the work done by the appellants, from which payments on account thereof should be deducted. Such difference existing, it was agreed that an appeal should be taken by the claimants to this court.

An argument was had before me, and affidavits were read, made by the Official Arbitrators, stating that their intention was to award only as to the value of the structure in question, leaving it to the Department of Public Works to charge against it the amount of payments made.

Had it been an action on an award covered by a submission authorizing it, I do not see that I would have been justified in receiving the affidavits of the Arbitrators as to their *intention*; but, considering the whole case submitted to the Arbitrators was open to appeal, I felt bound to conclude that the award should not, under the circumstances, be sustained; and having adjudged the whole case under the evidence before the Arbitrators, which was argued subsequently before me, I now proceed to give judgment thereon.

The case is one of no small difficulty. The circumstances and terms under which the bridge in question was built, are, to say the least, unusual and peculiar. During the year 1882, the Government determined to build a bridge across the Des Joachims rapids on the Ottawa River, and a contract, with plans and specifications, was entered into for its erection by the appellants on the 8th September of that year, for the sum of $25,300. During the following winter, the appellants got out and had ready all the materials and had entered into a sub-contract for the erection and completion of the bridge. The materials were procured at a cost

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of $15,000, and the sub-contractor agreed to complete the erection of the structure for $5,000, which, the appellants contend, would have left them a profit of $5,000. During the following month of August, the sub-contractor having commenced the work of erection, the Department of Public Works, on being notified, sent an engineer to locate the site of piers and abutments of the bridge. He ascertained that the original location, made by G. F. Austin, who was employed for that purpose by the said Department, was unsuitable and that the plans and specifications on his survey could not be acted on, and, having so reported, the Chief Engineer, with the sanction of the Department, changed them to such an extent that an entirely new and much more costly structure became involved. The contractors were given new plans and specifications by Mr. Perley, the Engineer-in-Chief, and were directed to build the bridge by them, and were informed that the prices for so doing would be subsequently ascertained. The contractors agreed to do so, and proceeded with the work with all reasonable despatch. The evidence of several witnesses, including that of Mr. Perley, shows most conclusively that it was agreed that the bridge should be built on the agreement thus made, and that the original agreement, plans and specifications should be abandoned. Had the contractors insisted upon the terms of the first agreement, which could not be carried out, and refused to build the bridge under the second contract, the evidence shows that they would have been entitled to recover damages to the extent of several thousand dollars ; but, having readily, at the instance of the Engineer, surrendered their legal rights in that respect, they are entitled to a fair and reasonable consideration of their claim. It was well known and understood, by all parties, that the new structure would be a totally

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different work from that at first agreed upon, and must necessarily cost a much larger sum of money. Under the agreement last entered into, I cannot see how the contractors can claim anything as damages for losses sustained by the failure of the Department to continue the original contract, for any claim of that kind was waived by their entering into the new contract; and, on the other hand, the continued reference to it by the Engineer and others is, to my mind, equally unjustifiable. The structure to be built was as essentially different from that originally agreed upon as if the one was to have been built with wooden pillars and wooden superstructure with pillars and spans of certain dimensions, and the other of a more costly material with different shaped and sized pillars, and with spans of different lengths.

Hamel, the engineer who laid out the work under the new plan, says:

There was evidently an error in the original plans. In September, 1883, I got orders to change the site of the piers. I found original plan would not do. Townson, was a competent man for Inspector. He is a curious man, but honest; a little contrary.

Perley says:—

In August, 1883, there was some difficulty as to finding centre line; I got Austin to go and pick up centre line and the work proceeded. When we found that Austin's soundings were wrong, we took fresh soundings, and revised the bridge and readjusted the spans to suit the altered circumstances. I never saw the work, but I was in the locality before the work was begun. The contractors were paid the progress estimates as the work went on. I never had such radical changes as there were in this contract. Before making out my final estimate, I asked the contractors for a detailed statement of their claim, but I did not get it before making final estimate.

The radical changes spoken of by Perley are proved, by others, to have been so unlimited as to be a total change from the first contract.

If then, such was the case, it appears to me that the

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conduct of Perley, adopted by the Department, in agreeing in the loose way he did with the contractors, is not to be commended. To agree with parties, as he did, to build the bridge according to plans not then made, but to be subsequently furnished (as they were from time to time) with the understanding they were to be paid fairly for the work, was, to my mind, not in the interests of the public, and, as it has so far turned out, not in the interests of the contractors. What, it appears to me, should have been done, when through Austin's negligence and grossly improper survey it was found that the first contract must be abandoned, was to have, as at first, plans and specifications of the substituted structure made and submitted to the contractors, and a price agreed upon for the whole work. In place, however, of adopting that course, Perley agreed with the contractors to build the bridge according to plans and specifications to be furnished from time to time, without having fixed any schedule of prices, or in any other way fixed the amount to be paid. An inspector, named Townson, was appointed by the Department, and the contractors had to do the work as he ordered; and, according to the evidence in the case, he unnecessarily caused a pretty large increase in the expenditure. To refuse to repay the contractors for the amount of their expenditure would, I think, be unjust. It is shown that he (the inspector) refused to accept birch timber, required for one or more purposes of the structure, which was provided in the neighbourhood at 50 cents a foot. The contractors tried to get tamarac, but after diligent search could not get it large enough; and the contractors were finally obliged to get birch timber from Kingston at a cost of $3.00 a foot. Subsequently it was decided on, and admitted, that the birch timber rejected by the inspector was as good—if not better—

than that imported from Kingston at eight times the cost. I have no reason to doubt what Hamel said,— that the inspector is an honest man but a curious one, and "*a little contrary.*" He was, however, the agent of the Department, and, if by his means additional outlay was caused, his principal, and not the contractors, is to bear the loss; and these remarks apply to other parts of the works. I have read over and considered the evidence most carefully, and have had no little difficulty in arriving at a conclusion as to the amount the contractors should be awarded. I have the evidence of two of the appellants, as well as other witnesses, showing them entitled to more than the amount awarded by the Arbitrators; and there is but little, in my opinion, to invalidate it. It is shown and admitted that the locality where the bridge was built was very difficult of access, and that the cost of getting supplies and materials there was very great. Perley never saw the work, and knew nothing from personal inspection. He had merely Hamel's estimate of quantities to go by, and he (Perley), by a sort of comparative estimate with other sites, undertook to make up a final estimate. I cannot concede that any such estimate is reliable, or likely to do justice either to the public or to the contractors. Perley says that before making it up he applied to the contractors for a detailed statement of their claim, but that he made up the estimate before they furnished their statement. I have the right to conclude that such a statement was necessary to enable him to make up a fair estimate; and I think he was right in seeking some information to guide him, knowing nothing personally of the matter; but why did he not wait for the information he must have felt he required, instead of acting upon the idea that a comparison with works done under wholly different conditions would be a proper basis to make up an estimate? That an

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engineer sitting in his office can do justice in such cases is more than can be imagined or expected. By such an estimate an engineer is presumed to know, by personal inspection, or otherwise, the subject-matter he deals with. In a case where schedule rates have been agreed upon and measurements duly returned, the engineer has something like reliable data upon which he can estimate. In this case he had the report of quantities from Hamel, but what had he to go by as to the cost of the materials and work? Nothing whatever; and by the contract under which the bridge was built, where no prices had been agreed upon, how could he undertake to decide as to the sum the contractors were entitled to without getting any statement from them of the amounts paid for work and materials, and the value of them, upon which to base his estimate? It is possible that an engineer might come to a correct conclusion, but it is not necessarily so; and it cannot be considered of much value when it is shown, by a great amount of evidence, that it should not be so considered. The Arbitrators—nominees of the Government—did not consider themselves bound by the estimate, and awarded beyond the amount of it. How their conclusion as to the amount found by them was formed, or upon what basis they made up the amount in the award, I have no means of ascertaining. I have no reason to believe that they are engineers or bridge builders, or that any of them inspected the bridge so as to form any idea as to its actual cost of erection. Under the circumstances, they had, as I have, nothing but the evidence to be guided by. If they, as laymen, take a wrong view of the position of the appellants' claim, under the evidence, of the contract, and as to its fulfilment, it is my duty to correct it. If they had based their decision as to the claim of the appellants' solely on the second con-

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tract, I cannot see how, under the evidence, (and that is all we have to go by) they did not award a larger sum to the contractors; and I am of the opinion they must have considered the first contract and made some comparative estimate between it and the second one. As to that I can but conjecture, but under any circumstances I feel bound to decide as the evidence points:

According to it the work cost the contractors	$50,290.21
I think the contractors Starrs and O'Hanly are, in addition, entitled to be paid for their time while employed *i.e.*, nearly two years. I have no evidence as to the rate, but I think they should be awarded at least......	3,000.00
	$53,290.21
From which deduct payments...........	41,896.50
And there is a balance of..................	$11,393.71

The fairness of the expenditure, as above, was not contested in any way, but it was assumed that the contractors were to be bound by a valuation of the Engineer estimated by a measurement of the works after completion.

I can find no evidence that such was the contract; but, on the contrary, the contractors were to be paid as might be subsequently settled on. No settlement of that kind was made, and, therefore, the work should be paid for according to its reasonable cost and value. No complaint is made that the contractors did not work economically; and, from the evidence on both sides, I conclude they did. It is admitted that they executed the work faithfully, and erected a first-class bridge of its kind, under circumstances of extreme difficulty and risk, and under peculiarly embarrassing conditions; and I consider them fully entitled to

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get at least the remuneration I propose to decree to them,—and I think they have given good value therefor.

At the argument before me, however, it was contended on the part of the respondent that the appellants could not recover,—

1st—Because there was no contract in writing;

2ndly—No certificate of the Engineer.

To these objections many answers might be given. The first objection is, however, an admission of the abandonment of the first contract, and that the work was all done under the second. This is not a claim for damages on an executory contract, but one under an alleged contract for work and labor and materials, done, performed and provided and accepted. Now sec. 7 of 31 Vic., 12, provides that

> No deeds, contracts, documents or writings shall be deemed to be binding upon the Department [of Public Works] or shall be held to be acts of the said Minister [of Public Works], unless signed and sealed by him or his deputy and countersigned by the Secretary.

This I construe, in respect of the contracts, to mean that mere executory contracts cannot be enforced unless they conform to the requirements of the statute; but, in my judgment, that provision does not affect the right of a party to recover for goods sold and delivered, or for work, labor and materials done, found supplied and accepted.

But, under the circumstances in this case, I think the objections come too late.

Let us consider what was done after the last estimate was made by the Chief Engineer. The contractors, being dissatisfied with the sum mentioned in it, offered to refer the matter to him as an arbitrator. He declined to act as such, and recommended that the claim should be referred to the Official Arbitrators. That recommendation was adopted by the Minister of Public Works,

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and on his recommendation an order-in-council was passed to carry it out. The whole of the papers in the Department were referred to the Arbitrators for their information and guidance. The Arbitrators met, and both parties produced their witnesses, who were heard and examined and the evidence taken in writing. It is not suggested that any objection to the submission was made; but, on the contrary, as shown by the minutes, the claim was fully considered and disposed of by the Arbitrators without any such objection being made. No cross-appeal is made from the award on the part of the respondent, and, in the absence of any such appeal, I consider that all I have to do is to review the finding of the Arbitrators; and, as empowered by the statutes, to decide the matter in controversy as they did. The law, to my mind, is well settled that any provision of a statute favourable to a party as to his civil rights may be waived. It is so laid down in *Park Gate Iron Co.* v. *Coates* (1), and other cases. If the Minister claimed to defend an action, such as this brought in this court, on the grounds that the contract was not in writing, not properly executed, or the absence of the Engineer's certificate, he must have pleaded such as a defence; but so far from making such objections in this case, he waived any such defences, and, on his own recommendation and that of the Engineer, procured the reference to the Arbitrators; and, by counsel representing him, appears before the Arbitrators, and contests the claim as filed in his Department and submitted to the Arbitrators with all the accounts and documents to be dealt with. He is, therefore, in my opinion, estopped as to these objections.

By sec. 35 of 31 Vic., c. 12, the Minister is authorized to refer such claims to the Official Arbitrators, and it provides that the award so made shall be binding

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unless appealed from. Had there been no appeal, the award, as construed by the counsel for the respondent, would have been binding; and I conclude that a decision of this court on an appeal must be equally binding.

For the reasons given, I am of the opinion that under the evidence the appellants are fully entitled to the amount to be awarded them. My only doubt is whether I have done right in not according a higher amount; but the whole affair was so loosely conducted, and the evidence not being as minute as it might have been, I feel no little difficulty in deciding that amount.

I am, however, of the opinion that the appellants have shown themselves entitled to recover the sum of fifty-three thousand two hundred and ninety dollars and twenty-one cents, and I give judgment in their favor for that amount with the costs before the Arbitrators and this court*.

Appeal allowed with costs.

Solicitors for appellants : *O'Gara & Remon.*

Solicitors for respondent : *O'Connor & Hogg.*

* On appeal to the Supreme Court of Canada by the Crown,—

Held, reversing the judgment of Henry, J. in the Exchequer Court, (Fournier, J. dissenting,) that the claim came within the contract and the provisions thereof which made the certificate of the Chief Engineer a condition precedent to recovery ; and, it appearing that such certificate had not been obtained, the claim must be dismissed. But the Crown having referred the claim to arbitration, instead of insisting throughout on its strict legal rights, no costs should be allowed.

See the case on appeal in 17 Can. S. C. R. 118.

Coram FOURNIER, J.

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Nov. 7.

J. N. POULIOT................(CLAIMANT) APPELLANT;

AND

HER MAJESTY THE QUEEN.... ....RESPONDENT.

Injury to land from flooding caused by construction of railway—Loss of profits from product of farm—Application to set aside award of Official Arbitrators under 44 Vic., c. 25, s. 43—Effect of such enactment as to time in which application may be granted—Practice.

Held :—(1). In assessing damages for injury occasioned to a property by the construction of a railway, the annual loss of profits since the commencement of the injury, as well as the permanent decrease in the value of the property, must be taken into consideration.

(2.) Under the provisions of 44 Vic., c. 25, s. 43, an application to the court for an order to set aside an award of the Official Arbitrators must be made within three months after the party applying has had notice of the making of the award, but the order need not be granted within that period.

Semble,—Where an arbitrator or assessor to whom a claim is referred by the Crown for report is empowered to take oral evidence, he cannot proceed to take such evidence without swearing the witnesses and giving each party an opportunity to cross-examine them.

APPEAL from an award of the Official Arbitrators.

The appellant, Pouliot, was the owner of a tract of farm land in the parish of St. Germain de Rimouski, P.Q., which was damaged by water coming from the ditches and culverts of the Intercolonial Railway,—some 18 or 20 acres of his land being flooded during the sowing season.

Pouliot claimed compensation from the Dominion Government for the injury thus occasioned to his property, and the claim was first referred to Mr. Simard, one of the Official Arbitrators, to report to the Department of Railways and Canals the amount of the damages sustained by the claimant. Simard reported that such damages amounted to between $450 and $500.

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Pouliot declined to accept the amount of compensation so assessed by Simard, and a reference of the claim was then made to the Board of Official Arbitrators for their investigation and award. In their award, the Official Arbitrators allowed the appellant the minimum amount of compensation fixed by Simard, viz., $450, with interest, in full satisfaction for all past, present, and future damages. From this award Pouliot appealed to the court.

The appeal was heard before Mr. Justice Fournier.

Gormully for the appellant ;

Hogg for the respondent.

FOURNIER, J., now (November 7th, 1887) delivered judgment.

Le réclament a appelé de la sentence rendue, par les Arbitres Officiels, le 30 décembre 1886, sur sa demande d'indemnité présentée au Département des Chemins de Fer de la Puissance,pour dommages causés à sa propriété située dans la paroisse de Ste-Anne de la Pointe-au-Père, comté de Rimouski. Il se plaignait, dans sa requête, que les travaux du chemin de fer Intercolonial ont eu l'effet d'amener et de faire refluer une grande quantité d'eau sur une étendue de dix-huit à vingt arpents de sa terre, de ruiner sa récolte de foin et de grain, et de rendre cette partie de sa terre impropre à la culture, en conséquence du séjour prolongé des eaux et aussi de la quantité de sable et de gravois apportés par les eaux.

Cette réclamation fut d'abord référée à M. Simard, l'un des dits Arbitres Officiels, qui, après enquête et examen des lieux, exprima, dans un rapport qui est produit, son opinion que les dommages soufferts par l'appelant pouvaient valoir de quatre cent cinquante à cinq cents piastres. L'appelant, trouvant ce rapport contraire à la justice et à la preuve, obtint une référence de sa cause à tous les membres du bureau des

Arbitres Officiels qui prononcèrent, le 30 septembre 1886, une sentence accordant à l'appelant le minimum de dommages rapportés par l'arbitre Simard. C'est de cette sentence que le réclamant a appelé à cette cour.

Quoiqu'il n'ait pas été fait d'application spéciale pour faire déclarer nul le jugement de cette cour, en date du 10 juin 1887, ordonnant que la sentence des Arbitres serait considérée comme une règle de cette cour, à l'audition au mérite, le savant conseil de Sa Majesté, avant d'entrer dans l'examen des faits de la cause, a cependant soulevé l'objection que l'application, pour faire mettre la sentence de côté, n'avait pas été faite dans les trois mois, tel que voulu par la sec. 43 de l'acte 44 Vic., c. 25, après la publication de la sentence et avis donné aux parties. Cette prétention n'est pas fondée. La sentence est en date du 30 septembre 1886, et l'application faite par l'appelant, pour faire déclarer cette sentence une règle de cette cour, est en date du 20 décembre 1886 et porte le reçu-copie des conseils de Sa Majesté.

Avis de cette application paraît avoir été donné au Ministre des Chemins de Fer, en date du 27 du même mois, l'informant que cette application serait présentée à la cour le 10 janvier 1887. Ce jour là, elle fut présentée et jugement rendu—déclarant la dite sentence une règle de cette cour. Il est vrai, qu'à première vue, la date du 10 janvier 1887, jour de la présentation de la motion à cette cour, pouvait faire croire que l'appelant s'est présenté trop tard ; mais il faut remarquer que la loi ne dit pas que l'application devra être accordée dans les trois mois, mais qu'elle devra être faite à la cour dans ce délai. C'est ce qui a été fait et cela est suffisant, d'après la lettre du statut et d'après l'autorité de *Chitty's Archbold's Practice of the Queen's Bench Division* (1).

De plus, la présentation même de l'application et son adjudication ont eu lieu dans les trois mois de la date

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de la sentence ; car, d'après le *proviso* de la sec. 43, le temps de la vacance ne doit pas compter dans les trois mois de délai pour faire application. Les procédés, dont il s'agit, ayant eu lieu pendant la vacance de Noël, qui commence le 15 décembre et finit le 8 janvier, il faut déduire des trois mois qui ont suivi le 30 septembre, date de la sentence arbitrale, les vingt-quatre jours de la vacance, ce qui fait, qu'au dix de janvier, date de l'adjudication, le délai légal avait encore treize jours à courir. Il est en conséquence évident, que l'objection est mal fondée et elle est déclarée telle.

Au mérite, l'appelant a établi par plusieurs témoins, dont la preuve est restée sans aucune contradiction, que les fossés pratiqués de chaque côté du chemin de fer amènent, des côtés est et ouest, une grande quantité d'eau qui séjourne longtemps sur sa terre, dans les saisons du printemps et de l'automne et aussi dans les grandes pluies de l'été ; que cette eau entraîne avec elle une grande quantité de sable et de gravois, qui, en restant sur son terrain, ont eu l'effet de diminuer considérablement ses récoltes de foin et de grain. Ici, les travaux du chemin de fer sont tout-à-fait insuffisants pour permettre l'écoulement des eaux ainsi amenées par les fossés du chemin de fer ; qu'avant la construction de ces travaux, son terrain n'était jamais inondé ; que son terrain, qui était d'une grande fertilité et d'une valeur de deux mille à deux mille cinq cents piastres et donnait de trois mille cinq cents à quatre mille bottes de foin de première qualité, en donne maintenant au plus la moitié et d'une qualité inférieure et que son terrain a considérablement diminué de valeur. Il souffre de ces dommages depuis 1877.

Dans sa requête, il a déclaré que ces dommages ne peuvent être moins de deux mille piastres, s'il n'est pas fait de canaux suffisants pour faire écouler les eaux qui s'accumulent sur son terrain, et conclut à ce qu'il

lui soit accordé quinze cents piastres si des travaux sont faits pour faire écouler une partie des eaux et que, dans le cas contraire, il lui soit accordé deux mille piastres.

Le Gouvernement n'ayant pas jugé à propos de faire des travaux pour faire disparaître la cause des dommages, et cette cause étant permanente, il s'en suit, qu'à part des dommages annuels éprouvés par l'appelant, il a droit encore à une indemnité pour la diminution permanente de valeur causée à sa terre par les eaux qu'y font accumuler les travaux du chemin de fer Intercolonial.

La preuve établit qu'il y a diminution de moitié dans le revenu du foin.

Joseph Lavoie dit, qu'avant la construction du chemin de fer, l'appelant avait beaucoup de beau foin ; mais que depuis 1877, cette partie de la terre de l'appelant est devenue incultivable, ne vaut presque plus rien. Il estime la différence à trente voyages, ce qui équivaut à quinze cents bottes ; et ce qu'il en reste est du foin de qualité bien inférieure, c'est du foin d'eau et des mauvaises herbes pour une grande partie. Avant la construction du chemin de fer, ces prairies rapportaient du foin de première qualité.

La moyenne du prix du beau foin, dans la paroisse, est de huit piastres. Le foin récolté par l'appelant, depuis plusieurs années, ne vaut que quatre piastres. Une bonne partie de ce terrain ne peut être ensemencée, parce que l'eau y séjourne trop longtemps.

Zéphirin Lavoie a aussi prouvé que la diminution du foin a été de moitié.

Pierre St. Laurent ne l'a estimée qu'à un tiers, mais il porte les dommages en tout à quinze cents piastres.

Prenant la récolte au minimum, à trois mille bottes par année, valant huit piastres par cent bottes, une diminution de moitié présenterait une perte annuelle

de cent vingt piastres, ce qui formerait, pour huit ans, une somme de neuf cent soixante piastres.

Il y aurait encore à tenir compte du fait que l'autre moitié, qui peut être récoltée, maintenant ne vaut que quatre piastres par cent bottes; ce qui représenterait, encore pour huit ans, une autre somme de quatre cent quatre-vingts piastres, donnant pour le total de la perte annuelle, pendant huit ans, la somme de quatorze cent quarante piastres.

Le résultat auquel j'en viens, en calculant la perte annuelle, comme je l'ai fait, s'accorde assez bien avec l'estimation des dommages donnée par les témoins, variant de treize cents à quinze cents piastres.

Il faut aussi tenir compte de la diminution permanente de la valeur de la propriété—qui valait, d'après tous les témoins, avant la construction du chemin de fer, de deux mille à deux mille cinq cents piastres; maintenant elle n'en vaut plus que de mille à douze cents piastres, et cette diminution est due, comme le disent les témoins, à l'eau des fossés de la ligne du chemin de fer qui se répand dans les prairies et y entraîne de la terre, du sable et des gravois qui la rendent incultivable.

Sur les quatre témoins qui parlent de cette diminution, la majorité fixe cette réduction à douze cents piastres, au lieu de deux mille piastres, valeur avant la construction du chemin de fer. Il faudrait encore ajouter au montant des dommages annuels, une autre somme de huit cents piastres pour représenter la diminution de valeur de la terre; ce qui ferait en tout une somme totale de deux mille deux cent quarante piastres, pour dommages annuels pendant huit ans et pour diminution permanente de la valeur du sol.

Ces estimations sont bâsées sur une preuve positive, dans laquelle il n'y a aucune contradiction. Pas un seul des témoins de la Couronne n'a fait mention du

montant des dommages, ni de la diminution de valeur. Il est pour le moins extraordinaire, qu'en face d'une pareille preuve, M. l'arbitre Simard ait fait rapport à ses collègues qu'une somme de quatre cent cinquante à cinq cents piastres serait une ample indemnité pour les pertes souffertes par l'appelant ; mais on comprend mieux cette étrange conclusion après avoir lu son rapport qui accompagne la preuve qu'il a recueillie lui-même et qui est la seule preuve qui a été soumise aux Arbitres, ainsi qu'à cette cour.

Après avoir rapporté les évaluations des témoins, au lieu de se former une opinion sur la preuve, il adopte le procédé de questionner le voisinage et conclut comme suit :

> Dans mon opinion, la réclamation est exagérée, si je prends la valeur des terres dans les environs ; *d'après les informations que j'ai prises sur les lieux*, l'on m'a dit qu'une terre, de la superficie de celle du réclamant, pouvait être achetée pour douze cents à quinze cents piastres.

La chose ne serait pas extraordinaire, puisque M. Simard semble avoir laissé de côté toute question concernant les qualités du sol, pour ne s'occuper que de la superficie. S'il pouvait de lui-même faire une enquête *ex-parte*, avait-il le pouvoir de la faire sans mettre ses témoins sous serment et sans donner au réclamant l'occasion de les transquestionner ? Par un procédé illégal, il est arrivé à une conclusion injuste et manifestement contraire à la preuve prise sous serment.

Il est vrai que l'estimation que j'ai faite, d'après la preuve, dépasse même le montant de la demande ; mais je ne crois pas cependant devoir accorder le montant en entier, pour la raison que l'un des témoins, Pierre St-Laurent, différant d'opinion avec les autres, a évalué la totalité des dommages, diminution de la valeur et perte des revenus, à quinze cents piastres, et que d'un autre côté, l'évaluation de la perte des revenus à une

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moitié aurait pu être faite d'une manière plus précise et détaillée qu'elle ne l'a été.

Pour ces considérations, je crois devoir faire une réduction de deux cent cinquante piastres sur le montant demandé et n'accorder en conséquence que la somme de dix-sept cent cinquante piastres, tant pour les huit années de revenus perdus que pour la diminution permanente de la valeur de la propriété, avec intérêt depuis la date de la sentence arbitrale,—et les dépens tant de cette cour que devant les Arbitres.

Appeal allowed with costs.

Solicitor for Appellant: *F. X. Talbot.*

Solicitors for Respondent: *O'Connor & Hogg.*

Coram FOURNIER, J.

1888
Dec. 3.

ROBERT HENRY McGREEVY.. .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN.......... DEFENDANT.

Claim for balance of moneys due under contract—31 *Vic.* c. 13, *ss.* 16, 17, 18—*Change of Chief Engineer before final certificate given—Approval of final certificate by Commissioners—Waiver.*

By the 16th section of the Intercolonial Railway Act (31 Vic., c. 13) the Commissioners of that railway were empowered to build it by tender and contract. By the 17th section thereof it was enacted that "the contracts to be so entered into, shall be guarded by such securities, and contain such provisions for retaining a proportion of the contract moneys, to be held as a reserve fund, for such periods of time, and on such conditions, as may appear to be necessary for the protection of the public, and for securing the due performance of the contract." By the 18th section it was provided that "no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners."

The Commissioners entered into a contract with the suppliant, which, while containing a stipulation that all the progress certificates of the Chief Engineer should be approved by the Commissioners, made no provision for the approval of the final certificate by them.

Held:—That under the provisions of the 17th section it was in the discretion of the Commissioners to insert in, or omit from, the contract a stipulation requiring their approval to the final certificate of the Engineer; and that, in the absence of such stipulation from the written instrument, it must be assumed that the Commissioners did not regard it as necessary for the protection of the public interest, or for securing the due performance of the contract.

The suppliant entered upon and completed his contract during the time that F. held the position of Chief Engineer, but did not obtain a final certificate from him before his resignation from office. S. was appointed by order-in-council to succeed F., and, having entered upon the duties of the office, it became necessary for him to investigate the suppliant's claim along with others of a similar character. Thereafter he made a report to the Department of Railways and

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Canals (the Minister of which Department then represented the Commissioners, whose office had been abolished) which did not certify that the whole work had been done and completed to his satisfaction, as required in the final certificate by the terms of the contract, but in general terms recommended that suppliant be paid $120,371 in full settlement of his claim. After receiving this report the Government allowed a long period of time to elapse before taking any further steps in the matter.

Held:—That S., being regularly appointed Chief Engineer, was competent to give the final certificate required by the contract; that his report was available to the suppliant as such final certificate; and that, had the approval of the certificate by the Minister, so representing the Commissioners, been necessary, such approval had been given by acquiescence.

After more than a year had elapsed since the report of S., as Chief Engineer, had been made, the Government appointed a Royal Commission to make enquiry into the suppliant's claim, along with others, and to report to the Governor-in-Council as to the liability of the Government upon such claims. Suppliant appeared before this Commission and produced evidence in support of his claim, but declared in writing to the Commissioners that he did so without prejudice to his right to insist on payment of the amount recommended to be paid him in the report so made by S. The Commissioners reported in favor of the suppliant for $84,075,—this amount being subsequently paid to the suppliant, for which he gave an unconditional receipt in respect of his claim. Prior to giving this receipt, however, he had written a letter to the Minister of Railways and Canals declining to accept such amount in full satisfaction of his claim.

Held:—That the receipt so given by the suppliant did not, under the circumstances, operate as a waiver of his right to claim for the balance due him upon the report of S.

PETITION of right for the recovery of $608,000, alleged to be due to the suppliant from the Dominion Government, for work under, and for damages arising out of a contract for the construction of Section 18 of the Intercolonial Railway.

The contract was made on the 8th July, 1870. By the provisions thereof, payments were to be made to the suppliant upon certificates of the Chief Engineer of the railway to be given from time to time during the

progress of the work, such certificates to be approved by the Commissioners of the railway appointed under the provisions of 31 Vic., c. 13. No mention was made in the contract of any approval being required from the Commissioners in order to entitle suppliant to be paid upon the final certificate being given by the said Engineer. Sandford Fleming, C.E. was the Chief Engineer during the performance of the contract, and gave suppliant progress certificates from time to time which were duly approved by the Commissioners and paid. On completion of the work, some time in the year 1875, there was owing to suppliant a large balance under the contract, for which he demanded a final certificate from Mr. Fleming as such Engineer. This certificate was not given to the suppliant during the time Mr. Fleming held office, and payment was not made of the balance due.

On the 1st December, 1879, suppliant filed a petition of right claiming a large sum as owing to him in connection with the work done by him under the said contract.

Before any proceedings on the petition of right were taken, Frank Shanly, C.E., was, by order of the Governor-in-Council of the 23rd June, 1880, appointed Chief Engineer of the Intercolonial Railway in the place of Mr. Fleming.

Suppliant's claim, with those of many other contractors for work done in the construction of the Intercolonial Railway, came before Mr. Shanly as Chief Engineer; and, after hearing the parties and their witnesses, and fully investigating the claims, he made a report to the Department of Railways and Canals recommending that $120,371 be paid suppliant in respect of the works executed by him.

After the lapse of more than a year since the making of this report, nothing being done in the matter in the

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meanwhile, in July, 1882, a Royal Commission was appointed to investigate and report upon the claims arising out of the construction of the Intercolonial Railway. The Commissioners met and invited the suppliant, amongst other contractors, to come before them and give evidence, and he and other witnesses did so; but his counsel filed the following declaration in writing with the Commissioners before closing the evidence:

"The claimant, while appearing before the Commission to give any assistance or information in the premises, does not thereby admit the constitutionality of said Commission, and does not waive any right he may have against the Government under the said contract or by reason of the same, or anything connected with the same, or resulting from the report or certificate of the Engineer-in-Chief, Mr. Frank Shanly, upon the said contract, and the claim of the said claimant made under it, or any other cause or causes whatsoever; the claimant reserving to himself such recourse and remedy as to law and justice may appertain."

The Commissioners reported on suppliant's case, amongst others, in 1884, recommending payment to him of $55,313, principal, and $28,762, interest.

These sums were paid to suppliant on August 5th, 1884, and a receipt for them was given by him, preceded by a letter from him to the Minister of Railways and Canals, stating that he received the payment of a less sum than the amount certified to by Mr. Shanley only as a payment on account.

No further payment was made to the suppliant by the Government; and on October 1st, 1885, he amended his petition of right, alleging the existence of the Shanly certificate and claiming payment of the amount thereof if not entitled to recover upon the other general grounds alleged in the petition.

An answer was filed to the amended petition upon various grounds so far as the general claim was concerned; but, in so far as Mr. Shanly's report was relied upon by suppliant, the Crown denied that it was a final certificate under the contract such as to entitle the respondent to recover upon it, and that even if it was a final certificate of the Chief Engineer of the railway, that it had not been approved of by the Minister of Railways and Canals, and therefore was of no effect.

Issue was joined, and the parties agreed to have the question of the availability of Mr. Shanley's report as a final certificate under the contract, and the right to recover thereupon, tried in the first place, leaving the other grounds alleged in the petition to be subsequently disposed of if it were found necessary.

For the purposes of the trial of the issue upon such report, the parties agreed to a statement of facts substantially the same as the foregoing.

The case was heard before Mr. Justice Fournier.

Girouard, Q.C. and *Ferguson* for the Suppliant;

Robinson, Q.C. and *Hogg* for the Respondent.

FOURNIER, J. now (December 3rd, 1888,) delivered judgment.

Par sa pétition de droit, en cette cause, le pétitionnaire réclame, de Sa Majesté, la balance du prix et la valeur des ouvrages qu'il avait exécutés, pour la construction de la section dix-huit du chemin de fer International, en vertu d'un contrat à cet effet, entre lui et les Commissaires nommés par le Gouvernement de la Puissance, pour la construction du chemin de fer Intercolonial, en date du 8 juillet 1870. Le contrat est dans la même forme et contient les conditions et stipulations générales, à peu près, que l'on trouve dans les

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contrats concernant la construction de ce chemin de fer.

Plusieurs de ces contrats ont déjà fait le sujet de discussion devant cette cour et devant la Cour Suprême. Leurs conditions sont tellement connues, qu'il est inutile d'en citer d'autres que celles qui seront jugées nécessaires pour la décision de la présente cause.

Il n'est pas nécessaire, non plus, pour en arriver là d'analyser la pétition de droit, ses divers amendements et la défense présentée par Sa Majesté ; car les parties ont, de consentement, préparé un exposé des faits essentiels pour l'examen de la question de droit soulevée préliminairement.

La seule question, dont il s'agit à cet état de la procédure, est de savoir si le certificat de Frank Shanly, l'ingénieur en chef de l'Intercolonial, constatant l'exécution et la valeur des ouvrages faits, en vertu du contrat en question, est suffisant pour permettre au pétitionnaire d'exercer son recours contre Sa Majesté pour le paiement de la balance constatée en sa faveur par ce certificat.

A cause de son importance, je crois devoir citer en entier l'admission de faits des parties, elle est comme suit :

"Statement of admission by both parties :

The only question to be argued, at this stage of the case, is as to whether the suppliant is entitled to recover on the certificate or report of Shanly referred to in clause 27*a* of the Petition of Right, reserving to the suppliant the right, if the court decide against him on that question, still to proceed on the other clauses of the petition for the general claim.

It is admitted :

1. That the contract alleged in petition, paragraph one, was entered into as therein alleged, copy of which contract is produced marked "A."

2. That the suppliant began and prosecuted the works, and executed a large amount of work in respect of the contract and section 18 of the Intercolonial Railway.

3. That Sanford Fleming was Chief Engineer of the Intercolonial

Railway when the contract was entered into, and up to the month of May, 1880, when an order-in-council was passed on the 22nd May, 1180, which is herewith submitted marked "X."

4. That in 1879 the suppliant presented a large claim for balance of contract price and extras.

5. The said Fleming, as such Chief Engineer, from time to time furnished the said suppliant with progress estimates of the work done under the said contract, which were paid, but gave no final certificate in respect of said contract for section 18 as required by the statute. The work was finished in December, 1875.

6. An order-in-council and report are herewith produced marked "B." The effect and admissibility of such papers and Mr. Shanly's appointment are to be discussed.

7. The claim of suppliant, with those of other contractors on said railway, came before said Shanly.

8. That said Shanly made, and duly forwarded to the Minister of the Department of Railways and Canals, the certificate or report, a true copy of which is produced by the Crown marked "C."

9. That the said certificate or report duly reached the Minister of Railways and Canals on or about its date.

10. Subsequently, by order-in-council of the 28th July, 1882, a copy which is hereto annexed marked "D," the suppliant's claim, with others, was referred to three Commissioners to enquire and report thereon.

11. The suppliant was called upon by the Commissioners to appear before the said commission and give evidence, and was examined with other witnesses in reference to his said claim; but such appearance and examination was without prejudice to his rights, as expressed by his counsel in paper marked "E," herewith submitted.

12. The Commissioners made their report, herewith submitted, which is to be found in the sessional papers for 1884, vol. 17, No. 53.

13. And upon such report, on the 5th August, 1884, on the authority of an order-in-council of the 10th April, 1884, a copy of which is hereto annexed marked "F," the Government paid to the suppliant the sum of $84,075.00, being composed of $55,313 principal, mentioned in said report, and $28,762 interest.

14. A copy of the receipt given by the suppliant for the amount of such payment is hereto annexed, marked "G."

15. On the 18th April, 1884, the suppliant addressed a letter to the Minister of Railways, marked "H," which was received. This is admitted as a fact, but the admissibility and effect of such letter is denied.

16. It is also admitted that, on the 10th September, the Departmen

of Railways addressed a letter to the suppliant of which a copy is annexed marked "I," and which the suppliant received.

(Sgd.) C. ROBINSON,
Counsel for Crown.
(Sgd.) D. Girouard,
For Suppliant.

October 14th, 1887."

La principale difficulté en cette cause étant à propos des formalités requises pour le paiement des travaux, il est nécessaire de référer aux termes du contrat pour savoir qu'elle est, sous ce rapport, la position du pétitionnaire.

La clause 11 se lit comme suit :

And it is further mutually agreed upon by the parties hereto, that cash payments, equal to eighty-five per cent. of the value of the work done, approximately made up from returns of progress measurements, will be made monthly *on the certificate of the Engineer that the work for or on account of which the sum shall be certified has been duly executed, and upon approval of such certificate by the Commissioners.* On the completion of the whole work to the satisfaction of the Engineer, a certificate to that effect will be given ; but the *final* and *closing* certificate, including the fifteen per cent. retained, will not be granted for a period of two months thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work, or release of the Contractor from his responsibility in respect thereof, but he shall, at the conclusion of the work, deliver over the same in good order according to the true intent and meaning of this contract and of the said specification.

Avant d'examiner la véritable signification de cette clause du contrat et d'en faire l'application au certificat de l'ingénieur en chef Shanly, il est nécessaire de savoir s'il possédait, en donnant ce certificat, la qualité officielle qu'il a prise ; car elle lui a été niée lors de l'argument. Malgré cela, je crois que, par leur admission de faits, les conseils de la défense se sont désistés de cette dénégation. Quoi qu'il en soit, je ne puis guère me dispenser de bien établir sa qualité d'ingénieur en chef autorisé à donner le certificat produit. Sans cela le pétitionnaire ne pourrait être admis à exercer son recours contre la Couronne.

Dès le commencement des travaux du chemin de fer Intercolonial, à l'époque du contrat en question, M. Sanford Fleming a été l'ingénieur en chef chargé de la direction de ces travaux et n'a cessé de l'être que par un ordre-en-conseil, en date du 20 mai 1880. Le 23 juin de la même année, par un autre ordre-en-conseil, adopté sur la recommandation du Ministre des Travaux Publics, M. Shanly a été nommé, en remplacement de M. Fleming, comme ingénieur en chef du chemin de fer Intercolonial.

Cette nomination est un acte officiel qu'il est impossible de contester. A dater de cet ordre-en-conseil, M. Shanly a été autorisé à exercer et a, de fait, exercé toutes les fonctions attribuées par la loi et par le Gouvernement à l'ingénieur en chef de l'Intercolonial. Il avait, lorsqu'il a donné le certificat dont il s'agit, toute l'autorité et tous les pouvoirs que possédait M. Fleming, lorsque ce dernier exerçait les mêmes fonctions

Pour quelles raisons son certificat n'aurait-il pas tout l'effet voulu par la loi ? Est-ce pour la raison donnée par les conseils de la défense—

Qu'il n'était pas l'ingénieur désigné par les parties au contrat comme arbitre devant décider de l'exécution et de la valeur des travaux ?

Cet avancé est tout-à-fait incorrect, il n'est nullement question dans le contrat d'un ingénieur désigné et choisi. Le contrat fait souvent mention de l'ingénieur chargé de la direction et surveillances des travaux, mais sans en nommer aucun, et oblige le contracteur à suivre ses instructions et à se conformer à ses ordres dans la construction des ouvrages du contrat. Il est vrai que lors du contrat, ces fonctions étaient remplies par M. Fleming, nommé durant bon plaisir, en vertu de la sec. 4 de 31 Vic., c. 13, pour agir sous la direction des Commissaires comme surintendant des travaux à être exécutés en vertu de cet acte ; mais son nom n'est pas même mentionné dans le contrat, pour la bonne

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raison que sa nomination pouvait être révoquée d'un jour à l'autre. Pendant la durée des travaux de construction, M. Fleming a exercé ses fonctions d'ingénieur en chef et fait de nombreux rapports au sujet de ces travaux ; mais lors du certificat final, dont il s'agit, il avait renoncé à ses fonctions et comme ni l'une ni l'autre des parties ne s'étaient engagées à en passer nommément par sa décision, le Gouvernement, en obéissance à la loi, a légalement nommé M. Shanly aux mêmes fonctions, comme il appert par l'ordre-en-conseil suivant : —

Copy of a Report of a Committee of the Honorable the Privy Council, approved by His Excellency the Governor-General in Council, on the 23rd June, 1880.

On a Report, dated 21st June, 1880, from the Hon. the Minister of Railways and Canals, stating that a letter has been received from Mr. Sanford Fleming wherein he states that, for reasons given, he is under the necessity of declining the positions of Chief Engineer of the Intercolonial Railway and Consulting Engineer of the Canadian Pacific Railway, to which, by Order-in-Council of the 22nd May last, he had been appointed ;

The Minister accordingly recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway, and that his salary while so engaged be fixed at five hundred and forty-one $\frac{66}{100}$ dollars ($541.66) a month, the engagement being understood to be of a temporary character.

The Committee submit the above recommendation for Your Excellency's approval.

Certified,

(Sgd.) J. O. COTÉ,
C. P. C.

Les termes de l'ordre en conseil :—

The Minister recommends that authority be given for the appointment of Mr. Frank Shanly, C.E., as Chief Engineer of the Intercolonial Railway,

ne laissent pas de doute sur la qualité conféré à M. Shanly.

En vertu de cette nomination, il est devenu l'ingénieur mentionné dans l'article dix du contrat où se trouve la définition suivante :

The words "the Engineer" shall mean the Chief Engineer *for the time being* appointed under the said Act.

Cette nomination, rendue nécessaire par la retraite de M. Fleming, était encore indispensable pour l'ajustement des nombreuses réclamations faites contre le Gouvernement, par divers entrepreneurs, pour l'exécution des ouvrages de leurs contrats. C'est en 1879 que le pétitionnaire présenta, pour la première fois, sa réclamation. Il n'avait pas alors obtenu le certificat final mentionné dans l'article onzième du contrat, sans lequel il ne pouvait ni espérer un règlement final, ni même se porter pétitionnaire devant cette cour. La matière de sa réclamation ayant été depuis référée à M. Shanly, comme ingénieur en chef, celui-ci adressa, le 22 juin 1881, au Ministre des Chemins de Fer, dans son rapport sur cette réclamation, un certificat final constatant l'exécution du contrat pour la construction de la section dix-huit de l'Intercolonial et déclarant qu'il existait, en faveur du contracteur (le pétitionnaire), une balance de cent-vingt mille trois cent soixante-onze piastres, à laquelle il avait justement droit.

Leaving a balance in favor of the contractor of one hundred and twenty thousand three hundred and seventy-one dollars, as shown on schedule "D," to which sum, I think, he is fairly entitled.

Ce certificat a fait le sujet d'un amendement qui a eu l'effet de permettre au pétitionnaire de se présenter devant la cour comme ayant justifié, à première vue, de l'exécution de la condition préalable au sujet du certificat de l'ingénieur en chef.

Après réception de ce rapport, le Gouvernement paya, en vertu d'un ordre-en-conseil, la somme de quatre-vingt-quatre mille et soixante quinze piastres, dont cinquante-cinq mille trois cent treize piastres à compte du principal et vingt-huit mille sept cent soixante-deux piastres pour intérêt,—pour laquelle le pétitionnaire a donné un reçu déclarant qu'il la recevait:

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Respecting certain claims arising out of the construction of the Intercolonial Railway.

Ce reçu n'est pas final et ne compromet nullement son droit de réclamer la différence entre le montant qui lui a été payé, viz: cinquante cinq mille trois cent treize piastres, et celui de cent-vingt mille trois cent soixante-onze piastres rapporté et certifié par Shanly, laissant en sa faveur une balance de soixante-cinq mille et cinquante-huit piastres. La question de responsabilité, si elle est affectée par ce paiement, c'est plutôt en faveur que contre la légitimité de la réclamation. Le reçu, donné et accepté par le Gouvernement, laisse les parties dans la même position qu'auparavant.

Cette position n'a pas été non plus modifiée par la référence, faite par le Gouvernement, de plusieurs réclamations du même genre à une commission chargée d'examiner ces réclamations et de faire rapport à ce sujet. Celle du pétitionnaire se trouve parmi celles qui ont été ainsi référées, mais ce n'est ni à sa demande ni avec son consentement. Bien au contraire, il n'a comparu devant cette commission que pour enregistrer son protêt contre la juridiction qu'elle pourrait assumer à l'égard de sa réclamation et sous la réserve suivante :

> The claimant, while appearing before the Commission, does not waive any right he may have against the Government under the said contract, or by reason of the same, or anything connected with the same, or resulting from the report or certificate of the Engineer-in-Chief, Mr. Frank Shanly, upon the said contract, and the claim of the said claimant made under it, or any other cause or causes whatsoever, the claimant reserving to himself such recourse and remedy as to law and justice may appertain.

Cette protestation fait voir clairement que les procédés de la commission, quels qu'ils soient, ne peuvent nullement affecter la position faite au pétitionnaire par la production du certificat de Shanly. Cependant cette position lui est contestée par la défense qui prétend que ce certificat seul est insuffisant pour lui donner droit

d'action contre la Couronne pour le montant certifié, alléguant qu'il lui faut en outre produire l'approbation des Commissaires ou du Ministre des Chemins de Fer qui les a remplacés. Elle appuie cette prétention sur la sec. 18 du c. 13 de la 31 Vic., déclarant que:

No money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for and on account of which the same shall be claimed, has been duly executed, nor until such certificate shall have been approved of by the Commissioners.

Le pétitionnaire répond à cela que cette formalité ne lui a pas été imposée par son contrat.

Pour donner à cette section dix-huitième sa véritable signification, il faut la lire en se reportant au deux clauses qui la précèdent, les seizième et dix-septième sections, adoptées dans le même but de protéger les intérêts du public pendant la construction du chemin de fer Intercolonial.

La section seizième pourvoit au mode de donner les contrats.

La section dix-septième, à cause des grands pouvoirs discrétionnaires qu'elle accorde aux Commissaires, doit être citée en entier:

17. The contracts to be so entered into, shall be guarded by such securities, and contain such provisions for retaining a proportion of the contract moneys, to be held as a reserve fund, for such periods of time, and on such conditions, as may appear to be necessary for the protection of the public, and for securing the due performance of the contract.

Cette disposition donne aux Commissaires des pouvoirs discrétionnaires très considérables pour faire les conditions des contrats; la seule limite qui leur est assignée est la protection de l'intérêt public et la due exécution des ouvrages du contrat. Sans doute que pour assurer cette exécution, il était nécessaire de prendre certaines précautions pour empêcher que le montant du prix du contrat ne fût épuisé avant la fin des travaux, et c'est, sans doute, dans ce but qu'est

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décrétée la section dix-huitième exigeant pour tous paiements d'ouvrages,

For or on account of which the same (money) shall be claimed,

le certificat de l'ingénieur approuvé par les Commissaires ; mais cette disposition n'enlève pas aux Commissaires l'exercice des pouvoirs qui leur sont conférés par la section précédente ; ils n'en conservent pas moins la liberté entière de faire telles conditions qui leur paraîtront nécessaires pour la protection du public et pour assurer la due exécution du contrat.

And on such conditions as may appear to be necessary for the protection of the public, and for securing the due performance of the contract.

Si les Commissaires ont jugé à propos, dans l'exercice de leurs pouvoirs, de n'appliquer les termes rigoureux de la section dix-huitième qu'aux paiements faits durant la construction, c'est, qu'en vertu de la section dix-septième, ils en avaient le droit tout en prenant les précautions nécessaires,

For securing the due performance of the contract.

Et c'est ce qu'ils ont fait dans ce cas, en établissant les conditions du contrat avec le pétitionnaire. Ils avaient, sans doute, en vue la section dix-huitième et les pouvoirs en vertu de la section dix-septième, lorsqu'ils ont fait, avec lui, la convention contenue dans l'article onzième du contrat, citée plus haut, en exigeant pour les paiements partiels *(progress estimates)*, pendant l'exécution des ouvrages du contrat, le certificat de l'ingénieur approuvé par les Commissaires, suivant la section dix-huitième, que les ouvrages, dont le paiement en partie était demandé, avaient été duement exécutés. Ayant ainsi pourvu aux moyens de contrôler les dépenses des deniers, de manière à assurer l'exécution entière des ouvrages du contrat, ils étaient entièrement libres de pourvoir, par une autre convention spéciale, au mode de constater le règlement final

de l'entreprise et à la décharge de toute responsabilité de la part du contracteur. Cette partie de la convention est comme suit :

On the completion of the *whole* work to the satisfaction of the Engineer, a certificate to that effect will be given, but the final and closing certificate, including the fifteen per cent retained, will not be granted for a period of *two months* thereafter. The progress certificates shall not in any respect be taken as an acceptance of the work or release of the contractor from his responsibility in respect thereof, but he shall, at the conclusion of the work, deliver over the same in good order according to the true intent and meaning of this contract and the specification.

Cette convention, relative au mode de constater la terminaison des ouvrages, est bien différente de celle règlant les paiements partiels (*progress estimates*). Il n'y est aucunement fait mention de l'approbation des Commissaires exigée pour les paiements partiels. En effet, il n'y avait plus aucune raison pour cela, l'ouvrage devant être alors entièrement exécuté, il n'y avait plus d'intervention à exercer de leur part pour en assurer l'exécution. Comme, après la fin des travaux, il ne devait plus rester qu'à constater s'ils avaient été duement exécutés suivant la spécification, ce devoir devait tout naturellement retomber sur l'ingénieur en chef comme étant l'autorité la plus compétente et celle indiquée par le contrat. C'est sans doute pour cette raison que les Commissaires, qui avaient stipulé leur approbation pour les *progress estimates*, n'ont pas jugé à propos d'imposer cette condition pour le certificat final. On ne pourrait maintenant l'importer dans cette partie de la clause du contrat sans violer la convention des parties

Cette convention, qu'il était certainement au pouvoir des Commissaires de faire, ils l'ont faite d'une manière toute spéciale et parfaitement suffisante pour protéger les intérêts publics, comme il était de leur devoir de le faire. En n'exigeant pas pour le certificat final (*the final and*

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closing certificate) leur approbation, les Commissaires ont sans doute interprété la loi comme leur donnant le pouvoir de dispenser de cette formalité. Cette interprétation, ils en ont fait le sujet d'une convention avec le pétitionnaire et cette convention a maintenant force de loi. Il faut donc en arriver à la conclusion, que le certificat seulement de l'ingénieur en chef est nécessaire et que son approbation par les Commissaires n'est pas nécessaire.

Tel qu'il est, le certificat produit est suffisant pour autoriser le pétitionnaire à réclamer la balance constatée en sa faveur. Il lie également les deux parties, comme le dit *Emden*, (The Law relating to Buildings, &c.) (1):—

> It will be observed that the architect's certificate when given, will, in the absence of fraud, be binding upon the employer under the same circumstances, and to precisely the same extent, as it is conclusive upon the builder (2).

On ne peut pas non plus, pour soutenir la nécessité de l'approbation des Commissaires ou du Ministre des Chemins de Fer, invoquer la clause douzième du contrat déclarant qu'il serait sujet à l'Acte concernant la construction du chemin de fer Intercolonial et aussi à l'Acte des Chemins de Fer de 1868, parce que cette clause contient la réserve que ce ne serait qu'en autant que ces actes seraient applicables (*in so far as they may be applicable*). On ne peut donc pas, pour détruire les conventions arrêtées entre les parties contractantes, se fonder sur les dispositions de ces deux actes. Car c'est évidemment pour éviter tout conflit entre ces actes et le contrat, que les parties sont convenues d'en limiter l'application de manière à ce que leurs conventions n'en puissent être ni affectées ni modifiées en aucune manière quelconque. On ne peut donc considérer comme faisant partie du contrat aucune disposition de ces deux lois qui aurait l'effet de porter atteinte au contrat qui est devenu la loi des parties.

(1) 2nd Ed. p. 133.

(2) *Goodyear* vs. *Weymouth* (*Mayor, etc.*), 35 L. J. C. P. 12.

Ce certificat qui ne pourrait être attaqué, comme je l'ai dit plus haut, que pour cause de fraude, doit donc avoir toute sa force à l'égard des parties en cette cause sur la présente contestation. Il pourrait sans doute faire plus tard la matière d'une autre contestation, mais il n'est maintenant nullement question de cela, la présente audition étant en droit seulement. Bien que je pense avoir démontré que l'approbation des Commissaires n'était pas nécessaire, je pourrais encore, si toutefois le contraire était reconnu, invoquer leur défaut de protestation et leur silence, à l'égard du certificat, comme une approbation tacite. La section du statut à cet égard doit être assimilée à une condition potestative, qui est censée accomplie lorsque celui qui l'a stipulée ne peut justifier d'aucune cause de mécontentement (1).

Le rapport ou certificat dont il s'agit, en date du 22 juin 1881, a été reçu par le Ministre des Chemins de Fer qui avait été, par 31 Vic. c. 15, substitué aux Commissaires. Depuis cette date, aucune plainte ni protestation n'a été faite contre ce certificat. Cependant d'après le contrat, deux mois après avoir terminé ses travaux, le contracteur avait droit à un certificat final de leur exécution et au paiement de leur prix. Cette limite de temps est fixée par la section onzième du contrat déjà citée. Elle devait, en l'absence de toute convention à cet égard, être la même pour son approbation ou son rejet par les Commissaires ou le Ministre. Au moins n'auraient-ils pas dû prendre action sur ce certificat aussitôt après sa réception et faire connaître leur décision ? Loin de là, il se passe des années pendant lesquelles rien n'est fait à ce sujet. Ce long silence et cette inaction ne doivent-ils pas faire présumer une approbation tacite, ou, mieux encore, la conviction du Ministre que son approbation n'était pas

(1) Laurent, vol. 2 No. 650.

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nécessaire d'après le contrat ? Le statut, ni le contrat, n'indiquent nullement la manière de constater cette approbation, c'est évidemment le cas de faire application de la maxime *Eadem vis est taciti atque expressi consensus*, parce que celui qui a gardé le silence était obligé de répondre (1). Si, en important dans le contrat la section dix-huitième, au sujet de l'approbation des Commissaires, qui en est exclue par la convention des parties, on prétendait que cette approbation est nécessaire, je répondrais qu'elle a eu lieu par l'opération de la loi, comme je viens de le dire.

Quant au témoignage de Sir Charles Tupper tendant à établir qu'il a refusé, comme Ministre des Chemins de Fer, son approbation au certificat en question, je crois que cette preuve orale a été illégalement faite. Le silence que lui et ses successeurs ont si longtemps gardé sur ce sujet avait produit son effet légal ; si elle était nécessaire, cette approbation était acquise au pétitionnaire et il n'était plus au pouvoir du Ministre de changer sa position. Cette preuve est en outre certainement illégale, comme contraire au principe, en matière de preuve, qu'on ne peut prouver par témoins contre et outre le contenu des contrats par écrit et en forme solennelle, comme celui dont il s'agit. Admettre cette preuve, ce serait introduire dans le contrat une condition qui ne s'y trouve pas au sujet de cette approbation.

Il ne me reste qu'une dernière observation à faire. C'est, qu'à première vue, on pourrait croire que j'exprime une opinion contraire à la doctrine consacrée par plusieurs décisions déjà rendues par cette cour, et entre autre par celle de *Jones* vs. *la Reine* (2), qui a plusieurs fois reçu l'approbation de la Cour Suprême. Au contraire, je soutiens dans cette cause la même doctrine, et je considère que la production d'un certificat de l'ingé-

(1) Laurent, vol. 15, No. 482. (2) 7 Can. S. C. R. p. 570.

nieur en chef est une condition préalable (*condition precedent*) à l'exercice du droit de recouvrer le prix des ouvrages en question en cette cause. Cette condition a été faite par le contrat même et doit être exécutée. C'est parce qu'elle l'a été dans la présente cause que les décisions, auxquelles je fais allusion, n'ont aucune application au cas actuel. Dans celle de *Jones* vs. *la Reine* (1), il n'avait été donné aucun certificat final constatant l'exécution des ouvrages. Sir W. J. Ritchie, qui a prononcé le jugement, fait à ce sujet l'observation suivante sur la position de Jones :

> The petition is conspicuous for the absence of any direct or inferential averment that any such certificate, as indicated by the contract or law, was ever obtained, or that there has been such approval by the commissioners.

Sur la nature du certificat qui fut produit dans cette cause, constatant l'exécution de certains travaux, l'honorable juge en chef dit à ce propos :

> This so far from being the certificate contemplated, that the work has been duly executed to the satisfaction of the chief engineer, is directly to the contrary.

Dans la présente cause, au contraire, le certificat de Shanly, contenu dans son rapport spécial fait en vertu d'un ordre du gouverneur-en-conseil, constate l'exécution finale de tous les ouvrages conformément au contrat, et certifie de plus la balance du prix revenant au pétitionnaire. La différence des faits, entre les deux causes, explique suffisamment la différence de la conclusion à laquelle j'en suis venu. Le certificat produit est suffisant pour donner au réclamant le droit de se porter pétitionnaire devant cette cour, pour obtenir la balance qui lui est due suivant le certificat, déduction faite de ce qu'il a reçu depuis.

Après avoir donné oralement un exposé sommaire des raisons qui m'ont amené à la conclusion de considérer le certificat de Shanly comme suffisant, le conseil

(1) Cited *ante*.

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du pétitionnaire ayant déclaré qu'il renonçait à cette partie de la demande qui n'était pas fondée sur le dit certificat, je déclare en conséquence que le pétitionnaire a droit d'obtenir de Sa Majesté, pour les raisons ci-dessus énoncées, le paiement de la somme de soixante-cinq mille et cinquante-huit piastres avec dépens, et je renvoie sa demande pour le surplus.

*Judgment for suppliant with costs.**

Solicitor for suppliant: *A. Ferguson.*

Solicitors for respondent: *O'Connor & Hogg.*

* On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Exchequer Court, (Strong and Taschereau, JJ., dissenting) that the report of S., who succeeded F. in the office of Chief Engineer of the railway, was in no sense of the term the final certificate contemplated by the contract or the statute, and that even had such final certificate been given, under the provisions of the statute it would not have been available to the suppliant until it had received the approval of the Minister of Railway and Canals who represented the Commissioners in that behalf. This approval by the Minister had been expressly with-held from S's. report, and a Royal Commission appointed to examine into suppliant's claim, along with others.

APPENDIX.

SHORT NOTES OF EXCHEQUER COURT CASES REPORTED AT LENGTH IN THE REPORTS OF THE SUPREME COURT OF CANADA.

APPENDIX.

ATTORNEY-GENERAL OF BRITISH COLUMBIA v. ATTORNEY-GENERAL OF CANADA.

[E.C.*] 1886 April 15.

[S.C.] 1887 Dec. 13.

B.N.A. Act s. 92 sub-sec. 5, ss. 109 & 146—47 Vic. c. 14 s. 2 (B.C.) Provincial public lands, transfer of to Dominion of Canada—Effect of—Precious metals, claim of Dominion Government to.

By section 11 of the order-in-council passed in virtue of sec. 146 of the B.N.A. Act, under which British Columbia was admitted into the Union, it was provided as follows:

The Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable in furtherance of the construction of the said railway (C.P.R.), a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed however twenty (20) miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-West Territories and the Province of Manitoba.

By 47 Vic. c. 14 s. 2 (B.C.) it was enacted as follows:—From and after the passing of this act there shall be, and there is hereby granted to the Dominion Government, for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located to a width of twenty miles on each side of the said line, as provided in the order-in-council, sec. 11, admitting the Province of British Columbia into confederation.

A controversy having arisen in respect of the ownership of the precious metals in and under the lands so conveyed, the Exchequer Court, upon consent, and without argument, gave judgment in favour of the Dominion Government. On appeal to the Supreme Court:

Held, affirming the judgment of the Exchequer Court (Fournier and Henry, JJ. dissenting) that under the order-in-council admitting British Columbia into confederation, and the statutes transferring the public lands described therein, the precious metals in, upon, and under such public lands are now vested in the Crown as represented by the Dominion Government.

See Can. S.C.R. Vol. xiv, p. 345.

*REPORTER'S NOTE:—The abbreviations E.C. and S.C. signify the Exchequer Court and Supreme Court, respectively; and the dates refer to the delivery of judgment in each court.

[E.C.] 1879
Dec. 24.
[S.C.] 1881
Feb. 10.

BELLEAU *et al.* *v.* THE QUEEN.

Debentures issued by Trustees of Quebec Turnpike Roads—16 Vic. c. 25 (Can.)—Legislative recognition of a debt—Trustees, liability of the Crown for acts by.

The province of Canada had raised, by way of loan, a sum of £30,000 for the improvement of provincial highways situate on the north shore of the river St. Lawrence, in the neighbourhood of the city of Quebec, and a further sum of £40,000 for the improvement of like highways on the south shore of the said river. Debentures for both loans were issued, signed by the Quebec Turnpike Roads Trustees, under the authority of an act of the parliament of the province of Canada, passed in the 16th year of Her Majesty's reign, intituled : "An Act to authorize the Trustees of the Quebec Turnpike Roads to issue debentures to a certain amount, and to place certain roads under their control."

By their petition of right, the suppliants, who had loaned money upon the said debentures, alleged, *inter alia,* that the moneys so borrowed had come into the hands of the Crown and were expended in the improvement of the highways in the said act mentioned ; that the debentures held by them fell due after the Union and were not paid, and that Her Majesty was not liable for the payment of the same under the 3rd section of the British North America Act, 1867, as debts of the late province of Canada existing at the Union.

In his defence to this petition, Her Majesty's Attorney-General did not deny the liability of the Crown for the debts of the late province of Canada, but he denied that the debentures in question were debentures of the province of Canada, that the moneys for which they issued were borrowed and received by Her Majesty, and that there was any undertaking or obligation by or upon the province of Canada to pay the whole or any part of the said debentures.

The questions of law arising out of the defence set up by the Attorney-General may be resolved into the following :—

Whether the debentures in question were, or not, debentures of the late province of Canada ?

Whether the moneys for which they issued did, or did not, come into the hands of Her Majesty, and were, or not, expended in the improvement of provincial highways ?

Whether there was any undertaking or obligation by or upon the late province of Canada to pay the said debentures ?

And whether Canada is, or is not, liable to pay the said debentures under the provisions of the British North America Act, 1867.

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Held:—(per Fournier, J.) That 'The Quebec Turnpike Trust,' as it was was constituted at the time of the passing of the act 16 Vic. c. 235, a public corporation charged with the execution, in the interest of the public, of great works of improvement.

2. That the trustees of that trust, acting within the scope of their authority, did not incur any personal liabilities but were the agents of the Crown.
3. That the roads, bridges and other property put under their control were not vested in them as their property and were not liable to be levied against, because by the ordinance 4 Vic. c. 17 they were declared to be the property of Her Majesty.
4. That the said trustees in issuing, in conformity with the provisions of the act 16 Vic. c. 235, debentures for the various loans therein mentioned, loans effected for the purpose of ameliorating properties declared to be vested in Her Majesty, and the proceeds of which were in fact employed in said improvements, were in law the agents of the Government which thereby became liable.
5. That independently of the obligation contracted as above by the trustees, under the special provisions contained in the above acts, viz.: 4 Vic. c. 17, 14-15 Vic. c. 115, 16 Vic. c. 235, the Government of Canada can be held liable for the repayment of the principal of the debentures, which amount is claimed by the present petition.
6. That the applicants have suffered losses by the alterations made in the law by 20 Vic. c. 125, but that the liability of the Government remains what it was and cannot be increased in consequence of said alterations, and therefore under section 7 the Government should be declared free from all liability as to interest.
7. That as the loans in question, at the time of the passing of the British North America Act, formed part of the liabilities of the late province of Canada, they have become, by virtue of the 111th section of said act, a debt and liability of the Dominion of Canada.
8. That the suppliants are entitled to the relief sought by their petition of right,—to the amount of principal, without interest, but with costs of said petition.

On appeal to the Supreme Court of Canada, by the Crown,—

Held:—(Ritchie, C.J. and Gwynne, J., dissenting,)—That the Trustees of the Quebec North Shore Turnpike Trust, appointed under ordinance 4 Vic. c. 17, when issuing the debentures in suit under 16 Vic., c. 235, were acting as agents of the Government of the late province of Canada, and that the said province became liable to provide for the payment of the principal of such debentures when they became due.

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Per Henry and Taschereau, JJ.—That the province of Canada had, by its conduct and legislation, recognized its liability to pay the same; and that respondents were entitled to succeed on their cross-appeal as to interest from the date of the maturing of the said debentures.

Per Ritchie, C.J. and Gwynne, J.—That the trustees, being empowered by the ordinance to borrow money "on the credit and security of the tolls thereby authorized to be imposed and other moneys which might come into the possession and be at the disposal of the said trustees, under and by virtue of the ordinance, and not to be paid out of or chargeable against the general revenue of this province," the debentures did not create a liability on the part of the province in respect of either the principal or the interest thereof.

On appeal to the Judicial Committee of the Privy Council, the judgment of the Supreme Court of Canada was reversed, and the construction put upon the statute, 16 Vic. c. 235 (Can.,), by Ritchie, C.J. and Gwynne, J. was affirmed.

See Can. S.C.R., vol. vii, p. 53, and also 7 App. Cas. 473.

[E.C.] 1877 Oct. 24.

[S.C.] 1886 Dec. 7.

BERLINGUET, *et al v.* THE QUEEN.

Petition of Right—Intercolonial Railway Contract—31 Vic. c. 13 s. 18—Certificate of engineer—Condition precedent to recover money for extra work—Forfeiture and penalty clauses—Failure of Performance.

The suppliants agreed, by contracts under seal, dated 25th May, 1870, with the Intercolonial Railway Commissioners (authorized by 31 Vic., c. 13) to build, construct and complete sections three and six of the railway for a lump sum,—section three for $462,444, and section six for $456,946.43.

The contract provided, *inter alia*, that it should be distinctly understood, intended, and agreed that the said lump sum should be the price of, and be held to be full compensation for, all works embraced in or contemplated by the said contract, or which might be required in virtue of any of its provisions or by-laws, and the contractors should not, upon any pretext whatever, be entitled, by reason of any change, alteration or addition made in or to such works, or in the said plans or specifications, or by reason of any exercise of any of the powers vested in the Governor-in-Council by the said act intituled, "An act respecting the construction of the Intercolonial Railway," or in the commissioners or engineers by the said contract or by law, to claim or demand any further sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and every

such claim or pretension, to all intents and purposes whatsoever, except as provided in the fourth section of the contract relating to alteration in the grade or line of location ; and that the said contract and the said specification should be in all respects subject to the provisions of 31 Vic. c. 13 ; that the works embraced in the contracts should be fully and entirely complete in every particular, and given up under final certificates and to the satisfaction of the engineers on the 1st of July, 1871, (time being declared to be material and of the essence of the contract), and, in default of such completion, contractors should forfeit all right, claim, &c., to money due or percentage agreed to be retained, and to pay as liquidated damages $2,000 for each and every week for the time the work might remain uncompleted; that the commissioners upon giving seven clear days' notice, if the works were not progressing so as to ensure their completion within the time stipulated or in accordance with the contract, had power to take the works out of the hands of the contractors and complete the works at their expense ; in such case the contractors were to forfeit all right to money due on the works and to the percentage retained.

On the 24th May, 1873, the contractors sent to the commissioners of the Intercolonial Railway a statement of claims showing there was due to them a large sum of money for extra work, and that until a satisfactory arrangement was arrived at they would be unable to proceed and complete the work.

Thereupon notices were served upon them, and the contracts were taken out of their hands and completed at the cost of the contractors by the Government.

In 1876 the contractors, by petition of right, claimed $523,000 for money *bonâ fide* paid, laid out and expended in and about the building and construction of said sections three and six, under the circumstances detailed in their petition.

The Crown denied the allegations of the petition, and pleaded that the suppliants were not entitled to any payment, except on the certificate of the Engineer, and that the suppliants had been paid all that they obtained the Engineer's certificate for, and in addition filed a counter-claim for a sum of $159,982.57, as being due to the Crown under the terms of the contract, for moneys expended by the commissioners over and above the bulk sums of the contratc in completing said sections.

The case was tried in the Exchequer Court by J. T. Taschereau, J., and he held that under the terms of the contract the only sums for which the suppliants might be entitled to relief were, 1st, $5,850 for interest upon, and for the forbearance of, divers large sums of

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money due and payable to them, and 2nd, $27,022.58, the value of plant and materials left with the Government, but that these sums were forfeited under the terms of clause three of the contract, and that no claim could be entered for extra work without the certificate of the Engineer, and that the Crown was entitled to the sum of $159,953.51, as being the amount expended by the Crown to complete the work.

On appeal to the Supreme Court of Canada by the suppliant,—

Held, affirming the judgment of the court below, (Fournier and Henry, JJ., dissenting), 1st. That by their contracts the suppliants had waived all claim for payment of extra work. 2nd. That the contractors not having previously obtained from, or been entitled to, a certificate from the Chief Engineer, as provided by 31 Vic. c. 13, s. 18, for or on account of the money which they claimed, the petition of the suppliant was properly dismissed. 3rd. Under the terms of the contract, the work not having been completed within the time stipulated, or in accordance with the contract, the commissioners had the power to take the contract out of the hands of the contractors and charge them with extra cost of completing the same, but that in making up that amount the court below should have deducted the amount awarded for the value of the plant and materials taken over from the contractors by the commissioners in June, 1873, viz.: $27,022.58.

See Can. S.C.R., vol. xiii, p. 26.

CHEVRIER v. THE QUEEN.

[E.C.] 1877 April 10. [E.C.] 1878 Oct. 3. [S.C.] 1880 Mar. 1.

Petition of Right—Demurrer—9 Vic., c. 37—Right of the Crown to plead prescription—10 years prescription—Good faith—Translatory title—Judgment of confirmation—Inscription en faux—Improvements, claim for by incidental demand—Arts. 2211, 2251, 2206, *C. C. (L.C.); Art.* 473, *C. P. C. (L. C.)*

N. C., the suppliant, by his petition of right, claimed, as representing the heirs of *P. W. jr.*, certain parcels of land originally granted by Letters-Patent from the Crown, dated 3rd January, 1806, to *P. W., sen.*, together with a sum of $200,000 for the rents, issues and profits derived therefrom by the Government since the illegal detention thereof.

The Crown pleaded to this petition of right—1st, by demurrer, *defense au fonds en droit*, alleging that the description of the limits and position of the property claimed was insufficient in law ; 2nd, that the conclusions of the petition were insufficient and vague ;

3rd, that in so far as respects the rents, issues and profits, there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliants.

These demurrers were dismissed by Strong, J., and it was *Held*, that the objection taken should have been pleaded by *exception à la forme*, pursuant to art. 116 C. C. P., and as the demurrer was to all the rents, issues and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues and profits accrued previous to the sale to him by the heirs of *P. W., jr.*

This judgment was not appealed against.*

As to the merits the defendant pleaded—1st. By peremptory exception, setting up title and possession in Her Majesty under divers deeds of sale and documents; 2nd. Prescription by 30, 20 and 10 years. An exception was also filed, setting up that these transfers to petitioner by the heirs of *P. W., jr.*, were made without valid consideration, and that the rights alleged to have been acquired were disputable, *droits litigieux*. The general issue and a supplementary plea claiming value of improvements were also filed.

To the first of these exceptions the petitioner answered that the parties to the deeds of sale relied upon had no right of property in the land sold, and denied the legality and validity of the other documents relied upon, and inscribed *en faux* against a judgment of ratification of title to a part of the property rendered by the Superior Court for the district of Aylmer, P. Q. To the exception of prescription the petitioner answered denying the allegations thereof, and more particularly the good faith of the defendant. To the supplementary plea, the petitioner alleged bad faith on the part of defendant. There were also general answers to all the pleas.

On the issues thus raised, the parties went to proof by an *enquête* had before a commissioner under authority of the Exchequer Court, granted on motion in accordance with the law of the Province of Quebec.

The case was argued in the Exchequer Court before J. T. Taschereau, J., and he dismissed the suppliant's petition of right with

*REPORTER'S NOTE.—The important judgment of STRONG, J. on demurrer not having been before reported, will be found on the following page. Had the notes of the learned judge been received at an earlier date, they would have been printed in their chronological order in the main portion of this volume.

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costs. Whereupon the suppliant appealed to the Supreme Court of Canada.

Held (Fournier and Henry, JJ., dissenting): 1. That before the Code, and also under the Code (art. 2211), the Crown had, under the laws in force in the province of Quebec, the right to invoke prescription against a subject, which the latter could have interrupted by petition of right.

2. That in this case the Crown had purchased in good faith with translatory titles, and had, by ten years peaceable, open and uninterrupted possession, acquired an unimpeachable title.

3. That in relation to the *inscription en faux*, the art. 473 of the Code of Procedure is not so imperative as to render the judgment attacked an absolute nullity, it being registered in the register of the court.

4. That the petitioner was bound to have produced the minute or draft of judgment attacked, but having only produced a certified copy of the judgment, the inscription against the judgment falls to the ground.

5. That even if S. O.'s title was *un titre précaire*, the heirs by their own acts ceded and abandoned to L. all their rights and pretensions to the land in dispute, and that the petitioner C. was bound by their acts.

Held, also, that the *impenses* claimed by the incidental *demande* of the Crown were payable to the petitioner, even if he had succeeded in his action.

Per H. E. Taschereau and Gwynne, JJ., that a deed taken under 9 Vic. c. 37, s. 17, before a notary (though not under the seal of the commissioners) from a person in possession, which was subsequently confirmed by a judgment of ratification of a Superior Court, was a valid deed, that all rights of property were purged, and that if any of the *auteurs* of the petitioner failed to urge their rights to the moneys deposited by reason of the customary dower, the ratification of the title was none the less valid.

See Can. S.C.R., vol. iv, p. 1.

[E.C.] 1877 — April 10.

STRONG, J. *on Demurrer*.

This is a petition of right, in the nature of a petitory action against the Crown, instituted to recover certain lands, parts of lots Nos. 2 and 3, in the 5th range of the township of Hull. The petition alleges that Philemon Wright, the original grantee of the Crown of the land in question, conveyed these lands to his son Philemon Wright, the younger, who subsequently died intestate leaving eight children co-heirs at law and also his widow surviving, and after stating the deaths of some of the original heirs, and also the death of the widow of Philemon Wright,

the younger, who had been entitled to her customary dower in these lands, the petition sets forth certain deeds executed by the heirs of Philemon Wright and the heirs of such of them as had died, conveying to the suppliant their respective undivided shares in the lands in question ; the earliest of these deeds, dated in May, 1875, alleges that the parties executing these deeds also transferred to the suppliant their undivided shares of all and every the rents and issues, indemnity and damages due by any party having occupied or occupying said lots of land, or any part thereof.

The petition further alleges that 159 acres of the said lots numbers 2 and 3, in the 5th range of the township of Hull (including a pond), which was part of the estate of Philemon Wright, the younger, and of which he died seized and possessed, are now in the possession, occupation and control of the Government of the Dominion of Canada ; and also that the petitioner is proprietor, and entitled to claim the said lots numbers 2 and 3, in the 5th range of the township of Hull, including a certain strip of land used for a canal, which said last mentioned property is now held and possessed by the Dominion Government as property belonging to the Department of Public Works ; that the Government of Canada have been in the possession of the property claimed for twenty-nine years, and that the suppliant is entitled to the rents, issues and profits thereof during that time. It is further stated that Sarah Olmstead, the widow of Philemon Wright, the younger, died on the 5th December, 1871, and that the only title the Government have to the property is derived from Sarah Olmstead (Mrs. Sparks) who had the usufruct for her dower. The prayer of the petition is that the suppliant be declared to be the true and lawful owner and proprietor of the above mentioned property, to wit, of all the property now held by the Government in said lots numbers 2 and 3, and that the same be awarded to him, and that he is entitled to have and receive the sum of $200,000 for the rents, issues and profits derived therefrom by the Government since their illegal detention thereof, with costs. To this petition the Crown has filed three demurrers, or *défenses en droit*. The ground of the first demurrer is that the petition failed to describe by clear and intelligible description, or by metes and bounds, the limits and position of the said 159 acres of land. The second demurrer shows for cause that the suppliant, by his petition, claims to cover the arrears of rents, issues and profits in respect of the detention by the Government prior to the accrual of the suppliants title by virtue of the deeds of transfer to him made by the heirs of Philemon Wright, the younger, without showing that signification and copy of the transfer of these rents and profits was ever given to the Crown. The third demurrer conjoins the two distinct grounds separately embraced in the first and second.

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The first demurrer must be dismissed for these several reasons, first: petitions of right are not dependent on the forms and modes of pleading and procedure in force in the province of Quebec. The pleadings subsequent to the petition are, pursuant to the second of the General Rules of this Court, to conform as nearly as may be to those in use in Her Majesty's Superior Court for the province of Quebec, but the form of the petition itself is prescribed generally for all the Provinces by section 2 and form No. 1 of the schedule of the Petition of Right Act, 1876. That form requires the petitioner, or suppliant, to state with convenient certainty the facts on which he relies entitling him to relief. The article 52 of the Code of Procedure of the province of Quebec, which has been invoked by the Crown in support of the first demurrer is, therefore, not applicable, the question being simply whether the petition in compliance with the statute sets forth the facts with convenient certainty.

Secondly : the principle of construction applicable to such a pleading as this is not the old rule of English common law pleading, which required every possible intendment to be made against the pleader, but the more benign doctrine which presumes everything in his favor, now universally applied to all pleadings. The description given in the petition as "159 acres, part of the lots mentioned, now in the possession of the Government as property belonging to the Department of Public Works," is surely sufficient to inform the Crown of the situation and extent of the land which the suppliant seeks to recover, since the officers of the Crown must know with exactitude, and be able to identify, the precise parcel or parcels of which the Crown is in the occupation. It was always a rule in the strictest system of pleading ever known—that which prevailed formerly in the English courts of common law—that less than the ordinary degree of certainty was required in the allegation of a fact more within the knowledge of the opposite party than of the party pleading, and that rule is very applicable here ; the Crown can have no embarrassment in shaping its defence, for its officers are able to designate the exact quantity of land they claim to be in possession of ; and, as regards the pretention that the conclusions of the petition are not sufficiently precise to enable the court to draw up its judgment for the suppliant, the answer to that objection is that the identity and exact description of the land, with its boundaries, are easily ascertainable by evidence which may be given for that purpose, or by the ministry of experts appointed by the court to ascertain them. The well known maxim *id certum est quod certum reddi potest*, sums up the answer to this argument. I am of opinion, therefore, that on these grounds alone the first demurrer fails. It would appear, however, that even if the rules of pleading and procedure enunciated by the Code of Procedure for the province of Quebec are applied to this

demurrer, it must equally fail, for the objection, assuming it to be a valid one, is not properly taken by demurrer.

Article 116 of the Quebec Code of Procedure enacts that informalities in the declaration, when they contravene the provisions contained in article 52, or any of them, must be pleaded by exception to the form. The insufficiency of the description of the land in the petition, if a good objection in any shape, depends altogether on article 52 which requires in an action brought to recover a corporeal immoveable that the nature of the immoveable, the city, town, village, parish or township, street, range or concession wherein it is situated, and also the lands co-terminous to it, should be mentioned. The proper mode of raising an objection to the sufficiency of the description was, therefore, by exception to the form, and not by demurrer.

This article 52 is a reproduction of article 64 of the French Code of Civil Procedure, which, in its turn, is derived from the Ordonnance of 1667 s. 9, arts. 3 and 4, with the exception that both the ancient and modern rule of the French practice are more rigorous than that of the Quebec Code of Procedure since they both prescribe the penalty of nullity for non-compliance with the requisite formalities (*le tout à peine de nullité*) ; but a strict and literal conformity to the requirements of the Quebec as well as the French procedure would make it incumbent on the plaintiff to describe the " héritage " by its boundaries.

It appears, however, from the authorities that the spirit rather than the letter of this provision has been regarded, and that the jurisprudence does not require all the particularity of designation which the words of the Ordonnance and Codes demand, but that it is considered sufficient if the description is such that defendant cannot be ignorant of the situation and quantity of the land which constitutes the object of the action. The history of the law shows that this is a reasonable construction, for article 9 ss. 3 and 4 of the Ordonnance of 1667 was substituted for the ancient practice of requiring the plaintiff to go to the land and point out to the defendant, on the spot, what he sought to recover in his action, and the defendant was entitled to a dilatory exception suspending the action until the plaintiff thus defined the object of his demand (1). Then, although this petition fails to give the boundaries and exact quantities of the land in litigation, I think there is contained in it a description sufficient to give the Crown notice of the exact portion of land which the suppliant seeks to recover, and this, which I hold to be be sufficient to satisfy the reasonable certainty called for by the Petition of Right Act, 1876, before referred to, will also, in my judgment, and as I read the authorities, meet the requirements of article 52 of the Code of Procedure of Quebec. The first demurrer is dismissed with costs.

(1) Carré Chauveau, vol. 1, p. 379. Boncenne, *Théorie de la Procédure*, vol. 2 p. 151. Pigeau, *La Procédure Civile*, vol. 1, p. 10.

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The second demurrer must be dismissed for the reason that being good in part only, its conclusion is too large in asking that the whole of the petition, so far as regards the rents, issues and profits should be dismissed.

The suppliant, by his petition, seeks to recover rents and profits which have accrued before as well as since the dates of the several deeds of donation, under which he claims, the earliest of which was executed on the 12th of May, 1875. This is clear from one of the statements of the petition which is as follows: "Your petitioner is entitled to claim the rents, issues and profits of the said portion of the property so held by the Government of Canada since the illegal detention thereof, to wit: since 29 years," and from part of the conclusion, or prayer which is for a declaration that the suppliant is entitled to have and recover the sum of $200,000 for the rents, issues and profits derived from the lands by the Government since their illegal detention thereof.

Rents and profits from the date at which the suppliant acquired his title, he is clearly entitled to recover as incidental if he succeeds in his claim for the recovery of the lands. Art. 1498 of the Civil Code of Quebec enacts, that from the time of the sale all the profits of the thing belong to the buyer.

As regards revenues and fruits which accrued anterior to the execution of the deeds under which the suppliant claims title, they constitute a debt due to the suppliant's *auteurs*, and he can only recover those rents as being a transfer of the debt due to the heirs of Philemon Wright, the younger, under the express clause of cession of those rents contained in the deeds set forth in the petition. In order, however, to show a perfect title under these transfers the suppliant, pursuant to article 1571 of the Civil Code of Quebec, should have shown that he had signified the acts of sale and delivered copies to the proper officers of the Crown, or he should have shown an acceptance of the transfers by those officers. This he has omitted to do.

The petition is, therefore, defective in not shewing a title to sue in respect of rents and profits which accrued before the date of the suppliant's own title. Prior to the enactment of the Civil Code, a practice prevailed in lower Canada of regarding the service of the summons in the action as a sufficient signification of the cession of a debt. *Aylwin* v. *Judah* (1). But, since the code, (see *Mignot* v. *Reeds*) (2) there appears to be a well settled jurisprudence the other way, and notice or signification anterior to the action must now be alleged and proved. *Forsyth* v. *Charlebois* (3), *McLennan* v. *Martin* (4). Although the suppliant fails to show by his petition a right to recover rents and profits accrued before the date of his titles, yet as he sufficiently alleges a

(1) 7 L. C. R. 128.
(2) 9 L. C. J. 27.
(3) 13 L. C. J. 328.
(4) 17 L. C. J. 78.

right to those subsequently accrued, it follows that the conclusion is too large and that the demurrer must, therefore, be dismissed with costs.

This will not, of course, prejudice the right of the Crown to insist, at the hearing of the cause, on limiting the suppliant to a recovery of the subsequent rents.

The third demurrer, which is mere reiteration of the two others conjoined, must be, for the reasons already given, also dismissed with costs.

DOUTRE v. THE QUEEN.

[E.C.] 1881 Jan. 12,

[S.C.] 1882 May 13.

Petition of Right—Claim for counsel fees—Retainer for services before Fishery Commission.

The suppliant filed a petition of right claiming a sum of $10,000 as being the balance of the value of his work and labor, care, diligence, and attendance, upon retainer, in and about the preparation of and conducting Her Majesty's claim before the Halifax Commission, which sat under the Treaty of Washington in the summer of 1877 at Halifax, to arbitrate upon the differences between Great Britain and the United States in connection with the value of the inshore fisheries, etc., and for money by respondent paid, laid out, and expended in travelling and remaining at divers places on Her Majesty's business connected with the said claim.

The suppliant had been paid the sum of $8,000., and the Crown defended the action on the grounds that the amount paid was accepted by the suppliant in full for his services and expenses; that, if not accepted in full, the amount paid was a sufficient remuneration for such services and expenses; and that no action would lie for the recovery of a claim for counsel fees.

Held, (per Fournier, J.) that the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the amount paid him, and that he should receive from the Crown, in addition to such amount, the sum of $8,000 as a remuneration for his services, with interest on that amount from the date upon which the petition of Right was received by the Secretary of State, together with his costs. On appeal to the Supreme Court of Canada,

Held (affirming the judgment of the Exchequer Court),

1. Per Fournier, Henry and Taschereau, JJ.: That the suppliant, under the agreement entered into with the Crown, was entitled to sue by petition of right for a reasonable sum in addition to the

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amount paid him,and that the $8,000 awarded him in the Exchequer Court was a reasonable sum.

2. Per Fournier, Henry, Taschereau and Gwynne, JJ.: By the law of the province of Quebec, counsel and advocates can recover for fees stipulated for by an express agreement.
3. Per Fournier and Henry, JJ.: By the law also of the Province of Ontario, counsel can recover for such fees.
4. Per Strong, J.: The terms of the agreement, as established by the evidence, shewed (in addition to an express agreement to pay the suppliant's expenses) only an honorary and gratuitous undertaking on the part of the Crown to give additional renumeration for fees beyond the amount of fees paid, which undertaking is not only no foundation for an action but excludes any right of action as upon an implied contract to pay the reasonable value of the services rendered ; and the suppliant could, therefore, recover only his expenses in addition to the amount so paid.
5. Per Ritchie, C.J.: As the agreement between the suppliant and the Minister of Marine and Fisheries, on behalf of Her Majesty, was made at Ottawa, in Ontario, for services to be performed at Halifax, in Nova Scotia, it was not subject to the law of Quebec ; that in neither Ontario nor Nova Scotia could a barrister maintain an action for fees, and therefore that the petition would not lie.
6. Per Gwynne, J.: By the Petition of Right Act, sec. 8, the subject is denied any remedy against the Crown in any case in which he would not have been entitled to such remedy in England under similar circumstances. By the laws in force there prior to 23—24 Vic. c. 34 (Imp.), counsel could not, at that time, in England, have enforced payment of counsel fees by the Crown, and therefore the suppliant should not recover. See Can. S. C. R., vol VI, p. 342.

[E.C.] 1884
Oct. 22.
[S.C.] 1885
Nov. 16.

DUNN *v.* THE QUEEN.

Petition of Right—Liability of Dominion Government for provincial debt—Account stated by order-in-council—Consideration—Assignment of claim—Demurrer.

Prior to confederation one T. was cutting timber on territory in dispute between the old province of Canada and the province of New Brunswick, the former having granted him a license for the purpose. In order to utilize the timber so cut, he had to send it down the St. John river, and it was seized by the authorities of New Brunswick and only released upon payment of fines. T. continued the business for two or three years, paying fines to the

province of New Brunswick each year, until he was finally compelled to abandon it.

The two provinces subsequently entered into negotiations in regard to the territory in dispute which resulted in the establishment of a boundary line, and a commission was appointed to determine the state of accounts between them in respect to such territory. One member of the commission only reported, finding New Brunswick to be indebted to Canada in the sum of $20,000 and upwards, and in 1871 these figures were verified by the Dominion Auditor.

Both before and after confederation T. frequently urged the collection of this amount from New Brunswick, with the object of having it applied to indemnify the parties who had suffered by the said dispute while engaged in cutting timber, and finally by an order-in-council of the Dominion Government (to whom, it was claimed, the indebtedness of New Brunswick was transferred by the B. N. A. Act), it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the governments of Ontario and Quebec therefor. Such consent was obtained and payments on account were made by the Dominion Government first to T. and afterwards to the suppliant, to whom T. had assigned the claim. Finally the suppliant, not being able to obtain payment of the balance due by said order-in-council, proceeded to recover it by petition of right, to which petition the defendant demurred on the ground that the claim was not founded upon a contract and was not properly a subject for petition of right.

Held, per Fournier, J. in the Exchequer Court (overruling the demurrer), that inasmuch as the order-in-council contained conditions to be complied with by T. and other interested parties, and these conditions were accepted and performed by them, a valid contract subsisted between the Crown, represented by the Dominion Government, and such parties; that the order-in-council operated as an account stated between the Dominion Government and the said parties; that the Crown had formally acquiesced in the transfer of T.'s claim to the suppliant by paying the suppliant large sums of money on account of the claim with knowledge of such transfer, and that the suppliant was entitled to proceed by petition of right for the recovery of so much of said claim as remained unpaid. On appeal to the Supreme Court of Canada,—

Held, reversing the judgment of Fournier, J. (Fournier and Henry, JJ. dissenting), that there being no previous indebtedness shown to T., either from the province of New Brunswick, the province of Canada, or the Dominion Government, the order-in-council did not create any debt between T. and the Dominion Government which could be enforced by petition of right. See Can. S. C. R., vol. XI., p. 385.

[E.C.] 1886
Jan. 21.
[S.C.] 1887
Mar. 1.

HUBERT *v.* THE QUEEN.

Award of Official Arbitrators—Inclusive of past and future damages—Appeal—42 Vic., c. 8.

On a reference being made to the Official Arbitrators of certain claims made by one H. against the Government for damages arising out of the enlargement of the Lachine Canal to land situated on said canal, the Arbitrators awarded H. $9,216 in full and final settlement of all claims. On an appeal taken to the Exchequer Court by H. (Taschereau, J. presiding) this amount was increased to $15,990, including $5,600 for damages caused to the land from 1877 to 1884 by leakage from the canal since its enlargement, and the judge reserved the right to H. to claim for future damages from that date. On appeal to the Supreme Court of Canada,—

Held, reversing the judgment of the Exchequer Court and confirming the award of the Arbitrators, that it must be taken that the Arbitrators dealt with every item of H.'s claim submitted to them, and included in their award all past, present and future damages, and that the evidence did not justify any increase of the amount awarded.

Gwynne, J. was of opinion that under 42 Vic. c. 8, s. 38, the Supreme Court had power (although the Crown did not appeal to the Exchequer Court) to review the award of the Arbitrators, and that in this case $1,000 would be an ample compensation for any injury that the claimant's land can be said to have sustained, which, upon the evidence can be attributed to the work of the enlargement of the canal. See Can. S. C. R., vol. XIV., p. 737 (Appendix).

[E.C.] 1878
Dec. 23.

ISBESTER *v.* THE QUEEN.

Petition of Right—Tender for work on Intercolonial Railway—Acceptance by Commissioners—Contract, liability of Crown for breach of—Extra work, claim for—Damages—31 Vic., c. 13—*37 Vic., c.* 15, *effect of—Works completed after* 1st *June,* 1874—*Certificate of engineer—Condition precedent, waiver of—Demurrer.*

In January, 1872, the commissioners of the Intercolonial Railway gave public notice that they were prepared to receive tenders for the erection, *inter alia*, of certain engine houses according to plans and specifications deposited at the office of the Chief Engineer at Ottawa. J. I. tendered for the erection of an engine house at Metapedia, and in October following he was instructed by the

commissioners to proceed to the execution of the work, according to his accepted tender, the price being $21,989. The work was completed and delivered to the Government in October, 1874. The specification provided as follows : " The commissioners will provide and lay railway iron, and will also provide and fix cast-iron columns, iron girders, and other iron work required for supporting roof." In September, 1873, J. I. was unable to proceed further with the execution of his work, in consequence of the neglect of the commissioners to supply the iron girders, &c., until March following, owing to which delay he suffered loss and damage. During the execution of the work, J. I. was instructed and directed by the commissioners or their engineers to perform, and did perform, certain extra works not included in his accepted tender, and not according to the plans, drawings and specifications.

By his petition of right, J. I. claimed $3,795.75 damages in consequence of the delay on the part of the commissioners to provide the cast-iron columns, &c., and $8,505.10 for extra works.

The Crown demurred and also traversed the allegation of negligence and delay, and admitted extra work to the amount of $5,056.60, and set up the 18th sec. of 31 Vic., c. 13, which required the certificate of the Engineer-in-Chief as a condition precedent to the payment of any sum of money for work done on the Intercolonial railway. By 37 Vic., c. 15, on the 1st June, 1874, the Intercolonial Railway was declared to be a public work vested in Her Majesty and under the control and management of the Minister of Public Works, and all the powers and duties of the commissioners were transfered to the Minister of Public Works, and sec. 3 of 31 Vic., c. 13, was repealed, with so much of any other part of the said act as might be in any way inconsistent with 37 Vic., c. 15.

Held, per Fournier, J. (in the Exchequer Court)—that the tender and its acceptance by the commissioners consituted a valid contract between the Crown and J.I., and that the delay and neglect on the part of the commissioners, acting for the Crown, to provide and fix the cast-iron columns, &c., which were, by the specifications, to be provided and fixed by them, was a breach of the said contract, and that the Crown was liable for damages resulting from such breach.

2. That the extra work claimed for being for a sum less than $10,000, the commissioners had power to order the same under the statute 31 Vic., c. 13 s. 16, and J. I. could recover by petition of right for such part of the extra work claimed as he had been directed to perform.

3. That the 18th sec. 31 Vic., c. 13, not having been embodied in the agreement with J. I. as a condition precedent to the payment of any sum for work executed, the Crown could not now rely on

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that section of the statute for work done and accepted and received by the Government.

4. That the effect of 37 Vic., c. 15, was to abolish the office of Chief Engineer of the Intercolonial Railway, and, for work performed and received on or after the 1st June, 1874, to dispense with the necessity of obtaining, as a condition precedent to the payment for the same, the certificate of said Chief Engineer, in accordance with sec. 18 of 31 Vic., c. 13.—See Can. S.C.R., vol. VII., p. 696.

[E.C.] 1877 May 21.

JONES, *et al.*, *v.* THE QUEEN.

Petition of Right—Intercolonial Railway contract—31 Vic., c. 13, s. 18—Certificate of Chief Engineer—Condition precedent to recovery of money for extra work—Petition of right against the Crown for tort, or fraudulent misconduct of its servants—Forfeiture and penalty—Liquidated damages.

On the 25th May, 1870, J. and S., contractors, entered into a contract with the Intercolonial Railway commissioners (authorized by 31 Vic., c. 13) to construct and complete section No. 7 of the said Intercolonial Railway for the Dominion of Canada, for a bulk sum of $557,750. During the progress of the work, changes of various kinds were made. The works were sufficiently completed to admit of rails being laid, and the line opened for traffic on the 11th November, 1872. The total amount paid on the 10th February, 1873, was $557,750, the amount of the contract. The contractors thereupon presented a claim to the commissioners amounting to $116,463.83 for extra work, &c., beyond what was included in their contract. The commissioners, after obtaining a report from the Chief Engineer, recommended that an additional sum of $31,091.58 (less a sum of $8,300 for the timber bridging not executed, and $10,354.24 for under-drain taken off contractor's hands) be paid to the contractors upon receiving a full discharge of all claims of every kind or description under the contract. The balance was tendered to suppliants and refused.

The contractors thereupon, by petition of right, claimed $124,663.33, as due from the Crown to them for extra work done by them outside of and beyond the written contract, alleging that, by orders of the Chief Engineer, additional work and alterations were required, but these orders were carried out only on the understanding that such additional work and alterations should be paid for extra ; and alleging, further, that they were

put to large expense and compelled to do much extra work which they were entitled to be paid for, in consequence of misrepresentations in the plans and the bill of works exhibited at time of letting.

On the profile plan it was stated that the best information in possession of the Chief Engineer respecting the probable quantities of the several kinds of work would be found in the schedules accompanying the plan, " but contractors must understand that these quantities are not guaranteed ;" and in the bill of works, which purported to be an abstract of all information in possession of the commissioners and Chief Engineer with regard to the quantities, it was stated, " the quantities herein given as ascertained from the best data obtained, are, as far as known, approximately accurate, but at the same time they are not warranted as accurate, and no claim of any kind will be allowed, though they may prove to be inaccurate."

The contract provided, *inter alia*, that it should be distinctly understood, intended and agreed that the said price or consideration of $557,750 should be the price of, and be held to be full compensation for all the works embraced in, or contemplated by the said contract, or which might be required in virtue of any of its provisions, or by law, and that the contractors should not, upon any pretext whatever, be entitled by reason of any change, alteration or addition made in or to such works, or in the said plans and specifications, or by reason of the exercise of any of the powers vested in the Governor-in-Council by the said act, intituled " An Act respecting the construction of the Intercolonial Railway," or in the commissioners or Engineer by the said contract or by law, to claim or demand any further or additional sum for extra work, or as damages or otherwise, the contractors thereby expressly waiving and abandoning all and any such claim or pretension to all intents and purposes whatsoever except as provided in the 4th section of the said contract relating to the alterations in the grade or line of location ; and that the said contract and the said specification should be in all respects subject to the provisions of the act first cited in the said contract, intituled " An Act respecting the construction of the Intercolonial Railway," 31 Vic. c. 13, and also, in as far as they might be applicable, to the provisions of " The Railway Act of 1868."

The 18th section of 31 Vic. c. 13, enacts " that no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed, nor until such certificate shall

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have been approved of by the commissioners." No certificate was given by the Chief Engineer of the execution of the work.

Held, per Ritchie, J.—That the contract requiring that any work done on the road must be certified to by the Chief Engineer, until he so certified and such certificate was approved of by the commissioners, the contractors were not entitled to be paid anything. That if the work in question was extra work, the contractors had by the contract waived all claim for payment for any such work. If such extra work was of a character so peculiar and unexpected as to be considered *dehors* the contract, then there was no such contract with the commissioners as would give the contractors any legal claim against the Crown ; the commissioners alone being able to bind the Crown, and they only as authorized by statute.

That there was no guarantee, express or implied, as to the quantities, nor any misrepresentations respecting them. But even if there had been, a petition of right will not lie against the Crown for tort, or for a claim based on an alleged fraud, imputing to the Crown the fraudulent misconduct of its servants.

In the contract it was also provided that if the contractors failed to perform the work within the time agreed upon in and by the said contract, to wit, 1st July, 1871, the contractors would forfeit all money then due and owing to them under the terms of the contract, and also the further sum of $2,000 per week for all the time during which said works remained incomplete after the said 1st July, 1871, by way of liquidated damages for such default. The contract was not completed till the end of August, 1872.

Held, That if the Crown insisted on requiring a decree for the penalties, time being declared the essence of the contract, the damages attached, and the Crown was entitled to a sum of $2,000 per week from the 1st July, 1871, till the end of August, 1872, for liquidated damages.

The Crown subsequently waiving the forfeiture, judgment was rendered in favor of the suppliants for the sum of $12,436.11, being the amount tendered by the respondent, less the costs of the Crown in the case to be taxed and deducted from the said amount. See Can. S. C. R., vol. VII., p. 570.

McFARLANE *v.* THE QUEEN.

[E.C.] 1881 May 25. [S.C.] 1882 May 13.

Non-liability of the Crown for the negligence of its servants—Crown not a common carrier—Payment of statutory dues.

The suppliants, by petition of right, claimed payment of certain losses sustained by them arising from the breaking of a boom, at the

mouth of the Madawaska river, owned by the Dominion Government as a public work and constructed for the purpose of facilitating the transmission of saw logs, &c., down the Ottawa river. Suppliants were carrying on lumber operations on the Madawaska river, and certain timber and logs owned by them passed into the Government boom at the mouth of the Madawaska. They alleged that the boom-master, by reason of the unskilful, negligent and improper manner in which he performed his duty, allowed a larger quantity of timber and logs than the boom was capable of holding to pass into it, in consequence of which the boom broke and the timber and logs of the suppliant floated out. Some of the logs were lost and suppliants were put to expenses in recovering others. Suppliants also allege that the boom was negligently and unskilfully constructed.

The Crown demurred to the petition of right in effect upon the grounds that no contract between the suppliants and Her Majesty was shown therein, and that in the absence of a contract in respect of which the negligence of the boom-master arose, damages therefor could not be recovered against the Crown.

Held, per Henry, J. (in the Exchequer Court), that there was an implied contract on the part of the Crown for the carriage of the logs by water, and over-ruled the demurrer. On appeal to the Supreme Court of Canada,—

Held, (reversing the judgment of the Exchequer Court): 1st. That a petition of right does not lie to recover compensation from the Crown for damage occasioned by the negligence of its servants to the property of an individual using a public work.

2nd. That an express or implied contract is not created with the Crown because an individual pays tolls imposed by statute for the use of a public work, such as slide dues for passing his logs through government slides.

3rd. That in such a case Her Majesty cannot be held liable as a common carrier. See Can. S. C. R., vol. VII., p. 216.

McLEAN AND ROGER v. THE QUEEN.

[E.C.] 1881
June 18.
[S.C.] 1882
June 22.

Petition of right—Non-liability of the Crown on parliamentary printing contract—Departmental printing contract—Mutuality.

H. in his capacity of clerk of the joint-committee of both houses on printing, advertised for tenders for the printing, furnishing the printing paper, and the binding required by the parliament of the Dominion of Canada. The tender of the suppliants was accepted by

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the joint-committee and by both Houses of Parliament by adoption of the committee's report.

The suppliants, in their petition, contended that their tender and its acceptance by the joint-committee and both Houses constituted a contract between them and Her Majesty, under which they were entitled to do the whole of the printing required for the parliament of Canada ; and alleged that this obligation was broken and parliamentary printing given out to be done by others, whereby they were unjustly deprived of the profits they would have derived from the execution thereof by themselves, and they claimed compensation by way of damages.

To this petition the Attorney-General demurred, on the ground, *inter alia*, that H. in his capacity as clerk of the joint-committee, had no authority to bind the Crown, and no action upon such contract could be enforced against Her Majesty.

Held, per Henry, J. (in the Exchequer Court), that H., acting as clerk of the joint-committee, had sufficient authority to bind the Crown by the contract signed by him in such capacity ; that the contract so made was not for a part, but for the whole of the printing, &c., required for the Parliament of Canada ; and that the Crown was responsible in damages for the breach thereof. On appeal to the Supreme Court of Canada,—

Held, (reversing the judgment of the Exchequer Court), that the parliamentary printing was a matter connected with the internal economy of the Senate and House of Commons over which the Executive Government had no control, and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it.

Under 32-33 Vic., c. 7, which provides that the printing, binding and other like work required for the several departments of the Government shall be done and furnished under contracts to be entered into under authority of the Governor-in-Council after advertisement for tenders, the Under-Secretary of State advertised for tenders for the printing " required by the several departments of the Government." The suppliants tendered for such printing ; the specifications annexed to the tender, which were supplied by the Government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the Governor-in-Council, and an indenture was executed between the suppliants and Her Majesty by which the suppliants agreed to perform and execute, &c., "all jobs or lots of printing for the several departments of the Government of Canada, of reports, &c., of every description and kind soever coming within the denomination of departmental printing, and all the

work and services connected therewith and appertaining thereto, as set forth in the said specification hereunto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the departmental printing having been given to others, the suppliants, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing.

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Held: per Henry, J., that there was a clear intention shown that the contractors should have all the printing that should be required by the several departments of the Government, and that the contract was not a unilateral contract but a binding mutual agreement.

On appeal to the Supreme Court of Canada, the judgment of the Exchequer Court was affirmed. See Can. S.C.R., vol. VIII., p. 210.

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[E.C.] 1882
April 1.
[S.C.] 1883
April 30.

Petition of Right—Personal injuries sustained on Government railway—Negligence of Crown's servants—Contract for safe carriage.

McL., the suppliant, purchased in 1880 a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island Railway, owned by the Dominion of Canada and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway, and that he was greatly and permanently injured in body and health, and claimed $50,000. The Attorney-General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants.

Held: (per Henry, J.) That the action was not brought to recover damages arising from the mere negligence of management or maintenance of the railway by the servants of the Crown, but it was alleged and proved that for a good consideration a valid contract to carry the suppliant safely and securely was entered into by Her Majesty, and that she failed to perform it; and that the suppliant was entitled to the sum of $36,000 for damages for the injuries

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sustained by him. On appeal to the Supreme Court of Canada,—*Held:* reversing the judgment of the Exchequer Court, (Fournier and Henry, JJ., dissenting.) That the establishment of Government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the non-feasance or mis-feasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways.

That the Crown is not liable as a common carrier for the safety and security of passengers using said railways. See Can. S. C. R, vol. VIII., p. 1.

[E.C.] 1883
Feb. 19.
[S.C.] 1887
Dec. 13.

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Petition of Right Act, 1876, *s.* 7—*Statute of Limitations*—32 *Henry* 8, *c.* 9—*Rideau Canal Act*, 8 *Geo.* 4, *c.* 1—6 *Wm.* 4, *c.* 16—7 *Vic.*, *c.* 11, *s.* 29—9 *Vic.*, *c.* 42—*Deed—Construction of—Estoppel.*

Under the provisions of 8 Geo. 4, c. 1, generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen as necessary for making and completing said canal, but only some 20 acres were actually used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to Wm. McQueen all his interest in the said lands, and on the 6th February, 1832, the said Wm. McQueen conveyed the whole of the lands originally granted to Grace McQueen to said Col. By in fee for £1,200.

By 6 William 4, c. 16, persons who acquired title to lands used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic., c. 2, the Rideau Canal, and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was

enacted: "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the use of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

By 9 Vic., c. 42, (Canada), it was recited that the foregoing proviso had given rise to doubts as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks, under 8 George 4, c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19-20 Vic., c. 45, the Ordnance properties became vested in Her Majesty for the uses of the late province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada.

The appellant, the heir-at-law of William McQueen, by her petition of right, sought to recover from the Crown 90 acres of the land originally taken by Col. By, but not used for the purposes of the canal, or such portion thereof as still remained in the hands of the Crown, and an indemnity for the value of such portions of these 90 acres as had been sold by the Crown.

Held: (per Gwynne, J. in the Exchequer)—Under the statute 8 Geo. IV., the original owner and his heirs did not become divested of their estate in the land until after the expiration of the period given by the act for the officer in charge to enter into a voluntary agreement with such owner, unless in virtue of an agreement with such owner. Nor was there any conversion of realty into personalty effected by the act until after the expiration of said period. By the deed made by William McQueen of the 6th February, 1832, all his estate in the 110 acres, as well as in the residue of the 600 acres, passed and became extinguished, such deed operating as a contract or agreement made with Col. By as agent of His Majesty within the provisions of the act and so vesting the 110 acres absolutely in His then Majesty, his heirs and successors.

2. Such deed was not avoided by the statute 32 Hy. VIII., c. 9, Col. By being in actual possession as the servant and on behalf of His Majesty, and taking the deed from William McQueen while out of possession, the statute having been passed to make void all deeds executed to the prejudice of persons in possession by persons out of possession to persons out of possession, under the circumstances stated in the act.

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3. There was no reversion or revesting of any portion of the land taken by reason of its ceasing to be used for canal purposes. When land required for a particular purpose is ascertained and determined by the means provided by the legislature for that purpose, and the estate of the former owner in the land has been by like authority devested out of him and vested in the Crown, or in some persons or body authorized by the legislature to hold the expropriated land for the public purpose, if the estate of which the former owner is so devested be the fee simple, there is no reversion nor anything in the nature of a reversionary right left in him in virtue of which he can at any subsequent time claim, upon any principle of the common law, to have any portion of the land of which he was so devested to be revested in him by reason of its ceasing to be used for the purpose for which it was expropriated.
4. Assuming that Grace McQueen had, by operation of the act, become devested of her estate in the land in her lifetime, and that her right had become converted into one merely of a right to compensation which, upon her death, passed as personalty, the non-payment of any demand which her personal representative might have had, could not be made the basis or support of a demand at the suit of the heir-at-law of William McQueen, to have revested in him any portion of the lands described in the deed of the 6th February, 1832, after the execution of that deed by him, whether effectual or not for passing the estate which it professed to pass.
5. The proviso in the 29th section of 7 Vic., c. 11, as explained by 9 Vic., c. 42, was limited in its application to the lands which were originally the property of Nicholas Sparks, and not conveyed or surrendered by voluntary grant executed by him, and for which no compensation or consideration had been given to him.
6. Her Majesty could not be placed in the position of trustee of the lands in question unless by the express provisions of an act of Parliament, to which she would be an assenting party.

On appeal to the Supreme Court,—

Held: (1). (Per Ritchie, C.J.) By the deed of the 6th February, 1832, the title to the lands passed out of William McQueen, but assuming it did not, he was estopped by his own act, and could not have disputed the validity and general effect of his own deed, nor can the suppliant who claims under him.

(2). (Per Ritchie, C.J., and Strong and Gwynne, JJ.) The suppliant is debarred from recovering by the Statute of Limitations, which the Crown has a right to set up in defence under the 7th section of the Petition of Right Act of 1876.

(3) (Per Strong, J.) Independently of this section, the Crown, having acquired the lands from persons in favour of whom the statute

had begun to run before the possession was transferred to the Crown, that body incorporated under the title of "The Principal Officers of Ordnance" would be entitled to the benefit of the statute.

(4). (Per Strong, J.) The act 9 Vic., c. 42, had not the effect of restricting the operation of the revesting clause of 7 Vic., c. 11 to the lands of Nicholas Sparks, and was passed to clear up doubts as to the case of Nicholas Sparks and not to deprive other parties originally coming within sec. 29 of 7 Vic., c. 11 of the benefit of that enactment.

(5). (Per Strong, J.) A petition of right is an appropriate remedy for the assertion by the suppliant of any title to relief under sec. 29. Where it is within the power of a party, having a claim against the Crown of such a nature as the present, to resort to a petition of right a mandamus will not lie, and a mandamus will never, under any circumstances, be granted where direct relief is sought against the Crown.

(6). (Per Strong, J.) By the express terms of the 3rd section of 8 Geo. IV., c. 1, the title to lands taken for the purposes of the canal vested absolutely in the Crown so soon as the same were, pursuant to the act, set out and ascertained as necessary for the purposes of the canal; and all that Grace McQueen could have been entitled to at her death was the compensation provided by the act to be ascertained in the manner therein prescribed, and this right to receive and recover the money at which this compensation should be assessed vested, on her death, in her personal representative, as forming part of her personal estate. Therefore as regards the 110 acres nothing passed by the deed of 6th February, 1832. And up to the passing of 7 Vic., c. 11, no compensation had ever been paid by the Crown, nor any decision as to compensation binding on the representative of Grace McQueen.

(7.) (Per Strong, J.) The proviso in sec. 29 of 7 Vic., c. 11 applied to the 90 acres not used for the purposes of the canal, and had the effect of reversing the original estate in William McQueen as the heir-at-law of his mother, subject to the effect upon his title of the deed of 6th February, 1832. But if it had the effect of revesting the land in the personal representative, the suppliant is not such personal representative and would therefore fail.

(8.) (Per Strong, J.) This deed did not work any legal estoppel in favor of Col. By which would be fed by the statute vesting the the legal estate in William McQueen, the covenants for title by themselves not creating any estoppel. But if a vendor, having no title to an estate, undertakes to sell and convey it for valuable consideration, his deed, though having no present operation either

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at law or in equity, will bind any interest which the vendor may afterwards acquire even by purchase for value in the same property, and in respect of such after acquired interest he will be considered by a court of equity to be a trustee for the original purchaser, and he, or his heir-at-law, will be compelled to convey to such purchaser accordingly. In other words, the interest so subsequently acquired will be considered as "feeding" the claim of the purchaser arising under the original contract of sale, and the vendor will not be entitled to retain it for his own use. Therefore, if the suppliant were granted the relief asked, the land and money recovered by her would in equity belong to the heirs of Col. By.

Although nothing passed under the deed of the 6th February, 1832, yet the suppliant could not withhold from the heirs or representatives of Col. By anything she might recover from the Crown under the 29th section of 7 Vic. c. 11, but the heirs or representatives of Col. By would in turn become constructive trustees for the Crown of what they might so recover by force of the rule of equity forbidding purchases by fiduciary agents for their own benefit.

(9.) (Per Strong, J.) The deed of the 6th February, 1832, being in equity constructively a contract by William McQueen to sell and convey any interest in the land which he or his heirs might afterwards acquire, there is nothing in the statute 32 Henry 8, c. 9, or in the rules of the common law avoiding contracts savoring of maintenance, conflicting with this use of the deed.

(10.) (Per Fournier and Henry, JJ.) The mere setting out and ascertaining of the lands was not sufficient to vest the property in His Majesty, and Grace McQueen having died without having made any contract with Col. By the property went to William McQueen her heir-at-law.

1. (Per Fournier, Henry and Taschereau, JJ.) The deed of the 6th February, 1832, made before the passing of 7 Vic., c. 11, s. 29, and five years after the Crown had been in possession of the property in question, conveyed no interest in such property either to Col. By personally or as trustee for the Crown, and the title therefore remained in the heirs of Grace McQueen.
2. The proviso in sec. 29 of 7 Vic. c. 11 was not limited by 9 Vic. c. 42 to the lands of Nicholas Sparks, and the appellant is entitled to invoke the benefit of it.
3. The 90 acres now used for the purposes of the canal did not by 19 Vic. c. 54 become vested in Her Majesty, nor were they transferred by the B. N. A. Act to the exclusive control of the Dominion Parliament. The words "adjuncts of the canal" in the first

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schedule of the B. N. A. Act could only apply to those things necessarily required and used for the working of the canal.

4. The Crown was not entitled to set up the Statute of Limitations as a defence by virtue of sec. 7 of the Petition of Right Act, 1876, that section not having any retroactive effect.
5. (Per Fournier, Henry and Taschereau, JJ.) There could be no estoppel as against William McQueen by virtue of the deed of the 6th February, 1832, in the face of the proviso in 7 Vic. c. 11.

The court being equally divided the appeal was dismissed, without costs. See Can. S.C.R., vol. XVI., p. 1.

O'BRIEN *v.* THE QUEEN.

[E.C.] 1877 Dec. 3.
[S.C.] 1880 Mar. 13.

Contract—Claim for extra work—Certificate of Engineer—Condition precedent—31 Vic., c. 12 (D).

By contract under seal, dated 4th December, 1872, the suppliant engaged with the Minister of Pubic Works, to construct, finish and complete for a lump sum of $78,000 a deep sea wharf at the Richmond Station at Halifax, N. S., agreeably to the plans in the engineer's office, and specifications, and with such directions as would be given by the engineer in charge during the progress of the work. By the 7th clause of the contract, no extra work could be performed unless "ordered in writing by the engineer in charge before the execution of the work."

By letter, dated 26th August, 1873, the Minister of Public Works authorized the suppliant to make an addition to the wharf by the erection of a superstructure to be used as a coal-floor, for the additional sum of $18,400. Further extra work, which amounted to $2,781, was performed under another letter from the Public Works Department. The work was completed, and on the final certificate of the Government's engineer in charge of the works, the sum of $9,681, as the balance due, was paid to the suppliant, who gave the following receipt, dated 30th April, 1875: "Received from the Intercolonial Railway, in full, for all amounts against the Government for works under contract, as follows: 'Richmond deep-water wharf works for storage of coals, works for bracing, wharf, re-building two stone cribs, the sum of $9,681.'" The suppliant sued for extra work, which he alleged was not covered by the payment made on the 30th April, 1875, and also for damages caused to him by deficiency in, and irregularity of payments.

Held: (per Fournier, J.) That the suppliant was paid in full the contract price, and also the price of all extra work for which he could pro-

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duce the written authority of the engineer in charge; that all other work performed by the suppliant for the Government was either contract work within the plans or specifications, or work rendered necessary in consequence of his non-compliance with the conditions of the contract and specifications; and that the written authority of the engineer in charge, and his estimate of the value of the work, were conditions precedent to the right of the suppliant to recover payment for any extra work.

On appeal the Supreme Court of Canada the judgment of the Exchequer Court was affirmed. See Can. S. C. R., vol. IV., p. 529.

[E.C.] 1886
Dec. 27.
[S.C.] 1887
Dec. 14.

QUEEN (THE) v. FARWELL.

Provincial grant of lands to Dominion of Canada—Rights of subsequent grantee under Provincial Letters-Patent against the Crown as represented by the Dominion of Canada—Insufficiency of description of lands in statutory grant.

By section 11 of the order-in-council admitting the province of British Columbia into confederation, British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government might deem advisable in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the legislature of British Columbia passed the statute 47 Vic. c. 14. by which it was enacted, *inter alia*, as follows: "From and after the passing of this act there shall be and there is hereby granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the main land of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of said line, as provided in the order-in-council, section 11, admitting the Province of British Columbia into Confederation." On the 20th November, 1883, by public notice the government of British Columbia reserved a belt of land of 20 miles in width along a line by way of Bow River Pass. In November, 1884, the defendant in order to comply with the provisions of the provincial statutes, filed a survey of a certain parcel of land situate within the said belt of 20 miles, and the survey hav-

ing been finally accepted on the 13th January, 1885, letters-patent under the great seal of the province were issued to F. for the land in question.

The Attorney-General of Canada by information of intrusion sought to recover possession of said land.

Held, (1.) (per Henry, J. in the Exchequer Court)—That the legislature of British Columbia has the power of passing a title to public lands by an Act, and by doing so might repeal, to that extent, any previous statutory provisions to the contrary.

(2.) That the grant by the legislature of British Columbia to the "Dominion Government," *eo nomine*, made no title in the Crown in respect of the Dominion of Canada.

(3.) That the title to the lands referred to in the statutory grant remained in Her Majesty on behalf of the province of British Columbia.

(4.) That the grant was, moreover, void for insufficiency of description of the lands intended to be conveyed therein.

On appeal to the Supreme Court of Canada,—

Held, (reversing the judgment of the Exchequer Court) that at the date of the grant the province of British Columbia had ceased to have any interest in the land covered by said grant, and that the title to the same was in the Crown for the use and benefit of Canada. See Can. S.C.R., vol. XIV., p. 392.

QUEEN (THE) *v.* GRINNELL.

[E.C.] 1887 June 11.
[S.C.] 1888 Dec. 14.

Customs duties—Article imported in parts—Rate of duty—Scrap brass—46 Vic. c. 12, s. 153—Subsequent legislation, effect of—Statutory declaration.

G., manufacturer of an "Automatic Sprinkler," a patented brass device composed of several parts, was desirous of importing the same into Canada, with the intention of putting the parts together there and putting the completed articles on the market. He interviewed the appraiser of hardware at Montreal, explained to him the device and its use, and was told that it should pay duty as a manufacture of brass. He imported a number of sprinklers in parts, paying duty on the several parts instead of on the completed article, although they required but trifling work and expense to be made ready for the market. The Customs officials thereupon caused the same to be seized, and an information to be laid against him for smuggling, evasion of payment of duties, undervaluation, and knowingly keeping and selling goods illegally imported, under secs. 153 and 155 of the Customs Act of 1883.

Held, (per Gwynne, J. in the Exchequer Court) that the entry of the sprinklers for duty, in pieces, was an evasion of the Customs Act of 1883, and that they should have been entered at the price of the

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patented invention in the United States where they were manufactured, that being their proper market value for duty when imported into Canada.

On appeal to the Supreme Court of Canada,—

Held, (reversing the judgment of the Exchequer Court) (1), that there was no importation of sprinklers as completed articles by G., and the act not imposing a duty on parts of a manufactured article, the information should be dismissed.

(2) That the subsequent passage of an act (48-49 Vic., c. 61, s. 11 sub-sec. 2, reenacted by R. S. C. c. 32, s. 61 sub-sec. 2), imposing a duty on the component parts of a manufactured article was an implied legislative declaration that such did not previously exist. See Can. S. C. R., vol. XVI., p. 119.

[E.C.] 1880 Oct. 7. [S.C.] 1882 April 28.

ROBERTSON *v.* THE QUEEN.

Fisheries Act, 31 *Vic.*, *c.* 60 (*D*)—*British North America Act*, 1867, *ss.* 91, 92 *and* 109—*Fisheries, regulation and protection of—Licenses to fish—Rights of riparian proprietors in granted and ungranted lands—Right of passage and right of fishing.*

On January 1st, 1874, the Minister of Marine and Fisheries of Canada, purporting to act under the powers conferred upon him by sec. 2, c. 60, 31 Vic., executed on behalf of Her Majesty to the suppliant an instrument called a lease of fishery, whereby Her Majesty purported to lease to the suppliant for nine years a certain portion of the south-west Miramachi river, in New Brunswick, for the purpose of fly-fishing for salmon therein. The *locus in quo* being thus described in the special case agreed to by the parties :—

" Price's Bend is about 40 or 45 miles above the ebb and flow of the tide. The stream for the greater part from this point upward, is navigable for canoes, small boats, flat bottomed scows, logs and timber. Logs are usually driven down the river in high water in the spring and fall. The stream is rapid. During summer it is in some places on the bars very shallow."

Certain persons who had received conveyances of a portion of the river and who, under such conveyances, claimed the exclusive right of fishing in such portion, interrupted the suppliant in the enjoyment of his fishing under the lease granted to him, and put him to certain expenses in endeavouring to assert and defend his claim to the ownership of the fishing of that portion of the river included in his lease. The Supreme Court of New Brunswick having decided adversely to his exclusive right to fish in virtue of said lease, the suppliant presented a petition of right and claimed compensation from Her Majesty for the loss of his fishing privileges and for the expenses he had incurred.

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By special case, certain questions were submitted for the decision of the Exchequer Court, and the court (Gwynne, J.) held, *inter alia*, that an exclusive right of fishing existed in the parties who had received the conveyances, and that the Minister of Marine and Fisheries, consequently, had no power to grant a lease or license under sec. 2 of the Fisheries Act of the portion of the river in question; and in answer to the 8th question, viz.: "where the lands (above tidal water) through which the said river passes are ungranted by the Crown, could the Minister of Marine and Fisheries lawfully issue a lease of that portion of the river?" *Held*, that the Minister could not lawfully issue a license to fish as a franchise apart from the ownership of the soil in that portion of the river.

The appellant thereupon appealed to the Supreme Court of Canada on the main question: whether or not an exclusive right of fishing did so exist.

Held (affirming the judgment of the Exchequer Court). 1st. That the general power of regulating and protecting the Fisheries, under the British North America Act, 1867, s. 91, is in the Parliament of Canada, but that the license granted by the Minister of Marine and Fisheries of the *locus in quo* was void, because said act only authorizes the granting of leases "where the exclusive right of fishing does not already exist by law," and in this case the exclusive right of fishing belonged to the owners of the land through which that portion of the Miramachi river flows.

2nd. That although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down, and a right of passage up and down in Canada, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands *ad medium filum aquæ*.

3rd. That the rights of fishing in a river, such as is that part of the Miramachi from Price's Bend to its source, are an incident to the grant of the land through which such river flows, and where such grants have been made there is no authority given by the B. N. A. Act, 1867, to grant a right to fish, and the Dominion Parliament has no right to give such authority.

4th. (Per Ritchie, C.J., and Strong, Fournier and Henry, JJ.), reversing the judgment of the Exchequer Court on the 8th question submitted, that the ungranted lands in the Province of New Brunswick being in the Crown for the benefit of the people of New Brunswick, the exclusive right to fish follows as an incident and is in the Crown as trustee for the benefit of the people of the province, and, therefore, a license by the Minister of Marine and Fisheries to fish in streams running through provincial property would be illegal. See Can. S.C.R., vol. VI., p. 52.

[E.C.] 1882 July 31. [S.C.] 1883 June 19.

SMITH *et al* v. THE QUEEN.

Government contract—Clause in—Construction of—Assignment—Effect of —Damages.

On 2nd August, 1878, H. C. & F. entered into a contract with Her Majesty to do the excavation, &c., of the Georgian Bay branch of the Canadian Pacific Railway. Shortly af the date of the contract and after the commencement of the work, H. C. & F. associated with themselves several partners in the work, amongst others S. & R., and on 30th June, 1879, the whole contract was assigned to S. & R. Subsequently on the 25th July, 1879, the contract with H. C. & F. was cancelled by order-in-council on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th of August, 1879, S. & R. notified the Minister of Railways of the transfer made to them of the contract. On the 9th August the order-in-council of July 25th was sent to H. C. & F. On the 14th August, 1879, an order-in-council was passed stating that as the Government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification S. & R., who were carrying on the works, ceased work and with the consent of the then Minister of Public Works realized their plant and presented a claim for damages, and finally H. C. & F. and S & R. filed a petition of right claiming $250,000 damages for breach of contract. The statement in defence set up, *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and, in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same ; and in such case the contractors should have no claim for any further payment in respect of works performed, but remain liable for loss by reason of non-completion by the contractors.

At the trial there was evidence that the Minister of Public Works knew that S. & R. were partners, and that he was satisfied that they were connected with the concern. There was also evidence that the Department knew S. & R. were carrying on the works, and that S. & R. had been informed by the Deputy Minister of the Department that all that was necessary to be officially recognized as contractors, was to send a letter to the Government from H. C. & F.

Held: (per Henry, J.) that the Crown had no legal right to avoid the

contract; and that the payment by the Railway Department of between $10,000 and $11,000 to Messrs. S. & R., the assignees of the contract, on account of work done, was evidence of the Crown's ratification of the assignment, and the recognition of them as the substituted contractors. That the suppliants were entitled to the sum of $171,040.77 as damages, together with their costs.

On appeal to the Supreme Court of Canada,—

Held, reversing the judgment of the Exchequer Court, that there was no evidence of a binding assent on the part of the Crown to the assignment of the contract to S. & R., who therefore were not entitled to recover.

2. That H. C. & F., the original contractors, by assigning their contract, put it in the power of the Government to rescind the contract absolutely, which was done by the order-in-council of the 14th August, 1871, and the contractors under the 17th clause could not recover either the value of the work actually done, the loss of prospective damages, or the reduced value of the plant. See Can. S.C.R., vol. X., p. 1.

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[E.C.] 1877
Nov. 14.

Petition of Right Act 1876, *s.* 7—*Statute of Limitations*—32 *Henry VIII., c.* 9—*Buying pretended titles—Public Works—Rideau Canal Act,* 8 *Geo.* 4, *c.* 1—6 *Wm. IV., c.* 16—*Trustee, contract by—Compensation for lands taken for canal purposes*—2 *Vic., c.* 19—7 *Vic., c.* 11, *s.* 29—9 *Vic., c.* 42.

Under the provisions of 8 Geo. IV., c. 1, passed on the 17th February, 1827, by the Provincial Parliament of Upper Canada, and generally known as the Rideau Canal Act, Lt.-Colonel By, who was employed to superintend the work of making said canal, set out and ascertained 110 acres or thereabouts, part of 600 acres or thereabouts theretofore granted to one Grace McQueen, as necessary for making and completing said canal, but only some 20 acres were actually necessary and used for canal purposes. Grace McQueen died intestate, leaving Alexander McQueen, her husband, and William McQueen, her eldest son and heir-at-law, her surviving. After her death, on the 31st January, 1832, Alexander McQueen released to William McQueen, all his interest in the said lands, and on the 6th February, 1832, William McQueen granted to Col. By all the lands previously granted to his mother. Col. By died on the 1st February, 1836.

By 6 William IV., c. 16, persons who acquired title to lands

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used for the purposes of the canal after the commencement of the works, but who had purchased before such commencement, were enabled to claim compensation.

By the Ordnance Vesting Act, 7 Vic., c. 11, (Can.), the Rideau Canal and the lands and works belonging thereto, were vested in the principal officers of H. M. Ordnance in Great Britain, and by sec. 29 it was enacted : "Provided always, and be it enacted, that all lands taken from private owners at Bytown under the authority of the Rideau Canal Act for the uses of the canal, which have not been used for that purpose, be restored to the party or parties from whom the same were taken."

By the 9th Vic., c. 42, (Can.) it was recited that the foregoing proviso had given rise to doubt as to its true construction, and it was enacted that the proviso should be construed to apply to all the land at Bytown set out and ascertained and taken from Nicholas Sparks under 8 Geo. IV., c. 1, except certain portions actually used for the canal, and provision was made for payment of compensation to Sparks for the land retained for canal purposes, and for the re-investing in him and his grantees of the portions of lands taken but not required for such purposes.

By the 19th and 20th Vic., c. 45, the Ordnance properties became vested in Her Majesty for the uses of the late Province of Canada, and by the British North America Act they became vested in Her Majesty for the use of the Dominion of Canada.

The suppliants, the legal representatives of Col. By, brought a petition of right, alleging the foregoing facts, and seeking to have Her Majesty declared a trustee for them of all the said lands not actually used for the purposes of the said canal, and praying that such portion of said lands might be restored to them, and the rents and profits thereof paid, and as to any parts sold that the values thereof might be paid, together with the rents and profits, prior to the selling thereof.

By his statement in defence the Attorney-General contended, among other things, that (par. 5) no interest in the lands set out and ascertained by Col. By passed to William McQueen, but the claim for compensation or damages for taking said lands was personal estate of Grace McQueen, and passed to her personal representative ; that (par. 6, 7 and 8,) the deeds of the 31st of January and 6th February, 1832, passed no estate or interest, the title and possession of the lands being in His Majesty, but that such deeds were void under 32 Hy. VIII., c. 9 ; that (par. 9) Col. By was incapable, by reason of his position, from acquiring any beneficial interest in said lands as against His Majesty ; that (par. 10, 11, 12 and 13,) Col. By took proceedings under 8 Geo. IV., c. 1, to ob-

tain compensation for the lands in question, but the arbitrators, and also a jury summoned under the act, decided that he was entitled to no compensation by reason of the enhancement of the value of his other land and of other advantages accrued by the building of the canal, and that this award and verdict were a bar to the suppliants claim ; that (par. 14 and 15,) the proviso 9 Vic., c. 42 was confined to Nicholas Sparks and did not extend to the lands in question ; that (par. 16, 17, 18 and 19,) by virtue of 2nd Vic., c. 19 (Upper Canada), and a proclamation issued in pursuance thereof, all claims for damages which might have been brought under 8 Geo. IV., c. 1, by owners of lands taken for the canal, including claims of the said Grace McQueen or Col. By, or their respective representatives, were, on and after the 1st April, 1841, forever barred ; that (par. 26, 27 and 28,) the suppliants were barred by their own laches ; and that (par. 27) they were barred by the Statute of Limitations.

On a special case stated on the pleadings for the opinion of the court,—

Held : 1. The Statute of Limitations was properly pleadable under sec. 7 of the Petition of Right Act of 1876.

2. William McQueen took the lands by descent from his mother, if she died before the lands were set out and ascertained for the purposes of the canal. If she died afterwards, he did not, as they were vested in the Crown under 8 Geo. IV., c. 1, ss. 1 and 3, and her right was converted into a claim for compensation under the 4th section.

3. This right of compensation or damages, if asserted under the 4th sec. of Geo. IV., c. 11, would go to Grace McQueen's personal representatives, but if the land was obtained by surrender under the 2nd sec. of the statute, then the heir-at-law of Grace McQueen would be the person entitled to receive the damages and execute the surrender.

4. The deeds of the 31st January, 1832, and 6th February, 1832, are void as against the Crown so far as they relate to the acres in dispute, except so far as the same may be considered as a surrender to the Crown under the 2nd sec. of the Rideau Canal Act.

5. The 9th paragraph of the statement in defence is a sufficient answe in law to the petition.

6. The defence set up in the 10th, 11th, 12th and 13th paragraphs of the statement would be sufficient in law, supposing the statements therein to be true.

7. The proviso of 9 Vic., c. 42, s. 29 was confined in effect to the lands of Nicholas Sparks only.

8. If the claim is to be made by Grace McQueen's personal represen-

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tatives under the 4th sec. of the Rideau Canal Act (and any claim by her could only be under that section) the Acts referred to in the 16th, 17th, 18th and 19th paragraphs of the statement in defence have an application to this case and would constitute a bar against all claims to be made under the Rideau Canal Act. As to the claims to be made by the heirs of Col. By, they have no claims under any of the statutes.

9. If the Ordnance Vesting Act vested the 110 acres in question in the heirs of Col. By, the court was not prepared to say that their claim had been barred by laches on the statement set out in the petition. But the statute had not that effect, nor had Col. By, or his legal representatives, ever had for his or their own use and benefit any title in or to these 110 acres. See Can. S. C. R., vol. VII., p. 651 (Appendix).

[E.C.] 1883
May 18.
[S.C.] 1885
Feby. 16.

WINDSOR AND ANNAPOLIS RAILWAY CO. v. THE QUEEN AND THE WESTERN COUNTIES RAILWAY CO.

Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint mis-feasor, judgment obtained against—Effect of, in reduction of damages—Pleading—37 Vic. c. 16.

By an agreement entered into between the Windsor and Annapolis Railway Company and the Government, approved and ratified by the Governor-in-Council, 22nd September, 1871, the Windsor Branch Railway,(N.S.), together with certain running powers over the trunk line of the Intercolonial, was leased to the suppliants for the period of 21 years from 1st January, 1872. The suppliants under said agreement went into possession of said Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B., being and acting as Superintendent of Railways, as authorised by the Government, (who claimed to have authority under an Act of the Parliament of Canada, 37 Vic., c. 16, passed with reference to the Windsor Branch, to transfer the same to the Western Counties Railway Company otherwise than subject to the rights of the Windsor and Annapolis Railway Company,) ejected suppliants from and prevented them from using said Windsor Branch and from passing over the said trunk line ; and four or five weeks afterwards said Government gave over the possession of said Windsor Branch to the Western Counties Rail-

way Company, who took and retained possession thereof. In a suit brought by the Windsor and Annapolis Railway Company against the Western Counties Railway Company for recovery of possession, &c., the Judicial Committee of the Privy Council held that 37 Vic., c. 16, did not extinguish the right and interest which the Windsor and Annapolis Railway Company had in the Windsor Branch under the agreement of the 22nd September, 1872.

On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of the 22nd September, 1871, the Exchequer Court of Canada, (Gwynne, J., presiding),

Held, that the taking the possession of the road by an officer of the Crown under the assumed authority of an act of parliament was a tortious act for which a petition of right did not lie.

On appeal to the Supreme Court of Canada, it was *Held* (Strong and Gwynne, JJ., dissenting,) that the Crown by the answer of the Attorney-General did not set up any tortious act for which the Crown claimed not to be liable, but alleged that it had a right to put an end to the contract and did so, and that the action of the Crown and its officers being lawful and not tortious they were justified. But, as the agreement was still a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of, or misinforma'ion as to, the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong, by such breach, become possessed of the suppliants' property, the petition of right would lie for the restitution of such property and for damages.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also by way of damages for monies received by the Western Counties Railway Company for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by the Crown, but was proved on the hearing by the record in the Supreme Court of Canada, to which court an appeal in said cause had been taken and which had affirmed the judgment of the Supreme Court of Nova Scotia.

Held: (per Ritchie, C.J., and Taschereau, J.), That the suppliants could not recover against the Crown as damages for breach of contract what they claimed and had judgment for as damages for a tort

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WINDSOR AND ANNAPOLIS RAILWAY COMPANY v. THE QUEEN.

committeed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment.

(Per Fournier and Henry, JJ.), that the suppliants were entitled to damages for loss of profits for the time they were, by the action of the Government, deprived of the possession and use of the road to the date of the filing of their petition of right. See Can. S. C. R., vol. X., p. 335.

REPORTER'S NOTE.—Leave to appeal to the Judicial Committee of the Privy Council from the judgment of the Supreme Court of Canada was obtained by the suppliants (W. & A. R. Co.), and the appeal being heard, the said judgment of the Supreme Court of Canada, in so far as it adjudged that the suppliants were intitled to damages for loss of profits from the time they were by the action of the Government deprived of the possession and use of the Windsor Branch to the date of the filing of their petition of right, was reversed, but, *quoad ultra,* was affirmed.

[E.C.] 1876

Nov. 28.

WOOD v. THE QUEEN.

Petition of Right—Application for security for costs, when to be made—Waiver of right to demand same.

Where the Crown asked for and obtained from the suppliant further time for filing statement of defence, an application on behalf of the Crown for security for costs was refused (per Fournier, J.): 1. Because the application for security for costs ought to have been made within the time allowed for filing the statement of defence. 2. Because the Crown, in asking for and obtaining an extension of time to file a statement of defence, had thereby waived its right to demand security for costs. 3. Because the power of ordering security for costs is a matter of discretion and not one of absolute right, and the Crown in this case could suffer no inconvenience from not getting security. See Can. S. C.R., vol. VII., p. 631.

[E.C.] 1877

April 23.

WOOD v. THE QUEEN.

Petition of Right — Demurrer—Executory Contract — Non-conpliance of contract with 31 *Vic. c.* 12 *s.* 7—*Unauthorized expenditure on Public Works.*

By his petitition of right, W., a sculptor, alleged that he was employed by the Government of the Dominion of Canada to prepare plans,

models, specifications and designs, for the laying out, improvement and establishment of the parliament square in the City of Ottawa; that he had done so, and had, at the request of the Government, superintended the work and the construction of said improvements for a period of six months. He claimed $50,000 for the value of his services.

By 31 Vic., c. 12, s. 7, it is provided that in order to make written contracts binding upon the Department of Public Works, they must be signed and sealed by the Minister or his deputy, and countersigned by the secretary; by sec. 15 of the same act, it is provided, that before any expenditure is *incurred*, there shall have been a previous sanction of parliament, except for such repairs and alterations as the public service demands; and sec. 20 thereof requires that tenders shall be invited for all works, except in cases of pressing emergency, or where, from the nature of the work it could be more expeditiously and economically executed by the officers and servants of the Department.

Held: (per Richards, C.J.) 1. That the Crown in this Dominion cannot be held responsible under a petition of right on an executory contract entered into by the Department of Public Works for the performance of certain works placed by law under the control of the Department, when the agreement therefor was not made in conformity with the 7th sec. of 31 Vic., c. 12.

2. That under sec. 15 of said act, if Parliament has not sanctioned the expenditure, a petition of right will not lie for work done for and at the request of the Department of Public Works, unless it be for work done in connection with repairs and alterations which the necessities of the public service demanded.

3. That in this case, if parliament had made appropriation for these works and so sanctioned the expenditure, and if the work done was of the kind that might properly be executed by the officers and servants of the Department under sec. 20 of said act, then no written contract would be necessary to bind the Department, and the suppliant shold recover for work so done. See Can. S.C.R., vol. VII., p. 634.

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CHEQUES—*Government cheque on deposit account with bank—Rights of payee endorsing for collection—Credit entry in payee's books, reversal of—Presentation by post—Sufficiency of notice of dishonor—Liability of drawer on non-payment.*] The Dominion Government having a deposit account of public moneys with the Bank of P. E. I. upon which they were entitled to draw at any time, the Deputy Minister of Finance drew an official cheque thereon for $30,000 which, together with a number of other cheques, he sent to the branch of the Bank of Montreal at O., at which branch bank the Government had also a deposit account. The said branch bank thereupon placed the amount of the cheque to the credit of the Dominion Government on the books of the bank, the manager thereof endorsing the same in blank and forwarding it to the head office of his bank at Montreal. The cheque was then sent forward by mail from the head office of the Bank of Montreal to the Bank of P. E. I. for collection, but was not paid by the latter bank which, subsequently to the presentment of the cheque, suspended payment generally. *Held*, (1). That the Bank of Montreal were mere agents for the collection of this cheque and that, although the proceeds of the cheque had been credited to the Government upon the books of the bank, it never was the intention of the bank to treat the cheque as having been discounted by them; consequently, as the bank

CHEQUES—*Continued.*
did not acquire property in the cheque, and were never holders of it for value, they were entitled on the dishonor of the cheque to reverse the entry in their books and charge the amount thereof against the Government. *Giles* v. *Perkins* (9 East 12); *Ex parte Barkworth* (2 De G. & J. 194), referred to. (2). That the mode of presenting a cheque on a bank by transmitting it to the drawee by mail, is a legal and customary mode of presentment. *Heywood* v. *Pickering* (L. R. 9 Q. B. 428); *Prideaux* v. *Criddle* (L. R. 4 Q. B. 455), referred to. (3). That although a collecting bank cannot enlarge the time for presentment by circulating a bill or cheque amongst its branches, yet, if it has been endorsed to and transmitted through them for collection, the different branches or agencies are to be regarded as separate and independent endorsers for the purpose of giving notice of dishonor. *Clode* v. *Bayley* (12 M. & W. 51); *Brown* v. *L. & N. W. Ry. Co.* (4 B. & S. 326), referred to. (4). That the defendants, whether considered as mere agents for the collection, or as holders, of the cheque for value, were, as regards the drawer, only called upon to show that there was no unreasonable delay in presentment and in giving notice of non-payment; and, no such delay having occurred, the Crown was not relieved from liability as drawer of the cheque. (5.) In a letter from the manager of the Bank of Montreal, at Ottawa, to the Deputy Minister of Finance, which the defendants put in evidence as a notice to the Crown—the drawer—of the dishonor of the cheque by the drawees—the Bank of P. E. I., the fact of non-payment was stated as follows:—"I am now advised that it has not yet been covered by Bank of P. E. Island. In case of it being returned here again unpaid I deem it proper to notify you of the circumstances, as I will be required in that event to reverse the entry and return it to the Department." *Held*, that the words "not covered," as used in this letter, were equivalent to "not paid" or to "unpaid;" and, being so construed, the letter was a sufficient legal notice of dishonor. *Bailey* v. *Porter* (14 M. & W. 44); *Paul* v. *Joel* (27 L. J. Ex. 383), referred to. The Queen *v.* The Bank of Montreal — — — — 154

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CONTRACT—*Claim for balance of moneys due under contract*—31 *Vic. c.* 13, *ss.* 16, 17, 18—*Change of Chief Engineer before final certificate given—Approval of final certificate by Commissioners—Waiver.*] By the 16th section of the Intercolonial Railway Act (31 Vic., c. 13) the Commissioners of that railway were empowered to build it by tender and contract. By the 17th section thereof it was enacted that "the contracts to be so entered into, shall be guarded by such securities, and contain such provisions for retaining a proportion of the contract moneys, to be held as a reserve fund, for such periods of time, and on such conditions, as may appear to be necessary for the protection of the public, and for securing the due performance of the contract." By the 18th section it was provided that "no money shall be paid to any contractor until the Chief Engineer shall have certified that the work, for or on account of which the same shall be claimed, has been duly executed,

CONTRACT—*Continued.*

nor until such certificate shall have been approved of by the Commissioners." The Commissioners entered into a contract with the suppliant, which, while containing a stipulation that all the progress certificates of the Chief Engineer should be approved by the Commissioners, made no provision for the approval of the final certificate by them. *Held*, that under the provisions of the 17th section it was in the discretion of the Commissioners to insert in, or omit from, the contract a stipulation requiring their approval to the final certificate of the Engineer; and that, in the absence of such stipulation from the written instrument, it must be assumed that the Commissioners did not regard it as necessary for the protection of the public interest, or for securing the due performance of the contract. (2.) The suppliant entered upon and completed his contract during the time that F. held the position of Chief Engineer, but did not obtain a final certificate from him before his resignation from office. S. was appointed by order-in-council to succeed F., and, having entered upon the duties of the office, it became necessary for him to investigate the suppliant's claim, along with others of a similar character. Thereafter he made a report to the Department of Railways and Canals (the Minister of which Department then represented the Commissioners, whose office had been abolished) which did not certify that the whole work had been done and completed to his satisfaction, as required in the final certificate by the terms of the contract, but in general terms recommended that suppliant be paid $120,371 in full settlement of his claim. After receiving this report the Government allowed a long period of time to elapse before taking any further steps in the matter. *Held*, that S., being regularly appointed Chief Engineer, was competent to give the final certificate required by the contract; that his report was available to the suppliant as such final certificate; and that, had the approval of the certificate by the Minister, so representing the Commissioners, been necessary, such approval had been given by acquiescence. (3.) After more than a year had elapsed since the report of S., as Chief Engineer, had been made, the Government appointed a Royal Commission to make enquiry into the suppliant's claim, along with others, and to report to the Governor-in-Council as to the liability of the Government upon such claims. Suppliant appeared before this Commission and produced evidence in support of his claim, but declared in writing to the Commissioners that he did so without prejudice to his right to insist on payment of the amount recommended to be paid him in the report so made by S. The Commissioners reported in favor of the suppliant for $84,075,—this amount being subsequently paid to the suppliant, for which he gave an unconditional receipt in respect of his claim. Prior to giving this receipt, however, he had written a letter to the Minister of Railways and Canals declining to accept such amount in full satisfaction of his claim. *Held*, that the receipt so given by the suppliant did not, under the circumstances, operate as a waiver of his right to claim for the balance due him upon the report of S. McGreevy *v.* The Queen. — — — — — — 321

2——*Contract for construction of a public work—31 Vic., c. 12, s. 7, construction of—Material change in plans and specifications—New contract—Waiver.*] The appellants entered into a contract with the Dominion Government to construct a bridge for a specified sum. After the materials necessary for its construction according to the original plans and specifications had been procured, the Government altered the plans so much that an entirely new and more expensive structure became involved. The appellants were then given new plans and specifications by the Chief Engineer of Public Works, the proper officer of the Government in that behalf, and were directed by him to build the bridge upon the altered plans, being at the same time informed that the prices for the work would be subsequently ascertained. They thereupon proceeded with the construction of the bridge. Under the provisions of the written contract, the Chief Engineer was required to make out and certify the final estimate of the contractors in respect of the work done upon the bridge; and upon the completion of the bridge, a final estimate was so made and certified, whereby the appellants were declared to be entitled to a certain amount. The appellants, however, claimed to be entitled to a much larger amount, and their claim was ultimately referred by the Government to the Official Arbitrators, who awarded them a sum slightly in excess of that certified to be due in the final estimate. On appeal from this award, *Held*, (1.) That s. 7 of 31 Vic., c. 12, which provides "that no deeds, contracts, documents or writings shall be deemed to be binding upon the Department [of Public Works], or shall be held to be acts of the Minister [of Public Works] unless signed and sealed by him or his deputy, and countersigned by the Secretary," only refers to executory contracts, and does not effect the right of a party to recover for goods sold and delivered, or for work done and materials provided to and for another party and accepted by him. (2) That the Crown, having referred the claim to arbitration, having raised no legal objection to the investigation of the claim before the Arbitrators, and not having cross-appealed from their award, must be assumed to have waived all right to object to the validity of the second contract put forward by the claimants. Starrs et al., *v.* The Queen — — — 301

3——*Breach of contract for book-binding—Loss of profits—Measure of damages.*] M. entered into a contract with the Dominion Government to do parliamentary and departmental binding for a period of five years. During the continuance of the contract the Government employed other persons to do portions of the work which M. was entitled to do, and in consequence of this M. (through his trustee in insolvency) brought an

CONTRACT—*Continued.*

action by petition of right, claiming damages against the Government for breach of contract. The breach was admitted by the Crown, and the case was referred by the court to two referees to ascertain the amount due M. for loss of profits in respect to the work that was withheld from him and given to other persons. The referees found that the work done by persons other than M. amounted to $25,357.79, and that the cost of performing such work amounted to $10,094.74 leaving a balance for contractor's profit of $15,263.05. From this balance the referees made deductions for "superintendence generally, wear and tear of plant, building, &c., rent, insurance, fuel and taxes," amounting in the whole to $3,637.71, and recommended that M. be paid a sum of $11,625.34 as representing the contractor's profit lost to M. by the breach of contract. On appeal from the referees' report,—*Held*, that the referees were wrong in making such deductions, and that M. was entitled to be paid the difference between the value of the work done by persons other than himself during the continuance of his contract, and the amount it would have actually cost him, as such contractor, to perform that work. Boyd *v.* The Queen — — — — — 186

4——*Contract for carrying rails, breach of—Employment of persons other than contractor to do work covered by contract—Representations prior to formation of contract by agent of the Crown—Evidence—Measure of damages.*] On the 9th August, 1875, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from sea-going vessels upon the wharves in the harbor of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine Canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory. Some time in the month of September, and when the suppliant had only carried a small quantity of rails, the Government, without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract. It was alleged by suppliant that M., who had acted on behalf of the Government in making the contract with the suppliant, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination. *Held*, (1). The fact that no stipulation embodying such representation

CONTRACT—*Continued.*

appeared in the written instrument was evidence that it formed no part of the contract. (2). That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875 for the purpose mentioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. Kenney *v.* The Queen — 68

CONTRACT, CONSTRUCTION OF—*Claim for balance of moneys due under contract—Construction of contract*—31 *Vic. c.* 13, *ss.* 16, 17, 18 —*Change of Chief Engineer before final certificate given—Approval of final certificate by Commissioners—Waiver.* — — — — 321
See Contract 1.

CROWN, THE—*Crown's rights under the Petition of Right Act*, 1876. — — — 1

2——*Mandatory remedy against the Crown sought by petition of right.* — — — 182
See Petition of Right 1 and 2.

3——*Waiver by the Crown of rights arising under contract.* — — — — — 321
See Contract 1 and 2.

CUSTOMS DUTIES—29-30 *Vic. c.* 11—*The Customs Act*, 1883—46 *Vic.* (*D.*) *c.* 12, *ss.* 68 *and* 69—*Construction—Importing constituent parts of proprietary medicines—"Market Value."* — 232
See Revenue (*a*) 1.

CUSTOMS HOUSE—*Entry at Customs House*—40 *Vic. c.* 10, *s.* 12, *interpretation of—Entering port for shelter—False statements of master as to cargo and voyage—Recovery of penalties—Procedure.* — — — — — 99
See Revenue (*a*) 2.

DAMAGES.
See Compensation.

DAMAGES, MEASURE OF—*Breach of contract for book-binding—Loss of profits—Measure of damages.* — — — — 186
See Contract 3.

2—— *Contract for carrying rails, breach of—Employment of persons other than contractor to do work covered by contract — Measure of damages.*] On the 9th August, 1875, the suppliant entered into a written contract with the Dominion Government to remove and carry in barges all the steel rails that were then actually landed, or that might thereafter be landed, from sea-going vessels upon the wharves in the harbor of Montreal during the season of navigation in that year, and to deliver them at a place called the Rock Cut on the Lachine

DAMAGES, MEASURE OF—*Continued.*

Canal. Suppliant duly entered upon the execution of his contract, and no complaint was made on behalf of the Government that his performance of the work was not entirely satisfactory. Sometime in the month of September, and when the suppliant had only carried a small quantity of rails, the Government, without previous notice to the suppliant, cancelled the contract and employed other persons to do the work that he had agreed to perform. Thereupon the suppliant filed a petition of right claiming damages against the Government for breach of contract. *Held*, that suppliant was entitled to damages, the measure thereof being the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. Kenney *v.* The Queen — — — 68

DEMURRER.—*Demurrer—Claim for timber unlawfully cut on Dominion lands—Pleading set-off against the Crown—Running accounts—Practice.* — — — — — — 134

See Practice 2.

2——*Petition of Right Act*, 1876—*Demurrer—Exception à la forme—Arts.* 52 *and* 116 *C. C. P. L. C.—Arts.* 1498 *and* 1571 *C. C. L. C.* — 350

See Practice 4.

DESTINATION.—*Immoveables by destination—Mill machinery—Arts.* 379 *and* 380 *C.C.L.C.* - 121

See Immoveables.

DOMINION LANDS.

See Petition of Right 2.

— Practice 2.

EASEMENTS—*Easements and servitudes created by claimants' grantor (auteur)—Claim for present damages affected thereby.* — — 144

See Grantor.

DRAWER—*Liability of drawer of cheque to bank holding for collection—Credit entry of cheque in payee's (collecting bank's) hands—Reversal of on non-payment by drawee.* — 154

See Cheques.

EVIDENCE—*Representations prior to formation of contract—Absence of stipulation embodying same in contract.*] Suppliant alleged that one M., who had acted on behalf of the Government in making a contract with him for the carriage of C.P.R. steel rails between Montreal and Lachine for the year 1875, had represented to him that a very large quantity of rails, amounting to some 25,000 or 35,000 tons, would have to be carried by the suppliant as such contractor; and that it was upon this representation that he entered into the said contract and made a large outlay with a view to efficiently removing and carrying the rails and delivering them safely at their place of destination. *Held*, -(1.) The fact that no stipulation embodying such representation appeared in the written instrument was evidence that it formed no part of the contract.

EVIDENCE—*Continued.*

(2). That although the suppliant could not import into the formal contract any representations made by M. prior to it being reduced to writing, yet under the terms of the written contract he was entitled to remove all the rails landed from ships in the port of Montreal during the year 1875, for the purpose mentioned in the contract, and should have damages for the loss of the profits that would have accrued to him if he had carried such portion of the rails as was carried by other persons during the continuance of his contract. Kenney *v.* The Queen — — — — — — 68

2——*Swearing witnesses before arbitrators—Oral evidence—Right to cross-examine.* — 313

See Practice 1.

EXPROPRIATION.

See Compensation.

— Grantor.

— Land.

— Profits.

— Public Works.

— Railways (Government.)

GOVERNMENT RAILWAYS.

See Railways (Government).

GRANTOR (*AUTEUR*)—*Expropriation for purposes of Lachine Canal—Easements and servitudes created by claimants' grantor (auteur)—Claim for present damages affected by—Compensation paid to grantor (auteur)—Right of action.*] Prior to the construction of the Lachine Canal, farm lots (cadastral) Nos. 3617 and 3912, situate in the parish of Côte St. Paul, in the county of Hochelaga, P.Q., were drained, each in its own line, by a natural water-course on their northern boundary. In constructing the Lachine Canal the Dominion Government destroyed the natural drainage of the lots, and, as it was impossible to effect drainage into the canal on account of the height of the embankments, the Government built several culverts under such embankments to answer that purpose. To conduct the drainage from the four neighbouring farms west of lot 3617, as well as from lot 3617 itself and the two farms immediately east of it, to a culvert situated on lot 3912, the Government provided the said farms with a drain-ditch leading to the culvert. This system of drainage appears to have worked satisfactorily when not interfered with. For the purposes of the canal, the Government expropriated a portion of lot 3617 while it was in possession of P.J., the father of the claimants, and from whom they derived title thereto. In pursuance of an award of the Official Arbitrators, the Government paid the then proprietor $2,320.33, with interest from the date of expropriation, for the area of land so taken, and a further sum of $4,035.10, for all damages resulting from the expropriation. After lot 3617 came into the possession of the claimants, the occupant of one of the farms adjoining it obstructed the passage of water through the said

GRANTOR—*Continued.*

drain-ditch and caused the said lot to become overflowed, whereby the claimants' barns and their contents were injuriously affected. Some time in the year 1853, and before lot 3912 came into possession of P.J., one of the claimants, the Government of Canada had paid for and obtained from the then owner certain easements and servitudes for the purposes of the said canal, and, in the exercise of the rights so acquired by the Crown, damage resulted to the lot and buildings erected thereon after they came into the possession of the last named claimant. Upon a claim against the Dominion Government for compensation for damages and loss of profits sustained by the claimants in respect of the use and occupation of the two lots, being submitted to the Official Arbitrators they found against and dismissed the same. On appeal from the award of the Official Arbitrators, *Held*,—(1.) That in respect to lot 3617, inasmuch as compensation for all future damages arising from the expropriation had been paid to claimants' grantor (*auteur*) while he was in possession, no right of action for such damages accrued to the claimants unless (as was not the case here) another expropriation had been made, or some new work performed, causing damages of a character not falling within the limits of those arising from the first expropriation. Moreover, if such new damages had arisen prior to the said claimants coming into possession of the lot, any right of action therefor could only have been exercised by claimants' grantor (*auteur*). (2.) That in respect to lot 3912, the claimant must abide by the easements and servitudes over and upon the property created by his grantor (*auteur*), and that the claim for damages arising out of the exercise of such rights by the Government was not well founded. JACKSON *et al.* *v.* THE QUEEN 144

GRAVEL PIT—*Expropriation of land for purposes of railway gravel pit—Basis of valuation.* — — — — — — 87

See VALUATION OF PROPERTY 3.

IMMOVEABLES—*Immoveables by destination —Mill machinery.*] Under the provisions of Arts. 379 and 380 C.C.L.C. machinery in mills becomes immoveable by destination and forms part of the realty. LEFEBVRE *v.* THE QUEEN - 121

INCREASED VALUE—*Expropriation of land for Government railway—Potential advantage of railway to remaining property.* — — 291

See RAILWAYS (GOVERNMENT) 3.

INLAND REVENUE.

See REVENUE (*b*.)

INSURANCE.— *Increased rates of insurance against fire rendered necessary to be paid through operation of railway.* — — — 53

See RAILWAYS (GOVERNMENT) 1.

INTEREST—*Expropriation of land—Award of Official Arbitrators—Interest allowed therein.*] Under the law of the Province of Quebec, where interest has been allowed on an award by the Official Arbitrators a claim for loss of profits or rent cannot be entertained by the court on appeal, as such interest must be regarded as representing the profits. *Re Fouché—Lepelletier*, (Dalloz 84, 3, 69), and *re Pechwerty* (Dalloz 84, 5, 485, No. 42), referred to. PARADIS *v.* THE QUEEN — — — — — — 191

JUDGE—*Appeal from order granted by judge in chambers.* — — — — — 184

See PRACTICE 3.

JURISDICTION.

See OFFICIAL ARBITRATORS.

LAND—*Expropriation—Availability of land for more than one purpose—31 Vic. c. 12, ss. 25-40—Basis of valuation.*] B. & Co. were owners of a lot of uncleared land in the Parish of St. Paul, Province of Manitoba, upon which certain agents of the Dominion Government had entered at different times, under the provisions of sec. 25 of 31 Vic., c. 12, and taken therefrom large quantities of sand and gravel for the purposes of the Canadian Pacific Railway, amounting in all to some 82,000 cubic yards. For the sand and gravel so taken the Government offered B. & Co. $72.50, which they refused to accept. The claim was then referred to the Official Arbitrators, who valued the property as farm land and awarded B. & Co. $100 in full compensation and satisfaction of their claim. On appeal from this award, *Held*, that the Official Arbitrators were wrong in assessing the damages in respect of the agricultural value of the land; and that such assessment should have been made in respect of its value as a sand and gravel pit. *Semble*, where lands are taken which possess capabilities rendering them available for more than one purpose, under sec. 40 of the Public Works Act (31 Vic., c. 12), compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value. BURTON, ET AL., *v.* THE QUEEN — 87

2——*Direct and consequent damages from the construction of a public work*—31 *Vic.*, *c.* 12, *s.* 34 —*Prospective capabilities of property—Unnavigable stream of water running through claimant's land—Property therein by right of accession.*] Where the Crown in the construction of a public work had forever destroyed the milling capabilities of a property and deprived the owner of future income derivable from the property as applied to such a use, and had rendered useless certain mills situate thereon, together with the machinery in the mills, upon a special case claiming damages in respect of these matters being submitted to the Official Arbitrators they dismissed the claim as not recoverable at law. On appeal from the award of the Official Arbitrators, (1). *Held*, In assessing compensation in respect of damage to property arising from the

LAND—*Continued.*

construction, or connected with the execution, of any public work, under the provisions of 31 Vic. c. 12, s. 34 the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value. *The Mayor, etc., of the City of Montreal* v. *Brown, et al* (L.R. 2 App. Cas. 168) referred to. (2). The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which has been or may be derivable therefrom. Lefebvre v. The Queen-121

See Public Works.

— Railways (Government).

LAW—*Similarity of the law of the Province of Quebec and that of England respecting the right to compensation* — — — — 191

See Compensation.

MARKET VALUE—29-30 *Vic.* (*Can.*) *c.* 6, *s.* 11 —"*The Customs Act*, 1883" (*D*) *ss.* 68 *and* 69—*Construction—Importing constituent parts of proprietary medicines—"Market value", meaning of.* — — — — 232

See Revenue (*a*) 1.

2——*Expropriation of land—Basis of compensation—Market value—Real value to owner at time of expropriation.* — — — — 191

See Valuation of Property 2.

MASTER OF SHIP—*Entering port for shelter—False statements by master as to cargo and voyage—Effect of*—40 *Vic.*, *c.* 10, *sub-secs.* 1 *and* 2, *s.* 12 —*Penalties.* — — — — 99

See Revenue (*a*) 2.

MORTGAGE, CHATTEL—*Agency of mortgagor—Parol agreement between Crown and mortgagor—Ratification by mortgagees.*] S., who was engaged in the lumber business, becoming indebted to the suppliants in a large sum of money, mortgaged to them by two separate instruments certain lumber, logs, and timber as security for the repayment of such indebtedness. The first mortgage was executed on the 18th December, 1876, and the second on the 11th May, 1877. By a collateral arrangement made at the time the first mortgage was executed, and by a proviso contained in the second indenture, S. was allowed to remain in possession of the property, and to attend to its manufacture and sale for the benefit of the suppliants. On the 15th day of May, 1878, S. became insolvent, but prior to such insolvency the suppliants had taken possession of the lumber, logs, and timber, and thereafter obtained a release of S.'s equity of redemption from his assignee. On the 6th June, 1877, while S. was in possession of the property in the manner above mentioned, by a letter addressed to the Minister of Inland Revenue, he offered and agreed to pay the Government the sum of $2 per 1,000 ft. b.m. on all lumber to be shipped by him through the canals during the then current season, and also the whole amount of his indebtedness for canal tolls and dues then in arrears. This offer was accepted by the Government, and the agreement was acted upon by S. during the season of 1877. In 1878, after the suppliants had taken possession of the property and began to ship the lumber for themselves without paying the sum agreed upon between S. and the Government, the collector of slide dues refused to allow such lumber to pass through the canals, and caused the same to be seized and detained until the amount due upon it in respect of said agreement was fully paid. *Held*, there being no re-demise clause or proviso in the mortgage of the 18th December, 1876, whereby the mortgagor might have remained in possession until default, the judge, sitting in the Court of Exchequer, not as a court of appeal, but in an Ontario case to administer the law of Ontario, was bound by the decisions in *McAulay* v. *Allen* (20 U. C. C. P. 417), and *Samuel* v. *Coulter* (28 U. C. C. P. 240), to hold that, upon the execution of such mortgage, the suppliants were entitled to immediate possession of the property granted thereby, and might, if they had pleased, at any time have exercised their right to sell thereunder without the mortgagor's intervention or consent. But, while the terms of the second mortgage reserved to the suppliants the right to dictate into what description of lumber the logs should be manufactured, with whom alone contracts for the sale thereof might be entered into, and to whom upon sales it should be consigned, it was expressly provided therein that the business of such manufacture and sale should be transacted through the intervention of the mortgagor for the benefit of the suppliants. The effect and intent of the second mortgage, therefore, was to make the suppliants principals and S., the mortgagor, their agent in carrying on the business thereafter with their property, and for their sole benefit, until the property should be sold or they were paid their claim. (2). As such agent S. must be held to have had sufficient authority to bind the suppliants by his agreement with the Government, which, under all the circumstances, was a reasonable and proper one and made in the interest of the suppliants. (3). But whether S. was, or was not, authorized to make such an agreement with the Government, the suppliants adopted, ratified, and confirmed the agreement by acting under it and advancing moneys to pay the Government in accordance with its terms after they must be held to have had full knowledge of the nature and effect of it. Merchants Bank of Canada v. The Queen — — — — 1

MUNICIPAL ASSESSMENT ROLLS.

See Assessment Rolls.

NOTICE OF DISHONOR—*Government cheque—Rights of payee endorsing for collection—Pre-*

NOTICE OF DISHONOR—*Continued.*
sentation by post—Sufficiency of notice of dishonor. — — — — — 154
See CHEQUES.

OFFICIAL ARBITRATORS — *Jurisdiction — What claims referable to them.*] Sec. 34 of 31 Vic. (D.) c. 12 (*The Public Works Act*) which provides for the reference to the Board of Official Arbitrators of claims for damages arising from the construction, or connected with the execution, of any public work only contemplates claims for direct or consequent damages to the property, and not to the person or to the business of the claimant. McPherson *v.* The Queen - 53

2——*Application to set aside award of Official Arbitrators—44 Vic. c. 25, s. 43—Effect of such enactment as to time in which application may be granted.* — — — — — 313
See PRACTICE 1.

PAYEE—*Government cheque—Rights of payee endorsing for collection—Credit entry in payee's books, reversal of—Presentation by post—Sufficiency of notice of dishonor—Liability of drawer to payee on non-payment* — — — 154
See CHEQUES.

PENALTIES—*Customs laws—40 Vic. c. 10, s. 12, interpretation of—Entering port for shelter—False statements of master as to cargo and voyage—Recovery of penalties—Procedure.* — 99
See REVENUE (*a*) 2.

PETITION OF RIGHT—*Petition of Right Act, 1876—Crown's rights thereunder in enforcing a parol agreement.*] Under the provisions of the 7th section of the Petition of Right Act of 1876, the Dominion Government, in enforcing a parol agreement, is entitled to whatever rights any subject of the Crown would have in respect of such an agreement in an action between subject and subject. Merchants Bank of Canada *v.* The Queen — — — — — — 1

2——*Dominion lands—33 Vic. c. 3, s. 32—38 Vic. c. 52—Mandatory remedy sought by petition of right.*] A petition of right will not lie to compel the Crown to grant a patent of lands. Clarke *v.* The Queen — — — 182

PLEADINGS — *Demurrer — Pleading set-off against the Crown—Running accounts.* — 134
See PRACTICE 2.

2——*Petition of Right—Demurrer—Exception à la forme—Arts. 52 and 116 C.C.P.* — 350
See PRACTICE 4.

3——*Statement of claim—Insufficiency of—Dismissal of plaintiff's application to set down case for trial.* — — — — — 184
See PRACTICE 3.

PORT—*Entering port for shelter* — — 99
See REVENUE (*a*) 2.

PRACTICE—*Appeal—Application to set aside award of Official Arbitrators under 44 Vic., c. 25, s. 43—Effect of such enactment as to time in which application may be granted—Swearing witnesses before arbitrators — Oral evidence — Right to cross-examine.*] Under the provisions of 44 Vic., c. 25, s. 43, an application to the court for an order to set aside an award of the Official Arbitrators must be made within three months after the party applying has had notice of the making of the award, but the order need not be granted within that period. *Semble*—Where an arbitrator or assessor to whom a claim is referred by the Crown for report is empowered to take oral evidence, he cannot proceed to take such evidence without swearing the witnesses and giving each party an opportunity to cross-examine them. Pouliot *v.* The Queen — 313

2——*Demurrer—Claim for timber unlawfully cut on Dominion lands—Pleading set-off against the Crown—Running Accounts—Practice.*] An information was filed on behalf of the Crown seeking judgment against the defendants for entering upon certain Dominion lands and cutting thereon and converting to their own use a quantity of timber and railway ties, contrary to the provisions of 46 Vic., c. 17. s. 60; and also for money owing to the Crown for dues in respect of the timber and ties so cut by the defendants. The defendants specially denied the allegations of the information, and in their 12th plea substantially alleged that the claims sought to be maintained by the Crown arose out of, and were connected with, certain contracts between them and the Crown, in respect of which the Crown was indebted to them in an amount greater than the sum claimed from them in the information; and in their 13th plea substantially alleged that the Crown was then also indebted to them in an amount of money other than that above mentioned, which last mentioned sum was larger than the amount claimed from defendants; and that, before the information was filed, it was agreed between the Crown and the defendants that in consideration of the defendants forbearing to sue the Crown until their claims could be investigated, the Crown would not, before such investigation had been made, demand from the defendants, or sue them for, the claims set out in the information. It was further alleged by the defendants in their 13th plea that the Crown had never caused such investigation to be made, although they had theretofore been, and were then, ready and willing that such investigation should be had; and that the amount thereupon found due to them from the Crown, or a proper proportion thereof, should be applied by way of set-off towards payment and satisfaction of the alleged claims of the Crown. To these pleas the plaintiff demurred on the ground that set-off cannot be pleaded against the Crown. *Held*, (1). That the rule in such a case is not to set aside the plea demurred to unless it is clearly bad. (2). That, inasmuch as the claim against the Crown set out in the defendants' 12th plea arose out of the same contracts between the parties in re-

PRACTICE—*Continued.*
spect whereof the claims sought to be enforced in the information had arisen, and as the dealings of the parties thereunder were so continuous and inseparable that the claims on one side could not properly be investigated apart from those of the other, the rule against pleading a set-off to a declaration for money due to the Crown did not apply, and the demurrer to said plea should be over-ruled (3). That, as there was no allegation to the contrary, it must be presumed that the claim set up in the first part of the 13th plea was one unconnected with, and distinct from, the transaction in respect of which the claims sought to be enforced in the information arose; and that so much of the plea as dealt therewith, being simply a matter of set-off, was bad in law. (4). That a promise of forbearance to sue, such as that alleged in the concluding portion of defendants' 13th plea, could not be successfully pleaded in bar of an action between subject and subject, nor would such a defence be available against the Crown. The Queen *v.* Whitehead *et al.* — — 134

3——*Appeal from order of judge in chambers—Insufficiency of statement of claim—Practice.*] Where an order had been granted by a judge in chambers discharging a summons to fix the time and place of trial or hearing because the statement of claim did not disclose a proper case for the decision of the court, a motion by way of appeal therefrom to the court was dismissed by the presiding judge on the ground that he was not prepared to interfere with the order of another judge of the same court. Attorney-General of Ontario *v.* Attorney-General of Canada - 184

4——*Petition of Right Act,* 1876—*Demurrer—Exception à la forme—Arts.* 52 *and* 116 *C.C.P.L.C.—Arts.* 1498 *and* 1571 *C.C.L C.*] The Crown pleaded to a petition of right; (1st), by demurrer, *défense au fonds en droit,* alleging that the description of the limits and position of the property claimed in such petition was insufficient in law; (2nd), that the conclusions of the petition were insufficient and vague; (3rd), that in so far as respects the rents, issues, and profits there had been no signification to the Government of the gifts or transfers made by the heirs to the suppliant. These demurrers were dismissed by Strong J., and it was *Held,* that the objection taken should have been pleaded by *exception à la forme,* pursuant to art. 116 C.C.P., and as the demurrer was to all the rents, issues, and profits as well those before as those since the transfer, it was too large and should be dismissed, even supposing notification of the transfer necessary with respect to rents, issues, and profits accrued previous to the sale to suppliant by the heirs of *P.W., jr.* Chevrier *v.* The Queen — 350

PROCEDURE—*Customs laws*—40 *Vic.,* c. 10, *s.* 12, *interpretation of—Etnering port for shelter—False statements of master as to cargo and voyage, effect of—Recovery of penalties—Procedure* - 99
See Revenue (*a*) 2.
—- Practice.

PROCEDURE, CODE CIVIL.
See Code Civil Procedure.

PROFITS—*Loss of profits of business in consequence of construction and operation of a railway.*] Although a claimant is entitled to reasonable compensation for the damage sustained in respect of the injury to, and depreciation in value of, his property arising from the construction and operation of a railway in its immediate vicinity, he is not entitled to damages for loss and injury to his business consequent thereon; nor for extra rates of insurance it might become necessary for him to pay upon vessels in course of construction in his shipyard by reason of increased risk from fire from the operation of the railway. *Metropolitan Board of Works* v. *McCarthy* (L. R. 7 H.L. 243) followed. McPherson *v.* The Queen - 53

2——*Injury to land from flooding caused by construction of railway—Loss of profits from product of farm.*] In assessing damages for injury occasioned to a property by the construction of a railway, the annual loss of profits since the commencement of the injury, as well as the permanent decrease in the value of the property, must be taken into consideration. Pouliot *v.* The Queen — — — — — — 313

3——*Loss of business profits.*] Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation; but where land has been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works. *Jubb* v. *The Hull Dock Co.* (9 Q.B. 443) and *Duke of Buccleuch* v. *The Metropolitan Board of Works* (L. R. 5 Ex. 221, and L. R. 5 H. L. 418) referred to. Paradis *v.* The Queen — 191

4——*Loss of business profits upon expropriation.*] The loss of profits derivable from the prosecution of a certain business is of a personal character, and cannot be construed as a direct or consequent damage to property within the meaning of sec. 34 *of* 31 *Vic. c.* 12. Lefebvre *v.* The Queen — — — — — 121

5——*Breach of contract for book-binding—Loss of profits—Measure of damages.* — — 186
See Contract 3.
—- Land.
—- Railways (Government).
—- Public Works.

PROPERTY, REAL.
See Land.

PUBLIC WORKS—*Domages to property arising from the construction and operation of a public work.*—Sec. 34 of 31 Vic. (D.) c. 12 (The Public Works Act) which provides for the reference to the Board of Official Arbitrators of claims for damages arising from the construction, or connected with the execution of any public work,

PUBLIC WORKS—*Continued.*

only contemplates claims for direct or consequent damages to the property, and not to the person or to the business of the claimant. McPherson *v.* The Queen — — — — 53

2——*Material change in plans and specifications for public work—New contract* — — 301

See Contract 2.

3——*Prospective value of property injured by construction or operation of a public work.*] Under the provisions of 31 Vic. c. 12, s. 34, in assessing compensation in respect of damage to property arising from the construction or connected with the execution of any public work, the prospective capabilities of such property must be taken into consideration, as they may form an important element in determining its real value. *The Mayor, etc., of the City of Montreal* v. *Brown et al.*, (L.R. 2 App. Cas. 168) referred to. Lefebvre *v.* The Queen — 121

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RAILWAYS (GOVERNMENT) — *Damages to property arising from the construction and operation of a railway—Fire, increased risk from.*] Although a claimant is entitled to reasonable compensation for the damage sustained in respect of the injury to, and depreciation in value of, his property arising from the construction and operation of a railway in its immediate vicinity, he is not entitled to damages for loss and injury to his business consequent thereon; nor for extra rates of insurance it might become necessary for him to pay upon vessels in course of construction in his shipyard by reason of increased risk from fire from the operation of the railway. *Metropolitan Board of Works* v. *McCarthy* (L. R. 7 H. L. 243) followed. McPherson *v.* The Queen — 53

2——*Expropriation of land—Imperial Lands Clauses Consol. Act and Railways Clauses Consol. Act—"The Government Railways Act, 1881"—Right to compensation under the law of the Province of Quebec—Arts.* 407 *and* 1589, *C.C.L.C.—Damage to claimant's business —Interest—Valuation of property on municipal assessment rolls.*] On appeal from an award of the Official Arbitrators, *Held*, (1). In so far as "The Government Railways Act, 1881," reenacts the provisions of the Lands Clauses Consolidation Act, 8-9 Vic. (Imp.), c. 18, and the Railway Clauses Consolidation Act, 8-9 Vic. (Imp.), c. 20, where the latter statutes have been authoritatively construed by a court of appeal in England such construction should be adopted by the courts in Canada. *Trimble* v. *Hill* (5 App. Cas. 342), and *City Bank* v. *Barrow* (5 App. Cas. 664) referred to. (2). Apart from any legislation of the Dominion Parliament, where lands have been expropriated for any purpose, a right to compensation obtains under the law of the Province of Quebec in the same way as under the law of England. (3).

RAILWAYS (GOVERNMENT)—*Continued*

Where lands are injuriously affected but no part thereof expropriated, damages to a man's trade or business, or any damage not arising out of injury to the land itself, are not grounds of compensation; but where land has been taken, compensation should be assessed for all direct and immediate damages arising from the expropriation, as well as from the construction and maintenance of the works. *Jubb* v. *The Hull Dock Co.* (9 Q. B. 443), and *Duke of Buccleuch* v. *The Metropolitan Board of Works* (L. R. 5 Ex. 221, and L. R. 5 H. L. 418) referred to. (4). Under the law of the Province of Quebec, where interest has been allowed on an award by the Official Arbitrators, a claim for loss of profits or rent cannot be entertained by the court on appeal, as such interest must be regarded as representing the profits. *Re Fouché—Lepelletier* (Dalloz 84, 3, 69), and *re Pechwerty* (Dalloz 84, 5, 485, No. 42) referred to. Paradis *v.* The Queen. — — — — — 161

3——*Expropriation of land for the purposes of a Government railway - Potential advantage of railway to remaining property.*] On appeal from an award of the Official Arbitrators, the court, in assessing the amount of compensation to be paid to the owner, declined to take into consideration any advantage that would accrue to the property if a siding connecting the property with the railway were constructed, as there was no legal obligation upon the Crown to give such siding, and it might never be constructed. Charland *v.* The Queen — — — 291

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REAL PROPERTY

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REVENUE.

(*a.*) Customs laws and duties.

29-30 *Vic.* (*Can.*) *c.* 6 *s.* 11—"*The Customs Act,* 1883" (*D.*) *ss.* 68 *and* 69—*Construction—Importing constituent parts of proprietary medicines—"Market value," meaning of.*] Some time before the Dominion of Canada was constituted, the J. C. A. Co., manufacturers of proprietary medicines in the United States, established a branch of their business in St. John's, P. Q., and commenced to import from the United States certain articles required in the preparation of their medicines. These articles were in the form of liquid compounds, and were valued for duty under the provisions of the act 29-30 Vic. (Can.) c. 6, s. 11, then in force, at the aggregate of the fair market value of the several ingredients entering into the compounds so imported, with the addition of all costs and charges of transportation. These ingredients after arrival in Canada were mixed, bottled, and sold under various names. The import entries were made under the rates of duty fixed by the Customs authorities in virtue of the provisions of the said act, they being fully aware of the purposes to which

REVENUE—*Continued.*
the articles imported were to be applied. The company continued to import such goods in this way for upwards of twenty years, except some alterations they were called upon to make in the valuation for duty of certain liquids in 1883, when, on the 22nd May, 1885, the Dominion Customs authorities seized large quantities of their manufactured medicines, and caused an information to be laid against the company for smuggling, evasion of the payment of duties, under valuation, and for knowingly keeping and selling goods illegally imported, contrary to the provisions of "The Customs Act, 1883." *Held*, (1.) That there was no importation of goods as compounded medicines ready for sale, and that the duty having been paid upon the fair market value, in the place of exportation, of the ingredients of which the liquids in bulk were composed, there was no foundation for the seizure. (2.) Where the constituent parts or ingredients of a specific article are imported, their value for duty within the meaning of sections 68 and 69 of "The Customs Act, 1883" is not the fair market value of the completed article in the place of exportation, but is simply the fair market value there of the several ingredients. The form in which the material is imported constitutes the discriminating test of the duty. (3.) Notwithstanding the interpretation clause in "The Customs Act, 1883," which provides that Customs laws shall receive such liberal construction as will best insure the protection of the revenue, &c., in cases of doubtful interpretation the construction should be in favour of the importer. (4.) Where an importer openly imports goods and pays all the duties imposed on them at the fair market value thereof in the place of exportation at the time the same were exported, he has not imported such goods with intent to defraud the revenue simply because he had the mind to do something with them, which, had it been done in the country from which they were exported would have enhanced their value, and, consequently, made them liable to pay a higher rate of duty, but which in fact was never done before the goods came into his possession after passing the Customs. THE QUEEN *v.* THE J. C. AYER CO — — 232

2——*Customs laws* — *40 Vic., c. 10, s. 12, interpretation of—Entering port for shelter—False statements of master as to cargo and voyage—Recovery of penalties—Procedure.*] *Held*,—(1). Where there has been nothing done by the master to show an intent to defraud the Customs, a vessel entering a port for shelter, before reaching a place of safety there, has not "arrived" at such port within the meaning of 40 Vic.c.10,s.12 so as to justify seizure of her cargo for not reporting to the Customs authorities. (2.) Where false statements are made by the master regarding the character of the cargo and port of destination of his vessel, which would subject him to a penalty under sub-sec. 2 of s. 12, 40 Vic., c. 10, they cannot be relied on to support an information claiming forfeiture of the cargo for his not having made a report in writing of his

REVENUE—*Continued.*
arrival as required by sub-sec. 1, s. 12 of the said act. (3). That sec. 10 of 44 Vic , c. 11 (amending secs. 119 and 120 of 40 Vic., c. 10), merely provides a procedure to be followed when the Customs Department undertakes to deal with questions of penalties and forfeitures, and does not divest the Crown of its right to sue for the same in the manner provided by secs. 100 and 101 of 40 Vic., c 10, even where departmental proceedings have been commenced under the said provisions of 44 Vic., c. 11, s. 10.—(4). That even if secs. 100 and 101 of the said act 40 Vic. c. 10 had been repealed by the later statute, the Crown could proceed by information *in rem* at common law, and this right could not be taken away except by express words or necessary implication. THE QUEEN *v.* MACDONELL — 99

(*b*.) INLAND REVENUE.

Slide and boom dues—C. S. Can. c. 28—31 Vic. (D.) c. 12—Regulations made by former statute how affected by latter.] Inasmuch as the provisions and enactments relating to tolls in 31 Vic., c. 12 are in substance and effect the same as those contained in chapter 28 of the Consolidated Statutes of Canada, under which the present regulations relating to timber passing through the slides were made, in virtue of the provisions of sec. 71 of 31 Vic., c. 12 such regulations are in effect to be construed as having been made under the later statute. THE MERCHANTS BANK OF CANADA *v.* THE QUEEN — — — 1

2——*Parol agreement by mortgagor in possession to pay tolls on lumber covered by chattel mortgage —Seizure of the lumber by the Crown on breach of such agreement.* — — — — 1
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SET-OFF—*Demurrer—Pleading set-off against the Crown—Running accounts.* — — 134
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SIDING, RAILWAY—*Expropriation of land—Damages—Potential advantage of railway to remaining property if siding constructed—Compensation in lieu of siding.* — — — 291
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5——40 *Vic. c.* 10 *s.* 12. — — — 99
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6——46 *Vic. c.* 17 *s.* 60. — — — 134
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7——33 *Vic. c.* 3 *s.* 32—38 *Vic. c.* 52. — 182
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8——" *The Government Railways Act*, 1881,"—*Imperial Railways Clauses Consolidation Act*—8-9 *Vic. c.* 20—*Imperial Lands Clauses Consolidation Act*—8-9 *Vic. c.* 18. — — 191
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9——29-30 *Vic.* (*Can.*) *c.* 6 *s.* 11—"*The Customs Act*, 1883," (*D.*) *ss.* 68 *and* 69. — — 232
See REVENUE (*a*) 1.

10——31 *Vic. c.* 12 *s.* 7. — — — 301
See CONTRACT 2.

11——44 *Vic. c.* 25 *s.* 43. — — 313
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12——31 *Vic. c.* 13 *ss.* 16, 17, 18. — 321
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STATUTES, CONSTRUCTION OF—*Imperial Lands Clauses Consolidation Act*—31 *Vic.* (*D.*) *c.* 12, *s.* 40.] The phrase "injury done" in 31 Vic. (D.) c. 12, s. 40 is commensurate with, and has the same intendment as the phrase "injuriously affected" in 8-9 Vic. c. 18, s. 68 (Imperial Lands Clauses Consolidation Act), and, in so far as the similarity extends, cases decided under the Imperial act may be cited with authority in construing the Canadian statute. MCPHERSON *v.* THE QUEEN — — 53

2——*Expropriation of land—Imperial Lands Clauses Consolidation Act, and Railways Clauses Consolidation Act*—" *The Government Railways Act*, 1881"—*Construction of.*] *Held*, (1). In so far as "The Government Railways Act, 1881," re-enacts the provisions of the Lands Clauses Consolidation Act, 8-9 Vic. (Imp.) c. 18, and the Railway Clauses Consolidation Act, 8-9 Vic. (Imp.) c. 20, where the latter statutes have been authoritatively construed by a court of appeal in England such construction should be adopted by the courts in Canada. *Trimble* v. *Hill* (5 App. Cas. 342), and *City Bank* v. *Barrow* (5 App. Cas. 664) referred to. PARADIS *v.* THE QUEEN. — — — — — — 191

3——*Slide and boom dues—Regulations made under C. S. Can. c.* 28—*How affected by* 31 *Vic.* (*D.*), *c.* 12. — — — — — — 1
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4——*Customs laws*—29-30 *Vic.* (*Can.*), *c.* 6, *s.* 11—" *The Customs Act*, 1883," *ss.* 68-69—*Importing proprietary medicines*—" *Market value*," *meaning of.* — — — — 232
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VALUATION OF PROPERTY.—*Municipal assessment rolls—Valuation of property on.*]—The valuation of a property appearing upon the municipal assessment rolls does not constitute a test of the actual value upon which compensation should be based where such valuation is made arbitrarily, and without consideration of the trade carried on upon the property or the profits derivable therefrom. PARADIS *v.* THE QUEEN — — — — — 191

2——*Basis of compensation—Market value—Real value to owner at time of expropriation.* In an expropriation matter the court should assess damages in the same way a jury would do in an action for forcible eviction. It is not merely the depreciation in the actual market value of the land that a claimant has to be indemnified for, it is the depreciation in such value as it had to him that should be the basis of compensation. PARADIS *v.* THE QUEEN. — 191

3——*Expropriation of land for purposes of a railway gravel pit*—31 *Vic., c.* 12, *ss.* 25-40—*Basis of valuation.*] B. & Co. were owners of a lot of uncleared land in the Parish of St. Paul, Province of Manitoba, upon which certain agents of the Dominion Government had entered at different times under the provisions of sec. 25 of 31 Vic., c. 12, and taken therefrom large quantities of sand and gravel for the purposes of the Canadian Pacific Railway, amounting in all to some 82,000 cubic yards. For the sand and gravel so taken the Government offered B. & Co. $72.50, which they refused to accept. The claim was then referred to the Official Arbitrators, who valued the property as farm land and awarded B. & Co. $100 in full compensation and satisfaction of their claim. On appeal from this award, *Held*,—That the Official Arbitrators were wrong in assessing the damages in respect of the agricultural value of land; and that such assessment should have been made in respect of its value as a sand and gravel pit. *Semble*—Where lands are taken which possess capabilities rendering them available for more than one purpose, under s. 40 of *The Public Works Act* (31 Vic., c. 12) compensation for such taking should be assessed in respect of that purpose which gives the lands their highest value. BURTON *et al v.* THE QUEEN. — — — 87

4——*Damage to land by construction of Public Work—Prospective value of property*].—Under the provisions of 31 Vic., c. 12, s. 34, in assessing compensation in respect of damage to property arising from the construction or connected

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