IN THE MATTER of the Petition of Right of

MAHLON FORD BEACH.....SUPPLIANT; 1905

AND Feby. 15.

HIS MAJESTY THE KING.....RESPONDENT.

Lease of water-power—Stoppage of power on improvement of canal—Damages—New lease—Waiver—Surrender—Measure of damages—Loss of profit—Dissipation of business.

The suppliant was the owner of a flour-mill at Iroquois, Ont., which was built upon a portion of the Galops Canal reserve, and, prior to December 12th, 1898, was operated by water-power taken from the surplus water of the canal. The site upon which the mill was built, as well as the water-power sufficient to drive four runs of ordinary mill stones, equal to a ten horse-power for each run, were held by the suppliant under a lease from the Crown. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out, by the Government of Canada, for its enlargement and improvement. At that time it was not intended that the stoppage of the supply of such surplus water to the mill should be permanent, but temporary only. Subsequently, however, certain changes in the work were made which resulted in such supply being permanently discontinued. These changes were made by the Crown, at the request of the suppliant, and others, for the purpose of developing the water-power, of which the suppliant expected to obtain a lease on favourable terms. If the suppliant had obtained a lease of considerable power, as he had hoped to get, he would have been willing to release all claim for damage arising from the loss of the forty horse-power supply of water he had under his first lease; but in the end the Minister of Railways and Canals was not able to lease the suppliant as much power as he had expected, and in accepting the lease of a smaller quantity of power it was agreed between the latter and the Department that his rights under the earlier lease should not be affected by the grant of the new one.

Held, that the suppliant was entitled to recover compensation for the loss of power to which he was entitled under the earlier lease.

2. The court did not include in such compensation any claim for loss of profits or for dissipation of business, because, on the one hand, in its inception the stoppage of water was lawful and within the lease, and there was no ground upon which such claim could be allowed

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except that founded upon a change in the works that was made in part at the instance of the suppliant and to meet his views, and wholly with his acquiescence and consent; while on the other hand he had at all times a well founded claim either to have the power granted by the former lease restored to him, or to be paid a just compensation for the loss of it.

3. It was provided in the first lease that the suppliant would have no claim for damages in the event of a temporary stoppage of the water for the purpose, *inter alia*, of improving or altering the canal. Upon the question whether the stoppage of the water supply for the period of two and one half years, being the time actually necessary for the execution of the works for enlarging and improving the canal, would have been a temporary stoppage within the meaning of the first lease.

Held, that having regard to the subject-matter of the lease, any stoppage of the supply of surplus water actually necessary for the repair, improvement or alteration of the canal, in the public interest, and to meet the requirement of the trade of the country, would be temporary within the meaning of the provision above referred to, although it might last for several years.

4. Upon the question as to whether the acceptance by the suppliant of the lease of 1901 worked a surrender of the grant of surplus water made by the former lease,

Held, that as there was nothing within the two leases which would go to affect the validity of either of them, and there was no inconsistency between them, the two leases should stand.

5. That the damages herein should be measured by the cost of supplying and using for the operation of the mill forty horse-power furnished in some other way than by the water supply in question.

PETITION OF RIGHT for damages for breach of covenant in a lease.

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

October 5th, 6th, 19th and 20th, 1904.

The case was heard at Ottawa.

G. F. Shepley, K.C. and *I. Hilliard* for the suppliant;

F. H. Chrysler, K. C. and *N. G. Larmonth* for the respondent.

Mr. Shepley, for the suppliant, contended with regard to the power of the Minister of Railways and Canals that the first lease only enabled the minister to

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cause a temporary stoppage of the water supply demised. The provision in the lease mentioned does not extend to the permanent stoppage and deprivation of the water by the minister such as actually took place upon the evidence. The Crown, therefore, cannot avail itself of this provision in the lease to minimize the damage. This provision must be construed strictly, because it professes to take away the right of the lessee to a continuous and uninterrupted use of the water. Again, the stoppage did not occur by reason of the repair, improvement or alteration in the canal; but, by reason of the building of an entirely new canal, and destruction *pro tanto* of the old. The court must apply this clause in the lease to precisely the thing contemplated by it, before the suppliant can be penalized by taking away a right of action which has accrued.

In the next place it is contended on behalf of the Crown that the taking of a second lease by the suppliant operated in law as a surrender of the earlier lease, and that such earlier lease being gone, no right of action in respect of a breach of it can be maintained.

Then I come to the next point. Counsel for respondent contends that the effect of taking the second lease is to operate in law as a surrender of the earlier lease, and that the earlier lease being gone, no right of action in respect of a breach of it can be maintained.

Now, I take issue, both as a matter of law and as a matter of fact with my learned friend. What is the fact in respect to that? In the first place it is quite manifest that at the time the second lease was taken, the subject-matter of that lease was something absolutely and entirely distinct from the subject-matter of the first lease. The subject-matter of the first lease was the land upon which the mill is situated and the power to run the mill. The subject-matter of the second

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lease was an entirely distinct and separate parcel of land, together with the right to take 200 surplus horse-power from the water at the weir not for the purpose of running the mill, or being a substitute for the 40 horse-power, but for commercial purposes. In the second place it is perfectly manifest upon this evidence and upon the documents that all claims in respect of the first lease were kept on foot at the time the second was negotiated, and the second does not profess to put an end to the first; nor does it upon its face bear any possibility of such a construction,

Now, when you understand that Mr. Maclennan was in charge of these negotiations on behalf of the suppliant at the time they culminated in the lease, and when you hear what Mr. Maclennan says, that this very matter was made the subject of discussion between himself and Mr. Ruel, the Law Clerk of the Department, that upon their coming to an agreement by which all rights under the first lease were to be preserved, and by which the first lease was to be left on foot and unaffected, they went to Mr. Schreiber, who was the executive head of the Department, and that he confirmed the agreement, and then you take up the lease and find it does not profess to operate as a surrender, I say I am at issue with my learned friend upon the question of fact. I say the evidence here is not competent to establish the proposition as a matter of fact which this defence urges. But, the defence is also bad as a matter of law. Let me emphasize the difference between the two leases. As I pointed out to your lordship the land is different, the power is different, the purposes for which it was to be used are different, the first lease is a perpetually renewable one; the later one is subject only to two renewals for two further terms of 21 years, and therefore can only operate at most for 63 years. The earlier lease was a

lease which was not forfeitable except for default of the lessee. The second lease is forfeitable at the option of the Crown, without any default upon the part of the lessee. All these differences between the subject-matter of the first, and the subject-matter of the second lease emphasize the point which I am going to make, that the second cannot be treated in law as operating as a surrender of the first. (Cites *Woodfall on Landlord and Tenant* (1).

Then let us come to the plea of estoppel, or what is virtually a plea of estoppel, and let us examine that plea, because I have ventured without intending any disrespect at all to the pleader, to speak of this as a "limping estoppel." Your lordship is familiar with the essentials of an estoppel, and we will see that they are not even alleged here. (Quotes from the statement of defence).

Now, let us examine the facts, having regard to the pleadings. Mr. Douglas was the engineer who made the report upon which this work was constructed long before Mr. Beach could have had any possible connection with the matter. Mr. Douglas recommended the construction of this weir to the Department, of which he was an officer at precisely, or practically, the same point at which it was subsequently erected. How can it be said that the Department, or Mr. Douglas reporting to the Department, could have been influenced in the slightest degree as a question of policy in the management of the Department, by any representations that Mr. Beach had made, if he had made any? But, is there any evidence that Mr. Beach did anything of the kind? My learned friend points to some action of the municipal council of which Mr Beach is said to have been a member during the year. For anything we hear, Mr. Beach may have opposed it. There is not anything here showing Mr. Beach's individual action

(1) 17th ed. pp. 334, 335.

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even as an individual member of the council. It is perfectly true, and to that extent my learned friend is entitled to comment upon his evidence, that once the idea of building the weir at this point was an idea which had become the policy of the Department, Mr. Beach was most anxious, as a commercial matter, that he should be able to make arrangements with the Crown by which he would secure the valuable power right in connection with the weir; and from the beginning to the end of the negotiations that is what Mr. Beach was anxious to accomplish. He did not in the end accomplish it, or anything like it; but that is an entirely different thing from inducing the Government to alter its policy to bring the weir to where it was erected for the purpose of altering the supply to the mill. Thus we find the plea is not proved.

Now the central proposition which I present for your consideration as regards the measure of damages in this case is this: That so long as Mr. Beach properly refrained from ameliorating his condition by the construction of permanent works, his measure of damages is the loss of his profits in the business of milling carried on by him at this mill, and as soon as it became—I will not use the word "proper" here—as soon as it became *obligatory* upon him to take measures in his own relief, the right to profits, as such, ceases, and he is entitled to recover what it will cost him by way of capital outlay, and by way of increased annual expenditure in the future, as the balance of his compensation for the wrong which has been done to him.

I have read the correspondence in this case so as to get a chronological historical account of what was going on. Your lorship sees the position from the beginning practically was this: Mr. Beach was negotiating for the water-power with a view to making it commercially valuable, not alone with a view, or even

principally with the view, of getting power for the operation of his mill; that, incidentally, he would have got no doubt from the company which he was to form. What was his position? Was he bound—because you must go that far, he must be bound as a matter of law, notwithstanding this inexpensive way, comparatively, of minimizing the damages which the Government were bound to pay him—was he bound to put up permanent plant?

Addressing myself to this point just for a moment, and not intending to repeat anything I have said, if this were a case where I was seeking to apply the principles which I am seeking to apply to this case, to small figures, I do not suppose there would be any dispute about the proposition. If Mr. Beach's profits were a matter of a couple of hundred dollars a year, and if he had lost them by this breach of contract, I suppose nobody would say or think of saying that they were not properly recoverable. It is because the figures are large that every effort—I do not say at all improperly—is made to get away from the application of the plain principles of law.

Mr. Hilliard followed for the suppliant.

Clause 8 of the new lease is one in which the additional or surplus water is given over and above the 200 horse-power, and by reading that closely one can easily see that the 40 horse-power was excepted from and out of the grant of the 200 horse-power. Let us take clause 8. There are the words, "now under lease." That was drafted before it was signed. At the time this was signed these words were there.

Now, what was the power "now under lease," when that was drafted. There were the Edwardsburg power, the Iroquois horse-power and the 40 horse-power that Mr. Beach had in the lease which was given in 1853 and renewed in 1871.

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Then it was "now under lease on the Galops Canal." Then it says "additional." Additional to what? Additional to what was now under lease, and what was now being granted. That to my mind makes the thing perfectly clear that the party who drafted this had in his mind what was in that memorandum of March, 1901, that it was not to include the 40 horse-power. He uses apt words to express exactly what the parties had come together and were at one about. And, it was then to be the balance of the term in the present lease. So that I contend that in the contract, in the actual writing of the contract itself, the 40 horse-power was excepted out of the contract just in the same way that the Edwardsburg power was excepted out of it, or that the village of Iroquois power was excepted out of it.

The new lease, as I call it, of 1901, does not say: "We give you 200 horse-power after the Edwardsburg Company gets theirs, or after the Iroquois Company gets theirs, or after you get your 40 horse-power" It does not make it subsidiary, or subject to what has been granted; but under this clause these other three were assumed to have been given, and this was given alongside of it. Then anything additional that he gets under his option has to be after all this other is provided for, which would include the 40 horse-power.

Then in addition to the differences that my learned colleague dealt with between the two leases, there is this further difference. Under the lease of 1871 it was provided that his structures, his erections and fixtures and so on, were to be paid for under the arbitration clause; and he would be fully indemnified with the addition of 10 per cent. Under this lease, the lease he was accepting in 1901, he does not get any of these allowances. All he has to do is to move his fixtures away, which would be merely scrap.

Would it be consistent that a man would allow as favourable a lease as that of 1871 to become merged or surrendered in one of the character of the new lease?

Mr. Chrysler, for the respondent: In the first place it seems to me convenient to say that I regard the situation of the parties after the lease of the 26th August, 1901, as quite different from the position which they occupied before. That is the date of the second lease. And I think it will be convenient to begin there, although that is not in time the beginning of the history. There is a question of the position of the parties after the lease, and its application to the question of the permanent damage, if any; and in the interval between the 12th December, 1898, and the giving of that lease, there are two answers which are to be made to the claim of the suppliant. The first is the clause in the lease referring to the temporary stoppage, which I shall argue shortly, and the other is the larger answer, which may not perhaps amount to a complete estoppel, preventing the suppliant from obtaining damages at all. If it does not amount to that, it perhaps is very strong, if not complete, evidence in reply to his claim for damages, showing that he was a consenting party to all that was done, and is not in a position to claim damages for that which was done with his consent. That perhaps is not estoppel, but goes to the question of damage. It may be considered in both views.

With regard then to the effect of the second lease, as I understand the question, the principle upon which an estoppel by operation of law works is something by which the person against whom the estoppel operates has released, or conveyed some interest which he might have conveyed otherwise by deed. The *Statute of Frauds* refers to the subject, and says that a lease

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otherwise than by operation of law shall be by deed or note in writing.

[*Mr. Shepley*: You mean a surrender?]

Yes. So that so long ago as the *Statute of Frauds* the phrase had a meaning, and its meaning was that the conduct of the parties, whatever it might be, was something that was equivalent to a deed.

Now I am applying that, for the moment, to the question of the separability of the right to obtain water from the lease of the land. I say that the principle of the operation of surrender is quite as applicable to an easement in land as for a surrender of a portion of the land itself, because it was quite possible for Mr. Beach to release to the Crown by deed the right which he had of having delivered to him a portion of the surplus water for the use of his mill, and retain the lease of the land and the mill; and if that can be done by release, it is a thing which may also be the subject-matter, if the facts are applicable, of a surrender by operation of law.

I may not be able to find an exact case in which that has happened. That is to say, I have not at this moment a reference to any case in which the surrender of an easement, without the surrender of the principal thing to which it belonged, by operation of law, has been held to be possible; but there are numerous analogous cases - take for instance the case of a subsequent lease of premises, a part of which coinciding with the premises in an existing lease, and it was held to be a surrender by operation of law of so much of the original lease as covered premises coincident with those in the new lease.

[*Mr. Shepley*: Supposing there is a total rent reserved for the whole?]

I do not think it matters whether the terms are the same in the two leases. The second lease may be for

a shorter term than the first, it does not matter. This is the principle upon which it rests, and which governs the whole law upon the subject, namely, the person who by accepting a lease has admitted the authority of the lessor to make that lease thereby surrenders everything under a previously existing lease of which he has taken the second grant or demise; because he cannot be permitted to say that the lessor had not authority to make what is contained in the second lease. This principle appears to have been for the first time distinctly called in question in the judgment of the Court of Exchequer in *Lyon* v. *Reid*, (1).

Now, in our case one needs to examine the leases. In the first place it is not power that is granted or leased. There is in each case a lease of some particular parcel of real estate. Then there is a lease of a certain measured amount of surplus water to be delivered from the Galops Canal. I point to the plan. In the first place my learned friend says it is a new canal. I say it is not a new canal. It is part of the identical canal from which the old surplus water was to be delivered. It is true there is a change in the dimensions of the canal. The canal has been widened. A new lock has been constructed outside of the old lock, and for some distance, perhaps 12 or 15 hundred feet, there is a point of land between the prism of the old canal, and the prism of the new canal; but above that point the two are brought together, the prism is one, the old branch of the old canal is on the north side just where it was, and on the south side it has been carried farther out. The new lease is for surplus water from the Galops canal, with certain alterations which the Government have made in it. That is the thing which is the subject-matter of the lease in both cases, certain surplus water of the Galops canal.

(1) 13 M. & W. 305.

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Now, the difference as to quantity is this. In the first place it was granted to Mr. Beach and his predecessors in title under the old lease, 40 horse-power out of a large quantity. Under the second lease there is granted to him 200 horse-power, being all that there is of surplus water at the point in question. Now, I am not at all disturbed by the evidence as to the quantity that might be delivered there. I go to the terms of the lease itself to ascertain what Mr. Beach got under his second lease, and for that purpose one requires to examine the terms of the lease. Now, the whole lease has to be read, and with the lease has to be read the general terms and conditions which are annexed to it, and which are declared to be part of it; and we have also to look at the plans.

There is one clause of the lease I wish to mention. The clause as to temporary stoppage. The question is what is meant by "temporary stoppage." I do not know that the term temporary stoppage has any limited meaning. Here is a lease that is perpetual, it runs for a thousand years, or a great many more. Could we say that two or three years is not temporary in relation to that period of time? I do not think the word "temporary" can be construed in that way. It has reference to surrounding conditions. We look to see what is meant by the context, and it is "temporary stoppage" of the flow or supply of surplus water.

There is no great hardship in it if you look at the facts. From 1853 to 1901, for 48 years, the suppliant and his predecessors in title had enjoyed this water-power at what your lordship calls, and what upon the evidence of these millers is said to be, a nominal rental. In the whole of these 53 years, so far as appears, this is the first disturbance that has taken place by reason of alterations being required to be made in the canal. The character of the alterations are here. In the very

nature of them they are extensive, and so far as Mr. Beach's complaint is expressed in this letter, that it was unnecessary, or that unnecessary trouble was given to him, I do not think that can be sustained upon the facts. Mr. Carman, I think, told us they commenced the work, in January, 1899, of building a dam. The work was commenced within less than a month from the time the water was let out of the canal. The suppliant said the water was taken off without warning. I produce the notice served upon him in September. Mr. Beach himself was not put to any disavantage so far as this correspondence discloses. He adopted two methods of coping with the difficulty. In the first place he installed his steam-engine, and he at once set about considering the other question of providing electrical machinery for his mill. The letter with regard to that is, I think, in February of 1899. He has not himself established in any way and no witness has said, that the water was allowed to be out of the canal while the work was suspended.

It was never intended to give him 200 horse-power and to continue to give him the 40 horse-power; but I do not see, short of that, where one can fix a point where it ceased to be temporary, unless you take the progress of the construction. At some point of time, we commenced building and completed that weir; and that probably may be taken as the exact point where it was determined that the water would not be supplied to him in the old way at the old place; but there is this difficulty about that—if my contention is right as to the scope of the second lease—at the time they gave him all the available power at the weir, it was still open to them to give him a pipe or conduit for the 40 horse-power, and in that view it would be

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only a temporary stoppage up to the time of the second lease.

I say the suppliant never asked the Government to give back his power in the old way at the old place If he did there is no evidence of it. Now, why not? My learned friend says that he was very badly treated, and that so much time was wasted in giving him this lease it prevented him from taking steps to protect himself. I appeal to the correspondence and ask your lordship to say that a great part of the delay which took place is his own fault. He ultimately got a lease which he accepted. If he did not like it he need not have taken it. He did take it. The best evidence that it was satisfactory to him is that he took it. He cannot come here now and say "I wanted more and did not get it, and I am very badly treated because I did not get it." He did get ultimately a lease, and he spent the interval practically between the letting out of the water and the date of that lease in forwarding plans, suggesting alterations, in asking for the whole width of the power to be granted to him.

I have only this additional observation, namely, that the delay was not the delay of the Crown; the work was going on. There was no delay there that we know of. The delay was in getting th · lease.

It seems to me incredible, if Mr. Beach was suffering this enormous loss in profit, of which evidence has been given, that he did not keep his mill going. If he was going to lose a business that was of such value to him, it seems difficult to explain why, when he was keeping it going in a measure by the use of that steam-engine from April, 1899, un il some time in the summer of 1900, why he took it away and carried i. to some other mill. It was easy enough to replace, or easy enough to supply the other mill with a machine.

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On the question of estoppel see 2 *Smith's Leading Cases* (1).

Mr. *Shepley*, in rely: The pivotal point of my learned friend's argument upon the effect of the second lease is, if I understand him correctly, that the subject-matter of the second lease is the same as the subject-matter of the first; that is, that the 200 horse-power is all the available horse-power that can be got at that weir, and that therefore there can be no co-existence of that lease with the former lease of 40 horse-power. I am quite unable to follow my learned friend on the last point. I do not know any rule of law which says there is to be a surrender by operation of law because the landlord does something wrongly which destroys your enjoyment of the leased premises. The question is what is the effect of the lease which you have taken. If you take a lease of the same property for a different term, as my learned friend puts it—because there are cases that go that far—if you take a lease of a portion of the same property for a different term, you, as to that portion of the first or the whole, as the case may be, surrender it by operation of law; but that must depend, wholly, or partially, upon the subject-matter of the lease. And if this second lease does not profess to determine, and there is no evidence that the minister has ever determined it, that the 200 horse-power is all that is available, is all that there is there, then there is an end, I venture to think, of my learned friend's contention. Now, this is what the second lease says, and grammatically it does not bear the construction that my learned friend is placing upon it. It says, 'together with the right of drawing from out of the canal 200 horse-power of the surplus waters flowing through." That does not say that 200 is all. On the contrary, the language used would negative that idea; and when

(1) 10th ed., p. 813.

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my learned friend turned to Mr. Douglas' report, in which Mr. Douglas says 200 is all that is available there, how can that have any bearing upon the construction of the lease itself? It is perfectly manifest from what Mr. Holgate says that Mr. Douglas did say that he was entirely in error about it; and there is no evidence that the minister has adopted that and fixed, as no doubt he might do, upon that as the sole surplus, because the regulation permits him to do that. Then Mr. Douglas himself admitted in the witness box there was an erroneous calculation as to the area of entrance, as he says (and his whole report is based upon that) that it is 96 square feet only. Mr. Holgate has shown, and the plans show, and he himself admits, it is over 200. It does not seem to me, however, that we can at all argue the effect of the second lease by seeing what Mr. Douglas reported or did not report prior to this work being taken up.

Mr. *Hilliard*, by permission, cites *Smeed* v. *Foord* (1), *Hydraulic Engineering Company* v. *McHaie* (2).

THE JUDGE OF THE EXCHEQUER COURT now (February 15, 1905) delivered judgment.

The suppliant is the owner of a flour-mill at Iroquois, in the County of Dundas and Province of Ontario. It is built upon a portion of the Galops Canal reserve, and, prior to December 12th, 1898, it was operated by water-power taken from the surplus water of the canal. On that date the canal was unwatered to facilitate the construction of certain works that were being carried out by the Government of Canada for its enlargement and improvement. At that time it was not intended that the stoppage of the supply of such surplus water to this mill should be permanent, but temporary only. Subsequently, how-

(1) 28 L. J. C., 178. (2) 4 Q. B. D., 670.

ever, certain changes in the work were made which resulted in such supply being permanently discontinued. For damages which he suffered from being deprived of this water, the suppliant on the 23rd of March, 1904, filed his petition of right and thereby asked that it may be declared that he has "suffered "damages in the premises of at least $93,381.12, being "the net profits of the said mill from 12th of December, "1898, to the present time, and the taxes and insurance "aforesaid: $20,751.36 for the dissipation and destruc-"tion of his said business; and that he is entitled to "damages at the rate of $20,751.36, and the taxes and "insurance yearly until the said surplus water is "furnished to his mill by the Government, and that "he is entitled to recover the same from the respon-"dent." When the case was opened it appeared to be common ground that the question to be determined was the measure of damages, the suppliant's right to succeed as to something not being denied. Afterwards, however, an amendment of the statement of defence was allowed by which a surrender to the Crown of the right to such surplus water by the suppliant's acceptance of a new lease thereof was set up; and it was also alleged that the changes in the work mentioned, which resulted in the discontinuance of such supply, were made at his solicitation, and that he was not entitled to damages for such discontinuance. There was also during the progress of the trial some change of position in the presentation of the suppliant's claim. The proposition as to the measure of damages, which in his argument Mr. Shepley presented for consideration, was stated by him in this way: "So long as the suppliant properly "refrained from ameliorating his condition by the "construction of permanent works his measure of "damage is the loss of his profits in the business of

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"milling carried on by him at this mill. As soon as "it became obligatory upon him to take measures in "his own relief, the right to profits as such ceased and "he is entitled to recover what it would cost him by "way of capital outlay, and by way of increased "annual expenditure in the future, as the balance of "his compensation for the wrong that has been done "him". But no amendment of the petition was asked for. Without objection, however, evidence had been adduced to show what the cost of supplying the mill in some other way with the necessary power, and of operating it, would be. And in the end it was agreed that if the suppliant were found entitled to damages they should be assessed once for all, and be an end of the litigation between the parties in respect of the matters in controversy. Whatever amendment of the petition of right is necessary to enable that to be done ought under the circumstances to be made.

The Galops Canal is a public work of Canada, being one of the canals constructed and maintained to improve the navigation of the River St. Lawrence. The demise of the portion of the canal reserve on which the mill was situated, with a right to use surplus water from the canal, was first made in 1853. The lease was renewed in 1871 and was assigned to the suppliant in 1883. The lease of 1871 was made for a term of twenty-one years, renewable in perpetuity for like terms, subject at the termination of each term to a revision of the yearly rent. With the lands demised was granted the use and enjoyment of so much of the surplus water of the canal as should be sufficient to drive and propel, by means of the most approved description of wheel, four runs of ordinary mill stones, equal to a ten horse-power for each run. Water was supplied from the canal at a point above what was known as Lock No. 25, and was carried to

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the mill by a flume or race-way constructed by the lessee at his own expense. Surplus water was water not required for the maintenance and operation of the canal as a water-way for vessels. The free and uninterrupted navigation of the canal, and the use of sufficient water for that purpose, was the first object to be attained. The use of such water for developing power was a secondary use and applied only to the surplus water; and the lease shows that it was in the contemplation of the parties thereto that the latter use might at times be interrupted. Among other things, it was therein provided as follows (the provision being found in the second proviso or condition):

"In the event of the temporary stoppage of the flow "or supply of surplus water, or a portion thereof, "hereby leased, by reason of the same being required "for the navigation of the said canal, or by reason of "repairs, improvements or alterations being by the "said Minister or his successors in office, or his officers "in that behalf, deemed necessary or desirable to be "made to the same, or for the purpose of preventing "damage to the said canal, by means of extreme high "water or by frost or ice, or any other uncontrollable "cause or accident, no abatement of rent shall be "claimed or allowed, nor shall the said lessees, their "heirs, executors, administrators or assigns, have or "pretend to have any right to any compensation what-"ever on account of the injury or damage that such "stoppage of the flow or supply of surplus water may "occasion, save and except only in the event of the "total stoppage of the said flow or supply of surplus "water for and during an uninterrupted period of six "calendar months during the usual navigation season, "in which case the said lessees, their heirs, executors, "administrators and assigns shall be allowed and "obtain in full compensation for the same, and for any

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"loss or damage that they may thereby sustain, an "abatement of six calendar months' rent accruing for "any and every such period of continuous interruption "in the flow or supply of surplus water hereby leased "as aforesaid."

The value of the suppliant's mill, with its equipment, may be taken to have been about fifty thousand dollars; and it is shown that he was carrying on there a large and prosperous business, the annual profits of which are estimated at sums ranging from ten thousand dollars to twenty thousand dollars and upwards.

The work of enlarging and improving the canal was commenced in April, 1897. It formed part of a larger work, undertaken in pursuance of a general policy, to provide better means of transportation by deepening and enlarging the canals by which obstructions to the navigation of the St. Lawrence River are overcome. The work done at the Galops Canal was considerable and required a number of years for its execution. The plans for this work provided for the making of a new channel adjacent to the old canal, at the point at which the waters of the canal were discharged into the river, and for some distance west thereof Across the old channel at the lower end of the basin above Lock No. 25 a regulating weir was to be constructed. When the work was completed the part of the old basin and channel above such weir would become a basin only, and the part below the weir a race-way. The channel would no longer be a water-way for vessels. But it continued to form part of the canal, the basin being connected with the new channel. Provision was made for supplying the suppliant's mill with water in the manner and at the place where it had formerly been supplied. There was no intention at the time to construct any work, or to do anything that would in any way interfere with the suppliant's rights under the

lease of 1871. It would be necessary to stop the supply of water for a time during the construction of the work. But that was provided for by the lease. When the weir was completed, and water let into the basin above it, the surplus water would be available for operating the mill, and was to be supplied in the old way and in accordance with the terms of the lease. If the works had been carried out as designed the questions now in issue would never have arisen, the present controversy having its origin in the changes that were made during the progress of the work. Instead of constructing the weir above the old lock No. 25 at the lower end of the basin, in which case surplus water could be supplied to the mill at the head of the mill flume, it was constructed across the basin at a point some two hundred feet or more further west, that is, further up the basin and away from the head of the flume, and no provision was made for supplying water to the mill. It is important to see how that came to be done.

Sometime prior to the 21st of February, 1898, and probably in that year, a petition from the Municipal Council of the village of Iroquois urging the development of water-power at the lower entrance to the Galops Canal was presented to the Minister of Railways and Canals. The petition cannot now be found, and all that appears as to its contents is derived from the report of Mr. Douglas, the hydraulic engineer of the Department, to whom it was referred, and from his evidence. He says it was "a general sort of petition for the "benefit of the village and developing electricity and "power at the village; a general petition for the devel- "opment of power". The suppliant was at the time a member of the village council. He has not been asked, and he has not stated, whether he voted for or signed the petition. Later we find him deeply inter-

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ested in the project, and there can, I think, be no doubt, that he was then supporting it. If not, it is probable that he would have told us so. Mr. Douglas' report, made on the 5th of March, 1898, is in evidence. With regard to the amount of power that might be made available at the weir across the basin above the old Lock No. 25, he and Mr. Holgate, a witness called by the suppliant, differ. But nothing turns on that difference. The question was one for the decision of the Minister, and he has decided it. It is not from that point of view that reference is made to the report; but because it gives better than anything else in evidence a clear view of how matters then stood. Instead of attempting to state briefly the substance of the report, or to give extracts from it, a copy of the report in full is appended*, with a copy also of the plan or tracing that accompanied it. The latter also will be found to be an aid to a good understanding of the facts of the case.

By referring to the report it will be seen that Mr. Douglas suggested two ways in which some additional power might become available. By adopting one of the methods suggested there would have been no interference with the supply of water to the flume of the suppliant's mill. By the other method, which was more favourable for the development of power, no provision was made for such supply; and he mentioned as an objection to it that if that plan were adopted "the department would render itself "liable for damages to the flour-mill as it would "require to be propelled by electricity generated at "the dam, or some other method, necessitating expen-"sive changes in machinery." In the end a plan was

* REPORTER'S NOTE :—See *post*, p. 328.

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adopted and the work constructed in a manner that did not in this respect differ materially from that which Mr. Douglas had pointed out would involve the question of damages to the suppliant's mill; but when the decision to adopt that plan or method was actually come to does not appear. Mr. Rubidge, the superintending engineer of the canal is dead; and the Chief Engineer was not called as a witness. Mr. Rhéaume, who was on the work at Iroquois until May, 1898, says that nothing had been decided upon at that date. He first heard the matter mentioned in the course of that summer, and the negotiations were in progress to his knowledge until the spring of 1899; but so far as what was decided upon he had no details, and he did not know at what date those in charge of the construction of the canal determined to depart from the original intention. His evidence that the negotiations were in progress until the spring of 1899 is supported by the correspondence in evidence. On the 8th of February, 1899, the suppliant wrote to Mr. Rubidge as follows:

"I expected at this date to be in a position to say "what shape would suit us best in the way of getting "our power from the new canal. I beg to ask for a "little more time. I find that the electric plant is "the right thing but expensive, and to make it a profit-"able investment would require to install a plant that "would use all the power that can be had; and may "therefore require all the space possible to spare. I "will do my best to get into shape and let you hear "from me again in a few days."

Then there is a letter of the 28th of the same month from Mr. Blair, the Minister of Railways and Canals, to the suppliant in these terms:

"Having reference to your application for an exten-"sion of your present water privilege on the old canal

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"at Iroquois, my suggestion is that you should see "Mr. Rubidge and go over the matter carefully with "him. It will be agreeable to me that he should dis- "cuss the matter with you; and he might in the light "of the facts and such opinions as he can express, "prepare your proposed plans in such a way as will "meet with approval at headquarters."

And that letter is followed by one of the 2nd of March, 1899, from the suppliant to Mr. Rubidge in which he writes:

"Enclosed find copy of letter received from the "Hon. A. G. Blair, Minister of Railways and Canals, "by which you will understand his wishes in the 'matter of my water-power here. I learned by tele- "phone that my consulting mill-wright is absent, but "have written him to let me know as soon as he "returns. I will endeavour to lose no time in having "it attended to."

There is no occasion at present to follow this correspondence and negotiation further. At the time when these letters were written the water was out of the Galops Canal, and the work on the temporary dam that was constructed across the old canal basin, to keep the works below unwatered during their construction had been commenced. But this temporary dam was equally necessary whichever method was adopted. Up to this time nothing had been done on the ground which would stand in the way of the original plans being carried out. And so far as appears that condition of things continued down to the 26th of June, 1899, when work was commenced on the masonry of the weir across the basin of the old canal. No doubt plans showing the changes proposed had in the meantime been prepared. The correspondence shows that, but no step that was irrevocable had been taken, and all the time the suppliant was carrying on his negotiation

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and seeking to obtain a lease of the power to be developed at this weir. His formal application therefor, and for a lease of the portion of the reserve adjacent to the weir, was made on the 24th of March, 1899. No doubt the fact is, as Mr. Shepley pointed out, that he was negotiating for a water-power with the view to making it commercially valuable, not alone with the view, or even principally with the view, of getting power in another form for the operation of his mill. So far as power for his mill was concerned there was nothing to be gained and something to be lost by the proposed change. But he was looking at the larger, or what appeared at the time to be the larger, interest. Mr. William Kennedy and some other engineers whom he had consulted had, he tells us, estimated the power that could be developed at the weir mentioned at 3,000 horse-power, while the estimate of the Government engineer at the Iroquois office was, he says, from 1,200 to 1,500 horse-power. He expected, and it seems on good grounds, that the lease of the power that could be so developed there, with the exception of a small quantity, some 20 horse-power that was needed for the village waterworks, would be given to him. And even as to the power for the waterworks, his proposal, made later, was that all the available power should be leased to him, and that he would furnish the village with what power it required at cost. As the holder of a lease of surplus water at Lock No. 25 on the old canal, he had no doubt a first claim to consideration. That seems to have been taken for granted on all sides. What he was at the time looking forward to and promoting was the development of a large power that could be used to generate electricity, and of which he expected to be given the lease upon favourable terms. If that could be obtained he was willing that the supply of water direct to his mill should be discontinued permanently;

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and he was ready to forego or release any claim to damages that he might have. He could operate his mill by electricity, and was willing to bear the greater expense involved, expecting to recoup himself out of the gains to be made under the lease that he expected to get. He knew that the development of power in the manner proposed involved the destruction of the power to which he was entitled under the lease of 1871. There is no doubt about that. Not that it would have been impossible in some way to carry water from the weir to the mill, but that the plan or method proposed made no provision therefor, and he expected and intended to operate the mill by electricity to be generated at the weir and transmitted to his mill. That was the standpoint from which the suppliant, on his side, carried on the negotiation. It is more difficult to see what it was that led the Minister or those who advised him to the conclusion that it was worth while to make the change proposed. Mr. Rubidge, the superintending engineer, as already stated, is dead, and if there is anyone else who knew why it was done he has not been called. In the amendment to the statement in defence it is alleged that in conseqence of the representations and requests of the suppliant, as to the advantage to the suppliant and others which would be derived from the development of a large water-power from the surplus water of said canal, the respondent constructed the said weir and expended thereon, and upon works connected therewith, large sums of money which the respondent would not have required to expend for the purpose of continuing the supply of surplus water to the suppliant's mill under the terms and conditions of the lease of the 16th of December, 1871. I understand that in part to be an allegation that the works as constructed cost a large sum of money, more than they would have cost if they

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had been constructed as originally designed. That may be true, but the fact has not been proved, at least by direct evidence. Plans of the work as designed and as executed are in evidence, and a person skilled in such matters might perhaps from a comparison of the plans form some conclusion as to the relative cost of the two ways of doing the work. I do not know whether he could or not, but I am not able to do so; and there is nothing to assist me. There is no reason, however, to think that there was any saving of expense or any avantage gained in respect of the use of the canal as a water-way. And so far as any additional revenue to be derived from the letting of power was concerned, the gain was inconsiderable from the point of view of the resposnible advisers of the Minister as to the quantity that could be safely leased. The suppliant, speaking of one of his conversations with Mr. Rubidge during the summer of 1899, quotes the latter as making the observation that they were building a canal, they were not building a water-power. That appears to be a just observation, and one that reflected, no doubt, the attitude of those who were responsible for the work. How comes it then that the change was made? Whose interests were to be served? There can, I think, be only one answer. No doubt the change was made to meet the wishes of the suppliant and others residing at Iroquois, and the interest of the suppliant in the matter was, it seems to me, greater than that of any other person. That is the conclusion to which, upon the evidence as a whole, I have come; and I have also come to the conclusion that the final decision to make the change was come to after the 8th of February, the date of the suppliant's letter to Mr. Rubidge, the contents of which have been given, and before the 26th of June of that year when the construction of the weir was commenced; and that during

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this period the suppliant had the question as to whether any change would be made largely in his own hands. This, as has been seen, is what he stated in that letter :— " I expected at this date to be in a position to say what " shape would suit us best in the way of getting our " water-power from the new canal ". The expression " our water-power " is perhaps equivocal and may refer either to the power that he was entitled to under the lease of 1871, or to that for which he afterwards made application, though it is difficult to see how the word " our " could with propriety be used with reference to the latter. But the following clause points, it seems to me, in only one direction : " I beg to ask for " a little more time. I find the electric plant is the " right thing but expensive, and to make it a profitable " investment would require to install a plant that " would use all the power that can be had, and may " therefore require all the space possible to spare." What was the question to be decided, and who was to decide it? Clearly the suppliant was to decide it, and the question was as to whether or not it was advisable to put up an electric plant. But that in effect was the object to be attained by the change that had been proposed. That is what the suppliant and others were asking for. The weir was to be constructed to develop power to generate electricity. That, from the first, had been the proposal made to the Minister. If it were not worth while going on with that project there was no occasion for any change in the work as originally designed. The project was not abandoned. The weir was constructed and in the end, after a great deal of negotiation and delay, the suppliant obtained a lease of the power there developed. The application for the lease was made, as has been seen, on the 24th March, 1899 ; the lease was executed on the 29th of August, 1901. The principal difficulty was as to the

quantity of surplus water available. Those who advised the Minister adhered to the view expressed by Mr. Douglas in his report that no more than 200 horse-power were available. The suppliant pressed for a grant of a much larger quantity. The Minister decided against leasing more than two hundred horse-power. Not being able to get what he wanted, the suppliant took what he could get. By the lease a portion of the canal reserve adjacent to the weir was demised to him and he was given the use of 200 horse-power of the surplus water of the canal. And it was also provided that if during the term of the lease the Minister should be satisfied that any more water was available, the lessee should have a first option of obtaining it at the rate charged for that granted. The lease of 1871 was renewable in perpetuity. The lease of August, 1901, provided for a term of twenty-one years, with two renewals for like terms, making in all sixty-three years; any further renewal being left to the "option of the Governor in Council". By the earlier lease the rent reserved was one hundred and forty dollars a year, being at the rate of three dollars and one half per horse-power for the 40 horse-power granted. The suppliant had hoped to get the new lease for the same total rent. The amount charged was however two dollars per horse-power, making the rent reserved four hundred dollars a year, with a proportionate increase in case additional power were granted to him. The rate per horse-power was less, the total rent more. The suppliant was not satisfied with the result. That was natural enough. He had entered on the negotiation and had continued it in the expectation that the Government would develop a considerable power and give him a lease of it on favourable terms. On his part he was ready, if that were done, to release any claim to damages that

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he might have. In a memorandum of requests from the suppliant to the Minister, the following request occurs: "That my lease be renewed on the "old basis, giving me the eight openings now instead "of four as understood by the old lease, price being "$140.00 per annum as before, thereby allowing me the "difference in power and larger premises in lieu of "damages now sustained and expense of connecting "our mill with new power which will necessitate a "large expenditure before mill can be operated by "water-power." By the expression "water-power" the suppliant meant water-power converted into electricity and transmitted to his mill. This memorandum has no date. It was, it appears, sent or delivered to the Minister in December, 1899. In a letter from the suppliant to the Minister, of March 26th, 1900, we get the answer that was made to this request: "I "am anxious", the suppliant wrote "to get my water-"power lease arranged at once in the best way "possible. I understand through Mr. Carruthers, of "Prescott, that you do not consider it advisable to "give me this power free in lieu of the damages "sustained by me, but that you are willing to give me "a favourable lease on the same basis as my old lease. "This I am willing to accept." He was not willing, however, to accept the lease in lieu of damages. In a memorandum respecting this lease, referred to as "Mr. "Schreiber's offer" of October 31st, 1900, there occurs, among others, this item: "1—Lease to cover 200 H.P., "which includes the 40 H.P., covered by old lease." The suppliant, in March, 1901, on a memorandum in amendment of the offer, puts that item in this way: "1. Lease to cover 200 H.P., rights under old lease not "to be affected." The conclusion of that particular negotiation is to be found in the evidence of Mr. D. B. Maclennan, who at the time was acting for the sup-

pliant. The following is an extract therefrom: "A "question in regard to the former lease arose on the 5th "June." (1901.) "It had arisen in the Department "before; but on the 5th of June it arose between Mr. "Ruel and myself. Under the former lease which "was given to Mr. Beach in 1871, and for a term of "21 years renewable perpetually, subject to the usual "terms for termination, a question in regard to that "lease arose in this way: Mr. Beach claimed that his "power under the first lease had been taken away, "and that he suffered very serious loss. On the 5th "of June, Mr. Ruel insisted that all questions under "the lease should be decided before the new lease was "granted. I objected to that very strongly. I said "we would never do it at all; that the old lease must "stand on its own foundation; and that Mr. Beach "was very anxious to get this new lease through as "soon as possible; he was in a great hurry about it; "and that if his application were allowed to stand "over until after everything was settled under the "old lease that it might delay him for months; and "we discussed the matter a while; and at last Mr. "Ruel said he would accede to my request that the old "lease should stand; that the new lease should be "given as a lease for a water-power and should not "interfere in any way with the old lease, or the "rights or remedies which Mr. Beach had under the "old lease. We then went to Mr. Schreiber and "repeated to him the discussion Mr. Ruel and I had, "and he assented to that. He assented to the grant-"ing of the new lease for 200 horse-power which was "to be exclusive of the 40 horse-power of the old lease; "that the rights and remedies of Mr. Beach under the "old lease should not be affected by the granting of "the new one." Mr. Schreiber was the Deputy Minister and Chief Engineer of the Department; Mr. Ruel

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was at the time the Law Clerk of the Department. The evidence was admitted subject to the objection that the Crown was not bound by what they assented to.

With reference to the unwatering of the canal, the suppliant contends that it was not necessary to let the water out of the canal as early as December, 1898, when that was done; that the unwatering might have been deferred for another year, in which case his damages would have been so much the less. And in one of his letters to the acting Minister of Railways and Canals he states that he is satisfied that this was done because it was of some advantage to a holder of water-power at Cardinal. The imputation that the canal was unwatered when it was with any unworthy motive need not be taken seriously. If there are any reasonable grounds, as I think there are, for concluding that the unwatering was at the time necessary for the construction of works then about to be undertaken, that is an end of the matter. The suppliant bases his contention that the unwatering at the time was unnecessary on admissions made by the Minister and on what the contractors had told him. I pass over the latter, as the contractors were not called as witnesses, and the respondent is not bound by anything that took place between them and the suppliant. The Minister was not called, and the suppliant is entitled to the benefit of the evidence with respect to such admissions. But notwithstanding that the Minister has not been called to deny or explain what he is alleged to have stated to the suppliant in the presence of another witness, Mr. Redmond, namely, that the unwatering was unnecessary, that he, the Minister, had no knowledge of it, and that there was no occasion to have it done for another year, there is, I think, some mistake or misapprehension about the matter. The letter from Mr. Rubidge to the suppliant informing him that the

canal would be unwatered during the winter of 1898-99 and asking him to govern himself accordingly, is dated the 24th of September, 1898. The decision to unwater the canal must have been come to before that date. In November following the municipal council of Iroquois and the suppliant, through Mr. Carruthers, of Prescott, applied to the Minister to have the unwatering deferred, giving reasons therefor. This application was not granted. The water of the canal was let out on the 12th of December, 1898. If the Minister did not know anything about it there must, I should think, be some good reason, such as absence from the Department, in which case some other Minister or the Deputy Minister would be acting for him. It appears, however, that the work of making one of the two temporary dams that were necessary for the unwatering of the weir and other works in the old basin was commenced on the 6th of January, 1899, and completed on the 20th April following. Then the new Lock, No. 25, was first used on the 12th of May, 1899. I infer from that that the water had at that date been let into the canal, enabling the new channel to be used, but that the temporary dams referred to kept the works between the dams in the old channel free of water. The masonry work on the weir was commenced on the 26th of June, 1899, and finished on the 20th of November following. It would be unreasonable in the face of these facts to come to the conclusion that the unwatering of the canal in December, 1898, was unnecessary. The water was not let into the basin adjacent to the weir until May, 1901. That is, these works remained unwatered for about two years and five months, and during that time it would not have been possible to supply the suppliant's mill with the surplus water to which he was entitled, even if provision had been made therefor. Whether this

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stoppage of the supply would have been longer or shorter if no change had been made in the works does not appear. In the absence of any evidence to the contrary, I assume that there would in each case have been about the same delay in letting the water into the basin adjacent to the weir. On the 29th of May, 1901, the water in this basin was at a level that made it available for developing power. Before that date and while the works were unwatered the foundations of a power-house had been constructed for the suppliant, and at that time it was understood that he was to have a lease of part of the surplus water, though some of the details were settled later. The lease, as has been seen, was not executed until August 29th following ; but the delay was caused by negotiations between the parties and the necessity of getting the authority of council to the granting of the lease, and then to some changes that were subsequently agreed upon.

Coming now to the means taken by the suppliant to protect his own interests during the time that his mill would be without water, it will be observed that he had ample notice that the supply would be stopped during the winter of 1898-99. The notice was given in September, 1898. The changes in the work that have been so frequently mentioned had been discussed, but no decision had been come to at that time. There is no reasonable doubt that the stoppage of the water supply was, when it occurred, intended to be temporary only and not permanent. It was reasonable for the suppliant to come to that conclusion ; but he also had reason to know, and I think he knew, that such stoppage was likely to continue for a considerable time. Under these circumstances and considering the extensive business he was doing, and the large profits which he was making, it was to be expected that he

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would, as a prudent business man, take proper and sufficient means to protect his business in the meantime. In the spring of 1899, at a cost of between fifteen hundred and two thousand dollars, he set up temporarily at his mill, a steam-engine by which he operated the rolling mill. That was only part of the business. The power was not made available for running the stones which were used for the custom business. There was some difficulty in making the connections, and it was not thought worth while to go to the expense of overcoming this difficulty. The engine was used until January, 1901, when it was taken out and removed to another mill, for which it had been intended, and where he had occasion then to use it. Since that time the mill has been idle. The lease of August 29th, 1901, was assigned to the St. Lawrence River Electric Company in which the suppliant is a shareholder, but the power thereby granted had not, when this case was heard, been utilized.

If there had been no demise from the Crown to the suppliant of the land on which the mill stood, or grant of the power by which it was operated, the rights of the parties, respectively, would have to be determined by reference to *The Expropriation Act* (52 Vict. c. 13). Under that Act, the Crown had a right, by filing a plan and description, to take the whole or any portion of the suppliant's property for the purpose of the work in question. Under the lease, by a provision that has not been acted on, it had the power to determine the lease and take the whole of the property, but not to take a part. Under the Act, and without filing any plan or description it could interfere with or destroy a right appurtenant to the property, such as a right to a supply of surplus water. Under the lease it had a right to stop such supply temporarily but not

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permanently. Under the Act, the Crown might have made provision for delivering the water to which the suppliant was entitled in some other way. A similar authority was given by the lease. In respect of anything done under the lease there was no right to damages or compensation other than that provided by the lease. In respect of anything done in the exercise of powers given by *The Expropriation Act*, the amount of the compensation, if not agreed upon, would be determined in this court. Those things which the Crown did, and which were within the terms of the lease and the powers therein reserved to it, ought, it seems to me, to be attributed to the exercise of such powers; and whatever was in excess thereof should be attributed to the exercise of the authority given by the statute. In the present case, however, it will make no difference whether such excess be so regarded and dealt with or be taken to constitute a breach of a covenant or condition of the lease, except in respect of the question of interest. If the claim be regarded only as one arising out of a contract in writing no interest can be allowed on the amount of damages awarded (50-51 Vict. c. 16, s. 33), whereas interest may be allowed on compensation money awarded for land or property taken or injuriously affected (*The Expropriation Act*, s. 29; 63-64 Vict., c. 22, s. 1).

The first question that has to be disposed of is the contention of the suppliant that, what was done in this case by the Crown was not an improvement or alteration of the Galops Canal within the meaning of the clause of the lease which has been cited. The ground upon which that contention is supported is that at Lock No. 25, and for some distance west thereof, a new channel was made. But that does not appear to me to be material, or to affect the case in any way. I do

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not see any reason to doubt that what was done was an alteration and improvement of the canal.

Then there is a second question. Whether the the stoppage of the water supply for the execution of the works as originally designed would have been a temporary stoppage, within the meaning of the lease, if such stoppage had continued for a period of about two years and a half, that time being actually necessary for the execution of such works? Having regard to the subject-matter of the lease, that is a supply of surplus water from a canal forming part of a great system of navigation and constituting in part the means whereby a large part of the commerce of the country is carried on; and to the fact that the lease was renewable in perpetuity, my view is, that any stoppage of the supply of surplus water actually necessary for the repair, improvement or alteration of the canal, in the public interest, and to meet the requirement of the trade of the country would be temporary within the meaning of the clause cited, although it might last for several years. A lease such as that in question affording a cheap and convenient power for operating a mill at a small cost is of great value. The amount of rent charged is little more than nominal. But against that must be put the consideration that an accident, or the public interest, may make it necessary to stop the supply of water for a time. That is a contingency to which the lessee's business was exposed and against which he had to protect himself. The Minister was, I think, intitled in the present case to exercise the right of stoppage given in the lease, and I have no doubt that, when it was exercised, such stoppage was intended to be temporary only.

We come now to a third question; one arising upon the amendment to the statement in defence. Did the acceptance by the suppliant of the lease of August

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29th, 1901, work a surrender of the grant of surplus water made by the lease of 1871? By the latter the lesses acquired a right to the use and enjoyment of so much of the surplus water of the canal as should be sufficient to drive and propel four runs of ordinary mill-stones equal to ten horse-power for each run. By the latter the lessee acquired a right of drawing and taking from the canal two hundred horse-power of the water of the canal not required for navigation or any other purpose of the canal, with an option on any additional power that the Minister might decide to be available over and above the quantity then under lease. The surplus water of the canal was a variable quantity, and there is nothing, it seems to me, within the four corners of the two leases which would go to affect the validity of either of them. Having regard only to the terms of the two leases there is, I think, no inconsistency between them. Both may stand. It is only when we go outside of the leases that there is any doubt about that in the present case. There being no inconsistency in the two leases themselves there is no occasion to consider what the result would be if there had been; whether the earlier grant of surplus water from the canal would have been surrendered by operation of law, as in the case of a demise from one subject to another; or whether both demises being from the Crown the second would not have been void there being no recital therein of the first (1).

But going outside of the lease it is very clear, it seems to me, that it was not in the contemplation of either party that the supply of surplus water granted

(1) See Comyn's Digest, Tit. Surrender in Law, 1 (1), 1 (2), vol. 7, pp. 386 and 387; Bacon's Tit. Leases, S. (2), (3), vol. 5, pp. 665, 667; Chitty's Prerog., p. 293; *Brook* v. *Goring*, 4 Croke, Car. 1, 197; *Wing* v. *Harris*, 1 Croke, Eliz., 231; *Lyon* v. *Reed*, 13 M. & W., 285: *Carnarvon* v. *Villebois*, 13 M. & W., 313: *Holme* v. *Brunskill*, L. R. 3 Q. B. D., 495; and *Baynton* v. *Morgan*, L. R. 22 Q. B. D., 74.

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by the earlier lease would ever be restored and continued to the suppliant. No doubt he would have surrendered it and released all claims to damages if he had been given a lease of the larger power on favourable terms. But he did not get that, and the new lease was accepted with a reservation, not expressed in the lease, but agreed to between those who represented the parties, that the suppliant's rights and remedies under the old lease should not be interfered with.

What, then, were the rights and remedies under the old lease that were not to be interfered with? The right, it seems to me, to recover compensation for the loss of power to which he was entitled under that lease. But I would not include in such compensation any damages such as those the suppliant claims for loss of profits or for the dissipation of his business. The Minister had a right to stop the supply of water for a time. In its inception the stoppage was lawful and within the lease, and if, because of the change that was made, such stoppage was continued for a longer time or occasioned greater damage than otherwise would have been the case, the suppliant has no good ground of complaint. The change was made in part at his instance and to meet his views and wholly with his acquiescence and consent, and the same considerations would apply to any loss of profits in business occurring after the power was available to generate electricity, and before it could in fact be utilized. But when we come to the other part of the claim as stated by Mr. Shepley—the claim to compensation for the actual loss of the power—I am of opinion that it should be allowed.

There is, it seems to me, a distinction to be made between the claim for damages for the loss of this power and the claim for the loss of profits. On the

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one hand there is no ground for the latter except such as is founded on the change in the works that was made at the instance of the suppliant and others On the other hand he at all times had a well founded claim either to have the power granted by the lease of 1871 restored to him, or to be paid a just compensation for the loss of it. No doubt it was in his contemplation, and probably in that of the Minister and his officers, that such compensation would be given by the granting of a new lease. But the parties were never of one mind as to that, and the question was an open one when the new lease was executed and was then reserved. I think it is still open and undetermined.

With regard to the damages, I think, they should be measured by the cost of supplying and using for the operation of the mill forty horse-power furnished in some other way; and that, it seems to me, would be the measure of the damages whether the case were regarded as one in which the suppliant's property was injuriously affected or one in which the suppliant had a right of action for the breach of a covenant to supply the water in accordance with the lease. As I have already stated it makes no difference in this case from which standpoint the question of damages is looked at.

I do not pretend to think that such damages can in any case be measured with any great precision or exactness. There is always room for considerable difference of opinion. But taking all the circumstances of the case into consideration, the change that was made from the first design of the work in question, the way that change came to be made, the object aimed at in making it, and the giving of a new lease of power to the suppliant for the purpose of manufacturing and selling electric power, the fair way to ascertain the damages would be, it seems to me, to

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take the cost of developing in that way two hundred horse-power and add thereto a reasonable profit and then see at what annual cost the suppliant's mill might in that way be supplied with forty horse-power for the purpose of operating it. Then there should also be added an allowance sufficient to indemnify the suppliant for the cost of making any necessary changes in the machinery at his mill, and to cover the increased annual cost of operating the mill by electricity instead of by water-power. From the best consideration I have been able to give to the matter I have come to the conclusion that a sum of twenty thousand dollars ($20,000.00) paid to the suppliant in May, 1901, when the water in the basin above the weir was available for developing power, would have been a full indemnity and compensation for all damages to which he is in anyway entitled in the premises.

There will be judgment for the suppliant for that amount, with interest thereon at the rate of five per centum per annum from the 29th day of May, 1901.

With respect to the claim set up in the petition of right the suppliant fails and the respondent succeeds. But in another aspect of the case the latter fails and the former succeeds. There will at present be no order as to costs; but either party may apply for a direction in that respect. If neither party applies, each will bear his own costs.

Judgment accordingly.

Solicitor for suppliant: *J. Hilliard.*

Solicitors for the respondent: *Chrysler & Bethune.*

REPORTER'S NOTE:—On the 27th February, 1905, the suppliant applied for a direction that he be allowed to tax the costs of the action. The court thereupon disposed of the question of costs as follows:—The suppliant to have the costs of the issue as to the surrender of the lease of 1871; the Crown to have the costs of the issue as to the suppliant's right to damages for the loss of profits or dissipation of business consequent upon the stoppage of the water supply.

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IROQUOIS WATER POWER.

REPORT OF R. C. DOUGLAS, 5TH MARCH, 1898.

COLLINGWOOD SCHREIBER, Esq., C.M.G.,
Deputy Minister and Chief Engineer,
Department of Railways and Canals,
Ottawa.

OTTAWA, March 5th, 1898.

DEAR SIR,—Agreeable to your letter of instruction of the 21st ultimo, enclosing a petition of the Municipal Council of the Village of Iroquois, which urges a development of water-power at the lower entrance of the Galops Canal, I beg leave to submit the following report :—

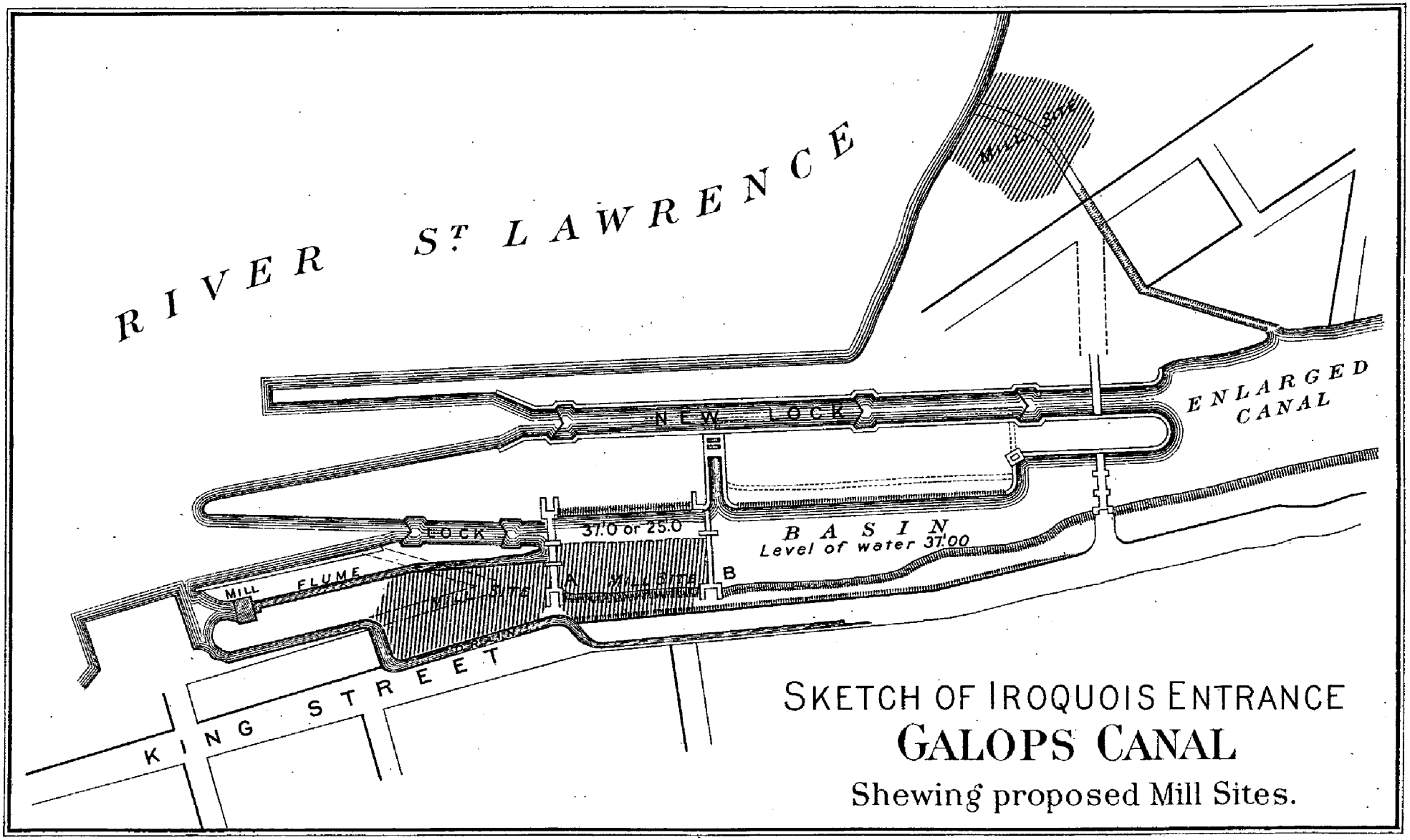
Under present conditions water-power is developed at Cardinal and Iroquois by a head or fall produced by the lift of a lock at each village. Through the project of enlargement of the canal, now in course of construction, the lock at Cardinal is given up; the summit level is to be extended to the lower end of canal; the lift of the two locks to be combined in one, creating at Iroquois a water-power double in extent for a similar quantity, or flow of water, to that now existent.

At Cardinal there is, under a perpetual grant and lease to the Edwardsburg Starch Company, the authority to draw from the canal, for power, a flow of 400 cubic feet of water per second. The water now passing through the flumes of that company is discharged into the present Iroquois level and might be utilized for power; when the canal enlargement is completed this flow of water will be discharged into the River St. Lawrence. It will, therefore, not be available for power at Iroquois; a loss to the village and in revenue to the Department, as the 200 H.P. so discharged would amount to 400 H.P. if available for lease.

Power, to an extent similar to that developed at the locks upon the Lachine Canal, might be created at Iroquois, if the area of sluice-ways, supplying the canal with water at its head, were of larger dimensions. At the head of the Lachine canal the combined area, of apertures in the supply weirs, is 504 square feet; at the Galops Canal, this area is only some 96 square feet. The large area of the former was rendered necessary by the lessees using more water than leased.

The supply of water for the Galops Canal is, as upon the other canals of the St. Lawrence River, variable and governed by its fluctuations in level. After deducting from the flow of water in the canal, the quantity wasted in lockage and leakage it would not be judicious, under present conditions, to lease for water-power more than 600 cubic feet of water per second. As stated previously 400 cubic feet per second of this flow has been already leased, and not available at Iroquois when the enlargement of the canal has been completed, which only permits of some 200 cubic feet per second or 200 H.P. being developed there.

With this limited amount of power permissable it is unnecessary to discuss any large scheme for the development of power. If the Department



SKETCH OF IROQUOIS ENTRANCE

GALOPS CANAL

Shewing proposed Mill Sites.

had assurance that the revenue could be adequately increased additional means of supply could, as in other canals, be provided.

The water-power heretofore leased at Iroquois amounted to 140 H. P.; on account of the enlargement 100 H.P., through purchase, have reverted to the Crown and the latter is under covenant to supply 40 H.P. not disturbed by the project of enlargement. There is therefore, if developed, 160 H.P. available for lease.

Reference to the appended sketch is asked. The present plan of enlargement shows two weirs, one at the head and the other at the foot of the Iroquois basin, it is proposed to maintain its level as at present, some 6 feet below the future summit level.

By abandoning the proposed weir at the head of basin and constructing a weir and dam at the lower end, at either sites A. or B. [Sketch], and raising the banks of the basin a water-power could be created which would utilize the proposed increased head; the old canal and lock becoming the tail-race.

There would be required a weir for regulating the canal of much smaller dimensions than proposed, as the sluice-ways would have double the head and discharge. There would not be required the long filling culvert, the lock being filled directly from the basin. The masonry wall along the south side of basin could be dispensed with.

At the head of old lock (at A.) a dam could be erected, in which at the south end would be the regulating weir; following a weir for supplying at the present level the mill flume of the flouring-mill; then in the dam steel pipes and head gates for the supply of water to any mill which might be constructed below. The tail-race would flow into the present drain enlarged, or pass under the mill flume into river.

A dam and weir above (at B.) would be more favourable for the development of power; this site would afford a better tail-race and in the event of a larger water supply the capability of greatly increasing the power. At this location there is the objection, that the Department would render itself liable for damages to the flour-mill, as it would then require to be propelled by electricity generated at the dam, or some other method, necessitating expensive changes in machinery.

Upon the south site (at C.) water could be drawn from the canal at a distance, direction and amount which would not interfere with vessels leaving the lock. There are available mill sites and the opportunity of creating an extensive power if, as previously remarked, the quantity of water was available.

From the plan and inspection of locality it would appear for the limited power that can be utilized the dam at the head of the old lock would be less expensive, especially if damages to the flour-mill are considered.

Mr. Rubidge might be requested to give an opinion as to the feasibility and cost of these developments of power.

I am, sir,

Your obedient servant,

(Sgd.) ROBERT C. DOUGLAS,

Hydraulic Engineer.