REPORTS

OF THE

EXCHEQUER COURT

OF

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JUDGES

OF THE

Exchequer Court of Canada

During the period of these Reports:

THE HONOURABLE SIR WALTER G. P. CASSELS

Appointed 2nd. March, 1908

THE HONOURABLE LOUIS ARTHUR AUDETTE

Appointed 4th. April, 1912

LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF CANADA

THE HONOURABLE	SIR A. B. ROUTHIER	Quebec	District
do.	F. S. MACLENNAN	do.	do.
do.	F. E. HODGINS	Toronto	do.
do.	ARTHUR DRYSDALE	N.S.	do.
do.	J. D. HAZEN, C.J.	N.B.	do.
do.	W. S. STEWART	P.E.I.	do.
do.	ARCHER MARTIN	B.C.	do.
do.	CHARLES D. MACAULAY	Yukon Territory	do.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA

THE HONOURABLE CHARLES JOSEPH DOHERTY, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA

THE HONOURABLE HUGH GUTHRIE, K.C.

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CASES

DETERMINED BY THE

EXCHEQUER COURT OF CANADA.

IN THE MATTER OF THE PETITION OF RIGHT OF

1918

April 15.

THOMAS DELAHUNT MALONE,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT;

AND

MACDONELL & O'BRIEN,

THIRD PARTIES.

Public lands—Provincial grants—Right of way—Railway—Timber—Expropriation—License—Assignment—Jurisdiction — Compensation.

Where a Province has made a free grant of a right of way on its lands to a railway of the Dominion Government, it cannot subsequently, in the absence of Dominion legislation authorizing it, grant or assign to a third person any rights to the timber on such right of way.

2. The Exchequer Court has jurisdiction to entertain a claim for the cutting and removing of timber by officers and servants of the Crown while engaged in the construction of a Crown railway.

3. A licensee to cut timber has a sufficient interest in the limits covered by the license to entitle him to claim compensation for the taking of the timber by the Crown. The measure of damages is the value of the timber as a whole as it stood at the time of the taking.

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Reasons for Judgment.

PETITION OF RIGHT to recover for the value of timber taken by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 12, 19, 20, 1918.

L. S. St. Laurent, K.C., and *J. P. A. Gravel,* for suppliant.

E. Belleau, K.C., and *E. Baillargeon,* K.C., for respondent.

R. T. Heneker, K.C., for third parties.

AUDETTE, J. (April 15, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $40,080 as representing the value of timber alleged to have been cut on his 3 timber-limits, Numbers 1, 2 and 7, by the respondent's officers and servants while engaged in the construction of the National Transcontinental Railway.

However, at the conclusion of the evidence, counsel at bar for the suppliant abandoned and reduced the figures mentioned in paragraph 4 of the petition of right, and brought his claim down to $29,466.

The claim now stands as follows, viz.:

(a) For timber alleged to have been cut on the right-of-way, (in substitution of paragraph 4 of the petition):

On Limit No. 1. 109 acres at 7,000 ft. b.m.	763,000	
On Limit No. 2. 121 acres at 8,500 ft. b.m.	1,033,000	
On Limit No. 7. 121 acres at 10,000 ft. b.m.	1,275,000	
		3,071,000

(b) For timber alleged to have been cut *outside* the right of way, as alleged in par. 6 of the petition:

On Limit No. 1. 50 acres at 7,000 ft. b.m.	350,000	
On Limit No. 2. 73 acres at 8,500 ft. b.m.	620,000	
On Limit No. 7. 83 acres at 10,500 ft. b.m.	870,000	
	———	1,840,000
		4,911,000

which, at $6 per 1,000, represents the total sum of $29,466.00

By an order-in-council of the Province of Quebec, bearing date November 26th, 1907, a free grant was made to the Commissioners of the Transcontinental, of the right of way upon the Crown lands of the province, in the manner provided in par. (3) of Arts. 5132, R.S.P.Q. 1886, everywhere where their railway passes, subject, however, to Art. 5164 thereof, in respect of the area which may be taken for the said right of way.

Subsequent to this free grant, namely, under the authority of an order-in-council of July 23rd, 1909 —as the whole will appear from exhibits 5 to 10 inclusively—tenders for right to cut on timber limits of the Province were asked and received, from among others, the suppliant for limits Nos. 1, 2 and 7, and accepted by order-in-council of October 20th, 1909. Some time after that date correspondence was exchanged between the officers of the Land and the Attorney-General Departments, as to whether or not the right to cut in question should cover the

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timber on the right of way of the Transcontinental, and from such correspondence it appears the Assistant Attorney-General was of opinion it did, and the Minister of Lands and Forests approved of that course. This correspondence is here mentioned only as a link in the history of the different phases of the case, as by itself it is not possible to conceive it could afford any ground for recovery. See *De Galindez v. The King*[1], affirmed on appeal to the Supreme Court of Canada.

The timber licenses in question were given, as follows:

For Limit No. 1—dated August 12th, 1910—for a period from October 20th, 1909, to April 30th, 1910.

For Limit No. 2—dated August 12th, 1910—for a period from October 20th, 1909, to April 30th, 1910.

For Limit No. 7—dated October 18th, 1910—for a period from May 1st, 1910, to April 30th, 1911.

In each of these three licenses the territory is described, *"as a territory extending one mile on either side of the National Transcontinental Railway"*—from mile number so and so to mile number so and so of the said railway.

Nothing could be plainer.

However, under indenture bearing date of February 4th, 1914, between the Province of Quebec, represented by the Minister of Lands and Forests, and the suppliant, it appears—after reciting that the above timber limits had been so granted, that—

[1] 15 Que. K.B. 320; 39 Can. S.C.R. 682.

"Whereas it was the *intention* of the said the Gov-
"ernment of the Province of Quebec to give and
"grant unto the said party of the second part, by
"the aforesaid licenses, the right to cut and remove
"all the timber on the right of way of the said the
"National Transcontinental Railway—and this whe-
"ther such right of way had or had not been granted
"by the said the Government of the Province of
"Quebec.

"Wherefore, the said party of the first part, here-
"by declares that it was the intention of the said
"the Government of the Province of Quebec to give,
"grant and convey unto the said party of the second
"part, by the above mentioned licenses, the right to
"cut and remove timber on the said right of way
"of the said the National Transcontinental Rail-
way.

"Now, therefore, these presents, and I, the said
"Notary, witness—

"That the said party of the first part declares to
"have given, granted and conveyed, and by these
"presents doth give, grant and convey unto the said
"party of the second part, represented as aforesaid
"and hereof accepting, that is to say:

"All the right, title and claim of the party of the
"first part to the timber growing on the right of
"way of the said the National Transcontinental Rail-
"way, where such right of way passes through the
"said timber limits so granted to the said party of
"the second part under the aforecited licenses, or
"is bounded by the said Timber Limits so granted to
"the said party of the second part, and doth also
"assign, transfer and make over unto the said party
"of the second part, hereof accepting, all the rights,
"claims and demands of the said party of the first

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"part to compensation for the value of any timber "cut on the said right of way, and this whether such "timber was cut previous to or after the above men- "tioned licenses were granted by the said party of "the first part to the said party of the second part.

"The present conveyance and transfer has been "made by the said party of the first part upon the "conditions hereinafter mentioned, which are here- "by accepted by the said party of the second part, "who hereby binds and obliges himself to imple- "ment and fulfil the same, that is to say:

CONDITIONS.

"1. The present grant, conveyance and transfer "is made without any warranty on the part of the "said party of the first part, and at the sole risk "and charges of the said party of the second part.

"2. That if the said party of the second part shall "cut any timber on the right of way of the said the "National Transcontinental Railway, or shall re- "cover compensation for the value of timber which "has been cut on the said right of way, he shall, in "either such cases, pay to the Commissioner of "Lands and Forests of the Province of Quebec "stumpage on the amount of timber so cut or in re- "spect of which compensation shall have been grant- "ed to him, at the same rate of stumpage as he pays "with respect to the timber cut on the remaining "portion of the said timber limits."

This deed, it will be noticed, bears only upon that part of the claim in respect of the timber cut on the right of way of the National Transcontinental Railway, as distinguished from the other branch of the case in respect of the timber cut *outside* of the said right of way.

It will perhaps be more convenient to deal now with this deed of February 4th, 1914, before entering into the consideration of the licenses. It may be said as a prelude that it is difficult to conceive whether in a case of this kind, a court of justice should take into consideration the motives and intentions of contracting parties with the object of altering plain and unambiguous language of previous deeds affecting third parties. It is the duty of the court to approach all questions from a legal angle.

In the *Moisie* case[1] it was held that when a Crown patent was in plain and unambiguous terms, the patentee could not claim additional rights, under previous or subsequent negotiations and correspondence, as enlarging the terms of the grant or even by reason of such rights having been exercised by him continuously from the date of the grant without hindrance or interference.

Freed from any subtlety, is not this an *ex post facto* declaration of this intention embodied in that deed, a self-confessed afterthought without any complexity? Does it not mean that the province, in answer to the suppliant's demand for the timber on the right of way, is willing to say, so far as it is concerned, it has no objection that the suppliant lay claim to this timber. In fact it has no objection to go further and disclaim. The province says, we will assign to you, without covenant, at your own risk and peril, all rights we may have in such timber. Could such an assignment be enforced against the Crown, as represented by the Dominion Government?

It was held in *Powell v. The King,*[2] "that the "Crown, as represented by the Government of Can-

[1] *Wyatt et al v. Attorney-General P. Q.* [1911] A.C. 489-496.
[2] 9 Can. Ex. 364 at 374.

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"ada, is not bound (by such transfer or assign-"ment.) The only legislature in Canada that would "have power in that respect to bind the Crown, as "represented by the Dominion Government, would ". . . . be the Parliament of Canada." As a general proposition the assignee of a claim against the Crown has no right to sue for it in his own name; and a debt due by the Federal Crown cannot be validly assigned, unless there is some Dominion legislation authorizing the same. There is no contract between the suppliant and the respondent herein. On the ground of public policy the Crown cannot be expected to seek out assignees of claims; its creditors and payees are those it sees fit to primarily and openly do business with, and it is upon this principle that garnishee process does not lie against the Crown. The Crown is not bound to recognize third-parties with whom it has not contracted.

The assignment contained in this 1914 deed is but the assignment of a so-called right to a claim against the Federal Crown, and nothing else.[1] It is made without covenant or warranty by the Province and at the sole risk and charge of the suppliant. It is contended by counsel at bar for the Crown that this is a transfer of litigious rights.

Sir Charles Fitzpatrick, in *Olmstead v. The King*[2] says: "The policy of the law has always been op-"posed to this trading of litigious rights, and such "transactions are to be discouraged in every pos-"sible way. . . . Whilst the assignment of a right "to litigation is forbidden as between subjects, the

[1] 7 Halsbury, 501. See also *The King v. Burrard Power Co., Ltd.*, 12 Can. Ex. 295; [1911] A.C. 87.

[2] 53 Can S.C.R. 450 at 453; 30 D.L.R. 345 at 347.

"rule must apply with greater force in the case of "the Crown, since the subject has *no right to sue "the Crown, but can only present a petition of right.* "There being no such thing as a right to a claim "to recover against the Crown, there can be no as- "signment of any such pretended right."

And when the "prerogatives of the Crown are in "question recourse must be had to the public law "of the Empire by which alone they can be deter- "mined."[1]

Under the laws of the Province of Quebec, as set out in Arts. 1582 and 1583, C.C.P.Q., a right is held to be litigious when it is uncertain and disputed, or disputable by the debtor, and between subject and subject may be sold, but may be discharged by the debtor by paying to the buyer the price and incidental expenses of the sale. And for a right to be litigious, it is necessary that the susceptible contestation of the same should bear upon the merits of the right itself.[2]

However, this deed of 1914 is in absolute derogation of the Order-in-Council of 1907 making a free grant of the right of way, and furthermore in derogation also of the licenses themselves, because in the result, they are clearly made subject to such right of way by their own clear and unambiguous language when it declares that this right to cut timber is in "a territory extending one mile on either "side of the National Transcontinental Railway". Why? The timber limit cannot be delimited before you find the right of way. And it is so much the case that it appears from the suppliant's evidence, that before describing the territory in those licenses, a

[1] *Attorney-General v. Black* (1828), Stuart R. 324.
[2] *Corpn. of St. Thècle v. Matte*, 27 Que. K.B. 185.

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plan of the right of way was obtained from the Transcontinental, which has been used as the very basis and starting-point in fixing the territory mentioned in those licenses. This very plan, or a copy thereof, has been filed of record as Exhibit No. 13, and is the plan upon which the tenders were called for.

Moreover, the timber on the right of way, as the natural growth of the soil, forms part of the soil itself—it is attached to and forms part of the land. It would seem difficult to conceive that there could be a severance worked out of the free grant and that the timber, *fructus naturales,* could be severed from the land so granted.

In February, 1914, at the date this deed was executed, the Provincial Government had no right of action against the Federal Crown in respect of the timber on the right of way, which went with the land under the free grant of 1907, and therefore had nothing in that respect to assign to the suppliant who is in no better position than his assignor.

Therefore, it must be found that under the circumstances of the case nothing passed under that deed of 1914, which could afford the suppliant a right of action on any ground to recover against the Crown, in respect of the timber cut on the right of way.

I shall now pass to the consideration of the rights acquired by the suppliant under the licenses themselves. Having disposed of the deed of 1914, which appears to be the result of an afterthought, an *ex post facto* declaration, for the reasons above mentioned, I must also find that from the very description of the territory upon which timber may be cut, as appears upon each license. it is impossible to hold

that the licensee thereunder ever acquired any right to the timber cut on the right of way. The right of way is in clear and unambiguous language excluded from the territory of the licenses.

TIMBER CUT OUTSIDE RIGHT OF WAY.

The extent of the lands which may be taken, under the free grant made by the Order-in-Council of November 27th, 1907, for the right of way of the Transcontinental, is controlled by sub-sec. 3 of sec. 5132, and sec. 5164 of the Revised Statutes of the Province of Quebec, 1888.

It appears from the evidence of Mr. Doucet, the district engineer, that in the course of the surveys to be made for locating the right of way, when at the origin surveyors go through the country to be crossed by the railway they have, in a way, to feel their way—go to the right or to the left, and in course of such process, trial lines are first made, which involve the cutting of trees on an area of 4 to 6 feet in width. Then, secondly, comes the *location line*—the selected line. And thirdly, there may also be a revised location line, followed by fourthly the final location.

Moreover, land is also taken for stations, double tracks, contractor's camps, engineers' camp, gravel pits, etc. We shall have to deal with each of these items or counts in respect of which claim is made by the suppliant.

The evidence in respect of these complex items is not as clear and satisfactory as it could be, and I regret to say I am under the obligation at times to arrive at a conclusion from very meagre evidence or from mere presumption, which, however, when

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arising from facts, are left to the discretion of the tribunal. Arts. 1238, 1242, C.C.P.Q.

The question upon which this branch of the case first presents itself is the date at which the rights of the suppliant originated under his licenses. His tender for the three limits was accepted by the Order-in-Council of October 20th, 1909, (Exhibit 8). Then the licenses for limits Nos. 1 and 2 are dated as of August 12th, 1910, but in the body of the licenses the right to cut is defined to be from October 20th, 1909, to April 30th, 1910—and counsel for the Crown contends that the licenses are good and valid only from their date, and that they cannot have any retroactive effect, and therefore are null and void. This contention is based upon sec. 1310, R.S.P.Q., 1886, and sec, 1598, R.S.P.Q., 1909, which reads as follows: "No license shall be so granted "for a longer period than twelve months from the "date thereof."

With this contention of the Crown I am unable to agree. This statutory enactment is only a limitation placed by the Legislature upon the executive whereby the latter is given a restricted and controlled power to issue licenses, but for a period of twelve months and no longer. That is obviously the object of this enactment, and no other.

It would appear to make no difference whether the license be ante-dated or post-dated—the life of the license is determined by the term mentioned therein.

While the dates for the license of timber limit No. 7 are different from those of Nos. 1 and 2, the same principle and reasoning will apply.

Therefore, before entering into the manifold and complex details of the items of the claims under

this branch of the case, I hereby find that the suppliant acquired his rights to cut from the dates mentioned in the licenses, and not from the time at which the licenses were dated.

Under the evidence of the district engineer, it appears that survey lines were started in 1904, and that he took charge in 1908, when he revised the lines, made trial lines, and revised location. There was nothing final until the line was actually constructed, and there were changes even after the line had been selected and contract given. This witness remembers three changes made, on limits Nos. 1 and 2; namely, at Lake Travers, at Lake Kamitsgamack, and at Lake Menjobagus, but no area is given. In respect of the last mentioned lake, he says there was a change for 5 to 6 miles; but he cannot say whether it had been cleared before. And he adds that these three changes were made between 1909 and 1911.

For all that was done outside the right of way prior to October, 1909, it is clear the suppliant cannot recover, and a good deal was done prior to that date—as much, however, as can be ascertained in a general way from the evidence; but for all that was cut on his limits outside the right of way since October, 1909, and during the period the territory was held under his licenses he is entitled to compensation, with, however, some small exceptions.

1st. CAMPS. Dealing first with the question of camps, I find that the suppliant has no recourse against the Crown for the area taken by the contractors for their camps. It will be sufficient to say upon this item, that as between the Crown and the suppliant there is no privity upon this branch of the case. These camps were for the contractors' use.

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2nd. ENGINEERS' CAMPS. For the area taken for the Transcontinental Railway—engineers' camps outside the right of way—the suppliant is entitled to recover. A very small area indeed appears to have been taken for that purpose. On this branch we have the evidence of witness Malone, who says there were two camps on No. 1, covering 4 to 5 acres, and on No. 2, 6 to 10 acres were, in a general way, taken for that purpose. But witness Black, the engineer in charge of 6 miles of No. 1, and of the whole of No. 2, says there was no engineers' camp on his part of No. 1, and that there was one camp on No. 2 occupying about 2 acres. It is somewhat difficult to arrive at any satisfactory conclusion upon such evidence. I will allow 6 acres for the engineers' camp.

3rd. BALLAST PITS. These were taken outside the right of way after October, 1909, and I will allow for the ballast pit on No. 1, 6 acres, and for the two ballast pits on No. 2, 17 acres, making in all 23 acres.

4th. TRIAL LINES AND CHANGES IN RIGHT OF WAY ABANDONED. Witness Wilfrid Adams, bush superintendent for the suppliant, says he went on limits Nos. 1 to 10 or 12 in 1909, and left in 1911. It appears he may have made a mistake as to the latter date, which should be 1912, when he was replaced by his brother Arnold. He testifies he does not recollect any trial lines on Nos. 1 and 2, and that no trial lines were run on Nos. 1, 2 and 7 while he was there.

Arnold Adams, who was in the suppliant's employ as bush superintendent from August 17th, 1912, to January, 1917, says no changes were made after he went on the limits. He contends he saw in the woods what he presumed to be changes in the right of way, and also trial lines running almost any way;

but he did not see anyone making these cuttings. Being asked to make an estimate of these cuttings, he reckons them on No. 1 at 50 to 75 acres; on No. 2 he says it ought to be 110 to 120 acres, and on No. 7 about the same as No. 2. During the examination of this witness he became ill and had to retire for a short period. From his demeanour in court he did not impress me as imparting anything of which he was in any manner very sure or convinced. He said that estimate was his idea, he had not measured. In the result it must be taken to be nothing else but a mere guess.

Engineer Black, who was in charge from November, 1909, until July, 1912, when the track was practically completed, with construction trains running through, testified that the right of way was begun in February, 1910, on No. 1, and in March, 1910, on No. 2. On No. 1, that part under his control, there was a change in the right of way involving seven acres. He adds that trial lines were run before December, 1909, of which he could make no estimate; but that there were three trial lines made after December, 1909, not covered by the right of way, involving about two acres.

On No. 2, the same witness would allow 18 acres for station grounds, and approximately 10 acres for abandonment of right of way, and for trial line, 2 acres. While he cannot give the area of trial lines made before he took charge, he says there were at least two. There is no evidence to establish whether the latter would have been made before October 20th, 1909.

Witness Malone says he saw trial lines on No. 2 before he purchased, and his estimate, or guess, as to what was cut after 1909 agrees with that of his

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employee, Arnold Adams, or Arnold Adams agrees with his employer's guess, and it is placed as follows: On No. 1, he puts it down at 50 acres. On No. 2, at 73; and on No. 7, at 83 acres.

It is very difficult under this evidence to arrive, with satisfaction, to an area that would be in any manner reliable. From these large areas mentioned by witnesses Malone and Arnold Adams, must be deducted what was done before October, 1909, and the contractors' camp. Does that estimate cover the ballast pit? Was there not fuel cut by contractors upon these limits which was afterwards sold as fuel, as disclosed by the evidence, that would be included in the larger estimate? I am unable to say. Witness Black speaks with certainty upon what he knows, but leaves out points that are not covered. His estimate would come up to about 39 acres, and if we allow say 5 acres for the two trial lines he says were made on No. 2 before he took charge, although there is nothing to show whether they were made before October 20th, 1909—and that would give us a total of 44 acres altogether, and that would also be allowing the full 18 acres for station purposes.

I may say also I am not overlooking the error made by witness Plamondon in respect of the yellow colouring on plan Exhibit No. 13, as explained by witness Scott.

Taking into consideration that the estimate of Engineer Black does give us some reliable data so far as it goes, but does not actually cover everything in respect of this claim, and that for the reasons above mentioned, much indeed must be deducted from the guesses or estimates of witness Malone and Arnold Adams, I see no other manner to reconcile the evidence than to add a fair acreage

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to the engineer's estimate, as hereinafter mentioned. I am unable to reconcile these two estimates in a better manner.

On the question of jurisdiction, it will be sufficient to say that the court has jurisdiction to entertain the claim as well under sub-secs. (a) and (b) of sec. 20 of the *Exchequer Court Act,* as under the *Expropriation Act,* and the *National Transcontinental Railway Act,* 4-5 Geo. V., ch. 43, and 5 George V., ch. 18; also *Piggott v. The King,*[1] *Johnston v. The King,*[2] *The King v. Jones.*[3] The government engineers had the power to enter upon the lands in question and cut trees as part of the works necessary for the construction of the railway. See sub-secs. (a) and (c) of sec. 3 of the *Expropriation Act,* and sec. 2, ch. 36, R.S.C., 1906, the *Government Railway Act.*

The suppliant, while not having a fee in the land upon which the timber was so cut, had an estate and interest in it, and he is entitled to compensation. He has a possessory right in the limits and a right of ownership in the timber cut thereon.

To arrive at the amount claimed, the suppliant taking the alleged area upon which the timber was cut, makes an estimate of the quantity, in board measure, which was growing upon that area and claims $6 per 1000 ft. B.M., of that timber, after it would have passed through the mill. In that amount of $6, counsel in the course of his argument says that $3.55 would go to the Provincial Government for stumpage and the suppliant would receive $2.45. That reasoning is borrowed from the deed of February, 1914, under which the suppliant undertook, if he recovered, to so pay the stumpage; but that only

[1] 53 Can. S.C.R. 627; 32 D.L.R. 461.
[2] 44 Can. S.C.R. 448.
[3] 44 Can. S.C.R. 495.

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applied to the timber cut on the right of way which is entirely disallowed, and such reasoning cannot be applied for what is cut outside of the right of way.

However, this mode of assessing the compensation cannot be accepted. I have already said, in the case of *The King v. The New Brunswick Railway Co.*,[1] wherein a claim was made in respect of the passage of the Transcontinental through their limits, that the value of the estate or interest of the suppliant in such timber lands must be arrived at by looking at the property as it stood at the time of the taking by the Crown. What is sought here is to compensate the suppliant for the timber so cut, as a whole, at the time of the taking, and to arrive at the value one is not to take each tree so felled, calculate the board measure feet that could be made out of it and the profits derived therefrom when placed on the market for sale. A somewhat crude but true illustration may be used. If through negligence, while driving an automobile, a steer were killed, the measure of damages would be the value of the steer as it stood at the time of the accident and not after it had passed through the hands of the butcher who had cut it up and retailed it by the pound.

Similar views were also expressed in the case of *The King v. Kendall*,[2] confirmed on appeal to the Supreme Court of Canada. See also *Manning v. Lowell*;[3] and *Moulton v. Newburyport Water Co.*[4]

The rights of the suppliant, under the first license was for October to May, and in subsequent licenses for 12 months only. He could not within the life of

[1] 14 Can. Ex. 491 at 496.
[2] 14 Can. Ex. 71 at 81; 8 D.L.R. 900.
[3] 173 Mass. 103.
[4] 137 Mass. 163, 167.

one license, or even two, cut the whole timber upon the limits. It is not in evidence whether he did cut immediately adjoining any part in respect of which claim is made. There would further be *areas* to be taken into consideration, such as having the whole limit destroyed by fire.

The suppliant was paying the sum of $5 a mile as a yearly ground rent. Under sec. 1312 R.S.P.Q. 1888, the licenses vest in the holder thereof all the rights of property in all trees, timber and lumber cut within the limits within the *term thereof*, whether such trees, timber or lumber are cut by authority of the holder of such license, or by any other person, with or without his consent. And under sec. 1313 the licensee has the right to seize such timber qualified as cut in trespass. But the trees, in the present case, were not cut in trespass, they were cut under statutory authority conferred upon the officers of the Crown for the purposes of the Transcontinental Railway.

I am unable to differentiate the present case from the general run of cases. The timber was cut under proper authority,[1] and the compensation to be paid the suppliant should leave him, after the expropriation, neither richer or poorer than he was before. The Crown is not to be penalized, but it should pay a fair and just compensation.

The suppliant's title consists in a right guaranteed for a short period, renewable only at will for a period of 12 months only. There is no evidence upon the record of the value of that land per acre or of the trees so cut.

As I have already said, while I cannot accept, under the evidence as presented, the estimate of

[1] *Attorney-General v. C. P. Ry.*, [1906] A.C. 204.

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206 acres made by witnesses Malone and Adams, I also find the estimate of the engineer Black is incomplete.

Under the latter's estimate we find the following allowances were made:

For engineers' camp	6 acres
For ballast pits	23 "
For trial lines and changes in the right of way, including the full area for station purposes, etc., and allowing 5 acres for the two trial lines he found when he arrived, but which he does not know whether they were made before or after October, 1909, making altogether	44 "
And to these 44 acres let us add, to make that allowance most generous, 50 per cent. more, making these 44 acres 66 acres, we will arrive at a total of.....	95 "

The suppliant is entitled to the fair value of the trees so cut at that date, before the railway was in operation. Most of these trees were cut, moved to the side and left there, and were not taken away.

There is not a tittle of evidence to help in arriving at a valuation upon a proper basis. Was this cutting on the trial line, on the abandoned area of the right of way, done on a poor or good part of the limits? Take the gravel pit, for instance. Gravel pits are usually, perhaps not always, under poor land where the growth is poor. In assessing the compensation regard must be had to the remoteness of the limit, the quality, quantity and species of the timber.

Two courses are now open to the court. The first would be to re-open the case and order that further evidence be adduced.

The second course left would be for the tribunal to assume the office of a jury and do what a jury would do in a case of this kind, and using common sense and taking all the surrounding circumstances into consideration, fix a lump sum which in its judgment would be considered fair and just under the circumstances.

Following the first course would involve procrastination and want of finality in adjudicating upon cases. I have already adopted the second course in the case of *Boulay v. The King* (May 10th, 1912), and it was confirmed on appeal to the Supreme Court of Canada (November 11th. 1912).

Taking all the circumstances of the case into consideration, and adopting the second course, I will allow for all the trees so cut the sum of $1,000—this amount I find will be a fair, just and liberal compensation as between the parties.

To this amount interest should be added. I have no definite date from which such interest should run, and the question was not mentioned at trial, although claimed by the pleadings, and is allowable under sec. 31 of the *Exchequer Court Act*. The first date of the licenses is October 20th, 1909. The cutting took place subsequent to such date, on different occasions, and I will adopt as a medium or average date August 12th, 1910.

Dealing now with the third-party proceedings, I find that as no part of the compensation allowed the suppliant is recoverable by the Crown from the third party, that issue shall stand dismissed with costs against the respondent.

As between the suppliant and the respondent there will be judgment in favour of the suppliant

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for the sum of $1,000, with interest thereon from August 12th. 1912, to the date hereof, and the costs will follow the event.

Judgment for suppliant.

Solicitors for suppliant: *Galipeault, St. Laurent & Co.*

Solicitors for respondent: *Belleau, Baillargeon & Belleau.*

Solicitors for third parties: *Heneker, Chauvin & Co.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, PLAINTIFF,

AND

THOMAS THOMPSON, DEFENDANT.

1916
Feb. 21.

Expropriation—Compensation—Farm — Value — Mill—Timber—Conversion.

In estimating the amount of compensation for the expropriation of a farm by the Crown for the purposes of a military training camp, the property is to be valued, not by segregating the acreage in severalty, so much for the timber and other things thereon, but by the prices paid for similar properties when acquired for similar purposes, and its value accordingly at the time of expropriation. The owner, however, will not be allowed compensation for a mill erected and operated upon the land after the expropriation, and he is answerable to the Crown, in conversion, for all timber cut and removed by him after that time.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 16, 17, 18, 19, 1916.

G. G. Stuart, K.C., and *Ernest Taschereau,* for plaintiff.

L. A. Cannon, K.C., for defendant.

AUDETTE, J. (February 21, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands and real property belonging to the

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defendant were taken and expropriated, by the Crown, under the provisions of the *Expropriation Act,* for the purposes of "The Valcartier Training Camp," a public work of Canada, by depositing, on September 15th, 1913, a plan and description of such lands in the office of the Registrar of Deeds for the County or Registration Division where the same are situated.

While the property was expropriated in September, 1913, the defendant was allowed to remain in possession after that date for about one year, as will be hereafter mentioned.

The lands expropriated are taken from lots 1 and 2, in the first concession of St. Gabriel of Valcartier, containing altogether 264 acres,—from which should be deducted ten arpents as representing the portion mentioned in paragraph 3 of the information,—leaving about two hundred and fifty-five and ninety-five hundredths acres.

The Crown, by the information, offers the sum of $4,200, and the defendant claims the sum of $14,420.84.

On behalf of the defendant, witnesses William McCartney, Jos. Savard and Samuel Clark valued the defendant's property as of November 2nd, 1915, at $7,911, excepting the value of the buildings.

Witness McCartney, to arrive at such a valuation, proceeds by segregating the acreage in severalty, allowing so much for so many acres, and so much for others and so on. Having gone so far and valued the soil, he proceeds by placing a value upon the timber upon the land, and estimates there are so many trees on the land which would yield so many feet of board measure at so much per thousand feet. Adding further, that after having valued the soil,

and the value of the timber reduced to board measure, he valued the balance of the wood as cordwood, at so much a cord. He admits, however, in answer to the Court, that although he bought farms, he never valued or bought them in that way,—but that he bought the farm as a whole, *en bloc.* In 1906 he bought one of the good farms at Valcartier, with good buildings, for the sum of $2,000. This farm was composed of 180 arpents, together with 90 arpents of a bush lot.

Witness Savard values the land in the same manner as the previous witness. He says there is a difference in the value of properties in 1913 as compared with 1915,—and that the mill being upon the property gives it a high value, and that the valuation is high because of this mill. He declares he *cannot say what was the value of the farm in 1913.*

Witness Clark gave the same evidence as the previous two witnesses—it being admitted by the parties he will give the same evidence as McCartney and Savard. He takes into consideration the existence of the mill there in his valuation, and he declines to make a valuation without the mill. He placed a value upon the lumber in the woods; but had no experience in doing so—it was the first time he had ever done it.

Besides the evidence of these three witnesses upon the value of the farm, there is also in this case evidence upon the value of each of the buildings and also upon the value of the agricultural implements, the furniture and other goods and merchandise. The two witnesses who testify with respect to the latter—as shown in Exhibit "L", admit having no knowledge of the value of such articles,—but as they

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were told the value of the same was so much, they valued accordingly. A very unreliable class of evidence.

The defendant also claims the sum of $300 as damages to his crop in 1914.

There is further the evidence of the defendant himself, who testifies that he decided during July, 1913, to put up a sawmill upon his property. On July 26th, 1913, he purchased the machinery and necessary supplies for the mill, as appears by Exhibits "G" and "H", amounting in all to the sum of $1,626.84. These goods and merchandise were shipped from Quebec on September 15th, 1913, and the defendant says he received them at Valcartier on or about September 17th, 1913, when he began hauling this machinery from the station. He began cutting lumber on lots 1 and 2 by the end of July or beginning of August, 1913, and Charles Savard, who owned a mill at about a mile and a quarter from Thompson's property, was sawing the logs for the latter for the purposes of his mill, and made the first delivery of them on September 30th, 1913, and the last one on October 23rd, 1913. The cost of cutting the timber amounted to $10.31, and the value of the lumber was $84.72. The defendant began operating the mill some time in November, 1913. He ran the mill for about 6 months. After his farm had been expropriated he cut a quantity of timber upon the property, and after sawing it, sold some of it to E. T. Nesbitt, a lumber merchant at Quebec, to the amount of $1,846.70, and also to farmers for an additional sum of $75 to $100.

Messrs. Bate & McMahon had the contract for the building of the rifle range at the Camp, and Mr. Lowe was their manager. In the latter part of

August, 1914, Lowe rented the mill from Thompson, at $10 a day, running it at his own expense and paying wages to Thompson. The latter says he worked for 11 days for Lowe, but was paid only for 10, receiving nothing for August 31st, 1914, the last day he worked for Lowe. After that date the defendant says he stayed around for a few days, and left on September 17th, 1914, leaving on the property whatever he had in the way of furniture, agricultural implements, etc., which did not, however, amount to much, he being a single man with no family.

On behalf of the Crown, *Captain Arthur McBain* testified that on September 17th, 1913, accompanied by Thomas J. Billing, he called on the defendant Thompson, and after asking him what he was going to do with the mill, he told him (Thompson) that it was not advisable to build the mill. The witness further notified the defendant on that occasion,—on September 17th, 1913,—that the plans of expropriation taking his property had been filed. The witness valued this property in September, 1913, at the sum of $1,000, stating that the buildings were old, that they had to repair the barn before using it. He testified that the farm was covered with moss and with a small second growth of scrubs of no value, indicating poor land.

Colonel William McBain, valuing this property, testifies that he does not think it was possible, in September, 1913, to find a purchaser for the defendant's property for any sum over $1,500. He says that Hopper Ireland, who owned the farm before Thompson's father, was unable to make a living upon it and had to leave it about 20 years ago. About 40 acres of this farm had been cultivated at one time. The farm was in a very bad condition, with

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very old and inferior buildings. The soil is a black sand, even worse than red sand; and the second growth of small trees or scrubs is the result of the condition of the ground being left uncultivated, and are absolutely of no value. The timber upon the property is very inferior, such timber consisting of very small spruce, and some hardwood. Colonel McBain, who had charge of the camp and of all these expropriations, states he did not get the mill valued, because his brother, Captain McBain, on September 17th, 1913, had warned the defendant not to put up the mill on the Crown's property. This witness also produced, as Exhibit No. 6, a list of 31 properties purchased by him, at Valcartier, for the purposes of the camp, at an average price of $16.57 to $17 per acre, for much better properties than that of the defendant. The prices then paid afford the best test and the safest starting point for the present enquiry into the market price of the present property. *Dodge v. The King*,[1] *Fitzpatrick v. Town of New Liskeard*.[2] The witness further testified that in August, 1914, he discussed the question of the mill with the defendant, and Thompson asked him if he would make him an offer of $5,000, leaving everything there. However, the witness declined to do so.

The defence also produced, as Exhibits Nos. 2 and 3, what appeared in two local papers published at Quebec, on September 16th, 1913, in the English language, being two articles, under large caption lines, announcing the expropriation of these lands, at Valcartier, for the purposes of the camp.

Now, under the provisions of sec. 8 of the *Expropriation Act*, the defendant's property became

[1] 38 Can. S.C.R. 149.
[2] 13 O.W.R. 806.

vested in the Crown on September 15th, 1913, and under sec. 22, of the same Act, any claim the defendant had from the date of the expropriation upon the land so expropriated was converted into a claim to the compensation money, and his claim in respect to his land or property became void. Then, under sec. 47, of the *Exchequer Court Act*, the compensation to which the defendant became entitled as a result of the expropriation must be ascertained as of the date of such expropriation. Therefore, all the evidence adduced by the defendant with respect to the amount of the compensation he is entitled to is absolutely beyond the mark and of no legal effect; because he has not a tittle of evidence as to the value of the property in 1913, at the time it was expropriated. The witnesses for the defence stated clearly they were placing a value upon the property as of November, 1913.

It will be easily realized that the value in 1913,—before there was any question of the camp, and the value in 1915, after the camp had been there with over 30,000 men, is very different. It is unnecessary to discuss this question, which is too obvious.

The evidence with respect to the value is therefore to be found only in the evidence adduced by the Crown, where one witness values the property, as a whole, at the sum of $1,000, and another witness at the sum of $1,500.

The defendant's evidence as to the value of the property ascertained as of 1915, instead of 1913, has even been adduced upon a wrong basis,—upon a wrong principle. It is, indeed, beyond any sane conception of common sense and business acumen to imagine that the market value of this property could be ascertained in a rational and equitable manner,

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by first valuing a soil of this kind, by segregating the acreage, and placing a value in severalty upon the same, and then after having done so, to turn around and value the timber and the cordwood upon the same at so much per 1,000 feet board measure, and the cordwood at so much a cord, respectively. In the result, by following this manner of valuation with respect to the timber, it would mean that a lumber merchant buying timber limits would have to pay to the vendor of the limits, as the value thereof, the value of the land, together with all the foreseen profits the purchaser could realize out of the timber on the limits; thus leaving to the purchaser all the labour and giving all his prospective profits to the vendor of the limits. Stating the proposition is solving it. No sane person would purchase under these circumstances.

Coming now to the question of the mill. It is established beyond peradventure that on September 15th, 1913, there was no mill upon the property and that compensation for the mill as a mill cannot be allowed. However, at that date the defendant had purchased the machinery and some supplies for the purpose of erecting a mill upon the property,—and although duly warned on September 17th, 1913, not to do so, on account of expropriation—and in face of the expropriation which was then common talk in the locality—the defendant chose, at his risk and peril to put up the mill, which was only completed sometime about the beginning of November, 1913, and operated it from that date for about 6 months, as hereinbefore mentioned. By remaining upon the property and thus erecting that mill, the defendant assumed the responsibility of such a course and its consequences—thus waiving in advance any right

to complain. *Chambers v. London, Chatham & Dover Railway Co.*[1] The defendant did more. He started cutting timber upon lots 1 and 2 for the purposes of his mill, and sold sawn lumber for an amount of between about $1,800 to $1,900. This wood was cut in trespass and converted to his own use. For this conversion he must account to the Crown for at least a part of the same; because the Crown is entitled to damages for the conversion of such timber cut upon its property after September 15th, 1913.

There is no doubt that the defendant is entitled to damages with respect to this mill, or, rather, the machinery of the mill. But these damages must be ascertained as of the date of the expropriation. True, the defendant was at that date under no compulsion to sell to the Crown, and the Crown under no compulsion to purchase this machinery; but the Crown had to indemnify him for all damages suffered by him in that respect. Were the Crown saying, "I will pay you the full amount of this machinery and supplies as you had them, that is new, on September 15th, 1913,"—the defendant could only deliver second-hand machinery and supplies, because they have been in use for quite a while.

This farm was purchased by the defendant's father on April 4th, 1900, for the sum of $700 mentioned in the deed, of which $200 only was paid on account. The father resold to his son on October 10th, 1900, for the $500 remaining unpaid. A railway goes through this farm, severing it into two pieces. The defendant, who was a train hand on the C. N. R. up to the spring of 1913, only started to live on that farm from that date, when he did some little ploughing, for about 14 to 15 acres, he says.

[1] (1863) 8 L.T. 235, 11 W.R. 479.

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This farm is much below the average farms in Valcartier. The soil is black sand, and had not been cultivated or ploughed for about 20 years up to 1912, when the defendant did but a little work upon it. He even said he did not figure upon this property as a farm.

The Crown, by counsel at trial, declared that the defendant could remove and retain as his property both the mill and the machinery in it.

Were the claim for loss of trade allowable, it is quite obvious, it could not be allowed in this case, because the mill was erected and began to be operated after the expropriation, and there was no trade established in September, 1913.

The claim of $900 for the second growth of scrubby shrubs, which is the result of the farm remaining so long uncultivated, is very characteristic of the case, and was attempted to be proved by very flippant evidence, which it is best to leave without further comment.

Were the highest amount of valuation allowed for this farm, ascertained upon proper basis, at the date of the expropriation, namely, at the sum of $1,500.00

The sum of..... 84.00
allowed as the value of the timber for his mill;

The sum of..... 53.00
for the slabs left upon the ground;

The full value of the machinery and supplies, as new..... 1,626.84

And the further sum of..... 250.00
for all damages to oats, potatoes, furniture in 1914,—although it is quite impossible to determine what is really re-

ferable to the grace and bounty of the Crown, by allowing him to remain on the property up to September, 1914, and what may well constitute a legal right to compensation:—we would arrive at a total of.....$3,513.84

However, from this total amount should be deducted a certain sum for the lumber cut after the date of the expropriation, the conversion of which enabled him to sell for about $1,800 to $1,900 of the same after passing it through the mill. A further sum should also be deducted from the total amount of the machinery and supplies, because he could not deliver the same in the state in which it was in September, 1913—but only as second-hand machinery; and, further, because with the offer of the plaintiff of the sum of $4,200 the Crown allows the defendant to remove the machinery and the mill, and retain the ownership of the same. The Crown did not take his furniture and his agricultural implements.

Under the circumstances, I find that the sum of $4,200 offered by the information, is much over and above the amount the defendant is entitled to recover, the compensation being established on a very liberal basis.

Therefore, there will be judgment as follows:

1st. The lands expropriated herein are declared vested in the Crown, from September 15th, 1913.

2nd. The compensation for the lands taken and for all damages resulting from the said expropriation is hereby fixed at the sum of $4,200 without interest.

3rd. The defendant is entitled to be paid the said sum of $4,200 without interest, upon giving to the

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Crown a good and sufficient title, free from all mortgages or encumbrances whatsoever upon the said property. And it is further declared that the defendant is entitled to remove and retain as his property both the mill and the machinery in the same.

4th. The costs will follow the event.

Judgment accordingly.

Solicitor for plaintiff: *Ernest Taschereau.*

Solicitors for defendant: *Taschereau, Roy, Cannon & Co.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

THE QUEBEC IMPROVEMENT COMPANY, LIMITED,

DEFENDANT.

1913
March 4.

Expropriation—Compensation—Value—Agricultural or development —Railways.

Lands in the vicinity of what promises to become a railway junction have a higher value than that of land for agricultural purposes, and are to be valued as land of the industrial or building class, in estimating the amount of compensation for their expropriation by the Crown.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, January 13, 14, 17, 1913.

G. G. Stuart, K.C., and *A. Dion*, for plaintiff.

Louis St. Laurent, K.C., and *Elzear Baillargeon*, K.C., for defendant.

AUDETTE, J. (March 4, 1913) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears that His Majesty the King, under the authority of 3 Ed. VII, ch. 71, expropriated certain lands for the purposes of the National Transcontinental Railway, a public work of Canada.

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A plan and description were deposited with the Registrar of Deeds for the County of Levis, P. Q., on May 13th, 1907, for an area of fourteen and eighty hundredths acres. A second plan and description were also deposited, as aforesaid, on November 30th, 1907, for an area of thirty-two and fifty-four hundredths acres. And a third plan and description were further deposited, as aforesaid, on June 4th, 1909, for an area of two and thirty-two hundredths acres.

The total area expropriated is forty-nine and two-thirds acres, for which the Crown tenders the sum of $250 per acre, making the total sum of $12,415.

The defendant, by his plea, avers that the amount tendered is insufficient and claims the sum of $49,660.

The defendant's title to the land in question has been satisfactorily established.

The defendant, by counsel, stated that the foreshore of the River Chaudiere did not belong to them, and no claim is made herein for riparian rights, as they do not pretend to be riparian owners.

The following witnesses were heard on behalf of the defendant, viz.: Robert Stewart, Joseph B. Bourassa, Percival W. St. George, Michel Lemieux, Napoleon Roy, Frederick Shaw, Donald Barton, Stuart Oliver and Pierre Fontaine. Here follows a brief summary of their testimony, viz.:

Robert Stewart, the manager and secretary of the Quebec Improvement Company, says that the defendant is a land company, owner of the lands in question, situate at about a quarter of a mile from the south approach of the Quebec Bridge. The three pieces of land expropriated are respectively marked A, B and C on the plan filed as Exhibit "D", and all three form part of what is known as the Mc-

Naughton property. Block A is bounded on the east by the government property already expropriated and assessed in this court for the right-of-way of the Transcontinental. This witness files as Exhibit "G" a resolution by the municipality of St. Romuald exempting from taxation, for a period of 25 years, from February 19th, 1904, all factories and industrial undertakings established upon the defendant's property. Part of the Price property, also owned by the defendant, on the north side of the Chaudiere towards the St. Lawrence, was divided into building lots, with some 12 to 14 lots sold in 1904, having refused to sell any more then because the price was too low when they sold only from 6 to 17 cents a foot. One house only has been built there so far. The McNaughton property is not actually divided in building lots, but is held for that purpose. Plan "I" is filed showing the Village of Charny marked "C",—the church by "X" on lot 252, the station nearly opposite the church,—the Chaudiere Curve is indicated by letter "A",—and the Chaudiere station is indicated by letter "B."

The Transcontinental passes at Block B under the Grand Trunk Railway, in a cut of about 30 feet deep, and the highway is carried over the Transcontinental by a steel overhead structure. Block C is on a level just adjoining the G. T. Railway, and the point marked C. C. abuts on the 30-foot cutting.

The actual price paid for the McNaughton property in 1904 was $10,000. At that date between 6 to 8 acres of the space between A and B was covered with shrubs, and the balance was cleared land used for agricultural purposes. The part between C and the road to St. Jean Chrysostome is cleared and the angle between B and C has never been cleared. Since

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their purchase, with the exception of the first year, the balance of what has not already been expropriated, has been rented at $100 a year for farming purposes,—enough to pay taxes and maintaining the road. The dump adjoining Block A is between 30 to 40 feet high. So far no factory has been erected on the defendant's property.

No damages were claimed in the former case before this Court respecting Block A, on account of the embankment. He thinks, but is not sure, that the Parishes of St. Romuald and Charny are divided by the highway marked D.D. on plan Exhibit "D." There are 5 or 6 houses along the public road, immediately opposite the end of the McNaughton property.

The witness assigns as the reason for refraining from dividing their property in building lots the fact that the company was not sure about the various railways coming in then, where and how they would come in over the McNaughton property, and accordingly the sub-division was left in abeyance, not knowing how much would be left after the railways had come in.

Joseph B. Bourassa, M.P. for the County of Levis and Notary, practising for 32 years, residing at St. Romuald, has some experience in valuing property and has already acted as arbitrator. For the last 12 years, up to 1907, the McNaughton property has increased in value from 200 per cent. to 300 per cent. on account of its neighbourhood, its vicinity to Charny with a dense population where the I. C. R. shops have been transferred, at about half a mile from the property in question, foreseeing its adaptability for industrial purposes.

Values block A when asked to do so as agricultural lands, at about $400 to $500 per acre, but he perceives an industrial value and if he considers that value he would arrive at the figure of $700 an acre. He adds if the Cape, he knows of, passes on the eastern part of block A, that would decrease the value down to $200 for a quarter of the block, on a farming basis. If the Cape does not pass there his industrial valuation would be for the whole of block A at $700. However, in 1907 he values this property for industrial purposes and for building lots. In 1907, he also values blocks B and C as a piece of land with the destination of being divided into buildings lots, on the full width of the lots, at an average price of 2½ to 3 cents a foot, equal to about $1,200 an acre. The witness mentions a sale to Michel Lemieux, in the neighbourhood, at $250 a lot,—another sale to Alexander Barbeau at $650 an acre, not far from the property in question.

The value of block A has been damaged or decreased by the high embankment of one-third of its value,—if considered for building lots; but if considered for industrial purposes the decrease he considers hardly appreciable, that it is much less. Approaching the property for industrial purposes he considers that for the part near the river, the neighbouring of such river would increase it by $500 an acre, in his valuation of $700, and that would be that someone would develop the water power from which the property would derive benefit. The extremity of the McNaughton property is about one-quarter of a mile from the Village of Charny. The witness finally adds he values block A at $700 an acre whether it is considered in the agricultural or industrial class. For building lots block A would be one upon

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which it would be difficult to realize its value, because of the high embankment and of the want of a road. Witness owned a piece of land, a couple of miles from the McNaughton property, which has been expropriated by the Transcontinental Railway and the assessment thereof has not as yet been determined. The neighbourhood of the railways is an advantage for the construction of factories there. To have a spur line on this block, the land required for the track would have to be taken from the block itself.

Percival St. George, civil engineer, of Montreal, who has been valuing land for expropriation during the last 10 or 11 years, places a value of $500 an acre upon a third of block A, adjoining River Chaudiere, as power could be had therefrom. He values the balance of the block at $700 an acre for building purposes. Passing to B and C, the witness says that the triangular space of 5½ acres between them and marked T upon plan D, has been entirely destroyed. The land to the north of the cut for about 600 feet will be depreciated by one-half for building lot purposes and values that land at about 3 cents a foot. Values blocks B and C at 3 1-3 cents a foot, equal to $1,400, bringing it to about $160 a lot. Considers land more valuable than the Breaky lot mentioned in Exhibit "J"—it is closer to Charny, which is about a quarter of a mile,—not much more,—from the McNaughton property. Has visited the property in question herein twice—once for the first expropriation and once on Saturday last, and has no personal knowledge of the value of the property in the neighbourhood; but has taken into consideration, in making his valuation, at least some of the sales, the lay of the land, in such proximity to

a village, and also that it is a railway centre, which will go to increase the value of the land, and then simply used his own judgment as to its value. Block A would be worth $1,200 to $1,400 without the embankment and he values it at $700 because it is depreciated to the extent of 50 per cent. by that embankment.

Michel Lemieux, farmer, of Charny, testifies that the Parish of Charny came into existence as a separate parish from St. Jean Chrysostome, 8 or 9 years ago. A church was erected and had to be enlarged twice. The McNaughton property is about 2½ arpents from one of his farms, part of which he sold in building lots. He sold, he thinks, as many as 15 lots—most of them have been built upon—a couple were returned, which he resold at a higher price. However, he is not anxious to sell now, believing it will be sold at a higher figure later on. These lots which he has thus (*concédés*) sold are on the highway. He has others at Charny. The place where he sold these lots is about 9½ arpents from the McNaughton property,—it is the farm he lives on which is 2½ arpents from the McNaughton property.

Napoleon Roy, farmer, of the Village of Charny, is proprietor of a farm; a portion of it is opposite the McNaughton property. On the piece fronting on the highway he gave some lots to his children. One of his sons has rented (*concédé*) a piece behind at $10 a year, on a basis of $200 for the lot. But his son returned him that lot last year, when he left the place. He rented the McNaughton property for the last four years at $100 a year, and when parts were sold the rent was decreased in proportion, and he had to maintain the road, which is difficult in winter

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time. One of his sons has it now. On that McNaughton property there are rough pieces; it is a farm the like of which we have not anywhere around our way—what is good is good, and a very large portion is good. The good part has not been taken by the railway.

Frederick Shaw, real estate agent, a partner of the firm of Carrick, Limited, of Montreal, has been in real estate business for about 10 years. He drove yesterday, accompanied by Mr. Barton, to the property in question, in order to get an idea of the lay of the land; went to Charny, Chaudiere River, and on the property itself to get a good idea of it. He examined the property with the idea of giving a comparison with other locations which he has seen situated in a similar way around Montreal—such as St. Lambert, across the river from Montreal. It is a city entirely made from the Victoria Bridge going there,—considering that the property in question is bound to turn into a junction centre. Property in St. Lambert is selling at about 3 to 60 cents a foot. Then he wishes further to mention a property 18 miles from Montreal where the Canadian Northern was is a similar condition as this. Witness never dealt in any property in Quebec or its vicinity. The Victoria Bridge he speaks of was opened in 1860, and the increase mentioned in the value of property took place within the last 3 years. The railways that will enter at the place in question herein will be the D. & H., the Central Vermont, the G. T. R., the Intercolonial Railway and some other small lines. The C. P. R. bridge at Lachine, landing on the south, at Caughnawaga, created very little increase in the population, although in operation for over 10 years. But the embankment runs inland for quite a dis-

tance, at an elevation of about 40 feet, and the approaches are very close to an Indian Reserve, at Caughnawaga. The triangle marked T. on plan D, has been damaged by the cut to the extent of 50 per cent. of its value.

Donald Barton, engineer, practising for about 21 years, of which 16 years in Canada. In Montreal the first 7 years. From 1902 to 1909 was general manager of the Canadian Electric Light Co. at Chaudiere, which expended between $400,000 to $500,000 for the power house. In 1909 the Canadian Electric Light Co. was bought by the Quebec Railway Light and Power Co., with which company he has since been in the capacity of consulting electrical engineer—in which capacity he is also acting with the Stadacona Hydraulic Co. He has had experience in buying property for various works from time to time, and looks upon the property in question as being bound to be a junction for several important railways coming into Quebec, and that it is bound to go ahead with a rapidity equal to any suburb of Quebec. He considers further it is well situated for factory purposes. The expansion of Charny is also bound to be towards the McNaughton property. He has invested in Charny. Between Charny and the McNaughton property there are 2 farms of about 2 arpents in width and there are houses opposite the McNaughton property, on the highway. The pole line of the Canadian Electric Co. passes well through the middle of the McNaughton property, giving special facilities for industrial purposes and electricity could be had in reasonable quantity. Values Blocks A, B and C at 3 cents a foot. The Breakey property is about one-third of a mile from the property in question. The cut of

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200 feet wide and 30 feet deep made by the Transcontinental is most unfortunate for the neighbouring property. The development of the property has been delayed by the fall of the Quebec bridge. The Levis Electric Railway has been extended this summer within a mile in that direction, up to the mouth of the Chaudiere River, along the St. Lawrence. However, the Quebec bridge is what gives value to this property and its surroundings, and without the bridge it has a value as a distributing centre for all the railways coming there. A disturbing element which kept matters in abeyance was the cut of the Transcontinental, as people did not quite know what was to be done. Block A has been damaged by the high railway and embankment adjoining it.

Stuart Oliver, an engineer and land surveyor, has measured the triangle marked T on plan D, and says it has an area of 6.27 acres.

Pierre Fontaine, Mayor of Charny for the last 4 years. Charny has been established since 1902 or 1903. In 1903 there were from 45 to 50 families, and to-day there are 250 to 255 families. They have an aqueduct, electric light for their houses, and a bank. The population has increased from 1907 up to to-day, but could not say how much. The McNaughton property is about 9 to 10 acres from the end of the Charny village.

Here follows a summary of the Crown's evidence composed of the following witnesses, viz.:

Charles J. Laberge, Arthur Cantin, Altheod Tremblay, Edmond Giroux, Romeo Beaudet and Jean T. Lemieux.

Charles J. Laberge was, down to last May, for 5 years in the employ of the Commissioners of the

Transcontinental Railway for the valuation and purchase of lands in that neighbourhood, and is now bookkeeper at Quebec. He was the land-purchasing agent of the Transcontinental Railway. There is an embankment of 40 to 50 feet adjoining Block A. He values Blocks A, B and C at $100 an acre as farming land. Farms in the neighbourhood of B and C are worth, excepting the buildings, about $50 an acre. Part of A is rocky and hilly for about three acres near the Chaudiere River.

Arthur Cantin, farmer, residing 4 acres from the McNaughton property, values Block B and C at $200 an acre; but taking the whole farm it would be worth $40 an acre. Block A is of a better soil, and taking the whole farm it would be worth $50 an acre. The Transcontinental took 2 1-3 acres of his farm and paid him $1,700, and he contends $1,000 for damages. His valuation is as farming land, and he does not see any other (point de vue) basis upon which to establish other valuation. The $1,000 he received for damages upon his property were made up of $500 for renouncing to a crossing, and $500 for being deprived of a water-course, and there was also $136 for interest. His property is to the east of the McNaughton property, and he was settled with about 4 or 5 years ago.

Altheod Tremblay, surveyor, is in the employ of the Transcontinental, and from 1906 to 1912 was assistant land purchasing agent for the right of way. Block A he values at $50 an acre, and it had been valued at $200 an acre by his predecessor; this land is fit for farming and pasturage; and part of it is rocky, and does not know of any demand for this land for building lots. The land could not be used as a railway yard on account of the difference in level.

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From the southern extremity to Block A there is a difference in level of 50 to 60 feet, and the Transcontinental has purchased at St. Jean Chrysostome, 4 miles away, land for a railway yard. Values Blocks B and C at $50 an acre. No damage with respect to Block A as the whole is taken. No damage to Block C. There might be some damage to Block B, because it forms a triangle, a point, between the I. C. R. and the Transcontinental. He does not think the damages would be very high. His valuation is on a farming basis. The embankment affected Block A 50 per cent. of its value. The cut on Block B is an inconvenience.

Edmond Giroux, insurance agent, has experience in the valuation of property both as arbitrator and as an expert witness, but is more familiar with the value of land on the north (Quebec) than on the south (Levis side). Values Block A in 1907 at $40 to $50 per acre for agricultural purposes; B at $200 per acre, including damages; and C at $100.

N. Romeo Beaudet, a civil engineer in the employ of the Transcontinental, has been in charge of the construction of the Transcontinental in that neighbourhood, and says there has been no increase in values of property since 1907. From Charny church to the McNaughton property there is about half a mile. The McNaughton property could not be used as a railway yard, consistent with expense, as there is a difference in level of 110 to 120 feet between the jib lot and the southern part; and between the southern end of Block A and the southern part of the property, the difference is between 90 to 100 feet. The Transcontinental has already purchased land for a railway yard, 4 miles away from the property.

Jean T. Lemieux, secretary-treasurer of St. Romuald since 1887. The McNaughton property was assessed in 1905, 1908 and 1911 at $4,000. For municipal purposes it is assessed at $20 an acre as farming lands, and presently he does not see any other use it could be put to.

This concludes the evidence.

This property must be assessd as at the date of the expropriation, at its market value in respect to the best uses to which it can be put, taking in consideration any prospective capabilities or value it may obtain within a reasonably near future. At the very threshold the question to be determined is to what class the defendant's property belongs. Is it in the farming class, or is it in the industrial and building lot class? All of the witnesses heard on behalf of the Crown place it in the farming class, while the witnesses for the proprietors place it in the industrial and building-lot class. It then becomes the task of the court to determine where the weight of the evidence preponderates. Now, who are the witnesses heard on behalf of the Crown testifying as to value? Tremblay is the assistant land purchasing agent for the Transcontinental; and Laberge, up to May last, was the land purchasing agent of that railway. Without attacking their character and casting any doubt upon their honesty, they are and must be as in all matters of opinion evidence, influenced by their desire to do the best they can for their employer, and all of this goes to the weight of the evidence when one comes to consider it. The next witness is a farmer, Cantin, who has been handsomely settled with for 2.1-3 acres at $1,700 including damages—and as a farmer he values

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the land as farming land—he says he does not know any other value. That leaves the Crown with one other witness, Giroux, who values the land at $40, $100, and $200, for Blocks A, C and B respectively, but who honestly says he is not as well versed in the value of property on this side of the river as on the Quebec side.

If this land should properly be assessed in the class of farming land, the figures of $50 to $100 and the $200 inclusive of damages would perhaps be right. But the Crown by its pleadings removes to a certain extent the difficulty and helps in arriving at the conclusion that by tendering $250 an acre, it recognizes the land has a higher value than that of farming property.

The evidence on behalf of the proprietors places the property in the industrial and building-lot class, and the valuation ranges from $700 to $1,400 an acre. While this Court is unable to adopt as a whole this valuation, it is ready to accept the basic principle of valuation underlying the method of valuing, without adopting, however, the conclusion upon the question of quantum. The conflict and difference as between the evidence for the Crown and that of the proprietors is great and material. What can help us out of the difficulty, if not sales made in the neighbourhood? And here again, as in the previous case between the same parties, the Court will (for the reason mentioned in the previous case, namely, that a lower price is usually paid for a large area proportionately than for a small one) consider the Breakey sale—a property about one-third of a mile from the lands in question—at $600 an acre. This Court will adopt as a *datum* the valuation of $550 an acre for Block A. The judgment in the first ex-

propriation covered all damages resulting from that expropriation. Then at the date of the present expropriation Block A had been greatly damaged by this high embankment of 40 to 60 feet in height, and accepting for the ratio of damages by the embankment the figures of most of the witnesses, namely, by half, one must arrive at a valuation of $275 an acre, and that would be a fair compensation for Block A, taking that valuation as an average price for the whole, although a large portion has a lesser valuation on account of its rocky formation. Passing to Blocks B and C there can be no doubt that the neighbourhood of a cut of 200 feet wide by 30 feet deep, is an element of a very serious damage, and that also the triangle T of 6.27 acres, has been very materially damaged; and for these two pieces B and C the Court is of opinion that the full sum of $550, inclusive of all damages to the triangle, to the 600 feet mentioned by witness St. George, of the land on the north of the cut, and generally for all damages whatsoever, would be a fair and liberal compensation. The question of having a crossing between C and T, or between B and T, is practically out of the question, and witness Cantin was allowed as much as $500 for the deprivation of a crossing.

This land has certainly in a general manner derived a great benefit from the Quebec bridge, from its neighbourhood to Charny, and from the further fact that the I. C. R., the G. T. R., the Transcontinental, and a number of minor lines of railways which will in the near future converge in that locality and make it a railway junction of some importance. All of this, coupled with other minor considerations, must manifestly place this property on the market at a higher value than that of land for farming pur-

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poses, and it must necessarily be considered as belonging to the industrial and building class.

At the figures above mentioned the following sums will be arrived at, viz.:

Block A of 32.54 acres at $275	$ 8,948.50
Block B of 14.80 acres at $550	8,140.00
Block C of 2.32 acres at $550	1,276.00
Making the total sum of	$18,364.50

for the 49.66 acres expropriated.

Therefore there will be judgment as follows, viz.:

1st. The lands expropriated herein are declared vested in the Crown from the date of the expropriation.

2nd. The defendant company is entitled to recover from His Majesty the King—for the lands taken and for all damages whatsoever resulting from the expropriation—the said sum of $18,364.50, with interest thereon, at the rate of 5 per centum per annum, on the sum of $8,948.50 from November 30th, 1907, on the sum of $8,140 from May 13th, 1907, and on the sum of $1,276 from June 4th, 1909, to the date hereof—upon giving to the Crown a good and satisfactory title and a release from all hypothecs or encumbrances whatsoever upon the said property.

3rd. The defendant is also entitled to costs of the action, after taxation thereof.

Judgment accordingly.

Solicitor for plaintiff: *Aimé Dion.*

Solicitors for defendant: *Belleau, Belleau & Co.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, PLAINTIFF,

AND

JOSEPH GRIFFIN, DEFENDANT.

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Feb. 21.

Expropriation—Compensation—Farm—Valuation — Quantity survey method.

The "quantity survey method" does not apply to the valuation of farm property as the basis of compensation in an expropriation thereof by the Crown. The best guide is the market value of the property as a whole, as shewn by the prices of similar properties in the immediate neighbourhood when acquired for similar purposes.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 15, 16, 18, 19, 1916.

G. G. Stuart, K.C., and *William Amyot,* for plaintiff.

L. A. Cannon, K.C., for defendant.

AUDETTE, J. (February 21, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands belonging to the defendant were taken and expropriated by the Crown, under the provisions of the *Expropriation Act,* for the purposes of "The Valcartier Training Camp," a public work of Canada, by depositing, on September 15th,

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1913, a plan and description of such lands in the office of the Registrar of Deeds for the County or Registration Division of Quebec.

While this property was expropriated in September, 1913, the defendant was allowed to remain in possession after that date for a long period of time, as will be hereafter mentioned.

The Crown, by the amended information, offers the sum of $4,500. The defendant, by his plea, claims the sum of $9,895.

On behalf of the defendant, witness Hayes valued the land and buildings at the sum of $8,280; witness Maher valued the same at $9,500; and witness King valued the land alone at $6,050 exclusive of the buildings, because he had been asked by the defendant not to do so. All of these valuations are inclusive of the lake. Witness King bought in Valcartier, in 1904, a 320-acre farm for $400, and sold it in 1911 or 1912 for $1,200. There is also on behalf of the defence evidence with respect to the lake, the buildings, and the masonry—together with the evidence of the defendant, and that of his wife, touching the loss and damage resulting from the expropriation.

It may be said in connection with the evidence adduced on behalf of the defendant, that to arrive at such valuation, the witnesses proceeded upon a wrong basis, as even admitted by witness Hayes when he said he never valued land in that way before. Indeed, the method followed with respect to the whole evidence adduced by the defence has practically been the "quantity survey method", a method usually followed in cases of mergers of companies only,—endeavouring to arrive at the intrinsic value of the farms and the buildings, and not at their

market value. (*The King v. Manuel*,[1] — confirmed on appeal to the Supreme Court of Canada). That evidence proceeds by valuing so many acres in severalty at so much, the buildings at so much, the chimney in the building at so much, the value of the foundation of each building, the fencing, the well, etc. Farmers, when valuing, buying or selling a farm, are in the habit of treating the property as a whole, and not by thus segregating the acreage in severalty, and separating the value of the buildings, the chimney, the carpentry, masonry of every kind and the well. An inflation of the true value of the farm, *per se*, must very naturally result from this unusual method of valuation, which is a departure from the usual course.

On behalf of the Crown, witness Colonel William McBain, valuing the farm as a whole, says it would not be possible to find a purchaser for a price beyond $2,400 for this farm, including the small lake. He also produced as Exhibit No. 2, a list of 31 properties purchased by him at Valcartier, for the purposes of the camp, some of them being in the immediate neighbourhood of this defendant's property, at an average price of between $16.57 and $17 per acre. The prices thus paid afford the best test and the safest starting point for the present enquiry into the market price of the present property. *Dodge v. The King*;[2] *Fitzpatrick v. Town of New Liskeard*.[3]

Witness Captain Arthur McBain values the farm and buildings, in 1913, at the sum of between $1,800 to $2,000. On September 9th, 1913, this last witness,

[1] 15 Can. Ex. 381, 25 D.L.R. 626.
[2] 38 Can. S.C.R. 149.
[3] 13 O.W.R. 806.

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accompanied by James Barry, called on the defendant for the purpose of opening negotiations for the purchase of this property, and Griffin then offered to sell for the sum of $2,600, stating that the farm was worth $2,000 and the lake $600. An option was not then taken, because, witness McBain says, it was considered too high at $2,600.

The defendant's property is an average farm at Valcartier. The soil is very sandy. Lot No. 30 was bequeathed to him by his father in 1890, and he bought lot No. 31 in 1883 for the sum of $100. For the farm and the buildings and all the dependencies valued as a whole, (*The King v. Kendall,*[1] affirmed on appeal), I will allow $30 an acre, which is a high price for farms in the locality, making, for the 126 acres, the sum of $3,780.

Coming to the valuation of the lake, a very small lake indeed, with part of it extending on the adjoining farm, one must be guarded against being carried away by the exaggerated valuations of some of the witnesses, who regard the lake as a sporting and fishing resort. The lake is too small for such purposes. It must, however, be admitted, that such a lake, small as it is, is of a most appreciable value on a farm, for watering cattle and other general purposes. It is somewhat better than the Woodlock Lake; and to the $30 an acre already allowed, I will add $5 (instead of $4 as in the Woodlock case) an acre as representing the additional value given to the farm by such lake, amounting to the sum of $630,—a sum even in excess of what the defendant valued it before there was any question of expropriation, when interviewed by witnesses McBain and Barry.

[1] 14 Can. Ex. 71; 8 D.L.R. 900.

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The lands in question became vested in the Crown on September 15th, 1913, but the defendant was allowed to remain in possession for a long period beyond that date. He had his full crop in 1913, without any interference whatsoever. He had most of his crop in 1914, but that year he lost some oats, potatoes, turnips, turkeys, clover seed, etc., etc., and suffered some damages to his furniture occasioned by the moving, and incurred expenses with respect to moving. It is perhaps well to bear in mind the defendant also owned a farm of 270 acres at about one mile and a quarter to one mile and a half from the present property, where he could have gone at any time after the expropriation, but he chose to remain on the farm, and even resided in his house up to January 25th, 1916. He did not have the use of his farm after September 14th, 1914, but had the use of the buildings up to January 25th, 1916, and at times the use of pasture for his cattle.

It is unnecessary to go into the details of the damages claimed and which obviously result from his having remained on the property, by the tolerance of the Crown, after the date of the expropriation, excepting, however, the question of moving. And it is next to impossible to distinguish and segregate from these damages what is really referable to the grace and bounty of the Crown, from what may actually constitute a right to compensation,—and further, to segregate the value of the land from that of the buildings and the pasture with a different date from which interest should run. Therefore, it is thought advisable to allow interest on the total amount recovered from the date of the expropriation in lieu and in the nature of such damages. The allowance of the interest for the full period is of

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more benefit to the defendant than the allowance of the damages coming within a legal scope.

With respect to the notice to quit served upon the defendant in September, 1914, I will refer to what I have already said in the Woodlock case, it being unnecessary to repeat here what has already been said upon this question.

In recapitulation, I may state the assessment of the compensation, as follows:

For the farm, including the buildings thereon erected, an average price of $30 an acre for the 126 acres	$3,780.00
The lake, or part of a lake—the additional value of $5 an acre upon the whole farm.	630.00
	$4,410.00
To which should be added 10 per cent. for the compulsory taking, namely, the sum of	$ 441.00
Making the total sum of	$4,851.00

with interest thereon from the 15th day of September, 1913. The interest alone would represent a sum of about $590, which will more than cover the damages.

There will be judgment as follows:

1. The lands expropriated herein are declared vested in the Crown, from September 15th, 1913.

2. The compensation for the land and property so expropriated, with all damages resulting from the expropriation, is hereby fixed at the sum of $4,851, with interest thereon from September 15th, 1913, to the date hereof.

3. The defendant is entitled to recover from and be paid by the plaintiff the said sum of $4,851, with

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interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all encumbrances whatsoever, the whole in full satisfaction for the land taken and all damages resulting from the expropriation.

4. The defendant is also entitled to his costs.

Judgment accordingly.

Solicitors for plaintiff: *Drouin & Drouin.*

Solicitors for defendant: *Taschereau, Roy, Cannon & Parent.*

1917
May 26.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

PARMENAS J. COTE,

DEFENDANT.

Expropriation—Compensation—Severance—Farm—Access.

Where the most serious damage from the severance of a farm resulting from an expropriation by the Crown is removed by the latter's undertaking to provide sufficient means of access across the expropriated property compensation must be assessed in view of such undertaking.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, May 10, 1917.

V. A. de Billy, for plaintiff.

J. A. Gagné, for defendant.

AUDETTE, J. (May 26, 1917) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears that a certain piece or parcel of land, belonging to the defendant, was expropriated for the purposes of a public work known as "Point Martiniere Battery", in the County of Levis, P. Q., by depositing of record, in the Registry Office on December 16th, 1916, a plan and description of the land so taken.

The area expropriated, which is of 9,030 square feet, has been taken for the purposes of making a

road from the King's highway to the Battery in question, as the whole will more clearly appear by reference to the plan filed herein as Exhibit No. 1.

The Crown, by the information, offers the sum of $200, and the defendant by his plea claims the sum of $2,000.

As a result of the expropriation for this road, a large part of the farm, to the west, became *enclavé*, that is, a portion of the defendant's farm became separated from the east of his farm without access to it, being enclosed on all sides by the land of other owners. This indeed meant a serious source of damages. However, at the trial the Crown filed an undertaking, which reads as follows:

"The plaintiff undertakes to give to the defendant "in this case a right of passage across the lands "expropriated and described in the information, "the right of passage, which will be maintained by "the defendant, will have a width of ten feet and to "be situated at the points marked 'Z' and 'X' on "the plan Exhibit No. 1, filed in this case; the "plaintiff will also pay the cost of erection and of "maintenance of two gates, of good workmanship, "to permit the defendant to use said right of pas- "sage, and withdraw all previous undertaking, this "last one being the only one in force."

This undertaking does away with the element of damages resulting in thus enclosing (*enclavant*) part of the farm. Another benefit derived from the undertaking is the fact that the Crown gives the defendant a right-of-way across the part expropriated and will erect and maintain gates at each side of same.

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This undertaking removes the most serious damages resulting from the expropriation.

The defendant's farm had already been visited by a previous expropriation, when the Crown took from the defendant a large portion of what is now indicated upon plan Exhibit No. 1 as "Militia Department." As a result of this first expropriation, the only access the defendant had from that part of his farm where his buildings are erected to the north-western part of lot No. 41 was by a narrow strip of lot No. 41 to the southwest of the piece then expropriated. And to communicate between these two parts of his farm he had to cross the road marked upon the plan as "Private road," and to open and close two gates.

By the present expropriation, which is a second invasion of the defendant's property, the defendant in travelling from one part of his farm to the other part, to the north-west, will have now to open and close 4 gates instead of 2, as he formerly had to do, notwithstanding that he has the advantage of taking and leaving his cattle, which pasture on the north-west, between these 2 sets of gates, to milk them during the summer months. However, he has to take them to the barn in the autumn and spring when they are not left out for the night. All of this constitutes damage for which he should be compensated together with the value of the land actually expropriated, which for the most part adjoins the Crown's property. In the winter all gates are left open and he can freely go to the north-western part of his farm for his fuel.

The Crown took possession of this land on or about August 25th, 1914; but the defendant has always, ever since this expropriation, crossed over the

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piece expropriated to get access to the north-western part of his farm, as he used to do before such expropriation. He has therefore never suffered any damages for want of communication between one part of his farm and the other, and in the result, with the above undertaking, he will suffer none in that respect in the future, save and except, however, such damages resulting from the opening and closing 2 additional gates and crossing the new road, which will make the access less easy and less free than formerly.

For the land taken and for all damages resulting from the expropriation, the compensation is hereby fixed at the sum of $375, always taking into consideration that the undertaking has removed the most serious damages complained of.

There will be judgment as follows, to wit:

1. The lands expropriated herein are declared vested in the Crown from August 25th, 1914.

2. The compensation for the land so taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of $375, with interest thereon from August 25th, 1914, to the date hereof.

3. The defendant is entitled to recover from the plaintiff the said sum of $375, with interest as above mentioned, upon giving to the Crown a good and satisfactory title, free from all hypothecs and incumbrances whatsoever, upon the said land so taken.

4. The defendant is further entitled to the performance and execution of the obligations mentioned in the undertaking above mentioned.

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5. The defendant is also entitled to his costs of the action as instituted.

Judgment accordingly.

Solicitors for plaintiff: *Bernier, Bernier & de Billy.*

Solicitors for defendant: *Gagné & Gagné.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

JOSEPH ALPHONSE BLAIS AND EDOUARD VADEBONCOEUR,

DEFENDANTS.

1915
June 23.

Expropriation—Compensation—Value—Prospective capability.

In estimating the amount of compensation for the expropriation of land by the Crown, the prospective capabilities of the property or its speculative value cannot be taken into consideration. The compensation should be measured by the prices paid for similar properties in the immediate neighbourhood.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, June 17, 1915.

E. Belleau, K.C., and *J. J. Larue,* for plaintiff.

A. Dion, for defendant.

AUDETTE, J. (June 23, 1915) delivered judgment.

This is an information exhibited by the Attorney-General whereby it appears, *inter alia,* that certain lands belonging to the defendant Blais, were expropriated, under the authority of 3 Ed. VII. ch. 71, for the purposes of The National Transcontinental Railway, by depositing a plan and description of the same, on June 27th, 1913, with the Registrar of

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Reasons for Judgment.

Deeds within the Registration Division where the said lands are situated.

The defendant Vadeboncoeur held a mortgage or hypothec dated February 8th, 1905, both upon the lands in question and other lands belonging to the said defendant Blais, namely, on lots 60 and 61, but the defendants by their plea alleged that the said mortgage had been paid, and also filed as Exhibit "C" the release or *mainlevée* of the said mortgage or hypothec.

The plaintiff offers by the information the sum of $1,753.30 and the defendant Blais claims the sum of $12,000 for the lands taken.

The property in question in this case is a small piece of land of irregular shape and containing 860 square feet, upon which a small shed is erected. It has a frontage on Crown Street of 13.1 feet, 44.7 feet on Prince Edouard Street, extending to a larger depth at its most western depth from Prince Edouard Street. The property is admittedly too small to be placed in the industrial class. It is undesirable as residential, because it is immediately adjoining the railway—with gates upon Crown Street at its north-eastern boundary to stop the traffic at the time of the passage of a train, thereby occasioning from time to time the gathering of both pedestrians and vehicles and blocking the traffic at that very place. It is claimed on behalf of the defence to be most desirable for commercial purposes, for the installation of a shop of some kind. But would it be rational for anyone to give $12,000 for such a small piece of land, located as it is, to carry on a small business at a place of that kind? No one would invest such a capital on such a small piece of land, if consistent with the expectancy of a return on such a capital.

The evidence of the owner is mainly based upon alleged offers made and refused with respect to this property and properties in the neighbourhood; but that evidence is unsatisfactory in the sense that in no case the party offering and the party to whom the offer was made have been heard. Either one or the other has been heard and mostly the party to whom it has been made, with perhaps one exception, but not both, and such alleged offers were all verbal, none in writing. This class of evidence has been carried to the narrowest conception it can be put to, where one woman is brought in the witness box to prove that her nephew in the course of a visit told her if she cared to sell her property, which is situated on Crown Street, and build upon, some little distance south of the property in question, she would get $20,000.

On behalf of the Crown we have evidence based upon actual sales of neighbouring properties and in the close neighbourhood. This property was expropriated in June, 1913, and it is at that date the value must be ascertained. On behalf of the defence great stress is laid on the prospective capabilities of the property on account of the new market, etc., which will become operated when the Crown's works on the St. Charles River are completed, and it is contended that while it may not have the market value asked for at the time of the expropriation, that by holding the property for some indefinite time it will with time acquire more value. This prospective capability appears upon the evidence to be too remote and distant, if it exists at all, and realizable as too far and too indefinite a future to be taken into consideration,—and this value becoming exclusively speculative does not disclose the real market price at the date of the expropriation.

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After considering and weighing the evidence, and the prices paid for the properties in the neighbourhood, I consider the compensation should be reckoned as follows:

860 feet at $2 a foot	$1,720.00
The small shed	200.00
	$1,920.00
And as the property is compulsorily taken, that is against the wish of the owner, the further sum of 10 per cent. should be allowed both for such compulsion and to cover all other unforeseen incidentals, including the moving of the effects in the shed and on the property, viz.	192.00
Making in all	$2,112.00

There will be judgment as follows

1. The lands expropriated are declared vested in the Crown from June 27th, 1913.

2. The compensation is fixed at the sum of $2,112, with interest thereon at five per centum from June 27th, 1913—and the defendant Blais is entitled to be paid the said compensation money, upon giving to the Crown a good and satisfactory title, free from all mortgages or incumbrances whatsoever, the whole in full satisfaction for the land taken and for all damages, if any, that may arise from the said expropriation.

3. The defendant Blais is also entitled to the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *J. J. Larue.*

Solicitors for defendants: *Gelly & Dion.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

JOSEPH EUGENE BLAIS, PIERRE EDMOND BLAIS, JOSEPH ALPHONSE BLAIS, EDOUARD VADEBONCOEUR AND ALFRED BLOUIN,

DEFENDANTS.

1915
June 23.

Expropriation—Compensation—Residential property—Valuation.

The re-instatement principle cannot be taken as the basis of compensation for residential property expropriated for a public work; nor can the prospective value of the property arising from the construction of the work be taken into consideration. The best guide is the selling value of similar property in the locality.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, June 18, 1915.

E. Belleau, K.C., *A. R. Holden,* K.C., and *J. J. Larue,* for plaintiff.

A. Dion, for defendant.

AUDETTE, J. (June 23, 1915) delivered judgment.

This is an information exhibited by the Attorney-General, whereby it appears, *inter alia,* that certain lands, with buildings thereon erected, belonging to the defendants Blais, were expropriated under the

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THE KING v. BLAIS, VADEBONCOEUR AND BLOUIN.

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authority of 3 Ed. VII., ch. 71, for the purposes of the Transcontinental Railway, by depositing a plan and description of the same, on June 27th, 1913, with the Registrar of Deeds within the Registration Division wherein the said lands are situated.

The defendants Vadeboncoeur and Blouin, respectively, held a mortgage upon the property. There is a *mainlevée* or release of the Vadeboncoeur mortgage (See Exhibit "C"), but the Blouin mortgage is still outstanding.

The area taken is 1,700 feet, upon part of which buildings are erected.

The plaintiff offers by the information the sum of $7,246.70 and the defendants Blais claim the sum of $20,000.

At the opening of the trial it was agreed that all the evidence, including the exhibits (excepting Nos. 1 and 2), adduced and fyled in the case No. 2660, wherein His Majesty the King is plaintiff and Joseph Alphonse Blais *et al.* are defendants, were made common to the present case.

The property in question is composed of a piece of land of irregular shape, containing 1,700 square feet, upon which is erected, on Crown Street, a residence, and a small shed at the extreme back of the lot. This lot has 37.3 feet frontage on Crown Street and 9 feet at the back, with a depth of 72.6 feet at the deepest part, with a right of passage from the back to Gosford Street, upon the Canadian Pacific Railway property.

The defendant Eugene Blais, who was heard as a witness, says he is the one who has fixed the amount claimed at $20,000 and he says it is the value of the property, adding that he values the same only as a private residence. He contends that we must not

calculate the market value (*la valeur marchande*), but that it is the value that the property will have in (*quelques*) some years. And he adds he takes the risk of waiting to realize his $20,000. The house is veneered brick, front, gable and back, the gable being clap-boarded. There is only one door on Crown Street, used by both tenants. The tenant for the ground floor, composed of 4 rooms, was paying, in 1913, the sum of $10 a month; the second floor and the attic, the house being 2½ stories high, had a tenant who was paying $17 a month in 1913. There are 4 rooms on the second floor and 3 in the attic. These rents were free of taxes, which were borne by the proprietors. The house was built about 40 years ago and its municipal valuation is $3,500 and has been valued, on the replacement or reinstatement basis, by one of the owner's witnesses at $4,422. This last valuation is obviously erroneous, and arrived at upon a wrong principle. Indeed, what we are seeking here is the market value of the house in the state in which it stood at the date of the expropriation, and not what it would cost to-day to build a similar and a new house. The doctrine of reinstatement does not apply to a case of this kind.

The owners place a value on their property for the purposes of a residence. It is sufficient to look at the plan to realize that the fact of the railway passing, as it did, a few feet from the house, makes it undesirable as such and that it could never command a price as the one asked for such purpose or even for commercial purposes. It may be said here, as was said in case No. 2660, that great stress was laid, on behalf of counsel for the owners, upon the prospective capabilities of the property on account of the new market, etc., which will become operated

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Reasons for Judgment.

when the Crown's works on the River St. Charles will have been completed. It is contended that while the property may not have the market price asked for at the time of the expropriation, that by holding it for some indefinite time it will, with time, acquire more value. This prospective capability appears upon the evidence to be too remote and distant, if it exists at all, and realizable at too far and too indefinite a future to be taken into consideration. And such value becoming exclusively speculative does not disclose the real market value at the date of the expropriation.

The Peticlerc property immediately adjoining to the north, and one house removed from the railway, a property larger, both in the area of the land and the size of the house, built of similar material, was sold on August 25th, 1914, for $8,710.35. Is not the best test of the market value the sale of similar property in the immediate neighbourhood? *Dodge v. The King.*[1]

After carefully considering the evidence and all the circumstances of the case, I am of opinion that the following compensation is fair and just, viz.:

The residence	$3,600.00
The shed	75.00
The land at $2 a foot—1,700 square feet	3,400.00
And the right of passage to the back, allowing a tenant, of the class which that house calls for, to keep a horse and vehicle, with which he earns his living,—would be of quite an appreciable value. No evidence as to the value of this passage has been adduced, and I hereby fix it at the sum of	600.00

[1] 38 Can. S.C.R. 149.

To this amount should be added 10 per cent. to cover all incidental expenses occasioned by the expropriation and for the compulsory taking against the will of the owners, who were desirous to hold the property for speculative purposes..... 767.50

$8,442.50

There will be judgment as follows, to wit:

1. The lands and property expropriated herein are declared vested in the Crown since June 27th, 1913.

2. The compensation is hereby fixed at the sum of $8,442.50, and the defendants, Joseph Eugene Blais, Pierre Edmond Blais, and Joseph Alphonse Blais, are entitled to recover from the plaintiff the said sum of $8,442.50, with interest thereon at five per centum per annum from the 27th day of June, 1913, upon giving to the Crown a good and sufficient title, free from all mortgages, hypothecs or incumbrances whatsoever upon the said property, the whole in full satisfaction for the lands and buildings taken and for all damages, if any, resulting from the said expropriation. Failing the said defendants to pay and satisfy the hypothecs or incumbrances upon the said property, the same shall be satisfied and paid out of the said compensation moneys and the balance paid over to the said defendants.

3. The defendants are also entitled to their costs of action.

Judgment accordingly.

Solicitor for plaintiff: *J. J. Larue.*

Solicitors for the defendants: *Gelly & Dion.*

1914
June 6.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

MARY E. DAVIS, ARTHUR J. DAVIS AND JAMES FINDLAY,

DEFENDANTS.

Expropriation—Compensation—Water lots—Value—Summer resort.

In estimating compensation for the expropriation of water-front property by the Crown for the purpose of harbour fortifications, mere prospects of developing the property into a summer resort cannot be taken into consideration in arriving at its true market value.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Halifax, N. S., May 18, 19, 1914.

T. S. Rogers, K.C., for plaintiff.

H. McInnes, K.C., and *J. A. McDonald,* K.C., for defendants.

AUDETTE. J. (June 6, 1914) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, setting forth that certain lands, belonging to the defendant, Mary E. Davis, have been taken and expropriated, under the provisions of the *Expropriation Act,* for the purpose of a public work of Canada, viz.: the fortification of McNab's Island, in the Harbour of Halifax, N. S.

The plan and description of the said lands were deposited, on July 29th, 1912, in the office of the Registrar of Deeds for the County of Halifax, N. S.

The area taken is two acres and fifty-two hundredths of an acre, more or less.

The Crown tendered on July 3rd, 1912, the sum of $1,080, mentioned in the information herein.

The defendants at bar aver by their plea that the amount tendered is not sufficient compensation and claim the sum of $5,000.

On behalf of the defendants the following witnesses were heard: Arthur J. Davis, John W. Regan, William E. Studd, Frederick W. Bowes and Robert Theakston.

Here follows a brief summary of the evidence:

Arthur J. Davis, testified his wife, in 1908, purchased, for the sum of $7,500, 47 acres of lands shown on plan filed herein as Exhibit "D," within the red lines to the west of the two acres and 52-100 of an acre expropriated herein, whereof the said 2.52 acres form part.

About 3 years ago he also bought lots 39 and 41, shewn on said plan Exhibit "D," for the sum of $125 each. He thinks each lot is about 82 feet by 100 feet. He paid $250 for the two lots.

On January 18th, 1909 he also bought lots 31, 29, 27, 25, 1 and 2, and paid for the six lots the sum of $1,500.

A great deal has been said in this testimony with respect to a company called the "McNab Resort Co., Ltd.", organized about 3 or 4 years ago by the Davises with the view of erecting a summer hotel on lot No. 1, using part of the grounds on the waterfront of the 2.52 acres as part of the scheme, and

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Reasons for Judgment.

mentioning also the idea of using the shore of the 2.52 acres lot for access thereto by a wharf.

John W. Regan, an investment broker, of Halifax, values the 2.52 acres at $1,800 to $2,000 as their market value, and at the sum of $3,600 to $4,000 with the view of the hotel scheme on the other lot.

William H. Studd, a real estate broker, values the 2.52 acres at $1,000 an acre, and says that within the last 5 years property on McNab's Island might have increased 25 per cent. to 30 per cent. in certain cases.

Frederick W. Bowes values the 2.52 acres at $4,750 including all damages resulting from the expropriation; but in arriving at this valuation, based on a subdivision of the acreage into building lots, he was not aware of the "clearance rights" vested in the Crown, whereby among other things, no buildings could be erected from the high water mark to the upper end of the Hugonin's Battery, as shewn on plan, Exhibit "D"—almost a third of the best part of the acreage. Under these circumstances he said he would have to cut down his values and would really have to re-value.

Robert Theakston values the land at $800, with a decrease of 25 per cent. if buildings cannot be erected in the front, bringing the value down to $600.

On behalf of the Crown the following witnesses were heard: Harry Knight, George E. Nichols, Colonel Frederick H. Oxley and McCallum Grant.

Harry Knight, who had been surveyor for the Royal Engineers since 1905, describes the land in question as rough rock, exposed rock with undersoil of gravel and rock. The highest point is on the crest of the hill by the position finding cell, about 60 feet over the level of the water, 130 feet distant from the shore, with a slope of 55 in 80 feet, more than

one in two. He says the land where the lighthouse is has an area of about 2 acres, which were bought about 1905 for $462.

George E. Nichols has been in the real estate business for 11 years in Halifax, describes the 2.52 acres as a narrow lot, with a high, steep front of about 50 feet, unfit for agricultural purposes. Taking everything into consideration, places a value of between $350 to $400 per acre, upon the 2.52 acres. He adds if the owners could not build a wharf on the front it would be worth $100 less per acre. He says the access to the back lots to the west, through the 2.52 acres, is not practical, the expense would be equal to the value.

Col. Frederick H. Oxley values the 2.52 acres at $400 an acre, without being aware of the "clearance rights" vested in the Crown. He valued the Perrin lands immediately adjoining to the south at $400, and they were under cultivation. However, he was ready to give the same price to the present owners, notwithstanding the rocky state of the land—and that the close proximity to the fort would decrease their value $100 an acre. He says the Hesslein lots to the north are worth somewhat more than the Davis lots.

McCallum Grant, without taking the clearance right into consideration, but considering the waterfront, values the Davis land at $400 per acre. He says the Hesslein lots were more valuable than the present lots.

This closes the evidence.

Dealing with the waterfront upon which so much stress has been laid, it will be well to say at the outset that as these lands abut at high water mark in a public harbour, the paramount right in the fore-

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THE KING v. DAVIS AND FINDLAY.

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shore is vested in the Crown in the right of the Federal Government.

Coming to the question of value, a great deal has been said with respect to the project of a summer hotel business to be worked out and operated by the McNab Resort Company. The place was, for a few years recently, operated with that view by means of a steamboat, and the renting of picnicking grounds. It did not prove very successful. How could values be established on the foundation of such a scheme? The whole proposition might prove an absolute failure—the success of it depending more upon the industry and capacity of the company running it, and the commercial possibilities of such a scheme in Halifax, than in the intrinsic value of the property. We are not here face to face with such a scheme in full operation, making money and proving itself successful; but with the mere prospects of such a plan at Halifax. The success of such an enterprise is too hypothetical and too remote to be placed seriously in the scale in arriving at the true market value of these lands. Such testimony as that of witness Regan defeats itself on its very face. The 2.52 acres for hotel purposes reckoned at his figures of $4,000 an acre, giving us $10,000 in round figures for the 2½ acres, appears on its face preposterous, when we realize what was paid for these lands a few years ago. The 47 acres of which these 2.52 acres formed part were bought in 1908 for $7,500. Three years ago Davis bought lots 39 and 41, of about 82 by 100 feet, for $250 for the two lots. In 1909 he bought the lots 1, 2, 31, 29, 27 and 25 for $1,500, equal to $250 a lot, on area shewn on Exhibit "D". Then Perrin, the adjoining proprietor to the south, sold to the Government at the time

of the expropriation 19 acres of cultivated lands at $400 an acre. Moreover, the lands taken are all immediately adjoining a gun range, subject to all the disadvantages of such a neighbourhood.

Taking all of these circumstances into consideration with respect to this land, this Court has come to the conclusion that the amount tendered by the Crown, namely, $400 per acre, is a just and liberal compensation to the defendants.

There will be judgment as follows:

1. The lands expropriated herein are declared vested in the Crown from the date of the expropriation.

2. The sum of $1,080 tendered by the Crown, is a just and liberal compensation for the lands taken and for all damages resulting from the said expropriation, which said sum the defendant, Mary E. Davis, is entitled to be paid upon giving to the Crown a good and sufficient title, free from all mortgages and encumbrances upon the said property. Failing, the said defendant to give the Crown such title, the money will be paid to the mortgagee, James Findlay, in satisfaction *pro tanto* of such mortgage and encumbrance as mentioned in the pleadings herein.

3. The Crown will recover the costs of the action. The mortgagee will be entitled to recover the sum of $25 for his costs against the Crown.

Judgment accordingly.

Solicitors for plaintiff: *Harris, Rogers & Henry.*

Solicitors for defendant: *McInnes, Mellish, Fulton & Kenny.*

1916
April 22.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

WILBROD and GEORGE JALBERT,

DEFENDANTS,

AND

THE QUEBEC HARBOUR COMMISSIONERS,

ADDED DEFENDANTS.

Expropriation—Compensation—Interference with business — Good-will.

In awarding compensation for the compulsory taking of land by the Crown, a fair allowance will be made in respect of the interference with the owner's business as a going concern, small as the good-will of such business may be.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, December 1, 2, 3, 1915.

G. F. Gibsone, K.C., and *A. C. Dobell,* for plaintiff.

G. G. Stuart, K.C., for defendants.

AUDETTE, J. (April 22, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands, belonging to the defendants, were taken and expropriated, under the authority of 3 Ed. VII., ch. 71, for the purpose of the National

Transcontinental Railway, a public work of Canada, by depositing a plan and description of the same, on November 8th, 1913, with the Registrar of Deeds of the Registration Division of Quebec.

While the plan and description were deposited on November 8th, 1913, the Crown took possession on October 26th, 1913.

The defendants' title is admitted.

The Crown by the information, offers the sum of $21,757.75 for the lands taken, and the defendants claim the sum of $55,827.

This property, situate on Champlain Street, in the City of Quebec, is composed of a building on that street, an extension and another building at the back. All of them were built many years ago, and referred to and valued in detail by the witnesses for the respective parties. There is also on the water-front 716 cubic yards of wharf. The defendants at the date of the expropriation were carrying on a junk business in engines, etc., and used the wharf for the purposes of that trade and rented the house on Champlain Street. The access from Champlain Street to the wharf is somewhat disadvantageous in that it is through a narrow porch and upon land sloping at a considerable degree, making the approach to the wharf a detriment to the value of the water-front.

The only question involved in this case is that of the amount of the compensation to be paid the defendants; but to the value of the land and real property so taken there should be added a fair allowance made in respect of the interference with the defendants' business, as a going concern, small as the good-will of such a business might be, *The King v.*

1916

THE KING v. JALBERT AND QUEBEC HARBOUR COMMISSIONERS.

Reasons for Judgment.

Rogers,[1] *The King v. Condon,*[2] *The King v. Courtney.*[3]

I have had the advantage, accompanied by the counsel for the respective parties herein, of visiting and viewing the premises in question—and giving due consideration to the evidence and all circumstances of the case, I have come to the conclusion to fix the compensation as follows, viz.:

For the land taken, including the wharf in its state of repairs	$12,000
For the buildings	12,000
For the interference with the defendants' business, a going concern at the date of the expropriation, interference with the good-will and for all riparian rights vested in the owners of the present property, the sum of	2,000
	$26,000
To which should be added 10 per cent. .... for the compulsory taking, and all other incidental expenses to the expropriation, such as moving out, etc.	2,600
	$28,600

Therefore, there will be judgment as follows, viz.:

1st. The lands and real property expropriated herein are declared vested in the Crown as of October 26th, 1913.

2nd. The compensation for the land and real property so taken, and for all damages resulting from

[1] 11 Can. Ex. 182.
[2] 12 Can. Ex. 276.
[3] 16 Can. Ex. 461, 27 D.L.R. 247.

the expropriation, is hereby fixed at the sum of $28,600, with interest thereon from October 26th, 1913, to the date hereof.

3rd. The defendants, Wilbrod and George Jalbert, are entitled to recover from and be paid by the Crown the said sum of $28,600, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, charges or encumbrances whatsoever upon the said property.

4th. The said defendants are also entitled to their costs.

Judgment accordingly.

Solicitors for plaintiff: *Gibsone & Dobell.*

Solicitors for defendants: *Pentland, Stuart & Co.*

1915
Jan. 14.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

WILLIAM McTAVISH BANNATYNE AND CHARLES VOKES, EXECUTORS OF THE LAST WILL OF ANNIE BANNATYNE,

DEFENDANTS.

Expropriation—Compensation—Effect of abandonment—Advantages —Set-off.

An abandonment by the Crown, under sec. 23 of the *Expropriation Act,* of part of the land taken for a public work, must be taken into account in assessing compensation therefor; and any benefit or advantage accruing from the construction of the public work must likewise, under sec. 50 of the Act, be taken into account and consideration given to it by way of set-off.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Winnipeg, Man., December 12, 1914.

J. G. Harvey, K.C., for plaintiff.

C. Isbister, for defendant.

AUDETTE, J. (January 14, 1915) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that under the provisions and authority of the *Expropriation Act,* certain lands and real property, belonging to the defendants, were expropriated for the purposes of the improvements in the Red River, at

St. Andrew's Rapids, Manitoba, a public work of Canada.

By the deposit of a plan and description in the proper Registry, on May 27th, 1907, a parcel or tract of land containing (0.68) sixty-eight hundredths of an acre was expropriated. However, subsequently thereto, it having been found that a portion of the said (0.68) sixty-eight hundredths of an acre, namely (0.24) twenty-four hundredths of an acre, were unnecessary for the purposes of the said public work, and no compensation money having as yet been paid, the said (0.24) twenty-four hundredths of an acre were, under the provisions of sec. 23 of the *Expropriation Act,* abandoned on July 11th, 1913, by the registration in the proper Registry, of a writing to that effect, under the hand of the Minister.

As a result of the said expropriation and abandonment, the Crown is now taking only (0.44) forty-four hundredths of an acre, as more particularly described in paragraph five of the said information.

The defendants' title to the lands in question is admitted.

The Crown, by the information, tenders the sum of $205 and the defendants, by their plea, aver *inter alia,* that this sum is wholly and grossly insufficient and inadequate and claim the sum of $3,000.

From the correspondence filed herein, as Exhibits Nos. 20, 16, 17, 18, 19, C and D, it appears that Mrs. Bannatyne, who died on June 17th, 1907, had in 1906 through her solicitor, Mr. Morrice, adjusted, fixed and accepted the compensation to be paid her for the lands then contemplated to be expropriated, on a basis of $200 an acre. Although the sketch mentioned in Exhibit 17 has not been filed (it could not be found), it is obvious that the description therein

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mentioned as referring to that portion of lot 107 to be expropriated must have been a sketch for the (0.68) sixty-eight hundredths of an acre, the area of the original expropriation.

Mr. Morrice, Mrs. Bannatyne's solicitor, was heard as a witness, and he says that she had left the matter to be managed by him. He further told us he was a better real estate man than a lawyer, and by this statement, I assume, he wished to convey the idea that he was well informed upon the subject of real estate. And it is, indeed, upon his knowledge as a real estate agent that I wish here especially to rely in dealing with this case, and to say when he made that agreement, at $200 an acre, he knew whereof he was speaking. He gave us an uncontroverted statement of the state of the real estate market, as follows: In 1882 there was a tremendous boom, with a break in 1883. From 1883 to 1891 values went down. In 1904 he was buying property for less than the accumulated taxes. In 1907 there was no market and no sale to his knowledge in that neighbourhood in question.

In October, 1900, Mrs. Bannatyne bought an acre of lot 108, that is, 66 feet frontage by 660 feet deep, as shown on plans filed, for the sum of $30, and built a house upon this piece of land of 66 feet frontage. On June 17th, 1907, under an agreement of sale of April 16th, 1901, she also bought for the sum of $450 the inner two miles of lot 107. Moreover, from Exhibit No. 7—an application to bring the land under the operation of the *Real Property Act,* made on June 28th, 1907—it appears and it is therein stated that the whole lot 107 is worth $900. And by Exhibit No. 8, it also appears that lot 108, excepting the small area hereinafter mentioned,

would be of a value of $2,200. In all these cases the consideration paid would bring the price per acre very low indeed.

At the date of the expropriation Mrs. Bannatyne, therefore, held in unity, the 66 feet frontage on lot 108 with the full width of lot 107. After the expropriation and the abandonment, the defendants are left with a frontage of 72.6 feet on lot No. 107, together with 66 feet on lot No. 108, making in all a frontage of 138.6 feet. If it was thought advisable to build, as Mrs. Bannatyne did, on the 66 feet of lot No. 108, *a fortiori* there is ample space to now build again at the same place, with the result that 72.6 feet are left, out of which to make a roadway to the back of the property and with some substantial additional space added to the 66 feet in question upon which the building can be erected.

The Crown's evidence with respect to the value of the land at the time of the expropriation is very meagre and of very little help. However, upon the evidence, as a whole, I have come to the conclusion that the sum of $205 tendered by the information, for the (0.44) forty-four hundredths of an acre, is ample and sufficient under the circumstances, in satisfaction of the land taken and all damages, if any, resulting from the expropriation.

One cannot be unmindful of the fact that this change of front, from a demand of $200 an acre to the sum of $3,000 claimed by the defendants, is the result of an afterthought, and that this sum of $3,000 is, under the evidence, both unjustifiable and extravagant.

Under sub-sec. 4 of sec. 23 of the *Expropriation Act,* it is provided that the abandonment of a part of the land taken, as provided by that section, should

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be taken into account, with all the circumstances of the case, in assessing the amount of compensation for the land taken.

The Crown has had the possession, occupation, enjoyment and use of the twenty-four hundredths of an acre from the date of the expropriation, viz., May 27th, 1907, to the date of the revesting of the same on July 11th, 1913. The owners, before the expropriation, were getting $60 a year for the rent of that whole piece of land, and using this ratio as a *datum* to work upon, I will fix, in round figures, the compensation for the retention by the Crown of the twenty-four hundredths of an acre during a period of a little over 6 years at the sum of $130.

It is true that the erection of the dam in question has had the effect, from the time of the expropriation, to enhance the value of this property in common with the properties in the neighbourhood; but under sec. 50 of the *Exchequer Court Act*, the Court, in assessing the compensation, should take into account and consideration by way of set-off, any such benefit or advantage accrued or likely to accrue by the construction of a public work. An additional reason, indeed, to confirm that under the circumstances,—the amount tendered is fair, reasonable and even liberal.

While the amount recovered by the owners is larger than the amount tendered, they have not succeeded upon the main issue of the controversy and they should not have full costs. Availing myself of the provisions of Rule 290, I hereby fix the costs at the sum of one hundred and twenty-five dollars.

Therefore, there will be judgment as follows:

1st. The land expropriated herein, subject to the abandonment, namely, the forty-four hundredths of

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an acre, are hereby declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the land so expropriated, and all damages resulting from the said expropriation and abandonment, is hereby fixed at the sum of $335 and interest.

3rd. The defendants, upon giving to the Crown a good and sufficient title, free from all incumbrances, are entitled to recover the said sum of $335, with interest thereon from May 27th, 1907, to the date hereof, together with the costs, which are hereby fixed at the sum of $125.

Judgment accordingly.

Solicitors for plaintiff: *Harvey & Jenkins.*

Solicitors for defendants: *O'Connor, Isbister & Morton.*

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Sept. 10.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOSEPH PIERRE DIONNE,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Open switch—Air brakes—Fellow servant—Contributory negligence—Prescription—Interruption.

An injury to a brakeman on a train of the Intercolonial Railway, resulting from the negligence of the employees of the railway in leaving a switch open without warning, is actionable against the Crown under sec. 20 of the *Exchequer Court Act*. The suppliant having himself been guilty of contributory negligence in failing to have on the air brakes, as required by the rules, the doctrine of *faute commune* was applied and the damages assessed accordingly.

2. The doctrine of fellow servant is not in force in the Province of Quebec.

3. The prescription for the filing of a petition of right is interrupted by the deposit of the petition with the Secretary of State.

PETITION OF RIGHT to recover damages for personal injuries to a brakeman of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Fraserville, Que., June 22, 23, 1914.

E. Lapointe, K.C., and *A. Stein,* K.C., for suppliant.

E. H. Cimon and *Léo Bérubé,* for respondent.

AUDETTE, J. (September 10, 1914) delivered judgment.

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The suppliant brought his petition of right to recover the sum of $10,000 damages alleged to be suffered from a broken foot, resulting in permanent disablement, as a result of a railway accident, arising out of the negligence of the employees of the Intercolonial Railway, a public work of Canada.

The action is brought under the provisions of sub-sec. (f) of sec. 20 of the *Exchequer Court Act.*

The accident in question occurred on May 20th, 1912, and the petition of right was filed in this court on December 3rd, 1913, more than a year after the accident. However, it appears from the evidence that the petition of right was left with the Secretary of State on May 12th, 1913, and for the reasons mentioned in the *Saindon* case,[1] it is found that such deposit with the Secretary of State, in compliance with the statute in that behalf, has interrupted prescription, which would otherwise have barred the present action.

The train in question is what is called the *shunter train,* used to gather and leave cars from and at the several stations within its territory, arrived at Montmagny, at 6.35 a.m. on May 20th, 1912, on a fine and bright day. The suppliant was one of two brakemen on the train. Diagram, Exhibit No. 2, prepared at the time of the accident, will be hereafter used to indicate the several places at which the train travelled while at Montmagny.

On arrival, the train was placed on the siding D, when the conductor with the brakemen went to the station to get, from the agent in charge, the instructions respecting the work to be done at that station and were given the *switch card,* with explanation, showing what they had to do. They had a box-car

[1] 15 Can. Ex. 305.

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to leave at that station, at what is called Price's Siding, marked J. They therefore left the point D, travelled to J, and returned to the main line, where they were told by the conductor, who remained off the train, to then go to the place called the Basin, and take from there 4 platform cars. The Basin, or the object of their present destination, is marked as point A on the diagram and is at a good distance outside of the railway yard at Montmagny. These 4 cars were to be taken to point Z, west of the station. While the engineer, with only one brakeman, Dionne, the suppliant, had left for the Basin, the conductor, who had failed to go with them, as his duty called him to do, and as so acknowledged by him, told Jean Albert, the other brakeman, that as they had cars to get from F, which was accessible through D, to open switch D, meaning, as he said, D and E. Albert did as he was told, opened switches D and E, and went on siding J to attend to some other work, leaving switches D and E opened and unprotected, thus transgressing and contravening the rules and regulations imposing upon him the duty to stand by the switches until closed.

The engineer and brakeman Dionne, on their return from the Basin with the 4 cars, were not aware that switch D was open and they were under the impression they were going to point Z, where the 4 cars were to be placed. The conductor said he expected them to go only to the station, but as the station is west of point D, it is of no consequence. The engineer says he was coming back from the Basin at about 6 or 7 miles an hour, at his post, looking in front, but that the whistling post, which has been removed since the accident, obstructed his line of vision with respect to switch D. He further says

he should never have been left alone with Dionne to go to the Basin—that he was very much surprised on his arrival there to find both the conductor and the second brakeman absent, and that on approaching D he was looking for them, but they were both away. On arriving at point D, according to him (and according to Dionne, at the last bridge),—Dionne signalled to stop the train, and he then applied the emergency brakes, but he could not stop his train until it had run into the switches D and E, coming in collision with the cars on the loading siding F, where two of the platform cars of his train were smashed and the third one was somewhat damaged. Dionne, the suppliant, realizing the situation, jumped from the western platform-car at about the point marked Y on the plan, and broke his foot. The engine was travelling with the tender behind and the 4 cars in front, and Dionne, seeing himself placed on the western car, the one that would necessarily collide, said: "A la vie, à la mort," better for me to jump to save my life, and he did so.

The total laxity with which the work assigned to these train hands has been carried on is most conspicuous and is only equalled by their total disregard for the rules and regulations of the railway directing them in the discharge of the duties incumbent upon them under such circumstances. These rules have been contravened in many respects. The train should not have gone to the Basin without the conductor and the two brakemen. The conductor admits, in a manly way, that he failed in his duty in not going with it. Brakeman Albert was suspended by the railway for 15 days in punishment of his breach of duty. The air brakes were not, but should have been, connected between the 4 cars and

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the engine, and last, the most flagrant violation of the rules, the switches should not have been opened and left opened without a man standing by to notify and warn the incoming train. The employees of the Crown, acting within the scope of the duties and employment, have severally and jointly been guilty of negligence which caused the accident in question.

The proximate cause, the determining factor which brought on the accident, was obviously the opening of these switches and leaving them opened without warning and the failing on behalf of the brakeman who opened them to stand by them and warn the incoming train. Under such circumstances the suppliant must succeed, as the case is brought within the four corners of sec. 20 of the *Exchequer Court Act.*

The next question to consider is whether the suppliant was guilty of contributory negligence. That question must be answered in the affirmative. There was no excuse for him not to put on the air-brake between the 4 cars and the engine. It was not done to save time, and he further says there are no rules obliging him to do so. True, there are no such rules, but there are no rules relieving him from doing so, and the air-brakes are not mere ornamental appliances, they are there to be used, and under Rule 17, in cases of doubt as to the proper course to pursue, he must take the safe side and not run any unnecessary risk. Then when he went to the Basin he travelled out of the railway yard for a very long distance. He was bound to have his air-brakes outside of a railway yard at least. Dionne says the air-brakes are put on in a yard only where there is a grade. Had the air-brakes been on, the speed could have been reduced much more promptly, and the

lesser the speed the lesser the danger. The inference is that had the air-brakes been on he would have been given an opportunity to jump with less danger and probably with less serious results. It is also questionable whether Dionne should not, or was not, in a position to give the signal to stop before it was actually given. The long series of breaches of duty seem to show that train hands get familiarized with danger and neglect to provide against it.

The legal doctrine of *faute commune* must therefore be applied and the damages assessed in view thereof. It is perhaps well to mention also that the doctrine of *fellow servant* does not obtain in the Province of Quebec.

The suppliant was paid during a certain number of weeks a sick allowance, at the expiration of which he was transferred to the Permanent Fund, and is now getting from the latter a pension of $20 a month. The questions as to whether or not the sick allowance paid upon the form of receipts as appear on Exhibits E to J,—the pension paid him from the Permanent Fund and Rule 113 of the association are bars to his action, have been discussed in the *Saindon* case, *supra* and for the reasons therein mentioned these three questions must be answered in the negative.

The suppliant was about 36 years old at the time of the accident when he was a brakeman on the railway, earning various wages during almost eight years he had been so employed. He has been paid this sick allowance during almost 26 weeks, his hospital and medical care there paid by the railway and he is now receiving $20 a month from the Insurance Fund, payable in cases of total disablement.

As a result of this accident he remains with an

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ankylosed instep, with the shortening by one inch of his leg at the heel and the lengthening by one inch at the end of the foot. When walking he is obliged to completely raise the injured limb and to move it out of the axis of his body, to avoid dragging the end of the foot. He is permanently injured, but he is not totally disabled. His capacity for work has decreased. Perhaps much more in ratio respecting the work of a brakeman than in respect to some other work which he could perfectly well discharge. He says he could work as baggageman on board a train and he says he has been working as a salesman in a country general store. See *Misner v. Toronto & York Radial Ry. Co.*[1]

Under all the circumstances, judgment is directed to be entered in favour of the suppliant for $400 and costs.

Judgment for suppliant.

Solicitors for suppliant: *Lapointe, Stein & Levesque.*

Solicitor for respondent: *Léo Bérubé.*

[1] 11 O.W.R. 1064.

1915
Sept. 7.

IN THE MATTER OF THE PETITION OF RIGHT OF

FLORIDA CANTIN,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Railways—Yard—Injury to trackman—Shunting—Appliances—Signals—Look-out.

The Crown is not responsible for the death of a trackman run over by an engine carefully backing into a yard of the Intercolonial Railway, not occasioned by the negligence of any officer or servant of the Crown in or about the operation of the railway, within the meaning of sec. 20 (f) of the *Exchequer Court Act*, but brought about by the negligence of the deceased in having failed to keep an especially good look-out for train signals as required by the rules. Sec. 35 of the *Government Railway Act*, requiring the stationing of a person in the rear of a train moving reversely, and the rules governing the running of trains, do not apply to shunting engines in a railway yard. The fact that the engine attending to the shunting had no sloping tender and no foot-board and railing was immaterial under the circumstances.

PETITION OF RIGHT to recover for the death of an employee of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Quebec, June 14, 15, 16, 1915.

Thomas Vien, for suppliant.

E. Belleau, K.C., for respondent.

AUDETTE, J. (September 7, 1915) delivered judgment.

This is a petition of right whereby it is sought by the widow of Michel Morneau, to recover the sum

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of $10,000 as damages arising out of an accident resulting in the death of her husband while in the employ of the Intercolonial Railway.

The accident happened on June 11th, 1913, between about 8.40 and 8.45 a.m. Morneau was, at the date of the accident, yard-foreman of the Chaudiére Yard, and his work consisted, in a general way, in repairing the tracks and looking after the yard. Having placed his men at cleaning the yard, he was seen shortly before the accident, when a ballast train was coming in the yard from the east, standing on that track, his hands in his pockets, with his face turned to the east, towards this incoming train and on the same track.

When this ballast train came in, engine No. 89, which on that day was doing the shunting in that part of the yard, in the place of the usual shunting pilot then under repairs, was uncoupled from a Montreal freight train, and in compliance with orders given by the proper officer, started backing, tender first, on the track adjoining the one upon which the ballast train was coming, with the object of taking the van in rear of the same. Engine 89 started backing slowly, as the engineer did not wish to get to the switch before the ballast train had cleared it. It thus travelled backward at the speed of 2 to 3 miles an hour, the engineer having started the automatic air bell before moving, and the bell was being rung during all the time it was moving. While in the act of so moving backward the engineer suddenly heard a cry, when he immediately put on his emergency brake and stopped his engine in about 20 feet.

By that time the engine had passed over Morneau, who died at 9.25 a.m. as the result of the accident.

In his endeavour to clear the ballast train he had obviously thrown himself under engine No. 89.

To succeed in an action like the present one, the suppliant must bring his case within the provisions of sub-section (f) of sec. 20 of the *Exchequer Court Act*, as amended by 9-10 Ed. VII. ch. 19, which reads as follows:

"Every claim against the Crown arising out of "any death or injury or loss to the person or to "property caused by the negligence of any officer "or servant of the Crown, while acting within the "scope of his duties or employment upon, in or about "the construction, maintenance or operation of the "Intercolonial Railway or the Prince Edward Island "Railway."

In other words, there must be, 1st, a public work; 2nd, an officer or servant of the Crown who has been guilty of negligence while acting within the scope of his duties or employment; and 3rd, the accident must result from such negligence.

The first requirement is duly found. The Intercolonial Railway is a public work of Canada.

The next question to consider is whether or not there has been such negligence on behalf of an officer or servant of the Crown as contemplated by the statute.

The accident happened on a fine day, in the early morning. The track where the accident happened is perfectly straight and there was no obstruction between Morneau and the engine at the time of the accident.

Two or three minutes before starting to back his engine No. 89, the engineer, Mountain, says he saw Morneau, who passed close by his engine. They

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spoke to each other, therefore he knew of the presence of engine 89 at the place in question.

No one saw the accident. It is surmised that when Morneau cleared the ballast train, instead of standing between the tracks where there was place, he came on the track upon which engine No. 89 was backing, and was struck, notwithstanding that the bell was ringing. It may be also that the bell of the ballast train was also ringing and that the latter drowned the sound of the bell of engine No. 89. The last words of Morneau seem indeed to confirm that view. Witness J. V. Lemieux, Morneau's clerk, asked him when he was still under the engine, how he had managed to meet with such an accident, and Morneau answered: "In trying to clear the ballast train, I got struck by the Pilot."

Under rule 37 of Exhibit No. 1 all trackmen are especially enjoined to keep a good lookout for signals. Morneau seemed to have overlooked or ignored the bell of engine No. 89, backing towards him, notwithstanding he knew engine No. 89 was there, having spoken to the engineer 2 or 3 minutes before.

The spirit of the rules for the guidance of foreman-of-track or trackmen under Rule 11 of Exhibit "G," and 37 of Exhibit No. 1, would seem to be that they should keep an especially good lookout for signals and *keep themselves out of the way at all times* of special or irregular trains.

If Morneau was killed in placing himself on the track upon which engine No. 89 was backing, he must alone be held responsible, and his death was due entirely to his own negligence. There was a space of 8 feet between the two tracks, and of 4½ to 5 feet between the two trains meeting one another, and 30 feet free on the other side of the ballast train. There

was no reason why he should not place himself between the two trains going as slowly as they were, or on the free space on the other side. And one of the employees, heard as a witness, said he often stood between two trains. There was no obstacle to prevent Morneau from seeing engine No. 89 coming,—no tree, no house, no fog, but a straight right-of-way, clear of everything, and fine weather. He probably had his back turned to engine No. 89. It was practically impossible for him not to hear the engine coming and the sound of its bell.

Mountain, the engineer on board of engine No. 89, was not guilty of any negligence. At the order of the proper officer he started to back—and all the shunting at that end of the yard was done by backing. He rang his bell,—he looked ahead from his window,—on the right, but could not see Morneau, who was at the left. He put on the emergency brakes on the first information of an accident. The fireman was busy at his fire when they started backing, and was subsequently engaged at the injector. He is supposed to help the engineer to look out, when he is not otherwise engaged in other duties, as provided by rule 181, of Exhibit No. 1.

As already stated, there was no eye-witness to the accident, and no doubt Morneau was on a track where he should not have been when engine No. 89 backed; but the action is based upon sub-sec. (f) of the statute above referred to, which is very similar to Art. 1054 of the Civil Code with respect to *quasi-délits*—and the *onus* is in such cases upon the suppliant to prove that the immediate and determining cause of the accident was occasioned by the negligence of the respondent's employees.

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A number of alleged grounds of negligence were mentioned by the suppliant's counsel which will now be considered and dealt with. It is contended that under sec. 35 of the *Government Railway Act,* a person should have been stationed in the rear of the tender. Clearly this section does not apply to a locomotive engaged in shunting in a railway-yard,—such obligation is limited to a train moving reversely in a city, town or village, but not to a railway-yard, even situated in a city, town or village,—and the place of the accident in this railway-yard is 12 to 15 acres from any public highway, and the public is not admitted in this railway-yard, which is exclusively limited to railway purposes and for railway employees. The same might be said with respect to rule 56 of the time-table in force at the time, Exhibit No. 2. This rule would appear to have been made in compliance with and to give effect to sec. 35 above referred to, and does not apply to shunting in a railway-yard; the time-tables and the rules attached thereto are in respect to running trains and not with respect to shunting in railway-yards. The same must be said with respect to rule 126 of Exhibit No. 1. That rule is under the heading of "Conductor" and there was no conductor in the present case. That rule applies to the conductor of a train, but not to the engineer in command of an engine doing shunting in a railway-yard,—its uses being limited to railway employees only. As witness Genois says, when we go out of the railway-yard, we place a man behind the train, but not in the yard.

Then it was contended that engine No. 89, which was attending to the shunting, in the Chaudiere

Yard, on the day of the accident, was not properly equipped in that it had not a sloping tender and a foot-board and rail at the back of the tender.

It is true that engine No. 818, the Pilot replaced by engine No. 89, to do the shunting on that day, had a sloping tender, allowing one to see better at the back when it is not loaded very high with coal. But that is not required by any regulation, and Pilot No. 816, which was also daily attending to the shunting in the Chaudiere Yard, had no such sloping tender, but a square one, as will be seen by reference to Exhibit No. 8. Moreover, the nature of the work did not require an engine of a special type under any statutory enactment or under any regulation. It was not necessary to have a foot-board and railing for the switchmen on the back of the tender of engine No. 89, taking into consideration the manner in which the shunting was done in that part of the yard. The switchmen also always use, as less dangerous, the foot-board in the opposite direction the engine is moving. Moreover, these foot-boards and hand bars are for the use of the switchmen and not for anybody else. Indeed, there was no more negligence in not having such appliance on the day of the accident, to be of some help to Morneau, than there would be in not having them on the ordinary passenger trains to prevent accident, or help in case of accident,—especially when in all likelihood he had his back turned to the engine when he was struck and that in such position it would have been easier for him to jump off the track than on the foot-board, taking into consideration that he was not accustomed to the use of such board and rails.

There was indeed no defectuosity in the engine and no negligence on behalf of any of the respond-

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ent's employees on the occasion in question and the action fails.

The decision of the Supreme Court of Canada, in the case of *Dominion Cartridge v. Cairns*,[1] cited by the respondent's counsel, would also find its application in the present case. In that case it was decided that where it appeared under the circumstances of the case, that the cause of the accident was either unknown or else it could fairly be presumed to have been caused by the negligence of the person injured, and whose personal representative brought the action, there cannot be any such fault imputed to the defendants as would render them liable in damages.

Where there is no fault, no *quasi-délit*—on behalf of any of the employees, the respondent cannot be held responsible for the accident. Familiarized as he was with a daily work in a somewhat dangerous locality, Morneau ignored all elementary diligence and prudence and became the victim of his own imprudence.

Having arrived at the present conclusion it becomes unnecessary to consider the question of insurance and the receipt given by the suppliant relieving the Crown of any responsibility respecting the accident.

There will be judgment in favour of the respondent, and the suppliant is declared not entitled to any portion of the relief sought by her petition of right.

Petition dismissed.

Solicitors for suppliant: *Francoeur & Vien.*

Solicitors for respondent: *Belleau, Belleau & Belleau.*

[1] 28 Can. S.C.R. 362.

1918
May 27.

IN THE MATTER OF THE PETITION OF RIGHT OF
NAPOLEON TRUDEL,
SUPPLIANT,
AND
HIS MAJESTY THE KING,
RESPONDENT.

Contract—Hire—Building contract — Working days—Delay—Damages—Admission—Error—Costs—Interest.

Where dredges or machinery are hired from the Crown by the day, only working days can be charged for. The Crown, by failing to deliver a tug, as required by the terms of the lease, cannot recover the rent therefor, but is not liable for damages to the lessee, more or less remote, by reason of delays in work occasioned thereby.

2. An offer or statement of settlement based on error is not binding and cannot operate as a judicial admission under the Quebec Civil Code.

3. The Crown cannot be held for delays occasioned by it in the performance of a building contract, where by the terms of the contract it was relieved from liability in any such event. The Court, under sec. 48 of the *Exchequer Court Act,* is bound to decide in accordance with the stipulations of the contract.

4. Where a party does not succeed on all the issues of an action, the Court has a discretion to deprive him of the costs.

5. The right of action having arisen in the Province of Quebec, interest upon the amount due under the contract was allowed from the date of the deposit of the petition of right with the Secretary of State.

PETITION OF RIGHT to recover a balance due upon a contract and for damages occasioned in the performance thereof.

Tried before the Honourable Mr. Justice Audette, at Quebec, April 29 and May 1, 1918.

Pierre D'Auteuil, K.C., and *R. Langlais,* for suppliant.

E. Belleau, K.C., for respondent.

AUDETTE, J. (May 27, 1918) delivered judgment.

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The suppliant by his petition of right, seeks to recover the sum of $17,056.90 for an alleged balance due upon contracts, and for damages resulting from suspension of the works or delays in the execution of the same.

The case as presented is composed of two distinct issues. One is in connection with works done at Matane, and the other with respect to works done at Cap a l'Aigle.

MATANE CONTRACT.

The works, at Matane, consisted of the construction and completion of a breakwater on the east side of the mouth of the River Matane, at Matane, in the County of Rimouski, P.Q. The works were duly executed, under a contract, between the suppliant and the Crown, and finally accepted by the latter. There were also, in connection with this contract, extras to the amount of $8,000, which the Crown has duly recognized and paid.

The total amount of the contract was for the admitted sum of		$55,021.00
together with the sum of		8,000.00
for the extras, which amounted in all to the sum of		$63,021.00
The Crown has so far paid the suppliant in satisfaction of the contract, the sum of	$39,810	
and for the extras	8,000	
		47,810.00
leaving uncovered or in dispute the sum of		$15,211.00

The suppliant, under his contract, as required by clause 3 thereof, had to provide for all kinds of labour, *machinery and other plant, etc.* He therefore hired from the Crown, as he might have done from anyone else, at the rate of $236 per day, the use of the dredge "Progress", 2 scows and a tug, to remove the sand and prepare the foundation for the breakwater to be by him erected. The lease for such plant and machinery, reads as follows:

"Montmagny, Que., le 22 juin, 1912.

"Je soussigne, Napoleon Trudel, entrepreneur "pour la construction d'un brise-lames a Matane, "m'engage per les presentes a payer au Departe- "ment des Travaux Publics du Canada, la somme "de deux cent trente six piastres ($236.00) par jour "pour l'usage de la dragne 'Progress', de deux "chalands et d'un remorqueur, pour enlever le sable "et preparer la fondation du dit brise-lames.

"Le temps du loyer de la dite drague & C., devra "commencer a compter au moment de son depart du "quai de Rimouski jusqu'a son retour au meme "quai.

"Le Departement devra fournir tout ce qui est "necessaire au bon fonctionnement de la drague et "de ses accessoires durant toute la duree des tra- "vaux.

"Signe a Montmagny, ce vingt deuxieme jour de "juin, 1911. "Temoin: *Louis v. Gadbois.* Signe: "Nap. Trudel, Entrepreneur."

On June 29th, 1911, the dredge and scows, in tow of the tugs "Evelyn" and "Wetherbee," left Rimouski, at 7 a.m., and arrived at Matane at 5 p.m. It being found the tug "Wetherbee" was drawing

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too much water to enter the River Matane, and finding no haven, she returned at once to Rimouski, although she had been assigned to serve the dredge. The dredge remained without any tug to serve her, and her first work, after setting up her spuds and general installation, consisted in casting over. The Crown having failed to supply a tug, as bound to do under the lease, Trudel, the suppliant, hired, at his own cost and expense, first the "Shelby" and then the "Victoria."

The dredge was engaged in Trudel's work, at Matane, up to August 25th inclusively, when she finished dredging for the suppliant. She was then for a while engaged on some other government work at Matane, with which the suppliant has nothing to do, and finally was towed up to Rimouski.

The controversy with respect to the dredge is as to the number of days she was engaged working, and the rate at which the suppliant should pay, having regard to the fact that the Crown has failed to supply a tug, as called for by the lease.

Under the uncontroverted evidence adduced by the suppliant, it appears that when dredges or machinery of any kind are so hired by the day, that only the working days are to be reckoned exclusive of the Sundays. Moreover, this dredge was hired by the suppliant, as I have already said, under the provisions of clause 3; but, under clause 35 of the same contract the suppliant is absolutely forbidden to carry on any work whatever on Sundays. Were the dredge hired by the month, it is apparent that the full rent should be exacted; but it is otherwise under the custom of trade established by the evidence, when the hire is by the day,—in that case only working days should be charged.

	Days.
We have in June	2
In July	31
And in August	25
To which should be added another day	1
Which must be allowed to tow the dredge back to Rimouski, as provided by the lease, making in all	59
From the 59 days should be deducted the Sundays and Dominion Day (July 1st), when the machinery was not used. There were 8 Sundays within the period, and July 1st, a red-letter day, when no work was done—In all	9
	50

On those 50 days, we have 2 days only in which the Crown supplied the tug,—that is, the day the dredge was taken from Rimouski to Matane, and the return day—

Two days at $236 ..... $ 472.00

Now it has been established by the evidence at trial that the value of the tug per day represented about $50 in the $236 a day, the Crown having failed to supply a tug for 48 days, the lessee, the suppliant, should only pay $236, less $50.

$186 for these remaining 48 days .. $ 186
48

$1,488
7,44

$8,928 8,928.00

$9,400.00

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It is clearly spread upon the record by the evidence that the suppliant had to hire—outside of his lease—the necessary tugs to replace the one the Crown was bound to supply and which it failed to do.

The first obligation of a lessor, under Art. 1612 C.C., is to deliver to the lessee the thing leased. The Crown did not deliver the tug, and cannot recover the rent therefor.

The suppliant claims damages in the delay of execution of his contract which would have been occasioned by the want of tugs. These damages are more or less remote and not of a tangible nature, and have not been clearly established. The suppliant, in the course of the excavation made by the dredge, was allowed to *cast over,* to remove sand with shovels drawn by horses, and in addition thereto in the result paid much less than $50 a day for the tug's service—having the advantage, with respect to one of the tugs, to pay only so much per hour when needed, being thereby freed from the obligation to pay for that part of the day when the tide was low and when the tug could not be used,—and these small tugs gave better service at Matane than larger ones, according to witness Murphy. Moreover, the Crown, in the course of the negotiations of settlement, finally abandoned the claim for overtime. If the suppliant actually suffered any of the damages claimed, a very doubtful matter, they are more than amply set off by the full allowance of $50 per day for the tug, coupled with the circumstances above mentioned.

It will be noticed that considerable delays have elapsed since the termination of the works in question, and it appears that negotiations of a protract-

ed nature were kept on until legal proceedings were instituted. In the course of these negotiations it appears in some of the letters and statements submitted to the respondent by the suppliant, that he at one time was willing to settle upon his paying $11,800. From these offers of settlement, counsel-at-bar for the Crown contends that the suppliant is bound by such offer, which he terms under Art. 1244 C.C. an extra judicial admission. He further contends that Art. 1245, under which a *judicial admission* can be revoked through an error of fact, does not apply to an extra judicial admission. There may be some authority for such a contention, but the preponderance of the jurisprudence is against it. Mr. Mignault, *Droit Civil*,[1] contends that such revocation applies to both in case of error. Indeed, if this admission has been based upon an error of fact, he has made a mistake, an error, and it is the duty of such party to declare he was in error when he made such admission, instead of persisting in a contention which he has discovered to be false. In any case, if there was error, there was no admission: *Non fatetur qui errat.*

It cannot be contended that the Crown can say it has been led into error by such an admission; because if the suppliant omitted to deduct a certain amount for the tugs the Crown had failed to supply, the Crown was well aware of this fact it had not supplied the tugs.

I find that the suppliant is not bound, under the circumstances of the case, by any such statement or offer made in error, against himself, in the course of his endeavour to arrive at a settlement,—a state-

[1] p. 125, vol. 6.

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ment or offer which the Crown never clinched by an acceptance.

I therefore find, as above mentioned, that the suppliant performed works, including extras, for an amount of.....$63,021.00
That he has been paid on account thereof by the Crown the sum of..... 47,810.00

Leaving uncovered and in dispute the sum of $15,211.00
That the suppliant owes the Crown, in respect of the lease of the dredge, etc., the sum of 9,400.00

Leaving due him by the Crown the sum of $5,811.00
which he is entitled to recover.

Under sec. 48 of the *Exchequer Court Act,* the Court is denied the power to allow any interest upon this balance, but, following the cases of *St. Louis v. The Queen,*[1] and *Lainé v. The Queen,*[2] this being a case where the right of action has arisen in the Province of Quebec, interest will be allowed upon the sum of $5,811, from the date the petition of right was left with the Secretary of State, as provided by sec. 4 of the *Petition of Right Act,* namely, from May 8th, 1916, to the date hereof.

CAP-A-L'AIGLE CONTRACT.

On December 26th, 1916, the suppliant entered into a contract with the Crown for the construction of an extension to the wharf at Cap-a-l'Aigle, as provided by the contract filed herein as Exhibit No. 10.

[1] 25 Can S.C.R. 649 at 665.
[2] 5 Can. Ex. 108.

The question arising under this contract, freed and segregated from the numerous branches of money claims made by way of damages alleged to have been occasioned by delays, resolves itself, in the result, in the question as to whether or not the suppliant can, under his contract, make such a claim for which the Crown would be liable.

In the course of the preliminary work for the execution of this contract, and after the foundation for the extension of the wharf had been duly staked, a diver was sent to the bottom to ascertain the condition of the bottom of the river, and having then reported verbally to the Government Engineer, the latter took upon himself to suspend the execution of the work,—having, I presume (because he was not heard as witness), some doubt as to whether the nature of the material at the bottom could be built upon in the manner required by the contract.

Indeed, it was not unreasonable to verify the nature of the foundation, but what is claimed as unreasonable and is the source of all the trouble on this issue, is the alleged unreasonableness of the delay of such suspension, and especially so in view of the fact it was found the engineer should have gone on, and did finally go on, building upon the foundation or bottom as described by the diver at the time of the suspension.

As flowing from that suspension in the execution of the works, the completion of the enterprise was carried over to the following year. Now, the question to be determined is whether under the terms of the contract and sec. 48 of the *Exchequer Court Act* the suppliant is entitled to recover $9,333 claimed in that respect—a claim embodying all manner of damages—some of the most remote class or kind.

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The contract entered into by the suppliant is one substantially identical in terms to those commonly in use in undertakings of this sort, whereby the contractor is, if the literal terms of the contract be adhered to, handed over, bound hand and foot, to the other party of the contract, or to the engineer of the other party, and is absolutely without any recourse or remedy.[1]

It is unnecessary to review the several clauses of the contract into which the suppliant entered with his eyes open. He must be held to them notwithstanding that they might appear oppressive. *Modus et conventio vincunt legem.* The law to govern as between the parties herein is to be found within the four corners of the contract. The form of agreement and the convention of parties overrule the law.[2] The suppliant cannot reject the terms of his contract and claim the damages flowing from delays, in view of clause 44, which reads as follows:

> "The contractor shall not have, nor make any "claim or demand, nor bring any action or suit "or petition against His Majesty for any damages "which he may sustain by reason of any delay or "delays from whatever cause arising in the pro- "gress of the work."

Clause 15 of the contract also relieves the Crown from any liability in respect of any loss or damage whatsoever which may at any time happen to the *"materials, articles and things"* required for the contract. This clause is casually mentioned because the contractor has set up a claim in that respect. (See also clauses 11 and 49.)

[1] *Bush v. Whitehaven Trustees,* Hudson on Contracts, vol. II., 124, 4th Ed.

[2] *Broom's Legal Maxims,* 8th Ed. p. 537.

Under the provisions of sec. 48 of the *Exchequer Court Act,* the Court is bound to decide in accordance with the stipulations of a contract in writing and it must be found that, under clause 44 of the contract, whether the suspension of the works occasioning the delays was rightly or wrongly done, the suppliant is out of court,—as the delays alleged to have given rise to the claim are such as are covered by this clause 44.

In arriving at the present conclusion, I am also following a similar decision of this court and of the Supreme Court of Canada in the case of *Mayes v. The Queen.*[1] There is also a long catena of cases upon this class of contract consecrating the same principle, but it is unnecessary to mention them. It is also unnecessary to either consider or decide other questions raised at bar. The case of *Mayes v. The Queen* (*ubi supra*) is a direct answer to most of them.

Coming to the question of costs, it is well to bear in mind that while the suppliant succeeds on one issue, the respondent succeeds on the other. Each issue covered a distinct claim arising out of two separate contracts, and if there is any difference between the actual time engaged on one issue as compared with the other, I would say, besides being for larger amount, the issue upon which the Crown succeeds is the heavier one and upon which pleadings and evidence were more lengthy.

"It seems to me," says Bowen, L. J., in *Badische Anilin und Soda Fabrik v. Levinstein*[2] that, with-"out laying down any hard and fast line, or trying "to fetter our discretion at a future period in any

[1] 2 Can. Ex. 403, 23 Can. S.C.R. 456.
[2] 29 Ch. D. 366 at 419.

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"other case, we are acting on a sensible and sound "principle, namely, the principle that parties ought "not, even if right in the action, to add to the ex- "penses of an action by fighting issues in which they "are in the wrong. It may be very reasonable as "regards their own interest, and may help them in "the conduct of the action, that they should raise "issues in which in the end they are defeated; but "the defendant who does so does it in his own in- "terest, and I think he ought to do it at his own ex- "pense." See also *Bennington v. Hill.*[1]

Again, in *Dicks v. Yates,*[2] Jessel, M.R., said: "I "think that the Court has a discretion to deprive a "defendant of his costs though he succeeds in the "action, and that it has a discretion to make him "pay perhaps the greater part of the costs by giving "against him the costs of issues on which he fails."

Under the circumstances of the case there will be no costs upon either of the issues, each party paying his own costs.

Therefore, there will be judgment entitling the suppliant to recover from the respondent the sum of $5,811, with interest thereon from May 8th, 1916, to the date hereof, and without costs.

Judgment for suppliant.

Solicitor for suppliant: *Pierre D'Auteuil.*

Solicitor for respondent: *Jules Gobeil.*

[1] 8 R.P.C. 326.
[2] 18 Ch. D. 76 at 85.

TREO COMPANY, INC.,

PLAINTIFF,

AND

DOMINION CORSET COMPANY,

DEFENDANT.

1918

May 15.

Patents—Subject matter—Corset—Novelty—Invention—Combination —Prior art—Costs.

Held, that a patent for supporting belts or bands in the nature of a corest was invalid for want of novelty or invention.

2. Where the patentee has merely adopted in the manufacture of his patented article old contrivances of a nature similar to those found in other articles of the same kind, and producing similar results, there is no invention to support the patent.

3. The Court, taking into consideration the conduct of a defendant leading up to the action, has a discretion to deprive him of his full costs although he succeeds in the action.

ACTION for the infringement of a patent.

Tried before the Honourable Mr. Justice Audette, at Montreal, Que., February 26, 27, 28 and March 1, 1918.

S. Casey Wood, for plaintiff.

L. A. Cannon, K.C., for defendant.

AUDETTE, J. (May 15, 1918) delivered judgment.

The plaintiff company brings its action, against the defendant, for an alleged infringement of the Canadian Patent, No. 158,542, bearing date October 27th, 1914, granted to the M. W. Schloss Manufacturing Company, the assignee of the patentee, Edgar Guggenheim, which said company in turn sold and assigned it with all right, title and interest to the plaintiff company.

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The grant contained in the patent is "*for an al-*"*leged new and useful improvement in supporting* "*belts.*"

The second paragraph of the specifications states: "This invention relates to *belts* or *bands* to be worn "around the body at the region of the waist for the "purpose of sustaining and preserving the natural "shape of the figure. While the device is in the form "of a belt or band, it is of considerable width and "therefore partakes of the nature of a waist or "corset."

Proceeding further on with the specifications, to which reference will be hereafter made, we come to the claims, which are in the following language, viz.: "I claim:—

"1. A low corset, consisting of a flat body-portion "whose upper and lower edges are substantially "parallel and unshaped to the figure of the wearer, "said body portion being elastic in a longitudinal "direction and provided in the upper portion and at "substantially the waist line with a zone of elastic "but less yielding nature than the remainder of the "body portion for the purpose set forth."

"2. A low corset, consisting of a flat-body por-"tion whose upper and lower edges are substantially "parallel and unshaped to the figure of the wearer, "said body portion being elastic in a longitudinal "direction and provided in the upper portion and at "substantially the waist line with a zone of elastic "but less yielding nature than the remainder of the "body portion, and hose supporters attached to the "body portion at points below the said less yielding "zone."

The second claim is a repetition of the first, with the addition of the hose supporters attachment. The

hose supporters are not *per se* claimed as an invention, but are claimed as part of the second combination, or as a combination between the hose supporters and the other features or elements of claim No. 1. And I may say there would have been, under the state of the prior art, no justification for claiming *per se* these hose supporters attachment. They were attached to all manner of corsets before the date of the alleged invention.

Before approaching the merits of the patent, it is well to bear in mind that the grant in the patent is for "supporting belts." The specification refers to it as *belts* or *bands* partaking of the nature of a *waist* or *corset,* and the claims call it a *"low corset,"* while at the trial it was continually referred to as a "girdle."

The patent is in itself very narrow.

By reference to the claims, specifications and drawings on the one hand, and Exhibits 7 and 8 on the other, the latter being the product of the patent, it will naturally occur to a casual observer that the least that can be said is that the article purporting to be manufactured under the patent differs materially from the article that appears to be contemplated by the patent. The upper and lower edges are not parallel, but are of different lengths; the stays are not placed in a V shape, as shown in the drawings. It is not, as described in the specification, "a simple, straight band of considerable "width, which surrounds the body and emphasizes "its natural shape by reason of inherent elasticity "of the band," for the obvious reason that the elastic band does not extend from one end to the other. There are two adjuncts of different material

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or fabric at each end which are not elastic. The product is *conic* and not unshaped.

However, the plaintiff's expert, heard at trial, contends that the plaintiff's corsets are not manufactured as per the patent, but with mechanical equivalents as needed by the trade; that they differ in structural details, but are within the language of the specification and claims and are full equivalents, and are substantially the same.

Counsel at bar for the defendant, relying on this difference between the patent and the product, claimed to have been manufactured thereunder, contends that the patent has become null and void, under sec. 38 of the *Patent Act,* for want of manufacturing in Canada, within 2 years from the date of the patent, the invention covered by the patent, as no extension for so doing appears to have been given as provided by sec. 39 of the *Patent Act.*

In the view I take of the case, it becomes unnecessary to make any pronouncement upon this point, and I will limit myself to the consideration of the validity of the patent itself, without considering the manufactured article.

Indeed, upon the enquiry as to whether or not the patent is good or bad, and as to whether the subject matter can be sustained by letters patent, regard must be had exclusively to the patent itself and not to the product of the same, or rather, as in the present case, not to the article the patentee has seen fit to produce under his patent.

Under the *Canadian Patent Act,* sec. 7, a patent may be granted to any person who has invented any new and useful art, machine, manufacture or composition of matter, or any new and useful *improvement* therein, which was *not known* or used by any

other person *before his invention thereof* and which has not been *in public use* or on sale with the consent or allowance of the inventor thereof for more than one year previously to the application for the patent.

The subject matter of the letters patent must be something new, useful and involving ingenuity of invention.[1] In order to support a patent the novelty must be the outcome of skilful ingenuity,[2] The primary test is invention and the question as to whether there has been invention is one of fact in each case.

And as was said in the *British Vacuum* case,[3] different minds may arrive at different conclusions on the point as to whether or not there has been invention.

In the present case, however, we must enquire whether the alleged combinations imply invention and whether the result therefrom has not been anticipated. Commercial success, contrary to what was contended at trial in this case, is not a test of invention, although it may be of usefulness. Has the present patentee brought forth a new result consistent with the prior state of the art? That is what we shall have to enquire into.

Tracing the etymology of the word "corset", we find that it comes from the old French word "cors," (the Latin *corpus*), a diminutive of the word *corps* or body, the original object of which was the bringing out of a small waist. In the early days, among the Romans and the Greeks, long before the 14th century, when the conventional corset with stays first appeared, small bands of some fabric or an-

[1] *Nicolas, on Patent Law*, pp. 1, 20.
[2] *Frost*, p. 27.
[3] 39 R.P.C. 209.

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other were used in their stead, and, in course of evolution, reappeared in France at the time of the French revolution; but, in 1815, what has been called all through the trial the conventional corset with stays, came back again.[1]

From Mr. Justice Gwynne's judgment in *Re Ball v. Crompton Corset Co.*[2] we also find that as far back as 1872, corsets made of "an elastic fabric of india-rubber webbing" were then in existence.

Can we not say that corsets existed from time immemorial, and that while the devices of some of them were protected by patent, others were not and were thus given to the public and are not therefore subject to the monopoly of a patent.

I think it may well be stated and conceded that there is no new element entering into the corset covered by the patent. Low corsets were in existence long before the date of the patent. Elastic material of different degrees of resiliency was also common in the art.

Counsel for the plaintiff claims that the patent "is for the *combination,* and the test of the com-"bination is interaction. Each corset depends for "its result upon the interaction of the general elas-"ticity of the band, acting in interaction with the "waist band, and that it is unshaped,—the whole "band being unshaped to the body of the wearer."

Therefore, the claim is for the combination.

Let us now enquire into the state of the prior art. As a starting point, we have garment Exhibit "M," unprotected by patent and belonging to the public, which consists of a flat belt, a girdle waist band, comprising a flat body portion, upper and lower

[1] See *Larousse,* vo. Corset.
[2] 13 Can. S.C.R. 493.

edges parallel, of elastic material stretching longitudinally and with three zones of varying elasticity, the centre being more yielding. The difference between the plaintiff's patent and Exhibit "M" practically consists in a different distribution of the resiliency of the bands, placing the less resilient at the waist, widening the band and making an opening as in the ordinary corset.

Passing to garment Exhibit "L" (*corset sangle*), we find a large waist band or girdle, much higher or wider than Exhibit "M"; also, with a flat body portion,—waist band, 3 zones and all of elastic material. This corset or band, as Exhibits "7" and "8", manufactured by the plaintiff under the patent, is conic, being larger over the hips, narrowing at the waist, describing a small curve at the junction of the waist and top bands.

Exhibit "K" is another garment in the nature of a girdle, waist band, unprotected by patent, with flat body portion, 3 zones of elastic material and a waist band of greater resistance. This exhibit would appear to be shaped to the body, retaining, however, the conic shape above mentioned.

Exhibit "J" is still another garment or band, belt, girdle or corset of elastic material, and of different elasticity in the front. It is less resilient at the waist, and is much in the shape of the article manufactured under the present patent, conic-shaped and curving at the waist.

Coming now to Exhibit "B" (Exhibits "C" and "Q" being practically the same, comments on "B" will apply to them), a Claverie corset which, to all purposes, possesses all the elements of the combination covered by the plaintiff's patent, with, however, small differences, but mostly in details.

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This garment (B), as well as M, L. K and J, was sold by the Claverie house here in Canada prior to the date of the alleged invention by the plaintiff.

In garment "B" we find, paraphrasing the patentee's claim, a *low corset,* which is what is claimed by the patentee. The body portion is *elastic in a longitudinal direction, and provided in the upper portion and at substantially the waist line with a zone of elastic but less yielding nature than the remainder of the body portion.* In thus describing Exhibit "B" I have used the language to be found in the plaintiff's claim No. 1, which is equally applicable to Exhibit "B".

Having purposely used the entire language of the claim, omitting, however, to be considered separately, the balance of the words, which read as follows: A flat body portion "whose upper and lower edges are substantially parallel and unshaped to the figure of the wearer." There is also all through these corsets the same peripheral tension. And the object and function of a claim in a patent is to determine the scope of the patentee's invention.[1]

Now garments, Exhibits "7" and "8," the articles produced under the patent, are not parallel, as claimed in the patent and shown in the drawings, and while according to the experts heard on behalf of the suppliant they are not manufactured as per the mechanism of the patent, they are equivalents as needed by the trade, differing from the patent, according to him, in structural details, but remaining within the language of the patent, being full equivalents.

[1] *Barnett-McQueen Co. v. Canadian Stewart Co.,* 13 Can. Ex. 186 at 221.

Adopting this mode of reasoning to the claim in the plaintiff's patent, it is easy to find that while garment Exhibit "B" is not absolutely parallel, in the manner mentioned, it is "substantially parallel" within the meaning and language of the patent, differing slightly in structural details only.

Again, the claim of the plaintiff's patent describes his garment as "unshaped to the figure of the wearer." The garments, Exhibits "6" and "7", which he manufactures are conic, and therefore not actually unshaped, but enough so, according to the plaintiff's evidence, to come within the meaning and language of the patent. Garment Exhibit "B", compared with a conventional corset, would be pronounced unshaped, and while it contains small curves in structural details, adopting the language of the plaintiff's expert, can it not be said that it is "substantially unshaped" and still within the language and meaning of the claim of the patent, and therefore anticipating the plaintiff's patent?

Exhibit "B" has also edges of different elasticity to prevent the corset from curling.

In the result, comparing garment "B" and garments "7" and "8", would not this combination or their construction perform absolutely the same function? I cannot conceive that the principle involved in the plaintiff's patent was new at the date of the patent. After all, does not the plaintiff's article amount to a mere elastic band, of an undefined width to be placed around the body by way of support?

All of these articles, or articles similar to the exhibits above mentioned, were on the market and being sold to the public prior to the alleged invention. I shall now approach the consideration of that part of the evidence in respect of some of the American

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patents, and the publications, produced at the trial, in respect of these garments.

The American "Lackey" patent of 1906, Exhibit "A", disclosed a "girdle" consisting of a flat body portion whose upper and lower edges are not only *substantially, but actually, parallel.* The body of the girdle is made "of some loosely woven fabric which "is cut on the bias, so that it really yields to give "some fulness to the girdle at the top and bottom "* * * permitting it to *conform to the body of the "wearer".* The waist-band is made of tape and is "therefore *less yielding* than the rest of the girdle."

Another American patent (Exhibit "W"), granted in 1906 to Abadie Leotard, for a "waistband, belt and the like", was also filed at trial. The principal feature of this exhibit is that it is of elastic material of different degrees of resistance, the upper and lower edges are parallel and it is unshaped to the body of the wearer, and stretches longitudinally as in the plaintiff's patent.

Exhibit "X" is an American patent granted as far back as 1884 to one Craig, and is for a "corset" made of elastic material from top to bottom, *with 3 elastic zones of different degrees of resistance.* The *waistband being less yielding* than the other portions of the corset. The language used in this patent is worth noting when reading the plaintiff's patent, and according to one expert this corset and that of the plaintiff would produce equivalent results.

Exhibit "Y", an American patent, granted to one Digney in 1906, is a combination of abdominal support and hose-supporters as in claim No. 2 of the plaintiff's patent. It is a curved band or girdle com-

prising a plurality of zones, made of elastic webbing adapting itself to the shape of the body.

On the question of prior publication, as establishing the state of the prior art, the defendant produced a copy of "Femina", of March 15th, 1912, which had been used by defendant when manufacturing his own corset, and wherein we find, at page 27, cuts of corsets showing great similarity with the class of corsets in this case, and which possess the characteristic elements so much relied upon by the plaintiff. The description indeed reads as follows: "Le No. 1618, est une combinaison gainant absolu- "ment le corps qu'elle laisse souple et onduleux; "en tissue caoutcheuté renforce a la taille * * * "Le No. 1621 est une ceinture caoutchouteé. Cette "ceinture est renforcee tout autour du haut, du bas, "et de la taille, sans que son epaisseur en soit aug- "menteé, ce qui la rend tres resistante en lui per- "mettant de suivre tous les mouvements du corps "sans se deformer."

In 1913 witness Amyot says he also had in his possession the publication called "The Corset and Underwear Review," and at page 33 thereof we find that among the corsets exhibited in September of that year there was, as described therein, "a cor- "set of a webbing arranged in 3 sections, the top "and bottom section of elastic and the centre non- "elastic."

By way of supplement reference may also be had to the Claverie catalogues and circulars, viz., in Exhibit "D" at p. 35; Exhibit "F" at p.p. 18 and 19; in Exhibits "E", "H-a" and "H-b" at p. 2, and in Exhibit 10 at p.p. 12 and 13. These are practically cuts and plates having the features and elements found in Exhibit "B" discussed above, and

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which in the result disclose the same or equivalent elements combined in substantially the same way and producing practically the same results as plaintiff's corset.[1]

Having already considered the state of the prior art in corsets, I must in the result come to the conclusion that all the features, functions and contrivances claimed in the combination of the present patent are also to be found in other corsets, specifically or generally. The most the patentee has done was to adopt, without invention, in the manufacture of his corset, old contrivances of a similar nature found in other corsets and producing similar results. The adaptation of old functions or contrivances to a new purpose, especially to the same class of article, would not even constitute invention. There is no subject matter where invention is wanting.[2] Moreover, the combination claimed in this case does not imply invention.[3]

The proposition that the article in question has been a commercial success, and that it can be produced cheaper than before alone would establish a patent, is to my mind unsound, as it would have the effect of enlarging the patent law by bestowing upon successful commercial adaptations a privilege confined to an invention that is new and useful. Indeed, success cannot be said to be the test to a right to the privilege of a patent, because most of the time such success is due to business energy which does not enter in the consideration of the patent laws. And, indeed, if I find no "meritorious inven-

[1] See *Hunter v. Carrick*, 11 Can. S.C.R. 300.
[2] *Terrell on Patents*, 5th Ed., p. 38.
[3] *British United Shoe Machinery Co. v. Fassell & Sons*, 25 R.P.C. 632; *British United Shoe Machinery Co. v. Standard Rotary Machine Co.*, 35 R.P.C. 33.

tion'' in the plaintiff's patent, I do not destroy, as claimed at trial, the plaintiff's commercial success. They can go on, as Claverie and others have done in the past, and sell their goods, unprotected by a patent, on their merits and extend their trade in the article by business energy and capacity.[1]

Eagle Lock Co. v. Corbin Cabinet Lock Co.[2] is authority for the proposition that, "There is no "patentable invention when the peculiar structure "necessarily resulted from the fact that the patentee "wanted to combine certain old elements, and a per- "son skilled in the art would naturally group the "elements in the way the patentee adopted."

It certainly cannot be said that the combination claimed by the plaintiff's patent lies so much out of the track of former use as to evolve ingenuity of invention.

As already said, the functions of the combination claimed in the plaintiff's corset are substantially to be found in the Claverie corset, Exhibit "B", and others; and, as all the parts going to make the plaintiff's corsets are obviously old, he can only claim in respect of the combination, as he has done; but his combination is substantially anticipated both by patented and unpatented corsets, and this combination is obviously without ingenuity of invention, without which a patent cannot be sustained.

The combination of the patentee did not, considering the state of the knowledge of prior art, disclose any new functions or discovery which could, to my mind, amount to invention. I cannot perceive any ingenuity of invention in the plaintiff's patent, con-

[1] See *Terrell on Patents*, pp. 34, 35, 88, 90; *Waterous v. Bishop*, 20 U.C.C.P. 29.
[2] 64 F. R. 789.

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sidering the state of the art and knowledge at the date of the patent.

Under our patent law a patent is granted as a reward for invention, whereby restraint upon commercial freedom in respect of the use of the patented invention necessarily results; and a court cannot be too careful in insisting that it is only when the requirements of the law have been satisfied by the patentee that the public will be prevented from using common and well-known articles or devices for a common purpose.

"There is no sufficient invention in merely apply-"ing well-known things, in a manner or to a purpose "which is analagous to the manner or to the pur-"pose in or to which it has been previously ap-"plied."[1]

In view of the prior art, I am of opinion that not only is there no contrivance or device that is new in the plaintiff's patent, but that there are no new features in the combination claimed, the same features having been previously obtained in other corsets.

The case of *Consolidated Car Heating Co. v. Came*[2] went even so far as to decide that "In an "action for infringement of a patent, if the merit "of the invention consists in the idea or principle "which is embodied in it, and not merely in the "means by which that idea or principle is carried "into effect, the patentee must shew that *the idea "or principle is new;* and must fail if the merit of "his invention lies merely in a new combination of "known features."

[1] *Nicolas on Patent Law,* p. 23, and cases therein cited.
[2] [1903] A.C. 509.

The present patent relies on the functions performed by the combination of old and well-known devices; but in view of the knowledge of the prior art, it must be found that such known features of such combination were by no means new. Corsets of elastic fabric of zones of different resiliency, with less resilient band at the waist, with the features of the patent, were in existence before the date of the patent and performing in their combination the functions claimed. And paraphrasing the language of Ritchie, C.J., in *Ball v. Crompton Corset Co.*,[1] I come to the conclusion the plaintiff's patent does not possess any element of invention, and I can, in no sense, "*find any creative work of an* "*inventive faculty* which the patent laws are in- "tended to encourage and reward," and as already said, the fact that the plaintiff's patent has proved successful does not necessarily establish that it is an invention entitling him to a patent. There is in that case very apposite language in respect of a patent for corsets that will apply to the present case with great propriety and where the pronouncement was against the validity of the patent.[2]

In the case of *Yates v. Great Western R. W. Co.*[3] it was also held that although the patented article was a most useful contrivance it could not be the subject of a patent as it was wanting in the element of invention.

The functions which the present patentee claims as new in his combination would, as well to a person of ordinary skill in the manufacture of corsets as to the unwary purchaser, appear, knowing the prior

[1] 13 Can. S.C.R. 475.
[2] See also *Williams v. Nye*, 7 R.P.C. 62.
[3] 2 A.R. (Ont.) 226.

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state of the art, to be old or even a case of "double use" involving no ingenuity of invention.[1]

Perhaps I should not dispose of the case without offering some short observations with respect to Exhibits 14 and 15, which are copies of judgments delivered by the Courts of the United States upon the plaintiff's patent. Exhibit No. 14 is the copy of a judgment obtained by consent of the parties and as such does not amount to more than an arrangement or compromise between the parties therein mentioned. It is hardly necessary to say that it is a class of judgment upon which no reliance can be placed with the view of using it as a determination by the Court upon the validity of the patent. Then Exhibit No. 15 appears to be another judgment between the parties therein mentioned. Canadian Courts, like the English Courts, are accustomed to treat the decisions of the American Courts with great respect, although they are in no manner bound by them.[2] However, the case appears to be unreported, no reasons for judgment are available, and it is impossible to ascertain upon what ground the conclusions of this judgment were arrived at. I therefore, fail to conceive how I could make any use of these judgments.

The defendant company, besides attacking the validity of the plaintiff's patent, denies any infringement of the same, and, moreover, alleges it has ob-

[1] *Potts v. Crearer*, 155 U.S. 597. See also *Wismer v. Coulthard*, 22 Can. S.C.R. 178, *Copeland-Chatterson v. Paquette*, 38 Can. S.C.R. 451, *Northern Shirt Co. v. Clark*, 38 D.L.R. 1, 17 Can. Ex. 273, and cases therein cited; and *Wilson v. Meldrum*, Coutlée's Dig. S.C.R. 1039.

[2] See per *Halsbury*, L.C. In *Re Missouri Steamship Co.* (1889) L.R. 42 Ch. D. 330; per *Brett*, L.J., in *The Queen v. Castro*, L.R. 5 Q.B.D. 516; and per *Kekewich*, J., in *Re De Nicols*, [1898] 1 Ch. D. 403 at 410.

tained Canadian patent No. 171276 on August 8th, 1916, for manufacturing the article or corset which is now claimed by the plaintiff as an infringement of his corset. A subsequent patent is no defence to the infringement of a prior patent.[1] Had the plaintiff's patent been found good and valid, I would obviously, without any hesitancy, have found that the defendants had infringed. However, in the view I take of the case consideration of the question of infringement is unnecessary, except in respect of its bearing on the allowance of costs.

Coming to the question of costs, I must say that, in view of all the circumstances of the case, I feel somewhat perplexed. As a general proposition, if an action is dismissed for want of validity of the patent, it should *primâ facie* carry with it all costs in favour of the defendant; but there may be circumstances which would abate this *primâ facie* claim and justify the exercise of discretion by the Court to withhold full costs.[2]

There is nothing in the *Canadian Patent Act* to hamper the Court in the exercise of its discretion upon the question of costs, which in this case falls within the provisions of Rule 290, that has statutory force. It is, however, quite clear that there are, under the *English Act,* provisions dealing specifically with costs under certain circumstances, differing therefore from our Act. With this qualified observation I wish to refer to most apposite language which has fallen from the lips of some of the eminent Judges on this question of costs. Bowen, L.J., in *Badische Anilin und Soda Fabric v. Levinstein*[3] says: "It seems to me that, without laying down

[1] *Grip Printing & Publishing Co. v. Butterfield,* 11 Can. S.C.R. 291.
[2] *Vancouver v. Bliss,* 11 Ves. 463, 32 E.R. 1164.
[3] 29 Ch. D. 366 at 419.

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"any hard and fast line, or trying to fetter our dis-"cretion at a future period in any other case, we are "acting on a sensible and sound principle, namely, "the principle that parties ought not, even if right "in the action, to add to the expenses of an action "by fighting issues in which they are in the wrong. "It may be reasonable as regards their own interest, "and may help them in the conduct of the action, "that they should raise issues in which in the end "they are defeated; but the defendant who does so "does it in his own interest, and I think he ought "to do it at his own expense." See also *Bennington v. Hill.*[1]

Again in *Dicks v. Yates,*[2] Jessel, M.R., said: "I "think that the Court has a discretion to deprive a "defendant of his costs though he succeeds in the "action, and that it has a discretion to make him "pay perhaps the greater part of the costs by giv-"ing against him the costs of issues on which he "fails, or costs in respect of misconduct by him in "the course of the action."

Moreover, in the consideration of the question of costs I do not think that the tribunal is exclusively confined to the abstract result of the litigation; it may also consider the defendant's conduct previous to and conducing to the action. Is it not the duty of the judge, before arriving at any pronouncement, to consider the whole circumstances of the case from beginning to end? Everything which led to the action, everything in the conduct of the parties which actually prompted and originated the proceedings should be considered.

[1] 8 R.P.C. 326.
[2] 18 Ch. D. 85.

Had I not disposed of the present case upon the question of the validity of the patent, I would have found without hesitation, as already mentioned, that the defendant's corset constituted an infringement of the plaintiff's patent.

But in the present case there is more. The defendant did not only copy that corset manufactured by the plaintiff, which he alleges was not patentable, but he also, in 1916, applied and obtained from the Canadian Patent Office, a patent which is now filed of record as Exhibit No. 5, as alleged in his statement of defence. In the specifications of that patent, we find at 5 or 6 places the identical language which is also found in the plaintiff's patent. If the defendant was truly in earnest in believing the plaintiff's patent invalid for want of novelty or invention, how could he in earnest apply for a similar patent, taking from the plaintiff's patent the very same language and using it in his own specification? How can the defendant reconcile, with any consistency, the duality of this position?

Under all the circumstances of the case on this question of costs, I think justice will be done if the plaintiff were allowed a certain amount of costs on the question of infringement, and the defendant were given qualified general costs upon the issue of want of validity of the patent, considering the plaintiff was successful on the question of infringement; and those costs should not be as ample as in a case where no such circumstances as above mentioned had existed. And with the view of carrying out this principle, and avoiding the taxation of costs upon two issues with set-off and proceeding under the provisions of rule No. 290 of the Rules and Regulations of the Exchequer Court of Canada, I hereby direct

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that the defendant's costs shall be hereby fixed and allowed at the sum of $300 in lieu of taxed costs.

Therefore, the plaintiff's patent is found invalid for want of subject matter, or ingenuity of invention, and the action is dismissed with costs to the defendant fixed at the total sum of $300.

Action dismissed.

Solicitors for plaintiff: *Rowell, Reid, Wood & Wright.*

Solicitors for defendant: *Taschereau, Roy, Cannon & Co.*

1918
April 9.

IN THE MATTER OF THE PETITION OF RIGHT OF

ERNEST N. BONNEAU,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Of custom officials—Detention of animals—Liability.

The liability for wrongful seizure and detention of animals by the Crown's custom officials being one in tort is not actionable against the Crown.

PETITION OF RIGHT to recover damages for the illegal seizure and detention of animals by the Canadian Customs authorities.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, March 27, 1918.

P. F. Casgrain, for suppliant.

C. P. Plaxton, for respondent.

CASSELS, J. (April 9, 1918) delivered judgment.

A petition of right filed on behalf of Ernest N. Bonneau. The petition alleges that he is a cattle trader carrying on business in the Province of Quebec. He alleges that on or about June 14th, 1915, a carload of animals belonging to him was seized by the Canadian Customs authorities at Farnham, in the Province of Quebec. Further, he alleges that the car containing lambs, etc., consigned to William Davies & Co., Limited, was illegally detained at Abercorn for over a week.

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The 4th paragraph of the petition of right reads as follows:

"That the said seizure was made by the officers of "the Canadian Customs Department as aforesaid "illegally, maliciously and with the intent to cause "your petitioner damage and annoy him in the con- "duct of his business, and to prevent him from de- "livering the said animals to William Davies & Co., "to whom he had sold them, thereby causing your "petitioner a loss of $640.71."

Paragraph 5 reads: "That the officers of the said "Customs Department acted without any reason- "able grounds whatever in seizing the said animals "belonging to your humble petitioner."

Paragraph 8 reads: "That your humble peti- "tioner is of opinion that the said illegal and ma- "licious seizure made by the Customs officers was "so made in the spirit of vengeance."

Paragraph 9 reads: "That on account of the said "malicious and illegal seizure, your humble peti- "tioner has suffered loss and damages."

The petition then details the damages claimed.

To this petition the Crown filed a statement of defence setting up that the petition of right is insufficient and bad in law because it does not allege any cause of action against His Majesty, etc.

An application was made for an order to have the question of law determined, practically amounting to a demurrer to the petition of right.

The case came on for argument on March 27th last. Mr. P. F. Casgrain appeared in support of the petition, and Mr. C. P. Plaxton for the Crown.

On the argument I was of opinion that the case alleged was purely one of tort, and that His Majesty was not liable. Mr. Casgrain presented his case in

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support of the petition with great ability and ingenuity, so much so that I reserved judgment in order to consider the points raised by Mr. Casgrain and the authorities cited by him. I have since the argument considered the questions, and am still of opinion that the case made is one purely in tort, and under a long series of decisions, both in the Supreme Court of Canada and elsewhere, in my opinion there is no liability attaching as against His Majesty.

The question of liability against the officer who so maliciously acted is another question. *Boyd v. Smith*,[1] may be referred to—but as the officer was not before me, the point does not arise.

I think the petition should be dismissed, and with costs.

Petition dismissed.

[1] 4 Can. Ex. 116.

1918
June 4.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF,

AND

ROBERT A. BRENTON, MINNIE E. BRENTON, AND EDWIN D. KING,

DEFENDANTS.

Expropriation—Water lots—Valuation—Riparian rights—Damages—Loss of access—Right of way.

The Crown having expropriated some water lots in the outskirts of Halifax, N.S., for the purposes of Halifax Ocean Terminals, it sought by an information to have determined the amount of compensation.

Held, that in the absence of any sales of similar property in the neighbourhood from which the value of the property could be ascertained, a valuation of seven and a half cents per square foot was a fair basis of compensation, adding thereto a 10% allowance for the compulsory taking; that the owners were also entitled to damages for the depreciation of property not expropriated, occasioned by the loss of access to the water-front for boating and bathing purposes, and of a right of way they enjoyed over a railway, as a result of the expropriation.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 27, 1916.

J. A. McDonald, K.C., and *T. S. Rogers,* K.C., for plaintiff.

L. A. Lovett, K.C., and *E. King,* for defendants.

CASSELS, J. (June 4, 1918) delivered judgment.

This is a proceeding on behalf of His Majesty on the information of the Attorney-General of Canada

against Robert A. Brenton, Minnie E. Brenton, and Edwin D. King, to have it declared that certain lands expropriated for the purposes of the Halifax Ocean Terminals be declared vested in His Majesty and that the compensation payable therefor be ascertained by this Court.

The defendant, Edwin D. King, was made a defendant, as mortgagee holding a mortgage against a portion of the lands. This mortgage has been paid off, according to the statement of counsel, and he is no further interested in the present action.

The case came on for trial before me at Halifax on September 27th, 1916, and subsequent days.

Counsel undertook to file a memorandum in reference to the title, and certain other material, and it is only lately that I received a memorandum signed by both counsel agreeing upon certain facts of importance in connection with the decision of one branch of the case. I shall have to refer to this later on.

The properties in question are situated in the village of Rockingham, about 4 miles from the post office in Halifax. There is not much difference of opinion as to the values of the particular properties expropriated.

The property of Robert A. Brenton, the husband, contains 19,634 square feet, and situate upon his property is a small bungalow. Exhibit No. 3, filed in the action, shows the properties. The Crown have offered for this particular property the sum of $1,410, *viz.*, at the rate of five cents a square foot. The defendant, Robert A. Brenton, claims the sum of 7½ cents a square foot, the difference in dollars and cents being comparatively small.

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The property owned by Mrs. Brenton comprises an area of 10,527 square feet. On this property is situate a house and sheds. In the same way the valuation placed upon the land by the owner is 7½ cents a square foot, the Crown's offer being five cents a square foot.

It is difficult to arrive at an accurate valuation, on account of the absence of sales of this particular class of property in the neighbourhood.

The properties both of Robert A. Brenton, and of Mrs. Brenton extended to high water mark. In front of the property of Mrs. Robert A. Brenton is a water lot granted subsequent to Confederation. The question of the validity of the title to this water lot has not arisen in this case. The Crown in the information filed have not claimed the water lot; and, as stated by Mr. Lovett at the opening of the case, there is no claim made in this case to the water lot, the claim being based upon the riparian rights.

There is some confusion as to the number of square feet in these particular properties, but not of any material moment. The figures which I have given are the figures stated in the information and are the figures shown by the plan.

I will deal first with the question of the value of the lands expropriated before proceeding to deal with the legal question, namely, the question of the damage which Mrs. Brenton claims by reason of the depreciation of certain lands to the west of the railway right-of-way.

Mr. Clarke, who acted for the Government in making the valuation, concedes that the value of five cents per square foot placed by him upon the lands in question, is merely an arbitrary figure arrived at without the advantage of any sales in the

neighbourhood to guide him in regard to the matter. He does, however, admit that the lands in question are of greater value than the lands which were valued by him in the *Maxwell* case,[1] in which I had occasion to give judgment. In that case he had placed a valuation upon the land of five cents a square foot.

James E. Roy is a gentleman whose evidence impressed me as being very fair, and he is a man with good knowledge of the values of suburban properties. Mr. Clarke, referring to Mr. Roy, states as follows: "Mr. Roy has a good knowledge of subur-"ban properties. He has a lot of money in suburban "properties."

"Q. You would call him competent to judge, pro-"vided he gives his evidence in a fair way?—A. "Yes."

I may state that I think Mr. Roy unquestionably gave his evidence in a fair way, and I accept his statement as to values. I think in fairness to Mr. Clarke, I should state, that his evidence was also given with a desire to be fair, but I do not think he is as competent to judge as Mr. Roy in regard to this particular class of property. The difference in question between these two gentlemen was comparatively trifling.

Robert A. Brenton gave his evidence. He valued the 19,636 square feet at 7½ cents per square foot; and the bungalow at $250, making in all the sum of $1,722.55—and with this valuation Mr. Roy concurs —and I find that for this property the proper sum to be allowed to Mr. Brenton would be the sum of $1,722.55, to which should be added 10 per cent.

[1] 17 Can. Ex. 97, 40 D.L.R. 715.

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In regard to Mrs. Brenton's property expropriated, containing 10,527 square feet, at 7½ cents per square foot, the value would be $789.52. On this property is a house and outbuilding which Robert A. Brenton values, for the house $1,200 and for the outbuilding $50. Mr. Roy valued the dwelling on this property at $1,000, and the outbuilding at $50, which amounts to $1,050. This amount being added to the sum of $789.52 would make a total of $1,839.52, which, I think, would be the fair value to be allowed to her, and in addition she should be allowed ten per cent.

This disposes of the question of values of the properties of Robert A. Brenton and of Mrs. Brenton actually expropriated.

The defendants by their defence have claimed the sum of $8,500. This sum of $8,500 includes both the sum claimed by the husband, and the sum claimed by the wife. I do not know whether or not they propose to treat their moneys which are allowed as joint property or not. In the settlement of the judgment this matter can be adjusted.

A further claim is made on behalf of Mrs. Brenton, which involves more of a legal question than a question of values. As I will point out there is practically but little difference of opinion on the question of value.

It would appear that in the year 1854, what was then called the Nova Scotia Railway was constructed. This railway subsequently became a part of the Intercolonial Railway, and it was with a view of widening the right-of-way for the purpose of creating shunting yards that the properties of the Brentons have been expropriated.

In 1854, Mrs. Brenton, or her predecessors in title, owned a piece of land situate on the west side of the old Nova Scotia Railway as then constructed. They also owned the land on the western side of the main highway from Halifax to Bedford, a highway which has been in existence from time immemorial.

It would appear that when the Nova Scotia Railway expropriated the land for their right-of-way, they gave to the owners a right-of-way extending across the railway tracks. This right-of-way was used to enable the owners of the land to reach a wharf which had been constructed on the water-front in connection with the property of Mrs. Brenton expropriated by the Crown, and the other properties now owned by her. Owing to the lapse of time it has been difficult to procure accurate evidence. Mr. Davidson, who was called, shows that at all events for nearly 50 years there was the right-of-way across the railway. Apparently this right-of-way was guarded by gates and was planked during the summer months, and that the wharf was used for the purpose of shipping lumber and lime from the properties on the other side of the track. There is no contest practically in regard to this point. Mr. Rogers, K.C., who was acting for the Crown, and who has spent a considerable amount of time in considering the facts, puts it in this way at the trial: "I say the right-of-way is from the "public way down to the shore. It is separate. It "is a question whether any damages could be re-"covered, but if so, it should be very inconsiderable.

"HIS LORDSHIP—Those lands on the west side are "connected with the right-of-way.

"*Mr. Rogers*—Yes, Mr. Brenton, when he bought "the whole of the land, in that connection bought

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"the right-of-way which extended from the east side "of the public road across down to the railway and "thence across the railway.

"HIS LORDSHIP—I asked the question whether the "right-of-way was limited to those lots on the water "side of the highway down to and across the rail- "way, or as well to the lots on the west side of the "road.

"*Mr. Rogers*—It was purchased all at the same "time.

"HIS LORDSHIP—I asked Mr. Lovett whether it "was not a right-of-way which was confined to the "lots on the other side of the highway.

"*Mr. Rogers*—The lots are described in three "different parcels.

"*Mr. Lovett*—And the right-of-way is attached "to all of them, each one of them having a right-of- "way to the shore.

"*Mr. Rogers*—I am expressing some doubt as to "whether the legal situation was not somewhat dif- "ferent. Supposing that on that lot where Brenton "lived there was held to be a right-of-way, a right "to go through someone else's land to the shore; "that was this case: undoubtedly that man would "be entitled to recover damages; but there were "three lots, and the deed says, 'Together with a "right-of-way from the east side of the road to the "shore,' as a separate parcel or easement. The "owner of the land, while he owned all those three "lots, of course, could use all that right-of-way. He "bought it and could use it, but the question is, is "that in a commercial or business sense so pertin- "ent to this land up here that it is anything more "than a nominal value to the land down there?"

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The lots referred to include lots both on the west side of the right-of-way taken by the Nova Scotia Railway and bounded on the west by the highway, as also the lots held and owned by the same owner on the west side of the main highway.

An agreement was filed describing the title, signed by the solicitor for the plaintiff and by the solicitor for the defendant, in the words following:

"1. The whole of the property of Mrs. Brenton, "consisting of the lot between the railway right-of- "way and the shore of Bedford Basin (the expro- "priated area), the lot between the railway right-of- "way and the main road and the lot on the west of "the main road, together with the adjoining lands "on both sides, and together with the railway right- "of-way before same was expropriated, was held as "one undivided property by Thomas Davison, who "procured title thereto by deeds dated 1838 and "1839, recorded in Book 66, page 50, and Book 67, "page 500.

"2. In June, 1854, the plans of the Nova Scotia "Railway were filed in connection with the expro- "propriation of the right-of-way.

"3. In August, 1854, Thomas Davison conveyed "the whole block of land to John Davison by deed "recorded in Book 107, page 581. The description "of the lands so conveyed makes no reference to "the railway right-of-way.

"4. In 1869, John Davison conveyed the lot of "land between the shore and the railway right-of- "way (the expropriated area), the lot of land be- "tween the railway and the main post road, and the "lot of land west of the main post road, together "with a right-of-way over the road from the main

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"post road to the shore to George Roome by deed "recorded in Book 161, page 644. The description "in said deed is as follows:

"All those three lots and parcels of land situate "on the western side of Bedford Basin, in the County "of Halifax, immediately joining the south side of "the property of Ephraim E. Burgess, and particu- "larly described as follows; namely, lot number one, "beginning at the western shore of Bedford Basin, "at a post on the south line of Ephraim E. Burgess' "property; thence to run westerly on said southern "line or south seventy-six degrees west to the Pro- "vincial Railroad; thence southerly by the side of "the railroad two chains and eighty links to a post; "thence north eighty-one degrees and forty-five "minutes east to the shore of Bedford Basin at high "water mark; thence northerly by the various "courses of said shore to the post at the place of "beginning. Second lot, above railway, east side of "Bedford Basin. Third lot, on west side of road; "together with a right-of-way for the said George "Roome, his heirs and assigns, his and their ser- "vants, tenants and agents, at all hours of the day "and night, with cattle, carts and all kinds of "vehicles, in, over and upon the road or passage "now located at the north end of the said John "Davison's house, and leading from the main post "road to the wharf, situate on lot number one here- "inbefore described, said road or passage to be of "sufficient width for conveniently using the same for "carting and trucking thereon.

"5. The said George Roome was the predecessor "in title of Mrs. Minnie E. Brenton, the present "owner of the three lots, and said lots have always "been held and owned by one owner from the time

"same were conveyed as one property to the said "George Roome.

"6. The evidence of Christopher Davison on the "record shows that the right-of-way, or road, from "the main post road to the sea shore on lot expro- "priated existed and was used in connection with "this property owned by one person, that the said "roadway continued to exist and be used in con- "nection with said property down to the time of ex- "propriation, the only difference being that gates "were erected on each side of the railway right-of- "way and in winter time the planks which were put "between the rails in the summer months to prevent "derailment were removed and replaced by the rail- "way in the spring. The gates were maintained by "the railway. Davison's recollection does not go "back of 1865.

"7. There is no written record that can be found "with reference to the old Nova Scotia Railway pro- "ceedings after the filing of the plan referred to in "paragraph 2 hereof.

"Dated at Halifax, N.S., November 8th, 1917."

It appears there are no records obtainable in regard to the proceedings at the time the Nova Scotia Railway expropriated the lands, and all that we have is that in point of fact a right-of-way was given by the railway and was continuously used in the manner indicated. I desired to have evidence as to the dates of the erection of the houses on the lands on the west side of the highway, but have been lately informed by counsel that no such evidence can be procured.

I am of opinion that these properties being held by the same owner, that the right-of-way over the railway and the right to reach the water-front was

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a valuable asset, and that the expropriation of the property of Mrs. Brenton, taking away all access by this right-of-way to the waters of Bedford Basin was a very serious injury to the property not expropriated, situate between the right-of-way and the main highway, also to the properties to the west of the highway. The locality in question was intended as a summer resort for the citizens of Halifax, and in later years also became a winter resort. The right of access to the water-front for boating purposes and bathing purposes, etc., is a valuable right. Mr. Robert A. Brenton places the depreciation upon these properties at 25 per cent. Mr. Roy corroborates this claim. Mr. Clarke, in his valuation, paid no regard to the question of the depreciation in value of these properties. He admits, however, that the cutting off of the access to the water depreciates the rest of the property. He thinks the property has depreciated from 10 to 15 per cent., if access to the water is cut off. He is referring in his answer to the property situate between the highway and the right-of-way. He states, however, the same in regard to the lands on the west side of the highway, which, he thinks, would also be depreciated from 10 to 15 per cent., but, as he states, it is only a guess. He agrees with Mr. Brenton and Mr. Roy that a fair value for the land on the west side of the highway, as also the land on the east side of the highway, extending to the right-of-way of the old Nova Scotia Railway would be about 10 cents per square foot. He is unable to speak as to the value of the houses situate upon these two properties not expropriated, and I think the values placed upon them by Mr. Brenton, and corroborated by Mr. Roy, should be accepted.

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I accept Mr. Roy's statement, and I would allow for the depreciation to these other properties 25 per cent., amounting to $4,130. This would allow the defendants for the lands taken, the property of Brenton, the sum of $1,722.58, the property of Mrs. Brenton, $1,839.52, and for the depreciation of Mrs. Brenton's other lots the sum of $4,130, making in all the sum of $7,692.10.

The parties are entitled, I think, to 10 per cent. on the sums of $1,722.58 and $1,839.52, but not upon the damages occasioned by the depreciation of the properties not expropriated.

I think that if the defendants are allowed the sum of $8,100 they will be fairly compensated for the value of the lands taken, and all the damage which they have sustained, including all claims for compulsory taking and damage to the balance of the farm.

The defendants are entitled to interest and the costs of the action.

If I have fallen into any inaccuracies as to measurements, counsel will kindly communicate with the Registrar.

Judgment accordingly.

1918
June 15.

IN THE MATTER OF THE PETITION OF RIGHT OF
DAME LOUISE BONIN,
SUPPLIANT,
AND
HIS MAJESTY THE KING,
RESPONDENT.

Negligence—Right of action—"Ascendant" relative—Stepmother.

A stepmother is not an "ascendant" relative within the meaning of art. 1056 of the Quebec Civil Code, so as to entitle her to a right of action for the death of a stepson killed while in the discharge of his duties in a ship-yard of the Crown.

PETITION OF RIGHT to recover for the death of an employee while in the service of the Crown.

Tried before the Honourable Mr. Justice Audette, at Sorel, P.Q., June 5th, 1918.

Adolphe Allard, and *P. J. A. Cardin,* for suppliant.

F. Lefebvre, K.C., for respondent.

AUDETTE, J. (June 15, 1918) delivered judgment.

The suppliant, by her petition of right, seeks to recover the sum of $5,000 for alleged damages arising out of Alfred Goulet's death, resulting from an accident which occurred while he was engaged in the discharge of his duties as boiler-maker in the Government shipyard at Sorel.

On August 11th, 1915, Alfred Goulet was occupied with other workmen in assembling or uniting the head and the shell of a boiler. This head, which, according to the evidence, weighed, according to

some witnesses, about 2,500 lbs., and to others about 4,000 lbs., was suspended on a tackle working on a traveller extending from one end of the building to the other. To the truck, working on this traveller, was attached a block, with 5 or 6 pulleys; and hanging under the block was a large hook, to which was inserted a double strap of chains terminated with hooks opening at a bent of about 45 degrees. These hooks were inserted in the head of the boiler, which was held upright by the tackle, and had thereby been brought close to the shell. All around the inside part of the head was a flange, which at the time of the accident, rested, at the bottom, on the inside, of the shell, which was lying on the ground.

The foreman had gone inside of the shell with the object of bolting the head and the shell together, and finding that the hole on the flange did not quite coincide with the hole in the shell, he called out, "*Donnez un petit coup.*" On this, Alfred Goulet, the deceased, took a crow-bar and raised the head with it. By so doing the head slanted and its weight was released from the tackle and the hooks slipped out, the head falling upon Goulet. He died about an hour and a half after being extricated from underneath this heavy piece of metal.

According to the evidence of the witnesses heard in this case, the use of the crow-bar in the manner mentioned was very dangerous, and a manner of operating unknown to them under such circumstances, and one which never should have been resorted to. The tackle should have been used. Although Alfred Goulet is given a very good character, and is presented as a good and experienced workman, he was condemned by all hands in respect of the use of the crow-bar. This was the sort of work

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he was daily engaged in, and the tackle was always used to move the head of the boiler; but it is to be assumed that the victim had become so familiarized with this class of dangerous work that he did not see fit to take the precaution consistent with ordinary prudence.

Goulet having died intestate, his brothers and sisters inherited all he had at the time of his death, obviously to the exclusion of his stepmother, who is not a blood relation.

Be the facts as they may, a very serious question of law confronts the suppliant and stands in her way, preventing her from recovering. Indeed, Alfred Goulet is not the son of the suppliant. He is the son of Henri Goulet and of Marie Louise Genereux, his father's first wife, as appears by the baptism certificate filed herein as Exhibit No. 1.

Henri Goulet, the victim's father, married twice, and the suppliant is the second wife and a stepmother to Alfred Goulet, therefore there is no consanguinity or blood relationship between them.

Under Art. 166, C. C. P. Q., children are bound to maintain their father, mother and other ascendants, who are in want. Under Art. 167, sons-in-law and daughters-in-law are also obliged, in like circumstances, to maintain their father-in-law and mother-in-law, and such obligation ceases when the mother-in-law contracts a second marriage, and when the consort through whom the affinity existed, and all the children issue of the marriage are dead. However, the obligation towards a mother-in-law does not extend to a stepmother, who cannot be considered as an ascendant. And, as it is said by Mr. Mignault,[1] no maintenance is due, under the circumstances, "*a*

[1] *Droit Civil Canadien*, at p. 483.

la seconde femme de mon père (ma marâtre)." Therefore, a step-mother is not an "ascendant" within the meaning of the Code.

The only right of action the suppliant can have, in the present case, as against the Crown—provided always the facts can be brought within the provisions of sec. 20 of the *Exchequer Court Act*—arises under Art. 1056 of the Civil Code. This article reads as follows:

"In all cases where the person injured by the "commission of an offence or a quasi-offence dies "in consequence, without having obtained indemnity "or satisfaction, his consort and his ascendant and "descendant relations have a right, but only within "a year after his death, to recover from the person "who committed the offence or quasi-offence, or his "representatives, all damages occasioned by such death." . . .

Alfred Goulet, after the accident and while alive, had a right of action under Arts. 1053 and 1054, C. C. After his death, without having obtained indemnity or satisfaction, and he being unmarried, his ascendants alone had a right of action, and as his step-mother (*marâtre*) is not his ascendant, within the meaning of the Code, she has no right of action. This right of action did not form part of Alfred Goulet's estate, and can only be exercised by the blood relations mentioned in Art. 1056 of the Civil Code for the torts suffered by them. See Mr. Mignault's *Canadian Civil Law,* Vol. 5, p. 379, and the numerous cases therein cited.

Therefore, the suppliant is not entitled to any portion of the relief sought for by her petition of right, and judgment will be entered for the respondent.

Petition dismissed.

1918
April 27

IN THE MATTER OF THE PETITION OF RIGHT OF

ALDERIC BOYER,

SUPPLIANT,

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Canal—Open bridge—Automobile—Reckless driving.

The suppliant, in the course of a joy-ride, driving an automobile without a chauffeur's license, attempted to cross a Government canal bridge when the bridge was being opened and the gates down, after being signalled to that effect by the bridge-master, resulting in the machine and its occupants plunging into the canal.

Held, under the circumstances and evidence, the suppliant has made out no case against the Crown, and that the accident was brought about by his own negligence.

PETITION OF RIGHT to recover damages for alleged negligence of officers and servants of the Crown.

Tried before the Honourable Mr. Justice Audette, at Montreal, April 19th, 1918.

L. Camirand, and *J. A. Thouin,* for suppliant.

J. A. Sullivan, for respondent.

AUDETTE, J. (April 27, 1918) delivered judgment.

The suppliant brought his petition of right to recover the sum of $1,525, for alleged damages resulting from an accident which happened while he was driving an automobile, without the license of a

chauffeur, in the course of a joy-ride and in the attempt to cross over the Wellington bridge, over the Lachine Canal, when the bridge was open and the gates down.

At about 4 o'clock, on Sunday afternoon, July 15th, 1917, a vessel was coming up the Lachine Canal, when the bridge-master, standing at point "A" on plan, Exhibit No. 1, rang a first bell, indicating the bridge was to be opened. At this bell, the bridge-tender, or gate-man, being somewhere around point "B" on the plan, put down his southern gates and the motorman got to his post, inside his small building, in the centre of the bridge, 23 feet above the travelled part thereof. This square building has 4 windows overlooking all around.

There being no traffic on the bridge, the bridge-master gave the second bell, which carried with it the order to open the bridge. When hearing the second bell, Drolet, the man in charge of the mechanism, and placed in the small building 23 feet above the bridge, after especially ascertaining there was no one on the bridge, started to open the bridge, which is managed by electricity.

Hanney, the bridge-master, testifies that before he gave the second bell, he ascertained there was no one on the bridge, and that the gates were down; and adds, that no one was in sight at the time the gates were put down.

However, after the second bell, and when the bridge had started to move, he says he saw an automobile, by St. Patrick Street corner, coming from Verdun toward Montreal. He then "halloed" to the gateman, on the south-eastern side, to stop the

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automobile, and he himself shouted once or twice. Mullin, the gateman, standing in the street, put up his hands to stop the automobile; but its occupants paid no heed to his warning, and he had to run out of the street not to be knocked down.

Coming at a rate of speed between 16 to 17 miles, according to some witnesses, and at 18 to 20 miles an hour, according to others, the automobile dashed into the gate. The radiator of this McLaughlin machine smashed the leg of the gate, raised the hand or gate, and coming to the edge of the approach, which the bridge had already left, plunged into the canal with its 5 occupants.

The support of the gate had been broken, the hand of the gate scratched, forced and strained. From that time on until the gate was repaired on the Monday, ropes were used in place of the gate, which was taken down on the Monday and repaired, as testified by the foreman of the machine shops at the Lachine Canal.

Freed from unnecessary details, these are the facts as testified by witnesses, who impressed me both by their demeanour and the honest manner in which they gave their evidence. This evidence is the result of the testimony of the bridge-master, the gateman, the engineer at the bridge, and also by an entirely disinterested intelligent witness, an employee of the Montreal Street Railway, who was stationed on the south-eastern end of the bridge, and who witnessed the accident.

In face of this evidence, the suppliant, who was heard as a witness, under his oath testified the gates were opened and that no signal to stop was given him. Repeating if the gate had been closed, he

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would not have passed, and that after getting beyond the gate the left wheel of his motor ran onto the moving bridge, where, after being suspended for a short while, they plunged into the canal, as above mentioned. The suppliant further stated he perhaps touched the gate with the top of the motor, but that he did not perceive it himself. This painfully reckless testimony is corroborated by one of the occupants of the automobile, who was asked whether he had heard the suppliant giving his testimony, and whether he approved of it, and he answered in the affirmative.

The other two occupants of the automobile, besides the child, were not heard as witnesses.

As a sequence of this testimony, the suppliant charges the officers of the Crown with negligence for leaving the gate open and for want of giving warning when the bridge was open. Is such behaviour and testimony the result of mental insolvency or of dishonesty?

However, without unqualified hesitation, I find the evidence adduced on behalf of the suppliant as most unreliable, and disbelieve it. The abuse of the sanctity of an oath was most manifest in the present case. I will leave the persons who have been guilty of such an abuse to settle the matter between their conscience and their God.

I leave the case at this point untrammelled with any further details which would only go towards establishing more clearly the result I have arrived at.

The case is not proven.

The suppliant has been financially the victim of his foolhardy and reckless driving. Seemingly the

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case would, with greater propriety, under the circumstances, have come before this Court at the instance of the Crown for the damages caused by the suppliant.

There will be judgment dismissing the action, and with costs, in favour of the Crown.

Petition dismissed.

TORONTO ADMIRALTY DISTRICT.

1918
Nov. 5.

FRED JOHNSON AND ADAM BROWN MACKAY,
PLAINTIFFS,

AGAINST

S.S. "CHARLES S. NEFF"
THE SHIP.

Motion to strike out party—Right of action by purchaser—Practice in salvage action.

A plaintiff who complains that his name is being used without authority may be retained as plaintiff if he has acquiesced in the action being prosecuted, although he may not have originally instructed the solicitor.

The purchase of an interest in a ship after the performance by it of salvage services does not necessarily disable the purchaser from prosecuting an action to recover same, when defended by underwriters.

It is proper to have the master and crew before the Court in an action for salvage.

The maritime lien for salvage arises when the service is performed.

It is not necessary in a salvage case to add cargo or freight unless a claim is made against them.

When actions are brought by the same plaintiff in Courts of different local jurisdictions, but by the same procedure, and the judgments in which are followed by the same remedies, such action will be treated as *primâ* facie vexatious.

MOTION by plaintiff Johnson to strike his name out of the record as a party plaintiff, and to stay proceedings, and motion by plaintiff Mackay to add the crew of the ship "Sarnor" as parties, plaintiff, and for the delivery of pleadings.

Heard in Chambers before the Honourable Mr. Justice Hodgins, Local Judge in Admiralty, on the 12th and 26th days of October, 1918.

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R. S. Cassels, K.C., and *J. A. H. Cameron,* K.C., (Montreal), for plaintiff Johnson.

C. V. Langs, for plaintiff Mackay.

M. J. O'Reilly, K.C., for the ship.

HODGINS, Loc. J. (November 5th, 1918) delivered judgment.

It is contended on behalf of the plaintiff Johnson that his name was and is being used without his authority in this salvage action by his co-plaintiff Mackay. He was master of the "Sarnor" when she rendered the services in question, and he and Bonham, the engineer, are entitled to a share of the profits and an interest in the "Sarnor" if Mackay is repaid his expenditure in purchasing and operating that steamer.

Johnson has been cross-examined on his affidavit in this matter and the correspondence between him and Mackay and others has been produced. I am quite unable, in the face of what appears, to accept the profession on which this motion is founded, that he did not know of his claim for salvage as master and registered owner or his interest in it as a person entitled to a share in the vessel itself, nor can I believe that he did not know that it was being pressed in the form of an action, and that an attempt had been made to arrest the ship for that claim, or that the use of his name was not disclosed to him. My finding on this branch of the case is that he knew and acquiesced in the claim and in this action until Mackay took proceedings against him and Bonham. The writ in that case was issued on August 23rd, 1917, and the writ in Montreal on September 2nd, 1917. It looks as though this made him

apprehensive that he would lose his interest in the "Sarnor" unless he could recover enough from the "Neff" to pay up his share. His joining in the action in Montreal was, I think, due to Bonham. who is described in his affidavit as living there, and the present motion rather indicates a move to embarrass Mackay from getting his salvage claim settled until Johnson and Bonham have had a try for a large enough sum to pay him off altogether. However that may be, it is difficult after reading his examination and the log, to see how the "Sarnor," a vessel worth, in Bonham's estimation, something under $30,000, and bought for $6,700, could earn in three and one-half hours by towing the "Neff" to Port Colborne, a sum of $117,000, or over $33,000 per hour, while the wind was S.S.W., fresh and hazy and becoming strong later. I am, therefore, somewhat doubtful of the *bonâ fides* of that action for the entire value of the salved ship. See as to quantum of salvage remuneration *Pickford v. S.S. Lux*,[1] *The Werra*,[2] I cannot strike out Johnson's name in this action on the ground put forward. Acquiescence is quite sufficient to take the place of initial authority. *Hood v. Phillips*,[3] *Allen v. Bone*,[4] *Maries v. Maries*,[5] *Scribner v. Parcells*.[6] There is to my mind abundant evidence of it here. I cannot readily accept the apparent ignorance in a master mariner of eight years' standing, of his right to set up and maintain a claim for salvage which he now places at no less than $117,000, or of his right to seize the vessel for it, while she lay at Port Colborne. I think his lament

[1] (1912), 14 Can. Ex. 108.
[2] (1886), 12 P.D. 52.
[3] 6 Beav. 176, 49 E.R. 793.
[4] 4 Beav. 493, 49 E.R. 429.
[5] 23 L.J. Ch. 154.
[6] 20 O.R. 554.

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(in the letter of March 2nd, 1917, to Mackay), "It is "really too bad we didn't stay with her that day in "Port Colborne till all papers had been served," should be taken as he wrote it, i.e., expressive of genuine disappointment at not securing the "Neff" by warrant in this action before she got away on the day following the salvage operation. It appears also from the papers submitted that Johnson is the registered owner of the "Sarnor," but that he has disclaimed in favor of Mackay, who is the real owner. This acknowledgment and disclaimer is, however, accompanied by a contemporaneous document between Johnson, Mackay and Bonham under which, in the event of certain payment being made to Mackay, the others would be entitled to a 20 per cent. and 40 per cent. interest, respectively, in the ship "Sarnor," and that meantime the moneys received from the operation of the ship are to be used as therein designated. It is sworn by Bonham that Mackay is not the owner, but has only an equitable interest to the extent of 40 per cent. This is also Johnson's contention. The point raised is that when the accounts are taken Mackay will be paid off and that they have not been settled. I think Mackay is entitled to have Johnson, as registered owner, before the Court to avoid difficulty as to title, and if necessary to use his name upon proper indemnity being given if demanded. *The Two Ellens*,[1] *The Annandale*.[2] Johnson was also master, and under the agreement operated the ship. A recovery by Mackay alone might be blocked by Johnson's ostensible interest as owner. At all events, questions of title and the right to recover might arise if Johnson were absent, especially in

[1] (1871), L.R. 3 A. & E. 345, 355.
[2] (1877), 2 P.D. 179.

view of the purchase by Mackay since the institution of the suit, of a half interest in the "Neff" in April, 1917. However, Johnson may be bound by what has been done in the past, he has his own remedy if he wishes to abandon his claim now and elect to drop out as plaintiff. Exchequer Court (Admiralty) r. 228 applies the practice from time to time in force in respect to Admiralty proceedings in the High Court of Justice in England. These rules enable him to change his solicitor and then discontinue upon such terms as are open to him, (See *Roscoe's Admiralty Practice*),[1] or take any course in the future as his interest dictates. But on this motion he must fail, as up to the present time he is bound by what has been done.

He may now desire to remain as plaintiff, though represented by a different solicitor, or he may be willing that his name should be used upon proper indemnity being given, or he may prefer to come to Court, after changing his solicitor, for leave to discontinue altogether. On that application the exact position of himself and Mackay may be considered. I do not think that the purchase of a half interest in the "Neff" by Mackay disables him from prosecuting the present action which is being defended by the underwriters. Had Mackay been part owner of the "Neff" when the action was begun, it would be easier to determine the point. But how far the cases on that point are applicable I cannot at present say. The purchase after the services has been rendered may create a difference, and I do not desire to do more than mention the matter so that it will be considered in any future application.

[1] (1903), 3rd Ed., 303, 333, Order 7, rule 3; Order 26, rule 1.

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It is proper to have the master and crew before the Court in an action for salvage, and I will, under r. 30, add the crew and the underwriters as parties defendant and give leave to amend in that direction. *The Regina del Mare*,[1] *The Diana*.[2]

My refusal of Johnson's motion to strike out his name does not dispose of the whole matter. A stay is asked because of the institution of the action to which I have referred, now pending in Montreal.

The present action is one *in rem*, and jurisdiction properly exists under the *Admiralty Act*,[3] if the *res* was within the jurisdiction when the action began. The writ was issued on November 30th, 1916, and at noon that day the "Neff" left Port Colborne, in Ontario. The law assumes the issue of the writ at the earliest hour of the day on which it bears date, and there is therefore no doubt that it was well begun and is properly maintained to-day. The maritime lien arose when the salvage service was performed, and the writ was a process to enforce it. *The Bold Buccleugh*.[4]

The slipping away of the vessel does not affect the question. As a matter of fact, the salvage service was rendered chiefly in Ontario waters, and ended in a harbour within this Admiralty District.

The action in the Quebec Registry was begun without the leave of the Judge or Court,[5] and I have little doubt that when this fact is brought to the notice of the learned Judge in Admiralty in Montreal his attention will also be drawn to the cases dealing with the subject of priority. I may mention

[1] (1864), Br. & L. 315.
[2] (1874), 2 Asp. Mar. Ca. 366.
[3] (1906), ch. 141, s. 18 (a).
[4] (1850), 7 Moo. P. C. 267, 13 E.R. 884.
[5] *Admiralty Act*, R.S.C. 1906, ch. 141, ss. 18, 82.

the following: *The Christiansborg*,[1] where Lord Esher quoted with approval the language of the late then Master of the Rolls in *McHenry v. Lewis*,[2] as follows:

"In this country, where the two actions are by the "same man in Courts governed by the same proced- "ure, and where the judgments are followed by the "same remedies, it is *primâ facie* vexatious to bring "two actions where one will do."

See also remarks on this point by Anglin, J., in *The A. L. Smith v. Ontario Gravel Co.*[3]

In the present case the actions are both in the same Court, where the same law is administered and the same remedies prevail, and it is easy to avoid any hardship by transferring the later action to the District in which the earlier action was commenced.

This action is for salvage against the ship "Neff," but not against cargo or freight. An action *in rem* against the cargo and freight can only be brought if cargo is on board the ship, *i.e.*, the cargo liable because salved with the ship.[4] The cargo that the "Neff" had aboard must have long since been unloaded and the freight paid, but they are not the same cargo and freight as are said to be attached in Montreal, which, I should think, would be in no way liable for this salvage. Both actions are therefore in the same position as to cargo and freight.

What are urged as defects in this action, I do not understand to be defects in the sense in which that word is used in dealing with the constitution of actions. To make a suit defective so as to deprive it

[1] (1885), L.R. 10 P.D. 141.
[2] 22 Ch. D. 397.
[3] 51 Can. S.C.R. 89 at 78, 28 D.L.R. 491.
[4] See *Rules of Practice*.

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of the right of priority in conduct, something is needed beyond matters which are readily amended, *i.e.*, something vital or essential disabling the plaintiff from suing. *Re McRae.*[1] It is not necessary in a salvage case to add cargo or freight, and this action is in no sense, as I have pointed out, defective by reason of its not being done.

Apart from these questions there is a larger one of the discretion to be exercised by me, as to staying the action, having in view the pendency of the action in Montreal, the seizure of the ship there and its release on bail.

The action in this Court was begun first. The services were performed for the most part within this local jurisdiction, and the writ properly issued while the *res* was in Port Colborne, in this Province. *Primâ facie,* the second action is vexatious, and no leave was obtained before it was instituted. The arrest and the release on bail are, of course, matters of moment, and the defendant vessel should not be unduly harassed. It was for this very reason, I presume, that the Statute requiring leave was passed. No application was made to me to transfer this action to the Quebec Registry, while one is pending there to transfer that action to the Toronto Admiralty District. The evidence will be more conveniently taken within this Admiralty District, where Johnson and Mackay live and where those on the "Neff" can more readily attend. The underwriters, too, who are interested, desire this action to go on here.

Were I convinced that any of the objections either as to the form of this action, its parties, or the amount claimed were real and serious, and that an

[1] (1883), 25 Ch. D. 16.

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injustice might or would happen if the case were not stayed, I should be disposed to yield to the motion, but I do not think the justice of the case demands this. The person moving is the one who has himself set in motion the second action. No good reason has been alleged for this, and no light was during his cross-examination permitted to be thrown on the services rendered so as to enable me to judge whether they indicated any reason to excuse or justify the double proceedings. The bail bond stands good in the Exchequer Court wherever the case is heard. I therefore refuse Johnson's motion with costs payable to Mackay and the underwriters—which, if this action proceeds with him as a co-plaintiff, will be paid in any event in the cause—he to elect within one week. If no election is then made and notified to the Registrar these costs will be payable forthwith after taxation.

I grant the order adding the crew as defendants and for pleadings to be delivered. The underwriters may intervene and defend with the owners of the other half interest. There will be no costs of the plaintiff's (Mackay) motion, other than would have been incurred on an ordinary motion for pleadings.

Judgment accordingly.

1918
April 27.

TORONTO ADMIRALTY DISTRICT.

FRED JOHNSON AND ADAM BROWN MACKAY,
PLAINTIFFS,

AGAINST

S.S. "CHARLES S. NEFF",
THE SHIP,

AND

QUEBEC ADMIRALTY DISTRICT.

FREDERICK H. JOHNSON, ET AL,
PLAINTIFFS,

AGAINST

THE SHIP "CHARLES S. NEFF",
DEFENDANT.

Salvage—Mode of estimating amount—Costs—Distribution.

In finding the value of salvage services, amongst other circumstances the Court must consider the degree of danger to which the salved vessel was exposed, and from which she was rescued by the salvors, and the risk incurred by the salvors in rendering their services and the mode in which the services were rendered. The value of the vessel salved, while important, is not decisive. There is a difference owing to conditions rendering disaster less probable in the amount to be allowed for salvage services on the Great Lakes and on the high seas.

CONSOLIDATED actions for salvage.

Tried before the Honourable Mr. Justice Hodgins on 27th and 28th days of March, 1918.

J. A. H. Cameron, K.C. (Montreal), and *R. S. Cassels,* K.C., for plaintiff Johnson and the crew of the ship "Sarnor."

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C. V. Langs, for plaintiff Mackay.

M. J. O'Reilly, K.C. (Hamilton), and *W. B. Scott,* (Montreal), for ship "C. S. Neff" and the underwriters.

HODGINS, Loc. J. (April 27th, 1918) delivered judgment.

Consolidated action for salvage tried before me at Toronto on the 27th and 28th days of March, 1918. The ship "Sarnor" on Nov. 29, 1916, about 10.15 a.m. went to the assistance of the ship "Neff," then at anchor six miles off the south shore of Lake Erie, near Dunkirk, N.Y. The ship had lost her propeller about 6 a.m. through striking some submerged obstacle. The "Neff" was taken in tow, and brought safely to Port Colborne. Just outside the harbour, the "Sarnor" cast off the tow line and tied up to the "Neff" in order to better make the harbour. The operation took about five hours and was performed without any untoward incident.

I have come to the conclusion that the plaintiffs are entitled to salvage. The "Neff" is a steel steamer, canal size, 225 feet long by 40 feet beam, the value of which I find to be $90,000 in her damaged condition when found by the salvors. She had a cargo of 1,293 tons of pig iron, worth about $32,000, and the freight being earned thereon from East Jordon, Mich., to Buffalo was stated to be $2,000. The loss of her propeller had injured the low pressure port column and the pump bracket was fractured. These injuries reduced her pumping capacity. She was off a shore said to be strewed with boulders and likely to become a lee shore if the wind should shift, as it did at 3 p.m. that day. Her mate, Lindeman, said

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that the weather glass showed that something might develop, and that if the sea got up there would be danger. Her captain, Doak, agrees as to the warning given by the barometer, which began to drop on the morning of November 28, and says that he went over to the south shore of Lake Erie to avoid a sea if the wind shifted and increased, as was indicated. He says that with her wheel gone there would be danger, but not otherwise. He, in fact, sounded distress signals to attract the attention of several ships which passed. His ship was, of course, helpless and had to depend on her anchors holding, if it came to blow. It was shown by the weather bureau records that on the morning of November 29th there was a fresh to strong westerly wind, cloudy at Port Colborne, and possibly raining on the south coast of Lake Erie, and that in the evening the wind shifted to the southwest. Its velocity near Dunkirk was between 20 and 32 miles an hour. Its effect may be deduced from the fact that after the ship "Neff" was in Port Colborne she had to be shifted by two tugs to the inner harbour on account of the freshening of the wind, which Captain Doak describes as "strong wind, squally," and that the "Sarnor," after leaving next morning, laid up all that day behind Long Point. On the other hand, the "Neff's" captain says he was in the usual line of travel to Buffalo. This is denied by Johnson, who puts the "Neff" eight or ten miles off the beaten track. But it appears that between 6 a.m. and 10 a.m. three vessels at least passed, but without responding to the signals. The probability of other assistance is an element in lessening the amount allowed for salvage. *The Werra.*[1]

[1] 12 P.D. 52.

As events turned out, the weather did not become heavy until Port Colborne had been reached. But there was apprehension of danger, and, as I view it, some real danger if the "Neff" had been left where she was without any means of propulsion, depending wholly upon the anchors or other passing assistance and with a glass which had been falling for over 24 hours.

I am not impressed with the argument that the operation of salving was attended with any great danger or difficulty. The "Sarnor" is a single-screw wooden vessel of 1,152 tons, 237 feet long and 38 feet beam, with a carrying capacity of 1,000 to 1,100 tons. She was steaming light, going to Erie, Pa., for a cargo of coal. Her captain, Johnson, says he saw the "Neff" two miles off, the sea was not rough, the vessels came within ten to fifteen feet of one another and the tow line was passed without trouble, while the voyage across was uneventful. There is, however, always danger in the manœuvring of a wooden vessel when near a steel ship, both in getting the line, straightening up to tow and in going alongside to tie together, and there is some risk to the crew from the unusual operation.

While, therefore, I hold it to be a true salvage case within the authorities, I am unable to find that the element of danger or risk to the salving vessel was important enough to call for any exceptional compensation. The proper rule in fixing the amount is stated in *The Chetah*,[1] that in estimating the value of salvage services the circumstances, among others to be considered by the Court are the degree of danger to which the vessel was exposed and from which

[1] L.R. 2 P.C. 205.

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she was rescued by the salvors, the mode in which the services of the salvors were applied and the risk incurred by the salvors in rendering the services.

I think the excessive emphasis placed on the value of the salved vessel as an element is due to an imperfect appreciation of the various considerations to be weighed in fixing the amount of salvage, *The Amérique.*[1] Reference may also be made to *Halsbury's Laws of England,* vol. 26, secs. 880-883, and to the case of *The Berwindmoor,*[2] which is helpful in determining the quantum.

There is always to be borne in mind the difference between salvage on our Great Lakes and that at sea. While often the peril is as great and the skill as manifest, there are conditions that frequently render disaster less probable.

In a case which bears much resemblance to this in its details, this element is thus very lucidly stated.

In *The Spokane,*[3] a case decided in Wisconsin by a Judge, appropriately named Mr. Justice Seaman, he observes:

"*The Spokane* was found in the open waters of "Lake Michigan, entirely disabled in her motive "power, and helpless to reach any port for refuge "or repair, at the close of the season, when serious "storms were to be apprehended, and when a falling "barometer indicated a storm pending, she was flying the signal and sounding the whistle of distress. ". . . The delicate and difficult question remains to "determine an amount for this salvage which shall "not only recompense the service, but shall be a just "reward for it, and shall also serve as an encourage-

[1] L.R. 6 P.C. 468.
[2] 14 Can. Ex. 23.
[3] 67 Fed. Rep. 254 at 257.

"ment of others to like action. At the same time, "the Court ought not to impose more than should be "justly paid by the respondents in view of the extent "of peril from which the vessel and cargo were res- "cued, or an amount that would constitute a pre- "cedent discouraging vessels in distress or peril "from invoking and accepting necessary aid. . . . "Upon these Lakes commerce has assumed vast pro- "portions; vessels up and down pursue a regular and "well-defined course, often within sight of shore, "and in case of distress are not liable to remain long "out of sight of other vessels; the newspapers pub- "lish the fact of passing Detroit and other points, "so that the progress and position of all vessels are "approximately known; good harbours are fre- "quent; the towage of large vessels, barges and rafts "has become a feature of this navigation, and only "storms of the utmost severity are regarded as dan- "gerous to such undertaking. The allowance for "salvage must be made in conformity with these "modified conditions. There are few reported de- "cisions in reference to salvage service on the "Lakes; none has been cited justifying the allow- "ance claimed by the libelant. I am satisfied that "it would not subserve the public interest, and would "not be just between the parties to allow so large "an amount for salvage under the circumstances "shown."

The amount finally awarded was $3,600, and the value of the salved vessel and cargo was $320,000, and that of the salvor $125,000.

The salving of the "Neff" delayed the business of the "Sarnor" some five days at a period of the year when maritime risks are greatest. The chance of be-

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ing frozen in between Montreal and Lake Erie is not inconsiderable. She was uninsured. The plaintiff Mackay claims 50 hours detention. The daily expenditure is put at $108.10 by the plaintiff Bonham, who says that he was delayed 4 or 5 days. At the utmost, then, the extra expense would be $540, and at the least, 50 hours, about $250. Towage, which according to the contention of the captain of the "Neff," is the correct description of what was done, would have cost, according to him, an amount which, having regard to the number of hours occupied in going and coming while towing, I should estimate at $250.

I come to the conclusion that, having regard to all the circumstances in evidence, the proper amount to allow as the value of the salvage service would be $2,600, to be distributed between the ship, the cargo and the freight. As the cargo has been discharged and is not before the Court, this will mean judgment in this action for $1,800 against the ship, distributable $1,350 to the owners and $450 to the master and crew. To the master I apportion $150, to the engineer $150, and to the remainder of the crew $150.[1] *The Raisby*,[2] *The Stephie*.[3]

Of this the sum of $1,650 will be paid into or left in Court pending further order. This is owing to the litigation arising out of the relations between the parties plaintiff. The amount allowed to the crew will be divided equally among its members.

The plaintiffs should have the costs of the action brought by Mackay throughout and of the action after the consolidated order, to be paid by the ship.

[1] See *Cox v. May*, 4 M. & S. 152, 105 E.R. 791; *Kennedy on the Law of Civil Salvage*, pp. 180, 186.
[2] 10 P.D. 114.
[3] 15 Can. Ex. 124.

As to the Johnson action it was advisable, and in one sense necessary, in that it resulted in the arrest of the ship and the giving of security on her release. But as it was brought without leave (see rule 18, ss. 2), and was without doubt a most oppressive one so far as the amount claimed was concerned, I will only give the plaintiffs in it the costs of the action up to the consolidation order, but not including therein any costs of or concerning the bail or the release of the vessel or consequent upon the order made therefor other than what would have been incurred if the claim had been stated at a more reasonable sum, say $5,000. I follow in this the precedent set by Mr. Justice Drysdale in *The Uranium*,[1] and am not adopting the severe action of Butt, J., in *The Agamemnon*,[2] although there would be some justification if I did so. I do not, however, intend in disposing of the costs to interfere in any way with any orders made by Mr. Justice Maclennan in so far as they award costs to either party, unless by the terms of any order or orders they properly fall within my jurisdiction to dispose of. The counsel fees at the trial in the consolidated action will be divided by the Registrar when taxing costs, having regard to the fact that there turned out to be no real reason for separate representation of the master and crew, which I permitted because of the strained relations between Mackay and Johnson and Bonham. I do not see that I can do anything towards reimbursing the ship or the underwriters for their expenditure of $1,050 when giving bail to obtain the release of the vessel. The fixing of the amount was done in Montreal,

[1] 15 Can. Ex. 102.
[2] 5 Asp. 92.

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where that matter could have been dealt with if proper evidence had been adduced before Mr. Justice Maclennan.

I should perhaps call attention to the extraordinary method adopted in keeping the log on the "Sarnor." There are two logs produced, the official one having been written first and the scrap log last; and to the interpolation of the word "West" in the latter. The evidence of the mate of the "Sarnor" was very unsatisfactory on this point.

The testimony given on behalf of the plaintiffs as to the value of the services was quite worthless and may be measured by the difference between the original amount stated in Port Colborne to Mackay, *i.e.*, $10,000 to $15,000, and the amount for which the second writ was issued, *viz.*, $117,000.

Judgment accordingly.

1916
Feb. 14.

HIS MAJESTY THE KING, UPON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

ROBERT E. GRASS AND SARAH M. GRASS, EXECUTOR AND EXECUTRIX OF RULIFF GRASS, DECEASED, AND MARSHALL BIDWELL MORRISON,

DEFENDANTS.

Expropriation—Conflicting theories of value—Voluntary sale—Test of market value.

When in establishing the amount of compensation payable for land expropriated evidence is adduced by one of the parties to show that the land at the time of the expropriation had a potential commercial value inhering in an undeveloped water-power, while the evidence of the other party is directed to show that the land had only a value for agricultural purposes, the Court may accept the price paid for the property at a recent voluntary sale as the proper test of actual market value at the time of the taking.

INFORMATION, filed by His Majesty's Attorney-General for the Dominion of Canada, for the expropriation of certain lands for the purposes of the Trent Valley Canal.

The case came on for trial at Belleville on October 6th, 7th and 8th, 1915. It was argued at Ottawa on October 16th, 1915.

C. A. Masten, K.C., and *A. Abbott,* for plaintiff.

E. G. Porter, K.C., for defendants.

Mr. Porter, for the defendants—The first consideration that I would present is with respect to the title and what rights these defendants had on April 10, 1908, when the Government took possession. Now, the defendants' title in one aspect of the case, de-

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pends upon the patent from the Crown. During the course of the trial it was agreed between counsel that whatever rights or title the original grantee from the Crown obtained by the grant, that my client now possesses the same rights.

[*Mr. Masten*—For the purpose of this argument it was agreed subsequently that the usual clause should be inserted in the judgment, that the money should be paid upon the title being demonstrated—in other words, we are not questioning the title here.]

Mr. Porter—This patent uses the words "water's edge."

[THE COURT—They are often found in grants where the line runs to the shore; being bounded by the river, the grantee is to have the riparian rights.]

That is why I say "water's edge." When it is to the bank it leaves an intervening space, but that question does not arise here because here it is the "water's edge" of the river. The *habendum* clause reads as follows:

"To have and to hold the said parcel or tract of "land to him the said William Allan, his heirs and "assigns for ever; saving, nevertheless, to us, our "heirs and successors, all mines of gold, silver, cop- "per, tin, lead, iron and coal that shall or may now "or hereafter be found on any part of the said par- "cel or tract of land hereby given and granted as "aforesaid; and saving and reserving to us, our heirs "and successors, all white pine trees that shall or "may now or hereafter grow, or be growing on any "part of the said parcel or tract of land hereby "granted as aforesaid."

[THE COURT—Would that take away your pine tree claim?]

No. We have the right to all the pine that is there for all purposes—the statute gives us that. Then, what I submit upon that branch of the case is that, apart from any other consideration, with the admission that has been made, my clients have shown not only the title to the land, to the river, by express grant, but there being no reservation in the grant to affect that right, that, therefore, they have taken not only the land that is granted, but whatever other rights the common law would attach to that, and those common law rights, I submit, cover the water to the thread or middle of the stream, whether navigable or not.

Apart altogether from the question of ownership of the bed of the river, or the use of the waters for power purposes, we being the owners of this land by grant from the Crown, and by being bounded by the river, that river gave to the land the additional or special value that land not situate upon a river or accessible to water would not have.

[THE COURT—Whatever rights the *Fishmongers'* case[1] gives you?]

I am speaking of the right or convenience that would attach to that land.

[THE COURT—As outlined by the *Fishmongers'* case?]

Bathing and boating lend additional value.

[THE COURT—But you are not the owner of the bed of the river, unless you have a specific grant?]

Apart from being the owner altogether, we have rights that are appurtenant to these lands. That brings me to the question of the rights of my clients under this patent by the common law; and upon that

[1] *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.

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point I cannot do better than refer to the case of the *Keewatin Power Company v. Town of Kenora.*[1] That was an appeal from the judgment of Mr. Justice Anglin, who wrote a very elaborate judgment the other way.

[THE COURT—It is a very fine judgment.]

Upon that authority and the patent I put in, I have shown that my clients are the owners of the land, and that it carries the ownership to the middle of the stream. Have my clients any further rights? I refer to ch. 129 of the R. S. O., 1914, sec. 4, and my submission is that this statute attaches and gives an additional right to my clients, other than those granted by the common law in these words:

"4. (1) A person desiring to use or improve a "water privilege, of which or a part of which he is "the owner or legal occupant, for any mechanical, "manufacturing, milling or hydraulic purposes by "erecting a dam and creating a pond of water, in- "creasing the head of water in any existing pond or "extending the area thereof, diverting the waters of "any stream, pond or lake into any other channel, "constructing any raceway or other erection or work "which he may require in connection with the im- "provement and use of the privilege, or by altering, "renewing, extending, improving, repairing or main- "taining any such dam, raceway, erection or work, "or any part thereof, shall have the right to enter "upon any land which he may deem necessary to "be examined and to make an examination and sur- "vey thereof, doing no unnecessary damage and "making compensation for the actual damage "done."

[1] (1908), 16 O.L.R. 184.

And sub-sec. 2 provides the machinery by which that right may be exercised upon application to the County Judge and filing a plan.

[THE COURT—This all applies to unnavigable rivers.]

I submit it is not limited in that way at all. If the title to the water and to the bed of the river is in the Dominion Government, then I say that this legislation would not affect it. But if, on the other hand, it is in the Province of Ontario, then the Dominion Government cannot interfere with it. We have the right to link up or connect our water power with any other possible development there in the river by paying compensation such as the County Judge would fix under this Act. And that is important to remember in this view of the case.

It probably will be argued by my learned friend that the head or water-power that my clients possess was so small or so insignificant as not to warrant development. Even if that were so, this statute, if it gives us a right to develop the power at that point, then it is possible for us to develop it just as it is to-day, and it is a valuable water-power.

Prior to the passage of the *B. N. A. Act* there were no potential rights in the Dominion, because at that time there existed the Provinces of Upper and Lower Canada.

[THE COURT—Before Confederation we had the old Province of Canada.]

But as to the Province of Canada, the lands in Upper and Lower Canada belonged to each of such Provinces. What I am arguing is this, the *B. N. A. Act* preserved to those provinces everything that they possessed up to the time of the passage of that

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Act, other than the identical things that were excepted. The ownership of lands was in Upper Canada, as the ownership in the Province of Quebec was in Lower Canada. The ownership of the lands carries with it, as a principle of law, the waters and the right to use the waters. The *B. N. A. Act* declares, in so many words, that the property of the provinces shall continue to belong to the provinces, excepting what is specified in the statute as being taken away from them. One thing taken away is the canals. It does not follow the wording of the old statute, but just mentions canals, with lands and water-powers connected therewith.

My argument upon that is this, that would only take out of the provinces such public works as might be called a canal at that time, and nothing more; and I submit the evidence is clear and distinct here, that even as late as in 1908, when lands were taken possession of, that there was nothing on the River Trent which could be called a canal. The evidence is that at one point, Chisholm's Rapids, there had been a lock constructed away back years ago, but beyond that no work had been done to make the River Trent or any part of it a canal. Now, let me press that further. Would it be reasonable, or could one with any justification, call the River Trent a canal, because there was a lock or a few hundred feet of a canal made in the river at that time? Would it not be just as proper to call the River St. Lawrence the St. Lawrence Canal? Surely no one would think of doing that. There is a string of canals all along the St. Lawrence River, but it remains a river just the same, the St. Lawrence River, and these public works along and upon it are canals that would come

within the operation or construction of that statute. Just so in regard to the River Trent. The River Trent still remains the River Trent, but if there are any works upon that river in the nature of canals, so far as those works are concerned, they would be called canals, and would be under the control of the Government, but beyond that, I submit, the statute does not go. Cites the *Fisheries case*,[1] *Burrard Power Co. v. The King*.[2]

My submission is, that under the operation of sec. 117 of the *B. N. A. Act*, the property in provincial rivers, such as the River Trent, is expressly reserved to the Province.

Counsel for defendants then discussed the question of damages.

Mr. Masten, for the plaintiff—The whole case depends upon whether the water in question is navigable or not. If it is navigable, then the Ontario statute applies, and there is no ownership beyond the edge of the water. However, I will not anticipate the course of my argument.

The first point I propose to deal with is with respect to the statutes, demonstrating, if I can, that legally this is a navigable river, whether in fact and in truth it is physically navigable or not. By the declarations of the Parliament and Legislature of Canada, by force of the words of the statute, it has been made in law a navigable river, even if no boat could ever go down it.

The first Act to which I wish to refer is ch. 66 of 7 William IV., 1837. It is recited in sec. 1 that it is highly important that a line of communication should

[1] *Atty-Gen. for Canada v. Atty.-Gen. for Ontario, et al*, [1898] A.C. 700 at 710, 711.
[2] 43 Can. S.C.R. 27, [1911] A.C. 87.

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be formed between the waters of the Bay of Quinte and Rice Lake, by improving the navigation of the River Trent. Commissioners are appointed to carry out the provisions of the Act.

By sec. 14, the Commissioners are given power to rent or to lease, for any time not exceeding 21 years . . . the use of any water which they may permit to be taken and drawn from the said canal or canals for hydraulic purposes, giving the owners of the land through which such canal or canals may pass the option of using such water at the price fixed by the said Commissioners.

Then the next statute that I refer to is in 1846, 9 years afterwards, ch. 37 of 9 Victoria—Canada. That statute establishes a commission to superintend, manage and control the public works of the province. The commissioners are given the "control and management of constructing, maintaining and repairing of canals, harbours, roads or parts of roads, bridges, slides and other public works and buildings now in progress or which have been or shall be constructed or maintained at the public expense out of the provincial funds."

Then, sec. 18 enables them to enter on property to make surveys, etc. Sec. 23 provides that the several public works and buildings enumerated in the schedule to this Act, and all materials and other things belonging thereto, or prepared and obtained for the use of the same, shall be and are hereby vested in the Crown, . . . and under the control of the said commissioners for the purposes of the Act. Amongst the works mentioned in the schedule is the "Rice Lake and the River Trent, from thence to its mouth, including the locks, dams and slides between those points."

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By the heading of Schedule A to the Act last referred to, these public works are vested in the Crown: "(a) That portion of the Otonabee River, between Peterborough and Rice Lake, with the lock and dam at Whitla's Rapids. (b)The Rice Lake and River Trent from thence to its mouth, including the locks, dams and slides between those points."

Then, in that connection, I would institute a comparison between those words and the language of the items relating to the Ottawa River in the same schedule:

"All such portions of the Ottawa River from the "City of Ottawa upwards, have been or shall be im- "proved at the expense of the Province"; and with that of the next item: "The lock and other improve- "ments on the River Richelieu." There we have a limitation to the particular portions which have been improved, whereas in the case of Rice Lake and the River Trent the language is broad and general, and included the whole area without exception.

The Schedule A also contains under the head of "Public Works" generally, the following: "And all other canals, lakes, dams, slides, bridges, roads or other public works, of a like nature, constructed or to be constructed, repaired or improved at the expense of the Province."

Now, this was a public work to be constructed. I am picking out the particular phraseology applicable to the River Trent. This was a public work contemplated from the year 1857, to be constructed for the improvement of navigation, vested for the particular purpose for navigation in the Crown, under the control of the commissioners, as specially described it falls within the words: "Public works to be constructed at the expense of the Province."

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Now, the effect of the foregoing legislation was to vest in the Crown, in right of the Province of Canada, the whole of the Trent River from Rice Lake to Lake Ontario, as one canal or river improvement. If so, that river passed to the Dominion at Confederation by virtue of sec. 108, and items 1 and 5 of schedule 3 of the *B. N. A. Act.*

[THE COURT—There is an action pending in this Court between the Government of Ontario and the Dominion of Canada about this Trent River. Both parties admit it is navigable. Ontario contends they are entitled to the surplus water over and above what the Dominion has used for the locks, and they claim the same also in respect to the River Niagara.]

Now, whether or not it is called the Trent Valley Canal, it forms part of one navigable system, and I submit would come within the sphere of works contemplated in the proposed Georgian Bay Canal. Looked at from the standpoint of the Government when the statute of 1837 was passed, it is one canal, one undertaking. It is for the purpose of navigation, and the fact that it is vested in the Dominion is borne out not only by the pleadings in the case that your Lordship has referred to, but by the expenditure that has been going on under Parliamentary authorities on Dominion property ever since Confederation. That takes the Trent out of the class of rivers belonging to the Province as contemplated by the *Fisheries* case.[1]

Then, passing to the consideration of the statutes, I come then to the next question whether this river is navigable in fact, and in that connection it has seemed to me that it might possibly be argued dif-

[1] *Atty.-Gen. for Canada v. Atty.-Gen. for Ontario, et al,* [1898] A.C. 700.

ferently in respect to rivers in Ontario and Quebec. The law is not as clear in Ontario, and in some cases there seems to be an indication that the old common law rule prevails, *viz.*, that only tidal rivers were navigable and that there was no other kind navigable. The term "navigable" was discussed in the Supreme Court of Canada. I refer first to the case of the *Attorney-General of Quebec v. Fraser*.[1]

"A river is navigable when, with the assistance "of the tide, it can be navigated in a practicable "and profitable manner, notwithstanding that, at "low tides, it may be impossible for vessels to enter "the river on account of the shallowness of the "water at its mouth." That is in the head note. I cite this case more particularly for the discussion of the term "navigable" by Mr. Justice Girouard, pages 596 and 597.

Then, the next case I refer to is *Tanguay v. Canadian Electric Light Company*.[2] Mr. Justice Girouard said in that case: "Floatable must mean something "different from navigable, for if it means the same "thing, then one of the two words is unnecessary. "Navigable is intended to refer to craft that re- "quires the direction of man and carry a crew. It "comprises rafts as well as vessels, because rafts "need the management of men on board. They float, "it is true, but every vessel does. The words 'float- "able' and 'navigable' are coupled together to pro- "vide for two distinct situations, first, the floating "of vessels and rafts, which is navigation; and, sec- "ond, the floating of loose logs and pieces of timber,

[1] (1906), 37 Can. S.C.R. 577 and 596.
[2] (1908), 40 Can. S.C.R. 1 at p. 32.

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"which is floatage, and is generally done in this "country by gangs of men called 'drivers'; other- "wise the word 'floatable' would have no sense."

The next case to which I would refer is a Quebec case, *Hurdman v. Thompson.*[1] "Une rivière est "navigable et flottable nonobstant que la naviga- "tion en soit interrompue en plusieurs endroits par "des chutes et des rapides."

The next case is an Ontario case, *Keewatin Power Co. v. Town of Kenora,*[2] and the pages I particularly refer to on the question of navigability are 242 to 244 and 263 to 264. Your Lordship will find at page 242 somewhat of a digest of a number of cases in Ontario and in New Brunswick relating to what is "navigability", gathered by Mr. Justice Anglin in his very admirable judgment. He says: "It is the "adaptation of a stream to purposes of navigation, "and not the being adopted in use, that renders it "a navigable river." Anglin, J., cites *Regina v. Meyers,*[3] *Esson v. McMaster.*[4] I understand Mr. Justice Anglin's view to be that a river might be navigable up to a certain point. He divided the river into two parts, navigable up to a certain point, and unnavigable above that point.

[THE COURT—*MacLaren v. The Attorney-General of Quebec,*[5] I think, settled that.]

I would refer your Lordship to the case of *Bell v. The Corporation of Quebec.*[6]

[1] (1895), 4 Que. Q.B. 409.
[2] (1906), 13 O.L.R. 237.
[3] (1853), 3 U.C.C.P. 305, 318.
[4] (1842), 1 Kerr N.B. 501.
[5] (1912), 46 Can. S.C.R. 656, 8 D.L.R. 800.
[6] (1879), 5 App. Cas. 84 at 90, 93.

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Then, the fact of navigability is not confined to tidal waters, but extends by the law of Ontario into non-tidal waters and into fresh water rivers.*

The next case I refer to for a similar purpose is that of *Gage v. Bates.*[1] This action was brought to try the right to an inlet on Burlington Bay. The plaintiff claimed title by patent dated March 19, 1798, and contended that it conveyed the inlet; and that the "bank" referred to in the patent was part of the bay, and not part of the inlet, and that consequently the public had no right thereon. Defendant contended that the inlet was part of the bay, and that the patent did not cover, but excluded the inlet; and further, that the *locus in quo* be navigable waters, even if the Crown could grant it at all, the public have the right to use and fish in it. Held, that the *locus in quo* is a navigable river, and therefore the public have a right to the free use thereof as such.

I refer to it on the one simple point that in Ontario navigable waters were, if navigable in fact, physically navigable, they were legally navigable, and that is the meaning of the word "navigable" when it is used in the *Cochrane Act,* to which I have referred.[2]

In *Bell v. The Corporation of Quebec, supra,* it was held that the river in question there was navigable. The discussion of what did not interfere with navigability was very strong: "The general char-"acter of the river at this place may be thus de-"scribed—numerous shoals exist in it, its bed is

* It was the first case in which it was made plain that the old common law rule that only tidal waters were navigable was held not to apply. That was at the upper part of Lake Erie.

[1] (1858), 7 U.C.C.P. 116.
[2] Ch. 31 R.S.O., 1914.

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"studded with rocks or boulders, which are a source "of danger to any craft which may ground upon it, "very high tides happen twice in the year, caused "by the melting of the snow in spring, and by the "rains in autumn, and it is only at the times of "these extraordinary tides that barges can at all "ascend the river, and then not without difficulty "and danger of grounding." Nevertheless it was held that it was navigable.

The next case I would cite is that of *Dixson v. Snetsinger*.[1] That was a case near Sheek's Island, in the St. Lawrence. It was held there that the River St. Lawrence above tide water is a navigable river, the bed of which is vested in the Crown; and, therefore, that under a grant of lots 31 and 32 in the first concession of the Township of Cornwall, described as bounded by the water's edge, no part of the bed of the river passed to the grantee.

I wish to refer again to *Rowe v. Titus*.[2] The headnote of that case is as follows:

"All rivers above the flow of the tide which may "be used for the transportation of property, as for "floating rafts and driving timber and logs—and "not merely such as will bear boats for the accom- "modation of travellers—are highways by water, "and subject to the public use; and in determining "whether a river is public or private, its length and "depth at ordinary times, and its capacity for float- "ing rafts, etc., are proper to be considered.

"In an action for obstructing a river by erecting "a mill dam, it is not a proper question for the jury, "whether the benefit derived by the public from the

[1] (1873), 23 U.C.C.P. 235.
[2] (1849), 1 Allen N.B. 326.

"mill is sufficient to outweigh the inconvenience oc-
"casioned by the dam.

"Evidence of special damage in not being able to "fulfil a contract for the delivery of logs, is not "admissible where the damage alleged in the de-"claration is that the plaintiff was prevented from "getting the logs to market, and thereby lost the "freight and sale thereof."

[THE COURT—It was a question of timber and logs?]

Yes, it was on the point of floatability. It was not a question of the ownership of the bed of the stream, it was a question of the use of it for floating logs and obstruction of that use.

[THE COURT—There are statutes in the Province of Quebec, and, I suppose, they must have them in Ontario, that is to say, everyone has a right to cut down logs and put them in the river and pass them down, and if they do any damage in and about this they will have to pay.]

The case of *McLaren v. Caldwell*[1] was a case on that point. I think that is all I can usefully refer your Lordship to on the question of navigability. Then, as to the evidence of the fact of navigability. We have the proof of the passing of huge rafts, 180 feet long by 48 feet in width. We have the information of the men who were coming down with rafts, and they were always carrying with them a boat and being able to use it from place to place—and the evidence that the water opposite this place had an average depth of three feet. We have the evidence of boats being used for fishing purposes, with a jack-light and spearing in the spring. We have also the

[1] (1882), 8 Can. S.C.R. 435.

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evidence given that there would be no difficulty in establishing a ferry opposite these lands at almost any part.

Under the circumstances, and in view of the decisions making it plain that navigation in Ontario is a question of fact, I submit this river is clearly navigable. If, then, the river is navigable, I then invoke the statute to which I have made reference, *viz.*, ch. 31 R. S. O., 1914. The evidence is quite clear that there was no development in this case at all, so that it does not come within any of the exceptions in sec. 3 of the Act. Then, if for any other reason, which I cannot imagine to exist, the statute does not apply, I fall back on the case of *The King v. Wilson*,[1] and to the principles there laid down by Mr. Justice Cassels at pages 287 to 292. The point I would now make is this. I have said everything I wanted to say in regard to the law of navigability, and in regard to this river being navigable in fact. But the point I am coming to, assuming it to be established as a navigable river, is that there is no power to interfere with navigation by the construction of a dam or otherwise—even the putting of a stick in it, as your Lordship mentioned—excepting upon obtaining an order from the Governor-in-Council—and unless there is positive evidence, something to lead the mind of the Court in some direction to prove that it would be granted or would not.

All the cases are discussed by Mr. Justice Cassels at pages 287 to 292, and I need not trouble your Lordship. It emphasizes this phase of the matter and makes it plain that if this is a navigable river,

[1] (1914), 15 Can. Ex. 283, 22 D.L.R. 585.

and there was no Order-in-Council authorizing any erections, there was no legal right in this defendant with respect to establishing a dam, and, therefore, it is not an element of damage.

[THE COURT—Provided the river is navigable.]

Exactly, that is, after all, what it comes back to.

Counsel then discussed the facts of the case as to damages.

Mr. Porter replied.

Case tried at Belleville, Ontario, October 6, 7, 8, 1915.

AUDETTE, J. (February 14, 1916) delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it appears, *inter alia,* that certain lands, belonging to the defendants were taken by His Majesty the King, under the provisions of the *Expropriation Act,* for the purposes of a public work, to wit: the construction of the Trent Canal, by depositing, on June 29, 1910, a plan and description of such lands, in the office of the Registrar of Deeds for the County of Hastings, Province of Ontario.

While the plan and description were so deposited on June 29, 1910, it is admitted by both parties that the Crown took possession of the lands in question on April 10, 1908; therefore, it must be found, under the provisions of sec. 22 of the *Expropriation Act,* that these lands became vested in the Crown on April 10, 1908.

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The defendants' property appears, from the deeds of record, to be composed of fifty-six acres, of which the Crown by these proceedings has taken an area of nineteen and twenty-three hundredths (19.23) acres.

The defendants' title is founded upon a Crown grant of August 3, 1799, to William Allan, their predecessor in title.

The Crown by the information offers the sum of $576.90 for the land taken and for all damages resulting from the expropriation. Furthermore, an undertaking, to which mention will be hereafter made, has been filed, at trial, under the provisions of sec. 30 of the *Expropriation Act,* whereby the damages resulting from the manner in which the lands have been taken will be greatly reduced.

The defendants, by their statement in defence, claim the sum of $30,000.

The land expropriated herein is taken on the front of the Trent River for a distance of about 145 roods, or about 2,390 feet, as, however, shown upon plan filed of record. It was vacant land when Morrison bought, and it remained so up to the expropriation. From the upper part of the land to the lower part thereof on the river, there is a difference in level of about two or three feet. The existence of this head of two to three feet has prompted promoters and speculators to value this property at a very high figure, notwithstanding that evidence adduced, even on behalf of the defendants, established that a power could not for any practical purpose, be developed on the defendants' property, unless they owned the other side of the river. Further evidence establish-

ed that a water-power with such a small head is not commercially practicable. I fear the defendants were the unhappy victims of promoters, and that this delusive water-power would be limited, as stated in the evidence, to the requirement of these lands being flooded as part of a bigger scheme.

The contention arising out of the possibility of such water-power has given rise to very conflicting evidence as to the value of the land taken. There is the optimistic evidence based upon promoters' schemes and upon speculative views, and there is the pessimistic evidence based upon the value of the land taken as fit only for pasture. The conflict is material: What indeed can help out of the difficulty if not the sale of this very property or a part thereof within a reasonable time of the date of the expropriation?

From the documentary evidence of record, it will appear (see Exhibit No. 4) that on April 28, 1899, Ruliff Grass acquired for the sum of $500 the whole of the fifty-six acres of which 19.23 acres have been expropriated by the present proceedings.

From Exhibit B, it will further appear that on January 13, 1909, a deed was passed conveying in fee simple an undivided half interest in the said fifty-six acres above mentioned, for the sum of $2,000 to the defendant Morrison. The latter, however, testified that this sale was made under an agreement dating as far back as 1905 (but which was not produced in evidence), and that this agreement in writing under the hand of the late Ruliff Grass was handed to the latter when the deed was passed in 1909, although Grass gave an option in 1906 without the association of Morrison.

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The suggestion of this small water-power, which in the course of the evidence, has been declared by some witness as not commercially practicable, has been used to inflate the speculative value of this property, and has given rise to very important forensic questions during the trial and argument such as the consideration of the question of the navigability of a river in Ontario under the Common Law of England, as introduced in 1792; and as to whether the title to this portion of the River Trent in question did not pass to the Federal Government at Confederation under sec. 108 of the *B. N. A. Act*, 1867. But in the view taken of the case, it is unnecessary for me to get into these questions, because it is of no substantial concern unless it were to discuss it in an academic manner, and that is not the duty of a Court of Justice and would only involve superfluous litigation.

Indeed, is not the best test of the market value of this property, as distinguished from the speculative value, the very price paid by the defendant Morrison so close to the date of the taking possession? And the value of the property at that time was practically the same at the time of the expropriation. Then defendant Morrison tells us he acquired that interest in the property with Ruliff Grass for the very purpose of developing this famous water-power. "That was," he said, "the idea I had, and that was the idea Mr. Grass had. I bought for the purpose of developing this water-power." Therefore this property at that date was sold and bought having in view all its prospective capabilities and potentialities, whatsoever they were, for the sum of $2,000 for the half interest in the fifty-six acres.

The sum of $2,000 paid by the defendant Morrison establishes the value of this property of fifty-six acres at that date at about $4,000, and the lands taken herein cover an area of 19.23 acres. As the best part, that is, the water-front, is taken, I will assess the compensation, covering all rights derived from such frontage, at the sum of $2,500, together with $500 damages resulting from the ditch, the fences on Frankford Road, and for all legal damages whatsoever resulting from the expropriation, making the sum of $3,000. To this amount will be added 10 per cent. for the compulsory taking against the will of the owners, making in all the sum of $3,300.

The public work constructed by the Crown has in the result placed, at the disposal of the owners of the balance of the property, available power which can be used for any purposes and does not therefore injure the balance of the property. If it does anything, indeed, it goes to enhance such value, which should be taken into consideration under sec. 50 of the *Exchequer Court Act*.

Therefore, there will be judgment as follows, to wit:

1st. The lands expropriated herein are declared vested in the Crown from the 10th day of April, 1908.

2nd. The compensation for the land taken and for all damages resulting from the expropriation is fixed at the sum of $3,300, with interest thereon from April 10, 1908, to the date hereof.

3rd. The defendants are entitled to be paid by the plaintiff the said sum of $3,300, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all mortgages and encumbrances whatsoever.

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4th. The defendants are further entitled to the rights, powers and privileges mentioned in the undertaking filed at the trial herein.

5th. The defendants are also entitled to the costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *A. Abbott.*

Solicitors for defendants: *Porter & Carnew.*

IN THE MATTER OF AN APPLICATION FOR LETTERS PATENT. 1918 Oct. 9.

LAVERS' HEELS PATENTS, LTD.,

APPELLANT.

Patent—Issue—Validity—Combination—Subject matter—Prior art.

The issuing of a patent does not make it conclusive or binding upon a litigant who questions its validity.

2. An application for a combination patent should not be refused on the ground that the subject matter is a combination of various separate elements, all of which are in existing patents, provided such elements are brought together in such a way as to be useful.

APPEAL from a decision of the Patent Office rejecting an application for a patent.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, October 9, 1918.

R. S. Smart, for appellants.

The Commissioner of Patents was not represented by counsel.

CASSELS, J. (October 9, 1918) delivered judgment.

Under the *Patent Act*, Revised Statutes of Canada, 1906, ch. 69, it was provided by sections 17 and 18 as follows:

"17. The Commissioner may object to grant a "patent in any of the following cases:

"(a) When he is of opinion that the alleged in- "vention is not patentable in law.

"(b) When it appears to him that the invention is "already in the possession of the public, with the "consent or allowance of the inventor;

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Reasons for Judgment.

"(c) When it appears to him that there is no "novelty in the invention;

"(d) When it appears to him that the invention "has been described in a book or other printed pub- "lication before the date of the application, or is "otherwise in the possession of the public;

"(e) When it appears to him that the invention "has already been patented in Canada, unless the "Commissioner has doubts as to whether the pat- "entee or the applicant is the first inventor;

"(f) When it appears to him that the invention "has already been patented in a foreign country, "and the year has not expired within which the for- "eign patentee may apply for a patent in Canada, "unless the Commissioner has doubts as to whether "the foreign patentee or the applicant is the first "inventor.

"18. Whenever the Commissioner objects to grant "a patent as aforesaid, he shall notify the applicant "to that effect and shall state the ground or reason "therefor, with sufficient detail to enable the appli- "cant to answer if he can the objection of the Com- "missioner."

By a statute passed by the Dominion Parliament in the year 1913, ch. 17, it is provided as follows:

"1. The *Exchequer Court Act*, chapter 140 of the "Revised Statutes, 1906, is amended by adding the "following section immediately after section 23:

"23A. Every applicant for a patent under the "*Patent Act* who has failed to obtain a patent by rea- "son of the objection of the Commissioner of Pat- "ents as in the said Act provided, may, at any time "within six months after notice thereof has been "mailed, by registered letter, addressed to him or

"his agent, appeal from the decision of the said "Commissioner to the Exchequer Court.

"2. The Exchequer Court shall have exclusive "jurisdiction to hear and determine any such ap- "peal.

"3. The Exchequer Court shall have exclusive "jurisdiction to hear and determine any now pend- "ing appeals to the Governor-in-Council under sec- "tion 19 of the *Patent Act,* and the Governor-in- "Council shall transfer the said appeals and all "documents and proceedings relating thereto to the "Exchequer Court."

The applicant for two patents, C. W. Lavers, petitioned for a patent which is called serial No. 191,227 and the other serial No. 191,228.

After a long and protracted procedure in the Patent Office the application was finally rejected by the examiner, and his decision being adopted by the Commissioner, the applicant appeals to this Court under the provisions of the statute hereinbefore quoted.

The Commissioner was duly notified of the appeal but did not appear on the hearing of the appeal.

Mr. Smart appeared for the petitioner, and urged his case from the point of view of the applicant for the patent. The Court received no assistance from the Commissioner, with the result that an enormous number of alleged anticipations have been waded through by the Judge, unaided by any assistance or help from the Patent Office.

If applications by way of appeal become numerous in this Court, so much time will be required on the part of the Judge to delve into all of these prior patents that practically the time of one Judge would be occupied as an appellate examiner from the Pat-

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ent Office. I do not think it is fair that such a burden should be cast upon the judiciary.

If the Patent Office take upon themselves to reject the applicant's claim for a patent, it seems to me that they should afford the Judge the assistance of counsel to sustain their findings, and that the matter should not be left to the Judge to grope through a long lengthy file and any number of previous patents unaided.

Under the circumstances of the case I have done the best I could. At the same time I feel that I may not be doing exact justice. It has to be borne in mind that the mere issuing of a patent does not make the patent conclusive or binding upon a litigant who desires to raise the question as to its invalidity; and therefore, if in reversing a decision of the Commissioner, as I intend to do, I feel that if I have erred, nobody is much hurt, as anyone will have the right to protest the validity of the patent in any other proceeding.

It is a matter of common knowledge that a large number of patents for invention issued by the Department have in litigated cases been declared by the Courts to be null and void, either because the so-called patents lacked the essentials of patentability or on account of the prior state of the art, etc. Every Judge, I think, is familiar with this proposition. I think that the examiner has erred in not granting the patent in the case before me.

Dealing first with the application for a patent, serial No. 191,227. The claim put forward is for a very strict construction patent. It is a very narrow patent, but nevertheless I cannot agree with the examiner in his reasons for disallowing the claim.

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The first claim of the patent is as follows:

"A detachable heel of flexible, resilient, plastic "material, having a plurality of recesses on its inner "face or contact for the purpose of moulding the "heel properly and permitting the entry afterwards "of domed, headed pins for attachment, with a "plurality of separated locking independent wash- "ers, embedded therein at the bottom of said re- "cesses, permitting such heel to slide laterally into "the locking position."

The subsequent claims of the patent are mere structural modifications. Probably some of them lack patentability. I have not gone into them, as I do not think it is of much consequence if the patentee is entitled to the main claim.

On April 3, 1918, a letter is written signed by Thomas L. A. Richard, patent examiner, addressed to Messrs. Fetherstonhaugh & Co., Ottawa, the attorneys for the applicant. Mr. Richard states that: "The heel forming the subject matter of this appli- "cation is built up of various separate elements each "found in the prior art as disclosed in the refer- "ences of record."

He refers to certain patents, and then states: "All "the references previously cited and mentioned in "this case are shown to disclose all the features of "construction of applicant's device, and they are re- "tained on record for the purpose of anticipations "of the general structure as well as of details there- "of."

"2. From the foregoing it is seen that none of the "features of applicant's structure is novel *per se*, "each and every one is found in one or the other of "the references of record.

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In re LAVERS' HEELS PATENTS.

Reasons for Judgment.

"All the things united in this heel being old and "not performing any joint function, each doing only "what it has formerly done in former heels, their "adaptation to this heel does not constitute a pro- "per combination and amounts merely to aggrega- "tion not involving invention."

I cannot agree with this statement of the law. In nearly all combination patents the claim is for a combination of old elements. It is no answer to a claim for a combination that one element may be found in a prior patent, another element in another patent, etc. If the elements are brought together in such a way as to be useful, and a combination is produced entitling the applicant to a patent, I do not see that it is any answer to wade through a series of patents and to state that each of the elements can be traced in other previous patents. Unless there has been a disclosure of a similar combination the combination would be good assuming it to have the essentials requisite to a valid patent. To call it an aggregation is to my mind incorrect.

For instance, take the dome-headed pins. Unquestionably these pins perform their ordinary function, but if you remove them from the combination what happens? The whole thing falls to pieces.

It may well be that some of the subordinate claims lack the elements of a proper combination having regard to Mr. Richard's view and his citations. I leave it open to the Commissioner to reject, if so advised, any of these subsequent sub-combinations. All I direct is that the patent shall issue with the first claim.

I may add my opinion that I do not see that much harm would be occasioned by allowing it to issue with these subsequent claims. The patentee would

take them at his risk, and if properly advised would not jeopardize by inserting a lot of useless sub-claims.

In regard to the application for patent serial No. 191,228, Claim Number 1 reads as follows:

"1. In combination with a boot or shoe having a "permanent heel, a base plate thereon and a plurality "of headed domed pins, extending through the base "plate, such pins being formed with shoulders adapt-"ed to bear against the base plate and retain the "same in position, a detachable heel of flexible, re-"silient, plastic material having a plate embedded "therein formed with slots to engage slideably the "headed pins, and locking means extending between "the permanent heel and the detachable portion."

It is unnecessary to repeat what I have stated in regard to the previous application. Practically the same remarks apply to Mr. Richard's letter of April 3, 1918.

I think the patent should issue for the first claim of this patent, leaving it open to the Commissioner whether to grant or reject the sub-combination claims.

There will be no costs of these applications.

Solicitors for appellant: *Fetherstonhaugh & Co.*

1918
Oct. 9.

IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN E. ASKWITH,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Contract—Offer and acceptance—Public work—Approval of Governor-in-Council.

Where a sum of money was claimed for extras under a contract, a letter by the representative of the debtor to the claimant asking whether he would be willing to accept an amount less than that claimed, and to which letter the claimant replied: "I am willing to accept your offer," is not an accepted and binding contract, but merely a statement that the claimant is willing to accept such sum.

Where a sum of money was claimed to be due by the Crown for extras under a contract made with the Public Works Department, a letter from the Chief Architect of that Department to the claimant saying: "I am directed to offer you the sum of $4,327 as full and final settlement of all claims you may have against this Department * * * subject to approval of council," does not bind the Crown if the Governor-in-Council refuses to ratify the alleged offer of the Chief Architect.

PETITION OF RIGHT for extras due on a contract.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, June 10, 1918.

A. E. Fripp, K.C., for suppliant.

R. V. Sinclair, K.C., for respondent.

CASSELS, J. (October 9, 1918) delivered judgment.

A Petition of Right on behalf of John E. Askwith claiming against the Crown for certain extras al-

leged to be due on a contract entered into by the Government of Canada for the erection of a drill hall at Halifax, Nova Scotia.

The petition alleges that the work was fully completed in the year 1901.

The case was tried before me at Ottawa, on June 10, 1918, but owing to pressing engagements I have been unable to consider it until my return from Halifax last week. I have since carefully considered the case and have gone over the evidence and the facts, and remain of the opinion which I entertained at the conclusion of the trial.

The petitioner has failed to make out any case entitling him to relief. The difficulties in the way of the petitioner, having regard to the provisions of the contract, are insuperable—and at the close of his case, Mr. Fripp placed the claim of the petitioner for relief on the supposed contract said to have been entered into by the Crown and the petitioner evidenced by a letter dated October 9, 1914, set out in the petition of right, and an alleged acceptance of October 13, 1914 also set out in the petition.

The two letters are as follows:

"October 9th, 1914.

"John E. Askwith, Esq.,
"24 Alexander St.,
"Ottawa.

"Sir:

"Having reference to your claim amounting to "$10,656.56, for extra work in connection with the "contract for the drill hall at Halifax, N.S. This "matter has been reported on to the Department, "and I am directed to offer you the sum of $4,327, as "full and final settlement of all claims you may have

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Reasons for Judgment.

"against this Department in connection with addi-
"tional, etc., work on the Halifax drill hall, and to
"also inform you that the Department is agreeable
"to allow 5 per cent. interest on the sum named,
"subject to approval of Council.

"Would you please reply, in writing, stating whe-
"ther you would be willing to accept the sum of
"$4,327, with interest as above mentioned.

"Your obedient servant,

"(Sgd.) E. L. HORWOOD,
"Chief Architect."

"24 Alexander St., Ottawa, Ont.,

"October 13, 1914.

"E. L. Horwood, Esq.,
"Chief Architect,
"Dept. Public Works, Ottawa.

"Dear Sir:

"I beg to acknowledge receipt of your letter of the
"9th inst., in which you offer me the sum of $4,327,
"with interest at five per cent., as full and final set-
"tlement of my claim of $10,656,56, for extra work
"done at the Halifax drill hall.

"I regret that the loss of certain documents places
"me in the position that I am unable to fully estab-
"lish my rights to receive payment of all the items
"submitted in my claim.

"Under the circumstances I beg to state that I am
"willing to accept your offer of $4,327, with the in-
"terest named, as full and final settlement of all
"claims I have against the Department of Public
"Works in connection with the Halifax drill hall.

"Yours very truly,

"(Sgd.) J. E. ASKWITH."

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Some discussion took place as to whether or not the words "subject to approval of council" refer merely to the interest or to the sum of $4,327 as well. In my opinion it is not of much consequence which meaning is placed upon this letter, for the reason that the petitioner in his letter of October 13, states he is willing to accept the offer of $4,327, with interest named, etc.

Even if the Crown could be bound by such a contract, the letters are not evidence of an accepted and binding contract. The letter of the architect is a mere request to know if the petitioner would be willing to accept the named sum, together with interest. It is apparent that at all events the approval of the Governor-in-Council was requisite before any offer of the whole sum, with interest added, could be binding.

The so-called acceptance is a statement that the petitioner is willing to accept the principal money, together with interest. The Governor-in-Council refused to ratify the offer of the architect. The result is that if, as I have mentioned, the Crown could have been bound there has been no contract entered into between the parties.

I think the petition must be dismissed and with costs.

Petition dismissed.

Solicitors for suppliant: *Fripp & McGee.*

Solicitor for respondent: *R. V. Sinclair.*

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Nov. 23.

CANADIAN VICKERS, LIMITED,

PLAINTIFF;

VS.

THE STEAMSHIP "SUSQUEHANNA,"

DEFENDANT.

Admiralty law—Agreement for repair of ship—Quantum meruit—Witnesses—Evidence—Registrar proceeding on wrong principle.

The plaintiff's claim was for work done and material supplied to the defendant's ship, amounting to $53,190, at Montreal in July and August, 1917, there being no definite contract between the parties. A bond was given for $55,000 for the release of the ship and liability was admitted, but the amount claimed was denied and $35,000 was offered in full settlement, which the plaintiff refused to accept. The matter was referred to the Deputy-Registrar to ascertain and report the amount due to the Court, which the Deputy-Registrar did, fixing the amount at $52,983.34.

Held on a motion of defendant to vary the Deputy-Registrar's report that as there was no price for repairs fixed between the parties that the plaintiffs were entitled to recover the fair and reasonable value of the work done and material supplied, or, in other words, what is the fair market value of the repairs made by plaintiffs to ship, and that in determining the value of the said repairs the principles laid down by Dr. Lushington in the *Iron Master,* Swab. 443, as to the best evidence of the value of the ship are equally applicable to the value of repairs in this case, and that the Deputy-Registrar proceeded on a wrong principle, and that defendant's offer of $35,000 was sufficient.

APPEAL from report of the Deputy District Registrar at Montreal on references had on January 30, February 16, 18, 22, March 5, May 14, June 18, August 1 and September 16, 1918.

Registrar's report made and filed October 5, 1918.

Heard before the Honourable Mr. Justice Maclennan at Montreal, October 18, 1918.

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F. H. Markey, K.C., for plaintiff.

A. R. Holden, K.C., for defendant.

MACLENNAN, J. (November 23, 1918) delivered judgment.

This case comes before the Court on a motion of the defendant to vary the report of the Deputy District Registrar, by which the latter found $52,983.34, with interest from December 4, 1917 and costs, to be due to plaintiff by defendant.

The plaintiff's cause of action and the nature of its claim endorsed on the writ of summons, filed on November 2, 1917, is a claim for the sum of $53,190 for work done and materials supplied to the ship "Susquehanna" at the Port of Montreal during the months of July and August, 1917. The defendant gave a bond for $55,000, obtained the release of the ship and then admitted liability for the work done and materials supplied, but denied the amount claimed and offered to settle for $35,000. The plaintiff refused to accept this and defendant thereupon moved that the case be referred to the Deputy District Registrar in order that the necessary claims, statements and vouchers be filed and such proof as may be necessary produced and that the Registrar be ordered to report to the Court the amount that he may find due to the plaintiff. Upon the order of reference the Registrar reported as above stated and the defendant appeals from the report by its motion to vary the finding of the Registrar.

The S.S. "Susquehanna", which had been engaged in the lake trade, in the early summer of 1917 was cut in two at Buffalo, N.Y., in order to be brought to Montreal, where certain repairs were required to be made and the ship joined together. Certain of

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these repairs were made at Montreal by the plaintiff; the ship was joined together at Levis, and finally taken to New York, where the repairs were completed and the ship made ready for sea. Plaintiff's action is for the value of work done and materials supplied and for nothing else.

After the work was done the plaintiff sent the owner of the ship a memorandum (Exhibit D-1) reading:

To labour and material repairing S.S. "Susquehanna" as per specification attached $53,190.00

The specification referred to is a list of repairs to the ship containing over 180 items. No other particulars of the plaintiff's claim, although asked for, were furnished or supplied until the case came before the Registrar on the reference, when plaintiff's manager produced a statement or summary as Exhibit P-2, which is in the following terms:

NAVAL CONSTRUCTION WORKS,
MAISONNEUVE.
Montreal, P.Q., December 3rd, 1917.

Mr. Frank Auditore,
44 Sacket Street,
Brooklyn, N.Y.

Bought of Canadian Vickers, Limited.

To joining together S.S. "Susquehanna" as per statement attached:

Material from stock ...	$5,517.57	
Material purchased ...	829.98	
		$ 6,347.55
Handling charges, 5%	317.88	
		$ 6,665.43

Labour	$14,905.73	
Overhead factor 90% on labour	13,415.16	
		28,320.89
		34,986.32
Profit, etc.		16,554.89
		51,541.21
Tug services as per copy invoices attached		2,000.00
		$53,541.21

It can be stated at once that the plaintiff did not do the joining together of the ship, but that its work consisted principally of the completing of so-called odds and ends about the deck and fitting of doors and a small amount of engine-room work and caulking the bulkheads and tanks. Plaintiff's statement shows that the material supplied, with 5 per cent. added for handling charges, amounted to $6,665.43, and the labour to $14,905.73, and that the total claim as shown in this statement amounted to $53,541.21. The plaintiff in effect added over 138.9 per cent. to the amount charged for material and labour, or if labour alone is considered over 200 per cent. to the amount charged for labour in order to arrive at the total amount of the bill.

As there was no price for the repairs fixed between the parties, plaintiff is entitled to recover the fair and reasonable value of the work done and materials supplied. That was the nature of the claim endorsed on the writ. The plaintiff before undertaking the work gave an estimate of what the repairs would probably cost, but declined to enter into a contract for a fixed amount. There was no sug-

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gestion from either party that the repairs should be paid for on the basis of cost plus a percentage for profit. The plaintiff, in its factum filed before the Registrar, stated that its claim is based on a *quantum meruit,* and in its factum filed before the Court submitted that "the value of the work based upon a "*quantum meruit* must be determined by the fair "market value at the time and in the locality where "the work is done, and, further, by the conditions ex- "isting at such time and place. This can only be de- "termined by the evidence of witnesses who are com- "petent to give evidence relating thereto." Instead of endeavouring to prove the fair market value of the work by competent witnesses, the plaintiff endeavoured before the Registrar to establish his claim on the basis of the alleged cost to it of the work, plus a net profit of over 47 per cent. There was no contract to pay the cost and a percentage of profit, and plaintiff's action is not an action based upon any such allegation or implication.

The plaintiff could not change the nature of its action before the Registrar and the question for the Court therefore is: What is the fair and reasonable value of the work done and materials supplied, or in other words, as counsel for plaintiff puts it, what is the fair market value of the repairs made by plaintiff to the ship? In the case of the *Iron Master,*[1] where the question was the value of a ship at the time of a collision, Dr. Lushington made the following observations with reference to different kinds of evidence which might be adduced to establish such value:

"In this case the loss is confined to a single item, "the value of the ship destroyed. The evidence

[1] (1859), Swabey, 441 at 443.

"adduced is, as usual, of different kinds; and I think "it convenient here to state how the Court ranks "these different kinds of evidence in order of im- "portance, the question being the value of the ship "at the time of the collision.

"The best evidence is, first, the opinion of com- "petent persons who knew the ship shortly previous "to the time it was lost; that evidence is manifestly "entitled to most weight, because, assuming their "competency to form a just judgment, they had a "personal knowledge of the state and condition of "the vessel herself, whereas all other persons, how- "ever skilful, could only draw general inferences "from their acquaintance with the prices of vessels "somewhat similar about the same time. The second "best evidence is the opinions of persons such as I "have just described, persons conversant with ship- "ping and the transfers thereof."

The principles laid down by Dr. Lushington as to the best evidence of the value of a ship are equally applicable to the value of the repairs in this case. The plaintiff's case is based almost exclusively on the evidence of three witnesses: Temporary Commander James William Skantelbury, of Saltburn, England, and James Smith Bonnyman, of Landaff, Wales, consulting engineer, and its manager, Mr. Miller. Commander Skantelbury was in Canada representing the British Admiralty as an expert adviser in connection with Canadian ship construction, acting under the director of shipping in Canada, and had been in Montreal less than one year at the time of his examination. He was acting as an expert adviser in connection with construction of new vessels, drifters and trawlers, which were being built at the plaintiff's shipyard. He never saw

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the work done on the "Susquehanna" and had no idea how long the job took. He was not asked to testify what, in his opinion, would have been fair and reasonable compensation or the market value of the work done by plaintiff for defendant. Mr. Bonnyman, who is a consulting engineer in shipping, had arrived in Canada about one month before his examination, never saw the "Susquehanna" or the work done by plaintiff, and had no knowledge of local conditions in Montreal, except such as he had seen at plaintiff's shipyard from the early part of January to the time of his examination on February 16, 1918. He had been sent by the British Government to look after the building of merchant ships at the plaintiff's works. He admits in cross-examination that plaintiff asked him what was a reasonable price for doing the work on the "Susquehanna," but he declined to express an opinion on that question; and in re-examination explained that it was impossible without having seen the ship to make an estimate of the value of the work done. The witnesses Skantelbury and Bonnyman, while no doubt familiar with shipyards and shipping generally in Great Britain, had very limited knowledge of conditions on this side of the Atlantic, and in no part of their evidence do they undertake to give an estimate or express an opinion as to the value of the work done by plaintiff on the "Susquehanna." Mr. Miller, plaintiff's manager, had given an estimate of about $35,000 as the probable cost of the repairs, but at the reference he endeavoured to make it appear that these figures were quoted by him on a part only of the work done. He did not pledge his oath, as it would seem reasonable he should have done if he believed his firm's claim honest and proper, that the fair market value

of the work done and materials supplied was the amount claimed in the action. He admitted that there was a list prepared of the work to be done, and, instead of producing that list, he produced and filed as plaintiff's Exhibit P-5 a list headed: "Repairs to S.S. 'Susquehanna,' job No. 1790." This latter list contains over 180 items. It is not the original list of repairs prepared by the plaintiff. Mr. Miller swore that the original list contained only 65 items and that afterwards, at some date or dates which he does not specify, 122 additional items were added. His motive in making this statement appears to have been to escape the consequence of an estimate by his works manager and by himself that the work which his firm was asked to do would cost in the vicinity of $35,000. When the ship arrived in Montreal, with Captain Barlow in charge, Mr. Cameron, plaintiff's works manager, and Mr. Burns, one of plaintiff's sub-superintendents, went on board the ship, where they were met by Captain Barlow, by Mr. Smith and Mr. Auditore. The latter gentleman called the attention of Messrs. Cameron and Burns to the work that was to be done, of which Cameron took note at the time. Captain Barlow also put the items down in a little work-book which he carried, and he swears that he afterwards got the repair list made by Cameron, compared it with the notes in his own book, found they agreed and that he re-copied the list into a private book for future reference. Captain Barlow swears that the ship was subsequently stranded, when he lost a considerable amount of personal property, clothing and this little note-book, but he produced and filed before the Registrar, as defendant's Exhibit D-7, the list of repairs which he had copied in his private book. This list is dated July 15, and

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contains over 150 items. There is no doubt it is a duplicate of the list of repairs made by Cameron and Burns three days before, on which both Cameron and Miller made their estimate of $35,000. A comparison of Captain Barlow's list with Mr. Miller's list (P-5) shows that the latter contained some 30 additional items, mostly small wooden jobs. Captain Barlow swears that his list (D-7) includes the work discussed with Cameron and Burns, and on which Cameron was to figure on the cost. The additional items to be found in Exhibit P-5 were ordered in writing by Captain Barlow as extra work and the original orders were delivered to the plaintiff. Plaintiff produced neither the original list made by Cameron and Burns, nor the orders for the extra work, and Captain Barlow's evidence, that the extras were not worth more than $1,000 or $1,200, is uncontradicted. After the examination of the ship by Cameron and Burns, Mr. Miller wrote a letter to the owner in the following terms (P-1):

"July 12, 1917.

"Frank Auditore, Esq.,
"Windsor Hotel,
"Montreal, Que.

"Dear Mr. Auditore:

"Mr. Cameron has been thoroughly through the "'Susquehanna' and finds it absolutely impossible, "in the incomplete state in which the various items "are, to figure a definite price. He estimates, and, "judging by the description I think he is correct, "that this work will cost in the vicinity of $35,000, "apart from joining together.

"We are prepared to quote you a firm price for "joining together of $22,000, including dock dues,

"but not including any repairs to damage done in "coming through the canal.

"We would, however, much prefer that you take "the ship to New York for completion, as I am "fully confident that, notwithstanding the condition "of the yards in New York, you are more likely to "get a quicker job from your friend Mr. Todd than "from us, as we cannot possibly afford to draw a "large number of men off present work.

"We will be glad to let you know as soon as we "ascertain the extent of the damage to the 'Singa-"pore' when your ship can get on the dock.

"I am sorry we cannot quote you a firm price, but "you will understand the conditions.

"Yours faithfully,

"(Sgd.) P. L. MILLER."

The examination of the ship by Messrs. Cameron and Burns had been made on the morning of July 11 or July 12, before the foregoing letter was written by Mr. Miller, when the plaintiff had in its possession the original list prepared by Cameron containing over 150 items of repairs and agreeing with the list made by Captain Barlow. It is worthy of note that neither Cameron nor Burns were called as witnesses on behalf of the plaintiff. Mr. Miller's letter admits that Cameron had made a thorough examination of the ship. That agrees with the evidence of Captain Barlow. The letter further admits that Cameron estimated the cost of repairs in the vicinity of $35,000. Mr. Miller himself admits that he gave an estimate of $35,000, but says that the original list upon which he based that estimate contained only 65 items, and that 122 were afterwards added as extras. There is a serious contra-

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diction in Mr. Miller's evidence as to when the original list was prepared. He first swore it was made up about July 25 or 26, and then stated that he had it when he wrote the foregoing letter on July 12. As the original list of repairs was in plaintiff's possession and under the control of Mr. Miller, and he did not see fit to produce it, I am unable to accept his evidence that either Cameron's estimate or his own of $35,000 was based upon 65 items of repairs. It would have been an exceedingly easy matter for plaintiff to have established that the estimate given by Cameron and Miller was based on 65 items if such were the fact. The suppression of the written evidence showing the items on which the estimate of $35,000 was made, the failure to call Cameron and Burns as witnesses and the contradictions in Mr. Miller's own evidence, satisfy the Court that his testimony on this question cannot be accepted. The work commenced in the harbour on July 13, the ship arrived at the plaintiff's works on July 18, and was finished on August 15, 1917, when the two parts of the ship were towed to Quebec and there joined together by the Davis Shipbuilding and Repairing Co., Ltd., and the ship was then taken to New York. It is common knowledge in shipping circles that shipyards on the St. Lawrence have to tender for ship repairing in competition with shipyards in New York and other points on the Atlantic seaboard. It is proved in this case that shipyard labour at the time the work was done to the "Susquehanna" was lower at the plaintiff's works than in shipyards in New York. The defendant examined three witnesses who had examined the ship and the work done by plaintiff and were competent to give an estimate of the fair market value of the work. Fred. L. Worke,

of Brooklyn, N.Y., marine superintendent of the owner of the ship, had 19 years' connection with shipping, 10 years at sea, the greater part of that time as chief engineer, and 9 years as marine superintendent for two different companies, 5 years of the latter period being superintendent of a general ship repairing company. He examined the ship on her arrival in New York, in September, 1917, in company with Captain Barlow and two experts to whom I shall presently refer. The work done by plaintiff was gone over and examined in detail, and Worke's estimate of its value was around $23,500. James H. B. MacKenzie, of New York, consulting engineer and ship surveyor, who had been to sea for 7 years, part of the time as chief engineer, and who had been for 10 years in the employ of one of the biggest ship-repairing firms of the United States, for 5 years as outside foreman and for the last 5 years as assistant to the superintendent, and having a great deal to do with estimating for repair work, and for the last 6 years has been in business for himself as consulting engineer and ship surveyor, examined the "Susquehanna" two or three days after her arrival in New York. Worke and Captain Barlow were present and pointed out to him the repairs made in Montreal, and Mr. MacKenzie estimated the value of the work done by plaintiff at $25,000. When this estimate was made this witness was not aware of the purpose for which the estimate was wanted. The work described to this witness by Mr. Worke as having been done in Montreal is set out in a statement signed by the witness and filed as Exhibit D-5, and a comparison of the items contained in this statement with the plaintiff's list of repairs filed as Exhibit P-5 shows that the two documents

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correspond as far as detailed description of the work is concerned, and for that work Mr. MacKenzie's first estimate was $22,000, subsequently increased to $25,000. Charles E. Ross, of New York, naval architect, engineer and surveyor, who, since leaving the University of Pennsylvania in 1889, has been continuously employed in the ship construction and repair business, and who for some years has been in a consulting capacity associated with Frank S. Martin, of New York, chairman of the Board of Consulting Engineers and Survey of the United States Shipping Board, examined the "Susquehanna" in New York, in September, 1917, and signed defendant's Exhibit D-5. The nature, kind and description of the work which he examined on this occasion was explained to him by Mr. Worke, and his estimate of the value or market price of the work done in Montreal on the ship was $22,000, and he subsequently made a re-examination and a revised estimate of $25,000. When this estimate was made Mr. Ross had no knowledge of what plaintiff was attempting to collect. Messrs. MacKenzie and Ross have no connection whatever with the defendant or the owner of the ship; they were asked to examine the work done by the plaintiff and they gave their opinion as to its value after having seen and examined it. Unquestionably these gentlemen were competent persons to express an opinion on the value of the repairs and the weight to be attached to their testimony was in no way affected in their cross-examination.

As has already been pointed out, plaintiff at the reference before the Registrar attempted to change the basis of its action and to establish the liability of the defendant on the basis of the cost of the work

to the plaintiff plus a net profit of over 47 per cent. on such cost. In considering the cost of the repairs consideration must be given to the cost of the material supplied definitely ascertained and the direct labour definitely ascertained, and a further sum necessarily indefinite in amount representing a proportion of the general expenses of the company doing the work. In this case, plaintiff sought to add to the cost of the material, plus 5 per cent. added for handling charges, and the amount paid out for direct labour a further item called overhead factor, 90 per cent. on labour, and to the total so obtained added 47.3 per cent. for net profit. Mr. Miller, when asked to explain this overhead charge, stated: "The overhead covers all items which, according to our method of keeping our books, are not directly charged to the cost of doing any particular job." He then explains that other firms make up their overhead in a different manner according to their method of keeping their books. The attempt to include in the bill against the defendant an overhead factor of 90 per cent. on labour has introduced endless confusion and controversy in this case, and if it were necessary to digest the evidence relating to what properly constituted overhead charges a large mass of contradictory evidence would have to be referred to.

The principal items of the overhead charge on which differences of opinion exist are: Work supervision, depreciation, liability insurance, administration expenses and interest. It was established before the Registrar and subsequently admitted by counsel for plaintiff that there were amounts exceeding 41 per cent. overcharged in connection with the items of works supervision and liability insurance; depreciation at the rate of 50 per cent. per

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annum was charged on new buildings of a substantial and permanent character and fixed plant, without due regard to the reasonable life of the property; excessive amounts were charged for administration expenses and a large amount of interest on loans which, according to the most reliable evidence in the record, including an admission of one of plaintiff's experts, does not form part of the cost of the work and should not be included in overhead charges. The plaintiff's repair shop is only a small part of the plant, and it is proved that, according to a schedule produced to defendant's expert accountant when he examined the plaintiff's books in its office, the repair shop overhead was 38 per cent., and if the deductions which were proved at the reference were taken off, that percentage would be considerably reduced. The plaintiff's plant is undoubtedly well equipped from the point of view of buildings, machinery and management. The work on the "Susquehanna" was a comparatively small repair job. One of plaintiff's experts, Commander Skantelbury, in speaking of the shipyard and the repairs in question, swore: "It is equipped for a navy yard and it is over-equipped for small work of that description." The impropriety of attempting to inflate the overhead charges against defendant for the work done because plaintiff's yard was over-equipped for small work of that description must be apparent. The general result of the evidence on the items making up the overhead charge, in my opinion, shows that if this were a case where overhead charges should be taken into consideration, plaintiff has charged nearly twice as much for that item as the evidence justifies.

The plaintiff's bill before the Registrar includes an item of 47.3 per cent. net profit. It is important to bear in mind that Mr. Miller swore that the profit charged includes absolutely nothing for interference with other work, for war conditions or for any special or unusual purpose. He claims only what he designated as normal profits under the climatic conditions in Montreal. Notwithstanding the stand so taken by plaintiff's manager, counsel for plaintiff endeavoured to justify the large profit claimed by evidence and argument, that men had to be withdrawn from other work which was consequently delayed and that the country was at war, and therefore plaintiff was entitled to take advantage of these special circumstances in the form of higher charges than would be justified under normal conditions. Such contentions are entirely without force in face of the manager's admission. It is proved that the number of workmen employed in plaintiff's yard at the time the reference was heard was substantially the same as were employed when the repairs were made to the "Susquehanna." It is quite true that repairs cannot be carried on to the same extent in winter as in summer, but other work, no doubt equally profitable to plaintiff, was under way in the winter season, engaging the services of substantially an equal number of workmen. Commander Skantelbury swore that having regard to local conditions in Montreal, in his opinion, 30 per cent. would be a fair profit to add to the cost of the work, and then in answer to leading questions by plaintiff's counsel, which should have been rejected on the objections made, permitted himself to be led to state that having regard to conditions at the plaintiff's shipyard (and no doubt influenced by the fact that the yard

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was over-equipped for repair work) the account should have been for about $80,000, and later reduced the percentage of profit to about 60 per cent. on the cost. Such evidence is not reliable. Mr. Bonnyman was impressed by the severity of the Canadian winter weather and put the percentage of profit at about 40 per cent. on the cost in order to enable plaintiff's business to exist. He had no knowledge of summer conditions here or of the work done on the ship, and refused to state what the work was worth. It was proved that seven other ships were under repair at plaintiff's yard while the work was under way on the "Susquehanna," but plaintiff offered no evidence of the profit or overhead charged for such repairs. There is, however, evidence that within the year preceding the repairs on the "Susquehanna" plaintiff made varying charges on a number of other ships as follows: 40 per cent. overhead on drifters, 45 per cent. against the Electrical Boat Co., 55 per cent. overhead and 10 per cent. profit to the British Admiralty for jobs on over 60 vessels for work done partly in the harbour and partly at plaintiff's yard, and 65 per cent. overhead on trawlers. Plaintiff appears to have had different prices for different owners, and there was no uniformity of charges to other ships so far as such charges were disclosed. Counsel for plaintiff in his factum or written argument before the Registrar says in reference to the work done for the Admiralty that "the "allowance of 55 per cent. for overhead and 10 per "cent. profit practically gave the plaintiff a clear pro-"fit of 65 per cent. upon the cost to it of the work." Part of the plaintiff's work on the "Susquehanna" was done in the harbour before the ship reached the shipyard and to that extent the conditions were

similar to the work done for the Admiralty, and if plaintiff's claim for 90 per cent. overhead and over 47 per cent. profit were maintained, it is apparent plaintiff would make a most exorbitant profit on the job. None of these rates were disclosed to the owner of the "Susquehanna" before he entrusted his ship to the plaintiff. The manager of the plaintiff has sworn that as no price was fixed in advance he thought he was entitled to charge any price he liked, provided it was fair and reasonable. The burden was upon plaintiff to establish that its account represented the fair market value of the repairs. If the cost were definitely ascertained a net profit of 10 per cent. or at most 12½ per cent, would have been fair and reasonable under the circumstances and in view of the evidence in the case. If the average of the overhead charges to others as just stated were added to the charges for labour and a net profit of 12½ per cent. added to the cost of material, labour and overhead so ascertained, the total would be under $35,000, the approximate estimate given by the plaintiff's works manager, and manager before the work was undertaken.

This is an ordinary *quantum meruit* action, but plaintiff sought to change its nature on the reference and endeavoured to prove its case as if the action were based upon a contract to pay the cost of the repairs, plus a profit. The Registrar proceeded upon a wrong principle and granted the plaintiff everything that it asked on the reference. His report contains no finding on the fair market value of the work done and the materials supplied. The defendant's witnesses, Worke, MacKenzie and Ross, were competent witnesses within the rule laid down by Dr. Lushington, and the principle put forward by

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plaintiff's counsel, to give an opinion on the value of the repairs. They had seen the work and examined it, and, in my opinion, their evidence is the best evidence on the value of the work done and the materials supplied. It is true their estimate was based on New York prices, but labour at plaintiff's yard was lower than in New York, and the defendant was willing to pay several thousand dollars more for the purpose of avoiding the trouble and expense of protracted litigation. There is an item of $2,000 in the account for towage which is not disputed. The plaintiff's estimate of $35,000 was well over the mark and exceeded the value of the repairs. I find that defendant's offer was sufficient and the amount due to the plaintiff by defendant is $35,000.

Before the reference was applied for, the defendant, through its solicitors, filed an admission of liability for the work done and materials supplied, offered to settle for $35,000 in order to avoid further litigation, denied liability for any greater sum and notified plaintiff that if it persisted in its refusal to accept said sum defendant would ask for costs on the reference. The defendant had furnished a bond for $55,000 as security for the plaintiff's claim and, under the circumstances, there was no necessity for a tender or payment in Court, and the costs of the reference should have been avoided. The defendant is therefore entitled to the costs of the reference, *The Reading*.[1]

There will be judgment for the plaintiff for $35,000, with costs up to the filing of the admission of liability, and the defendant's offer to pay that amount, the plaintiff will have to pay the defendant

[1] (1908), 77 L. J. Adm. 71.

the costs of the motion for the reference, the costs of the reference and of the present motion to vary the Registrar's report and the report will be varied accordingly.

Judgment accordingly.

Solicitors for plaintiff: *Markey, Skinner, Pugsley & Hyde.*

Solicitors for defendant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

1918
April 30.

THE BRITISH AMERICAN FISH CORPORATION, LIMITED,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown lands—Lease—Order-in-Council—Lease containing clause for renewal—Ultra vires—Void—Whether renewal clause severable.

In 1904, pursuant to an Order-in-Council recommending the granting of a lease for 21 years to the suppliant of certain fishery privileges in waters described in the Order-in-Council, the Minister of Marine and Fisheries executed a lease to the suppliant for the said term, the lease contained a provision that, upon complying with certain terms and conditions, the suppliants would be entitled to have the option of renewing the lease for a future period of 21 years.

In 1913 the Deputy Minister notified the suppliants that the lease was *ultra vires*, as not being in virtue of any Statute of Canada, and as being repugnant to the common law and that the lease was *ab initio* void. *Held* on a stated case to determine the rights of the suppliants under said lease that the provision for the renewal of the lease was void and inoperative, and beyond the power of the Minister under said Order-in-Council, but that the clause as to the renewal could be severed, and while that clause was void the lease itself for the term of 21 years was valid and binding.

Pickering v. Ilfracombe R. Co., (1868), L. R. 3, C. P. 235, 250; *In re Burdett* (1888), 20 Q. B. D. 310, followed.

ACTION claiming a declaration that a lease granted by the respondent to the suppliant is a good, valid and subsisting lease.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, April 18, 1918.

A. W. Anglin, K.C., for suppliant.

Christopher C. Robinson, for Crown.

CASSELS, J. (April 30, 1918) rendered judgment.

The argument before me was on a special case, the facts having been agreed to by counsel for the suppliant and respondent.

On July 12, 1915, the suppliant brought this action claiming a declaration that the document mentioned in paragraph 2 of the special case is a good, valid and subsisting lease.

It appears that on April 11, 1904, an Order-in-Council was passed recommending the granting of the lease in question for a period of 21 years, of fishery privileges in the waters described in the Order-in-Council. In apparent pursuance of this Order-in-Council, the lease which is set out in full in the special case was executed on April 19, 1904.

The lease provides as follows:

"To have and to hold unto the said lessee, subject "as aforesaid, for and during the term of twenty-"one years, to be computed from the 1st day of "May, A.D., 1904, and thenceforth next ensuing "and fully to be complete and ended, yielding and "paying therefor to His Majesty or his successors "yearly and every year during the said term the "certain rent and sum of ten dollars to be paid an-"nually and in advance."

The lease then contains a provision which, it is argued, is contrary to the provisions of the Order-in-Council. It provides as follows:

"Should the said lessee conform to all the terms "and conditions of the present lease, and should "establish at the termination of the said period of "twenty-one years that he, or the company herein-"after mentioned, has expended in exploring, de-"veloping, equipment and improvement of the said

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Reasons for Judgment.

"territory hereby leased, the sum of at least one "hundred thousand dollars, then he or the said "company shall have the option of renewing the "present lease, subject to the same terms and condi- "tions, for a further period of twenty-one years."

It is agreed between the parties that the suppliant has complied with all the provisions of the lease, and that the rents payable by the terms of the said document were duly paid, and that if and so far as the said document was ever valid and binding upon the respondent, it has not ceased to be binding or become subject to invalidation by reason of the non-fulfilment or breach by the suppliant of any of the covenants, provisions, terms or conditions therein mentioned.

The 7th clause of the special case reads as follows:

"The suppliant has been, and now is, willing to "accept the rights and premises in the said docu- "ment mentioned for any part of the period or "periods therein mentioned in respect of which the "said document may be held to be binding upon the "respondent, and, nevertheless, to pay the whole "rent and to comply with and fulfil all the cove- "nants, provisions, terms or conditions contained in "the said document, and to fulfil all obligations "thereby imposed upon the suppliant."

Paragraph 8 of the special case reads as follows:

"8. The question for the opinion of the Court "is: Is the said document, dated the 19th April, "1904, binding upon the respondent in respect of "the period or periods therein mentioned, or any "part thereof?"

Paragraph 9 is as follows:

"9. If the answer to the foregoing question be in "the affirmative, judgment is to be entered for the "suppliant for $15,000 by way of damages with "costs, and any rights and privileges or obligations "conferred or imposed upon the suppliant by the "said document shall thereupon cease and deter- "mine, and the judgment shall so declare; if in the "negative, the petition of right is to be dismissed "with costs."

On October 1, 1913, nine years after the execution of the lease in question, during which period the lessee had been in occupation under the terms of the lease and had complied with all the terms thereof, the following letter, dated Ottawa, October 1, 1913, was written by Mr. A. Johnston, the Deputy Minister of Marine and Fisheries:

"Re Lease of Fishing Privileges for Nelson and "other Rivers and Great Slave Lake and a por- "tion of Hudson Bay.

"Sir:

"The above lease being one granted of fishing "privileges in the Nelson and other rivers, and also "the Great Slave Lake and a portion of Hudson "Bay, to you, bearing date of April 19th, 1904, and "issued pursuant to an Order-in-Council of April "11th, 1904, was *ultra vires* of the Governor-Gen- "eral-in-Council to authorize as not being in virtue "of any statute of the Parliament of Canada, and "as being repugnant to the Common Law. The lease "was *ab initio* void, and has never been of any force "or effect, and I have been directed to so inform "you by the Minister."

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Paragraph 4 of the special case, in part, reads as follows:

"It is agreed between the parties for the purpose "of this special case that the right of the Minister "of Marine and Fisheries to issue or authorize to be "issued, fishery leases and licenses for fisheries and "fishing covering the territory described in the said "document is to be assumed . . ."

On the opening of the case I pointed out to Mr. Robinson, counsel for the Crown, that it was open to serious question whether this admission does not in fact admit the validity of the lease. It was not so intended between the parties. It was intended to admit that the Minister has generally the power to issue leases and licenses over this territory, but that it does not follow that he had the power to issue this particular one.

There is no difference of opinion as to what was in contemplation between the parties. I suggested that it had better be made plain.

Mr. Robinson, acting for the Crown, argued the case with ability. His submissions are two in number: First, that the renewal clause in this lease is *ultra vires* as extending beyond the powers conferred on the Minister by the Order-in-Council. Second, that the renewal clause in the lease is not severable from the rest of the lease, and therefore if the clause providing for renewal is *ultra vires*, the whole document falls with it.

These were the two questions argued. All other questions as to the power to grant a lease over part of the territory were eliminated on the argument. As Mr. Robinson states: "There was some doubt as "to his power (that is of the Minister) over part of

"the territory that is included here. Now that ques-
"tion we intend to eliminate. He is assumed to have
"power to issue leases over all of this territory."

"HIS LORDSHIP—You assume that this was within
"the Dominion's jurisdiction?

"*Mr. Robinson*—Quite so.

"HIS LORDSHIP—And the Dominion statute author-
"izing the Deputy is to be assumed. Is that what is
"contemplated?

"*Mr. Robinson*—Yes."

So far as the contention put forward that this provision as to the renewal at the expiration of the 21 years is void, I agree with the contention of counsel for the Crown. It is a provision inserted contrary to the provisions of the Order-in-Council.

It is conceded by the Crown that the Governor-in-Council might have granted a lease for 42 years or for any longer period. The Order-in-Council, however, only providing for a lease for 21 years, and not containing any provision entitling the lessee to a further renewal, this provision in my opinion is void and inoperative. Practically the same question arose before me in the case of *The King v. Vancouver Lumber Co.*[1] The case was tried before me, and I rendered judgment on May 30, 1914. It was a case relating to Deadman's Island. The decision was taken by way of appeal to the Supreme Court of Canada, which Court affirmed my judgment. Up to the present neither the judgment in the Exchequer Court nor in the Supreme Court has been reported. (See footnote 1). I understand an application was made to the Board of the Privy Council for leave to appeal from the judgment of the Supreme Court of

[1] (1914), 17 Can. Ex. 329, 41 D.L.R. 617.

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Canada, and that leave to appeal was granted and that the case is now standing before the Board for argument.

At present I see no distinction between the case before me, and the case I have referred to, and I have come to the conclusion that the clause in the lease in question providing for the renewal is void.

The contention raised on the part of the Crown by Mr. Robinson is that the clause as to the renewal, and the lease for 21 years, are not severable; and, therefore, it is argued that not being capable of being severed the whole lease is void. I do not think this point is well taken. I think that the clause as to renewal can be severed, and while it is void, the lease itself for the term of 21 years is valid and binding.

In the case of the *City of Vancouver v. Vancouver Lumber Co.*[1] cited by Mr. Anglin, in rendering the judgment of the Board, Lord Mersey, at p. 720, after setting out the facts, makes these remarks: "These "being the facts, the defendants take up the position "that they are in possession, and (as they properly "may do) they rely on their possessory title. The "question therefore turns entirely upon the strength "of the plaintiff's title. Is it better than the pos- "sessory title of the defendants?"

Referring back to the judgments in the Courts of British Columbia, the judgment of the trial Court is reported in vol. 15 B.C.R. 432. It appears the trial Judge was of opinion that the Vancouver Lumber Co., who claimed title under the Ludgate lease, were not entitled to succeed, and the action was dismissed with costs. In the Court of Appeal this judgment was reversed, and it is important to refer to the

[1] (1910), 15 B.C.R. 432, [1911], A.C. 711.

judgment of Macdonald, C.J.A. In the case in question the objection was raised that the whole lease was invalid by reason of the fact that there was a provision in the lease for a renewal not authorized by the Order-in-Council. The learned Chief Justice refers to that contention in the following language (p. 447): "It is also urged that the plaintiff's lease "is not in accord with the Order-in-Council of the "16th of February, 1899, under which it was author- "ized. This is true, but the provisions of the lease, "which go beyond the terms of the order, are sever- "able, in which case the lease is good for the bal- "ance. In *Hervey v. Hervey,*[1] Lord Hardwicke, at "p. 569, said: 'Suppose a power to lease for 21 "years, and the person leases for 40, this is void only "for the surplus, and good within the limits of the "power,' " and other cases are cited for the same proposition.

The judgment of the Court of Appeal in British Columbia was affirmed by the Board of the Privy Council; and, I quote the language of Lord Mersey to show that it could only have been confirmed had the lessee title as against the corporation in possession. This point as to its being severable must necessarily have come up for consideration, although nothing seems to have been said about it in the reasons for judgment.

I do not think the cases cited by Mr. Robinson support his contention. One or two of them are cases under the *Bills of Sale Act,* and were determined purely upon the construction of the statute, as, for instance, *Davies v. Rees,*[2] and the other cases under the *Bills of Sale Act.*

[1] (1739), 1 Atk. 561, 26 E. R. 352.
[2] (1886), 17 Q.B.D. 408.

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The facts in the case of *The Queen v. Hughes*[1] and *The Queen v. Clarke,*[2] are entirely different from the case before me. In the first case authority was conferred by statute to grant lands to the extent of 2,560 acres. In direct violation of the terms of the statute, a grant of land to the amount of 4,000 acres was executed. It was held it would be impossible to separate the lands as to which there was power out of the whole quantity granted. The case in my judgment is entirely different from the case in point.

Pickering v. Ilfracombe Ry. Co.,[3] At p. 250 the judgment, in part, reads as follows:

"In *Maleverer v. Redshaw,*[4] a sheriff's bond having been taken in a form other than that prescribed "by the 23 H. 6, c. 9, it was objected that it was "altogether void, the statute enacting 'that bonds "taken in any other form should be void,' but Twisden, J. said, 'I have heard Lord Hobart say upon "this occasion, that, because the statute would make "sure work, and not leave it to exposition what "bonds should be taken, therefore it was added that "bonds taken in any other form should be void; for, "said he, the statute is like a tyrant; where he comes "he makes all void; but the common law is like a "nursing father, makes void only that part where "the fault is, and preserves the rest.' But, after "the long series of decisions on the subject, it is "too late to make that distinction now. In truth, "as was said by Wilmot, C.J., in *Collins v. Blantern,*[5] 'the common law is nothing else but statutes

[1] (1865), L.R. 1, P.C. 81, 92.
[2] (1851), 7 Moo. P. C. 77, 13 E.R. 808.
[3] (1868), L.R. 3, C.P. 235.
[4] (1670), 1 Mod. 35, 86, E.R. 712.
[5] (1767), 2 Wils. K. B. 341, 95 E.R. 847, 1 Smith's L.C. 6th Ed. 325, 334.

"worn out.' The distinction now applies only where "the statute makes the deed void altogether. The "general rule is that, where you cannot sever the "illegal from the legal part of a covenant, the con- "tract is altogether void; but, where you can sever "them, whether the illegality be created by statute "or by the common law, you may reject the bad part "and retain the good."

I have perused all the other cases cited by Mr. Anglin, *viz., Isaacson ex parte Mason.*[1]

In *Re Burdett,*[2] in the Court of Appeal, at p. 314, Fry, L.J., states as follows: "We will first consider "the question upon principle. In our judgment, "clauses in statutes avoiding transactions or instru- "ments are to be interpreted with reference to the "purpose for which they are inserted, and, when open "to question, are to receive a wide or a limited con- "struction according as the one or the other will "best effectuate the purpose of the statute (per "Turner, L.J., in *Jortin v. South Eastern Ry. Co.*[3]) Furthermore, we adopt the language of Willes, J., in *Pickering v. Ilfracombe Ry. Co.,*[4] where he said: " 'The general rule is, that where you cannot sever "the illegal from the legal part of a covenant, the "contract is altogether void; but, where you can "sever them, whether the illegality be created by "statute or by the common law, you may reject the "bad part and retain the good.' "

I fail to appreciate the argument pressed upon me that in the case before me the Crown was induced to grant the lease at a small rental based upon a hope that the lessee might expend a further sum than

[1] [1895], 1 Q.B.D. 33, etc.
[2] (1888), 20 Q.B.D. 310.
[3] (1855), 6 DeG. M. & G. 270 at p. 275, 43 E.R. 1237.
[4] L.R. 3, C.P. 235, at p. 250.

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$50,000 in the development of the territory. There is no evidence whatever adduced showing any attempt to impose upon the Crown.

I answer the question set out in paragraph 8 of the special case, by stating that the document dated April 19, 1904, was binding upon the respondent in respect of a part of the period therein mentioned, that the said lease is now terminated, and I direct judgment to be entered for the suppliant for the sum of fifteen thousand dollars, with costs to be taxed.

Judgment accordingly.

Solicitors for suppliant: *Osler, Hoskin & Harcourt.*

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

THE MARCONI WIRELESS TELEGRAPH COMPANY OF CANADA, LIMITED,

PLAINTIFFS;

AND

CANADIAN CAR & FOUNDRY COMPANY, LIMITED,

DEFENDANTS.

1918
Nov. 12.

Courts—Co-ordinate jurisdiction—Interlocutory injunction—Infringement of patent—Vexatious litigation—Comity—Convenience of parties.

1. If the Superior Court of the Province of Quebec has dismissed a motion for an interlocutory injunction in a suit instituted by writ and declaration, the Exchequer Court, being a court of co-ordinate jurisdiction, will not entertain a similar motion; the finding of a court of co-ordinate jurisdiction cannot be overlooked.

2. Where no writ and declaration were so instituted, the Exchequer Court will refuse such motion on the ground of comity.

3. In an application for an interlocutory injunction, the Court will cautiously consider the degree of convenience and inconvenience to the parties, and whether the damages resulting from the refusal of the injunction would be irreparable.

Plimpton v. Spiller, (1876), 4 Ch. D. 286, 289, *et seq.,* followed.

4. Comity, as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because it is not imperative. It is a useful ultra-legal adjunct to the judicial doctrine of *stare decisis.*

ACTION for the infringement of a patent.

Tried before the Honourable Mr. Justice Audette, at Ottawa, November 12, 1918.

E. Lafleur, K.C., and *C. Sinclair,* for plaintiffs.

Peers Davidson, K.C., for defendants.

AUDETTE, J. (November 12, 1918) delivered judgment.

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THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

This is an action for the infringement of two Canadian patents of invention, one of which appearing, on its face, to have already expired.

The matter comes now before the Court on two motions, on behalf of the plaintiffs, against the two defendants, respectively, for interlocutory injunctions, until trial, seeking to restrain the defendants from supplying, vending, etc., a certain wireless apparatus protected by a patent of invention, which, *primâ facie,* is good and valid until the question of its validity has been raised and passed upon.

The Superior Court of the Province of Quebec and the Exchequer Court of Canada have, in such matters, concurrent and co-ordinate jurisdiction.

Similar motions and applications to those now made here were made before a judge of the Superior Court, at Montreal, P.Q., and on October 25, 1918, and judgment was thereon rendered dismissing the same with costs.[1]

The question raised in this Court is identical with that decided between the same parties by the Superior Court Judge of the Province of Quebec, upon similar interlocutory applications, and the defendants are brought twice before the Courts in respect of one and the same matter. While I would not rest my decision on the ground that the question is *res judicata* in the strict sense of the term, I would, however, feel bound to exercise that jurisdiction which is inherent in the Court to prevent vexatious litigation which amounts to an abuse of its process. *Stephenson v. Garnett.*[2]

At p. 81 of *Everett & Strode—Law of Estoppel,* (2nd Ed.) we find: "So that, even if the former pro-

[1] 43 D.L.R. 382.
[2] [1898], 1 Q.B. 677, 13 Hals. 334.

"ceeding were interlocutory, yet if the Court de-
"cided an issue between the parties which was with-
"in its jurisdiction, the same cannot be raised in
"subsequent proceedings between the same parties;
"and though the matter may not be, strictly speak-
"ing, *res judicata,* an attempt to raise such an issue
"will be dealt with as frivolous and vexatious, and
"an abuse of the process of the Court."

These motions and application were entertained at Montreal, P.Q., without the issue of any writ or institution of an action, but with, I am informed by counsel, the undertaking to do so.

The Exchequer Court has obviously no jurisdiction to entertain such matters by way of appeal from the Superior Court of the Province. And had the Superior Court suit been duly instituted with writ and declaration, I would, at this stage, without hesitation, have refused to entertain or consider these motions and sent the plaintiffs back, as a matter of propriety, to the forum first chosen by them, when they were at liberty to institute their suit in either Court.

Having gone so far it remains for me to say that Mr. Lafleur, of counsel for the plaintiff, declared at bar that no writ had been issued in the Superior Court at Montreal, and he formally declared, on behalf of the plaintiffs, they did not intend to prosecute any further proceedings at Montreal. To that extent, however, I am free and untrammelled; but, I cannot overlook and ignore the finding of a learned judge upon similar matter in a court of co-ordinate jurisdiction. In Ontario[1] a Judge is by law bound by that decision.

[1] R.S.O. 1914, ch. 56, sec. 32.

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THE MARCONI WIRELESS TELEGRAPH CO. v. CANADIAN CAR AND FOUNDRY CO.

Reasons for Judgment.

Must the motions be refused out of considerations of comity? A careful examination of the subject will show that the word "comity", as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because its obligation is not imperative; and the most that can be said of it in a practical way, is that it is a useful ultra-legal adjunct to the judicial doctrine of *stare decisis*. Nothing, however, need be added to the admirable definition of the term by Mr. Justice Brown in the patent case of *Mast, Foos & Co. v. Stover Mfg. Co.*,[1] where it was claimed that comity demanded that the Court below should have followed the decision of another Court of co-ordinate jurisdiction on the same patent. He says: "Comity persuades, but it does not "command. It declares not how a case *shall* "be decided, but how it may with *propriety* be de- "cided. It recognizes the fact that the primary duty "of every Court is to dispose of cases according to "the law and the facts; in a word, to decide them "right. In doing so the Judge is bound to determine "them according to his own convictions. If he be "clear in those convictions he should follow them. "It is only in cases where, in his own mind, there "may be a doubt as to the soundness of his views "that comity comes in play, and suggests a uni- "formity of ruling to avoid confusion, until a higher "Court has settled the law. It demands of no one "that he shall abdicate his individual judgment, "but only that deference shall be paid to the "judgments of the co-ordinate tribunals. Clearly it "applies only to questions which have been actually

[1] (1900), 177 U.S. 485 at p. 488.

"decided and which arose under the same facts."

Now seeing that a similar motion has been refused by a Judge of a provincial Court of co-ordinate jurisdiction, considerations of comity or propriety would induce me to stay my hand on this motion even if there were not other and more cogent reasons present in the material before me for declining to make an order for an interim injunction.

In such matters, does not the fundamental principle of law rest upon the question of, first, irreparable damage; 2nd, balance of convenience, and 3rd, the maintenance, if possible, of the *status quo,* as between the parties until the hearing upon the merits?

In a case of this nature the Court has first to consider whether the damages resulting from the refusal of the injunction would be irreparable, and upon this point it has been asserted, without contradiction, that the defendants are quite solvent and well able to satisfy any pecuniary damages that might ultimately be adjudicated against them. And it is further contended by counsel on behalf of the plaintiffs that besides this pecuniary damage there is also that class of damage which would result from the dissemination of these alleged infringing machines all over the world, an advertisement amounting to an encouragement to further infringements. But this class of damage is too remote and cannot be classed with what is termed, in such matters, as irreparable damage. Moreover, it appears from the argument before me, that the apparatus now being installed by the defendant company upon the twelve vessels which are being built for the Republic of France are similar to those installed and used on the French and American vessels, and that

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Reasons for Judgment.

that is the very reason why they are now so installed on these twelve vessels with the view of maintaining uniformity in the two fleets. There could be no justification to interfere peremptorily with such undertakings.

Moreover, as said in the leading case of *Plimpton v. Spiller,*[1] in such case the Court will cautiously consider the degree of convenience and inconvenience to the parties by granting or not granting the injunction. And as there pointed out, on the authority of the judgment of Lord Cottenham, in *Neilson v. Thompson,*[2] there are cases in which very much greater mischief would be caused the defendant by the granting of an injunction, if it should ultimately turn out that it ought not to have been granted, than you would cause the plaintiff by postponing the injunction when there was ground for its being granted.

If the injunction were granted in the present case the defendants would be unable to deliver, completed and ready for use, the balance of the twelve vessels under construction, and these vessels would be tied up in the ice, at Fort William, for the winter. The practical effect of such injunction would be to stop a going trade and adopt a course which might result in very great difficulty in finally assessing compensation. If in the present case the defendants should ultimately prove to be right and an injunction were to issue to-day, the damages would be most serious. And it is worthy of mention that all vessels delivered and which, as was mentioned at the argument, were at Montreal at the time of the application made

[1] 4 Ch. D. 286, 289, *et seq.*
[2] (1841), 1 Webs. P. R. 278.

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there, would have been foreign vessels protected by sec. 53 of the *Patent Act*.

Under the circumstances I have come to the conclusion that the plaintiffs have not made out a case for interlocutory injunction and the two motions are dismissed. The costs of and incidental to these motions will be, as is usual in such cases, costs in the cause.

Motion dismissed.

Solicitors for plaintiffs: *Greenshields, Greenshields & Co.*

Solicitors for defendants: *Davidson, Wainwright & Co.*

1918
Nov. 27.

IN THE MATTER OF THE PETITION OF RIGHT OF

ISAI GINGRAS,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Railways—Negligence—Employees' Relief Fund—Temporary employee—Contract of service—Estoppel.

An agreement by a *temporary* employee of the Intercolonial Railway, as a condition to his employment, to become a member of the Temporary Employees' Relief and Insurance Association and to accept the benefits provided by its rules and regulations in lieu of all claim for personal injury, is perfectly valid and is a bar to his action against the Crown for injuries sustained in the course of employment. By accepting the benefits he is estopped from setting up any claim inconsistent with those rules and regulations.

Miller v. Grand Trunk R. Co. [1906], A.C. 187, and *Saindon v. The King,* (1914), 15 Can. Ex. 305, distinguished; *Conrod v. The King,* (1914), 49 Can. S.C.R. 577, followed.

PETITION OF RIGHT to recover damages for personal injuries to an employee of the Intercolonial Railway.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 14, 15 and 21, 1918.

Alleyn Taschereau, K.C., for suppliant.

E. Gelly, for respondent.

AUDETTE, J. (November 27, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover damages in the sum of $3,000 for bodily in-

juries sustained by him and which he alleges resulted from the negligence of the Crown's servants.

On the morning of July 31, 1916, between the hours of ten and eleven, the suppliant was engaged, in the Intercolonial Railway yard, at Levis, P.Q., on the Government coal plant, or crane trestle, in loading railway cars, by means of coal chutes handled by him, while he was standing on the platform marked *"passerelle"* on plan Exhibit "E". His work consisted in opening the fly-gate, underneath the bin, by means of a lever pulled by hand, and to lower or raise the coal chutes, as from time to time required to fill the cars. The coal chute was so raised and lowered by means of a wire attached to the chute and worked on a pulley which he controlled by moving up and down, by means of a rope, the weight which appears on the plan and placed above the platform and so working alongside of wooden stringers of 12 x 12-inch.

In the course of one of these operations the nut, attached to the bolt holding together the two pieces of the pulley, having become loose, flew off, the pulley opened and the sheave fell upon the suppliant's head, and his hand becoming entangled in the rope, he was thereby lifted from the ground, having been felled by the sheave, remaining suspended on tip-toe upon the platform. *Toronto Power Co., Ltd. v. Paskwan.*[1]

As a result of the accident he suffered much pain, a cut on the head, a fracture of the little finger of the right hand. Finally gangrene having set in, the little finger had to be amputated, and he now remains with a crippled hand and without this finger. He was 59 years of age at the time of the accident,

[1] [1915] A.C. 734, 22 D.L.R. 340.

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and he declares, being hardly able to work, earning now weekly from about a year after the accident, but a few dollars.

The Crown has paid all hospital and medical cares and charges occasioned by the accident.

In the view I take of the case it becomes unnecessary to go into further details of the accident and the cause which occasioned it.

To this claim for damages the Crown, *inter alia*, sets up the plea that the suppliant being a member of the I. C. R. Employees' Relief and Insurance Association, it is relieved, by the rules and regulations of that Association, and by the suppliant's agreement on becoming a member thereof, of all liability for the claim now made.

Under the evidence, and the admission of facts filed of record, I find the suppliant at the time he entered the employ of the Intercolonial Railway must have signed a document called form 40, and similar to Exhibit "B" filed herein, and especially that he was given a booklet (similar to Exhibit "A") intituled "Intercolonial and Prince Edward Island Railways Employees' Relief and Insurance Association—Rules for the Guidance of the *Temporary* Employees' Accident Fund."

He has been given this booklet containing the rules of this insurance association for the *temporary* employees of the Intercolonial Railway, and he has consented to be bound thereby, as a condition to his employment, and to abide by the rules and regulations of the Association.

Furthermore, the suppliant, at different dates subsequent to the accident, and in compliance with the rules and regulations of the insurance associa-

tion, was paid and he received weekly allowances for which he duly gave acknowledgment.

The rules and regulations of the association contain the following provisions:

"The object of the Temporary Employees' Acci-"dent Fund shall be to provide relief to its members "while they are suffering from bodily injury, and "in case of death by accident, to provide a sum of "money for the benefit of the family or relatives of "deceased members; all payments being made sub-"ject to the constitution, rules and regulations of "the Intercolonial and Prince Edward Island Rail-"ways Employees' Relief and Insurance Associa-"tion from time to time in force.

"Rule 3. In consideration of the contribution of "the Railway Department to the association, the "constitution, rules and regulations, and future "amendments thereto, shall be subject to the ap-"proval of the Chief Superintendent and the Rail-"way Department shall be relieved of all claims for "compensation for injury or death of any member."

Having said so much, it becomes unnecessary to express any opinion as to whether or not the suppliant's claim could have been sustained on the ground of negligence. The agreement (Exhibit A and B) entered into by the suppliant, whereby he became a member of the insurance society and consented to be bound by its rules, was a part of a contract of service which it was competent for him to enter into. And this contract is an answer and a bar to this action, for the restrictive rules are such as an insurance society might reasonably make for the protection of their funds, and the contract as a whole was to a large extent for the benefit of the

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Reasons for Judgment.

suppliant and binding upon him. *Clements v. London and North Western Ry. Co.*[1]

Such contract of service is perfectly valid and is not against public policy, *Griffiths v. Earl of Dudley,*[2] and in the absence of any legislation to the contrary, as with respect to the *Quebec Workmen's Compensation Act,*[3] any arrangement made before or after the accident would seem perfectly valid. *Sachet, Legislation sur les Accidents du Travail.*[4]

The present case is in no way affected by the decisions in the case of *Miller v. Grand Trunk,*[5] and *Saindon v. The King,*[6] because in those two cases the question at issue was with respect to a *permanent* employee where the moneys and compensation due him, under the rules and regulations of the insurance company were not taken from the funds toward which the Government or the Crown were contributing. It is otherwise in the case of a *temporary* employee, and I regret to come to the conclusion, following the decision in *Conrod v. The King,*[7] that the suppliant's claim is absolutely barred by the condition of his engagement with the Intercolonial Railway. See also *Gagnon v. The King.*[8]

Furthermore, the suppliant having accepted the weekly sick allowance and given the receipt therefor in the manner above mentioned, he "is estopped from setting up any claim inconsistent with those rules and regulations, and, therefore, precluded from

[1] [1894] 2 Q.B. 482.
[2] (1882), 9 Q.B.D. 357.
[3] 9 Edw. VII., c. 66, s. 19; Art. 7339, R.S.Q. 1909.
[4] Vol. 2, pp. 209 *et seq.*
[5] [1906] A.C. 187.
[6] (1914), 15 Can. Ex. 305.
[7] (1914), 49 Can. S.C.R. 577.
[8] (1917), 17 Can. Ex. 301, 41 D.L.R. 493.

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maintaining this action." Per Sir Charles Fitzpatrick—*Conrod v. The King, supra.*

Therefore, the suppliant is not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitor for suppliant: *Alleyn Taschereau.*

Solicitors for respondent: *Gelly & Dion.*

1918
Oct. 23.

IN THE MATTER OF THE PETITION OF

THE AMERICAN SHEET AND TIN PLATE COMPANY,

PETITIONER;

AND

THE PITTSBURGH PERFECT FENCE COMPANY, LIMITED,

RESPONDENT.

Trade Mark—Specific trade mark—Registration—Resemblance to existing mark—Manufactured articles dissimilar.

In an application for the registration of a specific trade mark, where the resemblance to an existing registered trade mark is not sufficient to cause deception, registration should be granted.

PETITION for an order directing the registration of a trade mark.

Tried before the Honourable Mr. Justice Cassels, at Ottawa, September 13, 1918.

Peers Davidson, K.C., for petitioners.

F. H. Chrysler, K.C., for respondent.

CASSELS, J. (October 23, 1918) delivered judgment.

The petitioners ask for an order directing the registration in the trade mark register of the Department of Agriculture, Ottawa, of a trade mark claimed to be their property.

The trade mark in question consists in the outline of a keystone bearing across the face of the same and extending at each side the word "Keystone", and above this symbol an ellipse of broken lines sur-

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rounded by the words "American Sheet and Tin Plate Co.—Trade Mark."

The drawing of the said trade mark is shown in the application marked Exhibit No. 1, on the application before me. The Registrar refused the application on the ground that representations of the keystone had already been registered in favour of the Pittsburgh Perfect Fence Company, Limited, and Henry Disston & Sons, Inc.

Notices as required by the statute were duly served upon the Pittsburgh Perfect Fence Company, Limited, and also upon Henry Disston & Sons, Inc. The Pittsburgh Perfect Fence Company, Limited, appeared in opposition to the petition. Henry Disston & Sons, Inc., entered no appearance, but allowed the matter to go by default.

The case was tried before me on September 13 last, and at the request of counsel for the petitioners, the hearing was adjourned, written arguments to be furnished by counsel.

Arguments have been filed on the part of the petitioners, and also on the part of the respondents, and I may state that the arguments of both counsel are commendable for the clearness with which their respective views are stated. Counsel have selected certain authorities which show the principles which would govern any applications of this nature and I have myself refrained from multiplying citations. It is easy to multiply authorities in trade mark and patent cases by the thousand, but in my view nothing is gained by so doing.

After the best consideration I can give to the case I am of opinion that there is no reason why the petitioners should not be entitled to registration of their trade mark. What they ask is that their registra-

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tion should be for a specific trade mark, as being representative of steel sheets and plates of rolled soft steel, not tool or crucible steel. It has to be borne in mind at the threshold of the case that there is no application on the part of the petitioners to register as their trade mark the word "Keystone" by itself.

The first ground of objection by the Pittsburgh Perfect Fence Company, Limited, is to the effect that on May 27, 1904, they registered in the Department of Agriculture a specific trade mark consisting of a keystone with the words "Pittsburgh Perfect" and the initials of the company's name, *viz.*, "P.P.F.Co." Such drawing is set out in the statement of objections on behalf of the Pittsburgh Perfect Fence Company filed in this Court.

It is conceded that since the year 1913, the petitioners in this case have continuously used their trade mark on goods manufactured and sold by them; and have built up a large business in the manufacture and sale of sheets and plates of rolled soft steel, not tool or crucible steel.

It is also conceded that the respondents, the Pittsburgh Perfect Fence Company, Limited, have never manufactured or placed upon the market goods of a class similar to those manufactured and sold by the petitioners in this case.

It must also be kept clearly in mind that the respondents in no way claim as a trade mark the word "keystone" or the symbol of a keystone by itself. Their trade mark has a keystone, but in combination with other symbols described in their application. Not merely have they never used their trade mark on materials of a similar class to those manufactured and sold by the present petitioners, but I do not think, notwithstanding the argument on their be-

half, that they ever contemplated or intended to manufacture or to sell steel sheets similar to those manufactured and sold by the petitioners.

I think there is a great deal of force in Mr. Davidson's reference to the charter incorporating the Pittsburgh Perfect Fence Company, Limited. That charter is dated November 13, 1903. It incorporates the corporation with the corporate name of the Pittsburgh Perfect Fence Company, Limited. They are created a corporation for the purposes and objects following, that is to say: "To construct and erect "fences of every nature and description, and for the "said purpose, to manufacture, produce, buy, sell "and trade and deal in iron, steel, wire and other "metals of every description and all products and "articles made therefrom."

It is not necessary to deal with the intricate question, so often lately discussed, as to whether or not considering the limited purposes for which the company was incorporated they could nevertheless embark in the general business of manufacture. The latest case that I have had the pleasure of reading, and one very instructive, is that of *Edwards v. Blackmore,*[1] decided by the Appellate Division of Ontario.

At present I merely refer to the fact that from the time of their incorporation, namely, November 13, 1903, down to the present time, they have never manufactured the class of goods so extensively dealt in by the present petitioners; and, moreover, the purpose of their incorporation was to construct and erect fences, and for that purpose to deal in the articles mentioned.

[1] (1918), 42 D.L.R. 280, 42 O.L.R. 105.

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As I have pointed out, there has been no claim put forward upon the part of the Pittsburgh Perfect Fence Company, Limited, that the word "Keystone" forms their trade mark; and this is further emphasized by the fact that on December 30, 1913 (Ex. No. 5) a consent was given to Henry Disston & Sons, Inc., in which they state that "we can see no possi-"bility of our being hampered on account of Henry "Disston & Sons, Incorporated, having the keystone "registered as their trade mark in Canada on the "articles below enumerated", naming these articles. Henry Disston & Sons, Inc., have never, according to the evidence, used the word "keystone" by itself as their trade mark, but always in combination; and they have only manufactured the articles referred to in their application for a trade mark, a class of articles entirely dissimilar to the articles manufactured and sold by the petitioners.

There is no suggestion of any fraudulent intention on the part of the petitioners to steal the trade of the respondents, nor could it be possible under the circumstances of this case that such contention could reasonably be put forward.

There is no similarity between the trade mark of the petitioners and the trade mark of the Pittsburgh Perfect Fence Company. From the year 1913 to the present time the petitioners have been using their trade mark without objection on the part of the Pittsburgh Perfect Fence Company, or any other person. This is not a case of "passing off."

Our *Trade Mark Act,* as it has been stated, differs in a great many respects from the English Trade Mark Acts. It provides that "All marks, names, "labels, brands, packages or other business devices, "which are adopted for use by any person in his

"trade, business, occupation or calling, for the pur-
"pose of distinguishing any manufacture, product
"or article of any description manufactured, pro-
"duced, compounded, packed or offered for sale by
"him, applied in any manner whatever either to
"such manufacture, product or article, or to any
"package, parcel, case, box or other vessel or re-
"ceptacle of any description whatsoever containing
"the same, shall, for the purposes of this Act, be
"considered and known as trade marks."

Section 11, however, which reads as follows: "The "Minister may refuse to register any trade mark—

"(a) if he is not satisfied that the applicant is un-
"doubtedly entitled to the exclusive use of such
"trade mark;

"(b) if the trade mark proposed for registration
"is identical with or resembles a trade mark al-
"ready registered;

"(c) if it appears that the trade mark is cal-
"culated to deceive or mislead the public;

"(d) if the trade mark contains any immorality
"or scandalous figure;

"(e) if the so-called trade mark does not contain
"the essentials necessary to constitute a trade mark,
"properly speaking." limits the application of the Act.

I cannot do better than quote from the language of the late Lord Macnaghten, in the case of *Standard Ideal Company v. Standard Sanitary Manufacturing Company*.[1] His Lordship gave the decision of the Board, and is reported as follows: "On the "question as to the validity of the alleged trade "mark their Lordships are compelled to differ from "the Court of King's Bench. The Canadian *Trade*

[1] [1911] A.C. p. 84.

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"*Mark and Design Act,* 1879, (42 Vict., c. 22) re-
"quires trade marks to be registered. It does not,
"however, contain a definition of trade marks cap-
"able of registration. It provides that 'All marks,
"names, labels, brands, packages or other business
"devices, which are adopted for use by any person
"in his trade, business, occupation or calling for the
"purpose of distinguishing any manufacture, pro-
"duct or article of any description manufactured,
"produced, compounded, packed or offered for sale
"by him applied in any manner whatever, either to
"such manufacture, product or article, or to any
"package, parcel, case, box or other vessel, or re-
"ceptacle of any description whatsoever containing
"the same, shall for the purposes of this Act be con-
"sidered and known as trade marks.'

"The Act, however, declares that the Minister
"may refuse to register any trade mark 'if the so-
"called trade mark does not contain the essentials
"necessary to constitute a trade mark, properly
"speaking.'

"The Act does not define or explain the essentials
"of a trade mark, nor does it provide for taking off
"the register an alleged trade mark which does not
"contain the requisite essentials. In applying the
"Act the Courts in Canada appear to consider them-
"selves bound or guided mainly by the English law
"of trade marks and the decisions of the Courts of
"the United Kingdom."

A case that to my mind has considerable bearing on the case before me, is the case of *Re Bagots, Hutton & Company's Trade Mark.*[1] This was a case in which a decision of Mr. Justice Neville was reversed by the Court of Appeal. The judgment in appeal is

[1] [1916] 2 Ch. D. 103.

reported in L.R. 2 Ch. D. 103. The application there was on the part of Bagots Limited, for the registration for gin of a trade mark comprising the picture of a cat in boots. The allegation made by the opponents to the registration was that the proposed trade mark would be calculated to deceive by reason of the fact that in some eastern countries a certain gin manufactured by the opposers had become known as Cat Gin. It would appear that the device of a cat was common to the gin trade. In the case before me the symbol of a keystone by itself or in combination with other words is also common. However, their Lordships reversed the decision in the Court below and ordered registration of the trade mark. There was an appeal taken to the House of Lords. The case in appeal is reported in [1916] 2 A.C. 382. The appellants contended that their goods had become known in the United Kingdom, and in the markets of the world, by the name of "Cat Brand," and that the trade mark which the respondents were seeking to register was calculated to cause the goods bearing the same to be described as "Cat Brand" goods, and to be passed off as and for the appellants' goods.

At page 387, the Lord Chancellor states that in this case the appellants seek to prevent registration of a trade mark which the respondents have used in this country for at least 17 years, upon the ground that if registered it would be calculated to deceive. He states that, "So far as the probability that deception owing to the resemblance of the two marks could occur, it is sufficient to say that a mere glance is sufficient to dispel any such apprehension." I think the same language might be used in the case before me.

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Lord Loreburn, at p. 392, states: "It was not calculated to deceive anyone in the United Kingdom."

At p. 393, Lord Haldane's reasons are set out, and he states: "The appellants' trade mark is not a "cat, but a can on a barrel, and the appellation of "their brands ought properly to be 'Cat and Barrel' brands, and not 'Cat' brands. To the more "general appellation they are not entitled," etc.

As I have pointed out, the Pittsburgh Perfect Fence Company, Limited, are not entitled to the trade mark "Keystone," but to this word in combination with other words, and symbols, and I fail to see how any person could be deceived by the use by these petitioners of their trade mark.

If, hereafter, any fraud is attempted by the petitioners, there is a remedy in the Courts. I do not myself apprehend that such an action will ever arise. I think the application of the petitioners should be allowed, and the order made directing the registration.

The petitioners have asked that the registration should be rectified by limiting the trade mark of the Pittsburgh Perfect Fence Company, Limited, and the Henry Disston & Sons, Inc., so as to confine their trade mark to a specific trade mark for the particular goods manufactured by them, and excluding therefrom the goods manufactured by the present petitioners. I do not think that this relief is necessary.

Under the circumstances of the case I think that no costs to any party should be allowed, but each party bear their own costs.

Solicitors for petitioners: *Davidson, Wainwright, Alexander & Elder.*

Solicitors for respondent: *Chrysler & Higgerty.*

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Nov. 20.

IN THE MATTER OF THE PETITION OF RIGHT OF

EDWARD COLEMAN,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Negligence—Public work—Harbour of Victoria—Government scow—Fellow-servant.

The harbour of Victoria, B.C., which was a public harbour before British Columbia entered into Confederation, is a public work within the meaning of sec. 20 of the *Exchequer Court Act.*

The Crown is not liable for an accident happening on a Government scow in the harbour of Victoria, B.C., while engaged in work executed by the Government of Canada for the improvement of the harbour, where the negligence which caused the accident is the negligence of a fellow-servant of the suppliant.

Ryder v. The King, (1905), 36 Can. S.C.R. 462, followed; *Paul v. The King,* (1906), 38 Can. S.C.R. 126; *Montgomery v. The King,* (1915), 15 Can. Ex. 374; and *La Compagnie Generale Enterprises Publiques v. The King* (unreported),* distinguished.

PETITION OF RIGHT to recover damages for personal injuries while in the employment of the Government.

Tried before the Honourable Mr. Justice Audette, at Victoria, B.C., September 23, 1918.

R. C. Lowe and *J. P. Walls,* for suppliant.

E. Miller, for respondent.

AUDETTE, J. (November 20, 1918) delivered judgment.

The suppliant, by his petition of right, seeks to recover the sum of $5,000 as representing damages

* See 44 D.L.R. 459 (on appeal from 32 D.L.R. 506).

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alleged to have been suffered by him, as arising out of an accident which occurred while he was acting in the discharge of his duty in the employment of the Government of Canada.

On June 3, 1914, the Crown, through the Department of Public Works of Canada (Dredging Branch) was carrying on, in the harbour of Victoria, B.C., the work of rock-drilling for the purpose of improving the harbour. A part of the rock-drilling plant, used for such purposes, was a vessel or scow upon which was built a platform, with steam drills installed thereon. The scow was provided with four spuds, performing the same functions as spuds do on dredges. Upon this scow was also erected the structure which appears on the photograph, Exhibit No. 1; that is uprights joined at the top by a cross-beam, upon which was attached a traveller upon which ran a block and with ropes used, as occasion required, to lift up and let down the drills in the course of their operation. Below the cross-beam just mentioned there was a kind of truss-rod, which extended right across and passed through the uprights, being made fast to the same by a nut screwed or applied to the threaded end of the rod. Between the cross-beam and the rod there are two brackets, similar to Exhibit No. 2. The teat on the flat side part of this bracket ran into a hole, of the same size, underneath and in the wooden cross-beam, and was held in position, against its natural weight, by the rod above mentioned, which was maintained in the necessary tight position to hold the brackets, by means of the nuts above mentioned.

On the date in question the suppliant was working on a night shift. About midnight, while engaged at handle B, upon Exhibit No. 1, one of the

brackets fell upon his right hand, crushing the index finger. The three first phalanges of that finger were finally amputated, together with the head of the metacarpal bone at the base of that finger—the whole necessitating four surgical operations.

As a result of this accident the suppliant has lost time, and incurred medical expenses, suffered pain, and his earning capacity has been partially reduced for the rest of his life through the impaired function of his right hand. It is comforting to know from the evidence that the Crown has paid the suppliant his wages all through his illness and the time he lost, as well as all hospital and medical charges and expenses. The suppliant was continued in his employment after the accident, after having undergone these operations, and with this diminished capacity for work was given higher wages than before the accident. He only left off working for the Government when the works were closed down in 1917.

The harbour of Victoria was a public harbour long before British Columbia entered into Confederation, in 1871. As far back as 1860 the Legislature of Vancouver Island passed an Act for the purpose of borrowing and spending monies for the improvement of that harbour, and under sec. 108 of the *B. N. A. Act*, the harbour became the property of the Dominion Government.

The accident occurred in the harbour of Victoria on a *Government scow*, fitted with drilling appliances, while engaged in works executed by the Government for the improvement of the harbour.

From the above statement of facts it is manifest that this action is grounded on negligence and sounds in tort. In such a case there is no liability on the part of the Crown, unless it is made so liable by

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statute. The suppliant, to succeed, must, therefore, bring his case within the provisions of the statute prescribing a remedy against the Crown in respect of negligence by its officers or servants, *viz.*, the *Exchequer Court Act*, sec. 20, sub-sec. (c), as it stood at the time of the accident. To bring this case within such enactment the injury must, first, have occurred "on a public work"; and secondly, it must have resulted from the negligence of some "officer or servant of the Crown while acting within the scope of his duties or employment."

In the reports there will be found a number of cases which were instituted in this Court and which involved the interpretation of the term "*public work*" in the enactment in question; and it is desirable to consider some of them in respect of their bearing upon the case at bar. Most of these cases were carried on appeal to the Supreme Court of Canada. In two of them, *Paul v. The King*[1] and *Montgomery v. The King*,[2] there was a similarity in fact to this case to the extent that the injury happened on a vessel employed in navigation improvement works, and in each it was sought to establish that the vessel was a "public work" within the meaning of the enactment last mentioned. This contention was not sustained by the Courts; but I venture to entertain the view that not only are there controlling facts in the case before me that distinguish it from those to which I refer, and that a judgment for the suppliant in this case would, but for other considerations which are hereafter stated, be fully in harmony with decisions which I must follow because the language used by some of the judges of

[1] 38 Can. S.C.R. 126.
[2] 15 Can. Ex. 374.

the Supreme Court warrant a finding here that the *locus in quo* was a public work within the meaning of sec. 20 (c) of the *Exchequer Court Act*.

In support of this view I would cite the language of Burbidge, J., in *Leprohon v. The Queen*.[1] At p. 108 he says: "I think that the expression '*public* "*work*' occurring in the 16th section (now sec. 20) "must be taken to include not only railways and "canals and other undertakings which in older coun- "tries are usually left to private enterprises; but "also all other 'public works' mentioned in the *Pub- "lic Works Act* and other Acts in which that term "is defined." The *Public Works Act* mentioned by the learned Judge was R.S.C. 1886, c. 36, and is now to be found in R.S.C. 1906, c. 39, and apparently also sec. 2 of the *Expropriation Act*. By sec. 3 (c) of the *Public Works Act* it is declared that "public work" or "public works" means and includes any work or property under the control of the Minister.

Now, bearing this definition in mind, and remembering that the *Exchequer Court Act* provides a remedy for any one injured on a public work as the result of negligence by an officer or servant of the Crown, it will be apprehended that the case is one to which must be applied the rule of statutory construction which declares that as all Legislatures "are presumed to proceed with a knowledge of ex- "isting laws, they may properly be deemed to legis- "late with general provisions of such a nature in "view." *Sutherland's Statutory Construction*, by Lewis.[2]

If this is the rule of construction to be followed, and I think it is, then the harbour of Victoria, where-

[1] (1894), 4 Can. Ex. 100.
[2] Vol. II, sec. 355, p. 681, and sec. 447, p. 852.

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in the accident happened, being "property under the control of the Minister," must be held to be a public work, and if the other requirements of sec. 20 (c) of the *Exchequer Court Act* have been satisfied by the suppliant's proof, then he has made out a clear case against the Crown.

In the case of *Paul v. The King*[1] it was held that a Government steam tug and a scow, its tow, which caused a collision, while engaged in improving the ship channel of the St. Lawrence, was not a public work, and that the suppliant must therefore fail since the accident did not occur on a public work.

Sir Louis Davies, J. (now Chief Justice), commenting upon this expression "public work", in the *Paul case, ubi supra,* said, at p. 131: "To hold the "Crown liable in this case of collision for injuries to "the suppliant's steamer arising out of the collision, "we would be obliged to construe the words of the "section so as to embrace injuries caused by the "negligence of the Crown's officials *not as limited* by "the statute 'on any public work,' but in the carry-"ing on of any operations for the improvement of "the navigation of *public harbours* or rivers. In "other words, we would be obliged to hold that all "operations for the dredging of *these harbours* or "rivers or the improvement of navigation, and all "analogous operations carried on by the Govern-"ment were either in themselves public works, which "needs, I think, only to be stated to refute the argu-"ment, or to hold that the instruments by or through "which the operations were carried on were such "public works.

"If we were to uphold the latter contention I "would find great difficulty in acceding to the dis-

[1] 38 Can. S.C.R. 126.

"tinction drawn by Burbidge, J., between the dredge "which dug up the mud while so engaged and the "tug which carried it to the dumping ground while "so engaged. Both dredge and tug are alike en- "gaged in one operation, one in excavating the ma- "terial and the other in carrying it away.

"But even if we could find reasons to justify such "a distinction, which I frankly say I cannot. * * *

"I think a careful and reasonable construction of "the clause 16 (now 20) (c) must lead to the con- "clusion that the public works mentioned in it and "'on' which the injuries complained of must hap- "pen are *public works* of some definite area, as dis- "tinct from those operations undertaken by the "Government for the improvement of navigation or "analogous purposes, not confined to any definite "area of physical work or structure."

And Idington, J., in the same case, p. 134, said: "We were referred to the interpretation given the "words 'public works' in the *Public Works Act*. If "the meaning given there could be used here then "this appellant's right, if otherwise entitled to suc- "ceed, would be clear."

And Duff, J., in the case of *The King v. Lefrancois*,[1] said: "Having regard to the previous decis- "ions of this Court, the phrase 'on a public work' "in sec. 20, sub-sec. (c) of the *Exchequer Court Act* "must, I think, be read as descriptive of the locality "in which the death or injury giving rise to the "claim in question occurs. The effect of these de- "cisions seems to be that no such claim is within the "enactment unless 'the death or injury' of which it is "the subject happened at a place which is *within* "*the area* of something which falls within the de-

[1] (1908), 40 Can. S.C.R. 431 at 436.

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"scription 'public work.' *Paul v. The King*[1] and "the cases therein cited."

Again, Sir Charles Fitzpatrick, C.J., in *Chamberlin v. The King,*[2] said: "In a long series of decis- "ions this Court has held that the phrase '*on a pub- "lic work*' in sec. 20, sub-sec. (c) of the *Exchequer "Court Act,* must be read, to borrow the language "of Mr. Justice Duff in *The King v. Lefrancois,*[3] " '*as descriptive of the locality in which the death "or injury giving rise to the claim in question oc- "curs,*' and that to succeed the suppliant must come "within the strict words of the statute. Taschereau, "J., in *Larose v. The King.*[4]—See *Paul v. The "King.*"[1]

See also *Olmstead v. The King,*[5] *Hamburg American Packet Co. v. The King,*[6] *Macdonald v. The King,*[7] and *Piggott v. The King.*[8]

In the case of *Montgomery v. The King,*[9] Sir Walter Cassels, J., held, following the views expressed by the Judges of the Supreme Court of Canada in the case of *Paul v. The King, ubi supra,* that a dredge belonging to the Dominion Government is not a "public work" within the meaning of sec. 20 (c) of the *Exchequer Court Act.*

In the recent case of *La Compagnie Générale d'Entreprises Publiques v. The King* (unreported),* decided by the Supreme Court of Canada, wherein the question of the construction of the terms *on a public work* was discussed, where a scow that was

[1] 38 Can. S.C.R. 126.
[2] (1909), 42 Can. S.C.R. 350.
[3] 40 Can. S.C.R. 431.
[4] (1901), 31 Can. S.C.R. 206.
[5] (1916), 30 D.L.R. 345; 53 Can. S.C.R. 450.
[6] (1902), 33 Can. S.C.R. 252.
[7] (1906), 10 Can. Ex. 394.
[8] (1916), 32 D.L.R. 461, 53 Can. S.C.R. 626.
[9] 15 Can. Ex. 374.
* See 44 D.L.R. 459 (on appeal from 32 D.L.R. 506).

moored at a Government wharf, Idington, J., said: "In this case it is hardly possible, unless we give "the meaning to the word *on* or *upon* and insist that "the scow in question could not be said to be *on a* "*public work* unless it was on top of the very spot "in the wharf under and with which the appellants' "men were engaged."

In other words, if the scow had been on the wharf it would have been found that the scow was on a public work. The scow was then in the harbour of Quebec, but the question of the harbour being a *public work* was not raised in that case. In the present case the plant in question was in Victoria harbour, *on a public work*, within the meaning of the statute and the decision above referred to.

Anglin, J., in the same case, said: "It does not "seem to me to involve any undue straining of the "language of the statute to hold that it covers a "claim for injury to property—so employed. 'Pub- "lic work' may, and I think should, be read as mean- "ing not merely some building or other erection or "structure belonging to the public, but any opera- "tions undertaken by or on behalf of the Govern- "ment in constructing, repairing or maintaining "public property. In this sense the appellants' scow "was on a public work when it was injured."

The *locus in quo* of the accident having been within the boundaries of the harbour of Victoria, the accident happened on a public work "of some definite area," as Sir Louis Davies phrases it; or, again, it happened at a "place which is within the area of something which falls within the description of a 'public work'," to employ the language of Duff, J., above quoted. Again, it is a case to which the lan-

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guage of Anglin, J., in the unreported case above referred to applies with peculiar significance.

This would, in my opinion, have sufficed to support a finding that the Crown was liable, had it not been that the doctrine of "common employment" or "fellow servant" was raised as a defence. I have already expressed my view (*Conrod v. The King*[1]) of the interpretation of sec. 20 (c) of the *Exchequer Court Act,* regarding it as embodying the plain intention of Parliament that the Crown would not be heard to invoke anything extraneous to the statute or excuse itself from liability by setting up defences at common law inconsistent with the liability sought to be created by the enactment, were not such an interpretation negatived by the decision of the Supreme Court in the case of *Ryder v. The King.*[2]. See also *Jones v. C. P. R.,*[3] *Hosking et al v. Le Roi* (No. 2),[4] *Lees v. Dunkerley Brothers,*[5] *Hall v. Johnson,*[6] *Ruegg's Employers' Liability,*[7] *Smith v. Baker,*[8] *Brooks v. Rhine Fakkema,*[9] *The Canada Woollen Mills, Ltd. v. Traplin,*[10] *Ainslie Mining & Ry. Co. v. McDougall.*[11]

That case is authority for the right of the Crown to raise the defence of common employment to a petition of right seeking damages under the last-mentioned enactment for the negligence of a servant of the Crown. I am bound by that case, and can do nothing but apply it here, unless the facts show that

[1] (1913), 14 Can. Ex. 472, 482.
[2] (1905), 36 Can. S.C.R. 462.
[3] (1913), 13 D.L.R. 900.
[4] (1903), 34 Can. S.C.R. 244.
[5] [1911] A.C. 5.
[6] (1865), 3 H. & C. 589, 159 E.R. 662.
[7] 125 *et seq.*
[8] [1891] A.C. 325.
[9] (1910), 44 Can. S.C.R. 412.
[10] (1904), 35 Can. S.C.R. 424.
[11] (1909), 42 Can. S.C.R. 420.

the negligence was not secondary or derivative, but primarily that of the Crown in having a defective machinery in use.

The term "negligence", as used in connection with a case of this kind, has been defined as "the absence of that amount of care which each man, in this our social state, owes his fellows." The doctrine of common employment has been characterized as: "Every "risk which an employment still involves after a "master has done all he is bound to do for securing "the safety of his servants is assumed, as a matter "of law, by each of those servants." 54 Can. L.J. 282-283.

The plant or machinery in question herein cannot be said to be defective. It is not as perfected and as much improved as it might be; but the Crown or an employer is not bound to have the most perfected piece of machinery or the best appliances with the latest improvements.[1] It is true a similar bracket had fallen on a previous occasion and that, while this system of construction obtains in the building of railway coaches, yet railway coaches are not subjected to such violent vibration as the plant in question. The most that can be said with respect to the plant is that as it was not as good as it might be, and as the Crown's servant had been put on his enquiry from previous accident—more care and precaution had to be used in attending to it. The first accident had necessarily—*res ipsa loquitur*—brought the matter to the attention of the authorized officer, the inspector, or any one acting for him, that more diligence and care were thereafter necessary in the working of that plant. The inspector had to see to it oftener

[1] *Wamboldt v. Halifax & South Western R. Co.* (1918), 40 D.L.R. 517; *The Toronto Power Co., Ltd. v. Paskwan*, 22 D.L.R. 340, [1915] A.C. 734.

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than he did or direct some one to watch these nuts and thus prevent any further accident.

I. therefore, find that the accident was not caused by defective plant, but for want of proper care and prudence in properly attending to it.

Therefore, the negligence which caused the accident is the negligence of a fellow-servant of the suppliant, and he is thereby barred from recovery under the case of *Ryder v. The King* (*supra*).

The suppliant is not entitled to the relief sought by his petition of right and the action must be dismissed.

Petition dismissed.

Solicitor for suppliant: *J. P. Walls.*

Solicitors for respondent: *MacKay & Miller.*

DANS LA COUR DE L'ECHIQUIER DU CANADA, 1918

Dec. 7.

DAME CESARIE CORRIVEAU, VEUVE DE LOUIS PARE, EN SON VIVANT JOURNALIER, DE ST. CYRILLE DE WENDOVER, DANS LA PROVINCE DE QUEBEC, DISTRICT D'ARTHABASKA,

PETITIONNAIRE;

ET

SA MAJESTE LE ROI,

INTIME.

Workmen's compensation—Injury in course of employment—Railway —Sleeping quarters—"Dwelling".

The suppliant's husband was employed on the I. C. Ry. as part of a gang of men engaged in the repairs and maintenance of the tracks. The railway had placed at the disposal of such men a box or freight car, which was fitted with bunks or beds as a dormitory and placed on a siding. After leaving off work at 6 o'clock in the evening the employees' entire time was at their disposal and they were at liberty, but not obliged, to sleep in this sleeping car.

On the night of the 12th July, 1915, the suppliant's husband went to sleep as usual in the car and was found dead in his bed in the morning.

Held that this car was a "dwelling" and that the accident or death did not happen in the course of his employment, and that his widow was not therefore entitled to compensation.

PETITION OF RIGHT to recover damages for personal injuries.

Tried before the Honourable Mr. Justice Audette, at Quebec, November 26 and 27, 1918.

Gaston Ringuet, for suppliant.

L. P. Crépeau, for Crown.

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AUDETTE, J. Jugement rendu le 7 décembre, 1918.

La pétitionnaire poursuit pour le recouvrement de la somme de $5,000, montant des dommages allégués avoir été soufferts par elle comme résultant de la mort de son mari dans les circonstances suivantes.

Louis Paré, son défunt mari, était dans le cours du mois de juillet, 1915, à l'emploi du chemin de fer de l'Intercolonial, un travail public du Canada. Il faisait partie d'une équipe d'hommes travaillant à la réparation et entretien de la voie entre Chaudière et Ste Rosalie, P.Q. Dans le cours de cet emploi, les heures de travail étaient de sept heures du matin à six heures du soir. L'intimé fournissait à cette équipe, pour qui voulait s'en prévaloir, un char dortoir où y couchait qui voulait. Trois des hommes de l'équipe ne s'en prévalaient pas et couchaient en dehors tandis que la balance y couchait.

Ce char dortoir n'était autre qu'un char à fret—char à grain—d'environ 33 pieds de longueur sur à peu près 8 pieds de largeur et de hauteur, avec deux portes au centre se mouvant sur glissoire. Il y avait, du coté où couchait Louis Paré à l'extrémité ou au fond du char, deux lits de six pieds et quelques pouces à, à peu près, 12 à 15 pouces du plancher et d'à peu près deux pieds et six pouces de largeur, avec une allée d'environ deux pieds et six pouces les séparant, tandis qu'au dessus de ces deux lits et cette allée il y avait,—à à peu près trois pieds au dessus ces deux lits—une plateforme formant un autre lit de toute la largeur du char, où couchaient cinq hommes. L'extrémité de cette allée était alors couverte, à une hauteur d'environ quatre pieds et demi pour une longueur de six pieds et quatre pouces à ce bout du char. De chaque coté de cette allée en

laissant ces 6 pieds et 4 pouces il y avait aussi deux lits superposés. A l'autre extrémité ou bout du char, il y avait même genre de lits que ceux en premier lieu décrits; mais il n'y avait pas les quatre lits en dernier lieu mentionnés.

Il y avait aussi à chaque bout du char, au dessus du lit d'en haut, une fenêtre d'environ 15 à 18 pouces. Il résulte de tout ceci qu'il restait au centre du char, vis-à-vis les portes et au bout où il n'y avait qu'une longueur de lits, un espace libre assez considérable. Les employés avaient en outre un autre char qui leur servait de char réfectoire; mais ils n'étaient pas nourris par la Couronne. Ils voyaient eux-mêmes à leur nourriture par l'entremise d'un cuisinier qui était cependant payé pour ses services par l'intimé.

Or le 12 juillet, 1915, ou mieux le veille au soir, lorsque ce char était sur une voie d'évitement, à la Station Lemieux, où il y a un village où les employés pouvaient à leur gré aller coucher, Louis Paré prit son souper vers les 6.30 hrs., p.m., apres quoi il s'amusa comme d'habitude à causer et fumer jusqu'à son coucher vers 8.30 p.m. Il couchait seul dans le lit en dessous de celui occupé par 5 personnes, et dans le bout où il y avait ces 4 lits additionnels mentionnés plus haut. Après avoir été couché quelque temps il se releva vers 9.15 hrs., vint à la porte du char qu'il entrebâilla et se recoucha de suite sans parler et sans se plaindre. Le lendemain matin on le trouva mort dans son lit.

Paré souffrait d'indigestion depuis plusieurs années. Il avait été traité, par le Dr. Pelletier, pendant nombre d'années lorsque sa maladie, dans les deux dernières années, devint chronique et son médecin lui donnait alors médecine à prendre con-

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stamment. Il souffrait apparemment depuis 2 ans, à l'état aigü, d'hyperchlorhydrie, ou trouble de la fonction sécrétoire de l'estomac, caractérisé par une augmentation d'acide chlorhydrique dans le suc gastrique.

Le savant conseil de la pétitionnaire prétend que la mort de Paré est le résultat de la négligence des employés de la Couronne en fournissant un char dortoir où il n'y avait pas assez d'air pour y faire ainsi coucher ses employés.

Or il n'y a pas de droit d'action contre la Couronne pour dommage résultant de négligence à moins que l'action ne tombe sous le coup de l'Acte de la Cour de l'Echiquier du Canada, ch. 140 S.C.R., sec. 20, telle qu'amendé par 9-10 Ed. VII., ch. 19, se lisant comme suit: "Toute réclamation contre la "Couronne provenant de la mort de quelqu'un, etc., "etc., causée par la négligence de quelque employé "ou serviteur de la Couronne, pendant qu'il agissait "dans l'exercice de ses fonctions ou de son emploi, "sur, dans ou près le terrain de construction, d'en- "tretien ou de mise en service du chemin de fer In- "tercolonial, etc."

Il y a bien ici un travail public; mais y a-t-il eu dans l'espèce négligence d'un préposé à un emploi quelconque de la Couronne et dont la négligence aurait occasionné la mort de Paré? Je crois qu'il faut répondre dans la négative.

En effet, Paré était malade depuis nombre d'années et couchait après tout dans ce char dortoir avec nombre d'autres personnes qui s'accordent toutes à dire qu'elles n'ont pas souffert de l'exiguité du char. Qu'elles y dormaient et reposaient sans avoir lieu de se plaindre. Cette opinion est en plus exprimée par un employé qui couchait dans le lit opposé et

correspondant à celui de Paré et qui se trouvait placé de la même manière. Il apparaîtrait à prime abord que le défunt est mort des suites de la maladie dont il souffrait depuis de nombreuses années. Il n'y a ici aucune preuve directe établissant que Paré est mort des suites d'avoir couché dans ce char et la cause de sa mort ne saurait être établie sous de simples conjectures.

Mais il y a plus. Les employés n'étaient pas obligés ou tenus de faire usage de ce char dortoir qui était mis à leur disponibilité pour y coucher ou non à leur plein gré, chacun fournissant sa lingerie de lit. La compagnie a une vingtaine de ces chars pour la division en question. L'employé qui couchait dans le char était payé même prix que celui qui opinait pour coucher en dehors. Ce char devenait sous les circonstances "une résidence, une demeure, une habitation". *Rex v. Gulex.*[1] Quand l'employé avait travaillé de 7 heures du matin à 6 heures du soir, il avait fini sa journée et il était alors absolument maître de son temps et de ses loisirs. Quand le soir, sa journée finie, il couchait dans ce char, il avait cessé son travail et en conséquence il n'agissait pas dans la sphère de son occupation. *Philbin v. Hayes.*[2] De sorte que Paré n'est pas mort dans le cours de son emploi. Après sa journée finie, Paré ne travaillait plus pour le bénéfice de son patron, mais choisissait de coucher dans ce char pour s'éviter les dépenses de coucher ailleurs. Il n'était plus un employé au cours du travail pour lequel il était payé tant par jour en travaillant de telle heure à telle heure. Paré, lors de sa mort couchait dans ce char comme résultat d'un acte de sa propre volition et

[1] (1917), 39 O.L.R. 539.
[2] 34 T.L.R. 403.

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pour servir ses fins personnelles et dans ce cas son patron ne saurait être responsable. *Limpus v. London General Omnibus Co.*[1]

L'action de la pétitionnaire est en conséquence déboutée.

Judgment accordingly.

Solicitors for suppliant: *Garceau & Ringuet.*

Solicitor for respondent: *L. P. Crépeau.*

[1] 1 H. & C. 526-543.

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Sept. 5.

IN THE MATTER OF THE PETITION OF RIGHT OF

DAME ADELE LUCAS, OF THE PARISH OF ST. JEAN BAPTISTE DE L'ISLE VERTE, IN THE COUNTY OF TEMISCOUATA, WIDOW OF MAJORIQUE DUBE, IN HIS LIFETIME, FARMER, OF THE SAME PLACE, AS WELL, PERSONALLY AS TUTRIX DULY NAMED TO ROSE-ALMA DUBE, GABRIELLE DUBE, AND BLANCHE DUBE, MINOR DAUGHTERS, ALL OF THE SAME PLACE,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown—Railway—Level crossing—Government Railway Act—Gross negligence.

The suppliant's husband and two children were foolishly and recklessly driving along the highway in a buckboard, and while passing over a level crossing of the Crown's railway, the horse struck the engine of a train on said crossing, and they were killed. In the action the Crown was charged with negligence on four points, namely, that (1) the level crossing was a dangerous one and the Crown should have either built a viaduct or placed gates on the highway; (2) that the *locus in quo* "was a thickly peopled locality"; (3) and that therefore the train should have crossed the highway at a speed of not greater than six miles per hour; (4) that the trainmen failed to give the signals required by law.

Held, following *Harris v. The King* (1904), 9 Can. Ex. 206, that where the Minister or the Crown's officer in the exercise of his discretion comes to the conclusion not to make a viaduct or put gates across a highway, it is not for the Court to say that the Crown was guilty of negligence, even where the facts show the crossing to be a very dangerous one; and further on the facts that the crossing in question was not located in "a thickly peopled portion of any city, town or village" within the meaning of the *Government Railway Act* (R.S.C. 1906, c. 36), and that therefore there was no negligence in running the train at a greater speed than six miles per hour and that the proper signals were given by the trainmen.

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Held, further, that the deceased behaved in a manner not only amounting to want of ordinary care, but foolishly and recklessly, and was guilty of gross negligence, and this was the decisive cause of the accident.

PETITION OF RIGHT for damages arising out of an accident on a Government railway.

Tried before the Honourable Mr. Justice Audette, at Fraserville, P.Q., July 2, 3, 1918.

E. Lapointe, K. C., and *A. Stein,* K.C., for suppliant.

Léo Bérubé, E. H. Cimon, for Crown.

AUDETTE, J. (September 5, 1918) rendered judgment.

The suppliant, by her petition of right, as well on her own behalf as well as tutrix on behalf of her minor children, seeks to recover the sum of $8,000, as damages against the Crown, occasioned by the death of her husband and two of her children.

On Sunday, October 10, 1915, at about 11.30 a.m., the late Majorique Dube, the suppliant's first husband (she has since remarried), was returning from church, with two of his children. His son, 28 years of age, was driving and sitting on the front seat of a one-seated "slide" or buck-board, and his 17 years old sister was sitting alongside of him. The father was sitting on a chair behind them, holding on to the back of the seat.

The church, at Isle Verte, is about eight arpents to the north from the Intercolonial Railway crossing, which runs at right angles to the highway leading from the village to the south. Dube resided about 4½ miles south from the village, and was on his way home from church, having travelled over this cross-

ing a great many times before, and was quite familiar with the different aspects of the same.

Within 4½ arpents from the crossing on the north there is a small group of houses, together with three residences on the south thereof. This small settlement is practically separated from the village by a hill of about 75 feet, and from the top of this hill to the crossing there is a flat space of 4 to 4½ arpents.

The line of vision, on the west, is intercepted by buildings at certain points, but not for any distance, and a train at certain places could be seen as far as two miles from the crossing.

On the day of the accident, the deceased were driving a spirited horse of five years old, which had previously been used for reproduction, but which had been gelded the previous year. They were driving very fast, spurting "*ils bauchaient*", as put by one of the witnesses. On the hill they first passed Joseph Michaud and two rigs, and afterwards they passed other carriages that were ahead of them. When they reached the top of the hill they passed Boucher, who was driving the first rig in front between the hill and the crossing. Michaud followed Dube, and he cried out to him not to cross because he would not have time to do so; but the occupants of the "slide" seemed not to hear him. Michaud says he saw the train coming out of the woods, saw it coming, saw the smoke of the locomotive, and when he so saw the train he says Dube was about half an arpent distant from him. In the 4½ arpents from the top of the hill to the crossing, Dube distanced Michaud, whose horse was trotting, by two arpents. He was going very fast.

When Dube passed opposite the Beauchesne Hotel, Beauchesne was in his garage, about 40 feet from

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the highway. Beauchesne said he noticed the carriage passing very fast opposite his place, and having heard the train, he rushed out thinking the carriage was going too fast to be able to stop on time.

Witness Elise Berube, at the time of the accident, a servant in the Beauchesne Hotel, was standing in the doorway of the hotel, with one Mr. Gosselin, watching the carriages passing on their return from church. She says, that after hearing the incoming train, she saw Dube coming, his horse was galloping; but when he passed opposite the hotel, the horse had ceased galloping and was going very fast. *"Il allait au grand trot"*, not frightened, but pushed to go fast. Mr. Gosselin, who was with Elise Berube, remarked, "They have no time to pass" ahead of the train. And Elise Berube adds that, from what she could see, the horse threw itself between the tender and the engine of the incoming train.

Although in my opinion unnecessary for the determination of the action, several points of interest having been raised, I will give them a passing consideration.

The negligent acts charged against the Crown are:

1st. That the level crossing is a dangerous one, and that the Crown should have either built a viaduct or placed gates on the highway.

2nd. That the *locus in quo* is a peopled part of the municipality.

3rd. And that therefore the train should have crossed the highway at a speed of only six miles an hour, and

4th. That the train-hands failed to give the signals required by law.

1st. All level railway crossings, be they in cities, towns or villages, are dangerous. Dube was quite

familiar with the crossing in question, having had occasion to go over it time and again on business or otherwise, and if he considered it dangerous, he should have taken all the more care and precaution. There was no justification for his reckless conduct. Upon this question of viaduct and gates, I will refer to the case of *Harris v. The King*,[1] where the point was clearly decided against the suppliant's contention. Where, indeed, the Minister of Railways, or the Crown's officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to make a viaduct or put up gates across the highway, it is not for the court to say that the Minister or the officer was guilty of negligence, even where the facts would show that the crossing was a very dangerous one. See also *Hamilton v. The King*;[2] and *Quebec & Lake St. John R. Co. v. Girard*.[3]

2nd. The few residences, distant from one another, in the neighborhood of the crossing at the station, could not constitute, a "*thickly peopled portion of any city, town or village*", within the meaning of the words used in section 34 of the *Government Railway Act* (R.S.C. 1906, ch. 36). *Andreas v. C.P.R.*;[4] *Parent v. The King*.[5] And as each side of the railway right of way was properly fenced, as required by sec. 22 of the *Government Railway Act*, and as on each side of the crossing there were return fences to the cattle guard on the track, although not required by the *Government Railway Act*, there was no statutory limit to the speed at which a train was to be run at the crossing in question. The speed of

[1] (1904), 9 Can. Ex. 206, 208.
[2] (1911), 14 Can. Ex. 1, 13, 14.
[3] (1905), 15 Que. K.B. 48 at 52.
[4] (1905), 37 Can. S.C.R. 1.
[5] (1910), 13 Can. Ex. 93 at 101.

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20 to 25 miles an hour at which the train was running was not excessive under the circumstances.[1]

3rd. Therefore, there was no negligence in running the train, at the time of the accident, at a greater speed than six miles an hour.

4th. The evidence further establishes beyond peradventure that the proper signals were given by the men in charge of the train. The bell was rung and the whistle was sounded at the proper distance from the crossing. That is clearly established and remains uncontroverted.

Moreover, there is a feature of the case which is of especial significance and that is, the train did not strike Dube's horse and carriage, but it was Dube's horse and carriage that struck the train, between the tender and the cab of the engine. Indeed, the brakeman, who was standing at the left or northern window of the cab, with the engine-driver at the right window, at the time of the accident, says he saw the horse coming and throwing itself between the cab and the tender, and as to that fact, he is corroborated by other testimony. He says the horse "s'en venait a l'epouvante", and he saw it run under the train. The shock of the collision was even felt in the engine.

The engine-driver states in his evidence that he was told by the brakeman that a carriage had just struck them between the engine and the tender. And that fact, he adds, was corroborated by marks on the train, a plate of the lapboard was bent and there was some hair of the horse upon it.

There can be no doubt that the deceased were guilty of gross negligence, of what might be termed

[1] *G. T. R. Co. v. McKay,* (1903), 34 Can. S.C.R. 81; *Quebec & Lake St. John Ry. Co. v. Girard, supra; Parent v. The King, supra; G. T. R. Co. v. Hainer,* (1905), 36 Can. S.C.R. 180.

suicidal negligence under the circumstances. Approaching a railway crossing, one is bound to use such faculties of sight and hearing as he is possessed of, and display, at least, what might be called rudimentary precaution and prudence. Had the horse been stopped from this fast trotting and put at a walking pace, the accident would have been averted. As put by Sir Louis Davies in *Wabash R. Co. v. Misener*[1]: "Persons travelling along a highway while "passing or attempting to pass over a level railway "crossing, must act as reasonable and sentient "beings, and unless excused by special circum- "stances, must look before attempting to cross, to "see whether they can do so with safety. If they "choose blindly, recklessly or foolishly to run into "danger, they must surely take the consequences."

Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire. The deceased were clearly the victims of their own recklessness, and this action cannot be maintained.

If the horse had been beyond control,—a question upon which there is perhaps evidence both ways, with, however, preponderance that he was under control—he could have been turned and driven into the railway yard by a 40-foot entrance, or on the other side of the road, into a 12-foot entrance to the hotel premises. It was broad daylight,—the train had been seen approaching,—it had given at the proper time the proper signals, and the deceased were endeavoring to get over a crossing well known to them and upon which they had often travelled in the past.

[1] (1906) 38 Can. S.C.R. 94 at 100.

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Not only did the deceased behave in a manner amounting to want of ordinary care, but foolishly and recklessly they rushed, with eyes open, on to their own destruction. It was obviously this conduct and the want of rudimentary precaution, prudence and care on their behalf that was the decisive cause of the accident.

The suppliant, therefore, fails in her action, not being, under the circumstances, entitled to the relief sought by her petition of right, and judgment must be entered in favor of the respondent.

Judgment accordingly.

Solicitors for suppliant: *Lapointe, Stein & Levesque.*

Solicitor for respondent: *Léo Bérubé.*

IN THE MATTER OF THE PETITION OF RIGHT OF

1918
April 2.

ORIZE DESMARAIS, OF THE PARISH OF ST. FRANCOIS DU LAC, DISTRICT OF RICHELIEU, WIDOW OF ISIDORE PINARD, IN HIS LIFETIME NAVIGATOR, ALSO OF THE PARISH OF ST. FRANCOIS DU LAC, COUNTY OF YAMASKA, DISTRICT OF RICHELIEU, ACTING HEREIN, AS WELL IN HER PERSONAL NAME FOR HER BENEFIT, AS WELL AS IN HER QUALITY OF TUTRIX DULY NAMED TO HER MINOR CHILD ISSUED FROM HER MARRIAGE WITH THE SAID ISIDORE PINARD,—TO WIT, CECILE PINARD, AGED TWO YEARS,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Crown—Negligence—Action for tort—"Public work"—Stone-lifter—Exchequer Court Act.

The suppliant's husband was an employee of the Crown working on a stone-lifter, the property of the Crown, in the deepening of the ship-channel in the harbour at Montreal, and while so engaged in lifting a boulder from the channel was thrown overboard and drowned. *Held,* that the action was, in its very essence, one of tort, and apart from special statutory authority, no such action would lie against the Crown, and that the suppliant, to succeed, must bring her action within sub-sec. (c) of sec. 20 of the *Exchequer Court Act* before the amendment of 1917, and that the injury complained of must have occurred on a public work, and was the result of some negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Held, further, following *Paul v. The King,* (1906), 38 Can. S.C.R. 126, that the death of the deceased did not occur on a public work within the meaning of the Act, and further on the facts, even assuming that the stone-lifter was a public work, that the death of suppliant was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown.

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PETITION OF RIGHT for damages arising out of an accident on a Government railway.

Tried before the Honourable Mr. Justice Audette, at Sorel, P.Q., March 19th, 1918.

Aimé Chassé and *Adolphe Allard,* for suppliant.

A. Lanctot, for respondent.

AUDETTE, J. (April 2, 1918) rendered judgment.

The suppliant, by her petition of right, seeks to recover damages in the sum of $15,000, both on her behalf and on behalf of her minor child, as arising out of the death of her husband, Isidore Pinard, an employee of the Department of Marine, which occurred while engaged working on board a stone-lifter, the property of the Crown, in course of the operation by the Crown of deepening the ship-channel, at Montreal, P.Q.

The accident happened on the 14th October, 1916. Pinard was, at the time of the accident, first night officer on the Government Dredge No. 1, which was engaged in the harbour of Montreal, in dredging the ship-channel, between Montreal and Quebec, a work carried on by and at the expense of the Crown for the improvement of the navigation of the River St. Lawrence.

As part of the plant working in conjunction with the dredge, among others, were a stone-lifter, a tug serving the dredge, and a pontoon to which both the tug and the scows would moor.

The bed of the River St. Lawrence, at the place in question, is composed of sand and a number of boulders or rocks. In order to carry on the dredging and deepening of the channel, the dredge had to be

helped with or supplemented by a stone-lifter, which at the time of the accident, was lying at and tied to the port side of the dredge, as shown on Exhibit "B". On the day in question, after having lifted, with the stone-lifter, a rock or boulder of two to two and a half tons from the bottom of the river, the rock was placed alongside of the well, and was being rolled over on the deck by means of crowbars, toward the bow of the stone-lifter, when Lemoine's crowbar slipped while he was raising the boulder higher than the height obtained under Pinard's crowbar, and by the crowbar so slipping the boulder came back with a jerk on Pinard's crowbar, and as he was standing but a few feet from the side, he was thrown overboard and drowned under the circumstances detailed in the evidence. At the time of the accident Pinard was occupied in a kind of work with which he was familiar, having been engaged at such works for years before. For the purpose of the case it is unnecessary to go into further details in respect of the drowning of the suppliant's husband.

The case at bar is in its very essence in tort, and apart from special statutory authority, no such action will lie against the Crown.

Therefore, to succeed, the suppliant must bring her case within the provisions of sub-sec. (c) of sec. 20, of the *Exchequer Court Act,* before the amendment in 1917, by 7-8 Geo. V, ch. 23, and the bodily injury complained of must have occurred: 1st. On a public work; and 2nd, must be the result of some negligence of an officer or servant of the Crown while acting within the scope of his duties or employment.

With the object of shortening the evidence, Counsel for the Crown admitted that the dredge No. 1, and the stone-lifter in question in this case were, at the

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time of the accident, the property of the Government of Canada, and that the said dredge and stone-lifter were at that time employed at the execution of works done by the Dominion Government for the deepening of the maritime ship-channel of the St. Lawrence.

The first question to be *in limine* decided is whether or not the accident occurred *on a public work.*

Counsel at bar for the suppliant relied very forcibly upon the definition of the expression, a "public work", which is to be found both in the *Public Works Act,* and the *Expropriation Act.*

Sub-sec. (c) of sec. 3, of the *Public Works Act,* enacts that "public work" or "public works" means and includes any work or property under the control of the Minister. And by sec. 9 of the Act, among the properties enumerated under the control of the Minister is to be found, *"the works for improving the navigation of any water"*—and by sub-sec. (h) of that section it also covers *"all other property which now belongs to the Crown".*

As was observed by Mr. Justice Burbidge in the *Hamburg-American Packet Co. v. The King,*[1] the *Exchequer Court Act* contains no definition of the expression "public work"; but the Act from which this provision, now found in sub-sec. (c) of sec. 20 of the *Exchequer Court Act,* was adopted, contained such a definition. The Act from which it was adopted is the old official *Arbitrators Act* (ch. 40, R.S.C. 1886), sub-sec. (c) of sec. 1, which reads as follows:

"(c) (The expression) 'public work' or 'public "works' means and includes the dams, hydraulic "works, hydraulic privileges, *harbours,* wharves, "piers and works for improving the navigation of

[1] (1901), 7 Can. Ex. 150 at 173.

"any water—lighthouses and beacons—the slides, "dams, piers, booms, and other works for facilitating "the transmission of timber—the roads and bridges, "the public buildings, the telegraph lines, Govern- "ment railways, canals, locks, fortifications and "other works of defence, and all other property "which now belong to Canada, and also the works "and properties acquired, constructed, extended, en- "larged, repaired or improved at the expense of "Canada, or for the acquisition, construction, repair- "ing, extending, enlarging or improving of which "any public moneys are voted and appropriated by "parliament, and every work required for any such "purpose; but not any work for which money is "appropriated as a subsidy only."

The same definition of a "public work" is also to be found, in the same wording, as sub-sec. (d) of sec. 2 of the *Expropriation Act* (R.S.C. 1906, ch. 143), as now in force,—with, however, the addition of the words *"docks"* and *"dry docks"*.

Now, under this state of the law, as presented by counsel at bar, it was decided in the *Hamburg-American* case[1] by the Exchequer Court of Canada, (affirmed by the Supreme Court of Canada) that:

". . . . it cannot be doubted that the ship-channel "between Montreal and Quebec is a work for improv- "ing the navigation of the St. Lawrence River; and "that while the work was in the course of construc- "tion or under repair it was a public work under the "management, charge and direction of the Minister "of Public Works. The same may be said of any "work of dredging or excavation to deepen or widen "the channel of any navigable water in Canada. But "it does not follow that once the Minister has ex-

[1] 7 Can. Ex. 150 at 177; (1907), 39 Can. S.C.R. 621.

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"pended public money for such a purpose, the Crown "is for all time bound to keep such channel clear and "safe for navigation; and that for any failure to do "so it must answer in damages."

From that decision it would appear that while the works were being actually carried on in the ship-channel, they would be a "public work", and after the works had been completed and public moneys expended that they would cease to be a public work.

Had we only that decision for a guidance, it would apparently let in the present case, since the accident happened while the works were in course of construction; but after this decision came the judgment of this court in the case of *Paul v. The King*[1], confirmed by the Supreme Court of Canada, wherein Davies, J., with whom Maclennan and Duff, JJ., concurred, at p. 131 says:

"This court has already held, in the case of *The "Hamburg-American Packet Co. v. The King*[2] . . . . "that the channel of the St. Lawrence River, after "it had been deepened by the Department of Public "Works, did not, in consequence of such improve-"ment, become a public work within the meaning of "the section under consideration. . . .

"To hold the Crown liable in this case . . . we "would be obliged to construe the words of the sec-"tion so as to embrace injuries caused by the negli-"gence of the Crown's officials, not as limited by the "statute 'on any public work'; but in the carrying "on of any operations for the improvement of the "navigation of *public harbours* or rivers. In other "words, we would be obliged to hold that all opera-"tions for the dredging of these harbours or rivers

[1] 9 Can. Ex. 245; (1906), 38 Can. S.C.R. 126.
[2] (1902), 33 Can. S.C.R. 252.

"or the improvement of navigation, and all analo-
"gous operations carried on by the Government,
"were either in themselves public works, which
"needs, I think, only to be stated to refute the argu-
"ment, or to hold that the instruments by or through
"which the operations were carried on were such
"public works.

"If we were to uphold the latter contention, I
"would find great difficulty in acceding to the distinc-
"tion drawn by Burbidge, J., between the dredge
"which dug up the mud while so engaged and the
"tug which carried it to the dumping ground while
"so engaged. Both dredge and tug are alike engaged
"in one operation, one in excavating the material
"and the other in carrying it away.

"I think a careful and reasonable construction of
"the clause 16 (c) (now clause 20) must lead to the
"conclusion that the public works mentioned in it
"and 'on' which the injuries complained of must
"happen, are public works of some definite area, as
"distinct from those operations undertaken by the
"Government for the improvement of navigation or
"analogous purposes; not confined to any definite
"area of physical work or structure."

The above-mentioned definition of the expression "public work" covers "harbours." This accident occurred in the harbour of Montreal. Would that bring the case within the ambit of sec. 20 of the *Exchequer Court Act*?

The decision in the *Paul* case has since been mentioned and followed by the Supreme Court of Canada in many cases, and is now remaining undisturbed and binding upon this court. See *Piggott v. The King;*[1]

[1] (1916), 32 D.L.R. 461; 53 Can. S.C.R. 626.

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Chamberlin v. The King;[1] *Olmstead v. The King,*[2] and others. Therefore, following that decision, it must be found the accident did not happen on a "public work."

In *Montgomery v. The King,*[3] it was further held, following the views expressed by the Judges of the Supreme Court of Canada in the *Paul* case, that a dredge belonging to the Dominion Government is not a public work within the meaning of sec. 20 (c) of the *Exchequer Court Act.* And again, under the dictum of Sir Louis Davies in the *Paul* case, it would be impossible, under the circumstances, to establish any difference between the dredge and the stone-lifter in the present case.

If this decision in the result were—as was contended—a curtailment by the court of a clear and unambiguous definition given by Parliament itself, for the reason that if effect were given to it, it would take us too far afield, and on that very account criticized, —I must say that, even assuming the stone-lifter were a public work, under the full circumstances of the case, I would be unable to find any negligence as further required by sec. 20. Evidence on record fails to disclose anything upon which a court could find that an officer or servant of the Crown, while acting within the scope of his duties or employment, had been guilty of negligence from which the present accident resulted. And it must be stated that everything within human power appears to have been done to save the drowning man. A lifebuoy was thrown to him, he was caught with a boat-hook when he floated down by the stern of the dredge, but his coat

[1] (1909), 42 Can. S.C.R. 350.
[2] (1916), 30 D.L.R. 345; 52 Can. S.C.R. 450.
[3] (1915), 15 Can. Ex. 374.

gave way when a small boat from the dredge was lowered to his rescue, but unfortunately, without success.

The injury complained of is the result of a mere accident. "What happened was fortuitous and unexpected." As I already had occasion to say in *Thibault v. The King*:[1]

"The event was unforeseen and unintended, or was "'an unlooked-for mishap or an untoward event "which was not expected or designed'. *Fenton v. "Thorley Co.*;[2] *Higgins v. Campbell.*[3] It was a per- "sonal injury by accident. In *Briscoe v. Metropol- "itan St. Ry. Co.*[4] an accident is defined as 'such an "unavoidable casualty as occurs without anybody "being to blame for it; that is, without anybody being "guilty of negligence in doing or permitting to be "done, or in omitting to do, the particular things that "caused such casualty.'"

The accident in this case was an unforeseen event which was not the result of any negligence, misconduct of an officer or servant of the Crown.

It is gratifying, however, to know that the suppliant has received $500 in insurance, and that the Crown offered her, by the statement in defence, but without assuming any legal liability, the sum of $1,000.

Therefore, judgment will be entered in favour of the Crown, and the suppliant is declared not entitled to the relief sought by her petition of right.

Solicitor for suppliant: *Aimé Chassé.*

Solicitors for respondent: *Lanctot* and *Magnan.*

[1] (1918), 17 Can. Ex. 366, 41 D.L.R. 222.
[2] [1903] A.C. 443; 89 L.T.R. 314; 52 W.R. 31.
[3] [1904] 1 K.B. 328.
[4] 120 Southwestern Rep. 1162 at 1165.

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Sept.5.

IN THE MATTER OF THE PETITION OF RIGHT OF

EMILE THERRIAULT, OF THE PARISH OF ST. JOSEPH DE LA RIVIERE BLEUE, FARMER,

SUPPLIANT;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Expropriation—Transcontinental railway—Works on adjoining land —Unforeseen damages—Right to further compensation.

The suppliant, in 1910, sold the Commissioners of the Transcontinental Railway an area of his farm for the purposes of the railway. The agreement containing the following clause, "and in consideration of the above ,the vendor relinquishes to the purchaser all claims which he and his legal representatives could have upon the said land, and releases, moreover, the purchasers from all demands and claims for depreciation or arising from the expropriation and taking possession of the said land by the purchasers or even arising from the construction, keeping in repair and putting in operation, on the said land, of the line of the National Transcontinental Railway."

The respondents since constructed certain works upon lots belonging to suppliant's neighbours to divert the water along the railway, and by reason of such works the suppliant's farm was damaged on account of the overflow of such water.

Held that the damages so complained of did not arise from the taking of the defendant's land, and that the compensation in 1910 did not embrace or cover damages which could neither be foreseen, contemplated nor even guessed, at the time, and that the damages covered by the above clause must be such as could have been foreseen, and that the suppliant was entitled to compensation.

2. Where the owner of a superior heritage alters its natural state to the injury of the owner of the inferior under Art. 501, C.C.P.Q., he is liable to the latter, not as for a simple tort, but as for a breach of a duty imposed by law. *City of Quebec v. The Queen*, (1894), 24 Can. S.C.R. 420, referred to.

3. Where compensation has been paid for damages arising from an expropriation, it constitutes no answer to a claim for damages arising out of a new taking or new works constructed where the last-mentioned damages could not at the time of the first expropriation be foreseen or regarded as likely to happen.

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Tried before the Honourable Mr. Justice Audette, at Fraserville, P.Q., July 3, 4, 5, 1918.

E. Lapointe, K.C., and *C. A. Stein,* K.C., for suppliant.

E. H. Cimon, for Crown.

AUDETTE, J. (September 5, 1918) rendered judgment.

The suppliant brought his petition of right seeking to recover, from the Crown, the sum of $1,000, for damages to his property, arising out of the taking of a large volume of water from the neighboring lots or farms, and from the diversion of streams or watercourses flowing thereon, onto his property with a large quantity of sand, which spread upon and buried a certain area of his farm.

As appears by Exhibit "B", on October 9, 1910, the suppliant sold to the Commissioners of the Transcontinental Railway, an area of his farm of (5.40) five and forty hundredths acres, for the purposes of the railway, and was paid for the same the sum of $450, including all damages. In this indenture will be found the following clause, viz.:

"Et en considération de ce que dessus le vendeur "renonce envers l'acquéreur à toutes réclamations "qu'il, et ses représentants légaux pourraient avoir "sur le dit terrain et décharge de plus les acquéreurs "de toutes demandes et réclamations pour dépreciation ou provenant de l'expropriation et de la prise "de possession du dit terrain par les acquéreurs ou "encore provenant de la construction, de l'entretien "et de la mise en opération sur le dit terrain de la "ligne du chemin de fer National Transcontinental."

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The main question to be decided is whether or not the damages complained of herein are or are not covered by this clause.

These damages occur both at the western and eastern parts of the farm.

Dealing first with the west, it appears that at the beginning of the construction of the railway, the respondent constructed a trestle, running as high as fifty feet at places, on the right of way, and later on, in 1911 and 1912, says the engineer in charge, they began to fill this trestle, and for that purpose opened a borrow-pit to the west. The eastern end of the pit begins at point "C" on plan No. 1, running west. From point "C" to Riviere Bleue on the east there is a distance of, approximately, 4½ arpents. They began borrowing earth, at nothing, at point "C", working west, on rising ground, leaving a depth of about 20 feet at the west end of this borrow-pit, which is about half a mile long.

Within that western borrow-pit there are two watercourses, one at about three arpents and the other at about five arpents from "C" on the plan. Two culverts were, at the origin, constructed to take care of these watercourses, which ran—according to their natural courses—from north to south, across the right of way. Later on, when they began borrowing for the filling of the trestle, they dug this pit 7 or 8 feet lower than these culverts, with the result that these watercourses emptied in the pit, and afterwards found their way to the suppliant's land.

At one point in the pit, at the origin, they left some sand, which acted as a retaining wall preventing the water from running on to the suppliant's lot, No. 58, —but after a while, in the Spring, the volume of water having increased, it mined this sand wall and

finally carried it away, with additional sand, onto lot 58, between point "C" and the Riviere Bleue.

As a result, 7 or 8 arpents of the suppliant's land have been damaged. The sand at certain points has entirely buried the fences, which were about five feet high. There is no doubt that, as the result of such works, the waters of the two watercourses and the surface water of 500 or 600 acres, formerly draining into these watercourses and flowing to the south of the railway, now will empty into the Riviere Bleue, through this damaged area of the suppliant's farm. These waters run even during the summer season.

Having found that the earth on the western pit was becoming hard, the respondent opened another borrow-pit to the east on lots 59 and 60; but that also was done after the construction of a culvert, which then took care of the water, taking it to the south, on its natural course.

However, here again the excavation in this pit, of a length of over half a mile, was made about two feet lower than the culvert and the waters of lots 59, 60, 61 and 62, increased by the uncovering of some large springs in the pit, followed the different undulations of the land, as shewn by the black line, indicated on plan No. 1, by letters F, B, and G, and spread on the suppliant's land. The volume of water coming from the east is also considerable.

The ditch marked D, on the plan, formerly took care of the water, at that point, on the suppliant's land; but it has now been blocked and obstructed by the high railway embankment. The engineer testified that no culvert was built at that point, because it would have been too expensive to do so, the embankment being so high and heavy.

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There is no embankment opposite the eastern pit. Following the black line, indicated on the plan by letters F, B and G, it will be seen that the water runs, for a certain space, on the right of way, and while a ditch of 2½ by 1½ feet, was originally constructed at that point, it has increased, by erosion through the large volume of water, to 9 or 10 feet by 12 feet in width.

As a result of these eastern waters, the suppliant contends that the only road on his farm is mined by these waters; that it remains under water for a while in the spring and in the freshets; that they delay vegetation, and prevent him from seeding a certain acreage, which has to be always in hay instead of oats, etc. All of this going to decrease the value of his farm and its productive capacity.

It obviously results from the working of these borrow-pits, in the manner mentioned, that the suppliant's land, on the west, takes care of the water-courses, diverted from their natural courses,—together with the surface water of 500 or 600 acres, which empty on the farm with sand, and is a source of material depreciation to his farm.

On the east,—coupled with the waters coming from unearthed springs in the pit, the waters of lots 59, 60, 61 and 62, through such defective digging of the pit, are diverted from their natural course and spread, in a large quantity, upon his farm.

It must therefore be found, that when the Commissioners of the Transcontinental Railway took possession of the suppliant's 5.40 acres, and when it was represented to him, as testified in his evidence, they represented they were taking his land for the (*passage*) right of way of the Transcontinental Railway, it could not at that time be foreseen or contemplated

that he would suffer the damages in question in this case. Indeed, the construction of the culverts alone would convey to him the idea that the watercourses and the surface water would be taken care of in the usual manner.

The taking of these 5.40 acres, for the right of way, was one distinct and separate act, from that of the other works and diversion of watercourses on lands which did not belong to him. He had the right to assume that these culverts were not constructed for naught, and that they would take care of the waters.

The damages claimed do not arise from the expropriation, or rather from the taking, of the defendant's land and could not form part of such damages as would arise from such taking; but they are the result of works on neighboring lots or properties. See *Jackson v. The Queen.*[1]

The compensation of $450 paid him, under the indenture of October 9, 1910, did not embrace or cover damages which could neither be foreseen, contemplated, nor even guessed at the time.

If, after one compensation has been settled, further damage is caused by new works not carried out at the time of the assessment of this compensation, but at some future or subsequent time, compensation would no doubt be allowed in respect of such further damage. *Lancashire & Yorkshire R. Co. v. Evans;*[2] *Stone v. Corporation of Yeovil;*[3] *Attorney-General v. Metropolitan Ry. Co.*[4]

Undoubtedly the damages covered by the deed of

[1] (1886), 1 Can. Ex. 144.
[2] (1851), 15 Beav. 322, 51 E.R. 562.
[3] (1876), 1 C.P.D. 691; (1876), 2 C.P.D. 99.
[4] [1894] 1 Q.B. 384.

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purchase must be such as could have been then foreseen.[1]

The case of *Lawrence v. G.N.R.*[2] cited at page 310 of *Hudson,* is quite apposite to the present circumstances, and reads as follows:

"Owing to the construction of a railway, which "was carried along an embankment, the flood waters "of an adjacent river were unable to spread themselves over the low lands alongside the river, as "formerly, and flowed over a bank, which formerly "protected the plaintiff's land, on to that land. "Before the railway was constructed, and before the "plaintiff became possessed of the land overflowed "by the flood waters, the owner of this and of adjacent land, from whom the plaintiff derived title, "agreed with the railway company to refer to arbitration the sum to be paid by the company for the "purchase of part of such adjacent land and as compensation for all injury and damage to his remaining estate, 'by severance or otherwise': Held, that "the compensation awarded under this agreement "*related only to such damage, known or contingent,* "by reason of the construction of the railway at other "places as was apparent and capable of being ascertained and estimated at the time when the compensation was awarded; that it *did not embrace* contingent and possible damages which might arise afterwards by the works of the company at other places "and which could not be foreseen by the arbitrator; "and that the compensation for the damage arising "to the plaintiff in the present circumstances was "not included in the compensation awarded."[3]

[1] *Hudson on Compensation,* I., p. 310.

[2] (1851), 16 Q.B. 643, 117 E.R. 1026.

[3] See also *Browne & Allan, Law of Compensation,* 130, 135; *Cripps on Compensation,* 154, 155.

The respondent had, under sub-sec. (f) of sec. 3, of the *Expropriation Act,* the inherent power to divert and alter the course of these streams or watercourses; but that was an act distinct and separate from the taking of the suppliant's land under the deed of 1910, and the damages claimed herein did not arise from such taking, but from such diversion and from works subsequently executed on neighboring lots or properties, and were not included in the compensation of 1910. The construction of the culverts in question must also have led to the presumption they were so constructed to take care of the waters in question. Therefore the damages claimed herein were neither foreseen nor contemplated by the parties to the deed of 1910, and the damages satisfied under that deed, did not embrace contingent and possible damages which might arise afterwards by the works of the railway at other places.

Moreover, under Art. 501 of the Civil Code, P.Q., which is a reproduction of Art. 640 of the Code Napoleon, the proprietor of the higher land can do nothing to aggravate the servitude of the lower land, with respect to waters flowing on the higher part. Therefore, as held by Strong, C.J., and Fournier, J., in the case of the *City of Quebec v. The Queen,*[1] the Crown would be liable in damages for the injury complained of in this case not as for a tort, but for a breach of its duty as owner of the superior heritage by altering its natural state to the injury of the inferior proprietor. In support of that proposition will be found in the reasons for judgment of Sir Henry Strong in that case, a number of authorities establishing the Crown's liability under these circumstances. See also *Denholm v. Guelph & Goderich*

[1] (1894), 24 Can. S.C.R. 420, 421.

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R. Co.;[1] and *Martel v. C.P.R.*.[2] Moreover, such remedy would be found under sub-section (d) of sec. 20 of the *Exchequer Court Act*, as held in the case of the *City of Quebec, supra.*

The suppliant in his evidence claims $400 for the damages resulting from the western borrow-pit and $600 for the eastern borrow-pit.

There are 7 or 8 acres affected on the west. This acreage is of low and wet land and could only have been effectively used for agricultural purposes after establishing proper drainage. The damage is real. Although the fee in the land remains with the suppliant, at present such land has very little value and it is a question as to whether it could acquire value in the future. In 1916, when the respondent's engineer went upon the premises to make an inspection of these damages, the ground was so soft, on the western side, that he had to throw some wooden posts on the ground to walk over, as he was sinking to his knees. He further says that his idea was to expropriate that part covered by the sand on the western side and construct a drain to take the water to the Riviere Bleue. In the result, the suppliant cannot use this piece of land for agricultural purposes.

The damages arising from the eastern borrow-pit are not, under the evidence, of a very tangible nature. However, as already mentioned, he has to take care of a much larger volume of water which mines his road, floods part of his farm, delays and impedes his agricultural exploitation of the same. This is further aggravated by the closing of ditch D by the embankment.

[1] (1914), 17 Can. Ry. Cas. 316.
[2] (1895), 11 Rev. de Jur. 133.

The suppliant's witnesses place a value of $50 to $70 an acre on the west, and one of them values the damages on the west at $300 to $400, while some of the witnesses decline to place any estimate regarding the damages on the east. It is true that it appears from the evidence that the Crown paid from $75 to $80 an acre for the land expropriated in that locality; but we must not overlook that this price covered and embodied the damages resulting from the expropriation, which could be ever so much more than the actual value of the land taken. On behalf of the Crown, one witness fixes the value of the farms in that neighborhood, without buildings, at about $12 an acre.

I will assess all damages in question herein, east and west, at the sum of $440, an amount which will amply compensate the suppliant.

Therefore the suppliant is entitled to recover from the respondent the sum of $440 in satisfaction of all claims, once for all, for damages past, present and future, resulting from the works and construction in question herein, and with costs.

Judgment accordingly.

Solicitors for suppliant: *Lapointe, Stein* and *Levesque.*

Solicitor for respondent: *E. H. Cimon.*

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Feb. 20.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

BENJAMIN LEONARD DEACON, IVER EDBORN, PAUL DOLMAN, SARAH GOODMAN, EXECUTRIX OF THE ESTATE OF JAMES GOODMAN AND AUGUST SWANSON,

DEFENDANTS.

Public lands—Homestead—Jurisdiction of Exchequer Court—Validity of patent—Delivery—"Improvidence"—Judgment creditors—Bonâ fide purchasers.

The defendant, S., an alien, for a number of years was a homestead entrant on land in Manitoba and entitled to a patent therefor under the *Dominion Lands Act*. He refused to make application for the patent, because, until the patent was registered in Manitoba, the land was not subject to the payment of certain taxes, nor to the execution of judgments against such lands. He was induced to consummate the application for patent under threats of the Dominion land-office to cancel his homestead entry, and having taken out his naturalization papers and signing the application, the patent regularly issued and was mailed to him at his post-office address. It was later returned to the land-office because not called for by him. In the meantime a copy of the patent was registered against the land, whereupon the land was sold to satisfy the taxes and judgments, and thus found its way into the hands of innocent purchasers for value. Proceedings were instituted to set aside the patent and subsequent conveyances on the ground that the patent was procured by fraud and improvidently issued.

Held, the Exchequer Court has no power to review or question the validity of the judgments obtained by the creditors in the Provincial courts; that it has jurisdiction, under sec. 94 of the *Dominion Lands Act* (7-8 Edw. VII., 1908, c. 20) and sec. 31 of the *Exchequer Court Act* (R.S.C., 1906, c. 140) to determine the validity of the patent, and to set aside, if need be, the registration of instruments affecting the land in the registration offices of the Province.

2. The patent having been duly issued, in conformity to the provisions of sec. 90 of the *Dominion Lands Act*, physical delivery was not essential to render it operative or effective.

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3. Upon the registration of the patent thus issued the judgment creditors of the patentee had the right to treat it as having been regularly issued and to secure a sale of the land in execution of their judgments.

4. Under the evidence adduced, no fraud, error or improvidence was established as would warrant the avoidance of the patent under sec. 94 of the Act; the fact that the patentee, in a letter to the land-office, stated his unwillingness or refusal to sign the patent papers, when he in fact did sign them, does not shew "improvidence" in issuing the patent, particularly when his object for doing so was to defeat the payment of taxes and hinder his judgment creditors.

5. After the land has passed into the hands of third parties, who were innocent purchasers for value, no relief can be granted in violation of their rights.

INFORMATION exhibited by the Attorney-General, asking that *letters-patent* for certain Dominion lands issued to the defendant, August Swanson, on March 24th, 1911, be declared void and be delivered up to be cancelled.

Tried before the Honourable Mr. Justice Audette, at Winnipeg on October 1, 2, and at Ottawa on the 20th November, 1918.

A. J. Andrews, K.C., and *F. M. Burbidge,* for plaintiff.

H. A. Bergman, for defendant, Iver Edborn.

B. L. Deacon, for defendants, Paul Dolman and Sarah Goodman.

W. S. Morrisey, for defendant, Deacon.

AUDETTE, J. (February 20, 1919) delivered judgment.

It is alleged by paragraph 15 of the Information that the Letters Patent for homestead in question granted to Swanson were sent, by mail on April 11, 1911, to his regular post-office; but it is averred that

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such Letters Patent had been issued fraudulently, improvidently and by inadvertence, and that the same should be declared as having never been duly and regularly issued and *delivered so as to vest the said lands in Swanson.* The information further seeks, in the alternative, for a declaration *that if the said patent was issued, the issue of the same was procured by fraud, or that it was inadvertently and improvidently* issued, and that the same should be declared void and should be delivered up to be cancelled—and further, that the alleged sales and mortgages be declared void and of no effect and be set aside.

Now, the facts of the case are intricate, but stripped and freed from all unnecessary details, may be stated as follows:

At the outset it must not be overlooked that the defendant Swanson, the patentee, is not a relator, but is purely and simply a defendant in the case.

Swanson is a Swede who, according to his own statement, came to Canada from Minnesota, U.S., in 1900. Einarson, who has always lived in the neighbouring community of Pine Creek, now Piney, says that when he arrived in the fall of 1899, Swanson was already there, being a squatter on the land in question. Swanson duly signed his application for entry on August 27, 1900, and has performed and completed all the settlement duties that entitle him to his patent. In fact, he had done so many years previous to the issue of his patent, and so became entitled to the same according to the laws and regulations in that behalf made and provided.

Somewhere about 1903, Swanson got into trouble with some of his neighbours. He was arrested on a charge of having maliciously injured cattle belong-

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ing to certain of his neighbours that he caught roaming on his quarter-section, which, at the time, was not fenced. At the trial he was acquitted, or rather discharged. Then he turned around and sued his prosecutors for malicious prosecution, giving the conduct of the action to one Mr. Deacon, a defendant herein, who looked after his case up to a certain stage. Swanson, finding that his action was not being prosecuted as speedily as he desired, took the case out of Mr. Deacon's hands and retained the services of another legal firm who saw the case through, when the action was dismissed with costs against Swanson—the judgment being registered against his quarter-section. Mr. Deacon, in the meantime, failing to get paid for his services, sued for his costs, and obtained a judgment against Swanson, which judgment was registered in like manner.

It is unnecessary for the purposes of this case to go into the details of the cases in which judgments were so obtained in the courts of the Province of Manitoba and afterwards registered against the lands in question. However, in view of the allegations in the information, it is, I think, incumbent upon me to state here that no blame can be attached to Mr. Deacon for his conduct in this matter. The evidence at the trial so thoroughly cleared up the whole matter and exonerated Mr. Deacon from any blame that counsel for the plaintiff was impelled to withdraw averments impugning Mr. Deacon's conduct as made in the information.

It may be mentioned, by the way, that this court has no power to review the judgments rendered in the courts of the Province of Manitoba. The Exchequer Court is not a court of appeal for such Province, and, if Swanson had at any time reason

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to be dissatisfied with these judgments, his recourse was to the courts exercising appellate jurisdiction in that province, and not to the Exchequer Court of Canada. It appears, however, that Swanson took his complaints to the Governor-General of Canada, to the Attorney-General of Canada, and to the Attorney-General of the United States, and even brought the matter before the Grand Jury in Manitoba; but no action seems to have been taken thereunder.

These judgments not being appealed from, stand now in full force and effect, although that question—but for the allegations in that respect in the information—has no occasion to be mentioned, not being a consideration in arriving at the decision of the question involved in this issue.

Furthermore, ever since Swanson became entitled to his patent, he refused to make application therefor; because, until the patent was registered in Manitoba, he was exempt from the payment of certain taxes, and advised his neighbours to that effect, inciting them to follow his example, and thus creating annoyance both to the government and the municipality. The latter, as it appears from the evidence, complained to the government and pressed the issue of the patent.

There is spread on the record a very long and protracted correspondence from which it appears that, for a number of years previous to the issue of the patent, the government was earnestly endeavouring to induce Swanson to make his application for the patent, and going so far as to threaten him with the cancellation of his entry under sec. 26 of the *Domin-*

ion Lands Act, if he failed to do so. Instructions were even given to institute proceedings to that effect and notice of the same was accordingly given to Swanson.

However, after a number of months, even years, had elapsed, Swanson duly signed his application. Under the evidence on record, I have no hesitation in finding that he did personally of his own free will, sign the application. The evidence of the homestead inspector, Lagimodiere, who gave his testimony in a most straightforward and creditable manner, leaves no room for doubt, and besides, the signature on the application for the patent is undoubtedly the same as that which is to be found on Swanson's application for entry and on many other documents on record.

It appears from the evidence, both oral and documentary, that for a very long period instructions were being repeatedly given, by the department, to take Swanson's application for this overdue patent. However, Swanson persistently refused to do so, giving as his reasons for so behaving that he had been in trouble with some of his neighbours at Piney, who had obtained judgment against him, and further that the school trustees were after him for taxes, and that he wanted to delay the issue of the patent to allow him, in the meantime, to get rid of the same. The complaint by the municipal authorities was that Swanson was avoiding the payment of his taxes. (Exhibit 1, F).

Witness Lagimodiere says that he had had instructions at different times to take Swanson's ap-

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plication for the patent, and being, on February 19, 1910, in the Dominion Land Office, at Winnipeg, Swanson, who was quite in good humour, called at the counter and informed him he wanted to make application for his patent. That was some time after he had been threatened with the cancellation of his entry. (See Exhibit 1, A.F.). Lagimodiere, under the instructions of his superior officer, then took the application, filled it up in his own handwriting and had Swanson sign it in his presence. Having said he was not naturalized, Lagimodiere prepared naturalization papers, but when it came to sign these, Swanson demurred and refused to do so.

But for some stress being laid upon the letter of January 26, 1910, (Exhibit 1, A1), in which appears the words, "Swanson refuses to make application "for his patent and it is desired by the department "that you will visit him after seeding next spring, "and do your best to show him his position in the "matter and persuade him to make his application"— I would refrain from making any reference to the same. Obviously that is only a part of the heavy and protracted correspondence relating to the same subject and cannot be construed as intimating that the application could not be taken before the spring. As witness Lagimodiere puts it, that letter would have been considered as optional, of letting Swanson off up to and after seeding; and, moreover, that letter was never communicated to Swanson and therefore is of no effect in his behalf.

There is another important link, in the chain of facts, in that letter of February 21, 1910, (Exhibit 2, F), which reads as follows:

"Warren, Minn., Feb. 21, 1910.

"To the Honourable Homestead Inspector
of Dominion Land,
Winnipeg, Manitoba.

"Dear Sir:—

"I cannot sign those papers that we made out "when I saw you last. If I did, I would sign all my "property away for nothing. It will not be neces- "sary to come to my place until you get a letter in "writing from the Attorney-General of Manitoba "to the fact that he will bring the case up in court "in the King's Bench. If this case is not adjusted "in a reasonable time I will bring it up in court in "Minnesota.

"Yours truly,
"(Sgd.) August Swanson."

"P.O. Piney, Man."

Reference will be hereafter made to this letter.

Subsequently to this date, it having been found out by some one that Swanson had been naturalized and so become a British subject, his naturalization papers found their way into the hands of the department. The evidence does not disclose who so sent them, but the evidence is superabundant as to their legality. While it is of no importance to know how these naturalization papers came into the possession of the department, it is suggested by counsel that Swanson, upon being threatened with cancellation of his homestead entry, and in fear of losing it, sent them himself. This, if true, would operate as a complete estoppel against Swanson.

These naturalization papers having completed the preliminary steps in the application for the patent the same was duly signed and sealed on March 24,

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1911, and I assume, duly registered in the Department of the Interior pursuant to sec. 90 of the *Dominion Lands Act*. The patent was then in due course, according to the practice in that behalf, duly transmitted by mail on April 11, 1911, to Swanson's address, at Pine Valley, Manitoba. But the same was returned sometime in the month of May following, with a memorandum endorsed on the envelope by the postmaster at Pine Valley, that the letter had not been called for, and further stating that Swanson had been away for some time, etc.

However, Dolman having heard that the patent had issued and was at the post-office at Pine Valley, informed his legal adviser of it, who wrote to the department at Ottawa and obtained—in the interval between the mailing and the return of the patent—a copy of the same, which he duly registered against the lands in question.

The patent being thus registered, the land was sold to satisfy the taxes and the judgment creditors, and the property found its way into the hands of a third party—an innocent purchaser for value without notice—who spent and disbursed upon the property in improvements the sum of $2,053.17, inclusive of the purchase price of $1,200. The land was sold in due course at Winnipeg to one Ainsley, who sold afterwards to defendant Deacon, who, in turn, sold to defendant Edborn, who is in possession living on the land, and who when purchasing did not even know Swanson and all that has been mentioned above.[1]

[1] R.S.M., 1913, c. 107, s. 3; *U. S. R. Co. v. Prescott* (1872), 16 Wall. 603.

JURISDICTION.

In approaching the law of the case we are confronted with the question of jurisdiction. It is contended that the Exchequer Court of Canada has no jurisdiction to hear and determine the present case, either under sec. 94 of the *Dominion Lands Act*, or the *Exchequer Court Act*, and that the court has no jurisdiction respecting real property in the province —and for setting aside registration in the registration office—etc., etc.

The King, from time immemorial, has the undoubted privilege attaching to his prerogative of suing in any court he pleases.

We find in *Chitty's Prerogatives*,[1] dealing with actions "by the King and Crown": "In the first place, though his subjects are, in many in- "stances, *under the necessity* of suing in particular "courts, the King has the undoubted privilege of "suing in any court he pleases. . . . The Crown "possesses also the power of causing suits in other "courts to be removed into the Court of Exchequer "where the revenue is concerned, in the event of the "proceeding, or the action touches the profit of the "King, however remotely, and though the King be "not a party thereto. . . . The King is also sup- "posed to be always present in court."

Under sub-sec. 1 of sec. 91 of the *B. N. A. Act*, the Parliament of Canada has the paramount power to legislate with respect to its property, *Burrard Power Co. v. The King*.[2] Under sec. 31 of the *Exchequer Court Act*, the Exchequer Court is given concurrent original jurisdiction by sub-sec. (b), in all cases in

[1] (1820), p. 224.
[2] (1910), 43 Can. S.C.R. 27, 50, 52; [1911] A. C. 87.

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which it is sought at the instance of the Attorney-General of Canada, to impeach or annul any patent, lease or other instrument respecting lands; and, by sub-sec. (d) of the same section, it has also been given jurisdiction in all actions and suits of a civil nature at common law or equity in which the Crown is plaintiff or petitioner. Moreover, the Exchequer Court of Canada comes within the purview of sec. 94 of the *Dominion Lands Act* and is one of the courts "having competent jurisdiction in cases re-"specting real property in the province where the "lands are situate", and this principle and question have been clearly established and decided by the judgment of the Supreme Court of Canada in the case of *Farwell v. The Queen.*[1] See also *Cawthorne v. Campbell;*[2] *The King v. Powell;*[3] and *Williams v. Box.*[4]

Furthermore, as said by Anglin, J., in *Gauthier v. The King,*[5] "Provincial legislation cannot *proprio* "*vigore* take away or abridge any privilege of the "Crown in the right of the Dominion. . . . It does "not at all follow that, because the liability of the "Crown in right of the Dominion is to be deter-"mined by the laws of the province, where the cause "of action arose, that liability is governed by a pro-"vincial statute made applicable to the Crown in "right of the province, since it is by the provincial "law only so far as applicable to it that the liability "of the Crown in right of the Dominion is gov-"erned."

[1] (1894), 22 Can. S.C.R. 553-562; 3 Can. Ex. 271.
[2] (1790), 1 Anst, 205, 218; 145 E.R. 846.
[3] (1910), 13 Can. Ex. 300.
[4] (1910), 44 Can. S.C.R. 1.
[5] (1918), 56 Can. S.C.R. 176, 195; 40 D.L.R. 353 at 365 and 366.

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Therefore, I find the Exchequer Court has full power and jurisdiction to hear and determine the present issue and controversy.

This takes us now to consider whether the patent in question was duly issued, under the circumstances above mentioned, and I find that the patent herein was legally issued, without the formality of its being delivered into the hands of the patentee. It is duly issued when signed and sealed as provided by sec. 90 of the *Dominion Lands Act*. This title is of record in the department and it is therefore by no means necessary that delivery be made before it is completed. Halsbury, 6, p. 479, says: "Grants under "the Great Seal require no delivery and take effect "from the date expressed in the grant." See also *Contois v. Benfield.*[1]

A very large number of authorities can be and have been cited in support of that proposition. *Norton on Deeds,* 2nd Ed., p. 14: "The operation of a "deed is not suspended by the fact that the person "entitled to the benefit of it is ignorant of its exist-"ence."

"Depositing a deed directed to the grantee in the "post-office has been declared to be sufficient deliv-"ery."[2]

See also *Lonabaugh v. United States,*[3] a case much in point, wherein, at p. 480, the following observation is found: "We are of opinion that when, upon "the decision of the proper office, that the citizen "has become entitled to a patent for a portion of the "public lands, such a patent made out in that office

[1] (1875), 25 U.C.C.R. 39, 43.

[2] 13 Cyc. 561; *Doe'd Garnons v. Knight* (1826), 5 B. & C. 671, 108 E. R. 250; *Staple of Eng., Mayor, etc. v. Bk. of Eng.* (1887), 21 Q.B.D. 160, 165; *Gartside v. Silkstone* (1882), 21 Ch. D. 762; *Re Mathers* (1891), 7 Man. L. R. 434.

[3] (1910), 179 Fed. 476.

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"is signed by the President, sealed with the seal of "the General Land Office, countersigned by the re- "corder of the land office, and duly recorded in the "record book kept for that purpose, it becomes a "solemn public act of the Government of the United "States, and *needs no further delivery* or other authentication to make it perfect and valid."[1]

No physical delivery of the patent is essential to make it operative or effective.[2]

Now let us consider whether or not Swanson's patent is open to avoidance under the provisions of sec. 94 of the *Dominion Lands Act,* as having been issued through *fraud,* or *improvidence* or *error.*

Fraud is alleged in the information, but no fraud was attempted to be proved, and as there is never any presumption of fraud, the plaintiff fails on this point.

Can it be contended that there was any error in issuing the patent in the manner it was issued? The patent was issued for the right piece of land, to the entrant for his homestead, the party entitled thereto, upon his own application, long after the expiry of the period fixed by the Act, and after performing all settlement duties and requirements. In fact, under sec. 25 of the Act, he had acquired a right to it, before it was signed and sealed. There certainly was no error.[3]

Was there any improvidence? Where was the improvidence, in the true sense and meaning of the word? Does the charge of improvidence rest on Exhibit 2F, the letter of February 21, 1910, written

[1] *Colorado Coal Co. v. United States* (1887), 123 U.S. 307, 313.
[2] See also *Stark v. Starrs* (1867), 6 Wall. 402; *Benson Mining Co. v. Alta. Mining Co.* (1892), 145 U.S. 428, 431.
[3] 32 Cyc. 1029, 1030; *Simmons v. Wagner* (1879), 101 U.S. 260; *U. S. v. Detroit Lumber Co.* (1906), 200 U.S. 321.

by Swanson, two days after signing his application for the patent and when he refused to sign papers for naturalization? In that letter he says: "I can-"not sign those papers that were made out when I "saw you last. If I did, I would sign all my prop-"erty away for nothing," etc., etc. Can this letter have reference to the application for the patent he had duly signed? I would take it from the ordinary meaning of the words that it would have reference to papers unsigned, to the naturalization papers that Lagimodiere had made out for him to sign, but which he had refused to sign at the time without giving any reason. This letter gives his reason for refusing his patent and also the apparent reason for refusing to sign those naturalization papers; but he was aware that years ago he had signed such papers and did not want to disclose it for fear the patent might issue at once. Did he not wish that to be kept to himself, to disclose it later on if any trouble were to arise in the issue of the patent—his answer being ready that he had long ago complied with all requirements? And at p. 40 of his evidence, speaking of his naturalization papers he denies having known he ever had been naturalized, but he says: "Those papers that "are made out, they can keep them that way when "I get my money and property back." In his letter of May 7, 1915 (Exhibit 1 DQ), he claims protection "as a British subject".

Be all this as it may, surely a letter of this kind could not and would not, under the known circumstances, have justified the staying of the hand of the government in issuing the patent. It was well known and spread upon the record that the government for years, at the request of the municipality claiming its taxes, and in compliance with its duties defined

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in the *Dominion Lands Act*, had been endeavouring to have Swanson make his application. It had repeatedly threatened Swanson with cancellation of his entry, under the provisions of sec. 26, for his persistent neglect to make the application for his patent, when he had been for years entitled to it.

There is nothing new disclosed in the letter (Exhibit 2 F). It is nothing more than a consistent confirmation of the position taken by the patentee in the past. It is the same old characteristic letter following the trend of the past correspondence on the record, showing the obsession of his grievance to which the Crown is absolutely foreign, and in face of which it had been earnestly pressing Swanson to make his application for the patent. Why attach so much importance to this isolated letter, in view of the welter of letters already on record and practically to the same effect? I fail to see. The plaintiff had full notice and knowledge of all the facts in the case when the patent was duly issued.

Moreover, what reliance and credence can be placed upon this letter? Turning to the evidence we find that Swanson himself states he never wrote that letter (Exhibit 2F). He denies that it is his letter, or that he told anyone to write it for him, and he says he never signed it. Then on cross-examination, by counsel for the plaintiff, he adds he must have had somebody to write it—that he signed it—and then at the end he adds he does not recollect anything about the letter. The facts in respect of the writing of that letter instead of being cleared up by the evidence of Swanson are placed in such an obscure and bizarre circumvolution that no reliance can be placed either upon the letter or upon Swanson's evidence in that respect.

There is in that letter (Exhibit 2F), nothing new that was not disclosed before in the long-protracted correspondence which loads the record. That letter was only repeating and maintaining the same position taken from the beginning of his difficulties with his neighbours. All these facts were perfectly well known to the Crown, who, in face of the same, gave repeated instructions to endeavour to have him apply for his patent. The Crown even went further, they gave instructions to institute proceedings to cancel his entry for his want to apply for his patent, relying upon sec. 26 of the Act, and notice given Swanson to that effect.

The Commissioner of the Dominion Lands, heard as a witness, at Ottawa, testified he was unable to say whether the letter was on the Ottawa fyle, in the department, when the patent did issue. But even if that letter were not on fyle when the patent was issued, can that fact, considering all the allegations in the letter as obviously referable to all the circumstances of the case, amount to improvidence in issuing the patent? I must unhesitatingly answer that in the negative.

The term "improvidence", indeed, as defined by the Supreme Court of Canada, in the head note of the case of *Fonseca v. Att'y-Gen'l of Canada*,[1] "as distinguished from error, applies to cases when the "grant has been to the prejudice of the common-"wealth or the general injury to the public, or when "the rights of any individual in the thing granted "are injuriously affected by the letters patent."

What are the reasons for cancellation asserted by Swanson himself all through his correspondence and evidence, if not in aid of defeating the payment

[1] (1889), 17 Can. S.C.R. 612.

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of his taxes and his judgment creditors, whose claims would be barred by the Manitoba statute of limitations were the whole matter to be reopened.

The hand of the law cannot be extended in relief of the defendant Swanson under the circumstances, and much more so indeed, in violation of the rights of a third party who became the purchaser for value without notice and who has spent a substantial sum of money upon the land in question.[1]

The cancellation or avoidance of a patent cannot be trifled with. The burden of proving by clear testimony, of an unquestionable character, that the patent was granted improvidently wholly rested upon the plaintiff, and such evidence was not given. *Fonseca* case.[2] There is no evidence on the record of such a nature as would justify cancellation.

It is suggested, in the official correspondence fyled as exhibits, that another homestead be given the patentee. It is always open to the Crown, under its benevolence, grace and bounty, to allow Swanson some other quarter-section upon which to enter, the time placed on the original homestead to count—or under any other condition which may appeal to the law officers of the government.

The action is dismissed with costs.

Action dismissed.

Solicitor for plaintiff: *E. L. Newcombe,* K.C.

Solicitors for defendant, Edborn: *Rothwell, Johnson & Co.*

Solicitor for defendant, Deacon: *C. G. Keith.*

Solicitor for defendants, Dolman and Goodman: *D. W. McKerchar.*

[1] *Proctor v. Grant* (1862), 9 Gr. 224; *Cumming v. Forrester* (1820), 2 J. & W. 342; *Stevens v. Cook* (1864), 10 Gr. 415; 32 Cyc. 1057, 1029, 1030; 26 Am. & Eng. Enc. Law, 444; *U. S. v. Stinson* (1905), 197 U.S. 200, 204, 205.

[2] 17 Can. S.C.R. 612 at 652.

1918

July 11.

QUEBEC ADMIRALTY DISTRICT.

MICHAEL JOSEPH STACK, ET AL,

PLAINTIFFS;

v.

THE BARGE "LEOPOLD",

DEFENDANT.

THE PROVINCIAL BUILDING & ENGINEERING CO., LTD.,

MIS EN CAUSE.

Admiralty—Jurisdiction—Necessaries and repairs—Towage—Maritime lien.

By virtue of secs. 4 and 5 of the *Admiralty Court Act*, 1861, where a ship is not under arrest and its owner is domiciled in Canada, the Exchequer Court of Canada has no jurisdiction over an action for repairs or necessaries supplied to the ship.

2. Towage performed in connection with the repairs, not at the owner's special request, is not within the purview of "claims and demands for services in the nature of towage," within the meaning of sec. 6 of the *Admiralty Court Act*, 1840, as would give the Court jurisdiction over the claim; neither claim for towage nor for necessaries is the subject of a maritime lien.

3. An objection to the jurisdiction will hold good even if made after the trial.

ACTION in rem and claim for $959.92 for work done, materials furnished, towing and guarding barge "Leopold" from June, 1916, to the date of the institution of the action, and costs.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, October 7, 1918.

Alphonse Décary, K.C., for plaintiff.

Lucien Beauregard, for mis en cause.

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STACK v. LEOPOLD.

Reasons for Judgment.

MACLENNAN, Dep. L. J. (July 11, 1918) delivered judgment.

The plaintiffs were contractors for the construction of a portion of the Montreal and Quebec highway, under contract from the government of the province of Quebec. The barge "Leopold" and certain other plant were leased by the Quebec government to the plaintiffs in connection with the said contract and were used by the plaintiffs during the seasons of 1915 and 1916, when plaintiffs' contract was completed. The plant belonged to another contractor, who had undertaken to construct a considerable portion of the highway, but failed to complete the whole of his work, whereupon the government took possession of the plant and gave the balance of the work to the plaintiffs, who paid a rental to the government for the plant. When the plaintiffs completed their contract they notified the government and offered to surrender the plant, including the barge "Leopold". The government declined to take the plant off the plaintiffs' hands, and the claim in this action is to recover the alleged costs of certain repairs to the barge, materials furnished, towing the barge to a dry dock in order to have the repairs made, towing the barge from the dry dock and the costs of a guardian looking after the barge for a considerable time.

After trial, and in a written argument submitted by the counsel for the defendant, the question of the jurisdiction of the court was raised. It is well settled law that the jurisdiction of this court to hear an action for necessaries supplied to a ship depends entirely upon statute. By the *Colonial Courts of Admiralty Act,* 1890, a Colonial Court of Admiralty

has, subject to the Act, jurisdiction over the like places, persons, matters and things as the High Court in England has, and any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty, shall be read as if the name of that possession were substituted for England and Wales. By the *Admiralty Court Act,* 1861 (24 Vic., ch. 10, Imp.), sec. 4: "The "High Court of Admiralty shall have jurisdiction "over any claim for the building, equipping or re- "pairing of any ship if at the time of the institution "of the cause the ship or the proceeds thereof are "under arrest of the court." And by sec. 5; "The "High Court of Admiralty shall have jurisdiction "over any claim for necessaries supplied to any "ship elsewhere than in the port to which the ship "belongs, unless it is shown to the satisfaction of "the court that at the time of the institution of the "cause any owner or part owner of the ship is domi- "ciled in England or Wales." By the *Admiralty Court Act,* 1840 (3 and 4 Vic., ch. 65, sec. 6), the High Court of Admiralty was given jurisdiction to decide all claims and demands for services in the nature of towage and for the necessaries supplied to any foreign ship.

At the trial it was proved that the barge "Leopold" was registered at the port of Montreal on August 5, 1891, and that the registered owner since March 17, 1914, is Samuel Charland, of Montreal. The Provincial Building and Engineering Company, Limited, a body politic and corporate, having its principal place of business in the city of Montreal, claims that, at the date plaintiffs' services are alleged to have been rendered, it was and ever since has

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been the real owner of the barge. At the time of the institution of this action the barge was not under arrest of the court and the owner was either Charland or the said company. It, therefore, follows that under secs. 4 and 5 of the *Admiralty Court Act*, 1861, this court has no jurisdiction over the plaintiffs' claim for repairs or necessaries. *The Garden City*.[1] The plaintiffs' claim includes two items for towing, one for $10 for bringing the barge to the dry dock at Sorel, in order to make some repairs considered necessary by plaintiffs, and an item of $20, for towing the barge from Sorel to Berthier, where the plaintiffs retained the barge in their possession. This towing was not done at the request of the owners of the barge, but was for the convenience of the plaintiffs themselves, and was incidental to the repairs and retention of the barge by plaintiffs. In my opinion this was not the kind of towage which, under the *Admiralty Court Act* of 1840, sec. 6, would give the court jurisdiction. In my opinion the items for towage were incidental to plaintiffs' claim for necessaries and are to be treated in the same way; *The St. Lawrence*.[2] Neither claims for towage nor for necessaries are the subject of a maritime lien; *Westrup v. Great Yarmouth Steam Carrying Co.*;[3] *The Henrich Björn*.[4]

The plaintiffs submit that the defendant's objection to the jurisdiction having been raised after the trial came too late. Dr. Lushington, in *The Mary Anne*,[5] said: "If at any time the court discovers "and the facts show that the court has no jurisdic-

[1] (1901), 7 Can. Ex. 94.
[2] (1880), 5 P.D. 250.
[3] (1889), 43 Ch. D. 241.
[4] (1886), 11 App. Cas. 270.
[5] 34 L. J. Adm. 74.

"tion, it cannot proceed further in the cause; the "delay of one or both parties cannot confer juris- "diction." The objection raised by defendant is not a mere technical objection which could be waived by appearance and proceeding to trial, as under the statute there is absolute absence of jurisdiction; *The Louisa*,[1] *The Eleonore*,[2] *The Barbara Boscowitz*.[3]

The defendant could have raised the question of jurisdiction before trial, and if that had been done some expense for both parties would have been avoided. The defendant tendered and deposited with the Registrar the sum of $250 with the defence. As at the time of the institution of this action the barge was not under arrest of the court, and its owner was domiciled in Canada, it is clear that the court has no jurisdiction. There will be judgment dismissing the action, each party paying their own costs, and the Registrar is directed to return the deposit of $250 to the party from whom he received it.

Action dismissed.

Solicitor for plaintiff: *Alphonse Décary.*

Solicitors for mis en cause: *Beauregard & Labelle.*

[1] (1863), Br. and L. 59.
[2] (1863), Br. and L. 185.
[3] (1894), 3 B. C. R. 445.

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Feb. 20.

QUEBEC ADMIRALTY DISTRICT.

FRANK WALROD,

PLAINTIFF;

v.

S.S. "CONISTON",

DEFENDANT.

Collision—Tug and tow—Steamship—Narrow channel—Rules of road —Lights.

A steamship was coming up the St. Lawrence River in ballast, at a great speed, and approaching a tug and tow in the bend of the channel changed her course with the intention of passing them starboard to starboard, contrary to art. 25 of the Rules of the Road. Thereupon the master of the tug ported his helm in an endeavour to avoid a collision. The steamer then tried to manœuvre herself into position and collided with two barges at the head of the tow.

Held, the collision resulted from the steamer's failure, "when safe and practicable, to keep to the starboard side of the fair-way or mid-channel," as required by art. 25; even if the pilot of the steamer believed the tug and tow coming down the wrong side of the channel, good seamanship required him to stop or slow up, which he failed to do; that no blame could be imputed to the tug. The length of the tow and the absence of regulation lights on the barges cannot be said to have contributed to the collision when it occurred at the head of the tow.

ACTION for damages resulting from a collision.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, January 12 and February 4 and 5, 1918.

Geoffrion & St. Germain, for plaintiff.

MACLENNAN, Dep. Loc. J. (February 20, 1918) delivered judgment.

The plaintiff is the owner of barges which were being towed down the River St. Lawrence and came

into collision with the S.S. "Coniston" coming up the river.

The plaintiff's case is that about midnight on the night of June 18, 1917, his two barges, "Estella Walrod" and "Dorothy and Harold", were, with other barges, in the tow of the tug "Virginia" descending the River St. Lawrence in the steamer channel in Lake St. Peter and collided with the SS. "Coniston". The wind was a moderate westerly breeze; the weather was fine, dark and clear, the current was running about 2½ miles an hour, and the tug and tow had a speed of about 6 miles per hour; the tug and tow carried, brightly burning, the regulation lights; the "Coniston" was coming up the river in ballast at full speed and gave a signal of two blasts and wrongfully directed her course to port with the intention of passing the tug and tow starboard to starboard, contrary to art. 25 of the Rules of the Road. On seeing the green light of the "Coniston" the captain of the tug ported his helm in an endeavour to avoid the collision and gave the signal of one blast of his whistle; the helm of the "Coniston" was then ported, but too late to avoid the collision, and she collided with the first and second pair of barges in the tow; the helm of the "Coniston" was starboarded at an improper time; there was no proper lookout on the "Coniston", and those on board neglected in due time to take proper means to avoid a collision with the tow. The "Coniston" should have permitted the tug and tow to have passed below curve No. 2 on Lake St. Peter before attempting to pass the same; her speed was excessive and the order to reduce speed was given too late; the collision and damages in consequence there-

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of were occasioned by the negligence and improper navigation of those on board the "Coniston".

The case of the defendant is that the "Coniston" was coming up the ship channel with all regulation lights burning brightly, and at about ten minutes before midnight those in charge saw two masthead lights placed vertically and the green light on the tug and white lights on the tow coming down the river at a distance of four or five miles, bearing about one point off the port bow. There was a strong wind from the south south-west bearing on the port side of the "Coniston", which was in ballast, and high in the water and was about mid-channel; the tug and tow appeared to be on the north side of the channel; the speed of the "Coniston" was about six knots over the ground. After rounding curve No. 2 the lights of the tug and tow appeared about two points off the starboard bow. Her green and masthead lights only were visible and the length of the tow appeared to be 800 feet. About two minutes past midnight, when the tug was apparently one mile distant, the "Coniston" gave one signal of two blasts, indicating that she would pass the tug starboard to starboard; there was ample room and opportunity to do so. The tug made no reply to this signal, but when at a distance of about 800 feet the tug suddenly ported her helm, shut in her green light and opened her red and immediately thereafter gave a signal of one blast. The engines of the "Coniston" were thereupon ordered full speed astern; she ported her helm and gave a signal of one blast. The tug passed clear of the "Coniston" on her port side, but the bow of the barge on the port side of the first pair of barges struck the "Coniston's" port bow slightly. The tow was com-

posed of 16 barges in 8 pairs of 2 each, and its total length exceeded 600 feet. The barges were not under any control, except that of the tug; they had no side lights nor lookout, and each carried one white light. The tug had only two masthead lights besides her side lights, and she was in charge of a captain, mate and engineer; she had no lookout, and the engineer was not on duty in the engine-room; the "Coniston" was in charge of a licensed pilot, two officers were on duty on the bridge, and there was a competent wheelsman and a lookout. The first officer who had been relieved from duty at midnight, was still on the bridge; the collision was not due to any fault on the part of the "Coniston" nor of those in control of her. The collision and any damages caused thereby were due to the fault of the barges and of the tug for the following reasons:

A.—The barges "Estella Walrod" and "Dorothy and Harold" were two of a tow of sixteen canal barges in eight tiers of two each, in violation of regulation No. 16 of the port of Montreal, which applies to the place where the collision occurred.

B.—The "Estella Walrod" and "Dorothy and Harold" were not under control and had no one in charge of helm or rudder. They did not carry the regulation lights, having no side lights as required by International Rule 5, and one white light, in contravention to said rule.

C.—The "Estella Walrod" and "Dorothy and Harold" were in tow of a tug employed by them which was improperly equipped and did not exhibit the regulation lights in violation of art. 3 of the International Rules.

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D.—The tow of which the "Estella Walrod" and "Dorothy and Harold" formed part was over 600 feet in length. The tug had only two mast lights.

E.—The tug which was employed by the "Estella Walrod" and "Dorothy and Harold", and her tow, were on the north side of the channel. She was in a position to have passed clear of the "Coniston" starboard to starboard. When the latter was at a distance of about a mile she gave a two-blast signal, indicating that she would pass starboard to starboard. At that time the tug was bearing about two points on the "Coniston's" starboard bow. The tug gave no response. At a distance of about 800 feet she improperly ported her helm and altered her course to come across the bows of the "Coniston", and afterwards gave a one-blast signal. The tug did not slacken speed nor allow for the swing of its tow, the last three tiers of which were not loaded.

The tug "Virginia" was 115 feet long, 24 feet wide and on the occasion of the collision was drawing 11½ feet. She left Sorel early on the evening of June 18, 1917, to go down the river through Lake St. Peter with a tow of 10 loaded and 6 light barges. The plaintiff's two barges were lashed side by side and were the second pair of barges in the tow. The tow line between the tug and the first pair of barges was 250 feet long. The barges were about 100 feet long and there was a distance of about 15 feet between each pair of barges. The steamer channel through Lake St. Peter is 450 feet wide and is dredged to a depth of 35 feet. The collision happened at the upper end of a bend in the channel which is known as curve No. 2 turning to the right going down stream about two points and a quarter. The channel above this bend runs in a straight reach

about 3 miles, and the reach below the bend is slightly over 3 miles in length. When the tug and tow had gone about half way through the upper reach, the "Coniston" was seen in the lower reach. The tug and tow were then in mid-channel and went a little to the right-hand, or starboard, side and continued on the south side of the middle of the channel, with the barges in tow directly behind the tug. The "Coniston" was then in the lower reach below the bend. The tug and tow continued to proceed down the right-hand, or south, side of the channel, and the "Coniston" entered the bend showing her masthead and red side-lights. As the tug approached gas buoy No. 85-L at the lower end of the upper reach the red light of the steamer, which was then coming up the bend, was in sight, and, when at a distance of about 1,000 feet, the master of the tug saw the "Coniston" shut out her red light and show her green. The tug immediately gave a signal of one blast, got an answer of one blast from the "Coniston", and then the tug's helm was put hard a-port and the red light of the steamer came again in view. The tug passed the steamer port to port, but the steamer came into collision with the port bow of the port barges in the first and second pair of barges about 100 feet up-stream from gas buoy No. 85-L. The master and mate of the tug have testified that the tug and tow were in the south, or starboard, part of the channel for at least one mile above the place where the collision happened. The tug had gone past gas buoy No. 85-L at the moment of the collision, and the impact of the collision threw the barges farther south, with the result that the whole tow passed over the gas buoy, causing it to be extinguished and doing other damage to it.

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The "Coniston" was a steel screw steamer of 3,544 tons gross, 337 feet long and 47 feet beam. According to the evidence of her pilot, he saw the green light of the tug about 1½ miles away, and about one point off the port bow of the "Coniston". The "Coniston" was then at the lower end of the bend of the channel abreast of gas buoy No. 79-L, and was in mid-channel going full speed. The pilot says that as he went up the bend the light of the tug narrowed and gradually came directly ahead of him and that the "Coniston" was then following the north side of the channel; he gave no signal that he was taking that side of the channel; the wind was on his port side and he thought the tow would be affected by it, and he decided to go to the south and gave a signal of two blasts and the helm was put to starboard. The distance between the steamer and the tug was then, according to the evidence of the pilot, about 2,500 to 3,000 feet, but the defendant's preliminary act states the distance was about one mile. The pilot swears that he was opposite gas buoy No. 81-L when he gave two blasts, which is very nearly half a mile below the place where the collision happened. The master, mate and other witnesses on the tug all swear the two-blast signal was not heard on the tug. When the "Coniston" gave the two-blast signal her helm was put a-starboard and, according to the wheelsman, was kept in that position until it was ordered hard a-port. The "Coniston" got no answer to her two-blast signal and under the starboard helm she passed to the south side of the channel. The pilot admits that he had some uneasiness because he got no answering signal from the tug. When the tug and steamer were about 1,000 feet apart, the red light of the tug came in view and

immediately afterwards the tug gave the signal of one blast. The pilot swears the tug was then one-quarter or one-half point off the starboard bow of the "Coniston". On hearing the signal from the tug, the pilot ordered the helm to be put hard a-port and the engines to be put full speed astern. No signal was given by the whistle that the engines were going astern. The steamer passed the tug opposite gas buoy No. 85-L port to port. Some of the witnesses say that they almost grazed each other, and others say they passed within 15 to 40 feet. According to the evidence of those on the tug the steamer passed it with considerable headway, and the pilot says that at the moment of the collision the steamer was almost dead in the water.

The first thing to consider in this case is, what rule of navigation should have been observed by the steamer and tug going up and down the channel. The outstanding feature is that the dredged steamer-channel in Lake St. Peter, where the collision happened, was unquestionably a narrow channel within the meaning of the regulations for preventing collisions at sea, and that the steamer and tow came into collision very near the south side of the channel. The "Coniston" came into the south side of the channel by reason of having starboarded her helm when she was one mile away from the tug and continuing on her starboard helm until her engines were put full speed astern two minutes or two minutes and a half, according to the evidence of the chief engineer, before the collision. The plaintiff relies very strongly on the "Coniston's" failure to observe art. 25 of the Collision Regulations which reads as follows: "In narrow channels every steam "vessel shall, when it is safe and practicable, keep

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"to that side of the fair-way or mid-channel which "lies on the starboard side of such vessel." It is abundantly proved that the tug and tow observed this rule and kept well to the south side of the dredged channel. The "Coniston" when at a distance of one mile from the tug changed her course to port in breach of art. 25. The pilot's excuse for that change of course was that he thought the tug and tow were coming down on the north side of the channel and that the wind, which was on the steamer's port bow, would affect the tug and tow. The "Coniston" was still in the bend of the channel and her pilot and officers were not, in my opinion, in as good a position to say in what part of the channel the tug and tow were as the persons on board the latter. The evidence of the latter is accepted as establishing the fact that the tug and tow were in their own proper water to the starboard or south side of the channel and not in the north side. If the pilot then honestly believed that the tug and tow were coming down on the wrong side of the channel at a distance of about a mile away, there was nothing which rendered it dangerous for the "Coniston" to keep to her own proper side of the channel. The wind was light and, according to the evidence of the pilot and wheelsman, had no effect upon the steamer. The first officer admits that it would have been safe and practicable to keep over to the starboard side, and safer to keep in mid-channel, and further on in his evidence he was asked in cross-examination: "If you "were a mile apart there was still ample time and "opportunity for both vessels to do the right thing, "that is, to pass port to port, was there not?" and he answered: "Any amount of it there was." Art. 25 lays down the rule in imperative terms, that in

narrow channels, when it is safe and practicable, vessels shall keep to the right-hand side and pass port to port. It is the duty of those in charge of vessels to observe this rule.

Lord Alverstone, C.J., in *The Kaiser Wilhelm der Grosse*,[1] said:

"I am disposed to think that art. 25, in providing "that a vessel shall keep to its starboard side of the "channel, lays down a rule which is to be obeyed "not merely by one vessel as regards another, but, "so far as practicable, absolutely and in all circum- "stances. But, however that may be, I have no "doubt that where, as here, there are two vessels, "each vessel, as soon as she knows by the others' "lights that the other is in motion and what her "course is, is bound to comply with art. 25 and keep "to the starboard side of the channel."

My assessors advise me that: (1) After the "Coniston" arrived at the lower end of the bend of curve No. 2 in mid-channel, with the approaching tug and tow clearly in view above the bend, it was safe and practicable for the "Coniston" to have kept to the starboard side of the channel as she proceeded up stream through the bend; (2) that the tug did nothing which made it unsafe or impossible for the vessels to have passed port to port, and (3) that there was no danger of collision when the "Coniston" starboarded her helm and went to port, but that danger of collision arose later. This advice is in accord with my own judgment.

The law relating to the *Rule of the Road at Sea*, by Smith, at page 222 observes: "Starboarding in a "narrow channel in order to avert collision with an "approaching vessel will very rarely be a proper

[1] (1907), 76 L. J. Adm. 138 at 141.

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"manœuvre. A vessel in her right water is justi- "fied in assuming that a vessel approaching on the "same side of the channel will cross over to her own "right side." In considering the right to depart from a rule requiring a steamer when approaching another ship so as to involve risk of collision to slacken her speed or stop or reverse if necessary, Bowen, L.J., in *The Benares*,[1] said: "I am of opin- "ion that departure from art. 18 is justified when "such departure is the one chance still left of avoid- "ing danger which otherwise is inevitable."

In the case of *The Clydach*,[2] the narrow channel rule was applied. A steamer was going into Falmouth harbour on the wrong side of the channel. Butt, J., at p. 337, said: "Her own captain says that "he saw the lights of the 'Clydach' coming out of "the harbour somewhat more than a point on his "starboard bow and about a mile distant. What "was his duty under those circumstances? His im- "perative duty was to keep to the starboard side of "the channel. There is only one way in which he "could excuse his departure from following that "course, *i.e.*, by showing that under the circum- "stances it was not safe and practicable for him to "obey the rule."

In *The Kaiser Wilhelm der Grosse*, already cited, a collision happened just outside of the entrance of Cherbourg harbour, where the entrance is about half a mile wide, and the outcoming steamer was held liable for the collision because she improperly starboarded her helm and attempted to pass out on the wrong side across the bows of an inbound steamer. A similar non-observance of the rule was held

[1] (1883), 5 Asp. M. C. 171 at 174.
[2] (1884), 5 Asp. M. C. 336.

to carry with it liability in damages in *The Tecumseh*,[1] *R & O. Nav. Co. v. Cape Breton*,[2] *Turret Steamship Co. v. Jenks*,[3] *Bryde v. Montcalm*,[4] *Bonham v. The Honoreva*.[5]

I find, therefore, that the "Coniston" acted wrongfully in leaving her own side of the channel and going over to the port side into the water of the tug and tow. There was no danger of collision nor any other circumstances which would justify her conduct.

My assessors advise me that, if the pilot on the "Coniston" thought that the tug and tow were coming down the north side of the channel above the bend, good seamanship and prudent navigation would require the "Coniston" to stop or moderate her speed before entering or while proceeding up the bend.

The plaintiff urged as part of his case that the "Coniston" should have permitted the tug and tow to have passed the bend before she went up, that her speed was excessive and that the order to reduce speed was given too late. The current down the stream was about 2½ to 3 miles an hour and bearing obliquely across the channel to the south. The "Coniston" continued at full speed under its starboard helm until she had arrived quite close to the buoys marking the south side of the channel, about 1,000 feet from the tug, which was then one-quarter or one-half point off the starboard bow of the "Coniston". As the steamer had proceeded for three or four minutes under a starboard helm and at the end

[1] (1905), 10 Can. Ex. 44 and 149.
[2] (1906), 76 L. J. Adm. 14.
[3] C.R. [1907] A.C. 472.
[4] C.R. [1913] A.C. 472.
[5] (1916), 32 D.L.R. 196; 54 Can. S.C.R. 51.

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of that time had the tug a quarter or half a point off her starboard bow, it is quite apparent she was attempting to cross the bows of the tug into the water of the tug and at full speed. The advice of my assessors is shown by the following questions and answers:

"Q. Should the 'Coniston' have stopped or slowed up when she got no answer to her two-blast signal? A. Yes, when the 'Coniston' got no answer she should have stopped and navigated with caution.

"Q. Was it in accordance with good seamanship for the 'Coniston' to have continued at full speed with her helm a-starboard until after the tug had given the one-blast signal when the 'Coniston's' helm was put hard a-port and her engines were ordered full speed astern? A. No.

"Q. Did the speed of the 'Coniston' before she put her engines full speed astern contribute to the collision? A. Yes.

"Q. Was the order to put the engines of the 'Coniston' full speed astern given too late? A. Yes."

The pilot admits he had some misgivings when he got no answering signal from the tug after he gave the two-blast signal and put the "Coniston's" helm to starboard, but he kept on under full speed. In the case of *The Earl of Lonsdale*,[1] the Privy Council confirmed the decision of the late Mr. Justice Stuart, where it was held that where a steamship ascending the river, before entering a narrow and difficult channel, observed a tug approaching with a train of vessels behind her and did not stop or slacken speed, and where she subsequently collided with the tug and tow, the steamer was to blame for

[1] Cook's Adm. Rep. 153 and 163.

not stopping before entering the channel. Similar principles were followed in *The Talabot*,[1] *The Norwalk*,[2] and *The Ezardian*.[3]

The failure of the "Coniston" to moderate her speed and navigate the bend with caution appears to have been a departure from the rules of good seamanship, if not a breach of any positive regulation, when it is considered that the tug was hampered with its tow and the "Coniston" was unincumbered, light, quickly responsive to her helm, with the current against her, making it an easy matter to hold her head against the stream or turn in either direction. It was a neglect on the part of the "Coniston" of precautions required by the ordinary practice of seamanship which contributed to the collision. Some observations by Lord Kingsdown, in delivering the judgment of the Privy Council in *The Independence*,[4] are applicable to this case:

"A steamer unincumbered is nearly independent "of the wind. She can turn out of her course, and "turn into it again, with little difficulty or incon- "venience. She can slacken or increase her speed, "stop or reverse her engines, and can move in one "direction or the other with the utmost facility. She "is, therefore, with reason, considered bound to give "way to a sailing vessel close hauled, which is less "subject to control and less manageable. But a "steamer with a ship in tow is in a very different "situation. She is not in anything like the same de- "gree the mistress of her own motions; she is under "the control of and has to consider the ship to which "she is attached, and of which, as their Lordships

[1] (1890), 6 Asp. M. C. 602.
[2] (1909), 12 Can. Ex. 434 and 459.
[3] [1911] P. 92.
[4] (1861), Lush, 270 at 278.

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"observed in the case of *The Cleadon*,[1] 'She may for "many purposes be considered as a part, the motive "power being in the steamer, and the governing "power in the ship towed.' She cannot, by stop- "ping or reversing her engines, at once stop or back "the ship which is following her. By slipping aside "out of the way of an approaching vessel, she can- "not at once, and with the same rapidity, draw out "of the way the ship to which she is attached, it may "be by a hawser of considerable length—in this case "of about fifty fathoms—and the very movement "which sends the tug out of danger may bring the "ship to which she is attached into it."

Counsel for defendant submitted that even if the "Coniston" was wrong in crossing over to the south side of the channel, the tug could have avoided the collision by passing the steamer starboard to starboard, but that instead of doing so the tug ported her helm and caused the collision. As has already been pointed out, when the tug put her helm hard a-port she was then one-quarter or one-half point off the starboard bow of the "Coniston", or in other words, almost dead ahead at a distance of about 1,000 feet. The tug was then well to the south side of the channel. As this is a question of navigation, I asked my assessors: "Was the master of the tug "justified in putting her helm hard a-port when he "saw the 'Coniston' close her red light and open her "green light at a distance of about 1,000 feet?" And they answered in the affirmative, and further advised me that the tug could not have done anything else to have avoided the collision, and that the "Coniston", by the exercise of reasonable care and skill, could have avoided it. The dangerous situation

[1] (1860), Lush, 158.

which the tug had to face when the "Coniston" closed her red light and opened her green was the direct result of the "Coniston's" deliberate act in crossing to the south side of the channel into the water of the tug. In my opinion, it was the imperative duty of the tug to obey the rule contained in art. 25 of the Collision Regulations, and the master of the tug endeavoured to carry out that rule by putting the helm hard a-port. The situation which then arose was entirely brought about by the improper navigation of the "Coniston". The master of the tug did what he considered the best thing possible, and in doing so obeyed art. 25, *The Pekin.*[1]

The Privy Council, in the case of *The Nor,*[2] held that a vessel which having performed her own duty, is thrown into immediate danger of collision by the wrongful act of another is not to be held liable if at that moment she adopts a wrong manœuvre. This principle was followed in the Court of Appeal in the case of *The Bywell Castle,*[3] and later by the House of Lords in *The Tasmania v. The City of Corinth,*[4] where Lord Herschell said, p. 518: "In esti-"mating the conduct of the master, it must be remem-"bered that it was the gross negligence of the other "vessel which placed him suddenly in the difficult "position of having to judge when he was justified in "departing from the rule, and what manœuvre he "ought to adopt. In the case of *The Bywell Castle,* "*supra,* Brett, L.J., said: 'I am clearly of opinion "that when one ship, by her wrongful act, suddenly "puts another ship into a difficulty of this kind, we "cannot expect the same amount of skill as we should

[1] (1897), 8 Asp. M. C. 367.
[2] (1878), 2 Asp. M. C. 264.
[3] (1879), 4 Asp. M. C. 207.
[4] (1890), 6 Asp. M. C. 517.

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Reasons for Judgment.

"under other circumstances. Any court ought to "make the very greatest allowance for a captain or "pilot suddenly put into such difficult circumstances, "and the court ought not, in fairness and justice to "him, to require perfect nerve and presence of mind "enabling him to do the best thing possible.' With "this I entirely agree, though, of course, the appli- "cation of the principle laid down must vary accord- "ing to the circumstances." This principle has since been followed in the Admiralty Division by Bargrave Deane, J., in *The Huntsman,*[1] where he said: "Some latitude must be allowed to the officer "of a stand-on ship who is clearly doing his utmost "in a position of difficulty caused by bad navigation "of those in charge of a giving-way ship."

I am therefore of opinion that the tug is not to blame for having put her helm hard a-port, and that in doing so her master did everything possible to avoid the collision.

The infringement of the regulations by the tug in regard to the absence of side-lights on the barges and with regard to the lights on the tug not showing the length of the tow places the burden of proof upon the plaintiff, the employer of the tug, to establish that this infringement could not by any possibility have contributed to the collision. Evidence was given at the trial of a custom or practice of canal barges in tow carrying only a white light and no side lights. This practice appears to be in use on the river, but it cannot override the collision regulations. In this case when the pilot and officers of the "Coniston" saw the lights of the tug and tow, they knew at once what they were meeting and they should have taken precautions accordingly. The collision was with the first and second pair of barges

[1] 104 L.T. 466.

and the barges behind these escaped. Had the barges in the forward part escaped and the collision been with those at the after-end of the tow, there might be ground to say that the length of the tow had something to do with the collision, and in that case the court would have to try the question of fact whether the infringement could by any possibility have contributed to the accident. The collision here having happened at the head of the tow, I hold that the infringement as to absence of the prescribed lights and the length of the tow could not by any possibility have contributed to the collision, and following the rule laid down in the case of *Fanny M. Carvill,* I exonerate the tug and the plaintiff from all blame in that connection.

I am, therefore, of opinion that the collision resulted from the failure of the "Coniston" to observe art. 25 of the Collision Regulations, from excessive speed and failure to navigate the bend in the channel with proper caution. There is no blame imputable to the tug or the plaintiff.

There will be judgment for the plaintiff for the damages sustained and for costs, with a reference to the Deputy District Registrar to assess the damages.

Judgment for plaintiff.

Solicitors for plaintiff: *Davidson, Wainwright, Alexander & Elder.*

Solicitors for defendant: *Atwater, Surveyer & Bond.*

1918
March 2.

QUEBEC ADMIRALTY DISTRICT.

CANADA SHIPPING COMPANY, LIMITED,
PLAINTIFF;

v.

SS. "TUNISIE",
DEFENDANT,

AND

ARMEMENT ADOLF DEPPE,
PLAINTIFF;

v.

SS. "CABOTIA",
DEFENDANT,

Collision—Harbour—Incoming and outgoing vessels—Duty.

A vessel has no right to manœuvre her entry into the basin of a harbour while another vessel is leaving her moorings ready to come out; under such circumstances it is the duty of the former to remain below the canal entrance, in order to give way to the outgoing vessel, and her failure to do so will render her liable in case of collision.

Taylor v. Burger, (1898), 8 Asp. M. C. 364, followed.

ACTION for damages resulting from a collision.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the the Quebec Admiralty District, at Montreal, Que., February 8, 19, 1918.

MACLENNAN, Dep. L.J. (March 2, 1918) delivered judgment.

These two actions *in rem* arise out of a collision between the SS. "Tunisie" and the SS. "Cabotia" which took place in the harbour of Montreal on the

morning of October 28, 1917. The owner of each vessel sues the other for damages, each alleging that the collision was due to the fault of the other.

The SS. "Tunisie" was a steel single-screw steamer 310 feet long, 42 feet wide, having a gross tonnage of 2,470 tons, and at the time was drawing about 21 feet, being loaded and ready for sea. The SS. "Cabotia" was a single-screw wooden steamer 243 feet long, and 35 feet wide, drawing 13.10 feet and having a gross tonnage of 1,530 tons. The officers and pilot on the SS. "Tunisie" gave very clear and satisfactory evidence regarding the movements of the steamers immediately before the collision. The evidence of the master and others on board the SS. "Cabotia" is far from satisfactory, and I accept the evidence of the master, pilot and officers of the "Tunisie" in preference to the testimony given on behalf of the other steamer. The "Tunisie" had been lying at the Grand Trunk quay in the Windmill Point Basin, where she took her cargo aboard and was ready for sea early on the morning of Sunday, October 28, 1917. Windmill Point Basin can be described as a slip about 300 feet wide and 2,000 feet long; it opens into a large basin approximately about 1,000 feet square between the lower end of the Lachine Canal and Alexandra Pier, and on the downstream side leads into the main channel through the harbour of Montreal. The "Tunisie" was moored about 600 or 700 feet from the outer end of the Windmill Point Basin and on its west side stem inward. Shortly before 6.50 a.m. on October 28, last, a competent licensed pilot came on board the "Tunisie" and took charge. The steamer was unmoored, the engines put slow astern for a minute or two, a signal of three blasts was given twice and with a tug at

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the stern and another tug at the bow the steamer was slowly pulled out into the middle of the basin, the stern pointing downward to the mouth of the basin, with the intention to proceed down the harbour to turn round and proceed to sea. The master of the "Tunisie" swears that when his steamer was unmoored and left the quay no other steamer was in sight; but when he had proceeded about half a ship's length he saw the "Cabotia" standing still in the large basin between the lower end of the canal and the Alexandra Pier, and when at a distance of about 700 feet from the "Cabotia" another signal of three blasts was given on the whistle of the "Tunisie". When the latter arrived at about 250 feet from the end of the Windmill Point Basin, the master of the "Tunisie" saw the "Cabotia" moving forward, and a signal of three blasts was given again on the whistle of the "Tunisie". Both these signals were heard by the master of the "Cabotia". No signal of any kind was given by the "Cabotia". The "Cabotia" appeared to be endeavouring to enter the west side of the Windmill Point Basin, came forward, reversed her engines and then came forward again, apparently at full speed. The "Tunisie" was well to the starboard or east side of the Windmill Point Basin, being pulled out by the two tugs. While the "Cabotia" was manœuvring ahead and astern she was affected by a strong northwest wind blowing 27 miles an hour on her starboard side, which tended to carry her to the east side of the large basin where she was performing these manœuvres. The "Cabotia" made no allowance for this wind. At 7.13 a.m., when it became apparent to those in charge of the "Tunisie" that there was going to be an accident, the engines of the "Tunisie" were put full

speed ahead in order to lessen the effect of the impending collision. Notwithstanding this the "Cabotia's" stem came into collision with the stern of the "Tunisie" at 7.15, causing considerable damage to both steamers. The master of the "Cabotia", while he was manœuvring for the purpose of entering the Windmill Point Basin, was alone in his wheelhouse steering and handling his vessel. The "Cabotia" had come down the Lachine Canal a little to the west and parallel to Windmill Point Basin, and her master admits that, when he came out of the last lock and entered the basin between the end of the canal and the Alexandra Pier, he turned to starboard, and when he was about 200 feet from the end of the pier on the west side of the Windmill Point Basin, he saw the "Tunisie" in mid-channel at a distance of about 600 feet, being towed out by the tugs. He admits having heard the "Tunisie's" signal of three blasts twice. No signal was given by the "Cabotia" to indicate her movements or that she wished to enter the Windmill Point Basin, but she continued to manœuvre for that purpose until the collision.

My assessors advise me that the pilot and master of the "Tunisie" took all proper and necessary precautions before starting to go out of the Windmill Point Basin; that the "Tunisie" left nothing undone which she should have done while attempting to go out; that her manœuvres were right; that the "Cabotia" was not justified in manœuvring to enter the basin while the "Tunisie" was coming out and should have remained below the canal entrance where she was in safety, until the "Tunisie" had passed clear; that the "Cabotia" was at fault for

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not blowing her whistle to indicate what her intentions were; that she was not handled in a seamanlike manner; that her master should have had the wheelsman with him on the bridge and that his injudicious conduct was the cause of the collision.

The evidence establishes that, when the "Tunisie" was about half way out of the Windmill Point Basin and in full view of the "Cabotia", the latter was in a position of safety and instead of remaining in that position she began manœuvring to enter the Windmill Point Basin while the "Tunisie" was coming out. These manœuvres ended in the collision.

In the case of *Taylor v. Burger*,[1] the Lord Chancellor, p. 365, referred to "the universal rule that "an out-going vessel should get clear of a dock or "harbour before the in-coming enters", and the House of Lords applied this rule and held that, where a steamer was approaching a lock leading from a basin into a dock at the time another vessel was coming out, the in-coming vessel should give way to the out-going vessel.

Having regard to the evidence and the advice of my assessors, I find that the collision between these steamers was caused solely by the improper and negligent navigation of the "Cabotia". There is no blame imputable to those in charge of the "Tunisie".

There will be judgment, therefore, against the SS. "Cabotia" and her bail for damages and costs, with a reference to the Deputy District Registrar to assess the damages.

[1] (1898), 8 Asp. M. C. 364.

The action against the SS. "Tunisie" will be dismissed with costs.

Judgment accordingly.

Solicitors for the Canada Shipping Company: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for defendant, Deppe: *Atwater, Surveyer & Bond.*

1918
March 2.

QUEBEC ADMIRALTY DISTRICT.

CANADA STEAMSHIP LINES, LIMITED,

PLAINTIFF;

v.

MONTREAL TRANSPORTATION COMPANY, LIMITED,

DEFENDANT,

Collision—Canal—Passing vessels—Liability—Proximate cause.

Where vessels passing one another in a canal have exchanged the proper signals, and were properly navigated, the fact that one took a starboard course to avoid collision, and in doing so struck the canal banks and was damaged, does not give her a right of action against the other; where the damage was about the bilge or bottom of the vessel it is evidence of its having been caused by an obstruction on the bottom of the canal, and not by the banks.

ACTION *in personam* for damage to a ship.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, Que., February 21 and March 2, 1918.

Aime Geoffrion, K.C., for plaintiff.

MACLENNAN, Dep. Loc. J. (March 2, 1918) delivered judgment.

This is an action *in personam* in which plaintiff, as the owner of the steamship "Glenellah", seeks to recover damages from the defendant, owner of the steamship "Kinmount".

The plaintiff's case is that on the evening of September 1, 1913, the "Glenellah" was proceeding eastbound down the Soulanges Canal when she met the "Kinmount" going up westbound coming up the canal; that when the two ships were about a quarter of a mile apart the "Glenellah" sounded a passing

signal of one blast on her whistle; that the "Kinmount" immediately answered by one blast on her whistle, and that after exchanging these signals the master of the "Glenellah" ported her helm and the steamer was directed to the southern or starboard side of the canal, which, at the place the steamers met, is about 200 feet in width at the top and 100 feet at the bottom, and about 15 feet deep; that the "Kinmount" failed to direct her course to starboard and in order to avoid a collision the "Glenellah" was forced into the canal bank on her starboard side and was damaged. Plaintiff claims that the striking on the bank by the "Glenellah" and the damages and loss consequent thereon were occasioned by the negligent and improper navigation of those in charge of the "Kinmount".

The defendant denies the material allegations of the plaintiff's statement of claim and alleges that, if plaintiff had any claim against defendant the plaintiff forfeited and lost the same by failure and neglect to present a claim within a reasonable time; that if the "Glenellah" came in contact with the canal bank it was due to her own faulty navigation, and that the "Kinmount" took all usual and proper measures and precautions to avoid a collision.

These steamships were approximately 250 feet long and 43 feet wide and both were loaded to capacity. The proper signals were given just before they met in the canal. The plaintiff's case is that the "Glenellah's" starboard side struck the southern bank of the canal and that she was forced into that position by the "Kinmount" not giving her sufficient room to pass safely. Some temporary repairs were made to the "Glenellah", and she did not go into drydock until some months later, when

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upon examination it was found that the damages which she had sustained were not to her side, but to the plates on her bottom, commencing from about 5 feet from the turn of the starboard bilge towards the keel plate. None of the damaged plates of the bottom was closer than 5 feet to the bilge. Whatever the obstruction was which came into contact with the "Glenellah", it is evident that such obstruction was underneath the steamer. If the point of impact had been between the "Glenellah's" starboard side and the south bank of the canal the damages would have been to the side plates and not to the plates forming the bottom of the steamer. The part of the steamer which suffered damage is conclusive evidence that the obstruction must have been in the bottom of the canal and that the steamer did not strike its starboard side against the canal bank. My assessors advise me that both steamers appear to have been properly navigated.

The plaintiff has not proved the case alleged against the defendant and has not established that the damages to the "Glenellah" were occasioned by any neglect or improper navigation of those in charge of the "Kinmount". Under these circumstances it is not necessary to deal with the question of the delay on the part of the plaintiff in presenting its claim against the defendant.

The plaintiff's action is therefore dismissed with costs.

Action dismissed.

Solicitors for plaintiff, (first): *Cowan, Towers & Cowan,* (afterwards): *Rowell, Reid, Wood & Wright.*

Solicitors for defendant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

QUEBEC ADMIRALTY DISTRICT.

1918
April 5

ROBERT R. McCORMICK,

PLAINTIFF;

v.

SINCENNES-McNAUGHTON LINE, LIMITED,

DEFENDANT,

AND

UNION LUMBER COMPANY, LIMITED,

PLAINTIFF;

v.

SINCENNES-McNAUGHTON LINE, LIMITED,

DEFENDANT,

Towage—Negligence—Defective steering gear—Inevitable accident.

A steering wheel in a tug, rendered inoperative by a defect in the steering gear, will not relieve the owners of the tug from liability for damage to a tow, resulting from the grounding of the tow when released by the master of the tug, on the ground of inevitable accident; the accident could have been avoided by passing the tow to another tug which was there to assist.

ACTIONS *in personam* to recover damages resulting from the negligent performance of a towage contract.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, January 21, 22, 23 and April 5, 1918.

R. C. Holden, K.C., for plaintiff.

A. Geoffrion, K.C., and *Peers Davidson*, K.C., for defendant.

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McCORMICK v. SINCENNES-McNAUGHTON LINE.

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MACLENNAN, Dep. Loc. J. (April 5, 1918) delivered judgment.

These two actions *in personam* were tried together and on the same evidence, as they both arose out of the same mishap. Plaintiff McCormick is the owner of the barge "Middlesex", and the Union Lumber Company, Limited, is the owner of the schooner "Arthur", which, along with another barge, the "Dunn", were being towed down the River St. Lawrence, near Morrisburg, Ontario, on August 13, 1917, by the defendant's tug "Myra", which was accompanied by the tug "Long Sault", also belonging to the defendant. The tow was made up of three vessels lashed abreast the schooner "Arthur" in the middle, the barge "Middlesex" to her port, and the barge "Dunn" to her starboard side. Each vessel of the tow had a line of about 150 feet attached to the "Myra". The tug "Long Sault" was lashed to the port side of the "Myra". The towing and steering was done entirely by the "Myra", which was equipped with a steam steering gear and was steered from a wheel on the top of the wheel-house. This steering-wheel turned a shaft on which there was a sprocket wheel which carried a chain that passed over another sprocket wheel in the wheel-house, where there was a small engine which controlled and operated the rudder. The sprocket wheel on the shaft on the top of the wheel-house was held in place by a key pin. This key pin fell out, the shaft jammed, and the steering wheel became inoperative. When this happened the tug and tow were opposite Ogden Island, a short distance above Canada Island, and in a current running about ten miles an hour. The captain and mate of the "Myra" were on the top of the wheel-house when the steering gear failed,

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Reasons for Judgment.

the captain being at the wheel. The tug took a sheer to starboard and in the next ten or fifteen minutes made a complete circle, carrying the tow around with it. The tow lines were then cut on the "Myra" and the tow grounded and went ashore. When the captain of the "Myra" saw that something was wrong with the steering gear, he sent the mate to the wheel-house to ascertain the cause. The mate reported that the chain had fallen off the sprocket wheel, and he then went aft to place the tiller in position in order to steer by hand, but before he could use the tiller the tow lines were cut without warning or notice to those on the tow, with the result that both barges and the schooner went ashore on Canada Island. The plaintiffs in their respective actions claim from the defendant damages arising from the striking and grounding of their respective vessels, due, as they allege, to the fault and negligence of the defendant and its representatives and to the improper condition of the tug. The defendant pleads that the grounding occurred as the result of inevitable accident to the steam steering gear which, suddenly and without warning, failed to operate and which had always been in perfect working order, and from all appearances was in good condition up to the occasion in question, that it had been periodically and properly inspected, and no further or additional inspection could have prevented the accident, and that there was no fault on the part of the defendant or its servants.

The company defendant undertook to tow the plaintiff's vessels down the river and the defendant was bound to use reasonable care and skill in the performance of its undertaking. The duties of the tug under circumstances like these were clearly laid

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down by the Privy Council in *The Julia,*[1] a case under a contract of towage, where Lord Kingsdown, delivering the judgment of the court, said, p. 231:

"When the contract was made, the law would im-
"ply an engagement that each vessel would perform
"its duty in completing it; that proper skill and dili-
"gence would be used on board of each; and that
"neither vessel, by neglect or misconduct, would
"create unnecessary risk to the other, or increase
"any risk which might be incidental to the service
"undertaken. If, in the course of the performance
"of this contract, any inevitable accident happened
"to the one without any default on the part of the
"other, no cause of action could arise. Such an acci-
"dent would be one of the necessary risks of the
"engagement to which each party was subject, and
"could create no liability on the part of the other.
"If, on the other hand, the wrongful act of either
"occasioned any damage to the other, such wrong-
"ful act would create a responsibility on the party
"committing it, if the sufferer had not by any mis-
"conduct or unskilfulness on her part contributed
"to the accident. These are the plain rules of law
"by which their Lordships think that the case is to
"be governed."

This statement of the law was later approved by the House of Lords in *Spaight v. Tedcastle.*[2]

The defence to these actions is that the grounding of the tow was caused by an inevitable accident. In *The Uhla,*[3] Dr. Lushington said, p. 90: "Inevitable "accident is that which a party charged with an of-
"fence could not possibly prevent by the exercising
"of ordinary care, caution and maritime skill. It

[1] (1861), Lush, 224.
[2] (1881), 6 App. Cas. 220.
[3] (1867), 19 L.T. 89.

"is not enough to show that the accident could not "be prevented by the party at the very moment it "occurred, but the question is, what previous meas- "ures have been adopted to render the occurrence "of it less probable." This definition of inevitable accident was followed and approved by the Privy Council in *The Marpesia,*[1] In the case of the *William Lindsay,*[2] where a ship attempted to cast anchor, but failed because the cable became jammed in the windlass, the vessel collided with another ship, and the defence of inevitable accident was sustained. Sir Montague E. Smith, delivering judgment in the Privy Council, said:

"The master is bound to take all reasonable pre- "cautions to prevent his ship doing damage to "others. It would be going too far to hold his own- "ers to be responsible, because he may have omitted "some possible precaution which the event suggests "he might have resorted to. The true rule is that "he must take all such precautions as a man of "ordinary prudence and skill, exercising reasonable "foresight, would use to avert danger in the cir- "cumstances in which he may happen to be placed."

Later the Court of Appeal in the *Merchant Prince,*[3] considered and applied the defence of inevitable accident in a case where the steam steering gear of the defendant's vessel failed to act and a collision happened, for which the defendant was sued in the Admiralty Court, and the defence of inevitable accident was sustained. The judgment was reversed in the Court of Appeal, where Lord Esher said that the only way for the defendant to get rid

[1] (1872), L.R. 4 P.C. 212.
[2] (1873), L.R. 5 P.C. 338 at 343.
[3] [1892] P. 179.

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of liability for the accident was to show that he could not by any act of his have avoided the result. In that case the steam steering gear failed because the chain connecting with the rudder had stretched and kinked and the gearing jammed. Fry, L.J., observed that this was a danger which any person who had applied his mind to the matter might have avoided by the use of the hand steering apparatus instead of the steam.

The plaintiff's cases are based upon allegations of insufficient equipment and crew on the tug and upon failure to take effective measures to save the tow between the time the steering gear failed and the tow lines were cut.

The first question to be considered appears to be: When the steam steering gear on the "Myra" failed, could the tow have been saved by the exercise of ordinary maritime skill and careful seamanship on the part of those in charge of the tugs? An affirmative answer to this question will put an end to the defence of inevitable accident. The failure of the steam steering gear was caused by a key pin of the sprocket wheel dropping out, the steering wheel and shaft becoming jammed and the chain from the sprocket wheel having dropped off the wheel in the wheel-house. This made it impossible for the captain to operate the valves of the small engine controlling the rudder from the top of the wheel-house. He sent his mate to see what had happened. It is proved by the evidence of Thomas Hall, a marine engineer of long experience, examined on behalf of the defendant, and who had made a careful examination of the steering gear on the "Myra", that the lever controlling the valves of the small engine which did the steering could have been operated in the

wheel-house quite easily by hand and almost instantly. The captain admits he did not ask the mate to try to work these valves by hand. If the mate of the "Myra", who went into the wheel-house to see what was wrong, had exercised reasonable foresight and ordinary maritime prudence and skill he could, in my opinion, have easily operated by hand the small engine which controlled the rudder until the shaft on top of the wheel-house had been unjammed and a new key pin put in the sprocket wheel or until other measures had been taken to ensure the safety of the tow. That would have saved the situation and the accident would have been avoided.

When the steam steering gear failed, it was the imperative duty of the captain of the "Myra" to take the most prompt and immediate measures to meet the obvious dangers to which the tow was exposed. The *Santandarino*,[1] Ordinary seamanship and maritime skill would have required him to have stopped the engines on the "Myra" and the "Long Sault" and to have at once passed the tow lines to the "Long Sault". He made no such attempt. There was ample time to have done so. He gave orders to the "Long Sault" to starboard her helm and afterwards to reverse her engines, but he omitted to instruct the "Long Sault" to take over the tow lines. Both tugs were there to bring the tow down the river, and the defendant is responsible for the acts of the crew on both tugs. The "Long Sault" refused to give any assistance to the tow, although it is proved that the captain of the "Middlesex" asked the captain of the "Long Sault" to take a line from the "Middlesex". For a period of from 10 to 15 minutes the "Myra" manœuvred with the tow

[1] (1893), 3 Can. Ex. 378; 23 Can. S.C.R. 145.

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McCORMICK v. SINCENNES-McNAUGHTON LINE.

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Reasons for Judgment.

and made a complete circle, when suddenly, without warning to the barges or schooner, the tow lines were cut on board the "Myra" and the tow was abandoned and allowed to go ashore on Canada Island. I am advised by my assessor that the conduct of the captain of the "Myra" in the circumstances was unseamanlike. The captain and pilot of the "Long Sault" acted under the orders of the captain of the "Myra" and proved themselves absolutely inefficient and incompetent. They made no reasonable effort to assist the tow or to keep it out of danger. The captain of the "Myra" manœuvred for nearly a quarter of an hour before he abandoned the tow. He had ample time in which to consider what ordinary care, precaution and maritime skill imperatively called for. He had another tug to assist him in taking care of the tow, and there was ample room in which to take effective measures to avert disaster. The burden was on the defendant to prove that the unfortunate result could have been prevented at the very moment it occurred by the exercising of ordinary care, caution and maritime skill. In my opinion the defendant has not made that proof, and after careful consideration I have come to the conclusion that the evidence establishes that the grounding of the tow was caused by the want of reasonable promptitude, foresight and seamanship on the part of the master and crew of the two tugs when and after the dangerous situation arose. My assessor concurs in this conclusion.

Under these circumstances it is not necessary for me to express any opinion on the allegations of the plaintiffs, that the tugs were insufficiently equipped and supplied and insufficiently and improperly officered and manned.

There will be judgment for the respective plaintiffs for damages and costs with a reference to the Deputy District Registrar to assess the damages in each case.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for defendant. *Davidson, Wainwright, Alexander & Elder.*

1918
Dec. 21.

QUEBEC ADMIRALTY DISTRICT.

LAWRENCE C. GIFF,

PLAINTIFF;

v.

SINCENNES-McNAUGHTON LINE, LIMITED,
DEFENDANT.

Collision—Tug and tow—Snowstorm—Inevitable accident.

In attempting to avoid a collision with a black gas buoy in a channel, which became invisible owing to a snowstorm, the master of a tug, after passing an upbound steamer, starboarded his vessel and ran his tow, composed of several barges, into shallow water, thereby bringing about a collision between them.

Held, it was not an inevitable accident and could have been avoided by the exercise of ordinary caution and maritime skill; that the collision was caused by the improper starboarding of the tug; its failure to take soundings; the failure to anchor.

ACTION for damages resulting from a collision.

Tried before the Honourable Mr. Justice Maclennan, Deputy Local Judge of the Quebec Admiralty District, at Montreal, December 12, 13, 1918.

Peers Davidson, K.C., and *T. Winfield Hackett,* for plaintiff.

Aime Geoffrion, K.C., for defendant.

MACLENNAN, Dep. Loc. J. (December 21, 1918) delivered judgment.

This case arises out of a contract of towage. Plaintiff is the owner of the barge "Lawrence C. Giff", and the defendant is the owner of the tug "Virginia". About 2 a.m. on the morning of November 3, 1917, the defendant's tug "Virginia" left Three Rivers bound for Quebec with a tow consisting of

the barge "Atlasco" at the head of the tow, then the barge "Lawrence C. Giff" and the barge "Mary Giff" fastened abreast, and then the barge "E. H. Lemay" in rear. On leaving Three Rivers the tug pulled out into the stream, turning to head down the river, and, before the tug had succeeded in getting the barges in a straight line behind the tug, the master of the tug saw the headlights and the green light of a steamer up-bound, which passed the tug and tow starboard to starboard opposite the red buoy 56-C. It had been snowing more or less during the night and snow was falling when the tug and tow left Three Rivers, and continued to fall for some time thereafter. The tug passed down 100 feet from the red buoy 56-C, and owing to the snowfall the black gas buoy 55-C, as well as all other lights, became invisible. The black gas buoy 55-C is about 1,700 feet from the red buoy 56-C, where the tug met the up-going steamer, and about 800 feet from shallow water off Ile aux Cochens, on the port side of the channel going up. The deep water channel on the starboard side of the black buoy is about 2,500 feet wide. When the tug passed the up-bound steamer and was unable to see the black gas buoy, the captain of the tug, in order, as he says, to avoid fouling the black gas buoy, starboarded his helm and continued on his course for about 3,500 feet, when the lights of a mill on Ile de la Potherie came in sight on his port bow. He then ported his helm to haul out his tow more into the stream, when the first barge in the tow, which was drawing 14 feet, stranded, and the barge "Lawrence C. Giff", drawing about 6 feet, owing to its momentum, collided with the stern of the "Atlasco", and the barge "E. H. Lemay", owing to its momentum, collided with the

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"Lawrence C. Giff", and both the "Giff" and "Lemay" sank in a few minutes.

The plaintiff alleges that the collision and the damages and losses consequent thereof were occasioned by the negligent and improper navigation of the tug and by the incompetency of her master and crew, and the defence is that the grounding of the barge "Atlasco" and the sinking of the barge "Lawrence C. Giff", occurred as a result of an inevitable accident which could not have been anticipated, and there was no fault on the part of the defendant nor of its servants. The tug was in charge of a master, pilot, mate, two engineers, three firemen, three sailors and a cook. After the tug had passed the up-bound steamer and the buoy and rangelights became invisible, the master of the tug changed his course without having consulted his compass. He made no use of his compass whatever and took no soundings at any time, though he doubtless knew that the course on which he had put his tug would bring him very close to Ile aux Cochons. He had two anchors on board ready for use and he had a river over half a mile wide, the only obstacle in it was the black gas buoy 55-C. What happened shows that in attempting to avoid collision with the black gas buoy he ran his tow into shallow water and the foremost barge stranded, bringing about a collision of two of the barges in the after part of the tow.

There is no dispute about the facts, and the questions involved in this case have regard to matters of navigation and seamanship on which I have consulted my nautical assessor, with the following result:

1. After the master of the tug had passed downstream 100 feet off the red buoy 56-C, and had met

the up-bound steamer and the range and the buoy lights had become invisible by reason of the snow-storms, was it good and prudent navigation on his part to have continued his course without regard to his compass and without taking any soundings?

A. No, the compass should have been used. He should not have starboarded, especially—again—with an easterly wind blowing on the starboard side and possibly shearing him to the northward.

2. Was it good navigation on the part of the master of the tug, after he had met the up-bound steamer, to have changed his course by starboarding? If not, what should he have done in the exercise of ordinary care, caution and maritime skill?

A. He should have endeavoured to find gas buoy 55-C, and not having seen it—anchored immediately.

3. Was there anything having regard to the width of the river and the extent of navigable waters at his disposal which prevented the master of the tug taking such precautions as a seaman of ordinary prudence and skill exercising reasonable foresight would use to avert the stranding of the tow, and if not, what should the master have done in this case?

A. In view of the state of the weather, it was imprudent to have left Three Rivers, but having decided to leave he should have proceeded with extreme caution with lead kept going, good look-out and to have anchored upon the lights being shut out by snow. The width of the river is such that he had more than sufficient water to handle his tow to the southward of mid-channel.

The law applicable to the relation between tug and tow was stated by Lord Kingsdown in the Privy

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Council in the case of *The Julia;*[1] it is as follows:

"When the contract was made, the law would im-
"ply an engagement that each vessel would perform
"its duty in completing it; that proper skill and
"diligence would be used on board of each; and that
"neither vessel, by neglect or misconduct, would
"create unnecessary risk to the other, or increase
"any risk which might be incidental to the service
"undertaken. If, in the course of the performance
"of this contract, any inevitable accident happened
"to the one without any default on the part of the
"other, no cause of action could arise. Such an acci-
"dent would be one of the necessary risks of the
"engagement to which each party was subject, and
"could create no liability on the part of the other.
"If, on the other hand, the wrongful act of either
"occasioned any damage to the other, such wrong-
"ful act would create a responsibility on the party
"committing it, if the sufferer had not by any mis-
"conduct or unskilfulness on her part contributed
"to the accident. These are the plain rules of law
"by which their Lordships think that the case is to
"be governed."

This statement of the law was subsequently quoted with approval in the Privy Council in the case of *Smith v. St. Lawrence Tow Boat Co.*[2] and in the House of Lords in the case of *Spaight v. Tedcastle.*[3]

The defence here is inevitable accident, in other words that the accident could not have been avoided by the master of the tug by the exercising of ordinary care, caution and maritime skill. What amounts to inevitable accident was discussed by me recently in *McCormick v. Sincennes-McNaughton Line, Ante,*

[1] (1861), Lush, 224 at 231.
[2] (1873), L.R. 5 P.C. 308.
[3] (1881), 6 App. Cas. 217, 220.

p. 357, and it is unnecessary that I should repeat what I said on that occasion. Having regard to the advice of my assessor, in which I concur, I find the collision was caused (1) by the improper starboarding of the tug, after passing the up-bound steamer, (2) by the failure to take soundings, *The Altair*,[1] and (3) by the failure to anchor. It is stated in the defence that "a sudden snow flurry obscured the channel lights and the 'Virginia' lost her bearings." Ordinary caution and maritime skill then made it the imperative duty of the master to take repeated soundings, to proceed with extreme caution and to cast anchor until he got his bearings again and could proceed in safety. The negligence of the master of the tug led to the disaster which was clearly avoidable by the exercise of ordinary care, caution and maritime skill. The defence of inevitable accident therefore fails and there will be judgment for the plaintiff for the damages sustained and for costs, with a reference to the Deputy District Registrar, assisted by merchants, to assess the damages.

Judgment for plaintiff.

Solicitors for plaintiff: *Davidson, Wainwright, Alexander & Elder.*

Solicitors for defendant: *St. Germain, Guerin & Raymond.*

[1] [1897] P. 105.

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March 11.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF.

AND

ADAM B. CROSBY, MINNIE F. CROSBY, AND CHARLES L. NEWMAN,

DEFENDANTS.

Expropriation—Compensation — Land — Valuation—Future profits—Offers to purchase.

1. An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property, but which in fact had never been undertaken.

2. Offers to purchase property which are more or less indefinite and not so made as to be binding upon the persons making them are not to be regarded as satisfactory evidence of the value of such property in the opinion of the proposed purchasers.

INFORMATION to determine compensation for the expropriation of land by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 23, 1918.

T. S. Rogers, K.C., and *T. F. Tobin,* K.C., for plaintiff.

H. McInnes, K.C., and *L. A. Lovett,* K.C., for defendants.

CASSELS, J. (March 11, 1919), delivered judgment.

This case was tried before me in Halifax on the 23rd September, 1918. There was a dispute as to the area of the land expropriated from the defendant. The Crown had tendered for the land as

containing an area of 44,000 square feet, and for the water lot 30,400 square feet. It was agreed at the trial that the parties would get together and ascertain the exact area.

On the 13th January last, a memorandum signed by counsel was filed, which reads as follows: "It "is hereby agreed between the parties that the area "of land expropriated from the defendant by the "Crown for the purpose of the Halifax Ocean Ter- "minals is 49,600 square feet, and that the area of "water also expropriated from the defendant con- "tains 30,400 square feet, a total of 80,000 square feet." This makes an additional area of 5,600 square feet of land, which at the allowance made by Mr. Clarke of twenty-five cents per square foot, would increase his allowance by the sum of $1,400.

The land in question is similar in character to that which formed the subject of litigation in *The King v. Wilson,*[1] decided by me. One difference between the two properties is that the defendants' property is situate nearly a mile further from the centre of the city and towards the south than the Wilson property. Another material difference is the fact that in the Wilson case, a business was being carried on by Mr. Wilson on the property expropriated and an increased allowance was made to him for the loss of his business property. The appraisers in that case allowed him thirty cents per foot for the water lot, to compensate Wilson on account of this loss of an operating business. In the present case no business was carried on by the defendant in the premises in question. I will refer later to the evidence on this point.

[1] (1914), 15 Can. Ex. 283, 22 D.L.R. 585.

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The property in question which has been expropriated is a property bounded on the west by the easterly side of Pleasant Street. It is said to have a frontage on Pleasant Street of 289 feet, and running down into the water to a considerable depth.

Situate on the property in question expropriated were two dwelling houses. The one on the north and nearest the esplanade is what is spoken of as the Ritchie house. The other situate between what is called the galvanized iron shed and the Ritchie dwelling house is what is known as the Neill house.

On the premises there was a considerable amount of crib-work, and also a wharf which was partly in existence at the time of the purchase by the defendant of the properties in question and subsequently extended.

The evidence furnished on the part of the defendants is of a very unsatisfactory character. No witnesses have been called to testify to the values except the evidence of the defendant, Adam B. Crosby.

The defendant Newman is a tenant of what is called the galvanized iron shed. His lease would expire on the 13th October, 1913. The expropriation was on the 13th February, 1913. Under the terms of his lease he was entitled, as compensation, to the sum of $300, and the payment of this sum to the defendant Newman does not seem to be questioned by any of the parties to the action, and I fix his compensation at this amount.

It is important to consider carefully the evidence of the defendant Adam B. Crosby. His method of arriving at the sum of $100,000 claimed by him, is based upon profits which he expected to make were

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he to enter upon business in connection with these premises. I need merely refer to the cases of the *Pastrol Finance Association v. The Minister*,[1] *L. E. and Northern R. Co. v. Schooley*,[2] to show that the basis of valuation upon the probable profits of a business to be carried on on these premises in the future is an erroneous basis of arriving at the market value. I have to arrive to the best of my ability at the market value of the premises, to which would be added any loss to the defendant for his loss of business if he were carrying on business and turned out of the occupation of the premises by reason of the expropriation.

The date of the expropriation was the 13th February, 1913. The Crown have tendered the sum of $30,739. The defendant claims the sum of $100,000.

I quote from the evidence of Adam B. Crosby to show that these premises at the time of the expropriation were not being used by Mr. Crosby for the purpose of carrying on a business. He is asked by his own counsel, as follows:

"Q. Will you kindly tell me what your occupation "has been since the year 1908 or 1909? A. Well, "my occupation has been broker, ship and fish "broker, of Halifax, but I must say I have not been "very actively engaged since 1909.

He explains his reasons as follows:

"Q. Why have you not been actively engaged in "it since that time? A. Well, I was elected for "Parliament in 1908, and the sessions were very "long, and I was in Ottawa most of the time in "1909, 1910 and 1911. In 1911 I did not get away "from Parliament until in July.

[1] [1914] A.C. 1083.
[2] 30 D.L.R. 289; 53 Can. S.C.R. 416; 21 Can. Ry. Cas. 334.

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"Q. And since that time, 1911? A. Well, in "1911 I was very sick, in 1910 I was very sick, and "in 1911 I was pretty sick, and after the election I "was sick and was not practically in touch with "things till 1913. I was pretty sick.

Further on in cross-examination he is asked by Mr. Tobin the following questions:

"Q. You never carried on active business there "yourself (referring to the properties in ques- "tion)? A. I never did in particular. In fact, "the taking of that property, following my health "being bad, practically put me out of business.

"Q. And there has never been any active busi- "ness carried on in that neighbourhood? A. I "do not think in late years. They told me that "years ago there used to be a great deal of busi- "ness done there."

Apparently the defendant, Adam B. Crosby, bases his whole claim upon the fact that he would not sell for any price under the sum of $100,000.

It is important to ascertain what was paid for the properties, and I will quote from the evidence of the defendant in order to show this. In cross examination he puts it as follows. There were three properties purchased. The three comprising the properties expropriated and also a property upon the west side of Pleasant Street not expropriated, but which has been rented for about $600 a year. He states that the first of the three properties purchased was the iron shed. It is referred to as an iron shed as it has been partially covered by corrugated iron. "I would say that this purchase was "somewhere about 1904 or 1905." He is asked:

"Q. What did that include? A. That included "the iron shed and this wharf and all south of that.

"Q. It included the iron shed, the wharf, the "water lot and all south? A. Yes.

"Q. And did it include the property on the west "side of Pleasant Street? A. That was all in one purchase."

It should be stated that these properties were purchased at auction. There was apparently a liquidation proceeding. I mention this fact as having been purchased at auction under liquidation proceedings, it may not be a real test of market value, although of course it has a bearing. He is asked:

"Q. What did you pay for that property? A. I paid for that property $4,600."

It had a frontage on Pleasant Street of about 118 feet, roughly speaking. In addition included in this purchase was the property on the west side of Pleasant Street not expropriated, and he puts the frontage on the west side as of about 125 feet.

He is asked:

"Q. That had a large building on it; what was "the depth of the lot on the west? A. Going back?

"Q. Yes? A. I never measured that, but I am sure it is over 200 feet deep.

"Q. It had a very large building on it? A. A large stone building.

"Q. What sort of stone was it? A. I think "the front part was Amherst stone, but the other "was local stone. I am not sure about that, but "it looked to me like Amherst stone. I think the "other was perhaps local stone, and the end was "brick, and evidently put in temporarily."

It must be borne in mind that included in the $4,600 purchase was this property on the west side of Pleasant Street, not in question in this suit.

He states:

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"Q. You got all the cribwork to the east of the "iron sheds? A. Yes."

This comprised the first of the three purchases. It was purchased in 1904 or 1905.

He is asked:

"Q. When did you buy the next property? A. The "next property I bought was the Ritchie property.

"Q. That was immediately south of the esplan- "ade. A. In fact I was bargaining for those two "properties.

"Q. Tell me the next one you bought? A. I think "I bought the Ritchie property about 1906 or 1907.

"Q. That had a house on it? A. Yes.

"Q. What is the frontage of that lot on Pleasant "Street—about 60 feet is it not? A. I think so.

"Q. From whom did you buy that? A. From the "Ritchie estate. Mr. Langford was the man sold it "to me.

"Q. How much did you pay for that? A. $2,400, "I think; it might be $2,450, but between $2,400 and "$2,500."

This completed the Ritchie purchase.

With respect to the third purchase he is asked:

"Q. When did you buy the next lot? A. The "next one, I bargained for it some time along in "1907 or 1906. I bought that from Mr. McInnes.

"Q. That property had a frontage of 82 feet on "Pleasant Street? A. Possibly. . . .

"Q. 82 by 300 is the exact measurement shown "by your deed; is that right? A. Oh, well, that "would be right.

"Q. What did you pay for that? A. $3,000, I think."

These three sums of $4,600, $2,400, and $3,000 are the exact amounts paid for the three properties

and included, as I have stated, is the property on the west side, with a large stone building.

He further states:

"Q. You have told us what rental you got out of "the building on the west side of the street before "the expropriation, the old distillery itself? A. I "got $600 a year."

Mr. Lovett, for the defendant, objected to evidence being given in regard to the property on the west side of Pleasant Street as it was not the property expropriated. I allowed the evidence subject to objection, but I am of opinion that it was rightly received for several reasons. One being that this property was included in the purchase of part of the expropriated property for which $4,600 was paid, and it is necessary to get some idea of how much of this $4,600 was paid for that portion of the property lying to the west.

He is asked:

"Q. How do you arrive at the value of $100,000? "A. For my own business, in connection with my "own business I value that property. I said here "a moment ago that no man could buy it from me "for less than $100,000, because I felt that would "be the very least. I do not mean to say it is not "worth more than that, but I mean to say I could "make it a very valuable property to myself in my "own business. It would be worth $8,000 to $10,000 "to me in my own business."

This is only of course conjecture, as in point of fact he never carried on business on the property in question.

Mr. Crosby, in addition to his illness, was unfortunate in the loss of his financial man, Mr. Mason, who died in the year 1909. He is asked:

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"Q. I suppose you kept books of the property "showing what the property cost and what it "earned? A. I may say that after 1909 my finan- "cial man, Mr. Mason, died, and I must confess "that after that time I had a very hard time. I "had been looking for a man, but I had not really "a bookkeeper that kept my affairs, and I would "have been in much better position to come here "if I had had one, because my books in 1909 went "bad, and I had to pick up men off the street, you "might say, to come in and do my business.

"Q. You have no record of what the property "cost, or what its earnings were, or what you spent "on it? A. I can give you a good idea."

Referring to the Ritchie house, he states as follows:

"Q. Have you any documents in regard to it? "A. You see I moved away from my office some "three years ago, and it never occurred to me of "this coming up, but I can give you a good idea of "what it cost, and the man that built the L., for "instance, that I put on the Ritchie building, that "was built by Brookfield, and he can tell you what "it cost, and other works and repairs on the Neill "building and repairs on the shed."

Referring to the repairs on the shed, he says: "Nobody could tell that because I did it piece work, "according as I—"

According as I had money, he intends to say.

Mr. Crosby has not called Mr. Brookfield nor has he called anyone in support of his evidence of market value.

He is asked:

"Q. Who built the wharf? A. Mosher; you can "get him any time.

"Q. What did you pay for the wharf? A. I "think the addition I put on cost between $700 and "$800—not $800 I do not think.

"Q. That is what you paid Mosher? A. Yes. "The cribwork was done differently."

Mr. Mosher was not called as a witness by the defendant Crosby. Mr. Craig states the cribwork was done differently.

"Q. Who did that? A. Reid and Archibald.

"Q. What did you pay them? A. Something like "$500, and the truckage and that, that was done, "and the filling, that was another thing.

"Q. Who did that? A. Different ones.

"Q. Have you any record of that? A. We had a record.

"Q. Have you looked for it? A. Yes, I did, and "I found my books—you know when I moved my "books up I was not there."

The result is that the books were not forthcoming.

"Q. Take the Ritchie house. What did you pay "for the addition to that? A. $1,000 paid to Brook- "field for the L, and then we put in plumbing and "changed the plumbing.

"Q. What did that cost? A. I think it cost some- "thing like two or three hundred dollars. That is "the Ritchie property.

"Q. Did you spend any more money on the "Ritchie house, $2,000, and $200 plumbing? A. I "do not remember whether there was any shingling "done there or not."

This $2,000 is a mistake. It should be $1,000. If the $1,000 for the L, and the $200 for the plumbing are added to the sum paid for the Ritchie house it would make the total purchase price with the improvements the sum of $3,600.

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In regard to the money spent upon the iron shed, he states that he put a whole iron roof on it new. But he cannot tell what it cost. He says that Harris would probably remember, "but I am not sure "whether we had the whole property recovered with "iron on the top or not. I don't know."

"Q. Can you tell me what you spent or can you "not? A. No, I would not tell you definitely.

"Q. Do you think you spent $500? A. I am sure "I spent over $2,000."

Now, the total amounts of the expenditures made according to Mr. Crosby's evidence, including purchase price and improvements, amount to the sum of $14,400 inclusive of the property on the west side.

In regard to the statements as to the proposals for purchase made by different people, to my mind they are too vague and too indefinite to form the basis of any value in arriving at the market value of the property.

Nichols, in his book entitled "*The Law of Eminent Domain,*" 2nd ed., vol. 2, s. 454, p. 1195, states as follows:

"An offer to purchase the land at a certain price, "made by the party which subsequently took it by "eminent domain, is inadmissable to show market "value. It does not presuppose a willing seller "and a willing buyer, but is based upon the price "which a corporation, intending to take the land at "all events, is willing to pay to avoid the expense "of litigation and the chance of an excessive verdict "from an unsympathetic jury. An offer made by "a private party encounters none of these objec- "tions, and, in determining value outside of judi- "cial proceedings, the fact that an owner had re-

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"ceived and rejected an offer of a certain sum would "doubtless be looked upon as material. Neverthe- "less, it is felt by some courts that evidence or "offers should not be received. It is, at most, a "species of indirect evidence of the person making "such offer as to the value of the land. He may "have so slight a knowledge on the subject as to "render his opinion of no value. Oral and not "binding offers are so easily made and refused in "a mere passing conversation, and under circum- "stances involving no responsibility on either side, "as to cast no light upon the question of value, and "they are unsatisfactory, easy of fabrication and "even dangerous. While all these objections might "not apply in every case it is thought best, by most "courts, to reject evidence of offers altogether."

After the best consideration that I can give to the case, I am of opinion that the tender by the Crown of $30,739 with the addition of $1,400 for the extra 5,600 feet of land and 10 per cent. added for the forcible taking, is very adequate and fair compensation for the property expropriated.

I think the evidence of Mr. Clarke and the others shows that they intended to deal liberally with the defendant. The Crown adheres to the tender, and I think that the defendant should be thoroughly satisfied with the amount allowed.

There will be judgment for the defendant, Adam B. Crosby, for the amount of $35,352.90, and also for $300 in favour of defendant Newman, with interest on both amounts from the date of the expropriation.

I think the defendants are entitled to the costs of the action.

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The question between Mr. and Mrs. Crosby as to what her rights will be in regard to dower, if not settled between the parties, will have to be referred, but I imagine that there will be no trouble in the defendants arriving at an agreement as to this.

Judgment accordingly.

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

Solicitors for defendants: *McInnes, Mellish & Co.*

THE SISTERS OF CHARITY, OF ROCKINGHAM, IN THE COUNTY OF HALIFAX, A BODY CORPORATE, SUPPLIANT.

1919
March 7.

AND

HIS MAJESTY THE KING, RESPONDENT.

Expropriation—Crown railways—Shunting-yard—School—Compensation—Harbour—Riparian rights—Consequential injuries.

The Dominion Government, in the operation of its railways, constructed a shunting-yard on lands reclaimed by it from the waters of Bedford Basin, partly in front of the school buildings of the suppliant corporation. The latter owning water lots thereon, which had been improved as a bathing pavilion and wharf in connection with the school, claimed compensation for injurious affection by reason of the construction and operation of said yard.

Held, Bedford Basin being a public harbour at the time of Confederation, was the property of the Dominion by virtue of the *B. N. A. Act,* and no title to water lots thereon could pass under a provincial grant. *Maxwell v. The King,* (1917), 17 Can. Ex. 97, 40 D.L.R. 715, followed.

2. The fact that the suppliant had been allowed a crossing across the railway tracks to reach the beach where such lots were situated, it did not thereby acquire an irrevocable license as against the Crown, nor could it under the circumstances claim such as a riparian right, so as to be considered as an element of compensation.

3. The injury having been caused by the operation of works on lands other than those taken from the suppliant, the latter was not entitled to compensation therefor.

PETITION OF RIGHT claiming compensation and damages against the Crown.

Tried before the Honourable Mr. Justice Cassels, at Halifax, N.S., September 25, 26, 1918.

T. F. Tobin, K.C., and *L. A. Lovett,* K.C., for suppliant.

T. S. Rogers, K.C., and *J. A. McDonald,* K.C., for respondent.

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Reasons for Judgment.

CASSELS, J. (March 7, 1919), delivered judgment.

A petition of right filed on behalf of the suppliant, claiming compensation and damages against the Crown, for certain lands belonging to it expropriated for the purpose of the government railways in Halifax and damages to other lands said to be held therewith.

The suppliants claim the sum of $500,000. The respondent denies that the suppliants are entitled to any compensation but have offered a certain sum in full of any alleged claim.

The case was tried before me in Halifax, commencing on the 25th September last. At the conclusion of the case counsel requested an opportunity of putting in written arguments. The last of these arguments was received about the first of February last. Owing to other engagements I have been unable to consider the case at an earlier date.

The case is one in some respects of considerable importance. I have occupied considerable time in considering the evidence and authorities.

The supplicants are a corporate body (the charter granted by Statute of Nova Scotia in 1864). The amending Acts were consolidated by ch. 81 of the Statutes of Nova Scotia for the year 1907. The purpose of the organization is educational and charitable, extensively educational.

I had the pleasure, accompanied by counsel for the plaintiffs, and for the Crown, of paying a visit to the academy, and was most courteously received and shown over the establishment from top to bottom. I may say that I have never seen more complete buildings for the purposes of an educational establishment, and it is lamentable the effect upon

the academy of what has taken place. I will describe subsequently how the works tend to injure an establishment of this character.

The main grievance, as appears from the evidence, is the creation and operation of a shunting yard partly in front of the academy, and between them and the waters of Bedford Basin. The shunting yard is almost entirely on land reclaimed from Bedford Basin vested in the Crown. There are 14 tracks in this shunting yard, and all the freight cars in and out of the City of Halifax by the Intercolonial Railway, now a part of the Government railways, are made up in this yard. Ordinary knowledge without the aid of the evidence in the case would indicate the effect of such a yard partly in front of an institution of this character. There are about 140 pupils ranging from five years old up to the time when they graduate, and it may be said that all of these pupils are practically resident pupils. There are in addition about 140 novitiates who reside at the academy.

My thanks are due to the railway company for their kind consideration during the two hours occupied in going over the institution, in refraining from making the slightest noise in their yards. All operations apparently ceased while I was inspecting the institution, and I am glad to believe that the railway authorities must have been aware of my visit.

In order to understand the case, it is necessary to consider the situation on the ground. Exhibit No. 1 in the case is a plan showing the location and layout of the property. The buildings are erected on lands purchased from time to time by the corporate body to the west of a public road which has been in existence from time immemorial.

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Some time between the years 1850 and 1854 what was called the Nova Scotia Railway was constructed. This railway subsequently formed part of the Intercolonial Railway. All the papers in connection with this old railway apparently have been lost. At all events none of them have been procured. This railway was constructed immediately to the east of the public road, and extended nearly to high water mark along the harbour. At this time there were no riparian rights as far as can be ascertained between high water mark and the eastern side of the railway right of way except as to a small strip of land to the east of the railway, and between the railway and high water mark apparently of no value to anyone. The railway was not obliged to give any rights of crossing over their tracks whereby anyone from the road could reach the waters and no crossings existed in fact until about 20 years later when two crossings, which I will refer to, apparently were allowed to be used. As I have stated the land between the railway and high water mark had apparently no value to anyone. The properties owned by the corporation were purchased at different periods and from different persons. The first purchase was made in September, 1872. It is what is marked "cottage" on plan near the public road. On the 14th September, 1872, one water lot was purchased. The water lot in question was a post-Confederation grant, and was a grant from the Provincial Government.

I had occasion in the case of *Maxwell v. The King*,[1] to consider the question whether or not Bedford Basin was a public harbour at the time of Confederation. I came to the conclusion for the reasons

[1] 17 Can. Ex. 97, 40 D.L.R. 715.

set out in the report of that case that Bedford Basin at the time of Confederation formed part of the Harbour of Halifax, and became the property of the Dominion by virtue of *The British North America Act*. That case was not appealed.

In the present case counsel for the suppliant admitted that they could not claim title to the water lots, acquiesing in my decision in the *Maxwell* case.

There are two knobs of land to the east of the railway, one is said to contain about 220 square feet, and is between the railway and the high water mark at the place marked "the bath house." The other is a knob of land between the railway and the high water mark at the place marked "esplanade," which is said to contain about 1220 square feet.

At the time of the expropriation in this case, which was on the 9th March, 1913, it is admitted that the suppliant had title to these two knobs of land by prescription. They did not get title to either of these knobs of land except a title under the *Statute of Limitations*. These two parcels of land were not included in any of the various conveyances granting the lands to the suppliant.

It may be important also to notice that between the two knobs of land there is also a small piece of land to the east of the railway and between the railway and the high water mark, as to which no claim has been made on the part of the suppliant, their proof being confined to the two knobs of land that I have referred to.

In 1873, the suppliants having obtained title to the cottage in question, erected an enclosure at the place where the bath house is for the purpose of enabling the young ladies to bathe in the waters

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of Bedford Basin, and the railway permitted them to cross their tracks to reach this bathing enclosure, and subsequently erected a gate to the way leading across their track. The sisters and the pupils from that time forward were accustomed to cross the track during the bathing season to reach this bathing enclosure.

According to the evidence given before me, in the fall of 1872 what is called the main building was erected. This is said to have been completed by September, 1873, the cost being $8,750. The erection of the north wing was commenced in 1882, and was completed in the year 1885, at a cost of $27,256.33. The south wing was built in the year 1888, at a cost of $42,440.38. In 1891, farm buildings were erected at a cost of $2,953.40. In 1901 a laundry building was erected at a cost of $17,359.35. An additional wing was erected in 1903, at a cost of $36,660, and in 1904 the chapel and annex were erected at a cost of $208,635.87.

I may mention in passing that the chapel in question is a beautiful church and very imposing.

In addition to these various items there was the cost of the lands acquired and the improvements to the property. The cost of the land is placed at $16,060 and the improvements to the land at $125,120. The cost of the bathing house subsequently erected and also of the small wharf which I will refer to later are not included in these items.

I am mentioning these figures to show the great outlay that the suppliants have made on their premises.

According to Mr. Roper, at the prices in force at the time of the expropriation, the premises could not be erected for less than $900,000 to one million dollars.

The suppliant, subsequent to the making of the enclosure erected a bathing house on the spot marked "bathing house," taking the place of the former enclosure. The only evidence of anyone qualified to pass on the question of value is that of Mr. Roper, who placed the value of the crib-work and the bathing house at the sum of $5,500, at the date of expropriation, March, 1913.

The suppliant apparently being of opinion that their title to the water lot was valid, commenced to fill in the waters of the harbour, and created what is marked on the plan "the esplanade." It was admitted at the trial by counsel for the suppliant that the esplanade was entirely on land filled in and below high water mark. Jutting from the eastern portion of the esplanade a small wharf was erected in the year 1904, and rebuilt in 1907. Mr. Mosher, an expert in regard to wharves, placed what would be the cost of construction in 1913 at the sum of $1,350.

The cost of the filling in of the esplanade between March, 1899, and June, 1912, is stated to be about the sum of $12,829.16. There is no evidence of the exact time when this filling was made.

The cost of the crib-work is not included in the cost of the filling in of the esplanade.

According to the witness Harris, who acted as one of the government appraisers, the Crown tendered for the bathing house the sum of $1,610.

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He makes it up as follows:

9,600 feet of land at 5 cents a foot	$480.00
Bathing house	300.00
Crib-work	530.00
Fence	170.00
	$1,480.00
To this he adds 10 per cent.	148.00
	$1,628.00

If the suppliants are to be allowed for the cost of the bathing house and the wharf, I would accept the valuations of Mr. Roper and Mr. Mosher; and as the Crown are willing to reimburse the suppliants for these amounts, I think they should receive these two amounts of $5,500 and $1,628 with interest from the date of the expropriation.

It is clear that the suppliant acquired no title to the land filled in and called "the esplanade." When they commenced the fill they had not acquired any title to the land above high water mark and furthermore they have never acquired title as against the Crown.

The Crown apparently never raised any objection and the railway allowed the two crossings, one for the bathing house, the other to the wharf. I would refer in this connection to the case of the *Attorney-General of Southern Nigeria v. Holt & Co.*[1] The facts in the case before me are not similar to those in the *Nigeria* case. See also *Wood v. Esson,*[2] and *Rattè v. Booth.*[3] It may also be well to refer to the

[1] [1915] A.C. 599.
[2] (1884), 9 Can. S.C.R. 239.
[3] (1886), 11 O.R. 491, 494; 15 App. Cas. 188, 193.

Statutes for the Protection of Navigable Waters.[1]

I am of opinion that while at the date of the expropriation the suppliants were the owners in fee of the two parcels of land, the one containing 220 feet, and the other containing about 1,220 feet, and should be assumed to be riparian proprietors of these two parcels, it cannot be held that there was an irrevocable license on the part of the Crown to have the crossings to the bathing house and the esplanade and wharf for all time as against the Crown. These erections are on Crown property, and no title passed to the suppliants for work done on a public harbour. The value of the riparian right in respect of these two small pieces of land between the railway and high water mark is very small, if of any value detached from the right to the esplanade and the bathing house. It must not be lost sight of that no riparian right existed in favour of the properties of the suppliant bounded by the highway and the right to the two parcels of land of 220 and 1,220 square feet was acquired under the *Statute of Limitations* and became perfect years after. See *Giles v. Campbell*,[2] *Cockburn v. Eager*,[3] as to riparian right (if authority be necessary), and *Holditch v. Canadian Northern R. Co.*[4] as to the properties not being held together.

A serious question and one of importance is whether or not any legal claim can be made on the part of the suppliants in respect of the grave injury caused to the institution by the use of the property in front of their buildings and between the eastern

[1] R.S.C. (1906), ch. 115. Amended, 9 & 10 Ed. VII. (1910), ch. 44, 8 & 9 Geo. V., ch. 33 (24 May, 1918).
[2] 1872), 19 Gr. 226.
[3] (1876), 24 Gr. 409.
[4] 27 D.L.R. 14, [1916] 1 A.C. 536.

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boundary and the railway land reclaimed by the Crown from the bed of the harbour as part of the shunting yard. Had no portion of the suppliants' property been taken, the damage would be the same, but no legal claim for damages could be allowed. So far as the railway right of way is concerned, it has been in existence since the year 1854. At first but one track was laid on this right of way. At the time of the expropriation I gathered that there were two extra tracks, but I fail to see how any claim can be raised in regard to any user of their right of way for the purposes of their railway. The 14 tracks used as a shunting yard are mainly on lands the property of the Crown. It is possible that one track may be over what is called these two knobs of land which I have described; but the injury which has been occasioned to the suppliants by reason of the placing and use of the shunting yards at the present location, is an injury caused by the operation of the works on lands other than lands taken from the suppliants.

Our courts have followed the decisions in the English courts under the *Land Clauses Acts,* and I think that I am bound by the English decisions. Authorities in the United States can be found where the law is decided in a manner different from the law as enunciated in the English courts. I have pointed out I am bound as I think by the English authorities approved of in our own courts. See *Paradis v. Queen,*[1] *Queen v. Barry,*[2] *Brown v. The King,*[3] *The King v. Macpherson,*[4] *The King v. Wilson.*[5]

[1] (1887), 1 Can. Ex. 191.
[2] (1891), 2 Can. Ex. 333.
[3] (1909), 12 Can. Ex. 463, 471.
[4] (1914), 15 Can. Ex. 215; 20 D.L.R. 988.
[5] (1914), 15 Can. Ex. 283, 288, 22 D.L.R. 585, affirmed by Supreme Court (unreported).

In the case of *Cowper Essex v. Local Board of Acton*,[1] Lord Halsbury states, as follows:

"My Lords, with reference to the main question "I have had less difficulty, since I take it that two "propositions have now been conclusively estab- "lished. One is, that land taken under the powers "of the Lands Clauses Act, and applied to any use "authorized by the statute, cannot by its mere use, "as distinguished from the construction of works "upon it, give rise to a claim for compensation. But "a second proposition is, it appears to me, not less "conclusively established, and that is, that where "part of a proprietor's land is taken from him, and "the future use *of the part so taken may damage* "*the remainder of the* proprietor's land, then such "damage may be an injurious affecting of the pro- "prietor's other lands, though it would not be an "injurious affecting of the land of neighbouring "proprietors from whom nothing had been taken "for the purpose of the intended works."

In this *Cowper Essex* case the Lord Chancellor uses these words, p. 161: "That where part of a "proprietor's land is taken from him, and the "future use of the part so taken may damage the "remainder."

In the *City of Glasgow Union R. Co. v. Hunter*,[2] the land taken was a portion of the land in the rear. The damage claimed was for the injury to the land by the construction of a bridge on the front of the property. It was held that a claim for damage caused by the operation of the railway was not within the statute. The reasoning of this case put by Lord Chelmsford, that the land being in the

[1] (1889), 14 App. Cas. 153 at 161.
[2] (1870), L.R. 2 Sc. & Div. 78.

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rear of the property, it must be treated as if no land had been taken and the damage therefore was caused by something authorized by the statute.

The *Stockport* case[1] has been confirmed in the *Cowper Essex* case. In that particular case there is strong language to the effect that the mischief must be caused by what *is done on the land taken.*

In the case of the *Duke of Buccleuch v. Metropolitan Board of Works,*[2] the property was fronting on the Thames. There was a valuable riparian right. There was a causeway which gave access from the property at low water to the river. The authorities expropriated the causeway and built a road in front of the property and between the property and the river. There was a large amount of damage to the property by reason of dust and noise, etc. The owner, however, was held entitled to compensation for this damage by reason of his riparian right having been taken away, and not by reason of the causeway being expropriated. Had the taking of the causeway let in the other damage there would have been no necessity to allow the damage to him as a riparian owner.

In *Halsbury*[3] will be found a statement of the law, and a reference is given to a case in the Court of Appeal in England, *Horton v. Colwyn Bay and Colwyn Urban District Council.*[4] In that particular case the respondents constructed an intercepting sewer. The sewers were in part constructed on land the property of the claimant; the pumping station and the reservoir were constructed on land the property of other persons. The head-note states that

[1] (1864), 33 L. J. Q. B. 251.
[2] (1871), 5 E. & I. App. 418.
[3] Vol. 6, p. 42.
[4] [1908] 1 K.B. 327.

the present value of certain portions of the claimant's land which were in proximity to the pumping station and reservoir was depreciated by reason of the contemplated user of that station and reservoir for sewage purposes. Held, that as the acts of user, the contemplation of which caused the depreciation, could be done on land not the property of the claimant, the damage was not sustained "by reason of the exercise of the powers," of the *Public Health Act* within the meaning of s. 308 of that Act, and consequently that the claimant was not entitled to any compensation under that Act in respect of that depreciation.

Lord Alverstone, C. J., at page 333, states as follows: "It was contended by Sir Robert Finlay "in his most interesting and able argument that, in "addition to the compensation that was included in "the £871 for the damage done by the actual con- "struction of the sewer in his land, the claimant was "entitled to compensation for the general damage "which he alleged was occasioned to his property by "the construction of the whole of the sewage works, "according to the principle recognized by the House "of Lords in *Cowper Essex v. Acton Local Board.*"

The Chief Justice, at page 336, states as follows: "Sir Robert Finlay next contended that, although "the pumping station was not on the claimant's "land, it was of no use to the respondents unless the "sewage could be brought to it; that the pumping "station, when regarded simply as a building, did "not injure the claimant's land, but that what did "cause injury was the erection of a pumping station "which was intended to be used in connection with "a scheme for the disposal of sewage, and that as

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"it was necessary for that purpose to pass the "sewage through the claimant's land, the claimant "was in a position to veto, not merely the construc- "tion of sewers on his land, but the carrying out of "the whole system of sewage works. If that con- "tention is sound, the claimant would be entitled to "receive this further sum of money as compensa- "tion; but I desire to point out that the argument "goes a great deal further than anything that was "suggested in the *Cowper Essex* case, and it seems "to me that it is directly opposed to the principle "that was recognized in *City of Glasgow Union R. Co. v. Hunter.*"[1]

He then proceeds: "But Lord Watson in the "*Cowper Essex* case, when referring to *Ogilvy's* "case,[2] and to *City of Glasgow Union R. Co. v.* "*Hunter,* said that in both these cases 'land had " 'been taken from the claimants for railway pur- " 'poses; but the use complained of as injurious " 'was not of that part of the railway constructed " 'on the land so taken, and was held in both cases " 'to afford no ground for statutory compensation. " 'It appears to me to be the result of those authori- " 'ties which are binding upon this House, that a " 'proprietor is entitled to compensation for depre- " 'ciation of the value of his other lands, in so far " 'as such depreciation is due to the anticipated " 'legal use of works to be constructed upon the " 'land which has been taken from him under com- " 'pulsory powers.' "

And then proceeds to deal, at page 337, with the case of *Rex v. Mountford.*[3]

[1] L.R. 2 Sc. & Div. 78.
[2] (1855), Macq. 260.
[3] [1906] 2 K.B. 814.

Again at page 339, the Chief Justice emphasizes it, quoting from the *Tilbury* case,[1] and the *Metropolitan Board of Works* case. Referring to a judgment of Bigham, J.: "I think it is clear that the "exercise of the statutory powers referred to and "contemplated by the learned judges in the *Tilbury* "case consists of something done on the land taken "from the claimant by the public body, or on land "held by him. Such an exercise of the statutory "powers alone concerns him. The statutory powers "exercised elsewhere, though they may depreciate "the value of his property, cannot in my opinion be "relied upon for the purpose of increasing the com- "pensation recoverable. In my opinion that is a "perfectly accurate statement of the result of the "authorities as they now stand, and if the principle "of the *Cowper Essex* case is to be extended so as "to give a claimant the right to compensation for "injury resulting from the user of land other than "his own, it can only be done by a decision of the "House of Lords."

Lord Justice Buckley's opinion was to the same effect.

Having regard to these authorities I have reluctantly come to the conclusion that the suppliants are not entitled to claim the damages which will necessarily be occasioned by the use of the property partly in front of their building as a shunting yard.

I would allow the two amounts of $5,500 and $1,628.

These sums are ample to include 10 per cent for compulsory taking.

The suppliant is entitled to an additional sum for the loss of any riparian rights by reason of the ex-

[1] 24 Q.B.D. 326.

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propriation. If $500 be allowed I think, having regard to my findings, it would be ample. In all judgment will be entered for $7,628 and interest from March, 1913, to date of judgment and costs to the suppliant.

Judgment accordingly.

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

Solicitors for respondent: *Silver & McDonald.*

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

CHARLES ANDERSON,

DEFENDANT;

AND

M. A. NICKERSON,

THIRD PARTY.

1919
March 10.

Water—Wreck—Obstruction to navigation—Removal—Authority—Liability of "owner"—Sale.

Since the amendment of the Canada Statutes in 1897 (R.S.C. 1906, c. 115, s. 13), the owner of a wrecked vessel at the time the wreck was occasioned may be deemed the "owner" for the purpose of the statutory liability to the Crown for the costs of removing the wreck as an obstruction to navigation, notwithstanding the sale of the wreck to a third party. *The Queen v. Mississippi &c. Co.* (1894), 4 Can. Ex. 298, distinguished.

2. By virtue of the Canada Statutes, 1909, c. 28, amending s. 18, ch. 115, R.S.C., 1906, the authority of the Governor-in-Council directing such removal is no longer necessary.

INFORMATION to recover expenditures incurred by the Crown in removing a wreck as an obstruction to navigation.

The following information was filed on the 16th day of May, 1917:

To the Honourable the Judge of the Exchequer Court of Canada:

The Information of the Honourable Charles Joseph Doherty, His Majesty's Attorney-General of Canada, on behalf of His Majesty the King, sheweth as follows:

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Statement.

1. That prior to the 18th day of November, 1915, the defendant was the duly registered owner of the Schooner "Empress," O.N. 107761, registered at Bridgetown, Barbados.

2. That on or about the 10th day of November, 1915, the said schooner was burned to the water's edge and sunk and became a total wreck while lying at anchor at the western entrance of Barrington Passage, Nova Scotia, a public navigable harbour of the Dominion of Canada, and subsequently the said vessel was duly condemned, and on or about the 18th day of November, 1915, the said wrecked vessel was sold and disposed of by the defendant.

3. That the wreck of the said schooner at the place where the same was so sunk as aforesaid caused an obstruction and impediment to the navigation of the said Harbour of Barrington Passage and was a source of danger to vessels plying in said harbour.

4. That the said wreck of said schooner remained in the same position in said Harbour of Barrington Passage for more than twenty-four hours after being burned and sinking as aforesaid.

5. That His Majesty's Minister of Marine and Fisheries for Canada being of opinion that the navigation of said Harbour of Barrington Passage was obstructed, impeded and rendered more difficult and dangerous by reason of the wreck, sinking, partially sinking or grounding of said schooner or part thereof, on or about the 17th day of November, 1915, notified defendant to remove said wreck, which defendant refused to do, and upon failure of the defendant to remove said wreck in pursuance of said notice His Majesty's said Minister of Marine and Fisheries for Canada after public notice calling for tenders for the removal of said wreck accepted on

or about the 6th day of April, 1916, the tender of Hugh Cann & Son, Limited, of Yarmouth, N.S., for the removal of the said wreck and obstruction at a cost of $750.

6. That the said obstruction and impediment so caused to the navigation of the Harbour of Barrington Passage by the said wrecked Schooner Empress was duly removed by the said Messrs. Hugh Cann & Son, Limited, said work being completed on or about the 9th day of May, 1916, and His Majesty's Minister of Marine and Fisheries for Canada duly paid for the work performed in removing said wreck to Messrs. Hugh Cann & Son, Limited, the sum of $750.

7. His Majesty also paid the sum of $87.80, the costs and expenses incurred for the advertising of tenders for the removal of said wreck and the further sum of $24, being the expenses incurred in making an examination of said wreck and superintending removal of same.

8. That under and by virtue of the Statutes of Canada, ch. 115, Revised Statutes, 1906, and amendments thereto, the defendant as the owner of the said Schooner Empress is liable for all the expenditure and costs made and incurred by His Majesty the King in removing the obstruction and impediment to the navigation of the said Harbour of Barrington Passage caused by the wreck of said Schooner Empress, less any sum received on a sale of said wreck, but His Majesty's Attorney-General alleges as the fact is that no portion of the said wreck was or could be sold, and no sum has been received by His Majesty the King in respect thereof whereby and by reason whereof the defendant is liable to pay to His Majesty the sum of $861.80,

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being the sum so paid by His Majesty as aforesaid for and in connection with the removal of the wreck of the said Schooner Empress, and His Majesty is entitled by action to recover the said sum from the defendant.

9. The Attorney General on behalf of His Majesty claims as follows:

(1) The sum of $861.80.

(2) His costs of this action.

The Defence, dated April 20, 1918, was as follows:

As to the information herein the defendant Charles Anderson says as follows:

1. He denies that said vessel became a total wreck, that the said Barrington Passage or part thereof where said vessel was lying is a public or navigable harbour of the Dominion of Canada, that the said vessel was duly condemned or condemned at all or that the defendant sold or disposed of said vessel or of said wrecked vessel.

2. He denies that the said wreck caused an obstruction or impediment to the navigation of the said harbour of Barrington Passage or that it was a source of danger to vessels plying in said harbour.

3. He is not aware of and does not admit that His Majesty's Minister of Marine and Fisheries for Canada was of opinion that the navigation of said harbour of Barrington Passage was obstructed, impeded or rendered more difficult or dangerous by reason of the said wreck sinking, partially sinking or grounding of said schooner or part thereof.

4. He denies that he was notified to remove the said wreck on or about the 17th day of November, 1915, or at all.

5. He denies he refused to remove the said wreck.

6. He is not aware of and does not admit public notice calling for tenders for the removal of said wreck referred to in the fifth paragraph of the information.

7. He is not aware of and does not admit the acceptance of tender of Hugh Cann & Company, Limited, for the removal of said wreck and he is not aware of and does not admit any of the statements or allegations contained in the 5th paragraph of the Information with reference to the removal of said wreck or the tender or agreement with Hugh Cann & Company, Limited, with reference thereto or the terms thereof.

8. He is not aware of and does not admit any of the statements or allegations contained in the 6th paragraph of the Information.

9. He is not aware of and does not admit any of the statements or allegations contained in the 7th paragraph of the Information.

10. He denies each and every of the allegations and statements of fact contained in the 8th paragraph of the Information.

11. As to the whole Information the plaintiff says that the said wreck could have been sold and that there was enough of the said vessel or wreck to be sold.

12. The plaintiff will object that the Information sets forth no cause of action inasmuch as it is nc therein alleged that the removal of said wreck was under the authority of the Governor-in-Council or that the wreck was so removed and sold as required by ch. 115 of the Revised Statutes of Canada, 1906, Part 2, secs. 16, 17 and 18 as amended. The said Minister did not cause the said wreck to be sold

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by public auction after being removed and the defendant will object that he is not liable for the cost of removal until after the sale of the wreck or obstacle so removed.

13. If the said wreck had been removed to a proper place the same would have been worth and could have been sold for a sum in excess of the amount required to remove the said wreck and by reason of the neglect or failure on the part of the said Minister or of the plaintiff to sell or attempt to sell the wreck or the part so removed the plaintiff is not entitled to recover from the defendant any part of the cost or expense of removing the said wreck.

14. As to the whole of the Information the defendant will object that in point of law the same discloses no cause of action against this defendant.

15. As to the whole of the Information the defendant says that before the defendant received the notice referred to in par. 5 of the Information, to wit, on the 18th day of November, 1916, the said wreck had been sold by T. W. Robertson, of Barrington Passage, N. S., Receiver of Wrecks on behalf of the owners and underwriters for the benefit of all concerned for the sum of five dollars to M. A. Nickerson, of Clarke's Harbour in the County of Shelburne and Province of Nova Scotia. By the terms of the said sale the said purchaser assumed all liability and responsibility for the removal of the said wreck.

16. The defendant repeats par. 15 hereof and says that the said M. A. Nickerson neglected and refused to remove the said wreck wherefore the defendant did cause a Third Party Notice to be duly filed herein and to be duly served upon the said M.

A. Nickerson claiming indemnity from the said M. A. Nickerson to the extent of the plaintiff's claim herein or such sum as the plaintiff might recover from the defendant with costs on the grounds herein and therein set forth.

17. The defendant repeats pars. 15 and 16 hereof and claim indemnity from the said M. A. Nickerson to the extent of the plaintiff's claim herein or such sum as the plaintiff may recover herein against the defendant with all costs.

The case was tried before the Honourable Mr. Justice Cassels, at Halifax, N. S., September 18-20, 1918.

L. A. Lovett, K.C., for plaintiff.

J. McG. Stewart, for defendant Anderson.

V. J. Paton, K.C., for third party Nickerson.

CASSELS, J. (March 10, 1919), delivered judgment.

An information exhibited by The King, on the information of the Attorney-General of Canada, against the defendant Charles Anderson, claiming the payment of certain moneys expended in clearing Barrington Passage, Nova Scotia, from the wreck of the Schooner Empress owned by the defendant Charles Anderson.

A third party notice was served upon one M. A. Nickerson, the defendant Anderson claiming that the wreck in question was sold to Nickerson, and that part of the purchase price was the removal by Nickerson of the wreck in question.

The case had not been set down for trial, but by agreement between the parties, with my consent,

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the action was tried as between the plaintiff and the defendant Charles Anderson.

Nickerson's counsel consented to appear in order that he might have the right to cross-examine the various witnesses, it being arranged between the parties that the case between the plaintiff and the defendant Anderson should be tried, and if the plaintiff were held entitled to succeed then the trial as between the defendant and the third party should come on at a subsequent date to be agreed upon.

The counsel arranged to put in written arguments, and I have subsequently received papers, endorsed arguments.

I think the plaintiffs have proved their case and are entitled to judgment for the amount claimed.

The defendant Anderson's counsel alleged that the defendant Anderson was not the owner of the vessel, the vessel having been sold subsequently to Nickerson.

The date of the wreck was the 10th November, 1915, and the sale to Nickerson was on the 18th of November.

The case of *The Queen v. Mississippi & Dominion Steamship Co.*[1] was decided in the year 1894. In that case it was held that the purchaser from the owner was the owner within the meaning of the statute then in force. Subsequently the statute under which that case was decided was amended by ch. 23 of 60 and 61 Vic., 1897, which statute defined the meaning of the word "owner".

The Revised Statutes, 1906, ch. 115, sec. 13, interprets the word "owner" as follows: "Owner means "the registered or other owner at the time any "wreck, obstruction or obstacle as in this part re-

[1] 4 Can. Ex. 298.

"ferred to was occasioned, and also includes subse-"quent purchaser."

Another objection raised was that there was no authority from the Governor-in-Council directing the removal. Sec. 18 of ch. 115 provides that whenever under the provisions of the Act the Minister "has with the authority of the Governor-in-Council "caused to be removed," etc.

In 1909, ch. 28, 8 and 9 Ed. VII., assented to on May 19, 1909, these words, "with the authority of the Governor-in-Council", were deleted.

These seem to be the main defences.

Judgment to issue for the amount claimed by the plaintiff, and the defendant must pay the costs of the action.

Judgment for plaintiff.

Solicitor for plaintiff: *F. C. Blanchard.*

Solicitors for defendant Anderson: *Henry, Harris & Co.*

Solicitor for third party Nickerson: *C. J. Burchell.*

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March 17.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

AND

JOHN GEORGE McCARTHY, LOUISA C. McCARTHY, WIDOW OF THE LATE W. G. WARNER, AND JAMES M. McCARTHY,

DEFENDANTS.

Expropriation—Agreement of sale—Authority of Minister—Jurisdiction—Arbitration—Compensation—Shipyard—Earning capacity—Market value—Abandonment—Damages—Severance.

The Dominion government, for the purposes of its shipyard at Sorel, Quebec, expropriated some shipyard property on Richelieu and St. Lawrence rivers. The owners, claiming compensation, set up an agreement for the purchase of the property on behalf of the Crown entered into by the Minister of the Public Works, providing that payment therefor should be established by arbitration, and they contended that the Exchequer Court had therefore no jurisdiction to hear and determine the matter of compensation.

Held, that as the agreement failed to comply with the requirements of art. 1434 of the Quebec Code of Civil Procedure it was invalid as submission to arbitration, and as no time was fixed the submission was revocable, by virtue of art. 1487, at the option of either party, and under the English common law at any time before the award.

2. The King has the undoubted right attached to his prerogative of suing in any court he pleases.

3. The Minister had no power, unless authorized by an order-in-council or statute, to bind the Crown with such agreement.

4. In fixing compensation for the expropriation of such property its "earning capacity" cannot be taken as the basis of the market value; the best test is what similar property sold for in the immediate neighbourhood.

5. In the valuation of the wharves regard must be had to their present condition and allowance made for their depreciation.

6. Where part of the land expropriated was abandoned by the Crown, *held* that the owners were entitled to compensation for the use and occupation of the land for the period held by the Crown; but that they could not claim any damages for injurious affection or severance of the land, inasmuch as the severed portion did not form a unit of the land expropriated, and was in fact severed by a highway, apart from the fact that the abandoned land was sufficient for a shipyard at Sorel.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Montreal, January 8, 9, 10, 11, 28, 29 and 30.

E. Lafleur, K.C., *E. H. Godin,* K.C., and *F. Lefebvre,* K.C., for plaintiff.

D. R. Murphy, K.C., *A. Perrault,* K.C., and *P. St. Germain,* K.C., for defendants.

AUDETTE, J. (March 17, 1919), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby certain lands at Sorel, P.Q., were taken and expropriated, by the Crown, for the purposes of "The Sorel Government Shipyard", by depositing, on the 18th December, 1915, a plan and description of such lands in the office of the Registrar of Deeds for the City of Sorel, P.Q., in which Registration Division the lands are situate.

Under such plan and description, as set forth in the information, the lands taken were composed of:

	Area.
Parcel No. 1—Eastern part of Lot 82	98,000 Sq. ft.
Parcel No. 2—Eastern part of Lot 84	114,400 " "
Parcel No. 3—Lot.....No. 85	280,000 " "
Parcel No. 4—South-east part of..86	32,300 " "
Making in all.....	524,700 " "

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together with wharves and all *constructions* on such land erected both by the Crown and the suppliants.

During the pendency of the trial, namely, on the 24th January, 1919, the Crown, under the provisions of sec. 23 of the *Expropriation Act,* abandoned the whole of

Parcel No. 1—Eastern part of Lot 82	98,000 Sq. ft.
together with an area of lot 85 of....	45,163 " "
making in all.....	143,163 " "

which being deducted from the total area of 524,700 square feet, leaves, as admitted by the parties, a total area expropriated of 381,537 square feet.

The Crown, by the information, offers the sum of $30,000 for the total area expropriated in 1915, and the defendants claim by their plea the sum of $378,400, made up as follows:

Land.....	$272,630.40
Buildings.....	19,500.00
Wharves.....	40,823.00
Erections, jack screws, etc.....	1,046.60
	$334,000.00
Adding 10%.....	33,400.00
Preparation of case, costs of plans, experts' services, expert witnesses and Counsel.....	11,000.00
Grand total.....	$378,400.00

The pleadings, either on behalf of the plaintiff or the defendants, have not been amended since the abandonment.

The sum of $1,046.60 has not been proven and has been abandoned by counsel for the defendants.

As a preliminary plea to the present proceedings, by information under the *Expropriation Act,* the defendants set up the agreement of the 5th September, 1898, filed herein as Exhibit No. 24, whereby, among other things, the defendants promised to sell and the then Minister of Public Works promised to buy the property in question upon the payment of a sum to be established by arbitration—and they contend that the Exchequer Court is not the proper forum to hear and determine this matter, but that it should be submitted to a tribunal of arbitration.

As between subject and subject, under art. 1434 of the Code of Civil Procedure, the submission must state the names and additions of the parties and arbitrators and the delay within which the award of the arbitrators must be given. If this agreement or promise of sale on the one hand, and promise to buy on the other, can be treated as a submission, it fails to be valid under the provisions of the Code. Then under art. 1437 of the Code, "if the delay is not fixed, either of the parties may revoke the submission when he pleases",—and that is what was done in the present case. If the subject has the right to avail himself of these provisions, why would the Crown not have the same privilege?

Under the English common law a submission to arbitration was always revocable at any time before the award was made. *Gauthier v. The King.*[1]

Then the King, from time immemorial, has the undoubted privilege attaching to his prerogative of suing in any court he pleases.

[1] (1915), 15 Can. Ex. 444, 33 D.L.R. 88; (1917), 40 D.L.R. 353, 56 Can. S.C.R. 176.

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Chitty on Prerogatives (1820), at p. 244, dealing with actions "by the King and Crown", says:

"In the first place, though his subjects are, in many "instances, under the necessity of suing in particular "courts, the King has the undoubted privilege of "suing in any court he pleases . . . . The Crown "possesses also the power of causing suits in other "courts to be removed into the Court of Exchequer "where the revenue is concerned in the event of the "proceeding, or the action, touches the profit of the "King, however remotely, and though the King be "not a party thereto."

Moreover, there is the important question as to whether the Minister of Public Works could under the circumstances, and without valid authority, bind the Crown. Unless authorized by order in council or by statute, a Minister of the Crown cannot bind his Government. The Minister of Public Works, in the matter in question, has obviously no power to enter into such an agreement as set forth in Exhibit No. 24, without proper authority, and without the same he cannot bind the Crown in that respect. The question is so elementary that I shall confine myself in that respect to citing a few cases establishing that proposition, although the authorities are very numerous: *Quebec Skating Club v. The Queen;*[1] *Jacques-Cartier Bank v. The Queen;*[2] and *The King v. The Vancouver Lumber Company,*[3] affirmed on appeal to the Supreme Court of Canada on the 4th December, 1914.

[1] (1893), 3 Can. Ex. 387.
[2] (1895), 25 Can. S.C.R. 84.
[3] (1914), 17 Can. Ex. 329, 41 D.L.R. 617.

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Therefore the plea to the legality of the present proceedings in *that respect* is set aside.

Coming now to the question of compensation.

The property in question is situate at St. Joseph de Sorel, P.Q., on the south-east side of almost the mouth of the Richelieu River, where it meets with the St. Lawrence, at about 1000 feet from the St. Lawrence. It originally formed part of the seigniory granted to Monsieur de Saurel, on the 29th October, 1672, where he had built, in 1665, a fort for the protection of the inhabitants from the incursion of the Indians. Then the seigniory was, under the English regime, in 1781, bought for the Government by Sir Frederick Haldimand, the then Governor and Commander-in-chief.[1]

From Bouchette's "*Description Topographique de la Province du Bas Canada*", published in 1815, we find that while the "*magasins, casernes et batiments du Gouvernment*" were on the south-east side of the river, that the lots in question, on the west side of the river, were even at that early date used as a shipyard. See pp. 224 and 227. The predecessors in title of the present defendants, their father and uncle, and the Molsons before Confederation, were also using the property as such. Witness Beauchemin says that the McCarthys, to his knowledge, were building at Sorel, from 1858 to 1870 or 1872. They were at Sorel when he arrived there in 1856,—and adds, he does not know how long before his arrival they had been building there. Therefore, it may be almost said that these lands were, from time immemorial, used as private shipyards.

[1] *Tenure Seigneuriale, Pieces & Documents, 272; Bouchette (ubi supra); Archives Canadiennes—1759, 1791, Messrs. Short & Doughty 539.*

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While this property is a shipyard with many obvious advantages, it is not to my mind the paragon shipyard which seems to exist in the minds of some of the witnesses called for the owners, who, actuated with the desire of proving overmuch, prove nothing which would have the effect of leading the court to a fair assessment of compensation herein.

Up to the time of the expropriation it was a shipyard with a somewhat limited capacity, where no very large vessels were ever constructed. Among the largest vessels built there were the *Acadia,* 225 feet long, the *Fielding,* and on lot 82 the *Quebec* of a length of 288 feet. The main works of the yard really consisted mostly in yearly repairs to the several crafts wintering in the River Richelieu, and the construction of comparatively small boats and tugs. To build vessels up to 400 feet, the ways now in existence would be of no use. New ways would have to be built diagonally, and some of the buildings removed to allow of it, as established by the evidence.

On behalf of the defendants five witnesses were heard, who respectively valued the land alone as follows, viz.: Witness Fraser, at 60 cents; witness Swan, at 50 cents; witness Noble, lots 84 and 85 at 75 cents, and lot 86 at 56 cents; witness Bishop, at 50 cents, and witness St. George at 74 cents.

On behalf of the Crown, witness Giroux valued the same lands at 2½ cents and witness Couture at 2½ to 3 cents.

How can we resolve this equation and reconcile such gap and difference in this valuation, if not by analyzing on the one hand the basis of such opinion, and on the other by the comparison of the prices paid in sales of properties in the neighbourhood,—a most

cogent manner to arrive at the real market value of such property.

Let us now consider upon what basis these several valuations were arrived at. Witness Fraser, when valuing the land at 60 cents (a valuation which would give for the 524,700 ft.—$314,820), says the way he arrived at that price is by considering that he would have to pay that sum for the land at any other site that had labour and deep water. He values, he says, the shipyard on its earning capacity. While on some occasions property has a special value attached to the locality within which it is situate, the fallacy of valuing it on its earning capacity is too obvious. "The land is looked upon merely as so much land, "entirely apart from the *personality* of its owner. "It might well be that two rival tradesmen held "adjacent lots of land on the same street, similar in "all respects, upon which they maintained their "respective shops. One of them, by reason of "shrewdness, foresight and good fortune, might be "deriving a large return from his business and "would doubtless be unwilling to sell his land, and "thus break up his established trade, for a sum con-"siderably in excess of its market value,—while the "owner of the adjacent store, who found himself "losing money from day to day, might be glad to dis-"pose of his property at considerable sacrifice. If, "however, the two stores were taken by eminent "domain, the *measure of compensation would be the "same in each case* . . . . The productive value of "land, or the value of the land to its owner, based on "the income he is able to derive from his use of it, "is not the measure of compensation and is not "material except so far as it throws light upon the "market value. In other words, what is sometimes

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"called the '*value in use*' is everywhere repudiated "as the test. So also the compensation cannot be "measured by the value of the property to the party "condemning it, or its need for that particular prop- "erty.[1] Market value, and market value alone, is the "universal test."

It would indeed be fallacious to increase or decrease the market value of a property by reason of the large or small business carried on upon the same by a particular individual, or to arrive at a conclusion upon the conjecture or surmise of such a consideration.[2]

Indeed, the "earning capacity" of a property depends materially, if not exclusively, upon the industry, business energy, capacity of the individual, and upon the capital at his disposal, who carries on his trade or business upon the property. It might, however, apply to a lesser degree in respect of a farm used for agricultural purposes. This property for years back has returned to its owners, under leases, $1600 a year for a while, and in latter years $1200. Should this be the exclusive test? This witness proceeded upon a wrong basis, and his evidence is of no avail to a court desirous of arriving at a just and fair market value of these lands.

Witness Swan says he does not know the value of property at Sorel; but to get at his valuation, he adds up all the *values* and finds that the land in question is worth 50 cents a foot. He assumes the McCarthy property has railway communication, while the spur runs only on Government property.

[1] *Nichols on Eminent Domain,* (1909), pp. 662, 663.

[2] *Pastoral Finance Ass'n., Ltd., v. The Minister,* [1914] A.C. 1083; *Lake Erie & N. Ry. Co., v. Schooley* (1916), 30 D.L.R. 289, 53 Can. S.C.R. 416.

Witness Noble, who values lots 84 and 85 at 75 cents, and lot 86 at 56 cents, bases his price on what a shipyard can do and can produce. The same observations made as to witness Fraser will equally apply to this witness, who would in the result make as part of the market value the prospective profits which might be derived from the property. He takes into consideration the fact that the land is sheltered and that there is no trouble from ice. This last point is, however, qualified in the evidence.

Witness Bishop, who values the land at 50 cents, lived most of his life in the United States. He examined the McCarthy property on the 7th January, 1919, and since the month of April, 1917, has been engaged in purchasing and designing the construction of shipyards at Portland, Tacoma, New Jersey, Savannah, Georgia, New Orleans, Port Huron, Michigan and in British Columbia. He arrived at his valuation by taking into consideration the amounts that were paid for land either upon rental basis or purchases at these several places. The danger of such basis is that while the value of land at the places above mentioned might be worth that amount, he entirely overlooks the market price of property at Sorel.

Witness St. George, who values the land alone at 74 cents a foot, has a way of his own in arriving at that conclusion. He tells us that in arriving at that valuation, he is not basing himself at all upon the market price of real estate in that vicinity,—stating it has nothing to do with it. But he takes the adjoining Government property to the north of the McCarthy property, forming the corner at the meeting of the Richelieu and the St. Lawrence, which he

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says is "very low land", *not a very suitable* site for a shipyard, and calculating the cost of putting this adjoining property in the same condition as that of the defendants, he arrives at his estimate of 74 cents, notwithstanding that he considers he would have on that property, to build crib-work, wharves on the St. Lawrence to protect it, to prevent the ice breaking in and damaging the vessels moored in front, besides piling, filling and dredging. He says the figures he has made with respect to this Government property are higher than they would have been had he taken the Sincennes-McNaughton property as the object of comparison. This mode of arriving at the value of property at Sorel would be rather amusing if it were not so illogical. Were the court to adopt this witness's figures and allow 74 cents a foot, which for the land alone would amount to $388,398, perhaps from no one more than from this witness, when off the witness stand, would it readily evoke an exclamation of astonishment. There is no parity between the two properties. It is of no help or assistance. Why was not such parallel established between the defendants' property and the several pieces of land going up the River Richelieu. It would have been more consonant, and from the McCarthy property travelling south-east up the river there are a number of properties available for shipyards, both below and above the bridge. Witnesses might be competent to pass upon the desirability and the selection of a site for the purposes of a shipyard, and choose its equipment and plant, and yet might prove wanting in the necessary knowledge of the local market value of the land required for the same. The engineering and mechanical knowledge does not necessarily carry within its sphere the knowledge to properly appre-

ciate the local market value of real estate, approached with the consideration of proper elements freed and untrammelled from the consideration of the value of land in other localities that have no common basis of comparison.

On behalf of the Crown, two witnesses, Giroux and Couture, were heard in respect of the value of the land, the former placing a value of 2½ cents per square foot, and the latter 2½ to 3 cents a square foot. These two witnesses, to arrive at this conclusion, compare the property in question with properties similarly situated at Quebec, Levis, Lauzon and Sorel. Indeed, the prices paid at Sorel in the several cases mentioned by them is, in a number of cases, most apposite and most cogent evidence. Among the sales at Sorel, mentioned by witness Giroux, is that of lot 81, to Sincennes-McNaughton, composed of 4 arpents and 33 perches, on the 17th January, 1905, and immediately adjoining lot 82, for $3000—around two cents a foot. Lot 56, above the bridge, of an area of 8 arpents and 88 perches, sold on the 7th June, 1918, for $3100—used as shipyard—which is less than one cent. Then lots 76 and 81, composed of 10 arpents, were offered to witness, on the 8th or 9th December, 1918, for $30,000, which is equal to about eight cents a foot. Witness Larocque also offered this property to Dr. McCarthy, a couple of years ago, for $30,000 or $35,000, reserving, however, the right to winter and moor his vessels in the front.

Witness Couture, while valuing the defendants' property at so much a foot, as above mentioned, valued it as a whole at $22,000, and in that price he includes everything, not having the intention, he says, to make the Government pay for the wharves it (the Government) has built. I think, upon this

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argument, he is somewhat astray, because while the Government has built some wharves, the defendants or their predecessors in title, had also built some which are still in existence and which go to increase the value of the property. This witness says he based his valuation upon, first, its annual revenue; second, upon sales in the neighbourhood and elsewhere of similarly situated properties. And, among others, he cites the following sales, at Sorel: On the 9th May, 1883, the defendants, the McCarthy estate, sold to the St. Lawrence Pulp & Paper Co., 229,804 feet in superfices, part of lot 86, shown on plan Exhibit No. 1, for $4,500—about two cents a foot. Then he takes in consideration the offer, which he saw advertising the sale of the Canada Steamship Co.'s property at 3½ cents a foot. Other sales mentioned by this witness are that of the 22nd June, 1881, by Allan to Sincennes-McNaughton of lots 76 and 81, containing 233,610 square feet, for $4,500, a little less than two cents a foot. On the 29th May, 1918, the Leclerc Shipbuilding Company purchased at less than a cent a foot lot 56, having an area of 368,060 feet, for $3100, including a house, with some reservation in respect of the same. On the 26th May, 1918, the Leclerc Shipbuilding Co. leased from H. Paul part of lot 55, containing 149,149 feet, actually occupied with the construction of vessels, with a frontage of 500 feet on the Richelieu, at an annual rental of $300. If that lease is capitalized at 5½%, it would be equal to 3 2-3 cents a foot. The evidence of these two witnesses for the Crown upon the value of land, especially when based upon sales of similarly-situated properties at Sorel, is most cogent. However, while the owner's evidence is most exaggerated, I find that the Crown's evidence, based upon such sales

in the neighbourhood, is the best and the only safe starting point,—yet I also find due consideration has not been given to the comparison of the McCarthy property with these Sorel properties. For instance, witness Giroux says that the Sincennes-McNaughton property, is like the McCarthy property, worth 2½ cents a foot. I fear he overlooks the clear and obvious fact that the McCarthy property is higher, its topography is better, and the lands are improved, while the same cannot be said of the other properties.

We have here to deal with a good shipyard, having a limited capacity as to the size of vessels which can be built there. The land, the soil itself, has been improved. The soil has been hardened (*durci*), solidified from year to year by the refuse (*dechets*) thrown upon the ground, says witness Giroux, speaking of the McCarthy property. Witness Boucher says that the nature of the soil is muddy (*vaseux*), but from year to year the ground has been improved by (*machefer*) clinkers and cinders being spread upon the surface. Witness Noble, who examined the shipyard in 1914, says this soil is of hard sand, and he finds the land has been built up, stiffened, piled and graded. Witness Badeux also says the surface has improved with age and usage. Moreover, the last witness, among others, has actually worked in materially improving this property, especially as compared with the Sincennes-McNaughton property, by running in several hundred piles in the land for the purpose of the ways; but he says that at present the heads of the piles are brought up to the surface every spring from the effects of frost and he had to cut them yearly.

A great deal has also been said about the exceptional safety of the shipyards as against the ice; but

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it has, however, in exceptional cases been subjected to such a contingency on a few occasions. Witness Boucher, whose business has had to do, for the last 18 years, with the construction and repairs upon this shipyard, says that in the spring of 1903, in April, at the time of the debacle,—the ice shove,—in the St. Lawrence, the waters rose higher than those of the Richelieu. The ice ran into the entrance of the river and caused considerable damage. Then witness Beauchemin says that every spring, the waters rise and cover a certain portion of the shipyard, and the wharves being low, some of them are covered by water. He further says, he knows of only two inundations or floods at Sorel and that was in 1865 and 1896, lasting from four to five days. He denies or does not remember the flood of 1903. However, under the rule of presumption, *"Magis creditur duobus testibus affirmantibus quam mille negantibus"*, it must be found that, besides the yearly spring floods, the place was subjected to these bad inundations followed by serious damages.

Another very important fact to be considered, in respect of the prices paid on sales at Sorel, is, as admitted by defendants' witness Beauchemin, that these lots, on the water front, at St. Joseph de Sorel, between the McCarthy properties and the bridge, can also be turned into shipyards—they are all adaptable, but not prepared. Even above the bridge, the evidence shows there are shipyards in operation to-day.

Therefore, in endeavouring to arrive at a just and fair compensation, one must guard from being carried away by these exaggerated valuations testified to, and to weigh with judicious modifications the plaintiff's evidence. To allow the exaggerated

amounts testified to in the evidence of the defence, based upon such erratic grounds, "would be,"—in the language of Sir Samuel Evans in *Re S. S. Kim*[1]—"to allow one's eyes to be filled by the dust of theory "and technicalities and to be blind to the realities "of the case." The Court has to steer a judicial course between the optimist and the pessimist.

This property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking in consideration any prospective capabilities, potentialities or value it may obtain within the reasonably near future,—provided such capabilities can be foreseen at the date of the expropriation. Such capabilities or adaptability are, after all, but an element in the general value and form part of the market value.[2]

The owners after the expropriation should be neither richer nor poorer than before. It is intended that they should be compensated to the extent of their loss, and that loss should be tested by what was the value of the thing to them, not by what will be its value to the party expropriating it.[3]

From 1874 to 1890 the defendants derived a revenue from the whole property under lease, of the sum of $1600, and thence of the sum of $1200, as set forth in the evidence. Care must be taken to distinguish, as already said, between income from the property and income from the business conducted upon the property. And when the property is vested for the use to which the land is best adapted, for which it had been used for years and for which it is expropriated, it is certainly a safe working test of value which cannot be overlooked in arriving at the value of the

[1] 3 *Lloyd's Prize Cases* 1917.
[2] *Sidney v. North E. Ry. Co.*, [1914] 3 K.B. 629.
[3] *Cripps on Compensation*, 5th ed., 103.

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property.[1] In this case the evidence has somewhat qualified the circumstances under which it was leased at the low rents mentioned. However, low rent and the incidents likely to determine the lease must be regarded.[2] See Exhibit "F." After all, it is the commercial value of the land that is sought and not the capitalized value of the rental.[3]

The defendants, somewhere around the years 1897 or 1898, under special circumstances, offered to the Government for $19,000 this property, the area of which is described in plan Exhibit 25. Subsequently thereto, during the year 1912, as appears in the order in council filed here as Exhibit "G", another price of $150,000 is asked by the owners.

An offer by the owner may at times be made with the object of avoiding controversy, to save the expense of litigation, when in want of money, and under such circumstances it would not be a determining test of the actual value.[4] And the case of *Falconer v. The Queen*[5] is also authority for the proposition that where a claimant, for the purpose of effecting a settlement without litigation, had offered to settle his claim for a sum very much below that demanded in the pleadings, the court, while declining to limit the claim to the amount of such offer, relied upon it as a sufficient ground for not adopting the extravagant estimates made by claimant's witnesses.

At the date of the expropriation, namely, on the 18th December, 1915, the war was at its most

[1] *Nichols*, p. 172.

[2] *Halsbury*, Vol. 6, p. 27, *et seq.*; *Browne & Allan on Compensation*, 99.

[3] *Morgan v. London & N. W. Ry.*, [1896] 2 Q.B. 469.

[4] *Nichols*, p. 1195.

[5] (1889), 2 Can. Ex. 82.

momentous period, and if it had an effect upon property in Canada, it was certainly to its detriment, and it was a cause of depreciation which extended in respect of the class of property we are dealing with to the end of 1916 or the spring of 1917. Witness Brown, heard in behalf of the owners, said the Sorel shipyard had been declining and that there was not as much work done there by the Government as in the past. As established by witness Duguide, after the war broke out there was quite a demand for the construction of submarine chasers, but that industry was concentrated at Quebec and Montreal,—none at Sorel, while it might have affected it in the supply of some ancillary materials. The Lusitania was sunk in 1915, and the unrestricted destruction by submarines was resorted to in 1917. In the fall of 1916, came a demand for larger vessels and enquiry for steel carrying vessels. None were constructed at Sorel. In the spring of 1917, when the shipping destruction began on a large scale, the Munition Board was instructed to enquire on behalf of the Imperial authorities as to shipbuilding in Canada. This enquiry gave a stimulus, a spurt in this country in the demand for steel and wooden vessels. The real demand did not start before the spring of 1917. The demand in 1916 amounted to mere enquiries, with perhaps the starting in the construction of a few vessels. This witness Duguide contends that there was a small number of vessels built at the Sorel shipyard, but a large amount of repairs were made there.

Having said so much, and taking into consideration all these circumstances, and more especially the prices paid for lands, and lands almost similarly situated, at Sorel, although not improved and piled

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as the present shipyard, I am of opinion of allowing five cents a foot for the land taken. The prices paid at Sorel afford the best and most cogent test and the safest starting point for the present enquiry into the market value of this property. The best method of ascertaining the market value of property is to test it by sales in the neighbourhood. *Dodge v. The King*[1] —*Fitzpatrick v. Town of New Liskeard*[2], and numerous other cases decided by the Supreme Court of Canada.

The total area expropriated is 381,537 square feet, which, at five cents a foot, will amount to $19,076.85.

BUILDINGS.

The value of the buildings upon these lands has been fixed by agreement at the sum of $18,250, with, however, reservation by counsel for plaintiff, to adduce evidence as to the value of the property as a whole, *en bloc.*

WHARVES.

This leaves the question of the wharves still to be considered. Here the witnesses are very far apart. On behalf of the owners, witness Brown places upon the three wharves a value of $33,887.07; witness Fraser confirms witness Brown's valuation; witness Swan values them at $40,773; witness Noble at $65,000, and witness St. George at $34,104. On behalf of the Crown, witness Badeau values them at $19,797.75; witness Giroux at $8,997.86—allowing nothing for the approaches,—and witness Heroux at $16,354.10.

Witness Badeau is a ship carpenter who has been working at Sorel, on the land in question, since 1874.

[1] (1906), 38 Can. S.C.R. 149.
[2] (1909), 13 O.W.R. 806.

He has worked at these wharves. His valuation is for the price of new wharves, from which he deducted one-quarter of the total price. He further states that while the lumber in the McCarthy wharves was nicer (*plus beau*), he adds that to-day they are gone (*ils sont finis*). Since 1874, he says, we repaired them, but they have deteriorated. Witness Giroux exhibited in court some decayed pieces which he swore he had taken from these wharves. It is perhaps well to mention, *en passant,* that witness Brown, who places upon these wharves a value of $33,887.00, says that the life of such wharves is of about 30 to 40 years,—30 to 35 years. If the wharves were already old in 1874,—25% of their value already gone at that date according to witness Badeau,—they would, according to witness Brown's own view, be too old in 1915 to have any value, yet he values otherwise at $33,887, making no allowance whatsoever for depreciation.

I am of opinion it is unnecessary to say any more upon this point, and taking into consideration all that has been testified to by the witnesses upon that subject, and the deduction that should be made for depreciation, I will accept the valuation of witness Heroux at the sum of $16,354.10.

ABANDONMENT.

As already mentioned, during the pendency of the trial the Crown has abandoned, under the provisions of sec. 23 of the *Expropriation Act,* the whole of lot 82, containing..... 98,000 sq. ft.
and part of lot 85, containing..... 45,163 " "

Making in all an area of.....143,163 " "

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The defendants are making claim, as a result of the abandonment, for the value of the possession and usage by the Crown of the whole 143,163 square feet, between the date of the expropriation and the date of the abandonment. They make no claim for depreciation or damage arising out of the abandonment with respect to lot 85; but they claim damages for such depreciation to lot 82, resulting, as alleged in the argument, from the severance of lot 82 from the rest of the defendants' property.

On behalf of the defendants, witnesses Swan, Fraser, and J. M. McCarthy were heard with respect to the claim in connection with the abandonment, while the Crown offered no evidence in that respect.

Witness Swan testified that the damages arise from the fact of not maintaining lot 82 as part of the whole shipyard. He contends that the lot is now deprived of the railway access, in that the railway had access to part of the yard connected with a tram. If lot 82 is detached, it thereby loses access to the railway and is deprived of the use of the machine shops already in the yard. He further contends that on the 400 feet of lot 82 there is not sufficient room to build machine shops and construct vessels. He admits, however, the upper part of lot 82 is owned by the defendants. He considers the cutting off of the access to the railway as the more important reason of the two. If shops were built at the back of lot 82, it would mean duplicating the plant. It is not hurt with respect to skilled labour. He reckons the damages on the basis of 50% decrease in the value of the land, and for the compensation in respect of the occupation, he would capitalize the value of the land and allow yearly rent at 6% upon the same. On

cross-examination he says that lot 82, for the last 15 years, was used for mooring vessels on the front, and for storing materials in connection with the shipyard. Part of 82, back of the 400 feet from the river is vacant. Lot 82 cannot in future be independently used as a shipyard, but it could be used for building small boats.

Witness Fraser contends that lot 82 is now worth less by reason of being separated from the larger part of the yard. He valued the land, as originally taken, at 60 cents, and says that as the result of the abandonment the land of lot 82 is now only worth 36 cents a foot. He would value the compensation for the occupation of the lands on the same basis as the previous witness, at 6% or 8%, adding it was to his knowledge that 8% had been allowed under such circumstances. He says that, as part of the shipyard, it had a share of the water front, and direct railway connection, and contends the cost of a new siding or spur should be set off as against the value of the property. To make a shipyard of it, the building of a carpenter's shop would be needed. On cross-examination he says lot 82 would be "all right for a small proposition."

Having so reviewed the short evidence upon this subject, brings us to the consideration of the merits of the claim.

As compensation for the loss of occupation of these 143,163 square feet,—composed of lot 82 and part of lot 85, I will allow the compensation on the basis mentioned by me at trial. These 143,163 square feet, at 5 cents a foot, would amount to $7,158.15. In addition to this, I am somewhat perplexed as to what sum I should allow to the defendants as compensation for

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their being deprived of the use and occupation of this piece of property. In renting property the owner should get more than 5% upon the value of the land, since out of such revenue he has to find a fair revenue over and above taxes, etc., and other known incidentals. It is often contended that the landlord should at least receive from the tenant 10% on the value of the property leased to allow him a fair return, free of taxes, etc. I am of opinion that if 8% were allowed on $7,158.15 from the 18th December, 1915, to the 24th January, 1919, namely, three years and 38 days, making the sum of $1,777.57, that it would represent a fair and just compensation to the defendants for the loss of use and occupation of their premises during the period in question.

Coming to the question of damage by way of injurious affection, or *severance,* as put by Counsel,—which, coupled with the use and occupation abovementioned, come within sub-sec. 4 of sec. 23 of the *Expropriation Act,* I shall now have to consider and take into account the fact of such abandonment or revesting in connection with all the other circumstances of the case, in estimating or assessing the amount to be fixed for the defendants claiming compensation for the land taken.

That part of lot 82, as described in the information and originally expropriated, is separated from the other lots or premises expropriated, by a street which has been in existence for over a century. It is found in existence on a plan in *Bouchette's Description Topographique de la Province du Bas Canada,* published in 1815, and mentioned as "Chemin de la Traverse", and on the plans filed at trial as Montcalm St. Lot 82 has always been severed by the street from the lots 84, 85 and 86, and the frontage

of 82 cannot be taken, as mentioned by some of the witnesses, as part of a consecutive frontage with these other lots, because it would thereby obstruct the street. It could never be used as a whole with the other lots, placing a vessel partly on 82 and partly on the other lots. While there was bare unity of ownership in title, there was, so to speak, individuality in the lot 82 thus separated from the other lots by the highway, and the frontage on the river always is limited to the actual size without possibility of enlarging it by uniting it with the other lots.

Lot 82 cannot consistently be made a unit with the other lots for the purpose of building vessels or moorage on the front; because it is physically separated by the highway from the rest of the property. It can be used in connection with the shipyard for storage, etc., as used in the past by the Crown, just as much as any other parcel of land in the vicinity might be used as a lumber yard for storage purposes. But that does not make it a unit with the yard in such a manner as if separated therefrom it would be damaged. See upon this subject the two leading cases of *Cowper Essex v. Local Board of Acton*[1] and *Holditch v. C. N. Ont. Ry. Co.*[2]

Moreover, the shipyard as a whole was not, and is not, composed exclusively of lands belonging to the defendants at the date of the expropriation, but was, and is, composed in a large measure of both Government lands and defendants' lands, with part of the plant and buildings on Government property.

This lot 82 was never connected with the railway. In fact, the lots 84, 85 and 86 were really never con-

[1] (1889), 14 App. Cas. 153.
[2] [1916] 1 A.C. 536.

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nected with the railway; the railway spur or siding runs only on that part of the shipyard which belongs to the Government, and did so before the expropriation. What induced the witnesses to testify in the manner they did was apparently because the yard, as a whole, had railway connection; but it only had it because the railway ran on the government property, but not on any part of the defendants' land in question herein.

The damages claimed as flowing from the abandonment, and as put by the statute "in connection with all the other circumstances of the case", is entirely a question of fact, and under the circumstances of the case I fail to see any other compensation allowable but that in respect of the use and occupation of such lands as above set forth.

The expropriated part of lot 82 has been all through the evidence and during the trial spoken of as having a frontage, on the River Richelieu, of 400 feet; but if measurements are taken from the plans filed of record, both by the plaintiff and defendants, it will be seen that it has not quite 300 feet frontage. On its extreme southern side it may have a depth of about 400 feet, and on the extreme northern side slightly over 300 feet. However, at the back of that part expropriated and colored red on some of the plans, the defendants own, as part of lot 82, another area of the same width and of a depth of about 300 feet.

In 1865, the steamboat "Quebec", 288 feet in length, was built upon lot 82, upon which there are now two wharves, an old and a new one. The plant used by the government shipyard, at Sorel, is partly on government land and partly on the McCarthy land. So that if the government at any time, had

put an end to their tenancy, the McCarthy shipyard would have been left with an incomplete plant or with less plant. This plant, which belonged to the defendants before the expropriation, is sold to and taken by the government and paid for.

Lot 82 by itself, including the part originally expropriated and that part at the back, is of itself large enough for the purpose of a shipyard at Sorel, especially when it is considered that the size of the vessels that are being and can be built there is limited. It is of a large enough area for a Sorel shipyard when it is considered that in the past the works of this shipyard consisted for a small portion in the building of small vessels and chiefly in repairs.

All of these considerations, coupled with the very important fact that lot 82 is separated from the balance of the shipyard by the highway, led me forcibly to the conclusion that no damage resulted to lot 82 from the fact that lots 84, 85 and 86 have been expropriated and lot 82 abandoned. I have no doubt that the maintenance and development of a large shipyard at Sorel by the government, in all probability will increase as we go on, and would turn out to be of special, general advantage and benefit to lot 82, which should perhaps be taken into account by way of set off under the provisions of sec. 50 of the *Exchequer Court Act*.

Therefore, in the wording of sub-sec. 4 of sec. 23, of the *Expropriation Act*, taking into account the fact of such abandonment or revesting of part of lot 82, in connection with all the other circumstances of the case, in estimating or assessing the amount to be paid to the defendants, I have fixed the total amount of compensation in that respect at the sum of $1,777.57.

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Recapitulation of the amounts allowed, viz.:—

For lands taken	$19,076.85
For the buildings	18,250.00
For the wharves	16,354.10
From the abandonment	1,777.57
	$55,458.52

The business carried on upon the premises ever since 1874 was not so carried on by the owners, who for a number of years were endeavouring to part with their property. It is not a case where 10% can be allowed for compulsory taking.

Therefore, judgment will be rendered as follows:

1st. The lands and real property expropriated herein are hereby declared vested in the Crown from the date of the expropriation.

2nd. The compensation for the lands and real property so expropriated, with all damages arising out or resulting from the expropriation and the abandonment, as above mentioned, is hereby fixed at the total sum of $55,458.52, with interest on the sum of $53,680.95 from the 18th December, 1915, to the date hereof, and on the sum of $1,777.57 from the 24th January, 1919, to the date hereof.

3rd. The defendants are entitled to recover from and be paid by the plaintiff the said sum of $55,458.52, with interest as above mentioned, upon giving to the Crown a good and sufficient title, free from all hypothecs, mortgages, rents and incumbrances whatsoever, the whole in full satisfaction for the land and real property taken and for all damages

résulting from the said expropriation, as fully above set forth.

4th. The defendants are entitled to their costs of the action.

Judgment accordingly.

Solicitor for plaintiff: *F. Lefebvre.*

Solicitors for defendants: *Murphy, Perrault, Raymond & Gouin.*

1919
March 17.

IN THE MATTER OF THE PETITION OF RIGHT OF JOHN GEORGE McCARTHY, JAMES MARMADUKE McCARTHY, AND OF DAME LOUISE C. McCARTHY, WIDOW OF THE LATE WILLIAM G. WARNER, ALL THREE IN THEIR QUALITY OF TESTAMENTARY EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF THE LATE DANIEL McCARTHY, AND THE FIRST TWO IN THEIR QUALITY OF TESTAMENTARY EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF THE LATE JOHN McCARTHY,

SUPPLIANTS;

AND

HIS MAJESTY THE KING,

RESPONDENT.

Expropriation — Shipyard — Compensation — Valuation — Petition of right.

Held, where the Crown had been in occupation of a piece of land for a certain time previous to its expropriation, the compensation for such occupation was ascertained by accepting the value thereof as established in the expropriation proceedings and by allowing legal interest thereon.

PETITION OF RIGHT to recover for the use and occupation of land in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Montreal, January 8 and 30, 1919.

D. R. Murphy, K.C., *A. Perrault,* K.C., and *P. St. Germain,* K.C., for suppliants.

E. Lafleur, K.C., *E. H. Godin,* K.C., and *F. Lefebvre,* K.C., for respondent.

AUDETTE, J. (March 17, 1919) delivered judgment.

The suppliants, by their petition of right, seek to recover the sum of $80,000, with interest and costs.

alleged to represent the value of the use and occupation of their Sorel shipyard, since the 31st December, 1912, under the notice of cancellation of a running lease. This amount to cover the rent for the years 1913, 1914, 1915 and 1916.

The facts of this case are not only interwoven with, but are really so much the same as the facts in the action instituted by way of information by the Crown for the expropriation of this shipyard at Sorel, that at the opening of the trial an order was made, upon motion on behalf of the suppliants, the Crown acquiescing in the same, declaring the evidence, *viva voce* and documentary, in the case of *The King v. John G. McCarthy et al*,[1] common to this case, so far as applicable.

The petition of right action is but a corollary to the expropriation case, with respect to the period running from the 31st December, 1912, to the date of the expropriation, 18th December, 1915.

It is unnecessary to pass upon the question of the validity of the lease and the validity of its cancellation, since both parties have, at trial, accepted my view relating to the manner suggested by me at trial of fixing the compensation herein, and that is by treating the matter as if the Crown, under sec. 22 of the *Expropriation Act*, had taken possession of this property on the 1st January, 1913, instead as of the date of the deposit of the plan and description, on 18th December, 1915. The compensation should be ascertained by taking the full value of the property with the area originally mentioned in the information of the expropriation case and accepting the value found by the judgment in the expropriation

[1] Ante, p. 410.

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case, under its ratio for the value of the land per foot.

Therefore, to arrive at the capital upon which interest at 5% should run from the 1st January, 1913, to the 18th December, 1915, we will first take the already ascertained value of the shipyard with its restricted area, as follows:

Land	$19,076.85
Buildings	18,250.00
Wharves	16,354.10
	$53,680.95
To this should be added the abandoned area of 143,163 square feet, which, at 5 cents a foot, would represent	7,158.15
Making a total of	$60,839.10

Upon this amount of $60,839.10 interest will run at 5%, as already mentioned, between the 1st January, 1913, to the 18th December, 1915. The interest upon the same amounts to the sum of $9,009.19, which represents a fair and just compensation for the use and occupation of the land, arrived at under the provisions of sec. 31 of the *Expropriation Act*.

This amount may, at first sight, appear large in view of the rent that was formerly paid under the leases; but it should be approached both with the consideration that the government occupied a larger area than that covered by the leases, and also under the circumstances mentioned in Exhibit F.

It is unnecessary to decide whether this action by petition of right was necessary and whether the matter covered thereby could not have been made

part of and decided by the expropriation case; it will suffice to say that counsel for the claimants stated this action was taken to prevent the statute of limitation, or rather prescription, becoming a bar to the recovery of the back rent.

Having, however, in the result treated the period covered by the petition of right as if it formed part of the expropriation case, interest cannot be allowed upon the interest already allowed.

In so far as necessary to the determination of all the questions in controversy between the parties in the two actions, these reasons may be read with and taken as part of the reasons for judgment in the expropriation case. Judgment in the latter case being rendered on the same date as in the present case.

Judgment will be entered declaring that the suppliants are entitled to recover, from the respondent, the said sum of $9,009.19 and costs.

Judgment for suppliants.

Solicitors for suppliants: *Murphy, Perron, Raymond & Gouin.*

1915
May 4.

THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA,

PLAINTIFF;

v.

MARGARET HUNTING, LUCY BARROW, AND EMILY BELL (3 cases),

DEFENDANTS.

Expropriation—Business property—Shopping centre — Hotel—Compensation—Allowance of 10% for compulsory taking.

The Crown, for the purpose of extending the Post Office at the city of Hamilton expropriated several properties in the shopping centre of the city, one of which was a hotel property.

Held, that the owners were entitled to be compensated according to the value of the properties as business property, and that the hotel property, though acquired in separate lots, should be valued as one property, according to the frontage of the building occupied as the hotel, taking into consideration the present state of repairs of the properties, plus an allowance for the compulsory taking.

INFORMATION to fix compensation in an expropriation of land by the Crown.

Tried before the Honourable Mr. Justice Cassels, at Hamilton, February 2, 3, 4, 1915.

J. G. Gauld, K.C., and *S. D. Biggar,* K.C., for plaintiff.

Geo. Lynch-Staunton, K.C., for defendant Hunting.

M. J. O'Reilly, K.C., for defendant Barrow.

Charles Bell, K.C., for defendant Bell.

CASSELS, J. (May 4, 1915), delivered judgment.

These cases were tried before me in Hamilton on the 2nd, 3rd and 4th days of February, 1915.

The cases arise out of an expropriation by the Crown of certain lands in Hamilton, for the extension of the post office.

The properties in question comprise four parcels of land, two of them owned by the defendant Margaret Hunting, one by Lucy Barrow, and one by Emily Bell. These four parcels of land form one continuous block on the west side of John Street, in the City of Hamilton, and extending northerly from Main Street along John Street to an alleyway between the northern boundary of the Bell property and the post office, the post office being situate on the south side of King and John Streets. It is obvious that to a very great extent the evidence applicable to one case would be applicable to all.

At the opening of the case it was agreed by the counsel for all parties that the general evidence given should be applicable to all the cases, each claimant to have the right to put in additional evidence applicable to that particular case.

The southerly property in question, which is the property of Mrs. Hunting, has a frontage on John Street of 56 feet and 2 inches, running back to a depth of 69 feet and 3 inches along and parallel to Main Street.

There are also certain rights to an alleyway on the west of the premises which is said to be of value. The title to the alleyway and the rights of the parties thereto are stated by Mr. Staunton towards the end of the evidence of Mrs. Hunting, and was accepted as accurate by the various counsel.

The next property north and immediately adjacent to the Hunting hotel property is that of Emily

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Barrow. This property has a frontage of 23 feet 4½ inches on the west side of John Street, by a depth of 69 feet 9 inches parallel to Main Street. There is also a right in the alleyway to the west.

Mrs. Hunting is the owner of the third property immediately north of the Barrow property. It has a frontage of 26 feet 7½ inches on John Street, with a depth of 79 feet 9 inches, parallel to Main Street.

The fourth property is one belonging to Emily Bell. It is adjacent to and immediately north of the Hunting property, and it has a frontage of 32 feet 2½ inches on the west side of John Street, running back 79 feet 9 inches, parallel to Main Street. This property has an advantage over the properties immediately next to it in that there is an alleyway north, giving them right of light on three different sides.

A great deal of evidence was given, a good deal of it of an unsatisfactory nature by reason of there being no sales of property in the immediate neighbourhood, namely, on John Street between Main Street and King Street. There is evidence of sales of properties within a period not far removed from the date of the expropriation, the 22nd February, 1914, on the north side of John Street between King Street and King William Street. I think it is clear from the evidence that there has been a very large advance in the value of real estate in Hamilton within the last few years. It has been shown that between the years 1901 and 1914 the population of Hamilton has about doubled, the population in 1914 reaching, according to the evidence of Vernon, the number of 100,700. I think there is no doubt that John Street should be looked upon, probably next to James Street, as the most important street leading

north and south. Main Street, at the corner of which the hotel property stands, is the street upon which the Court House is erected, and the park forming part of the lots of the Court House abut on this street. Further south some considerable distance is the station of the Canadian Pacific Railway. The haymarket is situate south of this station, and a very considerable business has been developed in that locality. I think, on the evidence, it is clear that the property on James Street and the property on the north side of King Street extending from James Street easterly to John Street, and further east, is of much more value than property on John Street south between Main and King, and prices paid for property near James Street or on King on the north side between James and John and further east, are not a safe guide in endeavouring to arrive at values on John Street south between Main and King.

A great deal of evidence was given as to the relative values of properties on John Street south between King Street and Main Street, and John Street north between King Street and William Street, the object being, I presume, to minimize as far as possible the values sought to be proved by reference to sales of property on King Street north.

My opinion is that, having regard to the evidence and the facts of the case, the property for retail shops is more valuable on John Street north between King Street and King William Street. It is conceded that King Street north from James Street to John and further east is built up and occupied by the best retail shops in the City of Hamilton. Mr. McKay, who was referred to as a very competent witness, points out that you cannot compare King Street and James Street property with the corner of John and

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Main Street. King Street from James Street, running east, is a very wide street. It has in the centre of it what is called Gore Park. The south side of King Street, between James and John Street, is to a very great extent built up by mercantile institutions. It seems to me that what occurs to one's knowledge in outside cities is likely to happen in Hamilton as the population increases, and as the property on the north side becomes so valuable that people carrying on retail business must move, they are likely to move on to the side streets nearest to the shopping centre with its large traffic.

Coming back to the properties in question, the north-west corner of Main and John Streets, owned by Mrs. Hunting, is, I think, unquestionably the more valuable of any of the four properties in question in this action. At the present time it is difficult to see what other purpose it is adapted to than for a hotel site. Some of the witnesses have dealt with this hotel property as if it formed two parcels by reason of the fact that the 56 feet and 2 inches were acquired under different titles. I think this is an erroneous way of looking at the case. It is held as one property. The plaintiff in the information treats it as one property. It is covered by the hotel and, I think, should be valued as one property. The hotel building does not cover the whole of the lot. There is considerable space between the westerly end of the hotel and the westerly end of the boundary of the lot. For some time past the hotel has been rented to one Kempf. It is conceded that the hotel building, and in fact all the buildings on the other three properties, are in an extremely bad state of repair. Mrs. Hunting apologizes for the bad state in which her building is by reason of lack of money. The Barrow property,

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slightly better, has had some $1,500 expended upon improvements. The Bell property is also admittedly in an extremely bad shape. The explanation in regard to this property being allowed to get into such a bad shape was the probability of expropriation for the enlargement of the post office. It appears that for a considerable number of years back, Kempf, the tenant, has been paying a rental of $135 a month, that he also agreed to expend, and did expend the sum of $4,000 to $4,500 in repairs out of his own pocket, which repairs would, at the end of the lease, belong to Mrs. Hunting. She was getting about $1,620 a year rent, less $375 taxes, which were paid by the landlady. It is true that in addition to that they would save $4,500 by the repairs expended by the tenant, which, spread over a five years lease, would amount on an average to $900 a year. It is quite clear that these repairs were not of a very permanent character, and will not be worth at the end of the five years the sum of $4,500 to Mrs. Hunting. It is proved, I think, that some three years ago, the tenant Kempf offered Mrs. Hunting to expend some $8,000 to $10,000 in adding to the hotel property, making it more modern, the condition being that he should have a lease of ten years at a rental of $2,400 a year, and that the improvements at the expiration of the lease should belong to Mrs. Hunting. After deducting taxes, this would have left Mrs. Hunting an annual income of about $2,000 a year for the period of ten years, which, at five per cent. capitalized, would be about $40,000, with the addition that she would obtain any increased value arising in the future from the probable increase in population, and consequently of values.

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The tenant Kempf states in his evidence that an expenditure of $9,000 would add to the hotel and give him an addition of 40 rooms, in which case he would be willing to pay $3,500 a year. With an expenditure of $14,000, it would give him an additional storey and 60 rooms additional, for which he would be willing to pay $4,500 a year. I find no evidence, however, of any offer being made to pay these sums, the only offer being the sum of $2,400 previously mentioned. Mrs. Hunting places the value of the land at $2,000 a foot frontage for the hotel property and $1,500 a foot frontage for the property further north situate between the Barrow and the Bell properties. These prices, to my mind, are absurdly in excess of the real value from a market standpoint. What may happen in the next ten years one cannot foresee, but having regard to the present, there is no justification for any such values. Mrs. Hunting, no doubt, is much affected by the fact that the property has been held in the family for a great number of years, and she no doubt feels it hard to be deprived of it.

Waugh gives evidence in regard to the north-west corner of John and King Street. He shows what is apparent, that the property has very much increased in this locality in Hamilton between 1899 and 1912, that the value of property situate on the north-west corner of John and King Streets has very little bearing on the value of property on the north-west corner of John and Main Streets.

Mr. D'Arcy Martin's evidence is no doubt entitled to weight. He thinks, and I fancy rightly, that John Street comes next to James Street on the east as one of the leading thoroughfares of the city, and he looks forward with considerable hope to the time when property on John Street would become as valuable

as property on James Street. He has no evidence of any sales on John Street between Main and King Streets. He himself is basing his hopes more upon what may happen in the future than on any present market value. His view is that it would be better to let the property remain as a hotel site in the meanwhile to assist in carrying the property that will eventually become too valuable for a building of the character of the one on it, and would have to be replaced by either a more modern hotel or building of a different class. Therefore, in placing his value of $1,500 a foot, he puts that as exclusive of the value of the building. It has to be borne in mind that this means carrying the property at a loss of a very considerable amount in the way of interest, and moreover it by no means follows that unless a considerable sum of money is spent in putting the hotel property in order, the tenant would continue on.

Lounsbury puts the value of the land alone without the building at $2,000 a foot, an absurd valuation according to my idea.

McKay puts a value on the Hunting corner property of $1,500 a foot; and the second property further north at $1,200 a foot. When we come to the Crown's evidence, Gibbs refers to a purchase on the east side of John Street north between King and King William, situate about 21½ feet south of King William. This purchase was in January, 1912, and comprised a property consisting of 13 feet 6 inches on John Street by 76 feet in depth. There was a four-storey building on it and the price paid was $600 a foot frontage, including the building. James Dixon refers to a property two doors west of the post office on King Street. It was sold in 1911 to one McKay for $20,000. There were buildings on the

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property covering the whole lot, three stories in height. The property had a frontage on King Street of 19 feet 6 inches by a depth of 120 feet. The price paid was about $1,024 a foot frontage.

Walter W. Stewart, an architect, is called as to the buildings, and gives a bad account of the state of the repair in which he found them. Referring to the Bell building, he finds 100,500 cubic feet, which could be erected new at 9½ cents a cubic foot, with the depreciation of 50%—this would bring the present value of the Bell building, according to his idea, a little under $5,000.

The Hunting building, between the Barrow and the Bell building, 63,650 cubic feet, which he values new at 9½ cents a cubic foot, and allows off 50% for depreciation, which would bring the value to about $3,000. The Barrow building, 58,200 cubic feet, with depreciation would come to under $3,000. The hotel properties, the cubic contents for the addition, 4,788 cubic feet, and the hotel proper 101,750, which he values new at eleven cents a cubic foot, with a loss for depreciation of 50%, which would bring the values up, according to his idea, to about $6,000.

Munro is another architect agreeing to a great extent with Stewart.

It is useless attempting to repeat all the evidence. I have analyzed it to a great extent in order to come to the best conclusion I could.

After the best consideration I can give to the cases, I am of opinion that the tenders should be increased. As I pointed out, the hotel property is peculiar. It is pretty difficult to arrive at the exact market value. The tender for this is $51,360.66. I think if Mrs.

Hunting were allowed $60,000 she would be fully compensated. In addition, I would allow $6,000 for compulsory parting with the property, making in all $66,000 in respect of the hotel property, and this sum I will allow.

In respect to the second property situate between the Barrow and the Bell property, if she receives $23,000 I think she will be fully recompensed, and I also allow her $2,300 for compulsory expropriation. I think Mrs. Hunting should have the costs of the action, and I so order.

The Barrow property is slightly in better repair. I will allow for this property $22,000, which I think is sufficient, to which I would add $2,200 for compulsory expropriation, and she is entitled to her costs of the action.

With respect to the Emily Bell property, in her statement of defence, she claimed the sum of $48,000, being at the rate of $1,500 a foot frontage. She then claims $6,720 for the buildings, which she allows at ten cents a cubic foot. By her particulars she allows off the sum of $5,970. The allowance made is a sort of apology for having omitted to claim it by the defence, the total claim being $48,750. I think if she is allowed $32,000 she will be fairly recompensed, to which I would add 10% for the taking under compulsory powers, and she is entitled to her costs of the action.

I occupied a very considerable amount of time in analyzing all the evidence, and without making almost a complete re-copy of it, it is useless to go

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into it more in detail than I have endeavoured to do in these reasons.

*Judgment accordingly.**

Solicitors for plaintiff: *Biggar & Treleaven.*

Solicitor for defendant Hunting: *Geo. Lynch-Staunton.*

Solicitor for defendant Barrow: *M. J. O'Reilly.*

Solicitors for defendant Bell: *Bell & Pringle.*

* Affirmed by Supreme Court of Canada, 32 D.L.R. 331.

HIS MAJESTY THE KING, ON THE INFORMATION OF THE ATTORNEY-GENERAL OF CANADA, ON THE RELATION OF THE NATIONAL BATTLEFIELDS COMMISSION,

PLAINTIFF;

AND

ANNIE TIMMIS, WIDOW OF THE LATE WILLIAM MILLER; SARAH MARY MILLER, WIDOW OF ALBERT PIERRE LEPINE; MARY LEPINE AND HILDA LEPINE; LOTTIE MILLER, OF THE STATE OF MICHIGAN, WIDOW OF THE LATE TIMOTHY McLAUGHLIN; EMMA MILLER, WIFE OF WILLIAM HALLANDAL, AND THE SAID WILLIAM HALLANDAL, BOTH PERSONALLY AND TO ASSIST AND AUTHORIZE HIS SAID WIFE; JOHN MILLER AND VERNON MILLER, OF THE STATE OF MICHIGAN AND NOW OF PARTS UNKNOWN; WILLIAM AULDRICH, GRACE AULDRICH, VERON AULDRICH, ALL THREE OF THE STATE OF MICHIGAN; MARK SIDNEY AULDRICH, ALSO OF THE SAID STATE, BOTH PERSONALLY AND AS LEGAL GUARDIAN TO HIS TWO MINOR CHILDREN, LEAH AULDRICH AND CECIL AULDRICH, ISSUE OF HIS MARRIAGE WITH THE LATE SARAH MILLER, AND HIS MAJESTY'S ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC,

DEFENDANTS.

1918
Dec. 21.

Expropriation—Compensation—Title of owners—Deed—Prescription—Infancy.

By a deed between father and son, executed in 1880, it was provided, that in consideration of the son's release of his rights in the estate of his mother, the father "promises to transfer to his son, at his demand, all his rights and pretensions into certain two lots of

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land." The demand to transfer was never made and prescription had meanwhile run against this right, except for the interruption thereof on account of the minority of certain children. The Crown expropriated the land for the purposes of the National Battlefield at Quebec.

Held, that the deed created a gift upon a potestative condition exercisable by the donee and his heirs, a mere *jus ad rem* to demand the transfer but conveying no fee in the land, which was extinguishable by prescription; that the compensation monies may be paid to the owners in possession subject to their undertaking of indemnifying the Crown in respect of any claims which might be asserted by the children against whom prescription was not acquired,—such right being a divisible right.

INFORMATION for the vesting of land and compensation therefor in an expropriation by the Crown.

Tried before the Honourable Mr. Justice Audette, at Quebec, February 11 and November 28, 1918.

E. Belleau, K.C., and *L. S. St. Laurent,* K.C., for plaintiff.

Donald McMaster, K.C., and *A. Gobeil,* K.C., for defendants.

AUDETTE, J. (December 21, 1918), delivered judgment.

This is an information exhibited by the Attorney-General of Canada, whereby certain lands were taken and expropriated for the purposes of the "National Battlefields at Quebec", by depositing, on the 20th September, 1911, a plan and description of such lands in the office of the Registrar of Deeds for the County or Registration Division of Quebec, P.Q.

The Crown, by the information, offers the sum of $3,557.40, with interest thereon from the 20th September, 1911, to the date of judgment—this amount being payable to whomsoever is declared by the Court entitled thereto.

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Four of the defendants,—Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine—have appeared by solicitor and counsel and by their plea admit the amount so offered by the information to be a fair and just compensation and ask that the same be paid over to them.

The defendant, Emma Miller Hallandal, who, on the 16th April, 1917, filed a plea whereby she declared herself satisfied with the amount offered by the Crown, concluding by a demand to share in the same, also, on the 14th May, 1918, filed a disclaimer or *retraxit,* whereby she discontinued, surrendered and abandoned any claim herein.

The defendant, the Attorney-General of the Province of Quebec, who, made a party hereto in respect of the ground rent upon the lands expropriated, although duly served, made default in delivering a defence and did not appear at trial. The offer made by the information in respect of the arrears and capital of this ground rent, is the sum of $200.63, and judgment should be entered in favour of the Province of Quebec for the amount so offered, with interest.

Counsel appearing at trial for the plaintiff and for the four above-mentioned defendants declared the Attorney-General of the Province of Quebec would be satisfied with the sum of $200.63, without interest; if so, that interest should accrue to the other defendants who recover.

All the other defendants—excepting those just mentioned—have been duly served either out of the jurisdiction of the Court, or, being of parts unknown, were called by the newspapers, and being thus served with the information, have made default in deliver-

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ing a defence—including William Hallandal, the husband of the above-mentioned defendant Emma Miller Hallandal, who also did not appear.

But for a certain clause, hereafter mentioned, appearing in a deed of the 20th November, 1880, the compensation monies,—excepting, however, in respect of the ground rent,—would have been paid to the four defendants represented by counsel; hence the institution of the present action with the object of allowing the Crown to pay to the proper persons and have proper title.

This deed *inter vivos* of the 20th November, 1880, —Exhibit No. 5,—is practically, for all purposes, a deed of agreement,—*un acte d'accord*—as between father and son in respect of the abandonment of the rights the son had in the estate of his mother, his father's first wife. The deed, after reciting and describing the lands he thus released and the consideration the father pays therefor, proceeds as follows:—"And as a further consideration for the "present *cession de droits successifs*, the said Wil- "liam Miller promises to transfer to his son, at his "demand, all his rights and pretentions as they now "are into two certain lots of land situated without "the limits of the City of Quebec, on the Plain of "Abraham, between Grande Allee and the Cime du "Cap, theretofore known as lots Nos. 67 and 68 on "a certain plan, but now known as lots Nos. 161A "and 161B, of the Parish of Notre Dame of Quebec, "Banlieue of the City of Quebec."

Now the lots expropriated herein are the lots 161A and 161B mentioned in that deed of 1880, Exhibit No. 5.

The demand to transfer these lots was never made by the son or by any of his heirs and assigns up to date. Thirty-eight years have elapsed since the date of that deed. W. H. Miller, the son, died on the 27th February, 1889. On his death prescription had run against that right for eight years, three months and seven days. The prescription of 30 years has since run and been acquired against this right in respect of four of W. H. Miller's children; but through the interruption caused by the minority of the children of Sarah Miller Auldrich, the prescription of 30 years has not been acquired as against herself, her heirs and assigns. And there being no evidence on the record of their respective ages, I am unable to ascertain when the 30 years will expire.

Annie Timmis, the second wife and widow of the late William Miller, appears to be the registered owner of the property and to have had constructive possession of these vacant lots ever since. She has paid taxes upon the same. She was sued by the City of Quebec for such taxes, because she appeared to all intents and purposes to be the apparent legal owner of the same, and she satisfied such claim.

Without expressing a considered opinion on the nature and effect of the above-mentioned provision in the deed of the 20th November, 1880, it would appear to be nothing more than a gift upon a potestative condition exercisable by the donee and his heirs, *a jus ad rem* as distinguished from *a jus in rem* which did not convey the fee in such land, but only a right to demand such transfer. And such right is a divisible one which, as exercisable by four of the parties mentioned in the paragraph 8 of the information, has been extinguished by the acquired

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prescription of 30 years. The only possible claim that could now be set up would be on behalf of the children of Sarah Miller Auldrich for one-fifth of the monies, namely, the sum of $711.48, with interest from the 20th September, 1911, to the date hereof. See *Domat's Civil Law* (Strahan's trans.)[1], and *Page v. McLennan.*[2]

Therefore, under such circumstances, out of the compensation monies,—the ground rent, capital and interest should first be satisfied. Then the balance should be paid to the four defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine, in the following proportion, viz.: one-half to Annie Timmis; one-quarter to Sarah Mary Miller; one-eighth to Mary Lepine; one-eighth to Hilda Lepine. However, these monies will be paid to these four defendants only upon the condition precedent that they shall first give to the Crown good and sufficient title to the lands in question, with covenant to indemnify if at any time any trouble arise in respect of such title,—and moreover, upon these four defendants also giving to the Crown a bond, to the satisfaction of the Registrar of the Court, whereby they will undertake to indemnify the Crown in respect of any claim which might be hereafter made by the children, or their heirs and assigns, of the said Sarah Miller Auldrich. This bond to run up to and expire on the date when the prescription of 30 years would expire, reckoning in such computation of years the time such prescription ran in the lifetime of both W. H. Miller and his daughter, Sarah Miller Auldrich, when of age.

[1] Vol. 2, p. 431, and foot note.
[2] (1895), 7 Que. S.C. 368.

In the final adjustment between the four defendants—Annie Timmis, Sarah Mary Miller, Mary Lepine, and Hilda Lepine,—the amount of the taxes paid by Annie Timmis alone, must be adjusted and equally borne by the said four defendants.

Coming to the question of costs, it is conceded that the amount offered by the Crown was accepted—but as the Crown did not see fit (with proper justification) to pay such compensation money to the four defendants in question, who were all claiming the same,—these defendants were put to cost which, but for this expropriation, they would not have been subjected to. I am therefore of opinion that these defendants should be compensated in a fair manner with respect to such cost and the giving of a bond, which I hereby fix at the lump sum of $200.

Therefore there will be judgment as follows:

1. The lands expropriated herein are declared vested in the Crown since the 20th September, 1911.

2. The compensation for the lands so expropriated is hereby fixed at the sum of $3,557.40, with interest thereon from the 20th September, 1911, to the date hereof.

3. The defendant, His Majesty's Attorney-General of the Province of Quebec, is entitled to recover from the plaintiff,—upon giving good and sufficient title and the release of the said ground rent—the sum of $200.63, with interest thereon from the 20th September, 1911, to the date hereof.

4. The defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine,—upon giving to the Crown good and sufficient title to the land in question, with covenant to indemnify the same if at any time trouble arise in respect of such title, and

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moreover upon their giving to the Crown the bond as above-mentioned, are entitled to recover and be paid by the said plaintiff the balance of the said compensation monies, namely, the sum of $3,356.77, with interest, in the following respective proportion, viz.: one-half to Annie Timmis; one-quarter to Sarah Mary Miller; one-eighth to Mary Lepine; one-eighth to Hilda Lepine, the amount of the taxes paid by Annie Timmis being first adjusted and borne equally by the said four defendants in their respective proportion.

5. The said defendants, Annie Timmis, Sarah Mary Miller, Mary Lepine and Hilda Lepine, are entitled to their costs, which are hereby fixed at the lump sum of $200.

Judgment accordingly.

Solicitors for plaintiff: *Belleau, Baillargeon & Belleau.*

Solicitors for defendant Emma Miller: *McGaughey & McGaughey.*

Solicitors for defendants Annie Timmis et al: *Campbell, McMaster & Papineau.*

IN THE MATTER OF THE PETITION OF RIGHT OF HOSPICE DESROSIERS, SUPPLIANT;

AND

HIS MAJESTY THE KING, RESPONDENT.

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Feb. 12.

Principal and Agent—Liability of undisclosed principal—Action against agent—"Factor or commission merchant."

M., without disclosing the fact that he was acting as agent for the Crown, purchased hay from the suppliant and was sued in a provincial court for a balance of the purchase price. At the trial that fact became known to the suppliant, but he nevertheless proceeded with the case and recovered judgment against M. Later the suppliant brought an action in the Exchequer Court to enforce the claim against the Crown.

Held, the suppliant having elected to proceed to judgment against M. could not afterwards sue the Crown.

2. That M., having been retained to make such purchases on a commission basis, was a "factor or commission merchant" and alone liable under arts. 1736, 1738, of the Quebec Civil Code.

PETITION OF RIGHT to recover a balance for goods sold and delivered.

Tried before the Honourable Mr. Justice Audette, at Montreal, January 31, 1919.

E. F. Surveyer, K.C., and *L. E. Beaulieu,* K.C., for suppliant.

F. J. Laverty, K.C., and *O. Gagnon,* for respondent.

AUDETTE, J. (February 12, 1919), delivered judgment.

This matter comes before the Court under the provisions of rule 126, whereby the points of law arising upon the statement in defence are *in limine* submitted for adjudication before trial.

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The facts alleged by the pleadings are, for the purposes herein, taken as admitted.

During the months of August, September and October, 1914, the suppliant sold and delivered to one James McDonnell a certain quantity of hay which was partly paid for, leaving, however, a balance due, for the recovery of which the present action is instituted under the circumstances hereinafter mentioned.

McDonnell always acted in his own name, never disclosing whether or not he was acting for any principal. Failing to pay the balance claimed by the suppliant, an action was—prior to the filing of the present petition of right—instituted by Desrosiers against him (McDonnell) in the Superior Court for the District of Montreal for the same claim set out in the present action.

At the opening of the trial of that case in the Superior Court, counsel for the defendant McDonnell informed the Court that the hay in question had been intended for the benefit of the Imperial Government. Nevertheless Desrosiers elected to pursue his remedy to judgment against McDonnell in the Superior Court. He did not ask to suspend the action and made no claim against the Crown until after judgment had been rendered in his favour in this action before the provincial court.

The question now submitted is whether or not the fact of having pursued his remedy against McDonnell by obtaining judgment against him is now a bar to the present action,—accepting as a fact for the purposes herein that McDonnell was, in purchasing and accepting delivery of the hay, acting for an undisclosed principal, a fact which came to Desrosiers'

knowledge at the opening of the trial of the case before the Superior Court, and *before judgment was entered against McDonnell.*

Under the laws of the Province of Quebec, as laid down in art. 1716, a mandatory (agent) who acts in his own name is liable to third parties with whom he contracts, without prejudice to the rights of the latter against the mandator (principal) also. There is no corresponding article in the Code Napoleon. At page 10, vol. 3, of the Report of the Commissioners appointed to codify the law of Lower Canada, it is said that the law as laid down in art. 1716 "declares useful rules of undoubted authority in our "law, which, it may be observed, differs from the "Roman Law. Under that system, originally the "mandatory was always personally liable, being "obliged to contract in his own name. This rigor, "however, was afterwards modified by the praetors "in dealing with commercial mandatories known as "*Institores, Exercitores* and *Prepositi.*"

Under art. 1727 of the Civil Code, also relied upon by the suppliant and which really completes art. 1716, the mandator (principal) is bound in favour of third persons for all the acts of his mandatory (agent), except in the case of art. 1728,—to which reference will be hereafter made. Now, under this doctrine, the Commissioners for the Codification say (vol. 3, p. 12) that this article "announces the gen- "eral rule of the liability of the mandator and does "not materially differ from art. 1998 of the Code "Napoleon. Troplong, however, puts the construc- "tion upon that article that the mandator is not "bound when the contract is in the name of the "mandatory, without the name of the other being

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"disclosed, except in certain cases. This is in har-
"mony with the doctrine of the Roman law; but it is
"directly against the rule declared by Pothier, with
"*whom the English, Scotch and American law coin-*
"*cides.* The article submitted is based upon
"Pothier's statement of the rule, and includes all
"acts of the mandatory whether in his own name or
"that of the principal."

It would seem conclusive that under the articles just cited that the English common law is introduced upon the general principles of the subject matter in question and that where no solution or precedent can be found upon the question submitted herein which necessarily flows from such general principles, recourse should be had to the English common law, which is rich and exhaustive upon the question under consideration, and to which reference will be hereafter made.

Counsel for the suppliant—it may be said *en passant*—seems to rely with great stress upon the citation to Story, at p. 570 of vol. 13, in de Lorimier's Bibliothèque du Code Civil; but he overlooks that the learned author's reference is not apposite and is absolutely *nihil at rem,* because he relies upon *Story on Bailment,* which is quite a different doctrine from that of agency. Indeed, from the perusal of a few pages of *Story on Bailment,* under the head of *Mandates,* it is immediately realized that the whole of that chapter refers to bailment and not to agency; the doctrine of law corresponding to bailment under the Code is known as that of deposit, and that of agency as mandate. Moreover, in referring to *Story on Agency,* we find the very leading case of *Priestly*

v. Fernie[1]—to which reference will be hereafter made.

Strong, J., in *V. Hudon Cotton Co. v. Canada Shipping Co.*,[2] says: "Articles 1716 and 1727 of the "Civil Code, which make the principal liable to third "persons, even although the agent may have con- "tracted in his own name, and as a principal, thus "assimilating the law of Quebec to the English law, "must, I think, be considered by an extensive con- "struction as also making third persons so contract- "ing with the agent liable reciprocally to the prin- "cipal. . . . From the terms of the articles and from "the Report of the Commissioners, it appears to "have been intended to make this provision accord "with the doctrine of Pothier . . . and the cor- "responding rule of English commercial law which, "as is well known, differs in this request from the "modern French law."

In this case the Supreme Court of Canada has felt bound to accept the English common law in construing art. 1716 and its consequences—that is, in dealing with the rights and liabilities arising thereunder. See also *Bryant v. Banque du Peuple.*[3]

I was, at the argument, referred to no jurisprudence of the Province of Quebec upon the subject in question, and after research I have been unable to find any. In the absence of the same, I take it that as arts. 1716 and 1727 are different from the Code Napoleon and are borrowed from both Pothier and the English law, that general principles of the English law governing such doctrine should also be adopted in questions flowing from such doctrine and

[1] (1863), 3 H. & C. 977; 159 E.R. 820.
[2] (1883), 13 Can. S.C.R. 401.
[3] [1898] A.C. 170.

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which are a sequence from the same, as Strong, J., seems to have found in the case above mentioned.

The English common law is indeed redundant with precedents upon the subject in question. The effect of such doctrine is that the creditor may make his *election* to sue either the principal or the agent at any time before he has obtained judgment against either of them; but he has no such option after he has so sued one of them to judgment. Conclusive evidence of such an election is afforded by an action which has been proceeded with to judgment and execution even without satisfaction, says *Evans on Agency*—2nd ed. p. 529.

The leading case upon this point is *Priestly v. Fernie*,[1] decided in 1865, before the Civil Code, P.Q., was in force. In that case it was held that the second action did not lie, even if the judgment was not satisfied. "If this," says Baron Bramwell, who delivered the judgment of the court, "were an ordinary case "of principal and agent, where the agent, having "made a contract in his own name, has been sued on "it to judgment, there can be no doubt that no second "action would be maintainable against the principal. "By an election to sue was meant an election to sue "to judgment. The reason given being that an "action against one might be discontinued and fresh "proceedings be well taken against the other.— "*Evans*, 530." And Baron Bramwell, in the *Priestly* case (ubi supra), adds: "The very expression that "where a contract is so made, the contractee has an "election to sue agent or principal, supposes *he can* "*only* sue one of them; that is to say, sue to judg- "ment."

[1] 3 H. & C. 977; 159 E.R. 820.

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In *Kendall v. Hamilton*,[1] Lord Cairns says: "I "take it to be clear that, where an agent contracts in "his own name for an undisclosed principal, the "person with whom he contracts may sue the agent, "or he may sue the principal, but if he sues the agent "and recovers judgment, he cannot afterwards sue "the principal, even although the judgment does not "result in satisfaction of the debt. . . . But the rea- "sons why this must be the case are, I think, obvious. "It would be clearly contrary to every principle of "justice that the creditor who had seen and known "and dealt with and *given credit to the agent*, should "be driven to sue the principal if he does not wish "to sue him, and, on the other hand, it would be "equally contrary to justice that the creditor, on "discovering the principal, who really has had the "benefit of the loan, should be prevented suing "him if he wishes to do so. But it would be no "less contrary to justice that the creditor should be "able to sue first the agent and then the principal "when there was no contract, and when it was never "the intention of any of the parties that he should "do so." (And in the present case it is alleged in the petition of right that McDonnell was buying on a commission upon the number of tons.) "Again, if "an action were brought and judgment recovered "against the agent, he (the agent) would have a "right of action for indemnity against his principal, "while, if the principal were liable to be also sued, "he would be vexed with a double action. Farther "than this, if actions could be brought and judgment "recovered first against the agent and afterwards "against the principal, you would have two judg- "ments in existence for the same debt or cause of

[1] (1879), 4 App. Cas. 504.

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"action; they might not necessarily be for the same "amounts."

There is upon this doctrine a very long catena of decisions to the same effect and purport and I will limit myself to mentioning only the following:— *Halsbury;*[1] 10 Encyclopædia of the Laws of England, 373, and cases therein cited; *Wright;*[2] *Ethier v. Pilon;*[3] *Huard v. Banville;*[4] *Beaudoin v. Charruau* et al;[5] *Barnard v. Duplessis Independent Shoe Co.;*[6] *Anson on Contract;*[7] *Bowstead on Agency;*[8] *Morel v. Earl of Westmoreland.*[9]

In addition to all that has already been said, there is the important allegation, in the first paragraph of the petition, that McDonnell, in purchasing the hay from the suppliant, was acting under a contract whereby he was receiving a commission based upon the number of tons procured. This allegation would certainly make McDonnell, under art. 1736, "a factor or commission-merchant", and bring the whole matter within the purview of art. 1738, referred to in art. 1727. If the facts disclosed at the trial of the case before the Superior Court, at Montreal, are as alleged in sub-par. (d) of par. 3 of the statement in defence, does not then the case come under art. 1738, and is not the factor alone liable under these circumstances?

I therefore find, under the circumstances of the case, that McDonnell's principal was disclosed to the

[1] Vol. 1, No. 445, p. 209.
[2] *Principal and Agent,* 401.
[3] (1901), 7 Rev. de Jur. 97.
[4] (1907), 31 Que. S.C. 27.
[5] 15 Rev. Leg. 213.
[6] (1907), 31 Que. S.C. 362; 19 Que. K.B. 414.
[7] (ed. 1917) 420.
[8] 5th ed. 306, 321.
[9] [1904] A.C. 11.

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suppliant before he obtained judgment in time for him to stay his hand, and that the fact of persisting to sue to judgment with such knowledge amounts to a bar and estoppel which denies him a second action against the principal. It is a *fin de non recevoir.*

The suppliant is therefore found not entitled to the relief sought by his petition of right.

Petition dismissed.

Solicitors for suppliant: *E. F. Surveyer, L. E. Beaulieu.*

Solicitors for respondent: *Rainville & Gagnon.*

1919
March 5.

WILLIAM MARTIN, OLIVER MARTIN AND ARTHUR CAROW, TRADING AS CAROW TOWING COMPANY,

PLAINTIFFS;

v.

THE "ED. McWILLIAMS," HER CARGO AND FREIGHT,

DEFENDANT.

Towage—Lien for—Mortgage—Priorities—Lex loci—Place of contract—Acceptance by telephone.

Under British and Canadian law a claim for ordinary towage does not give a maritime lien upon the ship towed nor one superior or prior to a mortgage existing upon it at the time the claim arose.

2. Where a contract is proposed and accepted over the telephone, the place where the acceptance takes place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting had done so by posting a letter, or by sending off a telegram from that place. The contract having been accepted in Canada was governed by Canadian law.

ACTION for towage by the plaintiffs against the ship "Ed. McWilliams", a British ship registered at Amherstburg, Ontario.

The plaintiffs are a partnership, with their head office at Cheboygan, Michigan, in the United States of America.

The contract of towage on which the claim herein was based, was arrived at as follows: Telegram from Sault Ste. Marie, Ontario, by the Lake Superior Paper Company, to plaintiffs at Cheboygan, Michigan, and reply from plaintiffs to the Paper Company. No contract was made by these telegrams. Subsequently a long distance telephone call was sent by the plaintiff, William Martin, at Cheboygan, to Capt. Thos. R. Climie's house at Sault Ste. Marie, Ontario,

where it was answered by Capt. Climie, who by telephone discussed and agreed to the terms of the towage contract.

The subsequent towage service was in accordance with the contract, and consisted in towing the "Ed McWilliams", a dump barge, from Sault Ste. Marie, Ontario, to Calcite, Michigan, light, and back to Sault Ste. Marie, Ontario, loaded with limestone. The claim $434.38 was admitted to be correct.

At the time of the towage contract and of said towage service, the "Ed. McWilliams" was subject to two registered mortgages, both of which are still subsisting. The amount of these mortgages greatly exceeds the value of the ship.

No appearance having been entered, the plaintiffs, after some time had elapsed, applied for leave to proceed *ex parte,* and to set down the action for trial, in the usual way, and to prove their case by affidavit evidence, the Court ordering that notice of trial should be served upon the owner and the mortgagees of said ship.

An appearance was subsequently entered by the owners, and by one of the mortgagees of said ship as intervenor. A statement of facts was agreed to and signed on behalf of the plaintiffs and the intervenor.

The hearing took place at Osgoode Hall, before the Honourable Mr. Justice Hodgins, Local Judge of the Toronto Admiralty District, on the 30th December, 1918, and was adjourned for argument, and afterwards written arguments were put in.

W. S. Maguire, for plaintiffs.

J. G. Irving, for owner and mortgagee intervening.

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HODGINS, L. J. A. (March 5, 1919), delivered judgment.

Action for towage by the American tug "Charlie O. Smith" of the barge "Ed. McWilliams", from Sault Ste. Marie, Ont., light, to Calcite, Mich., U.S.A., and back from there, laden, to the point of departure. The amount is not in dispute.

A mortgagee, Simpson, intervenes and claims that the lien of the plaintiffs, if any exists, is subordinate to his mortgage claim. He shows that there is also a second mortgage for a large amount and it is not disputed that unless the plaintiffs are entitled to a maritime lien ranking ahead of these mortgages, a sale would result in no benefit to them.

The dispute therefore resolves itself into the question:—

Does towage give rise to a maritime lien ousting the mortgages, or merely to a statutory claim with the right to seize and sell the vessel subject to the charges then existing against it. In arguing this, the plaintiffs assert that American and not Canadian law applies.

The contract was led up to by telegrams, one despatched from Sault Ste. Marie, Ont., to Cheboygan, Mich., and the other a reply thereto. In consequence of these telegrams, the plaintiffs telephoned from Cheboygan to Captain Climie at the Canadian Soo and he there accepted their offer or made his terms with them. I think the contract was one made in Ontario, for, when Captain Climie went to his telephone, he then and there received an offer or discussed terms which, when accepted, formed the contract. In other words, the plaintiffs at Cheboygan, Mich., by using the long distance telephone, were

able to reach Captain Climie in Ontario just as if they had telegraphed to him and he had received the telegram at the Soo. His reply at the telephone is of the same effect as if he had posted a letter or sent off a telegram from an office in Ontario. See *Weyburn Townsite Co. v. Honsburger*.[1]

The contract provided for the despatch of the tug from Michigan to Ontario and involved taking the barge in tow to Calcite in Michigan. It also necessitated towing the barge back, laden with a cargo, and delivering her safely at Sault Ste. Marie, Ont. Both the beginning and the end of the enterprise were in this province, and the successful completion of it is an essential feature which must be proved before the money is due: *The "Edward Hawkins"*[2]; *The "Minnehaha"*[3]; *The "Queen of Australia"*.[4]

The fact, if it be a fact that the plaintiffs were to be paid for all the time which would elapse till the tug returned to Cheboygan, makes no difference as to where the performance of the contract ended.

Under these circumstances, what law should be applied? The place of the making of the contract, of its initial and final steps in performance was Canada, and entry into the United States was only for the purpose of securing a cargo. It is true that the moving of that cargo was commercially the *raison d'etre* of the contract, but in law what should be looked at for this purpose are the various incidents that go to make up not only the formation and performance of the contract, but the situation of the parties, its working out, where and how that is to be done, and

[1] (1919), 15 O.W.N. 428.
[2] (1862), Lush 515.
[3] (1861), 15 Moo. P.C. 133, 15 E.R. 444.
[4] 4 Asp. M.C. 274, N.

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the possible remedies in case of default.

I think these parties must have intended Ontario law to apply if the whole situation is looked at. The hiring was done here, the tug was to tow in waters half of which were Canadian, to return into Canada and deliver its tow and be paid there. Indeed, the successful completion of the towage contract could only be done by the delivery of the barge into the Canadian port, where, if the hire was not paid, suit would naturally be brought and proceedings *in rem* begun. So that the chief elements generally regarded in this connection point to the application of our own law. See *Hamlyn v. Talisker*[1]; *Spurrier v. La Cloche.*[2]

Applying Canadian maritime law, it is clear that where the owners do not appear or contest the claim, the remedy is limited to the *res*. The same result follows when the intervenors are the mortgagees, for they cannot be made liable for any part of the demand. Sir F. H. Jeune, Knt., says, in *The "Dictator"*[3]: "A mortgagee has no interest in or connection with the action beyond his interest in the *res*, . . could he by any process be fixed with any further liability."

No evidence was given suggesting that the plaintiffs were looking to the owners merely, and the presumption is therefore that the ship is liable. The exact terms of the contract are not disclosed. The cases cited to show that there is a conclusive presumption against the ship's liability when the contract is made in its home port (to which may be added *Kane v. The "John Irwin"*[4]), relate to neces-

[1] [1894] A.C. 202.
[2] [1902] A.C. 446.
[3] [1892] P. 304 at 321.
[4] (1912), 1 D.L.R. 447; 13 Can. Ex. 502.

saries and repairs and are not fundamentally applicable to a contract for towage.

The question is thus squarely up for decision, namely, does a towage claim give a maritime lien upon the *res* superior or prior to the mortgages existing upon it at the time the claim arose?

In several old cases towage is classed with other claims which carry with them maritime liens. These are *The "Isabella"*[1]; *The "Constancia"*[2]; *The "St. Lawrence"*[3]. And to them may be added *The "Athabaska"*[4]; Cassels Digest, S.C.C. 1875-1893, p. 522.

But in none of these cases is the point distinctly raised, but rather is tacitly assumed in favour of the lien. This is probably because the towage in these cases was really a continuation of or so connected with the other claims as to form a part of the operation in which a maritime lien properly attached. The only decision upon the exact point is to be found in *Westrup v. Great Yarmouth Steam Carrying Co.*,[5] a judgment of Mr. Justice Kay, in which he discusses the cases I have mentioned, saying that in them, there is no distinct argument nor any distinct decision that a maritime lien was created by towage simply.

That learned trial judge followed the expressions of opinion by Lord Bramwell in the House of Lords, and of Lord Esher and Lords Justices Bowen and Fry in the Court of Appeal in the *Heinrich-Bjorn*[6] case, and held that the weight of authority was

[1] (1838), 3 Hag. Adm. 427.
[2] (1846), 10 Jur. 845.
[3] (1880), 5 P.D. 250.
[4] (1884), 5 C.L.T. 600.
[5] (1889), 43 Ch. D. 241.
[6] (1885), 10 P.D. 44; (1886), 11 App. Cas. 270.

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against there being a maritime lien for ordinary towage.

This decision has not been accepted by Williams and Bruce, who, after the decision in 10 P.D. had been given, but before the appeal was disposed of, say that "no authority is stated for this proposition, and it is apprehended that the Court of Appeal did not intend to overrule the decision in *The "Constancia", supra,* which has been unquestioned for nearly forty years." I find, however, that most learned authors regard it as disposing of the question. It has not been doubted for thirty years, so that its authority stands high. Abbott and Roscoe both quote it as established, and in Halsbury's Laws of England it is so dealt with. Howell in his Canadian work on *Admiralty* does the same; Mayers leaves the matter in doubt. I find that Stewart, L. J. A., in Prince Edward Island in *The "Santa Marie"*,[1] has recently held against the proposition that a maritime lien for towage exists. American authorities differ on this point from the English and Canadian. Their State laws generally give a maritime lien, and it is then recognized by the U.S. Admiralty Courts.

I prefer to follow the English and Canadian decisions and authorities and must therefore decide against the plaintiffs' claim and in favour of the contention that the mortgagees rank first in priority. *The Pacific*[2]*; The Aneroid.*[3] In *The "Colonsay"*[4], Brett, J., held that when the mortgage claims exceed-

[1] (1917), 16 Can. Ex. 481; 36 D.L.R. 619.
[2] (1864), Br. & L. 243.
[3] (1877), 2 P.D. 189.
[4] (1885), 5 Asp. M.C. 545.

ed the value of the ship, the lien claimed for necessaries was completely ousted. That state of affairs exists here, but as one of the mortgages is to a bank and the circumstances may change, the dismissal of the plaintiffs' claim against the ship will be without prejudice to any future action if the mortgages are paid off or sufficiently reduced. The plaintiffs may, of course, if the mortgagees agree, have an order for sale subject to the mortgages. The view I have taken renders it unnecessary to deal with the other matters argued.

The dismissal as against the ship will be without costs down to the appearance fyled by the mortgagee, but the mortgagee will be entitled to his costs since then. *The "Eastern Belle"*.[1]

No order allowing intervention was applied for or made, but it seems that where mortgagees or others who are clearly entitled to intervene desire to do so, the proper practice is to allow them to fyle an appearance without more. As the owners have entered an appearance, there may be a judgment against them for $434.38, with interest and costs of action, including those payable to the mortgagees.

Judgment accordingly.

[1] (1875), 33 L.T. 214.

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2. *Jurisdiction—Necessaries and repairs—Towage—Maritime lien.* By virtue of secs. 4 and 5 of the *Admiralty Court Act,* 1861, where a ship is not under arrest and its owner is domiciled in Canada, the Exchequer Court of Canada has no jurisdiction over an action for repairs or necessaries supplied to the ship. 2. Towage performed in connection with the repairs, not at the owner's special request, is not within the purview of "claims and demands for services in the nature of towage," within the meaning of sec. 6 of the *Admiralty Court Act,* 1840, as would give the Court jurisdiction over the claim; neither claim for towage nor for necessaries is the subject of a maritime lien. 3. An objection to the jurisdiction will hold good even if made after the trial. STACK *v.* THE "LEOPOLD" 325

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ter of the tug ported his helm in an endeavour to avoid a collision. The steamer then tried to manœuvre herself into position and collided with two barges at the head of the tow. *Held,* the collision resulted from the steamer's failure, "when safe and practicable, to keep to the starboard side of the fair-way or mid-channel," as required by art. 25; even if the pilot of the steamer believed the tug and tow coming down the wrong side of the channel, good seamanship required him to stop or slow up, which he failed to do; that no blame could be imputed to the tug. The length of the tow and the absence of regulation lights on the barges cannot be said to have contributed to the collision when it occurred at the head of the tow. WALROD *v.* THE "CONISTON" 330

2. *Harbour—Incoming and outgoing vessels—Duty.* A vessel has no right to manœuvre her entry into the basin of a harbour while another vessel is leaving her moorings ready to come out; under such circumstances it is the duty of the former to remain below the canal entrance, in order to give way to the outgoing vessel, and her failure to do so will render her liable in case of collision. *Taylor v. Burger,* (1898), 8 Asp. M. C. 364, followed. CANADA SHIPPING CO. *v.* THE "TUNISIE" 348

3. *Canal — Passing vessels — Liability — Proximate cause.* Where vessels passing one another in a canal have exchanged the proper signals, and were properly navigated, the fact that one took a starboard course to avoid collision, and in doing so struck the canal banks and was damaged, does not give her a right of action against the other; where the damage was about the bilge or bottom of the vessel it is evidence of its having been caused by an obstruction on the bottom of the canal and not by the banks. CANADA STEAMSHIP LINES *v.* MONTREAL TRANSPORTATION CO. 354

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14. *Crown railways — Shunting-yard — School — Compensation — Harbour—Riparian rights — Consequential injuries.* The Dominion Government, in the operation of its railways, constructed a shunting-yard on lands reclaimed by it from the waters of Bedford Basin, partly in front of the school buildings of the suppliant corporation. The latter owning water lots thereon, which had been improved as a bathing pavilion and wharf in connection with the school, claimed compensation for injurious affection by reason of the construction and operation of said yard. *Held,* Bedford Basin being a public harbour at the time of Confederation, was the property of the Dominion by virtue of the *B. N. A. Act,* and no title to water lots thereon could pass under a provincial grant. *Maxwell v. The King* (1917), 17 Can. Ex. 97, 40 D.L.R. 715, followed. 2. The fact that the suppliant had been allowed a crossing across the railway tracks to reach the beach where such lots were situated, it did not thereby acquire an irrevocable license as against the Crown, nor could it under the circumstances claim such as a riparian right, so as to be considered as an element of compensation. 3. The injury having been caused by the operation of works on lands other than those taken from the suppliant, the latter was not entitled to compensation therefor. Sisters of Charity *v.* The King 385

15. *Agreement of sale—Authority of Minister—Jurisdiction — Arbitration — Compensation—Shipyard—Earning capacity —Market value—Abandonment — Damages—Severance.* The Dominion Government, for the purposes of its shipyard at Sorel, Quebec, expropriated some shipyard property on Richelieu and St. Lawrence rivers. The owners, claiming compensation, set up an agreement for

the purchase of the property on behalf of the Crown entered into by the Minister of Public Works, providing that payment therefor should be established by arbitration, and they contended that the Exchequer Court had therefore no jurisdiction to hear and determine the matter of compensation. *Held,* that as the agreement failed to comply with the requirements of art. 1434 of the Quebec Code of Civil Procedure it was invalid as submission to arbitration, and as no time was fixed the submission was revocable, by virtue of art 1437, at the option of either party, and under the English common law at any time before the award. 2. The King has the undoubted right attached to his prerogative of suing in any court he pleases. 3. The Minister had no power, unless authorized by an order-in-council or statute, to bind the Crown with such agreement. 4. In fixing compensation for the expropriation of such property its "earning capacity" cannot be taken as the basis of the market value; the best test is what similar property sold for in the immediate neighbourhood. 5. In the valuation of the wharves regard must be had to their present condition and allowance made for their depreciation. 6. Where part of the land expropriated was abandoned by the Crown, *held* that the owners were entitled to compensation for the use and occupation of the land for the period held by the Crown; but that they could not claim any damages for injurious affection or severance of the land, inasmuch as the severed portion did not form a unit of the land expropriated, and was in fact severed by a highway, apart from the fact that the abandoned land was sufficient for a shipyard at Sorel. The King *v.* McCarthy 410

16. *Shipyard—Compensation—Valuation—Petition of right. Held,* where the Crown had been in occupation of a piece of land for a certain time previous to its expropriation, the compensation for such occupation was ascertained by accepting the value thereof as established in the expropriation proceedings and by allowing legal interest thereon. McCarthy *v.* The King 438

17. *Business property—Shopping centre—Hotel—Compensation—Allowance of 10% for compulsory taking.* The Crown, for the purpose of extending the Post Office at the city of Hamilton, expropriated several properties in the shopping centre of the city, one of which was a hotel property. *Held,* that the owners were entitled to be compensated according to the value of the properties as business property, and that the hotel property, though acquired in separate lots, should be valued as one property, according to the frontage of the building occupied as the hotel, taking into consideration the present state of repairs of the properties, plus an allowance for the compulsory taking. The King *v.* Hunting 442

18. *Compensation—Title of owners—Deed—Prescription—Infancy.* By a deed between father and son, executed in 1880, it was provided, that in consideration of the son's release of his rights in the estate of his mother, the father "promises to transfer to his son, at his demand, all his rights and pretensions into certain two lots of land." The demand to transfer was never made and prescription had meanwhile run against this right, except for the interruption thereof on account of the minority of certain children. The Crown expropriated the land for the purposes of the National Battlefield at Quebec. *Held,* that the deed created a gift upon a protestative condition exercisable by the donee and his heirs, a mere *jus ad rem* to demand the transfer, but conveying no fee in the land, which was extinguishable by prescription; that the compensation monies may be paid to the owners in possession subject to their undertaking of indemnifying the Crown in respect of any claims which might be asserted by the children against whom prescription was not acquired,—such right being a divisible right. The King *v.* Timmis 453

See Public Lands.

FACTOR

See Principal and Agent.

FISHERIES

See Public Lands.

GIFT

See Expropriation.

GOOD-WILL

See Expropriation.

HARBOUR

See Collision.
" Expropriation.
" Negligence.

HOMESTEAD

See Public Lands.

INEVITABLE ACCIDENT

See Collision.
" Towage.

INFANCY

See Expropriation.

INFRINGEMENT

See Courts.
" Patents.

INJUNCTION

See Courts.

INTEREST

See Contract.

JURISDICTION

See Admiralty.
" Courts.
" Public Lands.
" Expropriation.

LANDS ACT

See Public Lands.

LEASE

See Public Lands.
" Contract.

LEX LOCI

See Towage.

LICENSE

See Public Lands.

MARITIME LIEN

See Admiralty.
" Salvage.
" Towage.

MARKET VALUE

See Expropriation.

MASTER AND SERVANT

See Negligence.
" Workmen's Compensation.
" Railways.

MORTGAGE

See Towage.

MOTION

See Salvage.

NAVIGATION

See Collision.
" Waters.

NEGLIGENCE

Railways—Open switch—Air brakes—Fellow servant—Contributory negligence—Prescription—Interruption. An injury to a brakeman on a train of the Intercolonial Railway, resulting from the negligence of the employees of the railway in leaving a switch open without warning, is actionable against the Crown under sec. 20 of the *Exchequer Court Act.* The suppliant having himself been guilty of contributory negligence in failing to have on the air brakes, as required by the rules, the doctrine of *faute commune* was applied and the damages assessed accordingly. 2. The doctrine of fellow servant is not in force in the Province of Quebec. 3. The prescription for the filing of a petition of right is interrupted by the deposit of the petition with the Secretary of State. Dionne *v.* The King 88

2. *Railways—Yard—Injury to trackman—Shunting—Appliances—Signals—Look-out.* The Crown is not responsible for the death of a trackman run over by an engine carefully backing into a yard of the Intercolonial Railway, not occasioned by the negligence of any officer or servant of the Crown in or about the operation of the railway, within the meaning of sec. 20 (f) of the *Exchequer Court Act,* but brought about by the negligence of the deceased in having failed to keep an especially good look-out for train signals as required by the rules. Sec. 35 of the *Government Railway Act,* requiring the stationing of a person in the rear of a train moving reversely, and the rules governing the running of trains, do not apply to shunting engines in a railway yard. The fact that the engine attending to the shunting had no sloping tender and no foot-board and railing was immaterial under the circumstances. Cantin *v.* The King 95

3. *Of custom officials—Detention of animals—Liability.* The liability for wrong-

ful seizure and detention of animals by the Crown's custom officials being one in tort is not actionable against the Crown. BONNEAU *v.* THE KING 135

4. *Right of action—"Ascendant" relative —Stepmother.* A stepmother is not an "ascendant" relative within the meaning of art. 1056 of the Quebec Civil Code, so as to entitle her to a right of action for the death of a stepson killed while in the discharge of his duties in a ship-yard of the Crown. BONIN *v.* THE KING...150

5. *Canal — Open bridge — Automobile— Reckless driving.* The suppliant, in the course of a joy-ride, driving an automobile without a chauffeur's license, attempted to cross a Government canal bridge when the bridge was being opened and the gates down, after being signalled to that effect by the bridge-master, resulting in the machine and its occupants plunging into the canal. *Held,* under the circumstances and evidence, the suppliant has made out no case against the Crown, and that the accident was brought about by his own negligence. BOYER *v.* THE KING 154

6. *Public Work—Harbour of Victoria— Government scow—Fellow-servant.* The harbour of Victoria, B.C., which was a public harbour before British Columbia entered into Confederation, is a public work within the meaning of sec. 20 of the *Exchequer Court Act.* The Crown is not liable for an accident happening on a Government scow in the harbour of Victoria, B.C., while engaged in work executed by the Government of Canada for the improvement of the harbour, where the negligence which caused the accident is the negligence of a fellow-servant of the suppliant. *Ryder v. The King* (1905), 36 Can. S.C.R. 462, followed; *Paul v. The King* (1906), 38 Can. S.C.R. 126; *Montgomery v. The King* (1915), 15 Can. Ex. 374; and *La Compagnie Generale Enterprises Publiques v. The King,* 44 D.L.R. 459, distinguished. COLEMAN *v.* THE KING...263

7. *Action for tort—"Public work"—Stone-lifter—Exchequer Court Act.* The suppliant's husband was an employee of the Crown working on a stone-lifter, the property of the Crown, in the deepening of the ship-channel in the harbour at Montreal, and while so engaged in lifting a boulder from the channel was thrown overboard and drowned. *Held,* that the action was, in its very essence, one of tort, and apart from special statutory authority, no such action would lie against the Crown, and that the suppliant, to succeed, must bring her action within sub-sec. (c) of sec. 20 of the *Exchequer Court Act* before the amendment of 1917, and that the injury complained of must have occurred on a public work, and was the result of some negligence of an officer or servant of the Crown acting within the scope of his duties or employment. *Held,* further, following *Paul v. The King* (1906), 38 Can. S.C.R. 126, that the death of the deceased did not occur on a public work within the meaning of the Act, and further on the facts, even assuming that the stone-lifter was a public work, that the death of suppliant was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown. DESMARAIS *v.* THE KING 289

See RAILWAYS.

" TOWAGE.

" WORKMEN'S COMPENSATION.

ORDERS-IN-COUNCIL

See PUBLIC LANDS.

" CONTRACT.

PARTIES

See SALVAGE.

PATENTS

Subject matter — Corset — Novelty—Invention—Combination—Prior art—Costs. Held, that a patent for supporting belts or bands in the nature of a corset was invalid for want of novelty or invention. 2. Where the patentee has merely adopted in the manufacture of his patented article old contrivances of a nature similar to those found in other articles of the same kind, and producing similar results, there is no invention to support the patent. 3. The Court, taking into consideration the conduct of a defendant leading up to the action, has a discretion to deprive him of his full costs although he succeeds in the action. TREO CO. *v.* DOMINION CORSET CO. 115

2. *Issue — Validity — Combination—Subject matter—Prior art.* The issuing of a patent does not make it conclusive or binding upon a litigant who questions its validity. 2. An application for a combination patent should not be refused on

the ground that the subject matter is a combination of various separate elements, all of which are in existing patents, provided such elements are brought together in such a way as to be useful. Re Lavers' Heels Patents 199
See Courts.

PRESCRIPTION

See Negligence.
" Expropriation.

PRINCIPAL AND AGENT

Liability of undisclosed principal—Action against agent—"Factor or commission merchant." M., without disclosing the fact that he was acting as agent for the Crown, purchased hay from the suppliant and was sued in a provincial court for the balance of the purchase price. At the trial that fact became known to the suppliant, but he nevertheless proceeded with the case and recovered judgment against M. Later the suppliant brought an action in the Exchequer Court to enforce the claim against the Crown. *Held,* the suppliant having elected to proceed to judgment against M. could not afterwards sue the Crown. 2. That M., having been retained to make such purchases on a commission basis, was a "factor or commission merchant" and alone liable under arts. 1736, 1738, of the Quebec Civil Code. Desrosiers *v.* The King 461

PROXIMATE CAUSE

See Collision.

PUBLIC LANDS

Provincial grants—Right of way—Railway—Timber—Expropriation—License—Assignment — Jurisdiction — Compensation. Where a Province has made a free grant of a right of way on its lands to a railway of the Dominion Government, it cannot subsequently, in the absence of Dominion legislation authorizing it, grant or assign to a third person any rights to the timber on such right of way. 2. The Exchequer Court has jurisdiction to entertain a claim for the cutting and removing of timber by officers and servants of the Crown while engaged in the construction of a Crown railway. 3. A licensee to cut timber has a sufficient interest in the limits covered by the license to entitle him to claim compensation for the taking of the timber by the Crown. The measure of damages is the value of the timber as a whole as it stood at the time of the taking. Malone *v.* The King 1

2. *Lease—Order-in-Council — Lease containing clause for renewal—Ultra vires—Void—Whether renewal clause severable.* In 1904, pursuant to an Order-in-Council recommending the granting of a lease for 21 years to the suppliant of certain fishery privileges in waters described in the Order-in-Council, the Minister of Marine and Fisheries executed a lease to the suppliant for the said term, the lease contained a provision that, upon complying with certain terms and conditions, the suppliants would be entitled to have the option of renewing the lease for a future period of 21 years. In 1913 the Deputy Minister notified the suppliants that the lease was *ultra vires,* as not being in virtue of any Statute of Canada, and as being repugnant to the common law and that the lease was *ab initio* void. *Held* on a stated case to determine the rights of the suppliants under said lease that the provision for the renewal of the lease was void and inoperative, and beyond the power of the Minister under said Order-in-Council, but that the clause as to the renewal could be severed, and while that clause was void the lease itself for the term of 21 years was valid and binding. *Pickering v. Ilfracombe R. Co.* (1868), L.R. 3 C.P. 235, 250; *In re Burdett* (1888), 20 Q.B.D. 310, followed. British American Fish Corporation *v.* The King 230

3. *Homestead—Jurisdiction of Exchequer Court—Validity of patent—Delivery—"Improvidence" — Judgment creditors—Bonâ fide purchasers* The defendant, S., an alien, for a number of years was a homestead entrant on land in Manitoba and entitled to a patent therefor under the *Dominion Lands Act.* He refused to make application for the patent, because, until the patent was registered in Manitoba, the land was not subject to the payment of certain taxes, nor to the execution of judgments against such lands. He was induced to consummate the application for patent under threats of the Dominion land-office to cancel his homestead entry, and having taken out his naturalization papers and signing the application, the patent regularly issued and was mailed to him at his post-office address. It was later returned to the land-office because not called for by him. In the meantime a copy of the patent

was registered against the land, whereupon the land was sold to satisfy the taxes and judgments, and thus found its way into the hands of innocent purchasers for value. Proceedings were instituted to set aside the patent and subsequent conveyances on the ground that the patent was procured by fraud and improvidently issued. *Held,* the Exchequer Court has no power to review or question the validity of the judgments obtained by the creditors in the provincial courts; that it has jurisdiction, under sec. 94 of the *Dominion Lands Act* (7-8 Edw. VII., 1908, c. 20) and sec. 31 of the *Exchequer Court Act* (R.S.C., 1906, c. 140) to determine the validity of the patent, and to set aside, if need be, the registration of instruments affecting the land in the registration offices of the Province. 2. The patent having been duly issued, in conformity to the provisions of sec. 90 of the *Dominion Lands Act,* physical delivery was not essential to render it operative or effective. 3. Upon the registration of the patent thus issued the judgment creditors of the patentee had the right to treat it as having been regularly issued and to secure a sale of the land in execution of their judgments. 4. Under the evidence adduced, no fraud, error or improvidence was established as would warrant the avoidance of the patent under sec. 94 of the Act; the fact that the patentee, in a letter to the land-office, stated his unwillingness or refusal to sign the patent papers, when he in fact did sign them, does not shew "improvidence" in issuing the patent, particularly when his object for doing so was to defeat the payment of taxes and hinder his judgment creditors. 5. After the land has passed into the hands of third parties, who were innocent purchasers for value, no relief can be granted in violation of their rights. The King *v.* Deacon 308

PUBLIC WORK

See Contract.
" Negligence.

QUANTITY SURVEY METHOD

See Expropriation.

QUANTUM MERUIT

See Admiralty.

RAILWAYS

Negligence—Employees' Relief Fund—Temporary employee—Contract of service—Estoppel. An agreement by a *temporary* employee of the Intercolonial Railway, as a condition to his employment, to become a member of the Temporary Employees' Relief and Insurance Association and to accept the benefits provided by its rules and regulations in lieu of all claim for personal injury, is perfectly valid and is a bar to his action against the Crown for injuries sustained in the course of employment. By accepting the benefits he is estopped from setting up any claim inconsistent with those rules and regulations. *Miller v. Grand Trunk R. Co.,* [1906] A. C. 187, and *Saindon v. The King* (1914), 15 Can. Ex. 305, distinguished; *Conrod v. The King* (1914), 49 Can. S.C.R. 577, followed. Gingras *v.* The King 248

2. *Railway—Level crossing—Government Railway Act—Gross negligence.* The suppliant's husband and two children were foolishly and recklessly driving along the highway in a buckboard, and while passing over a level crossing of the Crown's railway, the horse struck the engine of a train on said crossing, and they were killed. In the action the Crown was charged with negligence on four points, namely, that (1) the level crossing was a dangerous one and the Crown should have either built a viaduct or placed gates on the highway; (2) that the *locus in quo* "was a thickly peopled locality"; (3) and that therefore the train should have crossed the highway at a speed of not greater than six miles per hour; (4) that the trainmen failed to give the signals required by law. *Held,* following *Harris v. The King* (1904), 9 Can. Ex. 206, that where the Minister or the Crown's officer in the exercise of his discretion comes to the conclusion not to make a viaduct or put gates across a highway, it is not for the Court to say that the Crown was guilty of negligence, even where the facts shew the crossing to be a very dangerous one; and further on the facts that the crossing in question was not located in "a thickly peopled portion of any city, town or village" within the meaning of the *Government Railway Act* (R.S.C. 1906, c. 36), and that therefore there was no negligence in running the train at a greater speed than six miles per hour and that the proper signals were given by the trainmen. *Held,*

further, that the deceased behaved in a manner not only amounting to want of ordinary care, but foolishly and recklessly, and was guilty of gross negligence, and this was the decisive cause of the accident. Lucas *v.* The King 281

See Expropriation.
" Negligence.
" Public Lands.
" Workmen's Compensation.

REPAIRS

See Admiralty.

RIPARIAN RIGHTS.

See Expropriation.

SALVAGE

Motion to strike out party—Right of action by purchaser—Practice in salvage action. A plaintiff who complains that his name is being used without authority may be retained as plaintiff if he has acquiesced in the action being prosecuted, although he may not have originally instructed the solicitor. The purchase of an interest in a ship after the performance by it of salvage services does not necessarily disable the purchaser from prosecuting an action to recover same, when defended by underwriters. It is proper to have the master and crew before the Court in an action for salvage. The maritime lien for salvage arises when the service is performed. It is not necessary in a salvage case to add cargo or freight unless a claim is made against them. When actions are brought by the same plaintiff in Courts of different local jurisdictions, but by the same procedure, and the judgments in which are followed by the same remedies, such action will be treated as *primâ facie* vexatious. Johnson & Mackay *v.* The "Charles S. Neff" (No. 1) 159

2. *Mode of estimating amount—Costs—Distribution.* In finding the value of salvage services, amongst other circumstances the Court must consider the degree of danger to which the salved vessel was exposed, and from which she was rescued by the salvors, and the risk incurred by the salvors in rendering their services and the mode in which the services were rendered. The value of the vessel salved, while important, is not decisive. There is a difference owing to conditions rendering disaster less probable in the amount to be allowed for salvage services on the Great Lakes and on the high seas. Johnson & Mackay *v.* The "Charles S. Neff" (No. 2) 168

SCHOOL

See Expropriation.

SHIPPING

See Admiralty.
" Collision.
" Salvage.
" Towage.
" Negligence.
" Waters.

TIMBER

See Expropriation.
" Public Lands.

TITLE TO LAND

See Expropriation.
" Public Lands.

TOWAGE

Negligence—Defective steering gear—Inevitable accident. A steering wheel in a tug, rendered inoperative by a defect in the steering gear, will not relieve the owners of the tug from liability for damage to a tow, resulting from the grounding of the tow when released by the master of the tug, on the ground of inevitable accident; the accident could have been avoided by passing the tow to another tug which was there to assist. McCormick *v.* Sincennes-McNaughton Line 357

2. *Lien for—Mortgage — Priorities—Lex loci—Place of contract—Acceptance by telephone.* Under British and Canadian law a claim for ordinary towage does not give a maritime lien upon the ship towed nor one superior or prior to a mortgage existing upon it at the time the claim arose. 2. Where a contract is proposed and accepted over the telephone, the place where the acceptance takes place constitutes the place where the contract is made. Acceptance over the telephone is of the same effect as if the person accepting had done so by posting a letter, or by sending off a telegram from that place. The contract having been accepted in Canada was governed by Canadian law. Martin *v.* The "Ed. McWilliams" 470

See Admiralty.

TRADE MARK

Specific trade mark—Registration—Resemblance to existing mark—Manufactured articles dissimilar. In an application for the registration of a specific trade mark, where the resemblance to an existing registered trade mark is not sufficient to cause deception, registration should be granted. American Sheet & Tin Plate Co. *v.* Pittsburgh Perfect Fence Co. 254

ULTRA VIRES

See Public Lands.

VALUATION

See Expropriation.
" Admiralty.

VENDOR AND PURCHASER

See Expropriation.
" Public Lands.

WATERS

Wreck—Obstruction to navigation—Removal—Authority—Liability of "owner"—Sale. Since the amendment of the Canada Statutes in 1897 (R.S.C. 1906, c, 115, s. 13), the owner of a wrecked vessel at the time the wreck was occasioned may be deemed the "owner" for the purpose of the statutory liability to the Crown for the costs of removing the wreck as an obstruction to navigation, notwithstanding the sale of the wreck to a third party. *The Queen v. Mississippi &c. Co.* (1894), 4 Can. Ex. 298, distinguished. 2. By virtue of the Canada Statutes,), c. 28, amending s. 18, ch. 115, R.S.C., 1906, the authority of the Governor-in-Council directing such removal is no longer necessary. The King *v.* Anderson 401
See Expropriation.

WORDS AND PHRASES

"Ascendant," Bonin *v.* The King ...150
"Claims in the nature of towage." Stack *v.* "The Leopold" 325
"Dwelling." Corriveau *v.* The King..275
"Improvidence." The King *v.* Deacon 308
"Owner." The King *v.* Anderson ...401
"Public work." Coleman *v* The King 263
" Desmarais *v.* The King 289

WORKMEN'S COMPENSATION.

Injury in course of employment—Railway — Sleeping quarters — "Dwelling." The suppliant's husband was employed on the I. C. Ry. as part of a gang of men engaged in the repairs and maintenance of the tracks. The railway had placed at the disposal of such men a box or freight car, which was fitted with bunks or beds as a dormitory, and placed on a siding. After leaving off work at 6 o'clock in the evening the employees' entire time was at their disposal and they were at liberty, but not obliged, to sleep in this sleeping car. On the night of the 12th July, 1915, the suppliant's husband went to sleep as usual in the car and was found dead in his bed in the morning. *Held* that this car was a "dwelling" and that the accident or death did not happen in the course of his employment, and that his widow was not therefore entitled to compensation. Corriveau *v.* The King 275