REPORTS

— OF THE —

EXCHEQUER COURT

— OF —

CANADA.

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

REPORTER.

PUBLISHED UNDER AUTHORITY BY

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BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF; 1895 Nov. 15.

AND

THE SHIP "SHELBY."

Maritime law—Behring Sea Award Act, 1894—*Seal Fishery (North Pacific) Act*, 1893—*Infraction—Presence within prohibited waters—Bona fides.*

Held, *The Seal Fishery (North Pacific) Act*, 1893, and the *Behring Sea Award Act*, 1894, being statutes *in pari materiâ*, are to be read as one Act. (*McWilliams* v. *Adams*, 1 Macq. H.L.Cas. 120 referred to).

2. *Held*, (following *The Queen* v. *The Ship Minnie* 4 Ex. C.R. 151) that under the provisions of the above Acts the presence of a ship within prohibited waters, fully manned and equipped for sealing, requires the clearest evidence of *bona fides* to relieve the master from a presumption of an intention on his part to violate the provisions of such Acts; and where the master offers no explanation at all, and such evidence as is produced on behalf of the ship is unsatisfactory, the court may order her condemnation and forfeiture, or may commute the forfeiture into a fine.

ACTION *in rem* against a ship for an alleged infraction of the laws and regulations respecting the taking of seals in the waters of Behring Sea.

By the statement of claim the plaintiff alleged as follows:—

"1. The ship *Shelby* is a British vessel registered at Victoria, in the Province of British Columbia;

"2. The ship *Shelby*, Christian Claussen, master, was seized by an officer of the United States ship *Corwin*, on the 11th day of May, 1895, in latitude 52°

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52′ 10″ north, and longitude 134° 10′ 58″ west, being a point within the prohibited waters of the Pacific Ocean as defined by the *Behring Sea Award Act*, 1894;

" 3. The said ship *Shelby* set sail from the port of Victoria on the 13th day of February, 1895, for the North Pacific Ocean, in order to hunt seals;

" 4. The said ship *Shelby* at the time of the seizure, as set forth in the second paragraph hereof, was fully manned and equipped for the purpose of killing, capturing or pursuing seals, and had on board thereof shooting implements and one hundred and twenty-four fur seal skins, and the said ship was used and employed in killing, capturing or pursuing seals within the prohibited waters of the Pacific Ocean aforesaid between the 1st day of May, 1895, and the day of her seizure as aforesaid, both inclusive;

" 5. That after the said seizure, as aforesaid, the said ship with her crew, equipment and seal skins was sent to Sitka, Alaska, and there handed over to Lieutenant F. A. Garforth, commanding Her Majesty's ship *Pheasant*;

" 6. The said Lieutenant F. A. Garforth endorsed the certificate of registry and sealed her guns, and directed the master of the said schooner, Christian Claussen, to proceed direct to Victoria and report himself, with his said vessel, to the Customs authorities there;

" 7 The said one hundred and twenty-four fur seal skins found on the said ship, as mentioned in paragraph 4 hereof, were on the 1st day of June, 1895, in order to save the said skins at the request of the owner thereof, and by consent sold for the sum of $899. which said sum is deposited in the Bank of British Columbia to abide the event of this action, and to be dealt with as this honourable court shall direct;

" Arthur Yerbury Moggridge, lieutenant in H.M.S. *Royal Arthur* claims the condemnation of the ship *Shelby*

and her equipment and everything on board of her, or the proceeds thereof, on the ground that the said ship was at the time of the seizure thereof in the waters of the Pacific Ocean in latitude 52° 52′ 10″ north, and longitude 134° 10′ 58″ west, being a point within the prohibited waters of the Pacific Ocean as defined by the *Behring Sea Award Act* 1894, fully manned and equipped for killing, capturing or pursuing seals and had on board shooting implements and seal skins, and that the said ship was used and employed in killing, capturing or pursuing seals within the prohibited waters of the Pacific Ocean aforesaid between the first day of May and the day of her seizure aforesaid both inclusive."

By the statement of defence it was alleged as follows:—

"1. The defendant admits paragraphs 1, 2, 3, 5, 6 and 7 of the plaintiff's statement of claim.

"2. The defendant admits only so much, and no more, of paragraph 4 as alleges that the said ship *Shelby* at the time of the seizure was fully manned and equipped for the purpose of killing, capturing or pursuing seals and had on board thereof shooting implements and one hundred and twenty-four fur seal skins, but the defendant says that the whole of the said fur seal skins were killed or captured previous to, and not later than, the 30th day of April, 1895.

"3. The defendant in answer to the whole of the plaintiff's statement of claim says that the said ship was not used or employed after the 30th day of April, 1895, in killing, capturing or pursuing seals within the prohibited waters of the Pacific Ocean.

"4. The defendant says that the said ship after having finished sealing on the said 30th day of April, 1895, set sail for the port of Victoria, and was lawfully pursuing her voyage and was legally within the said pro-

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hibited waters when the said ship was seized as alleged.

"5. The defendant says that the said ship was not on the 1st or 11th days of May, 1895, or on either of said days, or on any day between said days used or employed in killing, capturing or pursuing seals within the said prohibited waters.

"6. Save as herein appears the defendant denies each and every of the allegations in the statement of claim.

"7. The defendant humbly submits that in the circumstances herein appearing this action should be dismissed."

Issue joined.

This cause came on for trial, at Victoria, before the Honourable Theodore Davie, C. J., Local Judge in Admiralty for the Admiralty District of British Columbia, on the 4th November, 1895.

C. E. Pooley, Q.C., for the Crown;

H. D. Helmcken, Q.C., for the ship.

DAVIE, C. J. L. J., now (Nov. 15th, 1895,) delivered judgment:—

The British vessel *Shelby*, Christian Claussen master, was seized by an officer of the U. S. S. *Corwin* on the 11th May, 1895, in latitude 52° 52′ 10″ north and longitude 134° 10′ 58″ west, being a point within the prohibited waters of the Pacific Ocean as defined in the *Behring Sea Award Act*, 1894, for an alleged contravention of the Act, such contravention being the employment of the vessel in pursuing seals within the proscribed waters during the period prohibited by law.

By force of the scheduled provisions of the *Behring Sea Award Act*, 1894, which under section 1 are to have the same effect as if enacted by the Act, the pursuit of seals within the aforesaid limit is

prohibited, and by subsection 2 of section 1, if there is any contravention of the Act, any person committing, procuring, aiding or abetting such contravention is guilty of a misdemeanor, and the ship employed in such contravention and her equipment, and everything on board thereof, are liable to forfeiture to Her Majesty: provided that the court, without prejudice to any other power, may release the ship, equipment or thing on payment of a fine not exceeding £500.

At the time of her seizure the *Shelby* was fully manned and equipped for killing, capturing and pursuing seals, and had on board implements and seal skins.

By section 1, subsection 6, of the *Seal Fishery (North Pacific) Act*, 1893, which Act was in force at the time of the seizure, if, during prohibited times and in prohibited waters, a British ship is found having on board thereof fishing and shooting implements or seal skins, it shall lie on the owner or master of such vessel to prove that the ship was not used or employed in contravention of the Act. The Acts of 1893 and 1894 being *in pari materiâ* are to be read as one Act (*Mc William* v. *Adams*) (1).

The *Shelby*, therefore, having been found within prohibited waters with seals and implements for taking them on board is to be deemed to have been employed in contravention of the Act unless the contrary be shown.

Has it then be shown that the ship was not used or employed in contravention of the Act? The most important witness to prove this, if such were the case, would clearly have been Captain Claussen, the master; but he was not called, nor has the failure to call him been satisfactorily accounted for. The only reason offered for his absence is that he was away on a fishing expedition. His evidence might have been taken

(1) 1 Macq. H. L. Cas., 120.

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de bene esse, but no effort to procure his evidence seems to have been made. The mate, August Reppon, was called as a witness, and stated that the *Shelby* stopped sealing on the 30th April, when the ship's log shows the vessel to have been in latitude 58° 30′ north and longitude 139° 30′ west, and that she then set sail for Victoria. On the 11th of May, after 10 or 11 days' sailing, she was found by the *Corwin* in latitude 52° 52′ 10″ north, and longitude 134° 10′ 58″ west, a distance approximately of four hundred miles from the point of starting, or less than an average of 40 miles a day. The proper course for the ship to have steered for Victoria was E.S.E. magnetic, but it appears that frequently when the course of the wind as indicated by the log would have permitted that course to be made good the vessel was not headed in that direction. For instance, on the 2nd of May she was headed on a southerly course; on May 3rd on a south by west course, and on the 5th of May on an east by north course, whereas the wind on each of these days was favourable to an east-south-east course. Captain Moggridge states, from an examination of the log, that the schooner ought to have made a considerably greater distance on her course during these days; and in view of the fact, as stated in evidence, that the *Shelby* had a favourable current of nearly a knot an hour, it is clear that she ought to have made a much greater distance. The *Corwin* in coming from the south to the point where she picked up the *Shelby*, experienced strong head winds, which were favourable winds for the *Shelby*, and the prevailing winds at that time of the year, as shown by the "Coast Pilot," are westerly, also favourable to the E. S. E course to be made by the *Shelby*.

The *Corwin* seized the *Shelby* for contravention of the Act, placed a crew on board her and ordered her to Sitka, a distance of 260 miles, which she reached under

sail in a little over two days. At Sitka the *Shelby* was ordered to Victoria, a distance of about 800 miles, as shown by the chart, which place she made, likewise under sail, in fourteen days.

The mate, when asked to explain why he went out of his course, particularly on the 2nd, 3rd and 5th of May, ascribes the fact to defects in the compass, which he says varies three or four points, but this statement is shown by his own evidence to be an equivocation, and the variation to have had no effect whatever on the course actually made or intended to be made, for whilst it is true that the compass varies, and varies considerably, such variation is regular, known precisely, and duly allowed for. Having committed himself on his examination at the hearing to the variation of the compass reason, which he was compelled to admit on cross-examination was no reason at all, he was by permission of the court recalled a day or two after the evidence had been closed, and he then ascribed the deviations from the course to the state of the wind.

I find myself entirely unable to place any dependence on the evidence of the mate, Reppon, and this leaves the deviations from the regular course between the 1st to the 11th of May, and the fact that 400 miles only was made in ten days, altogether unaccounted for. It is true that Denny Florida, a hunter, August Schone, the cook, and Victor Emanuel Laerquest, one of the seamen, all testify, and I have no doubt with truth, that no seals were taken during these days, nor were the boats lowered; but it appears also that none were seen during these days. Their evidence leaves the question of deviations from the course untouched; and, in the absence of evidence explaining it, the only reasonable conclusion is that the deviations were occasioned by the attempt to pursue seals. At all events

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it has not been proved to my satisfaction that the vessel was not employed in the pursuit of seals during these dates. In *The Queen* v. *The ship Minnie* (1), it was held by Crease, J. that the presence of the ship within prohibited waters required the clearest evidence of *bona fides* to exonerate the master of any intention to infringe the provisions of the Act, and that, as his explanation of the circumstances in that case was unsatisfactory, the ship must be condemned. This ruling is, I think, in thorough accord with subsection 6 of section 1, and I am bound to follow it. It applies exactly to this case. Here the captain has offered no explanation at all, and the explanation of the circumstances, suspicious in themselves, given by the mate, is unsatisfactory. The vessel, therefore, must be condemned.

I am inclined to think that this is a case (as no actual taking of seals is shown, but negatived upon the evidence) where a fine might meet the justice of the case, instead of forfeiture. I have power, under subsection 2 of section 1 of the Act of 1894 to substitute a fine for forfeiture. I will hear counsel upon this point. The costs of suit must follow the condemnation.*

Judgment accordingly.

Solicitor for the plaintiff: *C. E. Pooley.*

Solicitors for the ship: *Drake Helmcken & Jackson.*

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(1) 4 Ex. C.R. 151.

*By a subsequent order a fine of £100 sterling was substituted for the forfeiture.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

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Nov. 18.

HER MAJESTY THE QUEEN.....PLAINTIF;

AND

THE SHIP "BEATRICE".....DEFENDANT.

Maritime law—The Behring Sea Award Act, 1894—*The Merchant Shipping Act*, 1854—*Violation of prohibition—Enactments in pari materiâ—Construction.*

By section 1, subsection 2, of the *Behring Sea Award Act*, 1894, any ship employed in a contravention of any of the provisions of the Act shall be forfeited to Her Majesty as if an offence had been committed under section 103 of *The Merchant Shipping Act*, 1854. Subsection 3 enacts that the provisions of *The Merchant Shipping Act*, 1854, respecting official logs (including the penal clauses) shall apply to any vessel engaged in fur seal fishing. The penal clauses of section 284 of the last mentioned Act merely subject the master to a penalty, in the nature of a fine, for not keeping an official log book, and do not attach any penalty or forfeiture in respect of the ship.

Held, (following *Churchill* v. *Crease*, 5 Bing. 180) that inasmuch as the particular provisions of *The Merchant Shipping Act*, 1854, inflicting a fine only upon the master was in seeming conflict with the general provisions of subsection 2 of the *Behring Sea Award Act*, 1894, imposing forfeiture for contravention of the latter Act, such provision of the last mentioned enactment must be read as expressly excepting a contravention by omission to keep a log.

Section 281 of *The Merchant Shipping Act*, 1854, enacts that every entry in an official log shall be made, "as soon as possible," after the occurrence to which it relates.

2. *Held*, (following *Attwood* v. *Emery*, 1 C.B. N.S., 110) that the words "as soon as possible" should be construed to mean "within a reasonable time;" and what is a reasonable time must depend upon the facts governing the particular case in which the question arises.

THIS was an action *in rem* against a ship for an alleged infraction of the laws and regulations respecting the taking of seals in Behring Sea.

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Statement of Facts.

By the statement of claim it was alleged as follows:—

1. The ship *Beatrice* is a British vessel registered at the port of Vancouver, in the Province of British Columbia.

2. The said ship *Beatrice*, L. Olsen, master, set sail from the port of Vancouver on the 4th day of July, 1895, for the North Pacific Ocean for the purpose of hunting and sealing there.

3. The said ship *Beatrice* was seized by C. L. Hooper, a captain in the revenue cutter service of the United States, commanding the United States revenue steamer *Rush*, on the 20th day of August, 1895, in the Pacific Ocean in latitude 54° 54′ 03″ north and longitude 168° 31′ 21″ west.

4. From the 2nd day of August, 1895, down to and at the time of the seizure aforesaid, the said ship *Beatrice* was engaged in fur seal fishing, and the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day were not entered by the master of the said ship *Beatrice*, in the official log-book of the said ship *Beatrice*, as required by the *Behring Sea Award Act*, 1894; the last entry in the said official log-book having been made on the 14th day of August, 1895.

5. At the time of the seizure aforesaid there were on board the said ship *Beatrice* one hundred and forty-seven seal skins captured during the said voyage, and only sixty-four seal skins were and have been entered in the said official log-book.

6. On the 21st day of August, 1895, the said ship *Beatrice* with her fur seal skins and her equipment, and everything on board of her, were handed over to Frank A. Garforth, lieutenant commanding Her Majesty's ship *Pheasant*, at Ounalaska, by the said Captain C. L. Hooper.

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7. The said Lieutenant Commander F. A. Garforth endorsed the certificate of registry of the said ship *Beatrice*, and directed the said master, L. Olsen, to proceed direct to Victoria with his said ship *Beatrice*, and report to the Customs there.

8. On the arrival of the ship *Beatrice* at Victoria aforesaid there were on board the said ship *Beatrice* two hundred and two fur seal skins, which were captured during the said voyage, and the said skins were at the request of the owner and by consent sold for $1,818, which said sum was on the 24th day of September, 1895, deposited in the savings bank department of the Bank of British Columbia, to abide the event of this action and to be dealt with as this honourable court shall direct.

Arthur Yerbury Moggridge, commander in H.M.S. *Royal Arthur*, claims the condemnation of the said ship *Beatrice*, and her equipment and everything on board of her, and the proceeds thereof, on the ground that the said ship at the time of the seizure was in the waters of the Pacific Ocean in latitude 54° 54′ 03″ north and longitude 168° 31′ 21″ west, engaged in fur seal fishing; and prior thereto, from the 2nd day of August, 1895, to the date of the said seizure, had been engaged in fur seal fishing in the waters of the Pacific Ocean, and the master did not enter accurately in her official log-book the date and place of each fur sealing operation, and also the number and sex of the seals captured upon each day, as required by the *Behring Sea Award Act*, 1894.

The following is the statement of defence:—

1. Charles Doering, of the city of Vancouver, in the province of British Columbia, is the sole owner of the schooner *Beatrice*.

2. Paragraph 2 of the statement of claim, as to the sailing of the schooner *Beatrice*, and the purpose thereof, is admitted.

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Statement of Facts.

3. The schooner *Beatrice* was seized as alleged, but in latitude 55° 1′ N. and longitude 168° 55′ W.

4. *The Merchant Shipping Act*, 1854, is relied on, and more particularly sections 280 to 287, inclusive.

5. That the master of the schooner *Beatrice* did enter accurately the date and place of each fur sealing operation, and also the number and sex of the seal captured upon each day in his log-book and account book of the seal catch.

6. The official log-book was duly entered up in pursuance of the *Behring Sea Award Act*, 1894, until the 14th day of August, 1895.

7. The master has entered up his log-book and account book of the seal catch up to the 18th day of August, 1895, and the schooner *Beatrice* was boarded and seized early on the morning on the 20th day of August, 1895, and in accordance with the master's custom in that behalf—the master's log-book would, on the 20th day of August, 1895, be entered up showing the fur sealing operation of the 19th day of August, 1895—and also the account book written up showing the number and sex of the seals captured upon the 19th day of August, 1895, but the master was prevented from so doing by such seizure.

8. The master of the schooner *Beatrice* in pursuance of *The Merchant Shipping Act*, 1854, would have, but for being prevented as aforesaid, made entry in the official log-book of all proper occurrences and as required by the *Behring Sea Award Act*, 1894, showing the date of the required occurrences, and the date and place of each fur sealing operation, and also the number and sex of the seals captured upon each day from the original data so kept in his log-book and account book of the seal catch, and the master was entitled to make such entry within twenty-four hours after the arrival of the schooner in port.

Statement of Facts.

9. At the time of the seizure there were on board the schooner *Beatrice* 147 seal skins captured during the said voyage.

10. Paragraphs six and seven of the statement of claim are admitted.

11. On the day of the seizure of the schooner *Beatrice* and after such seizure, 52 fur seals were taken in addition to the 147 fur seals aboard the schooner at the time of seizure, the boats being out engaged in their sealing operations at the time of seizure, and were brought aboard after the schooner's official log-book was taken from the master, and after the master's log-book was initialled by the revenue officer.

12. The seal skins, 202 in number, were by mutual consent sold for $1,818, which sum was on the 24th day of September, 1895, deposited in the Savings Bank Department of the Bank of British Columbia to abide the event of this action and to be dealt with as this honourable court shall direct.

13. The defendant says that if the master erred in not entering up the official log-book as alleged, that it is only a matter for the imposition of penalties as provided for in section 284 of *The Merchant Shipping Act*, 1854, and not a matter for forfeiture of the schooner.

And by way of counter claim the defendant Charles Doering, the owner of the schooner *Beatrice*, says:— That he has suffered great damage by reason of the seizure.

And he claims as follows:

1. Judgment against Her Majesty or Arthur Yerbury Moggridge, commander of H. M. S. *Royal Arthur* for the damage occasioned to the defendant by the seizure and detention of the schooner *Beatrice*, in that there were no reasonable grounds for such seizure and detention, and for the costs of this action.

2. To have an account taken of such damage.

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3. Such further and other relief as the nature of the case may require.

Issue joined.

This cause came on for trial at Victoria, before the Honourable Theodore Davie, C.J., Local Judge for the Admiralty District of British Columbia, on the 13th November, 1895.

C. E. Pooley, Q.C. for the Crown;

E. V. Bodwell, Esq. (with him *G. H. Barnard*) for the defendant.

DAVIE, C.J.; L.J. now (November 18, 1895) delivered judgment.

The charge against the *Beatrice* is that, whilst engaged in seal fishing, the master did not enter in her official log-book the date and place of each fur sealing operation, and also the number and sex of the seals captured each day, as required by the *Behring Sea Award Act*, 1894. No other offence is charged against the ship, and for the offence above mentioned the present action is brought for the forfeiture of the vessel, her equipment, and everything on board.

It appears that the *Beatrice* was seal fishing from the 2nd to the 20th of August, on which latter date she was seized by the U.S.S. *Rush*. It seems that the entries had been duly made in the official log-book up to and including the 14th August, but none since, although fur seals had been captured on each subsequent day.

Article 5 of the scheduled provisions of the *Behring Sea Award Act*, 1894, enacts that the masters of vessels engaged in fur sealing shall enter accurately in their official log-book the date and place of each fur sealing operation, and also the number and sex of the seals captured upon each day. Subsection 3 of section 1

enacts that the provisions of *The Merchant Shipping Act*, 1854, with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing, and section 281 of *The Merchant Shipping Act*, 1854, provides that every entry in an official log shall be made as soon as possible after the occurrence to which it relates, and if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence and of the entry respecting it, and that in no case shall any entry therein in respect of any occurrence happening previously to the arrival of the ship at her final port of discharge be made more than 24 hours after her arrival.

Under section 1, subsection 2, of the *Behring Sea Award Act*, 1894, "if there is any contravention of the Act (and the scheduled provisions are made part of the Act) the ship employed in such contravention, and her equipment and everything on board thereof shall be liable to be forfeited to Her Majesty as if an offence had been committed under section 103 of *The Merchant Shipping Act*, 1894.

Assuming then a contravention of the Act owing to the neglect of the master to keep up his log, can the ship be said to be "employed" in such contravention, as it is only when "employed" in the contravention that she is subject to forfeiture?

If the contravention had been the taking of seals at a prohibited time or place or in a proscribed way, the vessel might fittingly be said to be "employed" in the contravention; but the keeping of the log is another matter, that is the master's duty. I cannot see how the vessel can be said to be "employed" in keeping the official log, or in omitting to keep it.

But, beyond this, following the general provisions of subsection 2, which, among other things impose the

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forfeiture of a vessel employed in contravention of the Act, is subsection 3, which says that the provisions of *The Merchant Shipping Act*, 1854, with respect to official logs (including the penal provisions) shall apply to every vessel engaged in fur seal fishing. The penal provisions of *The Merchant Shipping Act*, section 284, subject only the master to a particular penalty for not keeping the official log-book, such penalty being a fine of £5 or £30, according to the offence. No penalty or forfeiture whatever attaches to the ship. The particular provision of *The Merchant Shipping Act*, 1854, inflicting a fine only upon the master, seems to be incompatible with the general provisions of subsection 2 of the Act of 1894, imposing a forfeiture, and such being the case, and following the well recognized rule of construction laid down in *Churchill* v. *Crease* (1), *Pilkington* v. *Cooke* (2), and *Taylor* v. *Oldham* (3), subsection 2, imposing forfeiture of the vessel, must be read as expressly excepting a contravention by omission to keep a log. Hence, the vessel is not liable to be proceeded against, although the master might be punished by a fine.

But I am by no means persuaded that the captain was punishable for or guilty of any culpable omission in respect of the official log. As before pointed out, by section 281 of *The Merchant Shipping Act*, 1854, every entry in an official log is to be made as soon as possible after the occurrence to which it relates.

"As soon as possible" means "within a reasonable time," *Attwood* v. *Emery* (4), *Cammell* v. *Beaver Ins. Co.* (5), *Hobson* v. *Western Assurance Co.* (6); and what is a reasonable time must depend upon the facts governing the case in which the question arises.

(1) 5 Bing. 180.
(2) 16 M. & W. 615.
(3) 4 Ch. D. 395.
(4) 1 C. B., N. S., 110.
(5) 39 U. C. Q. B. 8.
(6) 19 U. C. Q. B. 326.

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Here it was proved in evidence that the captain kept a book of account with his hunters, who were paid according to the seals taken, and this book was kept in the cabin, constantly open and in use; and contained a daily entry of the particulars of the catch. Besides this the captain kept his ship's log, in which were entered daily particulars of the voyage other than the capture of seals, whilst the official log-book was kept locked up. The crew, besides the hunters, consisted only of the captain, mate and cook. The hunters would leave the ship in their boats at 5 a.m., and generally remain out until evening, and the crew of three left on board would have their time well occupied, particularly in rough or foggy weather, in navigating the vessel and keeping the boats in sight or hearing.

At night when the boats came in, the captain would take, on deck, particulars of the capture, and then go below and enter them in the account-book. When time and convenience afforded relaxation from other duties, the captain would make entries in his official log, which had, in this case, been duly posted up to and including the 14th of August.

The ship's log shows that between the 15th and 20th August there was considerable fog and bad weather. I am unable to say, under these circumstances, that the captain permitted an unreasonable time to elapse in making entries in the official log.

On these grounds I am of opinion that the action for condemnation wholly fails, and as, in my judgment, the charge upon which the vessel was arrested was of something for which arrest could not legally be made, no question of reasonable ground for the arrest arises, and, the ship having been arrested when in the pursuit of a legal and profitable employment, is entitled to recover damages therefor.

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I therefore dismiss the action for condemnation with costs; and I direct a reference as to the damages to which the ship is entitled for her illegal arrest and detention.

Judgment accordingly.

Solicitor for plaintiff: *C. E. Pooley.*

Solicitor for ship: *E. E. Wooton.*

JAMES MURRAY AND MERRITT A. CLEVELAND..... .... } CLAIMANTS; 1895 Nov. 23.

AND

HER MAJESTY THE QUEEN .....DEFENDANT.

Contract for construction of canal works—Progress estimates—Certificate of engineer—Condition precedent to right to recover—Position of court in regard to revising same—Refusal to give certificate.

By their contract with the Crown for the construction of certain works on the Galops Canal the claimants agreed, *inter alia*, that cash payments, equal to 90 per cent of the work done, approximately made up from returns of progress measurements and computed at contract prices, should be made to them monthly on the written certificate of the engineer, stating that the work so certified by him had been executed to his satisfaction and amounted to a sum computed as above mentioned. This certificate was to be approved by the Minister of Railways and Canals, and to constitute "a condition precedent to the right of the contractors to be paid the said 90 per cent or any part thereof." It was further agreed that the remaining 10 per cent "should be retained until the final completion of the whole work to the satisfaction of the chief engineer for the time being having control over the work, and that within two months after such completion, the remaining 10 per cent would be paid." It was also agreed that the written certificate of the engineer certifying to the final completion of said works to his satisfaction should be a condition precedent to the right of the contractors to be paid the remaining 10 per cent or any part thereof.

Held, that as the parties had agreed to be bound by the judgment of the engineer, the court had no power to alter or correct any certificate given by him in pursuance of the terms of the contract.

2. That in the absence of fraud on the part of the engineer in declining to give a certificate for a claim put forward by the contractors, the court will not review his decision.

THIS matter came before the Exchequer Court upon a reference from the Department of Railways and Canals of Canada, under the provisions of section 23

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of *The Exchequer Court Act*, 50 and 51 Vict. Cap. 16. No pleading were filed on either side, the case being heard and the evidence taken upon the reference.

The claimants alleged that the sum of $8,907.30 was due to them upon a contract, dated the 14th November, 1888, for the enlargement and deepening of the upper or western end of the Galops Canal on the St. Lawrence River and the construction of the necessary locks, weirs and other works to effect that object.

At the time the alleged claim arose the work under contract had proceeded for several years, and the contractors had received and been paid a large sum on progress estimates, from time to time, as the work progressed.

The claimants complained that by the progress estimate of the 26th September, 1893, which covered the work done and material delivered on the contract up to the 31st August, 1893, the Chief Engineer of the Department of Railways and Canals had undertaken to re-classify some of the work which had appeared in the former progress estimate of March, 1893: that by this re-classification the total amount certified for payment was $9,897.00 less than it should be, and that the said sum less ten per cent drawback, reducing it to $8,907.30, should have been paid them on the September estimate, in addition to the amount they then received.

The particular work in question with respect to which the re-classification had been made, came under item No. 6 of the schedule in the contract, which read as follows:—

"Earth excavation—Over water-line for the widen-
"ing of canal on the north side, from a point 100 feet
"east of present guard-lock to end of section, includ-
"ing all kind of material (solid rock and boulders con-
"taining one-fourth of a cubic yard excepted), hauling

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"the same across canal and for a distance of 700 feet to "3,600 feet to form a dam on Round Bay shoal to in- "close space for lock.....per cubic yard 50 cents."

The specifications showed that a lock and dam were to be constructed. The earth material for the making of the dam was to be procured from a point on the side of the river opposite to the site of the dam, which point was called "McLaughlin's Hill." The quantity of material in this hill proved to be insufficient by some 39,588 cubic yards for the completion of the work. For the hauling and placing of material from the place named and depositing in the dam, the contractors were entitled under item No. 6, to be paid 50 cents per cubic yard of the schedule of prices. The deficiency was made up with the approval of the engineer in charge of the works, by using the material taken from the lock-pit to complete the work of the dam. The lock-pit was immediately adjacent to the dam and by the 8th item of the said schedule, the material from the lock-pit was to be carried a distance of 1,500 feet and deposited in Round Bay, and for so hauling and depositing such material, the contractors were to be paid 60 cents per cubic yard.

The material was not returned in the monthly estimates, from time to time, at fifty cents a cubic yard for the taking of it over and putting it into the dam, the resident engineer saying that he had no formal instructions from Mr. Page, the then Chief Engineer, to return it under any particular item of the schedule so far as the work of taking it over and putting it into the dam was concerned. The claimants had then already been paid for the excavation of it under items 8 and 13 of the schedule.

Mr. Page died in July, 1890, and no material had up to that time been so included in the estimates. In September, 1890, on the contractors further urging

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that it be included in the monthly estimates, the resident engineer, Mr. Haycock, as directed by the then Chief Engineer, the late Mr. Trudeau, with the approval of the then Minister of Railways and Canals, the late Right Hon. Sir John A. Macdonald, returned it, one-half in the October estimate and one-half in the November estimate for 1890, under item 6 of the schedule of prices, that is to say fifty cents a cubic yard, the same as the material taken from McLaughlin's Point.

These estimates were duly signed by the Chief Engineer and approved of by the Minister and paid over to the claimants, and from month to month thereafter until March, 1893, the works progressed and estimates were duly issued and paid.

In December, 1892, Mr. Trudeau ceased to be chief engineer, and was succeeded by Mr. Schreiber, who certified the monthly estimates for December, 1892, and February, 1893, there being none for January. After February, 1893, Mr. Schreiber caused an examination and re-measurement of the works to be made; and in consequence, although the works were being still prosecuted, no estimate was issued after February until September, 1893, the one numbered 45, which takes the place of estimates 43, 44 and 45.

By the examination and re-measurement referred to, Mr. Schreiber, having ascertained that the claimants had been paid for the excavating of the 39,588 cubic yards according to the prices partly of item 8 and partly of item 13 of the schedule, and also at fifty cents a cubic yard for carrying it over and putting it into the dam, formed the opinion that they should not have been paid for it under both these classifications, and reported that the fifty cents a cubic yard should be taken back from them as having been improperly paid. The result of this re-classification was that the

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progress estimate of September, 1893, certified the total value of work performed and materials furnished by the contractors under their contract up to the 31st August, 1893, at the sum of $722,592.53, instead of, as the contractors claimed it should have been, the sum of $732,489.53. The difference between these sums with the ten per cent drawback deducted, is the sum of $8,907.30, the amount of the claim.

The case came on for hearing on the 14th December, 1894, before the Judge of the Exchequer Court, who, on the same day, gave judgment declaring the claimants to be entitled to the amount of their claim and costs, leave being reserved to the defendant to move to set aside the judgment upon matters of law.

On the 29th March, 1895, the defendant moved to set aside the judgment, pursuant to leave.

W. D. Hogg, Q.C., in suppport of motion :—

This action, being brought on a progress estimate, will not lie. (*Emden on Building Contracts*, p. 121; *Hudson on Building Contracts*, pp. 272, 273. *Tharsis Sulphur Co.* v. *McElroy*) (1).

2ndly. Even if my first point were refuted, claimants have no right of action because the certificate upon which they rely is not made within the requirements of the contract; and it did not have the approval of the Minister of Railways and Canals.

3rdly. The Chief Engineer had no right to deviate from the contract, and it is only upon a deviation that the claimants could have a *locus standi* here.

D'Alton McCarthy, Q.C., (with whom was *A. Ferguson*, Q.C.) *contra.*

The Crown has not paid the full amount of the value of the work done between the end of the period covered by estimate No. 42, and the end of that covered by estimate No. 45, as certified to in the latter.

(1) 3 App. Cas. 1040.

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The balance is the equivalent of the amount in question, and is not paid because Mr. Schreiber assumed a right, which he had not, of revising the estimates for October and November, 1890, and of reducing the price previously paid for putting into the dam the 39,588 cubic yards of material in question, and of trying to force the claimants to pay back the difference between what they had been paid for this item and what he allowed for it in estimate No. 45.

There is no authority under the contract for the successor of the Chief Engineer to revise the progress estimates of his predecessor; and, even if the price of fifty cents a yard was not regularly fixed and determined, and even if the order to do the work was not regularly given under the contract, these objections cannot now be raised, as they have by the payment of the estimates been waived.

The work for which payment is now claimed is in reality part of the work done subsequent to February, 1893, and it has been certified to in estimate No. 45.

If the Chief Engineer has given a certificate once that the work claimed for has been done, and that it is worth so much at contract prices, that is all that is necessary. The contractor cannot be refused payment because the certificate is not in a certain form.

Each progress estimate ought, according to clause 25 of the contract, to show only the work done in the previous month; not for the whole period from the beginning of the work. If this mode had been adopted by the Department instead of the present one of including all the work over again in each month, the claimants' contention would be perfectly clear on the face of estimate No. 45.

Then who is to settle this question as to the price of the material? To determine whether it should be 25, 40, or 60 cents? I say that the authority to determine

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that fact must be found within the four corners of this contract. My contention is that it was quite within the competency of the engineer to make the arrangement he did with the contractors. The work that had to be done was the making of this dump. What was done was not new work not contemplated by the contract, and no new written order was required for it. What was done was merely a change made in order to make the work for which the contract was entered into, less expensive. What the engineer did he was clearly empowered to do under the provisions of the contract.

Clause 8 of the contract gives the right of deciding upon the price of the work to the engineer in charge, and it says that his decision shall be final. Now the engineer determined that this work had to be paid for under item 6 of the contract. If that be so, and it is so, how does the argument of my learned friend apply? Counsel for the Crown says that this is an alteration of the contract under clause 5. And he further contends that there should be an authority in writing for the work done before the claimants can maintain this action, although they have done the work. Now it is clear that in contracts of this class, of a class which provide that no claim should be made for additional work done without the written order of some person in authority—and they are usually building contracts —a written certificate of the work done made after the work is completed, is of itself sufficient, and bars the employer from denying the sufficiency of his servant's, that is the engineer's, authority. [He cites *Goodyear* v. *Weymouth* (1); *Connor and Olley* v. *Belfast Water Commissioners* (2); *Harvey* v. *Lawrence* (3).] Now it is true that all these cases are upon final certificates, there are

(1) 35 L. J. C. P. 12. (2) 5 L. R. (Ir.) C. L. 55.
(3) 15 L. T. N. S. 571.

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no cases in regard to progress estimates upon this point. But there is nothing in the facts of the case before your Lordship to exclude the principles of law as laid down in the cases I have cited. The case of *Tharsis Sulphur Co., etc.* v. *McElroy* (*ubi sup.*), does not apply to the facts of this case. In that case there was a positive expression of intention that nothing would be due until the work was done, but that advances might be made under the terms set out in the contract. Now in the case before your Lordship, we agree to do the work, and Her Majesty agrees to pay us advances on progress estimates. That is, we are to be paid in the manner set out in the contract at length. [He cites *Pickering* v. *Ilfracombe Ry. Co.* (1); also in *Hudson on Building Contracts* (2).]

Counsel for the Crown's next point was that no action would lie on this certificate because it was not approved by the Minister, but he loses sight of the fact that the money has been paid. I maintain that an action properly lies upon the certificate, and that inasmuch as the certificate has been acted upon by the parties it was not competent for the engineer, Mr. Collingwood Schreiber, to correct it. The certificate having had the approval of Mr. Trudeau, it was not open to Mr. Schreiber to correct it. [He cites *Freeman* v. *Jeffries* (3).] All the evidence points to the fact that there is no mistake in the certificate, and it could not be corrected on that ground. The certificate we are entitled to is the certificate of the engineer for the time being, and his successor cannot correct it. The work has been done and has been certified to in accordance with the law and the contract, and therefore we are entitled to recover. [He cites *Goodyear* v. *Weymouth* (4); *Harvey* v. *Lawrence* (5).]

(1) L. R. 3 C. P. 235.
(2) P. 276.
(3) L. R. 4 Ex. 189.
(4) 35 L. J. C. P. 12.
(5) 15 L. T. N. S. 71.

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Reasons for Judgment.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895,) delivered judgment.

The claimants' demand to be paid the sum of $8,907.30, in controversy in this case, is, I think, on the merits of that controversy, a just one. But the Crown says, among other defences to which it will not be necessary to refer, that for this sum the claimants have not procured, as required by the contract on which the action is founded, the certificate of the engineer and the approval of such certificate by the Minister of Railways and Canals, and that for that reason the judgment for the claimants entered in this case should be set aside. That contention must, it seems to me, prevail.

For the claimants it is argued that the progress estimate or certificate of 26th September, 1893, is sufficient to sustain the action. That is a certificate that the total value of work performed and materials furnished by the claimants under their contract up to the 31st August, 1893, was $722,592.53, the drawback to be retained $72,252.53, and the net amount then due $650,340.00, less previous payments. The latter sum has been paid in full; there is no dispute about that. But what happened to give rise to the present controversy was this: In the progress estimate next preceding that of the 26th of September, 1893, that is in the certificate of March, 1893, the engineer had returned the total amount of work done under item 6 of the description of work given in the 24th clause of the contract at 160,810 cubic yards at 50 cents per cubic yard. In the progress estimate of the 26th of September certain reductions and a re-classification of the work done were made; and, among others not now in question, the total work under such item 6 was reduced by 39,588 cubic yards, which were elsewhere, under the re-classification, returned at 25 cents per cubic yard. The result was to reduce the total amount that but for

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such re-classification would have been certified for, by 25 cents a cubic yard on 39,588 yards, or by a sum of $9,897.00, from which, deducting the ten per cent. for drawback, we get the $8,907.30 now in question. Between these two progress estimates the new work described in item 6, referred to, amounted to only 1,209 cubic yards. If it had happened that such new work had amounted to 39,588 cubic yards, or more, it would have been obvious of course that the effect of what the engineer did was to prevent the claimants from getting for such 39,588 cubic yards of new work the price prescribed in item 6 and to give a lesser price under another classification. But because the work of the description mentioned in such item 6, done between the dates of the two progress estimates referred to, was less than 39,588 cubic yards the immediate result was that part, and as it happened the larger part, of the reduction occasioned by the re-classification of that quantity went to reduce the amount which the claimants were entitled to for other work about which there was no dispute and for which the engineer was certifying. For that reason it is argued that the court should treat the progress estimates of September 26th as being in fact and substance a certificate for $732,489.53, with an amount of $9,897.00 deducted from or charged against it for insufficient reasons; that in that view the engineer has in fact certified for $9,897.00, on which the sum of $8,907.30, for which judgment was entered, is actually due and has not been paid. With that view I cannot agree. What appears to me to be perfectly clear and plain about these certificates or progress estimates which the engineer has given, is that I have no right or authority to alter or correct them. To do so would be to substitute my judgment and certificate for his in a case in which the parties have agreed to be bound by his judgment and his certificate. Turning to the certificate of September 26th,

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1893, I find that he certifies that the total value of the work performed and materials furnished by the claimants up to the 31st of August, 1893, was $722,592.53. That sum may be right or it may be wrong. It is undoubtedly the sum that he intended to certify for. There is no mistake about that, and I must, I think, take the certificate as I find it and for the sum therein mentioned, neither more nor less. It is conceded that of that sum the claimants have been paid all that is due to them. If the amount now in controversy had been certified for it too would no doubt have been paid. It is because the engineer has refused to give his certificate for such amount that the parties are in court at all. That is the broad fact of the case, and although I do not think his reason for refusing to certify to be a good reason, the claimants have agreed to abide by his judgment. It is conceded, as I understand the argument, that if any mistake had in fact been made in the earlier progress estimates either as to quantity of work done, or in the classification of such work, the engineer might, in the certificate of September 26th, have corrected such mistake, and the claimants would have had no cause of complaint. That is, for a good reason he might have revised the quantities or classification. But then the engineer is, in the absence of fraud or improper conduct, of which there is not the slightest suggestion in this case, the judge of whether the reason or grounds upon which he acts or refuses to act are sufficient or insufficient, and what he has done or not done is in either case equally beyond review here.

The judgment for the claimants herein will be set aside, and judgment entered for the defendant with costs.

Judgment accordingly.

Solicitor for claimants: *A. Ferguson.*

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

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HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

SAMUEL MOSS AND THE SUPERINTENDENT-GENERAL OF INDIAN AFFAIRS..... } DEFENDANTS.

Public work—Injurious affection—Destruction of highway — Measure of damages—Obstruction to navigation.

Where lands are taken for a public work, and other lands, held with those so taken, are injuriously affected by the construction of the work, the measure of damages is, in general, the value of the lands taken and the depreciation in value of such other lands.

2. The claimant's lands were situated upon an island connected with the mainland by a highway carried over a structure in waters that were, in law, navigable, but had not been used for the purpose of navigation, being only some five or six feet in depth. The obstruction had been acquiesced in for many years. The Crown had repaid to the land owners on the island money the latter had expended in repairing the highway over this structure, and the municipality had also expended money in repairing the highway where it crossed such waters. By the construction of a public work this highway was flooded and destroyed. The Crown, however, treated it as a public way, and substituted another way for it that mitigated, but did not wholly prevent, the depreciation in value of the claimant's property.

Held, that even if the legislature had not authorized the obstruction in such navigable waters, the claimant was entitled to compensation for the depreciation caused by the construction of the public work, inasmuch as such depreciation did not arise from any proceeding taken by the Crown for the removal of such obstruction.

THIS was an information by the Crown for the expropriation of certain lands in the township of Cornwall, Stormont County, Ontario, for the purposes of the construction of the Sheik's Island Dam.

The facts are stated in the reasons for judgment.

The case was tried at Cornwall on the 5th, 6th and 7th days of November, 1895.

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Argument of Counsel.

G. Leitch, Q.C. for the defendant Moss: The inhabitants of the island were entitled to use the old bridge *ex necessitate*. They enjoyed the user of this bridge for nearly seventy years. Besides this the stream was not navigable, and the Crown never had a right to remove the bridge as an obstruction to navigation. A prescriptive right to the use of the bridge as part of the highway had accrued beyond a doubt before the destruction of the highway. Compensation must be made.

W. D. Hogg, Q.C. and *J. Bergin*, Q.C. for the Crown and the Superintendent-General of Indian Affairs:—This bridge is laid across part of the bed of the stream of the St. Lawrence river, therefore the islanders could not acquire any rights by prescription that would interfere with the *jus publicum*. The local legislature could not authorize such an interference. The obstruction to navigation could have been abated at any time, and the Crown having now removed it no right to compensation subsists on behalf of anyone. (*Dixon* v. *Snetsinger* (1); *Queddy River Driving Boom Co.* v. *Davidson* (2).

Mr. *Leitch*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895) delivered judgment.

The defendant Samuel Moss is in possession of a farm situate on Sheik's Island in the township of Cornwall and county of Stormont. The fee in the land on Sheik's Island is in the Crown for the benefit of the Iroquois Indians of Saint Regis, and Moss, and other occupiers of lands thereon, hold their lands as assignees under a lease of such lands to their predecessors in title for a term of nine hundred and ninety-nine years. The farm that Moss is in possession of contained, in

(1) 23 U.C.C.P. 235. (2) 10 Can. S.C.R. 222.

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January, 1894, one hundred and thirteen and a half acres. On the 12th of that month the Crown, through the Minister of Railways and Canals, for the use and enlargement of the Cornwall Canal, a public work of Canada, expropriated ten acres and eighty-five one-hundredths of an acre of the land theretofore forming part of this farm; and the parties have agreed upon the compensation to be paid for the land so taken by the Crown, and for damages occasioned by the severance, as well as upon the amount that is to be deducted therefrom and paid to the Superintendent-General of Indian Affairs in respect of the Indian title. The only questions to be determined are:—Is the defendant Moss entitled also to compensation for the depreciation in value of his farm occasioned by the construction of the public work, and, if so, the amount of such compensation. The latter question presents under the evidence little or no difficulty. There can, I think, be no doubt that when the works that are now in progress and for which the lands mentioned were taken, are completed the defendant's farm will be lessened or depreciated in value by the amount claimed, namely one thousand dollars.

Sheik's Island lies at the foot of the Longue Sault Rapids of the Saint Lawrence River. At this point the river divides itself into three channels or branches, Sheik's Island lying between the north channel and the middle channel. The north channel forms part of the navigable waters of the Saint Lawrence, though it does not appear to have been used for the purposes of navigation, the normal depth of water therein being some five or six feet. Since 1833, and perhaps from a time anterior to that, the inhabitants of the Island have had communication with the mainland by a bridge across this channel at or near the village of Moulinette; and in the construction at this point of the

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Cornwall Canal in 1833 or 1834, a way was provided by a tunnel under the canal by which the highway from the Island across this bridge was carried to the north or Moulinette side of the canal. This bridge was carried away in 1851, and was then rebuilt upon a new site, a short distance from that previously occupied. In rebuilding the bridge the inhabitants made use of what was called a dam that had been made for milling purposes, and which was built in the middle of the channel and part of the way across the same. In 1861 the Government of the Province of Canada paid to a number of the inhabitants of the Island one thousand dollars to indemnify them for work and money expended on the bridge, and the municipal authorities have from time to time expended money in repairing the bridge and maintaining the highway which connect and form the only means of communication between the island and the mainland. This bridge and partial dam formed no doubt an obstruction to the navigation of the channel such as such navigation was; and there is nothing to show that there was ever any legislative authority to justify or legalize the obstruction, unless the clause in *The Expropriation Act* (1) to which I shall presently refer is sufficient for that purpose. The channel was not used for the purposes of navigation. It was necessary and proper that the lessees of the island should have a way to the mainland, and every one, including the Crown, no doubt acquiesced in the maintenance of the obstruction. In the execution of the present work of enlarging the Cornwall Canal two large dams have been constructed across the north channel, one at the west or upper and the other at the east or lower end of Sheik's Island, and when the works are completed the canal will be turned into and

(1) 52 Vict. c. 13, s. 34.

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through this channel, which will then cease to be one of the channels of the Saint Lawrence, and will become a part of the Cornwall Canal, the water level of which is at this point much higher than the level of the Saint Lawrence River. The result of this will be that the highway from the island to the mainland will be submerged and destroyed, and the inhabitants of the island will be deprived of the means of communication that they have had with the village of Moulinette, at which place they have been accustomed to attend church, to send their children to school, and to transact their business as farmers. To meet this difficulty the Minister of Railways and Canals proposes, and it is part of the work contemplated and in progress, to substitute a highway to the village of Mille Roches, some three or four miles east of Moulinette. This proposed highway will be carried over the lower dam and then across the canal by a bridge. This substituted highway will mitigate the inconveniences to which any person in the occupation of lands upon the island would otherwise be put, and will lessen the depreciation in the value of land on the island which would otherwise occur by reason of the construction of the public work. But notwithstanding this highway to Mille Roches, it must, I think, be conceded that, when the proposed works are completed, the part of the defendant Moss' farm that has been left to him will, by reason of such works, be depreciated in value to the extent of one thousand dollars. By the 3rd section of *The Expropriation Act*, clause (*f*), the Minister of Railways and Canals is given power, among other things, in such a case as this, to divert permanently any road, street or way, but before discontinuing any public road he is to substitute another convenient road in lieu thereof. It is by virtue of this power, so I understand it, that the

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Minister proposes to divert or destroy the road or way from the island to the village of Moulinette and to substitute therefor the proposed road or way to the village of Mille Roches. Then the Act to which I have referred contemplates that the owner of land taken for a public work shall be paid compensation not only for the land taken, but for damages occasioned thereto by the construction of the public work (ss. 15 and 22), and it is not in this case contended that the defendant would not be entitled to damages but for one thing. It is said that the bridge and highway across the north channel of the river was an obstruction to navigation; that it was not a lawful structure or erection in and over such channel, and that the Crown has a right to submerge it and destroy it, without paying damages to anyone. That, if conclusive against the defendant, would of course apply only to such portions of the bridge and highway as are an actual obstruction to navigation, and not to other portions of the highway which are equally flooded and destroyed.

But we need not, I think, concern ourselves with what the rights of the Crown might have been had proper proceedings been taken to have this bridge and highway removed, or what it might without such proceedings have done had there been occasion to remove the bridge to improve the navigation of the north channel of the river. That is not what is being done. This channel, as we have seen, has been dammed off from the St. Lawrence, and has ceased to be a channel of the river, and has, or rather will, become a part of the Cornwall Canal. The Minister treats the highway in question as a public road, and proposes to follow the statute and substitute a way to Mille Roches in lieu thereof; and I see no reason to depart from the statute in assessing the compensation to the land owners where a part of their lands has been taken for the

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public work, and the remainder injuriously affected by the construction thereof. The highway, from the island to Moulinette, was one of the things that made the lands on the island valuable. By its destruction in the construction of a public work such lands are lessened in value. That depreciation is mitigated, but not wholly met by the making of a way to Mille Roches. If no part of the defendant's land had been taken he might have been without remedy. It is not necessary to discuss that question. But a part having been taken, the measure of damages is, I think, the value of the land taken and the depreciation in value of other lands, held with those so taken, occasioned by the construction of the public work.

I am the better pleased to be able to come to this conclusion, because I think that the bridge in question is within the spirit, if not the letter, of the concluding clause of the 34th section of *The Expropriation Act*, which provides that every bridge, wharf or public work theretofore constructed with the public money of Canada in or over navigable water should be, and be deemed to be a lawful work or structure.

There will be the usual declaration that the lands mentioned in the information are vested in the Crown, and the amount of the compensation money will be assessed at $2,025.35, as follows :—

For land taken for the public work, and damages resulting from severance, as agreed upon....	$	922 25
Interest thereon from Jan. 12th, 1894, to Nov. 23rd, 1895.....		103 10
Other damages, resulting from the construction of the public work as mentioned.....		1,000 00
	$	2,025 35

Of this sum of $2,025.35, the sum of $17.50 is to be paid to the Superintendent-General of Indian Affairs,

in respect of the Indian title in the lands taken, and the balance of $2,007.85 to the defendant, Samuel Moss.

The defendant Moss will be allowed the costs of the issue as to damages resulting from the diversion of the highway to Moulinette and the substitution of the way to Mille Roches.

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Reasons for Judgment.

Judgment accordingly.

Solicitor for the plaintiff: *John Bergin.*

Solicitors for the defendant Moss: *Leitch, Pringle & Harkness.*

Solicitors for the Superintendent-General of Indian Affairs: *O'Connor & Hogg.*

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Nov. 23.

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

AND

HOLLAND H. ELDRIDGE.....DEFENDANT. (1)

Fishing Bounty—R. S. C. c. 95—Fishing by traps and wears—Right to bounty.

Defendants prosecuted fishing by means of brush wears and traps. The wears were formed by brush leaders from the shore with a pound at the extreme end. At low water the wears were dry, and at neap-tide there would be some four feet of water therein. The traps were constructed by means of a leader from the shore and a pound at the end formed by netting stretched on poles or stakes set upright in the bed or bottom of the water. Boats were sometimes, but not always, used to take the fish from the wears and traps.

Held, that fishing by such means was not "deep-sea fishing" within the meaning of R. S. C. c. 95, and the Regulations made thereunder by the Governor-General in Council and the Instructions issued by the Minister of Marine and Fisheries in the year 1891; and that the defendants were not entitled to bounty as provided by the said Act.

THESE were four Special Cases submitted to the court under the provisions of Rule 111 of the Rules and Orders of the Exchequer Court of Canada.

The material facts were common to all the cases. The following is the case agreed upon herein.

"This action was commenced on the 5th day of April, A.D. 1895, by an information filed at the instance of the Attorney-General for the Dominion of Canada, against the above named defendant to recover $4.00, paid to the defendant on a fishing bounty claim for the season of 1891.

(1) The following cases were consolidated with this for the purposes of argument and for judgment: *The Queen* v. *Jacob E. Moorhouse; The Queen* v. *Samuel Gidney; The Queen* v. *Holmes Saunders*, et al.

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THE QUEEN v. ELDRIDGE.

Statement of Facts.

The following admissions, for the purpose of this information only, have been agreed upon by counsel for the Crown and for the defendant:

1. The defendant was the owner of one-sixteenth of a brush wear at Sandy Cove, in the County of Digby, in the year 1891.

2. The said wear was an ordinary low water brush wear, formed by a brush leader from the shore and a pound at the extreme end. At low tides the wear was dry; at neap-tides there would be four feet of water in the wear.

3. The fish caught in the said wear were taken out at low tide sometimes by men wading out around the wear; and sometimes when the tide was not dead low by seining the fish out of the wear into boats.

4. The boat owned by the defendant on which he claimed bounty was 13 feet 4 inches long, and it was employed in attending this wear when necessary during the season.

5. The defendant's share of the product of the said wear was three barrels of split mackerel, weighing 200 pounds each; but these fish, fresh from the water and undressed, would weigh nearly 400 pounds.

6. The defendant also owned one-tenth of a seine boat and seine.

7. The defendant's share of the mackerel caught in the said seine, together with the mackerel caught in the brush wear aforesaid, would weigh 2,500 pounds of split mackerel.

8. The said boat used in attending the brush wear was also used when necessary in attending the said seine; and was so employed in attending the said wear and seine more than three months during the season of 1891.

9. At the close of the season for 1891, the defendant filed the fishing bounty claim which is produced here-

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Statement of Facts.

with, and marked exhibit "A," and was paid by the Department of Fisheries the bounty of $4.00 claimed, viz : $3.00 as fisherman, and $1.00 as owner of the said boat.

10. The regulations for 1891, in reference to fishing bounties, which are produced herewith and marked exhibit "B," were posted during the season in public places at Sandy Cove where the defendant resided, and they were read by him.

11. Defendant says that at the time he filed his claim herein, he believed that he was entitled to the bounty claimed.

12. The orders in council referring to fisheries and payment of fishing bounties are admitted as a part of this case.

The facts being as above stated the question for the opinion of the court is whether the defendant was entitled to the fishing bounty of $4.00 paid to him, viz: $3.00 as fisherman, and $1.00 as owner of the boat employed as aforesaid.

If the court shall be of opinion in the negative, then judgment shall be entered for the plaintiff for the sum to which the defendant was not entitled with interest and costs of suits to be taxed.

If the court shall be of opinion in the affirmative, then judgment shall be entered for the defendant with his costs of defence to be taxed."

The plaintiff filed certain exhibits to the Special Case. Exhibit "A," was the defendant's claim for the bounty, which it is not necessary to print ; exhibit "B" consisted of the following :

"PRIVY COUNCIL OF CANADA.

"AT THE GOVERNMENT HOUSE AT OTTAWA,

"SATURDAY, 21st day of November, 1891.

"PRESENT—*His Excellency the Governor-General in "Council.*

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"His Excellency under the authority conferred upon him by the Act 54-55 Victoria, chapter 42, intituled "An Act to amend Chapter 96 of the Revised Statutes," intituled "An Act to encourage the development of the Sea Fisheries and the building of Fishing Vessels," and by and with the advice of the Queen's Privy Council for Canada, is pleased to order that the sum of $160,000 payable under the said Act 54-55 Victoria, chapter 42, shall be distributed for the year 1891, upon the following basis:

"VESSELS

entitled to receive the bounty shall be paid on the basis of one dollar and a half ($1.50) per registered ton, provided, however, that payment to any one vessel shall not exceed the sum of one hundred and twenty dollars ($120.00), one-half of such bounty, or seventy-five cents per ton to be paid the registered owner or owners of the vessels, and an equal division of the balance of seventy-five cents per ton to be the basis of payment to the crew, except in cases where one or more of the crew shall have failed to comply with the regulations necessary to entitle them to receive bounty; then the amount of such share or shares shall not be paid.

"BOATS.

"Fishermen engaged fishing in boats, who shall also have complied with the regulations entitling them to receive the bounty, shall be paid the sum of three dollars ($3.00) per man, and the owners of the fishing boats shall be paid one dollar ($1.00) per boat.

"It is further ordered that a compliance with the following instructions shall be necessary to entitle claimants to receive the bounty."

"(Certified)

"(Sgd.) JOHN J. McGEE,

"*Clerk of the Privy Council.*"

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Statement of Facts.

"FISHING BOUNTIES.

"1891.

"INSTRUCTIONS TO CLAIMANTS.

"BOATS.

"1. Claimants for fishing bounty, to be entitled thereto, must have been engaged in *deep-sea fishing* for fish other than shell fish, Salmon or Shad; or fish taken in rivers or mouths of rivers (these being the exemptions under the Washington Treaty) for at least *three months* and have caught not less than 2,500 pounds of sea-fish per man;"

"2. No bounty will be paid to boats measuring less than 13 feet keel, and not more than *three* men (the owner included) will be allowed as claimants in boats *under* 20 *feet;*"

"3. Dates and localities of fishing must be stated in the claim, as well as the quantity and kinds of sea-fish caught;"

"4. Ages of men must be given. Boys under 14 years of age are not eligible as claimants;"

"5. Returns must be verified by the solemn declaration of claimants;"

"6. Only one claim will be allowed in each season, even though the claimant may have fished in two vessels, or in a vessel and a boat, or in two boats. Any person or persons detected making fraudulent returns, will be debarred from participation in the bounty;"

"7. Claims must be filed on or before the 30th November."

"8. Customs or Fishery Officers will supply the requisite blanks free of charge and after certifying the same, will transmit them to the Department of Fisheries."

"VESSELS.

"9. Canadian registered vessels of 10 tons and upwards (up to 80 tons) which have been engaged during

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a period of three months in the catch of sea-fish not exempted under the Washington Treaty, are entitled to a bounty of $1.50 per ton; one half of which is payable to the owner or owners, and the other half to the crew;"

"10. Owners of vessels intending to claim bounty will be required, before proceeding on a fishing voyage, to procure a license from the nearest Collector of Customs or Fishery Overseer. The license must be attached to the claim when sent in for payment."

"11. Directions contained in paragraphs 3, 4, 5, 6, 7 and 8 apply to vessels as well as to boats."

"(Sgd.) CHARLES H. TUPPER,

"*Minister of Marine and Fisheries.*

"Department of Fisheries,

"Ottawa, 5th August, 1891.

"NOTE.—As much inconvenience has arisen by the delay on the part of claimants in filing their claims, it is requested that claims be filed as early in the season as is possible, to facilitate the work of examination and scheduling."

"Claims will not be received after the 30th November."

The argument of the special cases took place at Halifax, before THE JUDGE OF THE EXCHEQUER COURT, on 2nd October, 1895.

C. H. Cahan for the plaintiff:

These actions were brought to recover certain fishing bounties paid over to the defendants by the Department of Marine and Fisheries for fishing conducted during the season of 1891. The point at issue, and the sole issue, because we have agreed upon the facts, is as to whether fish caught in boats and wears are entitled to the fishing bounty under the statute and the regulations made thereunder.

The Bounty Act (1) is entitled *An Act to encourage*

(1) R. S. C. c. 96.

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the development of the sea fisheries and the building of fishing vessels. There was an amendment in 1891, which does not affect the issues raised here. By chap. 96 R. S. C. the annual grant for bounty was fixed at $150,000; by the Act of 1891 it was made $160,000, and the Governor-General in Council was authorized to make a grant annually of $160,000 *to aid in the development of the sea fisheries of Canada and the encouragement of the building and fitting out of improved fishing vessels.* The whole tenor of the Act seems to have been to aid in the development of the sea fisheries and in the improvement of fishing vessels. The regulations that were made thereunder were made before the date of the order in council of 21st November, 1891, which provides for the distribution of the annual grant of $160,000, as follows:—

Vessels entitled to receive bounty $1.50 per registered ton, and where the fishing was prosecuted in boats, those who complied with the regulations entitling them to receive bounty were to be paid $3.00 per man and the owners of the boats $1.00 for each boat.

The object of Parliament was thus to encourage the building of fishing vessels and boats. To entitle the fisherman to bounty, then, he must follow fishing either in vessels or boats, and not in purse seines or wears on the shore. The regulations adopted by this order in council were made on 5th August, 1891, and they require that claimants for fishing bounty to be entitled thereto, must have been engaged in "*deep-sea fishing* for fish other than shell-fish, salmon, or shad, or fish taken in rivers or mouths of rivers (these being the exemptions under the Washington Treaty) for at least three months, and have caught not less than 2,500 pounds of sea fish per man."

The contention of the Crown is that claimants must have been engaged in "deep-sea fishing," and

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that "deep-sea fishing" is not "shore fishing;" and as the wears in question are essentially connected with the shore or part of the shore, the shore is absolutely necessary as the basis and support of their operations. Deep-sea fishing is not fishing in mere tidal waters, and therefore these people are not entitled to receive the bounty.

Take mackerel, for instance: these fish spawn up at the head of the Bay of Fundy, and then turn and come down to each little indentation in the coast.

The wears are formed by a brush leader from the shore with a pocket at the end, the fish enter the wear and come down and run into the pocket where they are impounded. They consist entirely of brush and stakes. At lower water the wear is entirely dry; the fish are taken out by the men wading out or in boats at times when the water is higher. With regard to traps there is also a leader from the shore. The pocket is similarly constructed at the end but the trap consists of netting, the netting is spread on poles set on the bottom or attached to the shore. The poles must be set securely so as to withstand the tide. By sec. 14, R. S. C. c. 95 these wears and traps are prohibited along the whole of the coast of the country except under special license. The contention of the Crown is that this being a "shore fishery" which is proscribed except under special license, it was not the intention or policy of the Government that these parties who pay for special privileges should receive the benefit of an Act which was passed to encourage the construction of fishing vessels and the prosecution of the deep-sea fisheries.

With respect to the Province of Nova Scotia before Confederation, these traps and wears were regulated by c. 95, Revised Statutes, 2nd series "Of River Fisheries."

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I simply notice this to show that these fisheries are there dealt with as "River Fisheries."

Chap. 94 of the same series is entitled: *Of the coast and deep-sea Fisheries.* Section 2 of chap. 94 shows that the deep-sea fishery was prosecuted by vessels that went on "voyages." There were other provisions in the Act similar to some of those in *The Merchant Shipping Act.* By the 23rd section it is provided that agreements in writing should be entered into between the master and crew before proceeding upon a "fishing voyage." Our answer to what counsel for defendants will say is that "deep-sea fishing" is fishing beyond the "three-mile limit." I have gone carefully through the arguments before the Halifax Commission, and, I think, it may be fairly stated that by that Commission fisheries within the three mile limit were regarded as "inshore fisheries" and those beyond that called "deep-sea fisheries." But whether we have this view adopted here, or not, we rest primarily on the ground that fishing prosecuted by means of wears constructed on the shore and dry at low tide is not deep-sea fishing.

There was another statute, from which chap. 95 of Revised Statutes of Nova Scotia, 2nd series was evidently framed. It was the Consolidated Statutes of Canada c. 62: *An Act respecting Fisheries and Fishing.* At section 52 it reads:—

"The owner or owners of a vessel built in Canada, when employed in the following fisheries, viz.: Seal, codfish, mackerel, herring or whale, for at least three consecutive months, shall be entitled to a bounty of:

"1. Three dollars per ton, for three months consecu-
"tive fishing.

2. "Three dollars and a half per ton for three months
"and a half consecutive fishing;

3. "And four dollars per ton for four months consecu-
" tive fishing. But no vessel shall receive the bounty
" for more than one voyage."

Section 60 reads:—

" No vessel, employed as aforesaid, shall be entitled
" to the allowance granted by this Act, unless the
" master or owner thereof, before he proceeds on any
" fishing voyage, makes an agreement in writing or
" print with every fisherman employed therein."

This is similar to our Nova Scotia Act with reference to deep-sea fishing. It is applicable only to vessels engaged in deep-sea fishing.

Section 63 reads:—

" One third of such bounty shall be distributed bet-
" ween the crew of the fishing vessel in equal propor-
" tions, and the remaining two-thirds to the owner
" thereof—or the bounty may be distributed as agreed
" upon by an instrument or declaration to be made in
" writing by the parties."

Now, if we can succeed in showing that these parties are not entitled to bounty upon fish caught in traps, then we must succeed in all those cases in which trap fishing is called in question. If we can show that these parties fishing in wears are not entitled to bounty, then we must succeed in the special cases where wears are referred to.

We rely then, first, on the Dominion Act itself—which is for the encouragement of the construction of fishing vessels and boats,—the policy of the Act seeming to be the development of the fisheries beyond the three-mile limit of the shores, and to which the shore is not a necessary or material adjunct. We next refer to the regulations made under the Act of 1891, which provides for the payment of bounty to vessels and boats only, and that claimants must have been fishing in boats for at least three months, &c.,—not only must they have fished in

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boats, but they must have been engaged in deep-sea fishing in boats.

Now, as to traps and wears there is one regulation which is applicable to these cases in 'Bligh's Orders in Council,' c. 69, section 15, p. 61. This applies to the County of Digby, in which Sandy Cove, where the fishing was done, lies.

6. "The place and number of all wears or fisheries "on public ground, in the County of Digby, shall be "fixed by the Fishery Overseer for said County, subject "to the approval of the Inspector of Fisheries.

"No wear, net or other contrivance, except wears for "catching eels, shall be placed or set in any river in "the County of Digby visited by salmon, nor nearer "the mouth of any such river or stream than one "fourth of a mile.

10. "Owners of land along any falls in any of the "rivers of the County of Digby shall be allowed one "stand for dipping fish, to be selected by the owners "and pointed out to the Overseer, who shall determine "what claims they are entitled to, and to hold the "same as their fishing privilege."

Even if there is reasonable ground to say that a boat was necessary to carry on this brush-wear fishing, and it is admitted that fish were taken out at very low tide by boats and at other times by carts before the tide was dead low, (and it may be admitted that a boat is absolutely necessary to go out to ascertain whether the fish are young or whether they are suitable for food) our contention is, that while a boat is ancillary to this kind of fishing it is not boat fishing.

Now, under these regulations there is first a restriction as to the kind of fish which can be caught. The claimant must not be engaged in fishing for shell-fish, salmon or shad, or fish "taken in rivers or mouths of rivers." These were exemptions from the

provisions of the Washington Treaty, and I think it was the intention and policy of the Government to encourage by the bounty the development of just those fisheries which, under the Washington Treaty, were open to the Americans. For instance, a claim for bounty could not be made in respect of gaspereau or sea-trout.

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Up to 1889 the word "deep" was not in the regulations. Even if the law has been interpreted somewhat loosely in payment of these bounties, that does not establish the right.

We do not draw any nice distinction between fish caught one-half mile from the shore and those caught one mile, but our real contention is that deep-sea fishing can never include fishing in traps and wears that are attached to the shore.

It must be prosecuted in a boat of a certain length to receive the bounty, in order to encourage the building of larger boats than could be used inshore.

H. McInnes for the defendants:

Directing your lordship's attention to chap. 96 of *The Revised Statutes of Canada*, it will be found that there is nothing there said that the bounty should be paid under any regulations whatever; and I, therefore, say that the regulations printed in the Special Case are not law, and ought not to enter into your consideration of the case. It must have been the intention of the Department that these claims should be paid under the fishing bounty Act. (He quoted sections 4 and 6.)

So far as my search enables me to advise your lordship, there was no order in council until 21st November, 1891; and this order in council for the first time requires, or makes it part of any claim, that the claimant must have complied with the regulations or instructions to which my learned friend has referred as containing the words "deep-sea fishing"; and in three of

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my cases the claim was made before the 21st day of November, 1891 and before this order in council had the force of law. One claim was made on the 23rd of November, and with the exception of that one case there is nothing to show that these instructions were called to our attention when the claims were made, or hat such information was communicated to claimants when they got the money. So far as any of these claims are concerned there is nothing to show that claimants have read the regulations; but it is admitted that they were posted up at Sandy Cove where these men reside.

I wish to call your lordship's attention to another order in council, subsequent to the one I have just referred to. I refer to the order of 2nd November, 1893, published in the Dominion Statutes for 1894, p. cxx. By clause 2 thereof it is enacted:—

"2. No bounty shall be paid upon fish caught in trap-nets, pound-nets and wears, nor upon the fish caught in gill-nets fished by persons who are pursuing other occupations than fishing, and who devote merely an hour or two daily to fishing these nets, and are not as fishermen, steadily engaged in fishing."

Section 1 reads:

"1. Fishermen who have been engaged in deep-sea fishing for fish other than shell-fish, salmon and shad, or fish taken in rivers or mouths of rivers, for at least three months, and have caught not less than 2,500 pounds of sea-fish, shall be entitled to a bounty; provided always that no bounty shall be paid to men fishing in boats measuring less than 13 feet keel, and not more than three men (the owner included) will be allowed as claimants in boats under 20 feet."

We see here an interpretation put on "deep-sea fishing." For the first time the word "trap-nets" is mentioned. So that in construing the Act we must have

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regard to this last order in council; and insomuch as this order makes an interpretation of the general Act for the first time in November, 1893 and expressly says that fish caught in "trap-nets," "pound-nets" and "wears" shall not be entitled to bounty, I say it must be taken as a limitation of rights theretofore existing, and that fish caught before then in traps and wears were entitled to bounty.

The Act, Chap. 96 of *The Revised Statutes of Canada*, was intended to aid the sea fisheries of Canada and the "encouragement of the building and fitting out of improved fishing vessels and the improvement of the condition of the fishermen." I read this from the 1st clause, and there is nothing to be found in the Act prescribing how and where the fish are to be caught. I say one object of the Act was to encourage the development of the fisheries so that we should have a larger export trade in fish. That being so, then I say the men would be carrying out the object of the Act by fishing in any way unless they are restricted by order in council. The object of the Act was to have as many fish caught as possible. (He cites *Hodgson* v. *Little*) (1).

In this case *Willes* J. says that the word "fishery" "applies to any contrivance which, with little trouble and expense, can be put into a state to be capable of catching fish." Therefore, I say these wears are as much entitled to encouragement as anything by which you catch fish.

Reference has been made to the Washington Treaty, which is to be found in Dominion Acts, 1872, p. cxv. Under this treaty, fishermen were allowed to use nets. I scarcely think that the speeches under the Washington Treaty are applicable to legislation in 1894. Gill-nets are allowed bounty under the order of 1894,—nets

(1) 14 C.B., N.S., 121.

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run out from the shore for the purpose of catching bait. Bait is necessary for deep-sea fishing, and it is the object of the Act to encourage a large export trade. I submit that even if these regulations of 1891 did apply, that the words "deep-sea fishing" have to be construed with reference to the kind of fish caught as much as to the manner in which they are caught. It is a matter of common knowledge that bounties are paid upon fish caught in the harbours of Nova Scotia, like Musquodoboit Harbour, and even in Bedford Basin. Herring, mackerel and codfish are caught in all the harbours along the Atlantic coast, and it has been the custom of the Government to pay bounty on such fish so caught, and there never is any question about where the fish were caught when they file their claims. The Government have always paid bounty upon what was really deep-sea fish rather than in respect of where the men caught the fish.

R. E. Harris, Q.C., in reply :

There are one or two statutes, which govern these cases, I desire to refer to. Chap. 96 R. S. C., provides that bounties shall be paid to boats and vessels engaged in "deep-sea fishing." In the *British North America Act*, 1867, we have "sea-coast and inland fisheries" placed within the exclusive authority of the Dominion Parliament. There is no comma between them.

The word "sea-coast" is synonymous with "territorial jurisdiction." It includes a space or district of three miles off the shore.

From Pope's "Confederation Documents," the words would seem to be properly read "sea-coast and inland fisheries." I wish to say that "sea-coast" used in this Act is intended to cover a district of three miles from the shore of Canada. This seems to me the view

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taken by the court in the case of *Mowat* v. *McFee* (1). The place where the fish were taken in that case was more than three miles from the shore of Quebec or New Brunswick, but still the court held that was within the prohibition of the *Fisheries Act* because it was within the waters of Baie des Chaleurs.

The reason I mention it is that the case is an authority for my proposition that the word "sea-coast" in the *British North America Act* gives jurisdiction to the Parliament of Canada within the three-mile limit. But coming down more particularly to the facts in question here, we have statutes where the words "sea-coast and inland fisheries" are expressly mentioned. Chap. 17 of 55-56 Vict. sec. 3 (see schedule to sec. 8, item 23) gives the Minister of Marine and Fisheries jurisdiction over "sea-coast and inland fisheries." Chap. 25 R. S. C. sec. 4 does the same, and *Bligh's Orders in Council*, p. 615 makes it pretty clear that the Minister of Marine and Fisheries has the right to regulate the "deep-sea fisheries."

Now, wear fishing cannot be called "deep-sea fishing" or even "sea fishing." Can it be said that catching fish in wears dry at low water is sea fishing in any sense under the statutes cited?

[PER CUR.: – You think no bounty should be paid unless the fishing is done outside the three-mile limit?]

I think a good argument can be made out for that contention. (He cites the Halifax Fishery Commission Report, pp. 69, 70, 76, 86, 96, 128, 259, 330).

It does not make any difference to us whether the term used is "deep-sea fishing" or "sea fishing," because the Act was passed to encourage the "sea fishery," and the regulations provide for payment of bounty only in respect of "deep-sea fisheries." Under the Washington Treaty the Americans had no right to fish in wears or traps on the shore; and as the regula-

(1) 5 Can. S. C. R. 66.

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tions which the Government has made refer to the very same kinds of fisheries as were the subject of the Washington Treaty, I would submit that the fisheries being so specified in the regulations and the bounty payable out of the interest on the fund derived from the commission under the Washington Treaty, the bounty should only be paid in respect of the deep-sea fisheries. I think there is a good argument that the intention of the legislature was to give the bounty to those fisheries from which the principal of this fund must be said to have been derived. The Americans could not fish with wears and traps, and therefore the intention of Parliament was to exclude wears and traps from the benefit derived from such fund. I direct your lordship's attention to Art. 18 of the Washington Treaty in the Acts of 1872, which provides as follows: "It is understood that the above-mentioned liberty applies solely to the sea fishing, and that the salmon and shad fisheries, and all other fisheries in wears or the mouths of rivers, are hereby reserved exclusively for British fishermen." I think it is a fair and proper conclusion to arrive at that Parliament, in prescribing the bounty, intended to distribute it amongst those people who were brought into competition with the American fishermen under the Washington Treaty.

THE JUDGE OF THE EXCHEQUER COURT now (November 23rd, 1895) delivered judgment.

These cases were argued together, the facts being similar in each case. The only question to be determined is, whether under *The Revised Statutes of Canada*, c. 95, intituled "An Act to encourage the development of the sea fisheries and the building of fishing vessels," and the regulations made thereunder by the Governor-General in Council, and the instructions issued by the Minister of Marine and Fisheries,

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the defendants were entitled to fishing bounty upon mackerel caught in brush-wears or fish-traps. The brush-wears were, it appears, formed by brush leaders from the shore with a pound at the extreme end. At low water the wears were dry, and at neap-tides there would be some four feet of water therein. The traps in question were of the kind ordinarily used on the coast, and were constructed by means of a leader from the shore and a pound at the end formed by netting stretched on poles or stakes set upright in the bed or bottom of the water.

By the instructions issued by the Minister of Marine and Fisheries in the year 1891, it was provided that claimants for fishing bounty, to be entitled thereto, must have been engaged in "deep-sea fishing for fish other than shell-fish, salmon, or shad, or fish taken in rivers or mouths of rivers (these being the exemptions under the Washington Treaty) for at least three months, and have caught not less than 2,500 pounds of sea-fish per man." It is also provided that no bounty should be paid to boats measuring less than 13 feet keel.

In prosecuting the fishery by means of brush-wears and traps, boats are sometimes, but not always used; and what the defendants have been paid in each case, is, under the regulations, $1.00 for a boat, and $3.00 for a man. The question to be determined, as I have said, is: Whether persons engaged in taking mackerel in brush-wears or traps, such as those described, are entitled to the bounty, that is, can they be said to be engaged in deep-sea fishing for fish other than shell-fish, salmon or shad? I think it is very clear that the contention of counsel for the Crown that they cannot be said to be engaged in "deep-sea fishing" must prevail. Consequently, the defendants were not entitled to the bounty for which they made claim, and which was paid to them.

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The question submitted in each Special Case is answered in the negative, and there will be judgment for the plaintiff in each case for the sum of four dollars ($4.00) with interest, and costs to be taxed, as agreed upon in the Special Cases.

Judgment accordingly.

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

Solicitors for defendant: *Drysdale & McInnes.*

JOSEPH STRONG, *et al.* (DEFENDANTS) APPELLANTS; 1896

AND Jan. 20.

ALFRED G. SMITH, *Trustee of the Estate of Moses Munroe, deceased* (PLAINTIFF) ..... } RESPONDENT.

THE SHIP "ATALANTA."

APPEAL FROM THE LOCAL JUDGE OF THE NOVA SCOTIA ADMIRALTY DISTRICT.

Maritime law—Action by owner of unregistered mortgage against freight and cargo—Jurisdiction.

A mortgagee under an unregistered mortgage of a ship has no right of action in the Exchequer Court of Canada against freight and cargo; and unless proceedings so taken by him involve some matter in respect of which the court has jurisdiction, they will be set aside.

APPEAL from a judgment of the Honourable James McDonald, C.J., Local Judge for the Nova Scotia Admiralty District.

The grounds upon which the appeal was taken appear in the reasons for judgment on appeal.

The reasons for judgment of the learned Local Judge are as follows:—

"This is an application to set aside the arrest of the "ship and cargo and the proceedings in the cause. An "application made in October (1895) last to the same "effect, was dismissed. It was, however, renewed on "further affidavits disclosing facts not appearing in the "former application. The mortgage under which the "plaintiff claims was produced, and it is found that it "is not in the form prescribed by the statute, and fur-"ther, that it has never been registered. Indeed it could "not have been registered under the Merchant shipping "Acts, because it is rather a chattel mortgage of per-"sonal property than that of a British ship. Whether

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" any title whatever to the schooner *Atalanta* is conferred " by this instrument I do not think it necessary to de- " termine, but I am clearly of opinion that it is not " such as to give this court jurisdiction to determine " the rights of the parties under it. The arrest of the " ship will therefore be set aside, and the vessel will " be released. This decision does not apply to the " freight and cargo as to which the suit will proceed " to trial; and I direct that pleadings be filed by the " respective parties raising the issues they desire to " try. Further order as to costs in this and the pre- " ceding application reserved."

" The order will pass to set aside the arrest of the " ship. This order not to apply to the arrest of the " cargo and freight. The question of costs in this and " the former application will stand for further con- " sideration."

The appeal was heard before the Judge of the Exchequer Court on the 9th January, 1896.

C. H. Cahan for the appellants:

The Exchequer Court has no wider jurisdiction in admiralty matters than the courts in England have under *The Admiralty Courts Act*, 1861, and the Merchant shipping Acts. Prior to the passing of the first mentioned Act, the Admiralty Court had jurisdiction in cases of mortgage only if the ship was under arrest in a proceeding over which the Admiralty Court had jurisdiction, and in which the parties beneficially interested in the ship, or the proceeds thereof, were before the court. But the Act of 1861 for the first time gave the Admiralty Court an original jurisdiction in regard to proceedings upon a mortgage whether the ship, or the proceeds thereof, are within the jurisdiction of the court or not. But this new enactment limited the jurisdiction to a certain kind of mortgage, namely, that which is prescribed by *The Merchant Shipping Act*, 1854, and is also

registered under the provisions of that Act. [He cites *Howell's Admiralty Practice* (1); also, *Roscoe's Admiralty Practice* (2); *Abbott on Shipping* (3); *Williams & Bruce's Admiralty Practice* (4).]

Apart from the question of jurisdiction, the warrant to arrest in this case is bad in form because the affidavit to lead warrant did not disclose any ground upon which the court might found its jurisdiction; but on the contrary it expressly states that the ship was not registered, but was sailing under a 'provisional pass' in lieu of registry. [He cites *Williams & Bruce's Admiralty Practice* (5); *The Merchant Shipping Act*, 1894, sec. 31 (form *B*).]

The mortgage in question here is in no sense a mortgage of a ship, within the meaning of the Merchant shipping Acts. It is an ordinary "blanket mortgage" to cover all chattels upon the mortgagor's premises, and may not even convey the property in the schooner at common law. But that argument is not material to my purpose, and it is sufficient for me to maintain that it is not a mortgage over which an Admiralty Court has any jurisdiction whatsoever.

We only appeal from so much of the judgment of the learned Local Judge as refuses to set aside the proceedings against the cargo and freight; and we say that reasons equally as strong as those upon which he came to the conclusion to dismiss the proceedings against the ship should have led him to dismiss them also as against the cargo and freight. The court has no jurisdiction over a chattel mortgage of a cargo or freight, and if there had been original jurisdiction by writ of summons against cargo and freight we should not quarrel with the order of the Local Judge; but there was not. [He cites *Abbott on Shipping* (6); *Alexander* v. *Simms* (7).]

(1) P. 288.
(2) P. 82.
(3) 12th Ed. p. 51.
(4) 2nd Ed. pp. 38, 40.
(5) 2nd Ed. p. 715.
(6) 12th Ed. p. 43.
(7) 5 De G. M. & G. 57.

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As to the freight, the mortgagee must take possession before the voyage is completed in order to be entitled to receive the freight. This was not done. Furthermore, the mortgage does not pretend to cover this freight or cargo. [He cites *Bynon* v. *Godden* (1).] We are entitled to costs and damages for the seizure and detention. [He cites *The Evangelismos* (2); *The Strathnaver* (3); *The Walter D. Wallet* (4); *The Egerateia* (5); *Abbott on Shipping* (6); *De Mattos* v. *Gibson* (7).]

E. McLeod Q.C., for the respondent.

If there is no jurisdiction to entertain the action, there is no jurisdiction to award damages.

The mortgage was a sufficient conveyance of the ship and a sufficient power of attorney to authorize the solicitors at Halifax to take possession of the vessel as agents of the mortgagee. That they took possession in the name of the deceased mortgagee, Moses Munroe, does not alter the position of the parties in law, because it would be construed as taking possession on behalf of the parties legally entitled to the possession. The owner of the vessel was the owner of the freight.

It seems to me there are two elements involved in these proceedings upon which the court may well found its jurisdiction: 1st, the mortgage was sufficient to convey an interest in the freight earned by the vessel; and 2ndly, the mortgagee did take possession of the ship under the appropriate process of this court, as he lawfully might, and the *res* is now before the court.

THE JUDGE OF THE EXCHEQUER COURT now (January 20th, 1896) delivered judgment.

This action was commenced by a writ of summons

(1) 3 Exch. D. 263.
(2) Swab. 378.
(3) 1 App. Cas. 58.
(4) [1893] Prob. 202.
(5) 38 L. J. Ad. 40.
(6) 12 Ed. p. 52.
(7) 30 L. J. Ch. 145.

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issued out of the District Registry at Halifax, on the 22nd of October, 1895. By the indorsement upon the writ the plaintiff claimed against the vessel, her cargo and freight, the sum of $10,400 as due to him for principal and interest on a mortgage dated the 18th day of December, 1894. On the same day (the 22nd of October) the vessel, her cargo and freight were arrested. An appearance was entered under protest by the owner and others interested, and an application was made to the Local Judge of the Nova Scotia Admiralty District to set aside with costs the writ of summons, the service of the writ, and the warrant to arrest the vessel, her cargo and freight, and to order the release of the vessel, her cargo and freight, and for damages for the arrest and detention thereof. The affidavit to lead the warrant had been made by one of the solicitors for the plaintiff upon information communicated to them by telegrams from the plaintiff's solicitors, at St. Johns, Newfoundland, and the application to set aside the proceedings was met in the first instance by the plaintiff's solicitors at Halifax, asking for delay to enable them to communicate with the solicitors at St. Johns. Thereupon the application was dismissed, but subsequently it was renewed. The mortgage being then produced, it was found that it was not in the form, and that it had not been registered, as prescribed by the statute, and that in consequence the court had no jurisdiction under the 11th section of *The Admiralty Court Act*, 1861. The arrest of the vessel was therefore set aside, and the vessel released. The learned judge refused, however, to set aside the arrest of the freight and cargo, and directed that the suit should proceed to trial, and he reserved the questions as to damages and costs.

From this part of the order an appeal is taken by the defendants, and the court is asked to set aside the writ of summons, the service thereof, and the arrest of the

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cargo and freight, and to give damages and costs against the plaintiff.

The question to be now determined is, it will be observed, one of jurisdiction only. As to the cargo it was not suggested in this court that the mortgage on which the plaintiff relies covers it. It is contended, however, that the plaintiff had taken possession of the vessel and that he was entitled to the freight then due, and where freight may be proceeded against the cargo may be arrested as security for freight, and detained until the amount of the freight is brought into the registry. For the appellants it is conceded that if the court has jurisdiction in an action instituted by a mortgagee, under an unregistered mortgage against the freight and cargo, there being nothing else upon which to found the jurisdiction of the court, the order appealed from is a good order ; but it is contended that the court has no jurisdiction in such a case, and that contention must, it seems to me, prevail.

The jurisdiction of this court in proceedings in Admiralty depends upon the Admiralty jurisdiction of the High Court in England (1). Prior to the passing of the Act of the Parliament of the United Kingdom, 3rd and 4th Vict., c. 65, a mortgagee of a vessel could not initiate proceedings in the High Court of Admiralty, and it was doubtful as to whether or not he could intervene to protect his interest when a suit had already been instituted by parties competent to do so (2). To meet that difficulty the 3rd section of that Act, which extended to unregistered and equitable mortgages as well as to registered mortgages, provides that whenever any ship or vessel shall be under arrest by process issuing from the High Court of Ad-

(1) The Colonial Courts of Admiralty Act, 1890, s. 2; The Admiralty Act, 1891, s. 3; 3 Hagg. 402.

(2) The Percy; The Dowthorpe; The Fortitude; 2 Wm. Rob. 82, 222.

miralty, or the proceeds of any ship or vessel, having been so arrested, shall have been brought into and be in the registry, the court shall have full jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action. But that provision is limited to cases where the vessel is under arrest by process issuing from the court, or where the proceeds of the vessel having been so arrested, have been brought into the registry of the court, and does not extend to such a case as the present. It is also to be observed that in the case of *The Fortitude* (3) ; in which freight had been proceeded against by the arrest of the cargo, Dr. Lushington held that the power given to a mortgagee to institute proceedings where the ship was already under arrest, extended to the ship alone and not to the freight.

With reference to the questions of damages and costs, which where reserved, there is of course something to be said from the standpoint of convenience of disposing of them now; but on the whole I am inclined to leave them to be dealt with by the learned Local Judge of the Nova Scotia Admiralty District.

The appeal will be allowed with costs, and the writ of summons in this case and the service thereof, the warrant to arrest the vessel, her cargo and freight, and the arrest of the same, will be set aside, and the questions as to damages and as to costs, in the proceedings in the local registry which were reserved, will be left for the decision of the learned judge.

Judgment accordingly.

Solicitors for appellants: *Harris, Henry & Cahan.*

Solicitors for respondent: *Russell & Ross.*

(3) 2 Wm. Rob. 223.

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

AND

JAMES A. CLARKE ..... DEFENDANT.

Expropriation for railway purposes—Owner left possession of buildings on expropriated property—Use and occupation—Profits—Interest—Compensation.

Where the Crown had expropriated certain real property for the purposes of a railway, but had for a number of years left the owner in the use and occupation of several buildings thereon, two of which, an hotel and a store, were burned uninsured before action brought, compensation was allowed him for the value, at the time of the expropriation, of all the buildings, together with interest on the value of the hotel and store from the time they were so destroyed.

THIS was an information for the expropriation of certain property at Port Moody, B.C., required for the purposes of the Canadian Pacific Railway.

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

The case was heard at Vancouver, B.C., before the Judge of the Exchequer Court on the 16th and 17th days of September, 1895.

B. H. T. Drake for plaintiff;

W. M. Gray for defendant.

THE JUDGE OF THE EXCHEQUER COURT now (January 20th, 1896) delivered judgment.

The information is filed under *The Expropriation Act* in respect of certain lands at Port Moody, on Burrard's Inlet, in British Columbia, taken for the Canadian Pacific Railway. The title and interest of the defendant are admitted, and the only question in dispute is the

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amount of compensation. The Crown offers the sum of $149.07 for the land taken and for damages. The offer is based apparently upon an estimated value per acre of about eleven dollars; and no account has been taken of the prospective capabilities of the property from its situation and character, or of the fact that the whole water front of the property has been expropriated, or of other damages arising from the severance and the construction of the railway. These clearly are elements to be taken into account, so that apart altogether from the defendant's claim to be compensated for the value of a number of buildings that were on the property, when in 1885 the Crown's title was perfected, the offer is, I think, altogether insufficient.

The defendant estimates the compensation to which he is entitled at $20,778.74. Of this sum $4,000.00 is for a hotel and a store; and $2,100.00 for seven small houses. The evidence as to the value of these buildings is all one way; the only question is as to the defendant's right to recover. The property had previously to the taking of any part of it been laid out in town lots, and the plan of the subdivision duly registered. For the fifteen lots, taken in whole or in part, in question in this case the defendant claims $2,104.24; for 10.99 acres exclusive of such lots but including the whole water front, $9,574.50; and for damages from severance, etc., $3,000, making in all the sum of $20,778.74 mentioned. The 10.99 acres referred to include portions of several streets shown on the plan or subdivision of the property; and for such portions of such streets the defendant is not entitled to compensation. (1) The interference, however, with such streets is a matter to be considered in assessing damages for the injurious affection of his property. Then with regard to the value that he puts upon the property, it is to be

(1) Paint v. The Queen, 2 Ex. C. R. 154; 18 Can. S. C. R. 718.

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observed that Port Moody was never a town except on paper, and that such values are based upon sales made at a time when it was thought, and because it was thought, that it was to be the western terminus of the Canadian Pacific Railway. Apart from the view or belief that the terminus was to be there the property never had any such value. Now, if the railway had stopped at Port Moody instead of being carried on to Vancouver, the advantages accruing to the defendant's property there would have had to be taken into account in assessing compensation for land taken and for damages (1); and the value of such advantages deducted from the compensation to which the defendant would otherwise be entitled. Such an advantage being an element to be taken into account in the reduction of damages in the case mentioned ought not, it is clear, to be included as an element in estimating the value of property under the circumstances of this case. The speculative values that town lots at Port Moody had, while it was thought it was to be the terminus of the railway, disappeared as soon as it was known that the railway was to be continued to Vancouver. In 1878 or 1879 there were some sales at fifty dollars a lot; but I have no doubt that in that value to a greater or less degree the element of the prospective terminus entered. Part of that sum, probably, and certainly everything beyond it, represented the value of lots in a town that was to be the terminus of the railway.

In 1877, Mr. Cambie, the resident engineer in charge of the work, entered on the lands in question in this case, and set up a stake, and instructed the engineers under him to survey a line from that point easterly to Yale. On the 6th of September, 1882, a plan was filed

(1) The Government Railways Act, 1881, s. 16; R. S. C. c. 40, s. 15; 50-51 Vict. c. 16, s. 31; and Paint v. The Queen, 2 Ex. C. R. 149, and Can. 18, S. C. R. 718.

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in the proper registry office, on which was shown in a general way the portion of the defendant's land that the Crown proposed to take for the railway. But the proceedings did not comply with the statute then in force (*The Government Railways Act*, 1881, section ten) inasmuch as no description of the lands was deposited in the registry; and with the exception possibly of the actual right of way, there was no such taking possession of the lands expropriated as would give the Crown title under the eighteenth section of the Act—assuming that section to be applicable to the case. In July, 1885, the Crown made good its title by filing in the registry office a plan and description in accordance with the statute. This question of when the Crown acquired title has no material bearing on the matter of compensation, except with reference to the buildings I have mentioned, which were put up between the years 1882 and 1885. As to the general question of values, apart from such as resulted from the belief that Port Moody was to be the terminus, there was no advance between the years 1882 and 1885. But if the Crown acquired title in 1882 this part of the defendant's claim fails. If, on the contrary, the Crown did not acquire title to the portion of the land on which the buildings were put up, until July, 1885, and I think it did not, then he should succeed. There is another incident in connection with these buildings which has not only a bearing on the question of title so far as that might be thought to depend on possession, but also upon the question of interest. The defendant was left in possession of the buildings after July, 1885. The hotel and store were burned, uninsured, in July, 1888; but until that time he was in receipt of the rents from both buildings, and, at the time of the trial he was still in possession of the other buildings. I think the defendant is entitled to the value of these buildings, and that

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he should have interest on the value of the hotel and store since July, 1888. As to the other buildings, no interest should be allowed, without taking the rents into account, and the evidence is not clear and satisfactory enough to permit of that being done. The simplest way will be to allow the rents to go against the interest.

For the land taken (not including the buildings) and for all damages, I allow the defendant $2,500; for the hotel and store, $4,000; and for the seven other buildings, $2,100. To the sum of $2,500 will be added interest for ten years and a half, and to the sum of $4,000, seven and one half years' interest. The defendant will have his costs.

Judgment accordingly.

Solicitor for the plaintiff: *H. B. W. Aikman.*

Solicitors for the defendant: *Drake, Jackson & Helmcken.*

HER MAJESTY THE QUEEN.....PLAINTIFF; 1896

AND. Jan. 20.

JOHN MURRAY, THE ELDER, MARY HOWISON, HANNAH EMS AND JOHN MURRAY, THE YOUNGER..... DEFENDANTS.

Expropriation—Temporary enhancement in value of lands—Compensation —Interest.

The temporary enhancement in the value of lands by reason of their being adjacent to the site of a projected railway terminus which had been abandoned, was not taken into consideration by the court in assessing compensation under the 31st section of *The Exchequer Court Act* (prior to its amendment by 54-55 Vict., c. 26, s. 37) for the expropriation of such lands.

2. Where the Crown has gone into possession of lands sought to be expropriated for the purposes of a public work, interest upon the sum awarded as their value may be computed from the date of entering into possession, notwithstanding the fact that the Crown may not have acquired a good title to the lands until a date subsequent to that of such entry into possession.

THIS was an information for the expropriation of certain lands near Port Moody, B.C.

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

The case was tried at Vancouver, B.C., on the 17th day of September, 1895.

Wilson, Q.C., for the plaintiff;

Corbould, Q.C., and *Gray*, for the defendants.

THE JUDGE OF THE EXCHEQUER COURT now (20th January, 1896) delivered judgment.

The information herein is exhibited under the provisions of *The Expropriation Act*, in respect of lands taken for the Canadian Pacific Railway, at Port Moody on Burrard's Inlet, in the province of British Columbia. The

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only question to be determined is the amount of the compensation to which the defendants are entitled. The Crown has tendered to the defendants the sum of $27.29 as sufficient compensation for the land expropriated, and for damages arising therefrom. The land had, prior to the taking, been laid off into town lots, and a plan of the subdivision duly registered. That plan or subdivision was followed in the description of the land expropriated, and in the tender. The price of the lots appears, however, to have been based upon a value of the land per acre estimated at ten or eleven dollars, and without taking into account the prospective capabilities of the property arising from its situation and character, or the damages occasioned by severance or by the construction of the railway. These clearly are elements to be taken into consideration.

The defendant, John Murray, the elder, claims compensation in the sum $6.050.00 for the price of eleven town lots at $250.00 each, and for 2.64 acres at the rate of $1,250.00 an acre. The 2.64 acres represent portions of certain streets shown on the plan which have been crossed by or taken for the railway, and he also claims damages in addition for severance and for the diversion of certain streams that were upon the property. The other defendants claim compensation at similar rates for lots taken or injuriously affected. There can, of course, be no doubt that the defendants are entitled to the value of the lands taken and for damages arising from or incident to severance and the construction of the railway, which in the case of the defendant John Murray, the elder, would include the damages occasioned by the diversion of the streams, of which he complains. The difficulty lies in estimating aright such values and damages.

The lands in question were taken under the provisions of *The Government Railways Act*, 1881, by the 16th

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section of which it was provided that the Arbitrators should consider the advantages as well as the disadvantages of any railway, as respects the land or real estate of any person through which the said railway passes, or to which it is contiguous, or as regards any claim for compensation for damages caused thereby; and that they should, in assessing the value of any land or property taken for any railway, or in estimating and awarding the amount of damages to be paid to any person, take into consideration the advantages accrued or likely to accrue to such person or his estate, as well as the injury or damages occasioned by reason of such work. That provision was re-enacted in *The Revised Statutes*, chapter 40, section 15, and in the 31st section of *The Exchequer Court Act* (1); and was considered in this court in the case of *The Queen* v. *Carrier* (2), in which it was held that the advantages to be taken into consideration were such as were special and direct, and not the general benefit or advantage shared in common with other estates. The provision has since been amended so that both special and general advantage accrued or likely to accrue from the construction or operation of the public work are to be taken into consideration. (54-55, Vict., c. 26, s. 7.) I mention the amendment only to add that it has not, I think, any bearing upon the present case, which is to be decided upon the law as it stood when the lands were taken. In the values which the defendants place upon the lands taken and those injuriously affected, as attaching to them in 1882, or 1885 (and it is not important in this connection which date be taken) there is undoubtedly one element, and a large element, of value arising from the selection or supposed selection of Port Moody as the terminus of the Canadian Pacific Railway; and that is

(1) 50-51 Vict., chap. 16. (2) 2 Ex. C. R. 36.

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an element which must, I think, be taken into consideration under the statute then in force, (1), not in the present case in reduction of the compensation to which the defendants would otherwise be entitled, but so as not to include it as an element that would increase the amount of such compensation. While all fair prospective capabilities of the property arising from its situation and character ought to be taken into account and included as elements of value, the particular value that attached to the property during the time that it was thought that Port Moody would be the terminus of the railway, and attached by reason of that belief, ought not to be so included.

Then there is another element in the claim of John Murray, the elder, which I think should not be taken into account, at least in the form in which it is presented. He claims for the value of the streets laid off on his plan, that have been taken for or crossed by the railway. A like question also arose in *Paint's* case, to which I have referred, and it was there held on the authority of *Stebbing* v. *The Metropolitan Board of Works* (2) that the owner of the land through which the way or street ran was not in such a case entitled to compensation for the portions of the street taken. If his property were injured by the destruction of the way or street, that in a proper case might of course be a matter for compensation.

A question is raised as to whether the lands were taken in 1882 or 1885. It is not of any importance as bearing upon the rights of the defendants to compensation, as it is admitted that they are entitled in respect of the lands claimed by them respectively. Neither is it material to the question of interest, for whether the Crown had or had not in 1882 acquired a good title to

(1) Paint v. The Queen, 2 Ex. C. R. 149; 18 Can. S. C. R. 718.

(2) L. R. 6 Q. B. 37.

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the lands taken, it was in possession of them, and that is, I think, sufficient to justify the allowance of interest from that date. The question was raised on behalf of the defendants as having a bearing on the question of the amount of compensation. But in the view which I take of the case that is not material. There is nothing to lead one to conclude that so far as concerns any value of the lands that may properly be taken into account, there was any increase in value between the years 1882 and 1885. The sales show no doubt considerable advances in prices of lots, but such advances were occasioned wholly, I think, by the belief entertained that Port Moody was to be the terminus of the Canadian Pacific Railway.

The compensation to be paid to the defendants is assessed as follows:—

To John Murray, the elder, $700.

To John Murray, the younger, $250.

To Hannah Ems, $150.

The lot for which Mary Howison claims is not, so far as I see, mentioned in the information, but the information may, if necessary, be amended to include it, and for the portion thereof taken, and for damages she may be allowed $30. To the sums mentioned will be added interest from the sixth day of September, 1882. The defendants are, I think, entitled to their costs. In other respects the judgment will follow the usual declaration in cases of this kind.

Judgment accordingly.

Solicitors for the plaintiff: *Wilson & Campbell.*

Solicitors for the defendants, John Murray, sr., and Mary Howison: *Corbould & McColl.*

Solicitor for the defendants, Hannah Ems and John Murray, jr.: *W. M Gray.*

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JAMES CONNELL..... .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Tort—Injury to the person on a railway—Undue rate of speed of train at crossing—Liability of Crown—50-51 Vict. c. 16 sec. 16 (c).

Where a train was approaching a level crossing over a public thoroughfare in a town and the conductor was aware that the watchman or flagman was not at his post at such crossing, it was held that the conductor was guilty of negligence in running his train at so great a rate of speed as to put it out of his control to prevent a collision with a vehicle which had attempted to pass over the crossing before the train was in sight.

2. Where such negligence occurs on a Government railway the Crown is liable therefor under 50-51 Vict. c. 16 sec. 16 (c).

PETITION OF RIGHT for damages arising out of an injury to the person on a Government railway.

The Intercolonial Railway, a public work of Canada, runs through New Glasgow, N. S., a town of some five thousand inhabitants. In its course through the town this railway intersects at right angles, and crosses on the level, George street, one of the principal thoroughfares of the town. At this level crossing the railway runs almost due north and south, while the street so crossed runs, approximately, east and west in a straight line for two or three hundred yards or more. The street was only forty-three feet in width at this place, and the railway buildings were situated so closely upon the boundaries of the railway and George street that any one approaching the crossing from any direction could not see a train approaching until he was within a few feet of the railway. In the case of persons approaching the crossing from the west, along George street, a train coming from the north could not

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be seen until they were upon the crossing itself, because on the northern side of George street and on the western boundary of the railway, about eighteen and one-half feet from its centre line, there was a high stone building which completely obscured the view along the track to the north. There was a watchman or flagman whose duty it was to stand at this crossing and warn persons about to pass over it of danger from approaching trains.

On the afternoon of the 8th of December, 1891, between four and five o'clock, the suppliant, with his son, was driving in an express wagon eastwardly along George street and approaching the crossing. Some little time before coming to the crossing the suppliant had heard the whistle of a locomotive. Noticing that the flagman was absent from his post, before entering upon the crossing he looked up and down the track, as far as he was able, to see if a train were approaching. He could see none, and heard no warning of any approaching. He then attempted to cross, and while upon the crossing the wagon was struck by a freight train, the suppliant and his son being thrown out upon the ground, and the former quite seriously injured. The fireman of the train (and he was corroborated in this by one of the brakesman) swore that he had rung his bell while the engine was appoaching the crossing; but the conductor, who was on the van at the time, admitted that he did not hear it, and several witnesses called by the suppliant said they heard no bell rung.

The evidence, as a whole, established that the train was then running at the rate of about six miles an hour.

The case was tried at Halifax, N.S., on the 4th day day of October, 1895.

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Argument of Counsel.

J. L. Jennison for the suppliant:

The crossing in this case is a level one, and the fences and buildings make it a crossing where it is difficult to get a good view of the track until you are on the rails in passing. It is in evidence that a flagman has been stationed there for many years, and of late they have put gates there. But at the time of the accident in question here no flagman was present, but the flagman swears it was his duty to be present all the time. The only point we have to consider is the question whether Connell used ordinary judgment or acted in a way that any person would ordinarily act under such circumstances, or, in other words, did he contribute to the accident himself? Take the evidence of the Crown. This train started for Antigonish and went over the crossing, and the semaphore was against it and they returned. We say that in returning they were guilty of negligence. There were two brakesmen and a conductor on the train, and it was on a down grade. It was a train nine or ten car lengths long, and yet, strange to say, the conductor did not hear the bell being rung! Suppose they had rung that bell? The bell is supposed to be a signal to people using the crossing. If the bell could not be heard by the witnesses who swear they did not hear it, it was not a signal even if they had rung it. Connell says he looked for the flagman and that there was no flagman there, and he supposed the coast was clear. Connell having seen the train go out, and knowing that there was no other train due to leave or come in just at that time, was absolved from a great exercise of vigilance on that account. (He cites *The North-eastern Railway Co.* v. *Wanless*) (1). Under section 36 R. S. C. c. 38 the evidence of negligence preponderates in our favour. There was no whistle sounded and no bell rung, or, if rung at all, not

(1) L.R. 7 H.L. 12

rung in such a way as to be heard by the people on and about this crossing. (He cites *Bligh's Orders in Council*) (1).

The evidence is that the flagman was not there at the time of the accident, nor was the conductor then doing his duty under these rules and the provisions of the statute. There really was no signal given. Connell's conduct in the matter was, we contend, that which any discreet man would adopt. The conductor says he shouted to him ; that might have been just the cause of the accident. If, as the conductor says, he saw the suppliant was going over all right, the discreet thing to do was not to shout at all.

W. B. A. Ritchie, for the Crown :

If your Lordship believes the conductor, it is clear that Connell was guilty of negligence and took the risk himself.

There is no doubt Connell heard the whistle, and he would know if they whistled at the semaphore that they were coming back. He hears the whistle, he is approaching the track, I submit that coming to a dangerous place it was his duty to look to see if a train was coming or not, but he went on without looking to see.

[PER CUR. :—That brings you down to the Pennsylvania rule that a man is bound to "stop, look and listen," that is not the rule here!]

There is nothing to the contrary in our law that a man must take some precautions to avoid accident in a case like this.

I submit that the railway authorities, the officers of the Crown, having complied with the regulations which are made—and there being no negligence that can be fixed upon them as such officers, the Crown is not liable for this accident.

(1) 1889 p. 968, rule 188 also p. 960, rule 126.

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The suppliant was fumbling with the reins, so the conductor says, and going this way, it is very possible that they might have made a blunder and pulled the horse up.

The train was only 200 or 300 yards from the semaphore, on a down grade, does not your Lordship think that he must have had it at a slow rate of speed? The conductor, finding that he had to back his train, takes the precaution of standing at the back of the train to give warning to persons approaching.

If the suppliant had been killed, could the conductor have been held criminally responsible for his death? That is the best test to fix liability on the Crown.

I maintain, on the whole evidence, that this is not a case falling within clause (c.) of section 16 of *The Exchequer Court Act.*

The following authorities were cited by counsel for the respondent:

Davy v. *London & South-western Rail Company* (1); *Wakelin* v. *London & South-western Rail Company* (2); *Newman* v. *London & South-western Rail Company* (3): *Curtin* v. *Great South Railway* (4); *Greenwood* v. *Philadelphia Rail Company* (5); *Johnston* v. *Northern Rail. Company* (6); *Casey* v. *Canada Pacific Railway Company* (7); *Jones* v. *Grand Trunk Railway Company* (8); *Weir* v. *Canada Pacific Railway Company* (9); *In Beckett* v. *The Grand Trunk Railway Company* (10); *Hollinger* v. *Canada Pacific Railway Company* (11).

(1) 12 Q. B. D. 70.
(2) 12 App. Cas. 41.
(3) 7 T. L. R. 138.
(4) 22 L. R. (Ir.) 219.
(5) 17 Atl. Rep. 188, and cases there cited.
(6) 34 U. C. Q. B. 432.
(7) 15 Ont. R. 574.
(8) 16 Ont. App. R. 37; 18 Can. S. C. R. 696.
(9) 16 Ont. App. R. 100.
(10) 8 Ont. Rep. 601; 13 Ont. App. 174.
(11) 21 Ont. Rep. 705; 20 Ont. App. 244.

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C. S. Harrington, Q. C., replied. The essential features of this case are as follows:

1. The crossing was a dangerous one, over which it was not safe for a train to pass without a flagman being there.

2. The conductor who was moving the train knew that the flagman, whose duty it was to be there, was not at the crossing, because he met him, spoke to him, and left him going away from the crossing towards the semaphore.

3. Whether the bell was sounded or not, it did not perform the function of a signal, because it was not heard by any one at the crossing. The suppliant and his son both say they were listening, and positively aver that no bell could be heard. Now, I do not put any greater stress on their not hearing the bell than is necessary; but I claim that they listened for the sound of the bell, and the statute requires that trains should ring a bell or blow a whistle. Now, I say that the circumstances under which this train was being moved required that they should have given a signal that could be heard. Well, then, the train was going down there without any signal, and it was coming to a crossing where there was no flagman, and no matter how many people that train would meet it must go six car lengths before it could be stopped, with the possibility of killing all these people. An accident did occur, and the cause of it is *res ipsa loquitur*.

There was no contributory negligence on the suppliant's part in trying to get over the track, or otherwise. I submit the suppliant did only what one's common sense would suggest in the absence of the flagman,—he thought the coast was clear. Both the suppliant and his son swear that the absence of the flagman created in their minds an impression of safety. Leaving out of the question as to how far the Crown is

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answerable by reason of not having a flagman there, the absence of a flagman was an indication to this man about to cross that the crossing was safe, and he took it to be so. He was not guilty of negligence in supposing no train was coming, for he saw the train go out, and there was no need for the train to come back so far as the evidence shows.

When the suppliant got a view of the track it was quite clear. He had a line of vision up the track at a point of 90 feet, and this train was not in sight, and he did all a reasonable man would be expected to do. There was every reason for him to be careful, because he had his life in his hand. He looked to the right and the left, the flagman was gone and he was justified under the circumstances to say: "the track is clear."

I ask your Lordship to assume from the evidence that when the suppliant got past that corner there was no train in sight. What the conductor suggests about the suppliant hesitating on the track is only in the way of compromise. I say that the suppliant did all that a reasonable man would do under the circumstances, and that even if he hesitated, as suggested, he would not be held liable for contributory negligence. I think the evidence clearly shows that when the suppliant saw the train he did the best he could to get out of the way, and that he did not must have been because the train was going at too high a rate of speed. A witness speaks of the train slipping along "quite quickly and noiselessly." I can hardly imagine a more dangerous condition of things.

The following authorities were cited by counsel for the suppliant:

North-eastern Railway Company v. *Wanless* (1); *Brady* v. *The Queen* (2); *Gilchrist* v. *The Queen* (3);

(1) L. R. 7 H. L. 12. (2) 2 Ex. C. R. 273.
(3) 2 Ex. C. R. 300.

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Lavoie v. *The Queen* (1); *Filion* v. *The Queen* (2); *Leprohon* v. *The Queen* (3); *The Revised Statutes of Canada*, chapter 38, sections 36 and 29; Orders in Council, 1889, p. 960, rule 126; p. 961, rule 130; p. 968, rules 186-188.

THE JUDGE OF THE EXCHEQUER COURT now (January 20th, 1896) delivered judgment.

I think this case is within the statute (*The Exchequer Court Act*, 50 and 51 Vict., c. 16, sec. 16 (c); and that the injury complained of in the petition herein occurred upon a public work, and resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment. In particular, I think, that the conductor, knowing as he did, that the watchman or flagman was not at his post at the crossing at George or Bridge street, in backing the train into the station allowed it to approach and cross the street at too high a rate of speed, and without having the train sufficiently under command. I express no opinion one way or the other as to the other charges of negligence referred to in the petition and evidence in this case.

There will be judgment for the suppliant for four hundred dollars ($400.00) and costs.

Judgment accordingly.

Solicitor for suppliant: *J. L. Jennison.*

Solicitor for respondent: *R. L. Borden.*

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(1) 3 Ex. C. R. 96.

(2) 4 Ex. C. R. 134.

(3) 4 Ex. C. R. 100.

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Feb. 3.

THE ANDERSON TIRE CO., OF TORONTO, LIMITED..... } PLAINTIFFS;

VS.

THE AMERICAN DUNLOP TIRE CO...DEFENDANTS.

AND

THE AMERICAN DUNLOP TIRE CO...PLAINTIFFS;

VS.

THE ANDERSON TIRE CO., OF TORONTO, LIMITED..... } DEFENDANTS.

Patent of invention—R. S. C., c. 61, s. 37, and amendments—Importation after prescribed time—Sale, effect of—Importation of parts, effect of.

The A. D. T. Co. were the assignees of Patent No. 38,284 for an improvement in tires for bicycles. They imported, after the period allowed by *The Patent Act* for importations of the patented invention to be lawfully made, some twenty-two tires in a complete and finished state, and fifty-nine covers that required only the insertion of the rubber tube to complete them. In the completed tires and in the covers in the state in which they were imported was to be found the invention protected by the said patent. These tires and covers were not imported by the company for sale, but to be given to expert riders to be tested, and for the purpose of advertising the tire so patented. However, one, pair of such tires was sold through inadvertence or otherwise but they were not imported for sale. The company had a factory in Canada, where the invention patented was manufactured, and the value of the labour displaced by the importation complained of only amounted to two dollars and eighteen cents.

Held, in accordance with the decision in *Barter* v. *Smith* (2 Ex. C. R. 455), which the Court felt bound to follow, that the facts did not constitute sufficient ground for cancellation of the patent under the provisions of the 37th section of *The Patent Act*.

2. In order to avoid a patent for illegal importation, the thing imported must be the patented article itself, and not merely consist of materials which, while requiring but a trifling amount of labour and expense to transform them into the patented invention, yet do not in their separate state embody the principle of the invention.

THE plaintiffs, in the first case, asked for an injunction to restrain defendants from infringing their patent; and,

in the second case, the plaintiffs, *inter alia*, sought to avoid such patent for illegal importation.

At Toronto, 25th November, 1895, the first case, and the issue in the second as to illegal importation, were tried.

J. Ross, for the plaintiffs: The plaintiffs having shown that these tires have been imported, I submit that the onus is on the defendants to explain away that importation. It is for them to give an account of each one of these tires, and to show that they were not an importation which would render the patent void. I submit they have not shown that they were not imported for a commercial purpose. The evidence establishes that to have a racing man ride a Dunlop tire was a great advantage to the defendant company. They got a very large return in the sales of their tires; so that it was merely a matter of commercial gain which influenced them in sending these tires to Canada. There is no pretence that any special pattern was sent for use in the race of September, 1894, and it is not reasonable that it would be sent for the purpose of experiment. It is not reasonable that the Dunlop Company would pay a man to ride a tire, and then send him a tire for use at a crucial point which had not been tested. So that I submit that it is simply an attempt to give colour to that importation to say that the particular purpose was that of making experiments. I think it is clear from the evidence that it was for advertising purposes mainly. Referring to certain invoices to the Goold Bicycle Company and the Bowman Company of Hamilton, it is not shown that those were not imported tires that were sold. Therefore, I submit that on this branch of the case the American Dunlop Tire Company have not explained away these importations; and that on the other hand it is very clear for what purpose they were imported;

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that they were imported on orders sent by the defendants to New York, those orders being filled and sent here in the ordinary way of business.

Then as regards the importing of parts, I would refer to the judgment of Chancellor Spragge in *Smith* v. *Goldie* (1), as the judicial interpretation placed upon the question of importation. This question had been fought out in a case before the Minister of Agriculture, that of *Barter* v. *Smith* (2). Mr. Justice Henry, one of the members of the Supreme Court, who expressed an opinion on the point in *Smith* v. *Goldie* (3), said, in effect, "The Minister has jurisdiction; he has found in favour of the patentees, that it does not become void; the Act says it is final." Thus he there took the ground that as the question had been determined in the forum of the Minister of Agriculture, it was not open to them to review that case. Chancellor Spragge thought differently; but the Supreme Court did not construe the section of the Act at all, but held that the Minister of Agriculture had decided the case, and that was by the section final,—and that settled the matter so far as they are concerned. So that, I maintain, the only judicial interpretation of that section is in favour of my contention on this question of importing in parts. And that case was a very strong one. The only invention, as I understand it, covered by the patent in the case of *Goldie* v. *Smith*, was the new application of brushes, in a patent for grain cleaning or bolting process. Before the invention the brushes had to pass along the top of a sill or cloth, and Smith patented, or conceived the idea of applying the brushes under the cloth, to work by machinery. He had seen it done by hand, and he conceived the idea that it would be a

(1) 7 Ont. App. 628. (2) Ex. C. R. 492.
(3) 9 Can. S. C. R. 68.

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good thing to do that by machinery; and the Court of Appeal thought there was no invention *quoad hoc*, while the Supreme Court thought it was an invention which would support a patent. The only novelty there was the application of the brushes. Certain machines were imported and put up in a mill in Thorold. Now, it would be monstrous to say that if you had a patent simply on the position of the brushes, which were proposed to be altered in the placing up of the machine, that you are compelled to build the whole machine for the purpose of not violating the law. You might as well say you need to build a whole mill. But in the case before the court the fact is that they imported all the materials out of which the cover and tube were made—the cover composed of the tread, the lining and the wires—imported in a state which could be handily turned into the completed cover. The tread, the lining and the wires could be put together at a cost of five cents at the outside. Then is that complying with the spirit of the Act? If we are to construe the statute literally all we have to do is to prove the importation of one tire. Then, if we are to construe it so, I submit that the intention of the Act being to foster Canadian industry and to encourage Canadian labour, it should be carried out as nearly to the letter as possible. Now, it is proved that the covers could be obtained; and there is a question about whether the covers made by the Canadian Rubber Company for Fane & Lavender were as good as those imported or not. But, at any rate, the covers could be obtained in Canada, and canvas was used by Fane & Lavender, and not the cotton casings which were imported, and the rim was made by Fane & Lavender, in their factory in Toronto. The tubes were made by the Canadian Rubber Company, and the cement also could be made in Toronto.

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So that the only necessary thing, beyond the five cents of labour, was the Canadian air, I suppose, to fill the inner tube. Now, I submit that the statute should be construed to cover this. It is not pretended that the American Dunlop Tire Company should build a rubber factory, a factory for manufacturing cotton casings.

Then I would refer to the cases which have been decided on this subject. The decisions have been to construe the statute strictly. All the decisions of the Minister of Agriculture have been on the assumption that the Minister of Agriculture had a paternal care over patentees. It was a sort of paternal tribunal, which was to see that no forfeiture occurred from the disobedience of the strict letter of the law. But, now that it has been transferred to a judicial tribunal, I think it is impossible to say that anything but strict judicial interpretation should be placed on the statute. Take the case of the *Bell Telephone Company* and the other cases which are collected in the appendix to volume 2 of the Exchequer Court Reports. Although there is a great leaning in favour of patentees in reference to the jurisdiction of the Minister of Agriculture, and an assumption that his duty was not to interpret the statute as strictly as it would be in a court of law, yet in this case of the *Bell Telephone Company*, where telephones were imported in parts and set up in Canada, the very question was decided adversely to the patentees in that case, and the patent rendered void.

W. Cassels, Q.C., for the defendants: In regard to the tribunal, I must call your Lordship's attention to the decision in *Smith* v. *Goldie* defining the power of the tribunal—that is the Minister of Agriculture—to declare a patent avoided by a condition subsequent. The expression of opinion by the judges of the Supreme Court in regard to that, refusing to entertain jurisdic-

tion, was based upon the fact that that was something given to the Minister peculiarly as representing the commercial interest of the country; while His Lordship, Chancellor Spragge, held that under *The Patent Act*, as it was framed, it was the subject-matter of an appeal. The Court of Appeal reversed that, and the Supreme Court upheld it; and it was based upon the ground, as I have stated, that an application of that kind was something to be considered, or treated, as having regard to the commercial interests of the country, and the loss, in a commercial sense, by a failure to comply with what was there called a contract. Now, Parliament never intended, nor could have contemplated, that the rulings which the late Dr. Taché had made should be set aside or overruled; but what was contemplated and what was intended, no doubt, was this, that the question should be left with a tribunal that was continuous, and would settle the matter on principle, but not to vary the principles previously followed. It was expressly pointed out there was no right to raise it by way of defence; there was no right to raise it except by a substantive action.

Practically, what the higher courts held was that the defence there intended was something that went to the root of the patent *ab initio*, something which made the patent void. At all events, that is the view the Court of Appeal took of the matter. Now, in the judgment of the Court of Appeal and in the Supreme Court, they refer with approval to the judgment of Dr. Taché given in regard to that very matter. The patent in that case, *Smith* v. *Goldie*, was a patent for a combination, pure and simple, because it was conceded, as your Lordship will see on a reference to the case, that every element was old, with the exception of the brush underneath. All that Smith did was to take elements, all of which were old, and

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attach them to the brush under the sill instead of working it by hand; and the improvement was so great that the Supreme Court came to the conclusion, as against the judgment of the Court of Appeal, that it was a valid patent for an invention of a combination. What Smith has done in this case was to sell, by an out and out sale, to the Thorold Mill Company one of the machines. Chancellor Spragge thought that was an importation, but Dr. Taché thought differently; and the judges of the Court of Appeal and the Supreme Court were of the view that Dr. Taché's interpretation of the statute was the correct one. Now, there is no begging the question here that if we are bound in point of fact to manufacture one of the elements of this combination that we must manufacture all; because it is absolute want of logic, and it is in the face of the statute, to contend that we are bound to buy the elements in Canada.

Take this particular case; at the time this Fane and Lavender patent was brought in, the Dunlop patent was in existence. Now, the only difference of practical moment between the old Dunlop and the Fane and Lavender was this: that the old Dunlop was a non-detachable tire. The rubber tread, instead of being put with the wires inside the rim, was brought round the rim and cemented to the rim. That was the state of the art when the Welsh patent was obtained. Now, in the face of that, this patent was obtained for what is beyond question a most important combination, which has revolutionized the trade in bicycles. But every element that was in the old Dunlop is here, with the exception, instead of being cemented round the rim, the wire is put at the edge, and that wire automatically holds itself in place. Supposing we take the old Dunlop tire and simply undo the cement, and put the wire into the outer casing by

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means of a canvas, and fasten it in, could it be said that that was not manufacture? Because what we are bound to manufacture is our invention. Now, what is the invention? By the patent itself it is a combination of old elements every one of which is admittedly old, and admittedly, as far as we are concerned, a matter of commerce; anybody can buy it or anybody can use it. And when we go to the Crown, and ask the Crown for a patent, that patent being composed of elements none of which are claimed as new, your Lordship will see, according to the patent law, that is an admission that each element is old, but it is the peculiar manner in which they are put together that forms the invention. Then all the Crown exacts from us is this: take your invention and *manufacture* it. Then what are we to do? The manufacture is the putting together of old elements in a particular way, and when put together then it becomes a combination, the subject-matter of our patent.

Then as to the racing tires. Surely it cannot be contended that a patent of this magnitude and importance is to be set aside because they come forward and bring in evidence of twenty racing tires being imported? The statute does not mean that. The decisions of Dr. Taché, and all the other decisions, have not so interpreted it. I do not want to trouble your Lordship with the decisions; they are all together in the second volume of the Exchequer Court Reports; and they expressly point out that they will not deal with trifles. It is not a question of avoiding a patent even if twenty machines were brought in, as against about 10,000 to 12,000 manufactured and sold. The statute does not say that if one is brought in unwittingly that the patent is to be avoided on that ground.

The importation was only for the purpose of improving the Canadian manufacture and helping on the

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Canadian trade; because the very fact of the importations was with a view of enlarging and benefiting the Canadian trade, and there was no intent in sending them in of treating them as commercial articles.

The Crown enters into this contract away back in 1892; and the parties taking the patent from the Crown have the right to say: "Now, here, the Crown officials have interpreted what our rights are, and if in good faith we rely on such interpretation, we are not to have our rights destroyed because of one or two importations."

I would submit there is really no case. The whole thing is trifling, as far as the tires go. With regard to the Welch patent, that is a patent from the Crown, which at present is perfectly valid, and must prove perfectly valid. There is a right to import under the Welch patent till 11th October, 1894; and there is nothing imported after that date. Now, the Welch patent and the Fane & Lavender patent are held in the same hands; and under the Welch patent and the extension of the Welch patent there is the right, as a matter of contract with the Crown, to bring these things in; and if there were any wrong, surely it cannot be imputed to them that they intended to commit the wrong, and surely these importations must be imputed to that patent under which they had the right to import it up to 11th October, 1894. Why should these importations be attributed to the Fane & Lavender patent? For the purposes of this argument the Welch patent is a valid patent and gives the right up to 11th October, 1894, to bring in these very things. And why should the Fane & Lavender patent be set aside if, in another aspect of the case, we had a right to bring them in?

Z. A. Lash, Q. C., followed: Adverting to the question of jurisdiction, your Lordship threw out the sug-

gestion that the original jurisdiction here was not in a judicial body, but was within one of the Government departments having special reference to what we might call the trade of the country. The jurisdiction conferred upon it gave it a discretion to construe the statute, and it did construe it, having in view not the mere fact that there was a technical breach of the words of the statute, but that the reason for making the provision was the encouragement and protection of Canadian labour. Now, the moment you make the reason for the passing of the statute a part of its construction —which has been done here—and it is re-enacted with these decisions in existence, such decisions not only being those of the Department, but, as such, approved of and acquiesced in by the courts before which this matter came—the moment, I say, you depart from the strict construction of the statute, and construe it in reference to the reason of the enactment, there must be a discretion used. That discretion has been conferred, and must be exercised, and no fault can be found with the tribunal which exercises it; it is in the tribunal to whom the law refers the exercise of this jurisdiction, having specially in view the reason why this discretion should be conferred in that way. The question now arises as to whether your Lordship is justified, as a court of first instance, to change the construction which has been placed upon it in the previous cases. That, I think, is a matter for the legislature. We find the Court of Appeal in Ontario approving of the construction of the statute, and we find remarks of the judges of the Supreme Court approving of it; and we find it re-enacted by Parliament, with all that before them. That is in a special sense a confirmation of the decisions. It was merely because of the inconvenience that was felt in putting the decision of such questions before the Department of Agriculture instead of before a court that

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the Exchequer Court was given jurisdiction over patent matters. The thing was relegated to the Exchequer Court as a matter of jurisdiction only, but with the law as it was. The whole question is one of common sense, and what is convenient and reasonable.

J. Ross replied: On the general questions of law involved, apart from the matter of the jurisdiction where the matter is raised as a defence, I would simply say that some rule must be elucidated which will cover the cases, so that the public may understand what that view is; and it must not be some elastic thing, some vague idea of complying with the mere spirit of the law, some very indefinite thing, which cannot be reduced to any rule, or founded upon any particular reason. On account of the decisions of the Minister of Agriculture, it was found that his was not a good tribunal for the determination of these important questions.

It cannot be established that his decisions are in any way binding on your Lordship.

THE JUDGE OF THE EXCHEQUER COURT now (February 3rd, 1896) delivered judgment.

The question to be now decided in these cases is as to whether or not patent, number 38,284, granted on the 15th day of February, 1892, to Thomas Fane and Charles F. Lavender, for an improvement in tires for bicycles, is void for importation contrary to the provisions of the 37th section of *The Patent Act*. On the 18th of October, 1893, Fane & Lavender assigned the patent to the American Dunlop Tire Company, who were then about to commence to carry on, at Toronto, the business of manufacturing and selling what was known as the Dunlop tire. This tire is made in accordance with the improvements or combination protected in Canada by the Fane & Lavender patent. The same

combination is also covered by the Welch patent, number 40,630, which was issued on the 11th October, 1892, to The Pneumatic Tire and Booth's Cycle Agency, limited, and under which The American Dunlop Tire Company also work, and for the use of which in Canada they pay the patentees a royalty. The time within which the invention covered by the Welch patent might be imported was duly extended for one year, and did not expire until the 11th of October, 1894, while the time within which the invention might be imported under the Fane & Lavender patent had expired on the 15th of February, 1893. From the time when, in 1893, the American Dunlop Tire Company opened their factory at Toronto, to the 30th June, 1894, they sold of their own manufacture 4,247 tires, and from the latter date to August 31st, 1895, 7,667 tires. The average number of persons employed by the company was twenty, to whom they paid wages amounting in the aggregate to the sum of $10,764.

The importations which were proved, and on which the Anderson Tire Company ask the court to declare the Fane & Lavender patent void are of three classes.

First, it was proved that the American Dunlop Tire Company imported the materials used in the manufacture of the Dunlop tire in a form in which they could be used at the factory with as little labour and waste as possible. That applies to all the materials used—the rubber bands or treads, the cotton covers, the wires, the rubber tubes, the cement, the valves, and the rims to which the tires were attached. The rim and valves were in a finished state when imported, the cement ready for use, the rubber tubes and bands and wires of the requisite length, and the cotton of a convenient width. The cost of manufacturing a tire without the rim is $3.10, and with the rim about $3.60. Of these sums from five to seven cents represent labour,

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and the balance, in each case, the cost of the materials. But the materials were, I think, articles which, in the form in which they were imported, any one was free to buy or make, and to use so long as he did not combine them so as to infringe on the company's patent. No one of such materials separately could in any sense be said to be the invention for which the patent was granted; and the whole of them together did not constitute that invention, until they were fitted and put together, or combined in accordance with the improvements covered by the patent. It is clear, it seems to me, that the importation of the articles mentioned, was not an importation of the invention for which the patent in question was granted.

In the second place the plaintiff company complain that defendant company in February, 1895, and after the time limited had expired, imported 310 cotton cases with the wires fitted into them; and later there was apparently another importation of 50 cotton cases in the same state. On these cases it is clear that work had been done before importation which it was usual to do at the factory at Toronto, and which completed one step or process in the manufacture of the tire. The value of such work was, it appears, six dollars and thirty-two cents ($6.32). If the intention of the company in making the importation were in any view of the case thought to be material, it would, it seems to me, be fair to conclude from the very inconsiderable amount of labour displaced, and the fact that they had in Canada a factory where this work could have been done at perhaps no increased cost to themselves, that there was no intention on their part to evade the law as to the employment of Canadian labour in the manufacture of the invention. But that, it seems to me, is not the question here. The facts of the case do not raise that issue. The importation of the cotton cases,

in the condition in which they were, was not, it seems to me, an importation of the invention; and, if not, the patent cannot by reason thereof be void.

Then, in the third place, the defendant company imported some 22 tires in a complete and finished state and 59 covers that required only the insertion of the rubber tube to complete them. In the completed tires, without doubt, and I think in the covers in the state in which they were imported, was to be found the invention protected by the Fane & Lavender patent. These tires and covers were not, however, imported for sale, but to be given to expert riders to be tested, and for the purpose of advertising the Dunlop tire. One pair of such tires was, it seems, sold through inadvertence or otherwise, but they were not imported for sale; and if the company had a right to import them for the purposes and under the circumstances mentioned I should not think that the subsequent sale of two of them would render the patent void. The statute in fact says nothing about the sale of the invention. Either the patent is void or not void because of the importations mentioned, and the sale of the tires would be in no way material unless it were thought to have some bearing upon the question of the motives and intentions of the importer. But as the total value of the labour displaced by the importations complained of amounts only to two dollars and eighteen cents, and in the case of the two tires sold did not exceed fifteen cents, it is out of the question to suppose for a moment that there was any deliberate purpose of evading the law, or anything to be gained by breaking it.

The question as to whether or not a patent is void where the patentee, contrary to the letter of the statute, imports the invention, but with no intention on his part of evading or defeating the condition that requires

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him to manufacture in Canada, and without in fact displacing, to any appreciable or considerable extent, Canadian labour and industry, is not a new question. If it were, I should for myself be inclined to think that I had nothing to do with the importer's motives or intentions, or with the effect of the importation; that if the fact of importation contrary to the statute were clearly proved, as it was in this case, my duty would be to give effect to the law, and to declare the patent void. But to see how the matter now stands it may, perhaps, be well briefly to look at the history of the provision in question.

By the 28th section of the Revised Statutes of New Brunswick, chapter 118, repealed by *The Patent Act*, 1869 (32-33 Vic., c. 11, s. 52), it was provided that all patents granted under the chapter should be void if the patentee should not within three years after the granting thereof establish in the province the manufacture of, or introduce the article, improvement or composition for which the same was granted. That provision was satisfied if the thing patented was manufactured or introduced into the province within three years, and in that way became accessible to the public. In *The Patent Act of* 1869 the Parliament of Canada went farther and provided (sec. 28) that every patent granted under the Act should be subject to, and expressed to be subject to, the condition that the patent should be void, and all rights and privileges thereby granted should cease and determine, and the patent should be null and void at the end of three years from the date thereof, unless the patentee should within that period have commenced and carried on in Canada the construction or manufacture of the invention or discovery patented, in such manner that any person desiring to use it might obtain it or cause it to be made for him at a reasonable price at some manufactory or establishment for making it or constructing it in Canada; and

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that such patent should be void if, after the expiration of eighteen months from the granting thereof, the patentee or his assignee, or assignees, for the whole or a part of his interest in the patent, imported or caused to be imported into Canada, the invention or discovery for which the patent was granted. The objects of the enactment were two-fold: to secure to the public the use of the invention at a reasonable price, and to the labour and industry of Canada the advantage of its being made or produced here. At that date patents were not granted to persons who were not residents of Canada. By *The Patent Act*, 1872, (sec. 6) this restriction was removed, and it was provided that any inventor who was within the provisions of the Act might obtain a patent. By the 28th section of the Act of 1872 the time within which the patentee was to commence the manufacture in Canada, of the invention patented, was reduced to two years, and the time after which importation was prohibited was limited to one year; and it was also provided that in case disputes should arise as to whether a patent had or had not become null and void under the provisions of the section, such disputes should be settled by the Minister of Agriculture, or his deputy, whose decision should be final. In 1875 (38 Vict., c. 14, s. 2) the 28th section of *The Patent Act*, 1872, was amended by providing that whenever a patentee had been unable to carry on the construction or manufacture of his invention within the two years mentioned, the Commissioner might at any time, not more than three months before the expiration of that period, grant to the patentee a further delay on his adducing proof, to the satisfaction of the Commissioner, that he was, for reasons beyond his control, prevented from complying with the condition. In 1882 (45 Vict., c. 22) a like provision was enacted in respect of the time for importation. The patentee, or his assignee,

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was to apply to the Commissioner within three months before the expiry of the twelve months, and on showing cause satisfactory to the Commissioner, might obtain an extension of time not exceeding one year, during which the patent might be imported. These provisions recur without any material change in the 37th section of *The Patent Act*, as enacted in *The Revised Statutes*, chapter 61. In 1890, by 53 Vict., chapter 13, section 2, this court was given jurisdiction in the place of the Minister of Agriculture or his deputy, to decide any question that might arise as to whether or not a patent had become void by reason of the provisions of the statute to which reference has been made. In 1892, in the 6th section of 55-56 Vict., c. 24, these provisions respecting the manufacture and importation of anything patented are repeated, the material difference in substance being that it is provided that in the case of importation the patent shall be void as to the interest of the person importing the invention or causing it to be imported.

Now, it is clear that in enacting that a patent should be void for importation of the invention contrary to the terms of the statute, Parliament intended to secure the construction or manufacture in Canada of anything that was protected by a Canadian patent. There is no difference of opinion so far as I know as to that. But it has been thought that the question for decision under the importation clause of the statute is not the comparatively simple and direct issue of importation or no importation of the invention, but the more difficult questions of the intention of the importer, of the object he had in view, and as to whether or not the importation was considerable, or substantially displaced or interfered with Canadian labour. This was he view of the statute taken in 1877 by Dr. Taché,

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then the deputy of the Minister of Agriculture. In the case of *Barter* v. *Smith* (1), he concluded a learned and elaborate opinion, that has been much commended, as follows:—

The conclusion is, that the respondent having refused no one the use of his inventions and the importation assented to by him to be made being inconsiderable, having inflicted no injury on Canadian manufacturers, and having been so countenanced, not in defiance of the law, but evidently as a means to create a demand for the said inventions, which the patentee intended to manufacture, and did in fact offer to manufacture, in Canada, has not forfeited his patents.

In 1880 the validity of the patent in question in *Barter* v. *Smith* came again in question in *Smith* v. *Goldie* (2), and Chancellor Spragge appears to have taken a stricter view of the statute. He evidently thought that the question to be determined was as to whether or not the patentee had imported the invention for which the patent had been granted to him. In the Court of Appeal the impeached patents were held void on other grounds, but speaking of Dr. Taché's opinion, to which I have referred, Patterson, J. A., said:—

But if the subject were one for our decision I should be content to follow the very careful and able judgment of Dr. Taché, the deputy Minister, which commends itself to me as a sound exposition of the principles upon which the law laid down by this section should be administered, as well as a judicious and discriminating investigation of the facts.

Smith carried his case to the Supreme Court of Canada, where the judgment of the Court of Appeal was unanimously reversed, and the patents in question sustained (3). Mr. Justice Henry, in his reasons for judgment, in which Mr. Justice Fournier and Mr. Justice Taschereau concurred, expressed the opinion that Dr. Taché's decision was final, and then he added:—

(1) 2 Ex. C.R. 492. (2) 7 Ont. App. 628.
(3) 9 Can. S. C. R. 46.

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But in case of any doubt on that subject, I will add that having well considered the case as presented before him, I would have come to the same conclusion as he did. I think the law as laid down and explained by him in this exhaustive, and, I will add, able judgment, cannot properly be questioned.

Then it is also to be observed that since Dr. Taché's decision was rendered the clause of the statute against the importation of an invention, has, as we have seen, been re-enacted three times, in 1886, in 1890, and again in 1892, and on each occasion without anything to indicate any dissent by Parliament from the view that had been taken of the meaning of the provision. So that whatever my own view might be as to the true construction of the statute, I ought now, it seems to me, to follow the construction that has been put upon it in the cases to which I have referred. At the same time I cannot but think that there is a good deal to be said for the stricter construction of the enactment which appeared to commend itself to Chancellor Spragge ; or at least that there was a good deal to be said for such a construction when the question was before him. And it is clear, I think, that the more liberal interpretation that has prevailed has created some uncertainty, and opened the door to abuses and evasions of the statute. The provisions of the Act against importation are, it is true, the means only by which Parliament seeks to secure the construction or manufacture in Canada of any invention that enjoys the protection of a Canadian patent, and are not directed against the act of importation as such. It differs in that respect from the prohibition against the importation of seditious and immoral books, base or counterfeit coin, or goods manufactured by prison labour. Then, it may, and I have no doubt does, frequently happen, as has happened in this case, that an importation of an invention for which a patent has been granted displaces little or

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no Canadian labour, and does not appreciably affect the manufactures and industries of the country. But because that is so I do not see clearly by what authority the tribunal before which the question comes is to cut down the plain and explicit language of the statute, or engraft upon it any such qualification or exception, as that to which I have referred. It is clear, of course, as pointed out in the opinion of Sir John Thompson in *The Royal Electric Company of Canada* v. *The Edison Electric Light Company* (1) that no patent should be declared void for importation, unless it is manifest that the invention protected by the patent, has been imported. But where it is clear that importation has taken place contrary to the letter of the statute, I do not see, as I have said, what the court has to do with the motives or intentions of the importer, or of the effects of his importation. He holds his patent on an express provision or condition that he will not after a time therein limited, or any authorized extension of such time, import the invention for which the patent is granted, and any exceptional case is met by the provision for the extension of time within which importation may take place. It is possible that some of the hesitation to enforce the plain language of the Act has arisen from the large interests that are at times in peril. But who puts them in peril, and why should the tribunal hesitate to enforce the law when the patentee to gain some trifling advantage, or no advantage, does not hesitate to violate it and to incur the risk of having his patent annulled? Or why should it be thought that to import the invention for sale would avoid the patent, while if it were, as in the present case, imported to be given away, to be experimented with, or to be used as an advertisement, there would be no violation of the statute or breach of the

(1) 2 Ex. C. R. 597.

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condition, while the commercial advantage to the patentee might be much greater in the latter than in the former case?

The case is, however, it seems to me, within the rule laid down by Dr. Taché in *Barter* v. *Smith*, and approved by the learned judges whom I have mentioned; and following that rule, I am of opinion that patent number 38,284 in question in this case is not void for importation contrary to the statute.

The view I have expressed renders it unnecessary for me to decide the question that was raised as to whether or not any importation during the time that importation was permissible under the Welch patent could be taken to affect the Fane and Lavender patent.

The question of costs, will, as agreed at the trial, be reserved.

Judgment accordingly.

Solicitors for the Anderson Tire Co.: *Rowan & Ross.*

Solicitors for the American Dunlop Tire Co.: *Blake, Lash & Cassels.*

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Mar. 2.

DAMASE LAINÉ, OF THE TOWN OF LEVIS, MACHINIST, AND ARTHUR BELLEAU VANFELSON, OF THE CITY OF QUEBEC, CLERK, BOTH IN THEIR JOINT CAPACITY OF ADMINISTRATORS OF THE ESTATE OF CHARLES WILLIAM CARRIER, DECEASED, IN HIS LIFE TIME OF THE SAID TOWN OF LEVIS, DOING BUSINESS THERE AS FOUNDERS AND MACHINISTS, UNDER THE STYLE AND FIRM OF CARRIER, LAINÉ & CIE., } SUPPLIANTS;

AND

HER MAJESTY THE QUEEN. — RESPONDENT.

Contract for work done and materials supplied—Specifications—Interpretation of—Accident to subject-matter owing to cause not within contemplation of contracting parties—Allowance of interest against Crown—Computation.

The suppliants entered into a contract with the Crown to "place a second hand compound screw surface condensing engine" in a certain steamship belonging to the Dominion Government; and to convert the vessel from a paddle-steamer into a screw-propeller. By the specifications annexed to and forming part of the contract it was stipulated, *inter alia*, that the old engine and paddle-wheels were to be broken and taken out of the steamer at the contractor's expense, and that they should stop up all the holes both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery although not named in the specifications, which might be required by the Minister, &c., the whole to be completed and ready for sea, on a full steam pressure of 95 lbs. per square inch; ready to commence running on a certain date,—the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuilding, were to be executed and furnished at the cost of the contractors. It was also provided that the steamer was to have a satisfactory trial trip of

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at least four hours' duration, steaming full speed, before being handed over to the Department.

The vessel was built of iron and very old. The suppliants had taken the old engine out of the hull, and had grounded her, preparatory to placing her in a dry dock in order to complete their work under the contract. Owing to the fact that the bottom of the vessel under the old engine seat had been eaten away by rust, it gave way and was broken in when she grounded. It was established that the accident did not occur through the negligence of the suppliants; but the Crown insisted that the suppliants were liable to repair this damage under the terms of the contract and specifications.

Held, that there was nothing to show by the terms of the contract and specifications that either party at the time of entering into the contract contemplated that the portion of the steamship lying below and hidden by the engine seat would require renewing; and that the stipulation in the specifications that "the steamer was to be put in perfect running order" was intended to apply only to the work the suppliants had expressly agreed to do, and should not be extended to other work or things which they did not agree to do or to replace or renew.

2. That in such a contract as this, neither by the law of England nor by that of the Province of Quebec is there any warranty to be implied on the part of the owner of the thing upon which the work is to be performed that the same shall continue in a state fit to receive the work contracted for.

3. *Held*, (following *St. Louis* v. *The Queen*, 25 Can. S. C. R.), that interest may be allowed against the Crown upon a judgment on a petition of right arising *ex contractu* in the Province of Quebec in the absence of any express undertaking by the Crown to pay the same, or any statutory enactment authorizing such allowance.

4. But such interest should only be computed from the date when the petition of right is filed in the office of the Secretary of State.

PETITION OF RIGHT for moneys claimed to be due upon a contract for work done and materials supplied to the Crown.

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

The case was referred to the registrar for the purpose of taking the evidence.

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The argument upon the evidence took place at Ottawa on November 29, 1895.

I. N. Belleau, Q.C., for the suppliants: This is a case arising out of a contract between the suppliants and the Department of Marine and Fisheries for repairing or altering the steamer *Druid* from a paddle boat to a screw steamer. The boat, at the time the contract was made, was in the Louise Basin at Quebec, and was subsequently brought over to Levis to be docked there preparatory to repairs being done and the contract carried out. When the boat was taken from Quebec to Levis she was placed in Davie's Pond, and when she grounded she broke, because she was so decayed that she could not support her own weight.

We allege that it was not our fault the boat was broken; she was not fit to undergo the repairs the Government contracted for, and the Government ought, therefore, to bear the damages. The repairs were begun early in the spring. She was in the pond three days before she was broken. One of the workmen noticed she was leaking. He saw the water was coming in through a hole in the bottom. A man was sent to plug it up, and the plug he drove in went right through the place, it was so corroded.

One witness says that he examined one of the bad plates which were discovered, and that there were eight or nine of them in the ship's bottom. It was a mystery to the witnesses that the boat could have been carried over to Levis. They explain it in this way: during the winter there is ice that forms on the bottoms of the vessels, and that is the reason why she did not go to the bottom in bringing her over; but when she struck the bottom this coating of ice was broken. The witnesses say there was nothing to support the keel when the old engine was removed, and the break occurred where the old engine was situated. I con-

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tend that the accident was the direct and only result of the condition of the steamer. If we are not responsible through any fault or negligence, are we bound by the contract to make the repairs? The contract was to place a second hand compound condensing engine in the steamer *Druid*." The Crown contends that by our contract and specifications we contracted and agreed in addition to placing the engine in the *Druid* to make new any part of the engine or machinery although not named in the agreement or specifications, and to complete the whole ready for sea to the satisfaction of the Minister of Marine and Fisheries; the alterations of any part of the steamer to be executed at the cost of the suppliants or any work done or alterations made in the deck to be replaced to the satisfaction of the officer in charge; and that a satisfactory trial trip of at least four hours duration be had, steaming full speed, before being handed over to the Department. It is contended that we have to do all these things under our contract. Now I understand perfectly well that in making new the engine and machinery we had to do all things that were inherent in the carrying out of the work upon which we were engaged, but I do not think that we were bound to build a new steamer for the Government. The Government having contracted to have a new engine placed in the steamer there was an implied warranty on its part that the steamer was fit for the repairs contracted for. The Government took the position that the suppliants were responsible and should make the repairs occasioned by this accident, and the suppliants said, "We are not." Then the Government decided to have her repaired, and they signed a new contract, on the 22nd of May, to make these repairs two days after we had to deliver up the boat under the first contract, that is on the 20th of May. One of the primary rules in the

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interpretation of contracts is that, whatever the terms of the contract may be, it must always include the things to which the parties seem to have agreed, and this rule is founded upon a still more general rule that the contract must be interpreted in accordance with the intentions of the parties. I think it would be difficult to establish that when the Government contracted to put an engine into the steamer, they intended to contract for the rebuilding of the steamer. It is very likely that the Government did not know about the condition of the boat because it would not be reasonable that the Minister of Marine and Fisheries would leave the boat in such a condition. Evidently the Government did not think that they were contracting for a new bottom to this boat, because you will see that the repairs to the bottom cost over half of our original contract.

E. L. Newcombe (*D. M. J.*), Q.C.:—

It is important to bear in mind that this contract was made with regard to a vessel which was admittedly useless and unseaworthy. A vessel which for the purposes of a vessel as required by them, at the time of the contract, was of no manner of use to the Government. So the intention of the parties was to obtain by means of this contract, and the work done under it, a vessel that was, through certain alterations in her structure mentioned in the specifications, to be made of use to the Government. It was with regard to these circumstances that the contract was entered into. The contractors took possession of the vessel while in the Louise Basin on the Quebec side of the river; and they proceeded with the work there as far as they could without putting her into the dry dock, and then they took her across the river and for some reason or other she was grounded in this basin, where Mr. Davie repairs some of his vessels, on the outgoing tide, and

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when she took the ground it appears that a section of the bottom of the vessel which had been under the old engine seat gave way. It is beyond question that the work they undertook to do was not finished then. Even if the bottom had been perfectly sound, it was necessary for the vessel to go into dry dock for the completion of the original contract. The contractors were obliged under the contract, as any one would interpret it, to put this vessel in thorough running order. There is no case here of that having happened which should not have been contemplated at the time. The man who was put in charge by the suppliants to bring her over to Lévis was afraid to tell the crew the condition of the vessel. Personally, he knew it was a very risky matter to take the vessel across at the time. However, they took her across and let her ground with a knowledge of the bad condition of her bottom. So far as the grounding goes, however, we admit that they have gone a long way to show that they did whatever they could do to place the vessel properly. However, we do not rest our case upon that. We say our case is good upon the construction of the contract. If you make a contract like this and an accident happens through your negligence, or not, you are bound to make it good. We contracted for a seaworthy vessel. They now say to us,—You have to pay us over $4,000 more to do that; but we say to them,—No, under your contract you have got to make good this work. We regard the case exactly the same as if we made the second contract for repairing the bottom with another man. It was only after she was put into the dry dock that they finished the work which they admittedly had to do under the first contract. This goes to establish that the breakdown occurred in connection with the work they had undertaken to do. It was by reason of the removal of the old engine and the consequent decrease of support

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which that engine gave to the bottom of the ship, that the break-down occurred when and as it did. It may be your lordship will come to the conclusion that she may have broken down anyway within two or three months, but it is certain that this immediate break-down occurred by reason of the operations of the suppliants under their contract and in connection with work which was contemplated by the contract. It is a usual and ordinary thing in vessels of this class to find the bottom corroded and rotten. I submit that so far as the duty of the contractors under their first contract went, it would be just the same as if the bottom and the old engine were all one piece. In dealing with the engine they had to make good whatever was disturbed by its removal. By the terms of the contract the specifications are to be taken and read as part of contract. We contend that the word "work" in the contract has to be construed according to the specifications. What is the "work" to be done? "Converting the steamer *Druid* into a screw propeller, &c."

I submit that it is very clear they were not in a position to refuse to do the work because they found it more expensive than they contemplated. I admit that the contract is based upon the assumption that the subject-matter is going to remain in existence during the repairs. If the contract was to repair a vessel and she had gone to the bottom, I admit then that the parties would be released. But here there is no admitted impossibility of performance. We say here is a steamer which the contractors knew was a steamer liable to be in a pretty bad condition; therefore, undertaking to do this work, should they not be held liable to do everything that is specified and involved in the specifications. But my argument need not go further than this, that in order to take out the engine they had to expose a weakness of the vessel,—they had to leave

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that weak which was formerly apparently strong. The contract contemplated that so far as taking away old and putting in new, they should give us a ship that was seaworthy; and when they took away the old engine and found that, by reason of this taking away, the vessel is not in a position to go to sea, it is, I submit, necessary for them to make this good

We rely very much on the words "put in running order" in the specifications, under the rules of construction. These words must be construed according to their general meaning unless there is something to show that they ought to have a limited application. What has happened was within the reasonable contemplation of the parties. The contract was to put the boat in perfect running order. The contract being to change the vessel from one kind of a steamer to another, if the vessel had been in such a state as not to be a vessel within the meaning of the insurance cases, if burned or sunk, and impossible to be repaired, then there would not have been anything in existence in respect of which the contract was made, but that is not this case. We rely upon the law laid down in *Paradine* v. *Jane* (1). It is a question as to the contractors' obligation, and unless the accident arose from a cause so foreign to the business of the parties as to create an implied exception, then the contractors must be held bound according to the full extent of the obligations they entered into. *Taylor* v. *Caldwell* (2); *Brown* v. *Insurance Co.* (3).

I submit that there was no warranty to be implied on the part of the Government that the vessel was or should remain in a good condition, that she should remain in a seaworthy condition until these repairs were made and completed. *Appleby* v. *Myers* (4). There is no co-

(1) Aleyn, 27.
(2) 3 B. & S. 826.
(3) 1 El. & El. 853.
(4) L. R. 2 C.P. 651 and *Thorn's* case 1 App. Cas. 120.

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venant on our part except to pay. The general construction of the contract is in our favour because, having stipulated expressly for a number of things the cumulative effect of the contract is in our favour. On the other hand suppliants did not specify what they were to do, but they say generally that the vessel is to be put in "perfect running order." Again, they have contracted to "stop up holes." Now it must be admitted that there were no holes which were necessary to be stopped up if the vessel were sound. If you take these specifications which are part of the contract, you can extract a number of requirements or obligations which have been entered into by the contractors and which would render them liable to do this very work. There are general terms which are large enough to require them to make good all the damages that have occurred. There is a principle of law that there may be certain exceptions of certain events, but the events that happened here were those within the contemplation of the parties to the contract. (*Bayley* v. *DeCrespiny* (1); *Leake on Contracts* (2).) The material question is whether the event which is required to be excepted is one that could be foreseen and guarded against in the contract.

For the doctrine as to the construction of written instruments generally, I would refer to *Broom's Legal Maxims* (3). I don't think there should be a difference between the construction of the Crown's ordinary contracts and the subjects', but so far as the King's grant goes, *Bacon's Abridgement* (4) and the authorities there cited show that it should always be construed in favour of the Crown.

W. D. Hogg, Q.C., followed. He contended that as the suppliants had contracted to put the ship in

(1) L. R. 4 Q. B. 185.
(2) 2nd Ed. 592 *et seq.* Pollock on do. 6 Ed. 396.
(3) 6th Ed. p. 498 *et seq.*
(4) Vol. 8 p. 149.

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"running order," they were not entitled to be paid until they had carried out the contract to the fullest extent of the meaning of these words. He cited *Munro* v. *Butt* (1).

Reasons for Judgment.

Mr. Belleau replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 2nd, 1886) delivered judgment.

The suppliants bring their petition to recover a sum of four thousand two hundred and fifty dollars, and interest, alleged to be due to them on a contract made on the 25th of January, 1894, between Messrs. Carrier, Lainé and Company of the Town of Levis, in the Province of Quebec, engineers and founders, of the first part, and Her Majesty the Queen, represented by the Minister of Marine and Fisheries, of the second part, whereby Carrier, Lainé and Company, for the sum of nine thousand two hundred and fifty dollars, agreed, in accordance with the provisions of the contract and the specifications annexed thereto, to place a second hand compound screw surface condensing engine in the steamship *Druid*, and to convert the latter from a paddle steamer into a screw propeller, the work to be completed and in every respect ready for use on or before the 20th of May, eighteen hundred and ninety-four. The contract, among other things, further provided, that Her Majesty might make payments in advance on materials or implements procured for or used in the work, which should thereupon become vested in Her Majesty and be held as collateral security for the due fulfilment of the contract, but should remain at the risk of the contractors until finally accepted by the Minister as a portion of the work contracted for; that the specification annexed to the contract should be

(6) 8 El. & El. 738.

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deemed taken and read as part thereof; that time should be deemed to be of the essence of the contract; and that if the contractors should fail fully to complete the work in the manner and time agreed upon they would pay to Her Majesty, as and for liquidated and ascertained damages, the sum of twenty-five dollars a day for each day during which the delay to complete the work should continue. In the body of the contract the work to be done was described as follows: "To place a second hand compound screw surface condensing engine in the steamship *Druid;*" but by reference to the specifications it will be observed that the steamer was also to be converted from "a paddle steamer" to a "screw propeller," and it was, among other things, thereby agreed "that the old engine and paddle wheels were to be broken and taken out of the steamer at the contractors' expense, the old material to be their property, and that they should stop up all the holes both in the bottom and side of the vessel; that the contractors were to make new any part of the engine or machinery, although not named in the specification, which might be required by the Minister or by the Inspector of the work, and to complete the whole ready for sea to the satisfaction of the Minister, or the Inspector whom he might appoint to superintend the work; the whole to be completed and ready for sea, on a full steam pressure of ninety-five pounds per square inch; ready to commence running on or before the 20th May, 1894, the whole work to be of first class style to the entire satisfaction of the engineer appointed to superintend the work. It was further agreed that the steamer was to be put in perfect running order; that the alterations of any parts of the steamer, for the purpose of fitting up the new works, and any openings or cuttings or rebuildings were to be executed and furnished at the cost of the contractors; any work done

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or alteration made in the deck or displacement of iron or wood-work to be replaced to the satisfaction of the officer in charge, free of cost to the Department. It was also provided in the specifications that the steamer was to have a satisfactory trial trip of at least four hours duration, steaming full speed, before being handed over to the Department, the contractors to find stores and crew for the engine during such trip; that the contractors were to repair and make good any defects or damage that might occur to the new parts within four months after the final acceptance of the same by the Department, other than the usual wear and tear or accident arising from the carelessness of the Department's servants, over which the contractors would reasonably have no control, and that to insure the carrying out of this provision twenty per centum of the contract price should be retained by the Department until the expiration of the said four months.

The *Druid* is an iron steamship, and was at the time the contract was entered into about forty years old. It does not appear, however, that on that account either party contemplated that any repairs to the hull of the ship would be necessary. All that the specifications provided for were such repairs and renewals as would be rendered necessary by the work to be done and the changes and alterations to be made in the ship, under the contract. As a matter of fact, however, the whole of the ship under the old engine seat was so corroded and eaten away by rust, that unless this part of her had been renewed she would have been unseaworthy and unfit even for the trial trip of a few hours that the parties had stipulated for. Owing to the manner in which she had been originally constructed, this part of her had not been accessible either for examination or repairs. And although, if the attention of the parties had been directed to this circumstance, it might

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have been reasonable for both to have anticipated that when the old engine was removed it would be found that substantial repairs and renewals were necessary, the matter does not appear to have been present to the mind of either. It is this incident that has given rise to the present controversy.

In January, 1894, the *Druid* was in the Louise Basin, at Quebec, and while she was there the old engine was taken out, and other parts of the work contracted for were proceeded with. On March 30th the Minister of Marine and Fisheries sent the suppliants five thousand dollars as a payment or advance, it does not clearly appear which, on account of the work done.

On the 3rd of April the vessel was taken by the contractors to Levis to be placed in a dry-dock there, to enable them to complete the work to be done. The dock happened to be occupied and the vessel was placed in an adjoining pond where she must ground at low water, and the result was that the bottom of the vessel under the old engine seat, that had been eaten away and weakened by rust, gave way, and was broken in. On the 11th of April the contractors, by letter, gave notice to the Minister of Marine and Fisheries of the accident that had happened; that the vessel had been successfully docked on the 10th, and that they were rushing the work through so as to cause no delay; and they asked that the Minister would send some person to investigate the matter and see who should stand the cost of the necessary repairs. On the same day (the 11th of April) Mr. Smith, the deputy of the Minister of Marine and Fisheries, wrote to the contractors that the agent of the Department at Quebec had advised him of the accident to the *Druid*, and that they, the contractors, would be held responsible for the damage, and that the Department would, notwithstanding the accident, require the vessel to be

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delivered up at the time specified in the contract. On the 12th the contractors replied to Mr. Smith's letter of the 11th, repudiating any responsibility for the accident and offering to make the repairs at once, if ordered to do so. Mr. Smith, on the 26th April, in answer to their letter of the 12th, wrote to the contractors that he was advised that as the vessel was in their charge as contractors when the accident happened, and it did not appear that the accident was one that proper care could not have prevented, they were liable for the loss, and further that the provisions of the contract would appear to be such as to make them liable to repair. On the 1st of May the contractors, by a telegram, which, though not addressed to, was, I infer, communicated to Mr. Smith on the 2nd, offered to make the repairs to the *Druid* as per survey held for four thousand five hundred dollars and deliver the boat on the 20th of May, or for four thousand dollars if delivered on the 1st of June, provided an answer was telegraphed at once. On the 10th of May the contractors wrote to the Minister that they had proceeded with their work according to the contract, and that it would be finished before the 20th of May; that the work requiring the docking of the *Druid* would be finished on Saturday, the 12th, and that they would be ready to undock her on Saturday evening; that what would then remain of the work to be done could be proceeded with when the vessel was afloat; and they concluded their letter by notifying the Minister that after that date they would not be responsible for the dock charges. The new engine was not, it ought perhaps to be observed, placed in the same position as the old engine; and it was, it appears, possible for the contractors to do all the work that they conceded that they had contracted to do without making the repairs that were in dispute, though there

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could of course be no trial trip until such repairs were completed. On the 14th of May Mr. Smith telegraphed the contractors asking them to state the lowest sum for which they would repair the vessel without prejudice to the contract under which he then considered them liable. On the 15th they answered that they would make the repairs to the *Druid*, in twenty working days after order given, for four thousand five hundred dollars, and if more time were given them, for four thousand dollars. On the 18th, Mr. Smith answered the contractors' letter of the 10th, and informed them that, as advised, the Department considered them liable to deliver the *Druid* in thorough repair according to the provisions of the contract upon the day agreed upon, and that any expenses incurred in reference to the vessel for docking or otherwise would have to be borne by the contractors. On the 22nd, without prejudice to the contract, he accepted the contractors' offer to make the repairs in twenty days for four thousand five hundred dollars, and subsequently a formal contract bearing that date was entered into between the parties for the making of such repairs, which were to be completed by the 14th of June, 1894. This second contract contained the following proviso:—

"Provided however, and it is the true intent and meaning of these presents that nothing herein contained shall in any wise be construed or held to prejudice, affect or operate as a release discharge or waiver of any right, claim or demand which Her Majesty may have against the contractors to require or compel them to do and perform all the works herein specified or any part thereof by reason of the contractors being now liable thereto on account of their own negligence or under and by virtue of the contract bearing date the twenty-fifth day of January, 1894, between Her Majesty and the contractors relating to the steamer *Druid*: Nor shall anything herein contained be in anywise held or construed to prejudice affect or operate as a release, discharge or waiver of any right, claim, demand, action or cause of action which Her Majesty may now have or hereafter may have

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against the contractors by reason or on account of any obligation or liability on the part of the contractors to make good the damage caused to the said vessel by reason of her bottom giving way while the works contracted to be performed by the contractors under their said contract of the 25th day of January, 1894, were in course of performance, or while the said vessel was in their charge: Nor shall anything herein contained be held or construed in anywise to prejudice affect or waive any claim for damages or non-performance of the said contract of the twenty-fifth day of January, 1894, which Her Majesty now has or hereafter may have against the contractors. Nor shall anything herein contained be held to mean or intend that the contractors are not, independently of this contract, and by reason of the said contract of the twenty-fifth day of January, 1894, or their negligence in the performance of the works called for by the last named contract, liable to make good the damage and restore the said vessel to Her Majesty in a seaworthy condition and in thorough running order. Nor to prejudice or affect the claim to that effect now set up by Her Majesty. The true intent of the contracting parties being that their respective recourse and liability under the contract of January last shall not be affected by the present contract."

The contractors completed the work embraced in the first contract, made the repairs mentioned in the second, and having given the vessel a trial trip handed her over to the agents of the Minister, and were paid the sum of four thousand five hundred dollars for making such repairs. There was some evidence adduced, which was directed to the question as to whether the work was done to the satisfaction of an inspector appointed by the Minister, and as to whether or not the agent of the Department at Quebec, and the engineer of the steamer, who were present during the trial trip, were authorized to represent the Minister. That, I think, is not now important. The specifications annexed to the contract of January 25, 1894, were prepared by Mr. Samson, the Inspector of boilers and engines at Quebec, and though he was not, it appears, appointed to superintend the work, it was in fact done under his superintendence, and he says it was completed in a good substantial and workmanlike manner, and in

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accordance with the specifications. The Crown very properly raises no question as to this, and if any were raised it would be clear that the provisions of the contract in that behalf had been waived. So too there is no objection that the trial trip and the delivery of the vessel to the Minister's agent did not take place on or before the 20th of May. These acts obviously had to be deferred until the repairs embraced in the second contract which the parties entered into, were completed. The delay was not great. Probably there would have been none if the suppliants' offer to make the repairs had been accepted when first made. At all events this question does not come into the present case, and may be put aside without further consideration.

There is another matter, too, which may be dismissed in a few words, and that is the contention at first set up by the officers of the Crown that the accident had happened through some negligence of the suppliants. It is clear, I think, that it did not result from any negligence on their part, but from the inherent weakness of the vessel. There was nothing improper or unusual in grounding the vessel in the pond where she was placed. And there was nothing at the bottom of the pond to cause the injury. Under any circumstances it would have been necessary to renew the part of the bottom of the vessel that was set up when she was grounded. The grounding may have made that clear somewhat earlier than otherwise might have been, but that was a fortunate rather than an unfortunate circumstance.

That, I think narrows the question, on which the suppliants' right to recover depends, down to this: Were the contractors bound under the contract of January 25th, 1894, to make the repairs mentioned in the contract of May 22nd? If so, their action fails; but if not, they are entitled to recover. That, I think, is, on the whole,

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the effect of the second contract that was entered into. But for the general clause with which the proviso I have cited concludes, I should have thought that to be free from doubt. By that clause it is stated that "the true intent of the contracting parties was that "their respective recourse and liability under the con- "tract of January 25th, should not be affected by the "contract of May 22nd." These words standing by themselves might, it seems to me. be taken to mean that any defence then open to the Crown should not be affected by, but should remain open to it, notwithstanding the second contract. When the accident happened the officers of the Crown in effect said to the contractors:—Here is something that you must make good, because it happened through your negligence, and because you have contracted to do it. To that the contractors answered in substance:—No, we are not in any way responsible for the accident, and we have not contracted to make good the damage; but the Crown is bound to make it good, and we demand that that be done, so that we may complete the work we have undertaken. There was obviously a third position that might have been set up by either party, and that was that by the accident both parties were excused from further performance of the contract, in which case each party would have had to bear the loss that had fallen upon him. That position, however, was not taken, and it is not necessary to consider how far under all the circumstances it was the true position, or whether in that case the Crown might not only have had a good defence to the action, but might also have recovered back the five thousand dollars that had been advanced to the contractors. Of course it was open to either party to make the repairs if that were for his advantage, but it may be that neither was bound to do so; and in that case the Crown would on the 22nd

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of May, 1894, when the Minister entered into the second contract, have had a good defence to an action such as the present. Was it the intention of the parties by the concluding clause of the proviso to the contract, to which I have referred, to reserve to the Crown that defence? On the whole I think not. The clause must be read with the proviso of which it forms part, and the whole tenor and effect of that was that the contractors should not in the aggregate be paid more than the contract price of the work embraced in the first contract, if for any reason the contractors were liable or bound to make the repairs mentioned in the second contract. Both parties seem, after the accident, to have been agreed that the repairs in question should be made, and it is obvious that the cost of making them must fall upon one party or upon the other. If the contractors were liable or bound to make them, they would of course have to bear the cost. If the Crown was bound to make the repairs the expense would fall upon it. But there was the further contingency that neither might be bound to make the repairs. On whom in that case should the cost fall? What as to that was the intention of the parties? It seems to me it was their intention that in that case the cost should fall upon the Crown, the owner of the vessel. The expense was to be borne by the contractors if they were liable or bound to make the repairs, but by the Crown if the contractors were not so liable or bound. It is not possible, it seems to me, to put the parties in the exact position which they occupied prior to the 22nd of May, 1894. It was at that time open to the Minister of Marine and Fisheries to say to the contractors:—You contend that the Crown is bound to make the repairs to the hull of the vessel, which it is clear must be made before she can be sent to sea. I do not agree. On the contrary, I think that you, the contractors, are liable

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and bound to make such repairs, but whether or not you are so liable or bound, you have entered into a contract for a lump sum to convert the *Druid* into a screw propeller, to put in a second-hand compound screw surface condensing engine, and after a trial trip of at least four hours to deliver the vessel in perfect running order, and until you do that you will not be entitled to be paid anything. So if you wish to earn your money, it will be necessary for you to make the repairs in question. I am, however, ready now to agree with you to pay you for making the repairs but on the condition that you are not to be paid anything on your original contract price unless you are entitled to now recover without any trial trip, and without delivering the vessel to me in perfect running order. But what was said and done appears to me to be quite different. In substance it was this :—I am advised, the Minister, or those who spoke for him, said to the contractors, that you are not only liable to make the repairs in question because the accident happened through your negligence, but you are bound by your contract to do so. However I will pay you for making them, and if it turns out that you are either liable or bound I shall deduct the cost of the repairs from the contract price. That, it seems to me, is in substance the agreement to which the second contract gives expression, and by entering into it the Crown enabled the contractors to perform the conditions of the first contract, and to put an end to any defence that might otherwise exist because of the non-performance thereof.

Were the contractors liable or bound to make these repairs at their own cost and charges? That they were not liable because of any negligence on their part is, as I have already said, negatived by the facts of the case. Were they bound by the contract? The learned counsel for the suppliants contends that the Crown

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was itself bound to make the repairs, and if so, it is clear that the contractors were not. But with that view I cannot agree. It is clear that there was no express undertaking by the Crown to make any such repairs, or any express warranty that the vessel was in, or should continue in, a fit condition to enable the contractors to carry out the work and the alterations contemplated by the agreement of January 25th, 1894, and no such agreement or warranty is, I think, to be implied. In *Appleby* v. *Myers* (1), which I think supports that view, the facts briefly stated were that the plaintiffs had contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years, the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in course of completion, the premises with all the machinery and materials thereon were destroyed by accidental fire. Montague Smith, J., who in the Common Pleas delivered the judgment of the court, after stating the general rule of law that when a man contracts to do a thing he is bound to do it or to make compensation, notwithstanding he is prevented by inevitable accident, went on to say that, in the case before the court, they held that an implied proviso was present in the contract on the part of the defendant to provide and keep up the buildings, and the plaintiffs had judgment for the value of the work done. But this judgment was reversed in the Exchequer Chamber. There Blackburn, J., delivering the judgment of the court, said:—(2)

The whole question depends upon the true construction of the contract between the parties. We agree with the Court below in thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises con-

(1) L. R. 1 C. P. 615. (2) L. R. 2 C. P. 658.

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tinued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded, and to sue on a *quantum meruit*. But we do not agree with them in thinking that there was an absolute provision or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties, excusing both from further performance of the contract, but giving a cause of action to neither.

Nor is there, I think, any difference in this respect between the common law and the civil law in force in the province of Quebec. By article 1683 of the Civil Code it is provided that where a party undertakes the construction of a building or other work by estimate and contract, it may be agreed either that he shall furnish labour and skill only, or that he shall also furnish materials; and, by article 1684, that if the workman furnish the materials, and the work is to be perfected and delivered as a whole, at a fixed price, the loss of the thing in any manner whatsoever before delivery, falls upon himself, unless the loss is caused by the fault of the owner or he is in default of receiving the thing.

There does not appear to be any ground for thinking that in the absence of an express warranty, the owner of the thing upon which the work is to be performed undertakes in such a case that the thing shall continue in a state fit to receive the work contracted for.

We come back, then, to the question as to whether or not the contractors, by the contract of January 25th, agreed to do work which included such repairs as were mentioned in the contract of May 22, 1894. If they did, they would not, it is clear, be excused because the work they had contracted to do had proved more difficult or expensive than had been contemplated. In

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Paradine v. *Jane* (1) it was held "that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and he hath no remedy over, there the law will excuse him." * * * "But when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." And there is a long line of authorities relating to many differing subjects and circumstances, by which the principle is illustrated. (2.) In *Taylor* v. *Caldwell* (3) the rule is discussed at considerable length by Blackburn, J., in delivering the judgment of the court, and by reference to the report of the case it will be observed that he supports his views by reference to the principles of the civil law applicable to such cases.

There seems to be no doubt, he says, that where there is a positive contract to do a thing not in itself unlawful the contractor must perform it or pay damages for not doing it, although in consequence of

(1) Aleyn, p. 27.

(2) REPORTER'S NOTE:—The following are some of them: *Shelley's Case*, 1 Rep. 98; *Sparrow* v. *Sowgate*, W. Jones, 29; *Williams* v. *Lloyd*, W. Jones, 179; *Rolles' Abridgement*, P. 449, 450, *Condition G.*; *Brewster* v. *Kitchell*, 1 Salk, 198; *Menetone* v. *Celbrawe*, 3 Burr. 1592; *Cutter* v. *Powell*, 6 Term 320; *Gillett* v. *Mawman*, 1 Taunt. 136; *Rugg* v. *Minett*, 11 East 209; *Sinclair* v. *Bowles*, 9 B. & C. 92; *Roberts* v. *Havelock*, 3 B. & Ad. 404; *Jesse* v. *Roy*, 1 C. M. & R. 316; *Barr* v. *Gibson*, 3 M. & W. 390; *Marquis of Bute* v. *Thompson*, 13 M. & W. 487; *Hills* v. *Sughrue*, 15 M. & W. 253; *Shield* v. *Wilkins*, 5 Ex. 304; *Couturier* v. *Hastie*, 8 Ex. 40, 9 Ex. 102 and 5 H. L. C. 673; *Munroe* v. *Butt*, 8 E. & B. 738; *Scott* v. *Littledale*, 8 E. & B. 815; *Hall* v. *Wright*, E. B. & E. 746; *Hale* v. *Rawson*, 4 C. B. N. S. 85; *Brown* v. *The Royal Insurance Company*, 1 El. & El. 853; *The General Steam Navigation Company* v. *Slipper*, 11 C. B. N. S. 493; *Taylor* v. *Caldwell*, 3 B. & S. 826; *Appleby* v. *Myers*, L. R. 1 C. P. 615; *Ford* v. *Cotesworth*, L. R. 4 Q. B. 127; *Baily* v. *DeCrespigny*, L. R. 4 Q. B. 180; *Lord Clifford* v. *Watts*, L. R. 5 C. P. 577; *Anglo-Egyptian Navigation Company* v. *Rennie*, L. R. 10 C.P. 271; *Howell* v. *Coupland*, L. R. 9, Q. B. 463, 1 Q. B. D. 258; *Jefferys* v. *Fair*, L. R. 4 Ch. D. 448; *In re Arthur*, L. R. 14 Ch. D. 604; *Turner* v. *Goldsmith*, [1891], 1 Q. B. 544.

(3) 3 B. & S. 826.

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unforeseen accidents the performance of his contract has become unexpectedly burthensome or even impossible.....But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where from the nature of the contract it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor. (P. 833).

The same leading principle is expressed by Hannen, J., in delivering the judgment of the court in *Bailey* v. *DeCrespigny* (1), to which I refer only to quote the language used by him with reference to the rule of construction to be applied to an unqualified undertaking to do a thing that has become impossible through no act or default of the promisor:

> But where, he says, the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. (P. 185.)

Now it is clear, I think, that there are in the contract of January 25th, 1894, in question here, no words that have any reference to the particular contingency that has happened, and as I have already stated nothing to show that either party at the time the contract was made contemplated that the portion of the steamship lying below, and hidden by the engine seat would require renewing. If the contractors were bound to renew this portion of the ship it is be-

(1) L. R. 4 Q. B. 180.

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cause of some general clause or words to be found in their contract.

First, it is said that the contractors agreed to stop up all the holes both in the bottom and side of the vessel, but these words should be read with the other words of the paragraph of the specifications in which they occur, by which the contractors undertook, at their own expense, to break and take out the old engine and paddle wheels. This, it is clear, would leave holes in the sides of the vessel, and might by the removal of bolts or other fastenings leave holes in the bottom of the vessel. Such holes as these, the contractors, it seems to me, agreed to stop up, not to renew the whole of that part of the vessel's bottom that lay beneath the old engine. Then it is said that the contractors agreed to put the steamer in perfect running order, and these words are, it is clear, large enough to include an obligation to make such repairs as those in question, and probably a great deal more. They might possibly where that appeared to be the intention of the parties be thought to be wide enough to throw on the contractors the cost of repairing or renewing the vessel's furniture and tackle. Such words must, it is obvious, be construed by reference to the contract as a whole. What then did both parties have in mind and intend the contractors to do in the present case when they stipulated that "the steamer was to be put in perfect running order?" It was intended, I think, that with respect to the work the contractors had agreed to do, and the changes and alterations that they had contracted to make, the steamer was to be put in perfect running order; and not that in respect of other things or matters that they had not agreed to do nor to replace nor to renew, the steamer should when delivered be in perfect running order. If that is the case then it cannot be said, I think, that the contractors bound themselves by the first contract to

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make the repairs mentioned in the second. It was agreed no doubt that the steamer was to have a trial trip, and that was not possible unless such repairs were made; but that though a condition precedent to their right to recover the contract price of the work done, formed no part of such work.

In my opinion the contractors were neither liable because of any negligence, nor bound by the first contract to make the repairs to which I have had occasion to refer so often, and the result I think of the second contract is that in that event the cost of such repairs were to be borne by the Crown, and the contractors were to be paid the balance of the contract price of the work included in the first contract, amounting to the sum of four thousand two hundred and fifty dollars.

With reference to interest, it has been the rule of this court not to allow interest except where the same was made payable by statute or by contract.(1) But in the case of *St. Louis* v. *The Queen*, lately decided in the Supreme Court and not yet reported, that court, I understand, allowed interest to a contractor on the amount found to be due to him, from the date affixed to his petition of right. I do not understand that any reasons were given for departing from the rule laid down in *Gosman's* case, but I assume that as the contract in question in *St. Louis'* case was performed within the province of Quebec the practice in force in that province to treat the service of process as a demand of interest, and to allow interest from that date, was followed; the court being, it would appear, of opinion that the Crown is bound by the rule or practice in that behalf in force in that province. The rule is, it seems to me, a fair one. It affords at least a measure of relief and justice to suppliants who, in the absence of any statutory provision, or an express agreement, lose the

(1) See *in re Gosman*, L.R. 7, Ch. D. 771; *The Queen* v. *McLean*, Cass. Dig. 2nd ed., p. 399.

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interest on moneys that may be found to be justly due to them from the Crown. The only question is as to whether or not the rule is applicable to a petition of right, and that I take to be settled so far as the Province of Quebec is concerned by the case to which I have referred. It may, perhaps, be thought to be unfortunate that the practice should not be uniform throughout Canada, but that is a question for the legislature.

With reference to the date from which interest should be allowed, I am not sure that it would be safe, as a general rule, to allow it from the date when the petition is signed; because in such a case it would be very easy for the suppliant to antedate his petition. Besides, it would be unreasonable to hold the Crown liable on a demand of which it has had no notice. If the practice in force in Quebec is to be followed, it should, it seems to me, be followed as closely as possible; and I should think that interest should not be allowed at least prior to the date when the petition of right is filed in the office of the Secretary of State.

In the present case the petition is dated the 16th of October, 1894, and was filed in the office of the Secretary of State on the 17th, the day following; so that the difference here is altogether immaterial.

There will be judgment for the suppliants for four thousand two hundred and fifty dollars ($4,250.00), with interest from the 17th day of October, 1894, and for their costs.

Judgment accordingly.

Solicitors for suppliants: *Belleau, Stafford, Belleau and Gelley.*

Solicitor for respondent: *C. P. Angers.*

1896
Mar. 22.

RICHARD KIMMITT.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Petition of Right for services rendered to a Parliamentary Committee—Liability.

The Crown is not liable upon a claim for the services rendered by anyone to a Committee of the House of Commons at the instance of such Committee.

PETITION of Right for the recovery of the value of services rendered to a Committee of the House of Commons.

By this petition the suppliant alleged as follows:—

"1. In the months of June and July A.D. 1891, your suppliant was employed by one C. A. Geoffrion, Esquire, one of your Majesty's Counsel, and the duly authorized agent of your Government of the Dominion of Canada in that behalf, to do and perform certain work as an expert accountant in connection with an investigation then being held by the Committee on Privileges and Elections of the Parliament of the said Dominion, at the city of Ottawa

"2. In the course of such employment your suppliant was required on two different occasions to travel from his home in St. Catharines to Ottawa and back to St. Catharines, and necessarily paid for his travelling expenses and living while so travelling, in all $57.20, and was occupied in the said work at Ottawa for twenty-nine days and in travelling four days.

"3. The employment of your suppliant was within the scope, and was necessary to accomplish the object, of the authority and appointment of the said C. A. Geoffrion in that behalf, and your suppliant duly did

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and performed the said work and your said Government received the benefit thereof.

"4. Other accountants performing similar work upon the same investigation and under the same authority were paid for the same by your said Government at the rate of $15 per day and travelling expenses and $3 per day for living expenses while travelling and while engaged on such work at Ottawa, and your suppliant performed the said work on the understanding that he would be paid at the said rates, and the said rates are a fair and reasonable price to be paid for the said work.

"5. All conditions were fulfilled, all things happened and all times elapsed necessary to entitle your suppliant to payment of the amount incurred for his said work and expenses paid by him, yet the same still remains wholly unpaid and unsatisfied.

"Your suppliant therefore humbly prays that he may be paid the amount owing to him, that is to say:

For the said 29 days service at $15.00 per day.	$435 00
For money disbursed by your suppliant for living expenses 29 days at $3.00 per day.....	87 00
And for travelling expenses from St. Catharines to Ottawa 2 round trips at $22.60 for each trip	45 20
And living expenses while travelling in all 4 days at $3.00 per day.....	12 00
In all.....	$579 20

and interest thereon from the 1st day of January, 1892. Dated the 20th day of November, A.D. 1894."

The following are the material clauses of the statement in defence:

"2. Her Majesty's Attorney-General further says that there never was any contract between Her Majesty and the suppliant, or between any duly authorized agent of Her Majesty and the suppliant, for the per-

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formance of the work and services which the suppliant states in his petition of right were done and performed by him.

"3. Her Majesty's Attorney-General further says that any work and services which were done and performed, or any money which was expended by the suppliant in connection with the investigation, mentioned in the first paragraph of the petition of right were so done, performed and expended for and on behalf of the Committee on Privileges and Elections of the Parliament of Canada, and not for and on behalf of Her Majesty; and, further, that Her Majesty the Queen never received any benefit or advantage of or from the said work, services and expenditures, as mentioned in the third paragraph of the petition of right.

"4. Her Majesty's Attorney-General further says that the said C. A. Geoffrion, in the petition mentioned, was not at any time during the said investigation, employed as one of the counsel representing the Department of Public Works or the Government of Canada, and that the said C. A. Geoffrion was not authorized or empowered by Her Majesty to employ the suppliant on Her behalf, as an expert accountant, in connection with the said investigation.

"5. Her Majesty's said Attorney-General submits that under no circumstances is Her Majesty, as representing the Dominion of Canada, answerable or responsible to the suppliant for or in respect of the claim in the said petition of right mentioned, and he denies that the suppliant is entitled to the relief prayed for in the said petition."

The case was heard at Ottawa before the Judge of the Exchequer Court, on the 24th day of February, 1896.

W. D. Hogg, Q.C., for the respondent, at the close of suppliant's case, moved to dismiss the petition upon the ground that the evidence offered did not disclose

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Argument of Counsel.

any contract between the suppliant and the Crown, or the Executive Government. There was nothing to show that the Crown had undertaken to pay the claim, or was in any way liable for it. (He cited *The Queen* v. *McLean* (1); *Hall* v. *The Queen* (2).)

E. A. Lancaster, for the suppliant, contended that the suppliant had established sufficient grounds upon which to find a liability on the part of the Crown to pay this claim. The Crown had got the benefit of the suppliant's services; that being so, an implied contract arose between the parties. The Crown should be held liable to pay upon a *quantum meruit*.

THE JUDGE OF THE EXCHEQUER COURT now (March 22nd, 1896) delivered judgment.

The petition will be dismissed.

It is clear, both on principle and authority, that one who performs labour at the instance of a Committee of the House of Commons does not thereby acquire an action against the Crown for his services. In *The Queen* v. *McLean* (3), Chief Justice Sir William J. Ritchie, referring to the contract in question in that case made between the contractors and The Joint Committee on Printing of the two Houses of Parliament, said: "Her Majesty is no party to this agreement, "directly or indirectly. The Parliamentary printing "was matter connected with the internal economy of "the Senate and House of Commons, over which the "Executive Government had no control. The Crown "could neither dictate to the joint committee of both "Houses, nor interfere, nor deal with any contract "entered into by them or by their clerk under their "authority. The Crown neither authorized the execu-"tion of any contract for the work contemplated, nor in

(1) 8 Can. S. C. R. 210. (2) 3 Ex. C. R. 373.
(3) 8 Can. S. C. R. 224.

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"any way authorized the doing of the work to be per-
"formed under this contract. The Crown neither em-
"ployed the suppliants to do this work nor entered into
"any contract in reference thereto. The suppliants were
"in no way bound to the Crown nor, in respect to this
"contract, subject to its control. The Crown could
"neither put an end to the contract, nor enforce it, nor
"in any way interfere with its execution. This contract
"gave the Crown no right of action against the sup-
"pliants, nor the suppliants against the Crown; in
"other words, the Crown was no party to the contract
"and, therefore, cannot possibly, on any principle I
"can conceive, be held responsible for a breach of it."

What the learned Chief Justice said in that case is applicable to the present case.

There will be judgment for the respondent with costs.

Judgment accordingly.

Solicitor for suppliant: *E. A. Lancaster.*

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

NOVA SCOTIA ADMIRALTY DISTRICT.

1896

Mar. 19.

RONALD McMILLAN, HUGH McMILLAN AND JOHN McMILLAN, } PLAINTIFFS;

AGAINST

THE OWNERS OF THE SHIP "*CUBA*," DEFENDANTS.

Maritime law—Collision—Narrow roadstead—Rules of road—R. S. C. c. 79 Art. 21—Infraction.

On the 25th September, 1895, two steamships, the *C.* and the *E.*, were in the outer roadstead of the harbour of Sydney, C.B., the *C.* proceeding seaward, the *E.* toward the port of Sydney. The time was 7 o'clock p.m., the night fine and clear. Both ships had their proper lights burning, and those in charge of each ship descried the other sufficiently early to have prevented a collision if the rules prescribed by R. S. C. c. 79 had been complied with. Upon entering the roadstead the *E.* had taken the starboard side of the fairway in compliance with Article 21 of such rules, but, noticing the lights of the outward bound *C.* about one or one and a half points on her (the *E.'s*) port bow, her pilot ported her helm to give the approaching steamer more room to pass clear on the port side—red light to red light. When the ships were one-quarter of a mile apart the red light of the *C.* disappeared from the view of the *E.*, indicating that the former had starboarded her helm and was approaching the latter. Thereupon the *E.* put her helm hard to port with a view to averting collision. In a short time the *C.* blew two blasts, indicating, under Art. 19, that she was going to port. Then she was only a cable's length from the *E.* The engines of the *E.* were going full speed ahead, but when collision appeared unavoidable her engines were reversed full speed. It being immediately seen on board the *E.* that the head of the *C.* was falling off to starboard, although she had signalled that she was going to port, the engines of the *E.* were again put full speed ahead in an unsuccessful attempt to pass the *C.* by crossing her bows. The *E.* was struck amidships and badly damaged.

Held, that as Article 21 applied to the roadstead in question, the *E.* was on the proper side of the channel, and that the *C.*, having had ample room to take and keep her proper position relative to the fairway, was at fault in leaving it and solely to blame for the collision.

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Statement of Facts.

ACTION for damages arising out of a collision in the harbour of Sydney, C.B. The facts of the case are stated in the reasons for judgment (1).

The case was tried at Halifax, N.S., before the Honourable James McDonald, C.J., Local Judge of the Nova Scotia Admiralty District, on the 22nd November, 1895.

R. E Harris, Q.C., for the plaintiffs;

H. Mellish, for the defendants.

(1) It was thought that the publication of the opinion of the Nautical Assessor, Captain W. H. Smith, R. N. R., might be helpful towards a clear understanding of the facts of the case. It is as follows:

After a most careful examination of all the circumstances in connection with this collision, and having reviewed the evidence taken before the Registrar, Mr. Louis DesBarres, on the 13th and 20th November, 1895; also having read over the depositions of several witnesses examined by consent of the contending parties at Pictou, taken before John U. Ross, Commissioner, I am of opinion that the course of the steamer *Cuba* was safe and proper immediately after leaving the Victoria Pier, and as far as the buoy situated near the S.E. Bar Shoal.

The action of those in charge of the said vessel in starboarding the helm to pass under the stern of the steamer showing a green light was correct; but in the position in which the *Cuba* was situated, with a steamer two or three miles away in the direction she was going, being inward bound, showing her masthead and red (port light) light, indicating she was making for her proper side of the channel, it would have been more prudent for the pilot of the *Cuba* to have ported his helm directly after passing the steamer to go under the stern of the *Elliott*, when by that action he would have been directing his course to his own side of the fairway. He would then have shown the red light of his steamer to the red light of the *Elliott*, and red light to red light would have passed clear of each other, and no doubt the collision might have been avoided.

I am further of opinion that it was a wrong action on the part of the pilot and master of the *Cuba* to persistently starboard the helm of their ship to a crossing vessel, when they ought to have known by the red light of the *Elliott* being continuously in sight that the port side of that steamer was presented to them, and that the said vessel was steering towards the western shore to get on the proper side of the fairway.

The evidence appears to prove that the masthead and red lights of the *Elliott*, and no other, were seen all the time from the *Cuba*, and the masthead and side lihgts of the *Cuba* were in sight from the *Elliott* for ten or fifteen minutes

McDONALD, (C. J.) L. J., now (March 19th, 1896) delivered judgment.

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before she starboarded her helm and shut out the port light and displayed the green light.

I am still further of opinion that the *Cuba* kept persistently starboarding her helm, which wrong action caused her to follow up the course of the other vessel, while those on board were attempting to get on their own side of the channel, and it would have been impossible for the three lights of the *Cuba* to be seen for so long a time from the *Elliott* if the *Cuba* had kept on one steady course. It is also admitted that her head was afterwards kept off N.E.

When the collision appeared to be inevitable, both vessels should have stopped and reversed their engines at once as risk of collision was then involved, according to Article 18.

As the night was clear with very little wind and the water smooth, objects being observed from the deck of the *Cuba* and the lights of that vessel being seen from on board the *Elliott* at a distance of nearly three miles, it seems incredible that the two steamers should have come into collision when there was plenty of room to manœuvre in, and there could have been no difficulty in each vessel keeping upon her own side of the channel.

The arguments in favour of the witnesses on board the *Cuba* are based on Article 16 :—"If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." And Article 22 :—"Where by the above rules one of two ships is to keep out of the way, the other shall keep her course." And great stress appears to have been placed upon the fact that the ships were in that position as crossing ships. The *Cuba* acknowledged that she had a right to keep out of the way and those on board were endeavouring to do so, and probably would have gone clear, if the other vessel had obeyed the rule and kept upon her course.

I am of opinion that these conditions did not exist at first, but were afterwards brought about by the wrong action of the *Cuba* in persistently starboarding her helm; and even if the vessels had been placed in such a position, it was not proper seamanship for the *Cuba* to have attempted to cross the bow of the other steamer going at full speed, but her course should have been directed to go under that vessel's stern.

I have, therefore, to express my opinion that the wrong action of the *Cuba* was the cause of placing the *Elliott* in a perilous position ; and I consider that as those in charge of the latter vessel did their best to extricate their ship from it up to the time of their close proximity to the position in which the two vessels collided, it is sufficient proof to show on which side of the channel it occurred, and the fault of the casualty should be attributed to the carelessness of those in charge of the navigation of the *Cuba*. The severity of the blow, however, might have been lessened, had both vessels stopped and reversed their engines in time.

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Reasons for Judgment.

This is a suit by the owners of the steamship *Elliott* of 227 tons burthen, against the steamship *Cuba* of 453 tons, to recover damages caused by a collision of these vessels through the alleged fault of the *Cuba*. The *Cuba* in her defence denies any fault on her part, and throws the blame on the *Elliott*. The collision took place in the outer roadway of the harbour of Sydney, C.B., about 7 o'clock p.m. of the 25th Sept., 1895. The width of the navigable channel, a roadway from Low Point at its outer entrance to the mouth of the harbour proper, is about one or one and a half miles. The course from the harbour entrance to the outer entrance of the roadway is N.E. by E. magnetic, for a distance of about two and a half miles. The outer entrance is known as Low Point, although marked Flat Point on the chart. The *Elliott* was on a voyage from Charlottetown, Prince Edward Island, to Sydney, and when she arrived at Low Point about six o'clock p.m., stopped for a pilot. The ship, while waiting for the pilot, was about half a mile from the shore, and her head during that interval fell off somewhat from her course. It was but a few minutes till the pilot came on board, and the ship was put on her course W. by S. up the channel. The course indicated W. by S. while following the channel, was in a direction to the side of the channel opposite to Low Point, and would place the ship on that side of the fairway lying on her starboard side, thus obeying rule 21, which requires that: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ships."

While proceeding on this course the masthead light of a steamer was observed, which the master of the *Elliott* supposed to be crossing the inner harbour in a northern direction, coming from a position near the

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Victoria Pier, inside the south bar light-house. After going some distance, the steamer appeared to stop, and then as some of the witnesses phrased it, "she appeared to angle down the channel." Immediately afterwards her three lights, masthead, red and green lights, were seen apparently coming end-on to the *Elliott*, the lights showing about one or one and a half points on the *Elliott's* port bow. Up to this time the *Elliott* had kept the course on which the pilot put her when leaving Low Point, namely W. by S., but, noticing that the other vessel was coming down the channel, the pilot directed the helm to be ported, thus giving the approaching steamer more room, if required, to pass clear on the port side, red light to red light. This steamer proved to be the *Cuba* outward bound. The lights of both steamers were at this time burning brightly, and the three lights of the *Cuba* had been seen by those on board the *Elliott* for about ten or fifteen minutes after the former had squared on her course down the channel.

When the *Elliott's* helm was ported according to the pilot's orders, it was found the ship fell off about two points to starboard, and the lookout on the *Elliott's* bow states that the *Cuba's* lights were a point on the port bow of the *Elliott* for 15 minutes before that time. It also appears from the evidence that at the time, or about the time, the *Elliott's* helm was ported and her course altered more to the northward, the red light of the *Cuba* disappeared, indicating that the *Cuba* had starboarded her helm and was approaching the *Elliott*. The ships were at this time about a quarter of a mile apart. Those in charge of the *Elliott* became anxious and her helm was put hard to port, hoping they could pass close to the *Cuba*, and their helm was not again changed till the collision had taken place. Just about this time the *Cuba* blew two blasts of her whistle

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indicating under rule 19 that she was directing her course to port, an intention, however, which had already become apparent to the *Elliott* from the disappearance of her red light and the appearance of her green light on the *Elliott's* port bow; she was then only a cable length distant from the *Elliott*. The engines of the *Elliott* were still going full speed ahead when the *Cuba* blew the two blasts, and the master of the *Elliott* says it would have been impossible to avoid a collision, as they were going ahead through the water, and the *Cuba* being under her starboard helm was following the *Elliott* up as the latter endeavoured to evade her under her port helm. When the collision was seen to be inevitable orders were given on board the *Elliott* to reverse the engines full speed, but it was immediately observed that the head of the *Cuba* was falling off to starboard, although she had signalled that she was going to port, and the engines of the *Elliott* were instantly put full speed ahead, hoping to clear the other vessel by crossing her bows. The *Elliott*, however, was struck amidships. So far, it would appear that the *Elliott* had committed no error. The channel through which she was passing is one to which the precautions required by rule 21 are particularly applicable. She was on her proper side of the channel under that rule, and she was there under circumstances which apparently made it impossible for the *Cuba* to mistake the position of either vessel, while she had ample room by keeping her own side of the channel, or even keeping the midchannel of the fairway, to go on her course without danger to either vessel.

We must now consider the defence of the *Cuba*, which, as set out in her pleadings, is succinctly as follows:

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In the circumstances aforesaid, those on board the *Cuba* saw the red and masthead lights only of a steamship, the *Elliott*, from two to three miles off on the *Cuba's* starboard bow, and bearing about E. ½ S. from the *Cuba* by her compass, or E. by N. magnetic. The *Elliott* continued to show her red and masthead lights only, and to avoid risk of collision the helm of the *Cuba* was starboarded, when the *Cuba* was about one and a half miles from the *Elliott* and the course of the *Cuba* was then directed about N.E. by her compass, or N.E. by N. magnetic—in ample time to avoid all risk of collision had the *Elliott* kept her course. The *Elliott*, however, then ported her helm when she was about a mile or three-fourths of a mile from the *Cuba*. The helm of the *Cuba* was then forthwith put hard to starboard, and two short blasts blown on her whistle, indicating that the *Cuba* intended to clear the *Elliott* by such manœuvre; and as the *Elliott* continued to go at full speed under a port helm, attempting to cross the *Cuba's* bows, and causing risk of collision, the *Cuba's* engines were reversed at full speed, and three short blasts were blown on the *Cuba's* whistle. The *Elliott* did not slacken her speed, and the ships collided, the bow of the *Cuba* striking on the side of the *Elliott* about midships. It is admitted that the masthead and red lights of the *Elliott* were seen by the officers of the *Cuba* at a distance of three miles, being E. ½ S. from the *Cuba*. That the *Elliott* continued to show her masthead and red lights only. That the *Cuba* starboarded when about 1½ miles from the *Elliott*, and she pleads that the *Elliott* brought on the disaster by porting her helm. This is practically the whole defence, and the facts to which I have referred in considering the case of the *Elliott* are not at all shaken by the evidence for the *Cuba*. It was argued by Mr. Mellish

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that the *Elliott* must be considered a crossing ship, because when first seen at a distance of three miles her lights indicated that she was on that side of the fairway where, under the rule referred to, she ought to be, or was then on her course for that position. I would require the opinion of the Nautical Assessor, I think, to reject this contention, when it is apparent that the *Cuba* clearly understood, from the position of the *Elliott* and her then course, and when it must have been as apparent to the master of the *Cuba* as it is now to me, that to make the position of both ships perfectly secure he had only to port his helm a point or two to make a collision impossible. Indeed, if he had kept his course as it was when the *Elliott* saw his three lights, while she showed her masthead and red lights only, a collision would have been impossible, as it is not contended that there was not ample sea-room to enable the *Cuba* to port her helm and take the place on the one side of the channel which the *Elliott* had properly sought on the other. I am advised by my assessor that it is a maxim well known among seamen: "Never to starboard to red light of a crossing vessel when she is only a point or two on the starboard bow," and in this case the *Cuba* had nothing to gain by it, as by porting her helm a couple of points or less she would have passed clear, and would have regained her position on the right side of the channel without any fear of collision. I hold, therefore, that the *Cuba* was wrong in starboarding her helm when she did, that by doing so she brought on the catastrophe which happened, and is solely to blame for the collision of these two vessels. The opinion of Captain Smith, R.N.R., is in accordance with the conclusion I have announced, and I will file his memorandum with this judgment. The *Cuba* is condemned in damages and

costs. The usual reference to the registrar and merchants is ordered, and on payment of the damages and costs the *Cuba's* bail will be released.

Judgment accordingly.

Solicitor for plaintiff: *W. A. Henry.*

Solicitor for defendants: *H. Mellish.*

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NOVA SCOTIA ADMIRALTY DISTRICT.

1895
Aug. 14.

HER MAJESTY THE QUEEN .....PLAINTIFF;

AND

ANNIE ALLEN.....DEFENDANT.

Revenue law—R. S. C. c. 34, s. 334—Infringement—Penalty—Jurisdiction of Exchequer Court—The Colonial Courts of Admiralty Act, 1890, *(Imp.)*

The jurisdiction conferred upon the Vice-Admiralty Courts in Canada by sec. 113 of *The Inland Revenue Act* (R. S. C. c. 34) in respect of actions for penalties prescribed by such Act, is not disturbed by *The Colonial Courts of Admiralty Act*, 1890, (Imp.) The latter Act (s. 2, s.s. 3) vests the jurisdiction of the Vice-Admiralty Courts in any colonial court of Admiralty, and by *The Admiralty Act*, 1891, the Parliament of Canada made the Exchequer Court the Court of Admiralty for the Dominion, and by sec. 9 thereof confers upon the Local Judges in Admiralty all the powers of the Judge of the Exchequer Court with respect to the Admiralty jurisdiction thereof.

THIS was an action for penalties under *The Inland Revenue Act*, R. S. C. c. 34. The proceedings were taken in the Registry of the Nova Scotia Admiralty District.

The defendant, not being a manufacturer of tobacco, was charged with the offence of having packages of cigarettes in her possession without the proper revenue stamps thereon. At the trial on the 14th August, 1895, the offence charged was clearly established, but exception was taken to the Local Judge in Admiralty to hear the case.

F. J. Tremaine, Q.C., for the defendant:

While it is possible that the Exchequer Court may take cognizance of the matter in the exercise of its Exchequer jurisdiction, a Local Judge in Admiralty has no jurisdiction. The Vice-Admiralty courts had not.

J. A. Chisholm: By sec. 113 of *The Inland Revenue Act* the penalty sued for herein may be recovered in a

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Vice-Admiralty Court. This court is mentioned by name therein. *The Colonial Courts of Admiralty Act*, 1890, s.s. 3 of s. 2, does not take away this jurisdiction, but on the contrary confirms it. The last mentioned Act merely empowers colonial legislatures to establish Courts of Admiralty for themselves, and *The Admiralty Act*, 1891, (Canada), makes the Exchequer Court a Court of Admiralty for the Dominion. Furthermore, by section 9 of the last enactment all the powers of the Judge of the Exchequer Court, in respect to the Admiralty jurisdiction of the court, are conferred upon the Local Judges in Admiralty within their respective districts.

McDONALD, (C. J.) L. J.—This is a proceeding to recover penalties for violation of s. 334 of R. S. C. c. 34. The offence charged was established, but on the hearing a doubt was suggested as to the jurisdiction of the court. The question was whether the jurisdiction given to the Vice-Admiralty Courts in Canada by s. 113 of R. S. C., c. 34, is confirmed in the District Admiralty Courts by the legislation relating to Admiralty Courts in 1890. It was contended by the learned counsel for the Crown that by s.s. 3 of s. 2 of the Imperial Act 53 and 54 V. c. 27, the jurisdiction conferred upon the Vice-Admiralty Court by s. 113 of *The Inland Revenue Act* is continued in the present District Admiralty Court, or, in the words of the section, that the words "Colonial Court of Admiralty" must be read into s. 113 instead of "Court of Vice-Admiralty." This appears to be the reasonable construction to be given to the Acts, and I therefore decide in favour of the jurisdiction.

Judgment accordingly.

Solicitor for the plaintiff: *J. A. Chisholm.*

Solicitor for defendant: *F. J. Tremaine.*

1896

Mar. 17.

QUEBEC ADMIRALTY DISTRICT.

N. K. CONNOLLY, OF THE CITY OF QUEBEC, AND MICHAEL CONNOLLY, OF THE CITY OF MONTREAL, OWNERS OF THE STEAMBOAT *EUREKA*..... } PLAINTIFFS;

AGAINST

THE STEAMSHIP *DRACONA* AND HER CARGO.

Maritime law — Salvage agreement — Validity of — Undue influence— Quantum meruit—Evidence.

Where an agreement for salvage services has been entered into between the master of a stranded ship and the master of a tug, unless it appears that the latter has taken advantage of the distressed condition of the stranded ship to make an extortionate demand, the court will enforce such agreement and not decree a *quantum meruit*.

2. In such a case the agreement is valid *primâ facie*, and the *onus* is upon the defendant to show that the price stipulated for was unjust and exorbitant, and the promise to pay it extorted under unfair circumstances.

THIS was an action for salvage services alleged to be due upon a special agreement.

The facts of the case appear in the reasons for judgment.

The case was tried in March, 1896, before the Honourable George Irvine, Local Judge of the Quebec Admiralty District.

C. A. Pentland, Q.C. for the plaintiffs;

A. H. Cook for the ship.

IRVINE, L. J., now (March 17th, 1896) delivered judgment.

The steamer *Dracona* sailed on a voyage from Middlesburgh to Montreal on the 4th August last

(1895). In the course of her voyage she ran ashore at a place called Pointe Jaune, near Fame Point, in the River St. Lawrence. It appears to have been a very dangerous and exposed position. The master went ashore and proceeded to Fox River and telegraphed to the agents of the ship in Montreal, who immediately took steps to send assistance.

A telegram was forwarded to the *Eureka* then lying at Caribou Island, by her agent in Quebec, who had heard of the accident, directing her to go to the assistance of the *Dracona*, which she immediately proceeded to do, arriving there on the morning of the 15th August.

Some discussion took place between the captain of the steamer and the agent of the tug as to the charge the tug should make for rendering assistance. It was then understood by both the tug's agent and the master of the *Dracona* that the powerful tug *Lord Stanley* with wrecking apparatus was on her way down to assist the wrecked vessel and would probably reach her on the following day. The *Eureka's* agent asked $1,000 to stand by the ship to give all necessary assistance until eleven o'clock the next day, which was supposed to be the period when the *Stanley* would arrive.

The *Avalona*, a vessel belonging to the same owners, then came in sight, when the *Dracona* signalled to her to stop, and the *Eureka* took the master of the *Dracona* and the tug's agent on board the *Avalona*. The master said that he went on board for the purpose of consulting the other master on the position in which he was placed and particularly as to the claim for payment made by the tug. After considerable discussion as to the price, they returned on board the *Dracona*, when they finally agreed upon $350 a day, to be paid to the *Eureka* until the wrecked vessel was either condemned or got off.

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It is claimed, 1st: That this charge is exorbitant, and, 2nd, that it was made under coercion—the agent of the tug taking advantage of the position of the master of the *Dracona* to force from him an agreement for more than his services were worth. The pressure alleged to have been brought on the master of the *Dracona* was a statement made by the master and agent of the *Eureka* that their business was the towing of vessels, and that they were then occupied in looking out for such work; that there were vessels then in sight who would require their services, and that remaining alongside the *Dracona* would be a loss of time and money to them unless they were adequately remunerated.

An agreement was then entered into which, however, was not reduced to writing for some days after.

In the meantime the *Stanley* did not arrive as soon as was expected, and the *Eureka* remained alongside the *Dracona*, keeping steam up and rendering what assistance was necessary, until the 21st of the month. In the meantime the ship had been condemned, and the *Eureka*, being about to leave her, obtained from the master a written acknowledgment of his claim, which was dated the 15th although only made on the 21st.

The question to be decided is whether the agreements made for the remuneration of the *Eureka* were fair and reasonable, or, whether they were extorted by an undue advantage being taken of the circumstances in which the *Dracona* was placed.

I shall always be disposed in cases where I am of opinion that a vessel in distress had been subjected, on the part of the salving vessel, to extortionate demands which have led to the making of a contract for the payment of excessive salvage services, to set aside such

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contract, as I did in the case of *The Ismir* (1), ashore on the Island of Orleans in 1888.

The rules which govern such cases have been very clearly laid down in a recent case in the Probate Division of the High Court of Justice of England, that of the *Strathgarry* (2). It is there said:

> The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the court is called upon to decide between contending parties upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the court will try to discover what in the widest sense of the terms is, under the particular circumstances of the particular case, fair and just between the parties.
>
> * * * If the parties have made an agreement, the court will enforce it, unless it be manifestly unfair and unjust, but if it be manifestly unfair and unjust, the court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the court will consider what fair and reasonable persons in the position of the parties, respectively, would do or ought to have done under the circumstances.
>
> A number of cases have been cited during the argument, in some of them slightly different language has been used by the judges—sometimes the word exorbitant has been used—sometimes the word inequitable, but in substance all the cases are, I think, consistent with the rule laid down in *Akerblom* v. *Price*, 7 Q. B. D. 129 at pp. 132, 133, as the fundamental rule.

I cannot go so far as the counsel for the defendant appears to do when he said that under no circumstances can parties situated as those in the present case, be considered to be so far in an equal position that would justify a contract being made between them, but that the salvor can only be entitled to a *quantum meruit*. I look upon a contract of the nature of the one made in this case as being *primâ facie* binding, and that the onus of proof is thrown on the defendant to show that the price stipulated was unjust and exorbitant and the promise to pay it extorted under unfair circumstances.

(1) 14 Q. L. R. 353.

(2) [1895] Prob. 270.

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1st. I hold in this case that there was no undue influence exercised on the master of the *Dracona*. He was not dependent on the *Eureka* for assistance, he had within easy access another vessel belonging to the same owners who might have every opportunity of aiding him had there been a necessity for immediate assistance; and he made the arrangement after consulting with one of his own fellow-masters over the circumstances of the case; and, moreover, after several days reflection he confirmed the arrangement in writing without remonstrance or protest.

2nd. There has been in my opinion no convincing evidence that the arrangement was either unfair or unjust, the only testimony on that head has been that others might have done the work for less; but one of the defendant's own witnesses has, on cross-examination, admitted that the charge was fair.

I am, therefore, prepared to decide that there is nothing to justify the setting aside of the agreements which were made after due reflection and after consultation with others who were in the employment of the defendant owners, and very competent to decide; and that the agreement in itself was not unfair or unjust.

I award the plaintiffs the amount of the demand, with costs.

Judgment accordingly.

Solicitors for plaintiffs: *Caron, Pentland & Stuart.*

Solicitors for defendant: *W. H. & A. Cook.*

QUEBEC ADMIRALTY DISTRICT.

1896

April 18.

THE ACTIESELSKABET (THE COMPANY OF THE OWNERS OF THE) "*PRINCE ARTHUR*"..... } PLAINTIFFS;

AGAINST

HENRY JEWELL, AND OTHERS, OWNERS OF THE TUG "*FLORENCE*"..... } DEFENDANTS.

Maritime law—Towage—Injury to tow—Negligence of pilot of tow—Liability—Costs.

In an ordinary contract of towage the vessel in tow has control over the tug, and if the pilot of the tow negligently allows the tug to steer a dangerous course whereby the tow is injured the tug is not responsible in damages therefor.

2. Where a very great part of the blame is to be attributed to the tug the costs of the latter in defending the action may not be allowed.

THIS was action for the recovery of damages for the loss of a ship while under towage.

The facts of the case are stated in the reasons for judgment (1).

(1) The following is the opinion of W. H. Smith, R. N., Nautical Assessor:

I am of opinion that the W. S. W. magnetic course set and steered by the pilot of the *Prince Arthur*, when he went on board of her, was maintained up to the time that he approached the said light-ship and was also continued for some time after passing it, and that as the distance off the light-ship was not accurately ascertained, the W. S. W. course was unsafe and improper, even for a short time after passing the light-ship, as it took the vessel in a direction towards the shoal.

That there was no necessity for the vessels to pass so close to the light-ship as is stated, when there was a wide channel of five miles between Red Islet Reef and Green Island, upon the opposite shore and plenty of room to manœuvre in.

I am also of opinion that the course of the tug was not altered after she passed the light-ship, in accordance with instructions given by the first pilot before he left the deck.

It was therefore highly imprudent for the 2nd pilot in charge of the tug, to keep on a course in a direction so dangerous in its proximity to the shoal.

It must be observed that there

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The case was heard before the Honourable George Irvine, Local Judge of the Quebec Admiralty District, on the 17th April, 1896.

A. H. Cook for plaintiffs;

C. A. Pentland, Q.C., for defendants.

IRVINE, L. J., now (April 18th, 1896) delivered judgment.

This action is brought by the owners of the Norwegian barque *Prince Arthur* to recover from the tug

was no other obstruction to the navigation of the vessel by passing ships, and the evidence does not show that the helms of the vessels were at any time altered for that purpose.

I am further of opinion that there was no competent person in charge of the deck of the tug, sufficient for her safe navigation, having a barque in tow, and no proper look-out was kept forward on board the tug.

The night was clear and fine, with light breeze from the eastward and smooth water, and it seems incredible that such a disaster should have occurred if proper measures had been taken in time for the safe and proper navigation of the vessels.

At night time it is always necessary that a look-out man should be upon the deck of a tug and stationed outside of the pilot house or any other deck-house, so as to give timely warning of the approach of passing vessels.

A tug employed towing a large vessel in a channel which is frequented by numerous steam and sailing crafts, requires to have a competent look-out man forward, who may occasionally cast his eyes astern and notice the appearance of any irregularity which might occur to the steering of the tow.

A proper look-out is a necessity on board a tug as it is on board of other steamers, and she is required to obey the same International rules as are applicable to all vessels, and it is necessary that a sharp look-out should be kept at night when it may become a duty for the tug and her tow to keep out of the way of a sailing vessel which might be crossing the tug's bow.

The watch on deck cannot be considered competent on board any steamer or tug, after sunset, without a proper look-out man at the bow, and the master and owners may not avoid their responsibility when such neglect in not having one, is shown

The 2nd pilot, the man at the helm, had to look ahead to keep clear of vessels, to notice the tow astern and to navigate the vessel and change the course as required.

The attention of a wheelman should be confined to steering the ship and watching the compass, and this was more especially necessary in the position in which the two vessels were placed when skirting along the edge of such a dangerous shoal, and he should have been fully occupied in attending

Florence the value of the ship, which, when under tow of the tug, was run ashore and totally lost on Red Island reef in the early morning of the 27th June, 1893.

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to such duties. One man in the wheel-house of a tug, with closed doors, is not sufficient to steer, to keep a look-out for passing vessels, and to watch the movements of the tow and attend to signals, or listen to orders, given 540 feet away.

In such a position, if the helmsman has sole charge, as in this case, and observes a light approaching, he must of necessity watch it closely to ascertain the course the vessel exhibiting it is making and the movement required to be made to keep clear of her ; he must also attend to the tow at the same time, and if a sudden change in the direction of the tug's head, or any communication is required, he being by himself, would have no means of signalling to the vessel in tow and would either have to leave the deck to call another man or make some signal for assistance.

The occupation of tugs is a most responsible one, as they frequently have charge of vessels with cargoes of considerable value to conduct long distances and through narrow and intricate channels where strong and irregular tides may be found, and it is necessary that some competent and careful person should be constantly in charge of the navigation, especially at night time, that person being entirely separate and distinct from the wheelman who is steering the craft.

The contract for towing was a written one and implied that the tug should be properly manned and those in charge should employ the accustomed diligence and care, notwithstanding there was a pilot on board the tow, and the fact of the tug passing inside of the buoy goes far to prove either that the second pilot was incompetent to navigate, or he was not paying the careful attention to the navigation of the tug which was necessary under the circumstances.

I am, however, of opinion that the pilot of the barque did not exercise that good judgment and caution which was required, and the action he took was not done in sufficient time to prevent the casualty and he was therefore in fault, but the cause of the accident should mostly be attributed to the careless navigation of the 2nd pilot of the tug.

I consider this case proves the necessity of having some properly arranged signals to be used by vessels in tow, and these should be printed and registered and placed in the hands of all pilots as well as of those persons in charge of tugs.

I am further of opinion that the designation of 1st and 2nd pilot is not correct, and therefore it is not properly understood by seafaring men, and such title does not exist in Great Britain or any of her colonies, except Canada, and then only in the Province of Quebec.

The 1st pilot is in fact the master, and the 2nd pilot the mate, of a tug, and the titles 1st and 2nd pilots are misleading and do not carry any pilot responsibility.

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The ship was on a voyage from Sydney, Cape Breton, to Montreal with a cargo of coals. At 9.30 a.m. on the morning of the 26th June, being then off Pointe des Monts, the vessel was taken in tow of the tug *Florence* and proceeded up the river towards Quebec. Arriving at Bic they signalled for a pilot and at 8 p.m. Charles Francis Brown, a licensed pilot for and below the Harbour of Quebec, came on board the barque and took charge of her. No understanding or communication of any kind seems to have taken place between the pilot and the tug as to the manner in which the pilot could, if necessary, signal to the tug, and they proceeded on what, the pilot says, was the correct course—west south-west by ship's compass—the tug proceeding on and not deviating from the same course. The weather was fine and clear, the wind a light breeze from the east. All the lights were distinctly visible. There should have been no difficulty whatever either for the pilot, who is a man of forty years' experience on the river, or the parties on board the tug, in so conducting the navigation of the two vessels as to lead them safely on their voyage up the river. They had in front of them, on their starboard side, the Red Island light and Red Island light-ship, and to the south, Green Island light, all perfectly clear and easy to be seen.

The second mate of the ship took charge of the watch shortly after the pilot came on board. The tug was manned by the first and second pilots, two engineers, two stokers and two deck hands. The first pilot of the tug, who was in charge when the ship was first taken in tow, went below shortly before they reached Red Island light-ship, and on going below he told the second pilot, who then took charge, to pass the light-ship at a good distance, and when he was clear of Red Island to steer S. W. half S., which is the usual

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course. This course is admitted by both the parties to be the correct one to undertake, and the chart shows that it would have carried the vessels well clear of the reef.

There can be no doubt that the loss of the ship under these circumstances shows that there must have been some gross culpable negligence on the part of the persons responsible for the safety of these vessels; and the duty of the court, in the present case, is to discover where the blame lies.

The law regarding the division of the responsibility between the pilot of the tow and the persons in charge of the tug is very clearly laid down in the case of the *Niobe* (1). Sir James Hannan said: "Under the ordinary contract of towage the vessel in tow has control over the tug, and is therefore primarily liable for the wrongful acts of the latter unless they are done so suddenly as to prevent the vessel in tow from controlling them." In that case the captain of the *Niobe*, said, in his testimony, that if he saw the tug taking a direction leading to danger she should be apprised of it, and that he should do so by altering his own course and this would be the effectual mode of doing it—girting the tug, he says, is a common manœuvre. The judge in that case distinctly laid down that:—"The authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug." I hold it to have been the duty of the pilot of the ship to have in the first instance taken such precautions as to prevent the accident that occurred. He says that for twenty minutes, or, between fifteen and twenty minutes, he saw that the tug was going on a wrong course and that he starboarded his helm and kept the helm a-starboard for that period, and was unable to succeed in compelling the tug to change her

(1) L. R. 13 Prob. D. 55.

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course; that he shouted and apparently was not heard, and finally put his helm hard a-starboard, which brought his vessel round seven points, but notwithstanding these efforts on his part, the tug continued on her way and finally dragged him on the reef.

The evidence of what occurred on board the tug seems to me to show that the second pilot, who was in charge of the tug, did not follow the instructions given to him by the first pilot—which was: to change his course on passing the light-ship S.W. half S.,—but kept on a different course which, instead of taking him away, as the proper course would have done, from the reef, led him directly unto it. While it must be admitted that the tug is under the control of the pilot of the tow, nevertheless vessels undertaking to tow ships up the River St. Lawrence must be supposed to be under the control of a person or persons reasonably acquainted with the river. The man at the wheel ought to have known enough to follow the instructions which he received as to the course he was to take on passing the light-ship, and when he found he was inside the buoy he should have known that he was in immediate danger of running on the reef.

It is also plain to me that there was not a sufficient look-out on board the tug. One man at the wheel, even if it be in more experienced hands than the man actually on duty, was not sufficient to watch the motions of the tow and look out for lights or passing ships. The evidence of the persons on board the tow, and specially the testimony of the pilot goes to show that the pilot perceiving himself in danger put his helm a-starboard so as to bring the bow of the ship towards the port, and thus indicate to the tug the necessity of keeping more to the southward and further away from the reef. This the pilot said he did as soon as he perceived he was in danger from being on the wrong course, and

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that he continued with his helm a-starboard until the accident occurred—and this during fifteen or twenty minutes. The man at the wheel says that the pilot shouted to the tug and put the helm hard a-starboard about ten minutes before the accident occurred, and that shortly before the accident he put the helm hard a-starboard, which the pilot says, brought the vessel round seven points. The man at the wheel of the tug says that up to immediately before the accident he had never perceived any change in the course of the tow.

After a careful consideration of the facts, as so testified, and the position in which the vessel would have been in, if the story of the pilot were true, I am satisfied that no reliance is to be placed on his statement. I am convinced that he never saw the danger until almost immediately before the accident, when he put his helm hard a-starboard, and it was then too late to avoid the reef. The answer given by the Nautical Assessor on this point shows that the story of the pilot is practically impossible, and therefore the accident could not have occurred in the way he described.

I am of opinion that the evidence shows that the pilot was negligent and grossly in fault throughout. His statement that twenty minutes before the accident, or even fifteen, he commenced to starboard his helm with a view of keeping the tug on the starboard bow of the ship, and continuing in that condition up to a period shortly before the accident, when he put the helm hard a-starboard, is entirely incredible. It is impossible that any such movement on the part of the ship would not have been at once felt by the man at the wheel of the steamer, and it is incredible to suppose that, after feeling the effect which such a motion on the part of the tow would have had on the tug, he should have continued his course without

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putting his helm to starboard; and the only result that I can deduce from the fact is that the pilot did not perceive his danger until he gave the order to the man at the wheel to hard a-starboard, when it was evidently too late to save the vessel from going on the reef.

I do not give an opinion in this case as to how far the owners of the vessel are responsible by the admissions of the pilot; but the excitement which he showed after the accident occurred, and his lamentations and self-reproaches seem to show that his confidence in his own conduct was not as clear then as it was afterwards when he gave his testimony in this case.

It is most unfortunate to have to believe that on a night so clear, a ship could not proceed safely up the River St. Lawrence in tow of what was supposed to be a well appointed steamer, and under the guidance of a branch pilot of long experience, and three brilliant lights in full view. Upon this part of the case it is not my duty to render any decision; but seeing the great importance of the safety of navigation of the St. Lawrence to the welfare of the whole of Canada, I think it only right to call the attention of those whose duty it is to regulate these matters to the circumstances of this case, and to the very important and very interesting report made by the Assessor which, although a little unusual, I have permitted to be filed in the case.

If I could have applied to this case the principles which govern the division of damage in cases of collision, I should have been pleased to do it; but as the statute which makes the rule applies it only to cases of collision it is not in my power to extend it.

The tow in this case being at fault through negligence of its pilot, however much the tug is to blame for the accident, the owners are not entitled to recover and their action will have to be dismissed, but seeing

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that very great part of the blame is to be attributed to the tug the judgment will be that each party pay its own costs.

Judgment accordingly.

Solicitors for plaintiff: W. & A. H. *Cook.*

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

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July 28.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

THE SHIP "*BEATRICE*"..... DEFENDANT.

Wrongful arrest of merchant ship by Crown—Damages—Interest.

Where a merchant vessel was seized by one of Her Majesty's ships, acting under powers conferred in that behalf by *The Behring Sea Award Act*, 1894, and such vessel was found to be innocent of any offence against the said Act, the court awarded damages for the wrongful seizure and detention together with interest upon the ascertained amount of such damages.

THIS was an assessment of damages taken pursuant to the judgment delivered on the 18th November, 1895, dismissing the action for condemnation of the ship, and directing a reference as to the damages to which the ship was entitled for her illegal arrest and detention. The main case is reported in Exchequer Court Reports, vol. 5, page 9.

Hon. C. E. Pooley, Q.C., appeared for the Crown;

A. E. M. McPhillips, Esq., (with him *G. H. Bernard*) for the owner of the *Beatrice*.

DAVIE, (C. J.) L. J., now (July 28th, 1896) delivered judgment.

This was an assessment of damages arising out ofthe seizure of the sealing schooner *Beatrice* by the United States revenue steamer *Rush* on the 20th August, 1895. Upon the trial before me of the action for condemnation of the ship for alleged infraction of the *Behring's Sea Award Act*, 1894, I dismissed the action on the ground that the seizure was unlawful, and I directed a reference as to the damages sustained by the owners of the *Beatrice* on account of her unlawful arrest and detention (1).

(1) See 5 Ex. C. R. 9.

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The arrest took place on the 20th August, 1895, in latitude 54.54 north and longitude 168.31 west, whilst the vessel was engaged in seal fishing. She had then caught 202 seals, having an outfit of six boats and two canoes and a crew of 18 white men, but no Indians. She had been fishing since the 2nd of August, and under instructions to the master given by the owner would probably have continued fishing until the end of the season, which is shown to be the 20th September, several of the vessels having continued until that date, making good catches up to the last day; for instance, the *Walter Rich* caught 72 skins on the 9th September, and 36 on the 18th; the *Ainoko* 137 on the 9th September, 36 on the 17th and 54 on the 19th; the *Florence M. Smith* took 69 on the 20th September. These vessels were all sealing in Behring Sea the same as the *Beatrice*, and although they had more boats and more men than the *Beatrice* it is useful to refer to their catches as showing that it would have probably been profitable for the *Beatrice* to have continued sealing up to the last day. There were some forty vessels, including the *Beatrice*, sailing out of Victoria engaged in sealing that year, and Mr. Godson, whose duty it was under the Paris award to keep a record of the industry, informs us that the average catch per schooner was 897.95, or of about 70 to each boat or canoe. It has been contended on the part of the Crown that in assessing damages I should proceed upon the average catch per boat, but I think this would afford hardly a fair estimate for the *Beatrice*.

In the first place, Mr. Godson's average includes the catch of the *Beatrice*, which had only just commenced sealing when seized, as also of the *E. B. Marvin*, which was seized on the 2nd September when she had caught only 376 seals. These seizures, therefore, reduce the average which would otherwise be shown. Moreover,

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many of the other vessels had quit sealing before the 20th September, whereas the *Beatrice* was provisioned to, and had instructions to continue until, the 20th. The catches are shown to have been heavier after the 20th August than they were before that date. Some of the vessels took as high as one hundred and more to the boat; the *Borealis*, a vessel of only 37 tons register, with twenty-one white men and six boats, taking as high as 123 seals to the boat.

The seizure in this case having been established as wrongful, the defendant is entitled to substantial damages, the criterion of which is the whole injury which he has sustained thereby. In the *Consett Case* (1), where a charter-party was lost in consequence of detention caused by a collision in which the defendant was to blame, the measure of damages was held to extend to the loss of the charter. The defendant's case here stands upon at least as high a footing as that of the *Consett* (1). Here, I think I am bound to allow such an amount as would represent the loss of an ordinary and fair catch if the voyage had been extended until 20th September (2). I think that 90 seals to the boat would have been an ordinary and fair catch for the *Beatrice* to have made; as the *Borealis* with only three more men took 123 seals, it is not unreasonable to presume that the *Beatrice* would have taken at least 90. This, for eight boats, including canoes, would make 720 seals, or 518 more than were taken.

The evidence shows that the agents for the *Beatrice*, R. Ward & Co., who were also the agents for several of the other schooners, sold all of their catches at Victoria, and realized $10.25 per skin, including the 202 caught by the *Beatrice* before she was seized. I think the same price must be allowed the *Beatrice* for

(1) L.R. 5 P.D. 232.

(2) The *Argentino*, L.R., 14 App. Cas. 519.

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her estimated additional catch of 518 seals, or $5,309.50. From this has to be deducted $4 per skin, which it was proved would amply cover all expenses of the lay to which the sealers would have been entitled as well as all wages. There will also be deducted $74 for the tinned goods and two barrels of beef which would probably have been consumed had the *Beatrice* completed her voyage, but which Mr. Doering had restored to him after the vessel was released. The remainder of the provisions were mildewed, eaten by rats and spoiled whilst the vessel was under arrest. There can be no deduction in respect of these. These deductions leave a balance of $3,163.50 in favour of Mr. Doering, for which sum, together with interest at the rate of 6 per cent per annum from the 20th of September, he is entitled to judgment against Her Majesty, with costs."

Judgment accordingly.

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Aug. 5.

NOVA SCOTIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

THE OWNERS OF THE SHIP "*FREDERICK GERRING, JR.*".} DEFENDANTS.

Maritime law—Fishing within the three mile limit—Seine fishing.

The crew of a fishing vessel owned in the United States had thrown her seine more than three miles off Gull Ledge in the Province of Nova Scotia, but before they had secured all the fish in the seine both it and the vessel had drifted within the three mile limit where the vessel was seized by a Canadian cruiser while her crew was in the act of bailing out the seine.

Held, that the vessel was guilty of illegal "fishing" within the meaning of the Treaty of 1818 and Imperial Act 59 Geo. III, c. 38, and also under the provisions of chapter 94 of *The Revised Statutes of Canada*.

ACTION for the condemnation and forfeiture of a United States vessel for illegal fishing in Canadian waters.

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

The substance of the Treaty of 1818, respecting the North American fisheries, is as follows:—

"A certain convention between his late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, and the United States of America was made and signed at London on the 20th day of October, 1818, and by the first article thereof after reciting that differences had arisen respecting the liberty claimed by the said United States for the inhabitants thereof to take, dry and cure fish on certain coasts, bays, harbours and creeks of his Britannic Majesty's Dominions in America, it was agreed between

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Statement of Facts.

the High contracting parties that the inhabitants of the said United States should have forever in common with the subjects of his Britannic Majesty the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the western and northern coasts of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company; and that the American fishermen should also have liberty forever to dry and cure fish in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland above described and of the coast of Labrador, but that so soon as the same or any portion thereof should be settled, it should not be lawful for the said fishermen to dry and cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors and possessors of the ground. And the said United States thereby renounced forever any liberty theretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on, or within three marine miles of any of the coasts, bays, creeks or harbours of his said Majesty's Dominions in America not included within the above mentioned limits; provided, however, that the American fishermen should be admitted to enter such *bays* or *harbours* for the purpose of shelter and of repairing damages therein or purchasing wood and of obtaining water, and for no other purpose whatever. But that they should be under such restrictions as might be necessary to prevent their taking, drying or

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curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them."

The Imperial statute 59 George III, c. 38, (1819) was passed to authorize the enforcement of this treaty. Sections 2 and 3 of the Act are as follows :—

"2. And be it further enacted, that from and after the passing of this Act it shall not be lawful for any person or persons, not being a natural born subject of his Majesty, in any foreign ship, vessel or boat, nor for any person in any ship, vessel or boat, other than such as shall be navigated according to the laws of the United Kingdom of Great Britain and Ireland, to fish for, or to take, dry or cure any fish of any kind whatever, within three marine miles of any coasts, bays, creeks or harbours whatever, in any part of his Majesty's Dominions in America, not included within the limits specified and described in the First Article of the said Convention, and hereinbefore recited; and that if any such foreign ship, vessel or boat, or any persons on board thereof, shall be found fishing, or to have been fishing or preparing to fish within such distance of such coasts, bays, creeks or harbours, within such parts of his Majesty's Dominions in America out of the said limits as aforesaid, all such ships, vessels and boats, together with their cargoes, and all guns, ammunition, tackle, apparel, furniture and stores, shall be forfeited, and shall and may be seized, taken, sued for, prosecuted, recovered and condemned by such and the like ways, means and methods, and in the same courts, as ships, vessels or boats may be forfeited, seized, prosecuted and condemned for any offence against any laws relating to the revenue of customs, or the laws of trade and navigation, under any Act or Acts of the Parliament of Great Britain, or of the United Kingdom of Great Britain and Ireland: Provided, that nothing in this Act contained shall apply, or be construed to

apply to the ships or subjects of any Prince, Power, or State in amity with his Majesty, who are entitled by treaty with his Majesty to any privilege of taking, drying, or curing fish on the coasts, bays, creeks or harbours, or within the limits in this Act described."

"3. Provided always, and be it enacted: That it shall and may be lawful for any fishermen of the United States to enter into any such bays or harbours of his Britannic Majesty's Dominions in America, as are last mentioned, for the purpose of shelter and repairing damages therein, and of purchasing wood, and of obtaining water, and for no other purpose whatever; subject, nevertheless, to such restrictions as may be necessary to prevent such fishermen of the said United States from taking, drying or curing fish in the said bays or harbours, or in any other manner whatever abusing the said privileges by the said treaty and this Act reserved to them, and as shall for that purpose be imposed by any order or orders to be from time to time made by his Majesty in Council, under the authority of this Act, and by any regulations which shall be issued by the governor, or person exercising the office of governor, in any such parts of his Majesty's Dominions in America, under or in pursuance of any such Order-in-Council as aforesaid."

The Canadian legislation on the same subject is contained in chapter 94 of *The Revised Statutes of Canada*, entitled: "An Act respecting Fishing by Foreign Vessels." Sections 2 and 3 of that Act are as follows:

"2. Any commissioned officer of Her Majesty's navy, serving on board of any vessel of Her Majesty's navy, cruising and being in the waters of Canada for the purpose of affording protection to Her Majesty's subjects engaged in the fisheries, or any commissioned officer of Her Majesty's navy, fishery officer or stipendiary magistrate, on board of any vessel belonging to or in

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the service of the Government of Canada, and employed in the service of protecting the fisheries, or any officer of the customs of Canada, sheriff, justice of the peace, or other person duly commissioned for that purpose, may go on board of any ship, vessel or boat within any harbour in Canada, or hovering in British waters within three marine miles of any of the coasts, bays, creeks or harbours in Canada, and stay on board so long as she remains within such harbour or distance."

"3. Any one of the officers or persons hereinbefore mentioned may bring any ship, vessel or boat, being within any harbour in Canada, or hovering in British waters, within three marine miles of any of the coasts, bays, creeks or harbours in Canada, into port, and search her cargo, and may also examine the master upon oath, touching the cargo and voyage; and if the master or person in command does not truly answer the questions put to him in such examination, he shall incur a penalty of four hundred dollars; and if such ship, vessel or boat is foreign, or not navigated according to the laws of the United Kingdom or of Canada, and (*a*) has been found fishing, or preparing to fish, or to have been fishing in British waters within three marine miles of any of the coasts, bays, creeks or harbours of Canada, not included within the above mentioned limits, without a license, or after the expiration of the term named in the last license granted to such ship, vessel or boat, under the first section of this Act, or (*b*) has entered such waters for any purpose not permitted by treaty or convention, or by any law of the United Kingdom or of Canada for the time being in force, such ship, vessel or boat, and the tackle, rigging, apparel, furniture, stores and cargo thereof shall be forfeited."

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The case was tried at Halifax before the Honourable James McDonald, C.J., Local Judge of the Nova Scotia Admiralty District, on June 29th, 1896.

W. B. A. Ritchie, Q.C., for plaintiff;

W. F. MacCoy, Q.C., for defendants.

McDONALD, C.J., Local Judge, now (August 5th, 1896) delivered judgment.

This is an action claiming the condemnation of the schooner *Frederick Gerring, Jr.*, a vessel owned in the United States of America, for a violation of the Fishery laws of Canada. The vessel was seized on the 25th day of May last past off Liscomb on the southern coast of Nova Scotia, by the Dominion cruiser *Aberdeen* where it is alleged, she was engaged in fishing within three miles of the coast, in violation of law. It is clearly proved that the defendant vessel when seized was engaged in fishing mackerel; but the defendants allege by way of defence, First, that when seized the vessel was not within three miles of the coast, and Secondly, that if at the time of seizure she was within the three mile limit, she had thrown her seine, in which the fish were taken, while beyond three miles from the coast, and when seized was engaged only in saving from the seine the fish there lawfully enclosed by the seine. The facts appear to be concisely as follows:—On the morning of the 25th of May aforesaid, the fishing cruiser *Vigilant*, Capt. McKenzie, commander, was cruising off Liscomb when he saw the defendant vessel with others, also fishing vessels, sailing along the coast. He first saw the *Frederick Gerring, Jr.* between four and half-past four p.m. fishing. The seine had been thrown and was then pursed up, and the schooner was going up to her boat which was attached to the seine, in which a quantity of fish was enclosed. Capt.

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McKenzie passed within two hundred yards of the schooner and seine, but did not disturb her operations, as having taken his bearings, and that of the schooner, he decided that she was at least a half a mile outside of the prohibited line. The *Vigilant* then proceeded to the westward cruising slowly along the coast, when about an hour and a half afterwards he observed the Canadian steam cruiser *Aberdeen* coming up from the west and south, and about half an hour afterwards saw her alongside the *Frederick Gerring, Jr.* The *Vigilant* was at this time some distance to the westward of the *Frederick Gerring, Jr.* On approaching the *Frederick Gerring, Jr.* and finding her engaged in fishing, Captain Knowlton of the *Aberdeen* took the bearings of his own ship and that of the *Frederick Gerring, Jr.* and found that according to those bearings she was within two miles of the coast; and after communicating with the master of the *Frederick Gerring, Jr.* arrested her for the offence of fishing within the prescribed limits. The evidence of Capt. Knowlton and his officers as to the exact locality in which he found the *Frederick Gerring, Jr.* when the *Aberdeen* came up to her, appears to be very definite and precise. The cross bearings by which he determined that locality appeared to be very carefully taken by himself and verified by his officers, all very intelligent and seemingly capable men; and it was admitted by Mr. MacCoy, the learned counsel for the defence, that if these bearings were correct, and no error accidental or intentional occurred in taking them, it could not be disputed that the defendant vessel was more than a mile inside of the prohibited line when seized. The master of the *Frederick Gerring, Jr.* took no bearings and could give no idea of his position other than an impression he entertained that he could not in the time which had intervened since he threw his seine, have drifted so far inwards from the place

where Capt. McKenzie had at that time located him. This in fact is the only argument on which the defendants rest this point of their case, that is to say, if Capt. McKenzie was right in the position assigned to the schooner when he left her about half-past four o'clock p.m., it was improbable if not impossible she could have in the intervening time drifted inshore so far as the spot where Capt. Knowlton alleges he found her; and several respectable seafaring persons were examined who stated their opinion as experts that taking into consideration the state of the weather, wind, tide and currents then prevailing at this particular locality, they did not think it likely or possible that the change of position of schooner and seine involved in the contention of Capt. Knowlton could have taken place. Apart from the recognized uncertainty of expert evidence of this character, it is in evidence that the master of the *Frederick Gerring, Jr.* at the time the *Vigilant* was in his neighbourhood was himself uncertain as to his position, and was guided in his decision to throw his seine by the statement of Capt. McKenzie that it was safe to do so, and his subsequent declaration that he could not on his oath state on which side of the line he was when he threw his seine, indicates the same uncertainty as to his position. But the expert testimony to which I have referred, is very much weakened by the evidence of Capt. McKenzie of the *Vigilant*, a man fully as capable, experienced and intelligent as those persons called by the defence, and perhaps from the nature of his recent employment, more likely to be familiar with the movements of the tides and currents in the locality referred to, than most of those expert witnesses. He says that while sailing westerly after leaving the *Frederick Gerring, Jr.* his own schooner was carried by the currents or tides inside the three mile limit at the time he observed the approach of the *Aberdeen*. Capt. McKenzie was asked:

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Was there any wind at the time you passed the "Gerring"? A. There was just enough for the "Gerring" to get alongside of her net.

Q. With her sails balanced and half a mile away, and the net in the sea, would she be half a mile in the course of an hour? A. Yes, with the swell and the current.

Q. Further than that I suppose? A. It may be.

Q. What is your judgment about that? A. That day according to the way I was carried in myself, she would.

Q. How far did you drift in that day? A. I can hardly say, but I got inside the three miles.

Capt. McKenzie also states the very important fact that when he saw the *Aberdeen* approaching the *Frederick Gerring, Jr.*, he observed that the latter had got within the three mile limit. When in addition to all this evidence, we consider that of Capt. Spain, the commander of the Canadian Fishery Fleet and his officers, I cannot help feeling that the allegation of the Crown, as to the position of the *Frederick Gerring, Jr.* when seized, is strongly supported. Capt. Spain visited the locality in his own ship, and with his chief officers, verified by actual measurements the statement of Capt. Knowlton, and unless we are to assume that the latter officer and his subordinates on board the *Aberdeen* were guilty of the most gross and criminal negligence in noting the courses on which their bearings and cross bearings were based, the point of intersection fixed by Capt. Knowlton and verified by Capt. Spain, must be correct. There is not a particle of evidence to justify suspicion of such error; and assuming, as I do, the correctness of the courses given by Capt. Knowlton, Capt. Spain has shown, by the cross bearings taken by himself from these courses and the measurements made by entirely reliable instruments, that the locality of the *Frederick Gerring, Jr.* at the time of seizure was correctly indicated by Capt. Knowlton. That being so, it is immaterial to inquire how the vessel reached that position. She

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was there found, and found fishing, and the legal consequence must result.

I must not omit to notice the contention of Mr. MacCoy, that admitting the seine to have been thrown and the fish enclosed in it outside of the three mile limit, it is not an offence against the Act to continue to bail the fish from the seine into the vessel after permitting her to drift across the prohibited boundary. I cannot accept his contention that the "fishing" and the "catching" of the fish was complete when the seine was successfully thrown. Further labour is required to save the fish from the sea, and reduce the property to useful possession, and until that be completed the act of fishing and "catching" fish is not in my opinion completed; and in the case before us the crew were in the act of bailing the fish from the seine into the vessel when the seizure was made. It would, I apprehend, be difficult, if not impossible, to enforce these Fishery laws, to which our people attach supreme importance, if those American subjects who so eagerly seek to compete with our people along our shores in this industry, and who are not, I fear, overscrupulous in the observance of laws of which they have ample notice, should be permitted to plead accident or ignorance to a charge of infraction of such laws. Such a plea, however effective it may be to the executive authority of the country, cannot avail in this court.

There will be a decree condemning the vessel and cargo with costs.

The following is the decree as settled by the Registrar of the Nova Scotia Admiralty District:—

[STYLE OF CAUSE.]

"On the 5th day of August, 1896, before the Honourable JAMES MCDONALD, Local Judge in Admiralty for the Admiralty District of Nova Scotia."

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"The judge having heard this cause, and the witnesses and evidence adduced, and having heard counsel on behalf of the plaintiff and of Edward Morris owner of the above named schooner, her cargo, tackle, rigging, apparel, furniture and stores, pronounced that the said schooner *Frederick Gerring, Jr.*, being a foreign ship or vessel, not navigated according to the laws of the United Kingdom of Great Britain and Ireland, or of Canada, but being a ship of the United States of America, owned by foreigners, did on the 25th day of May, 1896, off Gull Ledge in the Province of Nova Scotia, within three marine miles of the coast of Canada, fish for mackerel and other fish, and was found so fishing, and that the place where the said schooner *Frederick Gerring, Jr.* was so fishing and was so found fishing, was in a portion of the Dominion in America, formerly of His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, and not lying and included in that part of the southern coast of Newfoundland which extends from Cape Race to the Rameau Islands, nor on the western or northern coast of Newfoundland from said Cape Race to the Quirpon Islands, nor on the shores of the Magdalen Islands, nor on the coasts, bays, harbours and creeks, from Mount Joly on the southern coast to Labrador, to and through the Straits of Belle Isle and thence northerly along the coast."

"And that said ship or vessel *Frederick Gerring, Jr.*, was so fishing contrary to the provisions of the convention made between His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, of the one part, and the United States of America of the other part, made on the 20th day of October, 1818, and contrary to the provisions of the Acts of the Parliament of Great Britain and Ireland, made and passed in the fifty-ninth year of the reign of

His late Majesty George the Third, King of the United Kingdom of Great Britain and Ireland, being chapter 58 of the Acts of the said last named Parliament, made and passed in said year."

"And that said ship or vessel *Frederick Gerring, Jr.*, was found so fishing, and to have been fishing in British waters, within three marine miles of the coast of Canada, not included within the limits specified and described in the first article of the convention between His late Majesty King George the Third, and the United States of America, made and signed at London on the 20th day of October, 1818."

"And that said ship or vessel *Frederick Gerring, Jr.*, was so found fishing, and to have been fishing, by a fishery officer of Canada on board of a vessel in the service of the Government of Canada, and employed in the service of protecting the fisheries."

"And that said ship or vessel *Frederick Gerring, Jr.*, being so found fishing, and to have been fishing, by said fishery officer was by him brought into the port of Halifax, in the Province of Nova Scotia, in Canada."

"And that said ship or vessel *Frederick Gerring, Jr.*, was so fishing, and found fishing, and to have been fishing contrary to the provisions of *The Revised Statutes of Canada*, Chapter 94, made and passed by the Parliament of the Dominion of Canada. And the judge condemned the said ship or vessel *Frederick Gerring, Jr.*, her cargo, tackle, rigging, apparel, furniture and stores, together with the fish, seine, fishing gear, supplies and other property on board said ship or vessel *Frederick Gerring, Jr.*, at the time of her seizure by said fishery officer as forfeited to Her Majesty."

"The judge further ordered and it is hereby ordered, adjudged and decreed, that said Edward Morris, who

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resides at Gloucester, in the State of Massachusetts, in the United States of America, do pay to the plaintiff in this action, Her Majesty Queen Victoria, Queen of Great Britain and Ireland, the plaintiff's costs of this action to be taxed, including costs of the commission ordered to issue herein and application therefor."

Dated at Halifax, in the Province of Nova Scotia, in the Dominion of Canada, this 28th day of August, A.D. 1896.

(Sgd.) L. W. DESBARRES,

District Registrar.

Solicitor for plaintiff: *W. B. A. Ritchie.*

Solicitor for defendant: *W. F. MacCoy.*

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

AND

THE CANADIAN SUGAR REFINING COMPANY (LTD.)..... } DEFENDANTS.

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Revenue law—Tariff Acts of 1894 *and* 1895—*The Customs Act (R. S. C. c.* 32, *as amended by* 52 *Vict. c.* 14, *s.* 12) *sec.* 150—*When importation of goods to be deemed complete for the purpose of assessing the duty.*

Any importation of goods is complete within the meaning of the 150th section of *The Customs Act* when the ship in which the goods are carried comes within the limits of the first port in Canada at which such goods ought to be reported at the Customs.

INFORMATION for the recovery of Customs duties alleged to be due to the Crown.

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

The case was heard at Ottawa, on the 10th day of April, 1896.

B. B. Osler, Q.C., for the defendants:—It is our contention that the goods in question were "imported into Canada" when they arrived at the port of North Sydney. The intention of Parliament was to make the duty attach to the goods as soon as the ship in which they are carried arrives at the first port of entry in Canada. Neither in the English nor American reports is it possible to find authority to show that it is the time of the actual entry of the goods at the port of destination that fixes the time when the duty attaches. (He cites 49 Vict. c. 32, as amended by 52 Vict. c. 14, secs. 21, 25, 31, 34, 97, 98 and 150.) Granting that North Sydney was only touched at by the ship for the purpose of obtaining coal, nevertheless under

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the Customs law it was a proper port of entry for her, and she did report her cargo there. Then under sec. 31 of *The Customs Act* it is provided that in the case of goods brought in as these were the duty shall not be paid nor the entry completed at the first port, but at the port where the goods are to be landed. So that the duty having once attached it is immaterial where the entry of the goods is completed. (He cites the Tariff Acts of 1894 and 1895, sec. 4.)

The fair interpretation of all the statutes bearing upon the question in controversy is that the moment of importation is the moment when duty would attach on dutiable goods.

(He cites *Meredith* v. *The United States* (1); *Attorney-General* v. *Ansted* (2).

J. J. Gormully, Q.C., followed:—The "report" that is spoken of in the 150th section of *The Customs Act*, and which determines the time when the importation is complete, is the report of the goods by the master of the ship. The master fully complied with all the requirements of the law in reporting at the port of North Sydney, and the importation thereby became complete.

W. D. Hogg, Q.C., for the plaintiff:—Our contention is that an entry at a port like North Sydney is not an arrival within the meaning of *The Customs Act*, sec. 25. The "arrival" occurs when the port at which the goods "ought to be reported" is reached, and that is the port of destination. It was never intended that the goods should be reported for duty at any port at which the ship might casually touch for supplies, &c., in the progress of her voyage to the port of destination of her cargo. As to what is an "arrival" within the meaning of the Customs laws, I cite *Elmes on Customs Laws* (3); *Perrots* v. *United States*

(1) 13 Pet. 494.
(2) 12 M. & W. 520.
(3) Sec. 37.

(1); *Kohne* v. *The Insurance Co. of North America* (2); *Prince* v. *United States* (3); *United States* v. *Shackford* (4); *Harrison* v. *Vose* (5); *Toler* v. *White* (6); *Meigs* v. *Mutual Insurance Co.* (7); *Grondstadt* v. *Witthoff* (8); *Simpson* v. *Pacific Mutual Ins. Co.* (9).

Mr. *Osler* replied.

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THE JUDGE OF THE EXCHEQUER COURT now (September 14th, 1896) delivered judgment.

The question for decision is:—Was the raw sugar mentioned in the information exhibited in this case subject or not subject when imported into Canada to a duty of one-half cent per pound prescribed by *The Customs Tariff Act*, 1894, as amended by 58-59 Victoria, chapter 23?

By the 4th section of *The Customs Tariff Act*, 1894 (10) it is enacted that there shall be levied, collected and paid upon all goods enumerated in Schedule "A" to that Act the several rates of duties of Customs set forth and described in the said Schedule when such goods are imported into Canada, or taken out of warehouse for consumption therein. And by the 5th section it is provided that all goods enumerated in Schedule "B" of the Act may be imported into Canada, or taken out of warehouse for consumption therein without the payment of any duties of Customs thereon. By item 392, Schedule "A," all sugar above number sixteen Dutch Standard in colour, and all refined sugars were subject to a duty of sixty-four one-hundredths of a cent per pound; and by item 708, Schedule "B," sugar not elsewhere specified not above number sixteen Dutch Standard in colour was free of duty. By the

(1) Pet. C.C. 246.
(2) 1 Wash. 158.
(3) 2 Gall. 204.
(4) 5 Mason 445.
(5) 9 How 372.
(6) 1 Ware 280.
(7) 4 Law. Dec. 588.
(8) 15 Fed. Rep. 265.
(9) 1 Holmes 136.
(10) 57-58 Vict. c. 33.

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Act 58-59 Vict. chap. 23, assented to on the 22nd of July, 1895, item 708, Schedule "B" was repealed, and item 392, Schedule "A" was so amended as to make sugar above sixteen Dutch Standard in colour, and all refined sugars, dutiable at the rate of one cent and fourteen-hundreths of a cent per pound, and sugar not elsewhere specified, and not above that standard dutiable at the rate of one-half a cent per pound. And it was declared that the Act should be held to have come into force on the third day of May, 1895, that being the date of the passing of the resolutions on which the Act was founded.

The sugar in question was shipped at Antwerp and formed part of the cargo of the steamship *Cynthiana*, on a voyage from that port to the port of Montreal, in the course of which voyage, and as part thereof, she called at the port of North Sydney for coal. The master's report inwards and outwards at the port of North Sydney and his clearance therefrom for Montreal, all bear date of the 29th of April, 1895. The cargo in the report inwards is described as "general cargo not to be here landed—in the same bottom for Montreal," and a like description occurs in the report outwards, and in the clearance it is stated as a general cargo in same bottom "from Antwerp not here landed and no duties paid." In the affidavit verifying the report inwards the master states that the manifest then exhibited to him, and attached to the report contains to the best of his knowledge and belief "a full, true and correct account of all the goods, wares, and merchandise laden on board such vessel at the port of Antwerp." The copy of the manifest referred to is not now attached to the report or before the court, and I have had no opportunity of comparing it with the copy subsequently filed at the port of Montreal. But nothing, I think, turns upon that. The question is not,

it will be seen, whether the sugar was reported at the port of North Sydney, but whether it ought to have been reported there. And no question is raised, or suggestion made that it was not properly described in the manifest produced at that port.

The *Cynthiana* arrived at the port of Montreal on the 4th of May, 1895. On the 1st of May the defendants had attempted to enter the sugar there free of duty under the tariff of Customs duties then in force, but the entry was refused by the Acting Collector of Customs on the ground that the *Cynthiana* was not then within the limits of the port of Montreal. On the 2nd of May, in accordance with a practice which for convenience, but apparently without any statutory authority, has been adopted at the port of Montreal and which has been long followed there, the ship's manifest without the master's report, which was not made until the 6th, was filed at the Custom-house and numbered, and that being done, an entry of the defendants' sugar was accepted and a landing warrant issued. The sugar was entered as dutiable under protest, the goods being, it was claimed, free of duty. That form of entry and the protest had reference to a question as to whether or not the sugar was "above number sixteen Dutch Standard in colour" and had no reference to any matter now in controversy. It is conceded that the sugar was not above that standard, and that the defendants were entitled to enter it free of duty, if it was not subject to the duty of one-half of one cent per pound prescribed by the Act 58-59 Vict., chap. 23. The entry of the 2nd of May was made without the knowledge of the Acting Collector of Customs at Montreal, and when on the 4th he learned of it he gave directions that the entry should be cancelled and the sugar placed in a warehouse and that the duty proposed in the tariff resolution of May

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3rd, to which I have referred, should be exacted. At that time 2,317,786 pounds of the sugar had been landed and taken to the defendant company's refinery. On that quantity the Crown seeks to recover the duty. The remainder, amounting to 4,269,653 pounds, was warehoused, and as to that the Crown asks for a declaration that it was, when imported, subject to the duty prescribed by the Act of 1895. The fact that it was warehoused is not in the present case material. That was done by direction of the Customs authorities, and for the protection of the revenue. As to all the sugar in question, as well that which was warehoused as that which was delivered to the defendant company, it is conceded that if it was when imported free of duty the Crown's case fails.

When then was the sugar in question imported, within the meaning of the Customs laws of Canada?

By the 150th section of *The Customs Act* (1); as amended by 52 Vict. c. 14, s. 12, it is provided that whenever on the levying of any duty or for any other purpose it becomes necessary to determine the precise time of the importation of any goods, such importation if made by sea, coastwise or by inland navigation in any decked vessel shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported; and if made by land, or by inland navigation in any undecked vessel, then from the time such goods were brought within the limits of Canada. The same provision is to be found in the 78th section of the Act of the late Province of Canada, 10-11 Vict. c. 31, which was, I think, the first consolidation of the Customs laws that was made in Canada. It was re-enacted in the Consolidated Statutes of the Province of Canada, chapter 17, section 101,

(1) R. S. C. c. 32.

and in "An Act respecting the Customs" passed by the Parliament of the Dominion of Canada in 1867, and it appears in every consolidation of the Customs Acts since (1). There was no similar provision in the Imperial Act 8-9 Vict., chap. 93, to regulate the Trade of British Possessions abroad, which in pursuance of powers granted by the Act of the Parliament of the United Kingdom, 9-10 Vict. chap. 94, was repealed as to the Province of Canada by the Provincial Act 10-11 Vict. chap. 31, to which reference has been made. The provision was taken, apparently, from sec. 136, chap. 86, of another Imperial statute passed in the year 8-9 Vict., for the general regulation of the Customs; but with a change of language which must, I think, be taken to indicate an intention on the part of the legislature of the late Province of Canada to depart from the rule and definition prescribed by the English statute. By the Act 8-9 Vict. chap. 86, sec. 136, as by earlier and later English Customs Acts (2), the time of the importation of any goods was taken and deemed to be the time when the ship importing such goods actually came within the limits of the port at which such ship should in due course be reported and such goods be discharged. In the 78th section of the Provincial Act 10-11 Vict. c. 31, and in the subsequent re-enactments of that provision the words "and such goods be discharged" are omitted, and it is provided, as we have seen, that the importation shall be deemed to have been completed from the time the vessel in which such goods are imported came within the limits of the port at which the goods ought to be reported. In the province of Nova Scotia the legislature in enacting a similar provision subse-

(1) 31 Vict. c. 6, s. 130; 40 Vict. c. 10, s. 133; 46 Vict. c. 12, s. 239; and R. S. C. c. 32, s. 150.

(2) See 6 Geo. 4, c. 107, s. 122, and 39-40 Vict. c. 36, s. 40.

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quently repealed by the Dominion Act 31 Vict. c. 6, defined the time of importation to be the time at which the importing ship should in due course be reported (1). In the United States there is no statutory provision on this subject, but an importation is there held to be complete as soon as the goods are brought from a foreign country within a port of entry of the United States, with the intention of unlading the same (2). The language of some of the American authorities would seem to indicate that unless there be an intention to unlade the goods at the port of entry at which the vessel first arrives the importation is not then complete. I am not aware that the point has been determined, but in the case of a vessel proceeding as she may from one port to another to land her cargo, the laws of the United States require the master to give to the collector of the district within which the vessel shall first arrive a bond in a sum equal to the amount of the duties on the residue of the cargo, conditioned upon the production of evidence of the lawful landing of the same (3). In such a case in order that the importation may be complete there must of course be an intention to land the goods at some port in the United States, but not, it would seem, to land the goods at the port of entry at which the vessel first arrives. Then the duty of the master of the vessel in which goods are imported as to reporting the goods is not the same in the United States as in Canada. The master of any vessel coming from any port or place out of Canada or coastwise, and entering any port in Canada whether laden or in ballast is, when such vessel

(1) R. S. N. S. 3rd s., c. 12, s. 4; 31 Vict. c. 6, s. 138.

(2) Elmes on the Law of Customs, s. 32, and cases there cited; Customs Regulations of the United States (1892), art. 275.

(3) Customs Regulations of the United States (1892), art. 115, R. S. 2782.

is anchored or moored, to go without delay to the Custom-house and there make a report in writing to the proper officer of the arrival and voyage of such vessel, stating her name, country, tonnage and other prescribed particulars, and, if laden, the marks and numbers of every package and parcel of goods on board, and where the same were laden, and where and to whom consigned, what part of the cargo is to be landed at that port and what at any other port in Canada (1). The master of a vessel arriving in a port of entry of the United States from a foreign port must report the vessel within twenty-four hours after the vessel's arrival there; but he has forty-eight hours in which to enter his vessel by filing his manifest, and he is at liberty to depart after report and before the expiration of the forty-eight hours (2).

Probably, nothing is to be gained by pursuing the enquiry any further in the present direction. The definition of the time when an importation of goods into Canada is complete must be construed by the language used by the Canadian legislature, and probably no considerable assistance can be derived from a consideration of the rule adopted in other countries, especially where there may be differences of circumstances, laws and regulations.

What then is meant in the 150th section of *The Customs Act* by the expression, "the port at which the goods ought to be reported"? What was the meaning of that expression as used by the legislature of the late Province of Canada in the 78th sec. of 10-11 Vict. chap 31? For there is nothing to indicate that it has since been used in the corresponding provisions enacted by the legislature of that province, or by the Parliament of the Dominion in a sense differing from that

(1) The Customs Act, s. 25. 1892, art. 102, R. S. 2774, s-s. 4107,
(2) Customs Regulations U. S. 4900, 6603.

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which first attached to it. Where there are two or more ports at which the goods ought to be reported does the expression mean the first port at which they ought to be reported? By the 25th section of *The Customs Act* it is provided, as by the 10th sec. of 10-11 Vict., chap 31, it was provided, that the master of a vessel arriving from sea or coastwise, and entering any port in Canada, must, as we have seen, not only report his vessel but the goods constituting her cargo (1). By the 27th section of *The Customs Act* it is made his duty at the time of making his report, if required by the officer of Customs, to produce to him the bills of lading of the cargo or true copies thereof; and to make and subscribe an affidavit referring to his report and declaring that all the statements made in the report are true. By the 31st section of the Act it is provided that if any goods are brought in any decked vessel from any place out of Canada to any port of entry therein, and not landed, but it is intended to convey such goods to some other port in Canada in the same vessel there to be landed, the duty shall not be paid or the entry completed at the first port, but at the port where the goods are to be landed, and to which they shall be conveyed accordingly under such regulations, and with such security or precautions for compliance with the requirements of the Act, as the Governor in Council from time to time directs. A like provision is to be found in the 12th sec. of 10-11 Vict. c. 31 (2). But in such a case the report of the goods at the first port of entry is not dispensed with. It ought, it is clear, to be made, and by the plain words of the Act the importation is then complete and the duty, if the

(1) See also 8-9 Vict. (U.K.) c. 93, s. 21; 10-11 Vict. c. 31, s. 10; C. S. C. c. 17, s. 11; 31 Vict. c. 6, s. 10; 40 Vict. c. 10, s. 14; 46 Vict. c. 12, s. 25.

(2) See also C. S. C. c. 17, s. 14, s-s. 5; 31 Vict. c. 6, s. 13, s-s. 5; 40 Vict. c. 10, s. 15, s-s. 5; and 46 Vict. c. 12, s. 45.

goods are dutiable, then attaches. The goods themselves then become subject to the control of the Customs authorities and their conveyance to the port where they are to be discharged is subject to any regulation the Governor in Council prescribes, and security may be taken for compliance with the provisions of the Act, that is, among other things, that the goods be landed, the entry completed and the duties paid. There is nothing to prevent the Customs authorities in such a case from putting an officer on board the ship and in that way to retain the possession of the cargo until entered or discharged in due course. That, it appears, was, before the Union, the procedure required by law in the case of vessels arriving with a cargo at the port of St. John bound to the port of Fredericton (1).

It seems to me, therefore, that the words of the 150th section of *The Customs Act* "within the limits of the port at which they ought to be reported" mean within the limits of the first port at which they ought to be reported. And that view is, it seems to me, strengthened by comparing the language of the Canadian Act with that used in the corresponding provision of the English Act from which the former was adopted (2).

By the English Act the time when an importation of goods is complete was determined, as we have seen, by the coming of the ship in which such goods were within the limits of the port at which such ship should in due course be reported and such goods be discharged. In the Canadian statute the words "and such goods be discharged" are omitted and the time is determined by the coming of the vessel in which the goods are imported within the limits of the port at which the goods, not the ship, ought to be reported; and then

(1) R. S. N. B. c. 28, s. 11; 23 Vict. c. 22, s. 1.

(2) 8-9 Vict. (U. K.) c. 86, s. 136.

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another provision of the statute comes in and makes it the duty of the master of the ship to report not only his ship but the goods imported therein at the port at which he arrives, that is, it seems to me, in such a case as that under consideration, at the first port at which he arrives.

The cargo of the *Cynthiana*, of which the sugar in question formed part, was reported at the port of North Sydney. It is, I think, clear that it ought to have been reported there. The master then made his report outwards and obtained his clearance for the port of Montreal. All that was done in accordance with the provisions of the statute. That is not denied. But some stress is laid upon the fact that in the report inwards at Montreal the master makes oath that he last cleared from the port of Antwerp. That, however, we know not to be the fact. It is manifestly a slip or mistake in the affidavit verifying the report, and the case must be decided on the actual facts, not on an allegation that is known not to be true. I am of opinion, therefore, that the importation of the sugar mentioned in the information was complete according to the definition contained in the 150th section of *The Customs Act* when, on the 29th of April, the vessel in which it was imported came in the course of her voyage within the limits of the port of North Sydney; that being a port of entry at which such goods ought to be reported, and that the sugar is not subject to the duty of one-half a cent per pound imposed by the Act 58-59 Vict. chap. 23.

The conclusion I have come to on this branch of the case renders it unnecessary for me to express any opinion on the other questions debated in this case, and which had reference to the sufficiency of the entry of the 2nd of May; and to the question as to whether or not the intention of the legislature to make the *Tariff*

Act of 1895 retroactive had been so clearly expressed that effect should in such a case as this be given to it.

There will be judgment for the defendant company, and with costs.

Judgment accordingly.

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

Solicitor for defendants: *J. J. Gormully.*

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Aug. 26.

TORONTO ADMIRALTY DISTRICT.

JOHN SIDLEY .....PLAINTIFF;

AGAINST

THE SHIP "*DOMINION*."

JOHN SIDLEY .....PLAINTIFF;

AGAINST

THE SHIP "*ARCTIC*."

Master's wages and disbursements—Account between co-owners—Proportion of costs to be paid by co-owners—Mortgagee—Priority of lien-holder.

In actions for account between co-owners the rule as to the incidence of costs followed by the courts of law in partnership actions may be adopted in a Court of Admiralty.

2. In an action of account where there is a deficiency of assets the court may order the costs of the proceedings to be borne equally by the co-owners.

3. Where the *res* is not of sufficient value to pay the claims of a lien-holder and a mortgagee in full, the lien-holder is entitled to apply all the proceeds in payment of his claim.

ACTION *in rem* for the recovery of a master's wages and for account between co-owners.

The two cases were tried together. John Sidley was the plaintiff in both cases,—the first action being on a claim by him for master's wages and also for an account, he being the owner of 32 shares in the ship *Dominion*. The other owner was Elizabeth J. Peters, who was made a defendant, as well as one Magann who was the mortgagee of the 32 shares owned by the defendant Peters.

The action against the *Arctic* was brought by the said Sidley for an account by his co-owner Elizabeth J. Peters.

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Both vessels were sold by the marshal and the proceeds remaining in court after the payment of the marshal's fees and costs were not sufficient to pay the amount found due to the plaintiff on the taking of the account, which was done by the judge at the trial as shown by his judgment herein.

The case was tried at Toronto before the Honourable Joseph E. McDougall, Local Judge of the Toronto Admiralty District, on the 13th and 22nd days of April and the 3rd and 12th days of June, A.D. 1896, and judgment was reserved.

T. Mulvey, for the plaintiff:

The master is entitled to a lien for wages and disbursements, although he is also co-owner. (The *Feronia* (1).) A mortgagor cannot give a mortgage higher rights against part owners than he, the mortgagor, himself had (2).

In an action *in rem* the court has jurisdiction to give judgment for costs against the defendant personally. The *Hope* (3); The *Volant* (4). Both co-owners must pay all the liabilities owing by them jointly before any of their costs will be paid out of the proceeds of assets, and all costs must be borne equally. *Ross* v. *White* (5) and cases therein referred to.

J. Kyles, for defendant Peters:—The plaintiff is not entitled to costs. Accounts were not furnished before bringing action. (The *Fleur de Lis* (6).) The claim of the plaintiff was greatly reduced. For these reasons he is not entitled to costs (7).

A. C. McDonell, for the defendant Magann:—The mortgagee is entitled to priority over the plaintiff (8).

(1) L. R. 2 A. & E. 65.
(2) *Alexander* v. *Sims*, 18 Beav. 81; *Catto* v. *Irving*, 5 DeG. & S. 210; The *Chieftain*, Br. & L. 104.
(3) 1 Wm. Rob. 154.
(4) 1 Notes of Cases 503.
(5) L. R. 3 Chy. Div. 326.
(6) 1 Asp. 149.
(7) The *William*, Lush. 200; The *Ellen Dubh*, 5 Asp. M.C. 154; The *Leumella*, Lush. 147; The *Englishman*, 38 L. T. 756.
(8) The *Orchis*, L.R. 15 P.D. 38.

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The defendant is entitled to his costs of intervening (1). The court has jurisdiction to make a personal order against defendant, Peters, for amount of claim (2).

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McDOUGALL, L.J. now (August 26th, 1896) delivered judgment.

As a result of the trial of these two actions, tried together by consent, and both being actions *in rem*, between co-owners, one of them including a claim of the plaintiff (though part owner) for wages and disbursements as master of the *Dominion*, I have found upon the taking of the accounts a balance in favour of the plaintiff for nine hundred and fifty-six dollars and ninety-three cents ($956.93).

Both vessels have been sold under the directions of the court and the gross proceeds of both vessels was the sum of one thousand four hundred dollars ($1,400) only. Deducting the costs of sale there will not be sufficient balance of the proceeds in court to satisfy the plaintiff's claim apart from any question of costs.

There is no reason why the incidence of costs in partnership actions adopted by the courts of law should not apply to actions between co-owners in the Admiralty Court. That rule appears to be, where there are assets to direct the payment of the costs of taking the partnership accounts out of the partnership assets.

Where there is a deficiency of assets the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and defendant. The Court of Admiralty has power to make an order that the costs of a proceeding shall be paid personally by the owners, at least, that is the rule in damage actions (3).

(1) The *Sherbro*, 5 Asp. N.S. 88. The *John Dunn*, 1 Wm. Rob. 159;
(2) 56 Vict. c. 24, sec. 35. The *Volant*, 1 Wm. Rob. 390;
(3) The *Dundee*, 1 Hagg. 109; *Ex parte* Rayne 1 Q. B. 982.

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I cannot see any reason for not following this practice in actions for an account between co-owners.

I make the following order as to the disposition of the proceeds of the sale of these two vessels:

1. The costs of the sale of the *Arctic* will be paid out of the proceeds of that vessel, so far as the proceeds will allow. I understand that in the case of that ship the sale did not produce sufficient funds to pay these costs in full.

2. In the case of the *Dominion* the costs of the sale shall be first paid out of the proceeds.

3. The claim of the plaintiff, as far as the proceeds will allow, he producing a voucher of payment to Magann of the sum of $363.79, which sum forms part of his claim as awarded him. In this case, too, I believe after paying the costs of the sale there will not remain sufficient funds to pay the plaintiff's claim in full.

4. The total amount of the party and party costs of both the co-owners (there are only two) parties in each action shall be taxed, and the plaintiff Sidley, or Peters, the other co-owner, as the case may be, must pay to the said Peters or the plaintiff Sidley the difference between one moiety of the total amount of the party and party costs and his own party and party costs. (*Austin* v. *Jackson* (1); *Namer* v. *Giles* (1); *Re Potter* (2).)

The only remaining question is as to the costs of the intervening mortgagee, Magann. As the claim of the plaintiff for wages and disbursements absorbs the whole fund, Magann's mortgage only covering thirty-two shares, the plaintiff is entitled to be paid in priority to the mortgagee.

I dismiss the claim of the mortgagee intervening against the *res* or proceeds, without costs.

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(1) 11 Ch. Div. 942.

(2) 13 Ch. Div. 845.

1896
Sep. 14.

THE AMERICAN DUNLOP TIRE COMPANY..... } PLAINTIFFS;

AND

THE ANDERSON TIRE COMPANY.....DEFENDANTS.

Patent of invention—Pneumatic bicycle tires—Infringement.

The plaintiffs were the owners of letters-patent No. 38,284, for improvements in bicycle tires. The inventors' object was to produce a pneumatic tire combining the advantages of both the "Dunlop" tire and the "Clincher" tire, and that was done by finding a new method of attaching the tire to the rim of the wheel. They used for this purpose an outer covering the two edges of which were made inextensible by inserting in them endless wires or cords, the diameter of the circle formed by each wire being something less than the diameter of the outer edge of the crescent or "U" shaped rim that was used and into which the tire was placed. Then when the inner or air tube was inflated, the edges of the outer covering were pressed upwards and outwards, as far as the endless wires would permit, and were there held in position by the pressure exerted by the air tube. In the second and third claims made by the plaintiffs, and in their description of the invention they describe a rim "provided with an annular recess near each edge into which enters the wired edge of the outer tube or covering." In their first or more general statement of the claim is described "a rim, the sides of which are so formed as to grip the wired edges of the outer tube."

Held, that a rim with annular recesses did not constitute an essential feature of the invention, the substance of which consisted in the use of an outer covering having inextensible edges which are forced by the air tube when inflated into contact or union with a grooved rim, the diameter of the outer edges of which are greater than the diameters of the circles made by such inextensible edges.

2. The defendants manufactured a pneumatic tire with an outer covering through the edges of which was passed an endless wire forming two circles instead of one. The wire was placed in pockets, in the outer covering, which ran nearly parallel to each other except at one point where the two circles crossed each other. The wire being endless the two circles performed in respect of the inextensibility of the edges of the outer covering, the same part

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and office that the wire with a single coil or circle in the plaintiffs' tire performed. There was, however, this difference that the two circles, into which the wire would form itself in the defendants' tire when the inner tube was inflated, would not be concentric, but as one circle became larger the other would become smaller.

Held, that while the defendants' tire might have been an improvement on that of the plaintiffs', it involved the substance of the plaintiffs' patent and constituted an infringement upon it.

THIS was an action for damages for the infringement of a patented invention.

The facts of the case appear in the reasons for judgment. (1)

The case was heard at Toronto on the 27th and 28th April, 1896.

Z. A. Lash, Q.C. for the plaintiffs:

When we get a pioneer patent in any particular art, the construction given to it, the regard given to it, and the effect of it is far wider than the effect which would be given to a subsequent patent which deals with the same subject but which applies something new in connection with working out the principle which it involves. (*Pneumatic Tire Co.* v. *Ferguson* (2); *Gadd* v. *Mayor of Manchester* (3); *Badische Anilin* v. *Levinstein* (4).)

Upon examination of the tire manufactured by the defendants it will clearly appear that they attain their object without proceeding upon any principle at all different than that involved in the plaintiffs' patent. The operation of the two tires is precisely the same.

The evidence establishes beyond a doubt that the defendants' tire is an infringement upon the patented invention of the plaintiffs.

W. Cassels, Q.C. followed for the plaintiffs:

(1) REPORTER'S NOTE:—For a clear understanding of the issues decided in this case reference is directed to a former case between the same parties reported *ante* p. 82.

(2) 11 R. P. C. 459.

(3) 9 R.P.C. 530.

(4) 12 App. Cas. 170.

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First, the patent has to be construed by reference to the state of the art as it existed at the time of the invention, and having regard to the state of the art, the patent has to receive the broadest construction that can be given to it compatible with the true meaning of the specification. In other words, if the specification is doubtful, if it is open to criticism, no matter what the endeavour to show the court that the patentee intended to limit what he was claiming, the court will construe it in favour of the broadest invention, if in point of fact, having regard to the state of the art, the broad invention is in reality an invention; and the patentee will not have his invention narrowed down, and the full extent of his invention conferred upon the public, unless he has so framed his specification and so framed his claim that the court must come to the conclusion that he intended to keep merely for himself the narrow construction, and to dedicate to the public that which the public had not theretofore, namely, the breadth of his invention.

In the second place, as a matter of construction, it is the duty of the court, where there are two claims differing in various respects, to so construe the patent as to give effect to both of the claims. (*Terrell on Patents* (1).)

Next, I submit that it is an absolutely erroneous principle to bring forward what a man manufactures as in any shape controlling the construction which is to be placed upon his invention. The court must take the patent, must look at the state of the art, must look to what the inventor was arriving at, and with that knowledge, and using the benevolent construction that some of the judges used, must give him everything that he has got in the patent, reading it fairly, and that is about all it amounts to.

(1) Page 99.

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I would refer your Lordship on the question of construction to a late case in England which goes into the question very fully. *Proctor* v. *Bennis* (1). That case was this: It was the invention of a radial action of throwing coal into a furnace. What the plaintiff accomplished there was this: To throw coal upon a furnace fire automatically. At the time he got his patent there was an automatic method, in fact a patent, for throwing coal, but it was done by a rectangular chute, and that threw the coal, as it were, in a body upon the fire. This man invented a radial action, which, instead of throwing it in a body on the fire, spread it, and he got his patent for that. The way the court dealt with it was this: That a patent for combination of known mechanical contrivances producing a new result was held to be infringed by a machine producing the same result by combination of mechanical equivalents of the above with some alterations and omissions, which, however, did not prevent the substance and the essence of the patentee's invention being involved in it. (*Cannington* v. *Nuttal* (2); *Dudgeon* v. *Thomson* (3); *Clark* v. *Adie* (4).)

As to its being a question of infringement, if we are entitled to anything this must be an infringement. If we are entitled to nothing, it is not. But, how there can be a middle course, having regard to the patent and the state of the art, it is difficult to comprehend. I can understand the learned counsel's argument if he could displace the patent altogether; but, if the patent is there, and if the patent is worth anything, it seems to me that your Lordship must conclude that this is an infringement.

E. F. B. Johnston, for defendants:

The plaintiffs claim a combination. It may or may not be a primary combination, with that we have

(1) 36 Chy. Div. p. 740.
(2) L. R. 5 H. L. 205.
(3) 3 App. Cas. p. 45.
(4) 2 App. Cas. p. 315.

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nothing to do for the moment; but I have to do with this point, namely, that if they have claimed three elements in a combination, as essential, and one of those elements is dropped out in the defendants' device and the same result is accomplished by the use of the two elements, there is no infringement, and the plaintiffs cannot be heard to say that the third element is non-essential. What they can do, and what is allowed by the authorities, is this: You may abandon it, but you have to put in a mechanical equivalent, in order to protect and preserve your combination. (*Walker on Patents* (1), and cases there cited.)

The principle which seems to be based upon common sense as well as law was followed in *Carter* v. *Hamilton* (2). That was in regard to a check-book; and it was held as your Lordship remembers, that the use of a clean margin for a like purpose was not an infringement, and that it could not be said that the tape was essential at the time, in order to attack the patent upon that ground.

A case to which I desire to refer is that of *Curtis* v. *Platt* (3) which follows up the contention that I am making, and supports the view that I am urging, viz., that having arrived at that stage where a combination must be considered as essential, each part relatively to the other, and that no combination for four elements can be brought into court, and any one of those four then declared by the plaintiff seeking to uphold his patent, or rather to punish for an infringement—it cannot be said that number four, for instance, is non-essential at the time of his proceeding. It is, as I have read from *Walker*, conclusively to be presumed that the four are essential elements. *Curtis* v. *Platt* (*supra*) comes to our aid in this way,—even if the line of my

(1) 3rd. ed. at p. 295. (2) 3 Ex. C. R. 351.
(3) L. R. 1 H. L. 337.

learned friend's argument is correctly applied to us, namely, that we have adopted the inextensible wire—by saying, you may take any two or three elements out of a plaintiff's combination, if you can combine them in a different way. If you do not use all the elements, and even if you do use all the elements, so long as you accomplish by a different method the same means, in a more satisfactory way, and a cheaper way, in a more practical way, or in any other way in which you could put your patent forward as a patentable article, then you do not infringe, unless your patent is a mere colourable evasion of the plaintiffs' article and that is the sole test. There is nothing, in other words, in a monopoly giving the plaintiffs, or the patentees, a right to eliminate one, two, three or four, because these elements are admittedly all old and must be old. What the patent gives them is a right to the four elements. To that extent, and no further, will the law help them. They have no prerogative rights. Another person comes along, he takes one, two or three, and he says: I produce with three elements exactly the result you have produced with four, therefore I am in advance of you. You cannot shut me out from using these elements. I am using them in a somewhat different combination, and using them to produce the very same result you are producing. Therefore, I am entitled to a patent, unless, as I say, that criterion which I am now submitting to the court is a true criterion—unless the device of the person, the subsequent patentee, is a mere colourable evasion of the plaintiffs' right. I think, having stated that, I have stated fairly what the law is upon the question.

J. Ross followed for the defendants:

In the case of *Needham* v. *Johnston* (1), it is laid down that the court has nothing to do with the

(1) 1 R. P. C. 49.

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"benevolent construction" of a patent in a case of infringement. In such a case the patent must be construed fairly like any other document. (*Lucas* v. *Miller* (1); *Plimpton* v. *Spiller* (2); *Edmunds on Patents* (3); *Robinson on Patents* (4); *Ticket Punch Co.* v. *Cowley's Patent* (5).)

Mr. *Lash* replied:

By section 17 of *The Patent Act* there are clear and indefeasible rights given to a person who has invented something which was not known or used by another before, and which was not in public use or for sale with his consent for more than one year previous to his application. The plaintiffs' invention fulfilled these requirements, and there is nothing that has been done to take away such right. (He cites sections 7, 8, and 16 of *The Patent Act.*)

We are not trying here the character of the defendants' invention, but that of the plaintiffs' invention; and whether what the defendants have done is or is not an infringement of the plaintiffs' rights. It is true that the court in *Needham* v. *Johnston* (*supra*), repudiated the doctrine of "benevolent construction" as applied to actions of infringement; but in the proper construction of a patent, in getting at what it means, the court must needs inquire into the intention of the inventor in regard to the scope of his invention, and give him the benefit of that which he is really entitled to upon a fair construction. In other words, the court will look at the substance of the thing and dissect it in order to ascertain what really is the invention,—construing the claim as made in reference to what the whole thing was intended to be. (*British Dynamite Co.* v. *Krebbs* (6).)

(1) 2 R. P. C. 159.
(2) 6 Ch. Div. 426.
(3) P. 134.
(4) Vol. 2, p. 142.
(5) 12 R. P. C. 185.
(6) Good. P. C. 88.

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The words in the claim to the plaintiffs' patent, "substantially as described," mean substantially as specified in regard to the particular matter which is the subject of the claim. (*Walker on Patents* (1).)

The most that can be said of the defendants' tire is that it embodies the plaintiffs' invention, *plus* something else which the plaintiffs could not use without a license from the patentee of such other device or invention. That does not alter the fact that the defendants have infringed upon the plaintiffs' invention.

THE JUDGE OF THE EXCHEQUER COURT now (September 14th, 1896) delivered judgment.

The plaintiffs seek in this action to restrain the defendants from manufacturing, using or selling tires for bicycles that embody, it is alleged, the invention or improvement protected by letters-patent numbered 38,284, which were issued to Thomas Fane and Charles F. Lavender on the 15th day of February, 1892, and which were duly assigned by the latter to the plaintiffs on the 18th day of October, 1893.

The defence principally relied upon is that the defendants have not infringed the patent mentioned. The defendants also allege that Fane and Lavender were not the inventors of the invention patented by them, that there was no novelty in the alleged invention, that it was not useful, that it was not the proper subject-matter of a patent, that it had been anticipated, that it had not been sufficiently described in the specifications, and that the letters-patent had become void by reason of the importation of the invention contrary to the statute and the condition on which they had been granted. The last issue has already been disposed of except as to a question of costs to which I shall refer again. The other issues which are set out in the

(1) 2nd ed. p. 141.

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statement of defence more fully than I have here stated them, must, it seems to me, be found in the plaintiffs' favour; and it is not, I think, necessary to say more about them than to state the finding of the court on the facts, except with respect to the question of infringement.

The letters-patent in question were granted for alleged new and useful improvements in tires for bicycles. Having described the invention, the patentees, in the specification attached to the letters-patent and forming part thereof, claim as new:—

1. A pneumatic tire consisting of an outer tube having an endless wire along each edge thereof, an air tube partially enclosed by the outer tube provided with the usual means of inflation, and a rim the sides of which are so formed as to grip the wired edges of the outer tube, and securely hold all parts in place when the air tube is inflated to its fullest capacity, substantially as set forth.

2. In a wheel a tire consisting of an air tube provided with the usual means of inflation, an outer tube or covering curved to correspond with the curve of the air tube, each edge of the outer tube having an endless wire running therethrough in combination with the rim of the wheel, which rim is provided with an annular recess near each edge into which enters the wired edge of the outer tube or covering, substantially as set forth.

3. A tire for a wheel consisting of an air tube provided with the usual means of inflation, an outer tube or covering curved to correspond to the curve of the air tube, and having a wire or string passing through each edge in combination with the rim of the wheel having an annular recess at or near each edge into which enters the wired edge of the outer tube or covering, substantially as set forth.

The object of the invention as defined by the inventors was to produce a pneumatic tire which could be easily removed, repaired and replaced, and which at the same time would retain the elasticity obtained from the expansion of the air tube by the pressure of the air contained therein. In other words, the inventors' object was to produce a tire which would combine the advantages of the two principal forms of pneumatic tires then in use, the "Dunlop" tire and the "Clincher" tire.

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Both of these tires consisted of an outer tube or covering, and an air tube provided with the usual means of inflation that the inventors proposed to make use of. The "Dunlop" tire was attached to the rim of the wheel by cement, and could not be readily detached. In the "Clincher" tire the edges of the outer covering engaged the side flanges of the rim by a hook or dovetailed formation, and the tire was held in position by the pressure exerted by the inner tube when inflated, and it could of course be readily detached when not inflated, a great advantage in the practical use of the wheel. But it was thought that this advantage was gained in the case of the "Clincher" tire at the expense of the resiliency of the tire obtainable in the case of the "Dunlop." As both were then made it was possible with the "Dunlop" to have a larger part of the tire beyond the edges of the rim than was thought to be possible with the "Clincher." That gave the "Dunlop" tire greater resiliency than the "Clincher." The inventors' object then was to produce a tire combining the advantages of both, and that was done by finding a new method of attaching the tire to the rim of the wheel. They used for this purpose an outer covering, the two edges of which were made inextensible by inserting in them endless wires or cords, the diameter of the circle formed by each wire being something less than the diameter of the outer edge of the crescent or "U" shaped rim that was used and into which the tire was placed. Then when the inner or air tube was inflated the edges of the outer covering were pressed upwards and outwards, as far as the endless wires would permit, and were there held in position by the pressure exerted by the air tube. In the second and third claims made by the patentees, and in their description of the invention which precedes the statement of what they claimed,

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they describe a rim "provided with an annular recess near each edge into which enters the wired edge of the outer tube or covering." In the first or more general statement of the claim, as will have been observed, is described "a rim, the sides of which are so formed as to grip the wired edges of the outer tube." Now, it is, I think, tolerably clear that the ordinary crescent-shaped rim may be so formed, that is that the groove in the same may be so shaped that without any annular recesses, it will grip or hold the wired edges of the outer tube. It would perhaps be more correct to say that the wired edges grip the sides of the groove in the rim, but it is easy to understand what takes place and what the inventors meant to describe. A rim with such recesses may for the tire in question be better than, and have advantages over, a rim that has no such recesses, especially in securing in the process of inflation a proper alignment of the wired edges of the outer covering, but the annular recesses do not, it seems to me, constitute an essential feature of the invention, the substance of which is to be found in the use of an outer covering having inextensible edges which are forced by the air tube when inflated into contact or union with a grooved rim, the diameter of the outer edges of which are greater than the diameters of the circles made by such inextensible edges. The defendants claim, however, and that is the first question to be determined, that the Fane and Lavender patent is to be limited to the use of rims in which there are annular recesses; in other words, though it was not put that way, that any one in making pneumatic tires is free to use outer coverings the edges of which are made inextensible by the use of wires or cords, provided only that they are not attached to rims having annular recesses, and that contention is based upon the argument that the general words of the first claim stated by the patentees

should be restricted by the preceding description of the invention. That is, that the words "substantially as set forth" with which the statement of the claim concludes should be read as limiting the patentees to the particular form of rim described. Now I do not so read them. I do not think that they so limit and narrow the invention to a particular form of rim which is not essential. It is possible, I think it is probable, that the inventors did not at the time of the invention see, or see so clearly as we now do, that the office of the annular recesses was rather to secure a proper alignment of the wired edges of the outer covering than to assist in keeping the tire on the rim. They have, however, been fortunate enough to claim a tire which was to be attached to and used in conjunction with "a rim the sides of which are so formed as to grip the wired edges of the outer tube" and there is, I think, no good reason for refusing them the full benefit of their claim.

Then there is another question arising on the issue as to infringement. The defendants in making the bicycle wheels that it is alleged constituted an infringement of the plaintiffs' patent used in a pneumatic tire an outer covering through the edges of which was passed an endless wire forming two circles instead of one. To use the description in the defendants' patent, which however is not at issue in this case, or at least not directly in issue:

> This wire was coiled spirally upon itself so as to form a compound or double band which was interchangeable and reciprocating as regards its diametrical and circumferential parts. This wire was proportioned in length so that the diameters of the circles or forms into which it was coiled would correspond approximately with the diameter of the rim.

The wire was placed in pockets in the outer covering which ran nearly parallel to each other except at one point where the two circles crossed each other.

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The wire being endless the two circles performed, in respect of the inextensibility of the edges of the outer covering, the same part and office that the wire with a single coil or circle in the other case performed. But there was this difference. It is manifest that the two circles into which, when the inner tube was inflated, the wire would form itself would not be concentric, and that as under the pressure exerted by the air one circle became larger the other must become smaller. It is claimed, and it may be that this is an advantage, that in this way the tire is more securely held on to the rim of the wheel. But is it an infringement of the plaintiffs' patent? I think that it is. It would not, I am sure, be seriously contended that any one was free to use two or more endless wires on each edge of the outer covering. That might or might not be an advantage, but it would, I think, be an infringement. But why should one be permitted to use a single endless wire in two coils? It may have its advantages; it may be an improvement on the method protected by the plaintiffs' patent, and it may be patentable as an improvement. I say nothing at present as to that, but it involves, it seems to me, and includes the substance of the invention protected by the patent issued to Fane and Lavender.

There will be judgment for the plaintiffs, and the injunction prayed for will be granted. The plaintiffs are entitled to costs on all the issues except that taken on the 11th paragraph of the statement of defence.

There will, for the reasons stated at the argument, be no costs to either party on that issue or in the case of "*The Anderson Tire Company of Toronto (Limited)* v. *The American Dunlop Tire Company.*"

Judgment accordingly.

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

Solicitors for defendants: *Rowan & Ross.*

THE OWNERS OF THE STEAMSHIP "*DRACONA*" AND HER CARGO (DEFENDANTS)..... } APPELLANTS;

AND

N. K. CONNOLLY, AND OTHERS, (PLAINTIFFS) ..... } RESPONDENTS.

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Maritime law—Salvage—Contract for service rendered—Validity.

If an agreement for salvage services was just and reasonable when entered into it will not be disregarded because something has happened subsequently, or some contingency, of which one party or the other has taken the risk, has occurred to make it more onerous on one or the other than was anticipated when it was entered into.

The *Strathgarry* ([1895] Prob. 264) referred to.

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

The appeal was argued at Quebec on Friday, the 29th May, 1896.

A. H. Cook, for the appellants:

The agreement was an unfair one; it was entered into by the master of the ship because of his distressed circumstances, and after a threat by the agent of the respondents that the tug would leave the ship unless his offer was acceded to. The circumstances show that it was clearly not a salvage service. The amount the respondents stood out for is greatly in excess of the ordinary rates of remuneration for services of this character. The tug ran no risk in the performance of the services. Under such circumstances the authorities show that the agreement will not be enforced. (*The Mark Lane* (2).)

(1) Reported *ante*, p. 146. (2) L. P. 15 Prob. 135.

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Argument of Counsel.

C. A. Pentland, Q.C.:

There was nothing present at the time of entering into the agreement to induce the master of the ship to enter into it rashly or improvidently. There was no menace to the lives of those on board the ship, and the means of communication with the ship's agent were abundant. Indeed, the captain had communicated with other parties in Quebec to come to his rescue before this tug had appeared upon the scene at all. Moreover, on his cross-examination, the captain admits that he thought the price agreed upon reasonable. Then the agreement was not signed until some days after it was entered into, and at the time of signing the captain did not protest against it in any way. If there is any doubt it must be resolved in favour of the validity of the agreement. (*The Victory* (1); *Couette* v. *The Queen* (2); *The Palmerin* (3); *The Canadian Pacific Navigation Co.* v. *The C. F. Sargent* (4); *The Firefly* (5); *The Elm* (6); *The James Armstrong* (7); *The Medina* (8); *Carge Ex Woosung* (9).)

Mr. *Cook* replied.

THE JUDGE OF THE EXCHEQUER COURT now (October 27th, 1896) delivered judgment.

This is an appeal from the judgment of the Judge in Admiralty of the Exchequer Court for the Admiralty District of Quebec, by which the learned judge pronounced the tender of fourteen hundred and fifty dollars, made in this action, to be insufficient, and awarded to the plaintiffs the sum of two thousand three hundred and eighty-seven dollars and fifty cents, which they claimed to be due to them in respect of

(1) Cook's Adm. Rep. 335.
(2) 3 Ex. C. R. 82.
(3) Cook's Adm. Rep. 358.
(4) 3 Ex. C. R. p. 332.
(5) Swab. 241.
(6) Swab. 168.
(7) L. R. 4 Ad. & Ec. 380.
(8) L. R. 2 Prob. Div. 7.
(9) L. R. 1 Prob. 260.

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two agreements entered into between the master of the steamship *Dracona* and the agent of their steam-tug, the *Eureka*. One agreement bears date of the 15th of August, 1895, and the other of the 21st of the same month. By the latter the master of the *Dracona* agreed to pay two hundred dollars to the owners of the *Eureka* for taking the crew, and the gear of the *Dracona*, and also a boat, from Pointe Jaune, near Fame Point in the River St. Lawrence, to Quebec. This service was performed, and the amount agreed upon is not in dispute. The controversy between the parties arises upon the agreement of the 15th of August, whereby the master of the *Dracona*, for the use of the tug *Eureka* to stand by the *Dracona* and to render all assistance to save the vessel and, if possible, to tow her off the reef on which she then was, agreed to pay the sum of three hundred and fifty dollars per day until the vessel came off, or was condemned. No attempt was made to tow the *Dracona* off, and after six and one quarter days from the time when the agreement was entered into, she was condemned. During that time the *Eureka* stood by the *Dracona* and rendered all the assistance demanded of her. For that service the plaintiffs seek to recover, at the rate agreed upon, the sum of two thousand one hundred and eighty-seven dollars and fifty cents. The defendants say that they are not bound by the agreement, that the agent of the *Eureka* took advantage of the position that the master of the *Dracona* was in to exact the agreement from him, and that the rate agreed upon is inequitable and exorbitant, and they tender in respect of such service a sum of twelve hundred and fifty dollars, that is two hundred dollars per day for the time during which the *Eureka* was standing by and assisting the *Dracona*.

The questions to be decided are:—

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1. Should the agreement of August 15th be upheld? and if not,

2. What amount should be allowed to the plaintiffs for the services rendered? Is the amount tendered sufficient?

Now, apart from the agreement and what was contemplated by the parties when they made it, and having regard only to the services actually rendered, it seems to be clear from the evidence that the amount tendered would be sufficient to compensate the plaintiffs for such services. But because that may be so, it does not follow that the agreement may be disregarded. In coming to the conclusion that two hundred dollars per day would have compensated the *Eureka* for what she did, one judges after the event, and naturally looks at the service actually performed, and at the length of it. But in determining the question as to whether such an agreement is to be upheld or not one must look at the service contemplated by the parties at the time, and the circumstances under which the agreement was entered into. If the agreement was just and reasonable when entered into, it will be enforced and will not be disregarded or set aside because something has happened subsequently, or some contingency of which one party or the other has taken the risk has occurred, to make it more onerous on one or the other than was anticipated when it was entered into (1). Where the parties have made an agreement the court will enforce it, unless it is manifestly unfair and unjust; but if it be manifestly unfair and unjust the court will disregard it and decree what is fair and just. That, it was said by Brett, L.J., delivering the judgment of the Court of

(1) The *True Blue*, 2 Wm. Rob. 176; The *Resultatet*, 17 Jurist, 353; The *Jonge Andries*, Swa. 226; The *Cato*, 35 L. J. N. S. Ad. 116; The *Waverly*, L.R. 3 Ad. & E. 369; and the *Strathgarry*, [1895] Prob. 264.

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Appeal in *Akerblom* v. *Price* (1), is the great fundamental rule, and in order to apply it to particular instances, the court will consider what fair and reasonable persons in the position of the parties would do, or ought to have done under the circumstances. The rule is of course applicable to both parties to such agreements. Where salvors, or persons claiming salvage compensation, have sought to disregard agreements which they had made, and to recover as salvage larger sums than they had bargained for, they have been told that such agreements ought to be respected if they have been fairly entered into and are not clearly unjust or inequitable (2). In the same way and on like grounds agreements made by the masters of vessels in distress have been upheld against the contentions of the owners that they should be relieved from such agreements (3). The instances in which agreements have been set aside in favour of salvors or persons claiming salvage compensation, are not numerous. That has been done, however, where some material fact has been concealed by the master of the vessel (4), or where the service has been rendered by one who was ignorant of its value, and the amount agreed upon has manifestly been inadequate (5), or where the agreement was clearly inequitable (6). In general, however, the cases in which such agreements have

(1) 7 Q. B. D. 129.

(2) The *Mulgrave*, 2 Hagg. 77; The *British Empire*, 6 Jur. 608; The *Betsey*, 2 Wm. Rob. 167; The *True Blue*, 2 Wm. Rob. 176; The *Repulse*, 2 Wm. Rob. 396; The *Henry*, 15 Jur. 183; The *Resultatet*, 17 Jur. 353; The *Jonge Andries*, Swa. 226; The *Firefly*, Swa. 240; *Bondies* v. *Sherwood*, 22 Howard, 214; The *Cato*, 35 L.J.N.S. Ad. 116; The *Canova*, L.R. 1 Ad. & E. 54; The *Waverley*, L.R. 3 Ad. & E. 369; The *Solway Prince*, [1896] Prob. 120.

(3) The *Helen and George*, Swa. 368; The *Arthur*, 6 L.T.N.S. 556; The *Prinz Heinrich*, L.R. 13 P.D. 31; and the *Strathgarry*, [1895] Prob. 264.

(4) The *Kingalock*, 1 Spinks, 213.

(5) *Silver Bullion*, 2 Spinks, 70; The *Phantom*, L.R. 1 Ad. & E. 58.

(6) The *Enchantress*, 1 Lush. 93; 30 L.J.N.S. Ad. 15.

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been disregarded are cases in which some advantage has been taken of the master to extort from him terms that are not fair and just. It rarely happens that the master of a vessel in distress and need of assistance is on equal terms with those offering to aid him. Sometimes in such cases he is compelled to accede to unreasonable demands by threats openly made to leave him unless he agrees to the terms offered to him. At other times although no such threat is openly made he is subject to a like and equally effective compulsion to agree to terms that are unfair and unjust, because of the circumstances in which he finds himself. Again, he may recklessly, or through ungrounded fears, accede to demands manifestly exorbitant. In all such cases the agreement will be disregarded (1). The same rules are followed in the courts of the United States. Where such agreements are fairly made, no advantage being taken of ignorance or distress, they are to be upheld (2). But while Courts of Admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain, they will not tolerate the doctrine that a salvor can take advantage of his situation and avail himself of the calamities of others to drive a bargain ; nor will they permit the performance of a public duty to be turned into a traffic of profit (3).

(1) The *Theodore*, Swa. 351 ; The *America*, 2 Stu. Ad. R. 214 ; The *Medina*, L. R. 1 P. D. 272, and on appeal 2 P. D. 5 ; The *Silesia*, L. R. 5 P. D. 177 ; The *Ismir*, 14 Q. L. R. 353 ; The *Mark Lane*, L. R. 15 P. D. 135 ; and the *Rialto*, [1891] Prob. 175.

(2) The *Independence*, 2 Curtis, 350 ; The *J. G. Paint*, 1 Benedict, 545.

(3) *Post* v. *Jones*, 19 How. 160 ; The *Emulous*, 1 Sum. 207 ; See also *The Brothers*, Bee's Ad. R. 136 ; The *Nancy*, Bee's Ad. R. 139 ; The *Jenny Lind*, 1 Newberry, 443 ; The *Wexford*, 6 Benedict, 119 ; *Two hundred and two tons of Coal*, 7 Benedict, 343 ; The *Homely*, 8 Benedict, 495 ; The *C. & C. Brooks*, 17 Fed. R. 548 ; The *Young American*, 20 Fed. R. 926 ; The *Tennasserim*, 47 Fed. R. 119 ; The *Don Carlos*, 47 Fed. R. 746 ; The *Jessomene*, 47 Fed. R. 903 ; The *Sirius*, 15 U. S. App. R. 181.

United States courts have perhaps been more ready than English courts are to disregard such agreements, and that tendency finds expression occasionally in the terms in which the rules applicable to such cases are laid down. English courts do not lightly encroach upon the old rule of the Admiralty Court, that where there is an agreement made by competent persons, and there is no misrepresentation of facts, the agreement ought to be upheld unless there is something very strong to show that it is inequitable. (Per Brett J.A., in *The Medina* (1).)

The *Dracona* went ashore on a reef near Pointe Jaune, on the 14th of August, 1895. On the morning of the 15th when the *Eureka* came to her aid, Captain Baxter, of the *Dracona*, was expecting that on the day following the *Lord Stanley*, a powerful tug, with a schooner and pumps, would arrive from Quebec to assist in getting the vessel off the rocks. He had the day previous sent one of his officers to Fox River in a fisherman's boat, and had been able to communicate by telegraph with his owners' agent at Montreal, and had received an answer from them to that effect. When Mr. Weir, the agent of the *Eureka* came on board the *Dracona*, Captain Baxter stated to him that he was expecting the arrival the next day of a tug and pumps, and the negotiation upon which they then entered had reference to the amount to be paid to the *Eureka* for standing by until the arrival of the *Lord Stanley*. Weir demanded one thousand dollars to stand by until four o'clock of the next day. Captain Baxter refused to accede to the demand; and at this time Weir did, I think, according to his own evidence, put some pressure upon Baxter, by intimating that unless the *Eureka* could get something to do she could not remain, as there were sailing vessels outside upon which

(1) L. R. 2 P. D. 7.

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she depended a great deal for her business. But while this negotiation was proceeding the *Avalona*, a steamship belonging to the owners of the *Dracoña*, came in sight and the masters of the two ships interchanged signals. At Baxter's request the *Eureka* took him on board the *Avalona*, where he had a consultation with Captain King of that vessel. Weir says that after they had consulted together in the chart room of the *Avalona* they came out and asked him how much he would charge per day, and that he answered five hundred dollars; that they went in again and on coming out the captain of the *Avalona* said: "Don't be too hard, you can come down a little"; that he, Weir, said: "No; it is kind of a bad place here. We might be here only for a day or two and we must get something for it"; and that Captain King finally said: "I will figure on it" and they came down to three hundred and fifty dollars, and he, Weir, accepted that. Baxter's account of what took place differs materially from Weir's. He says that no sum other than the thousand dollars was mentioned on board the *Avalona*; that after they went back to the *Dracona* he and Weir had another interview when the latter offered to stand by for five hundred dollars per day, if he, Baxter, would make an agreement that the *Eureka* should tow the ship to Quebec, and take the crew and their effects there; that Weir threatened to leave and go after a sailing ship that was coming up if he, Baxter, did not accept that offer; and that eventually he agreed to pay him three hundred and fifty dollars per day to stand by and to tow the *Dracona* off, if possible, the service to continue until the vessel was towed off or condemned. The captain admits that when he agreed to pay three hundred and fifty dollars per day he thought the amount to be reasonable, but he says that at the time he was afraid the *Eureka* would leave him.

Weir denies that he threatened to leave the *Dracona* and proceed to a sailing ship if Baxter did not enter into an agreement; but he admits that before he took Baxter on board of the *Avalona* he had said that if he could not get something to do he would not stop there. The agreement although dated of the 15th of August, the day on which its terms were agreed to, was not drawn up until four days afterwards, when, without any protest or objection on the part of Captain Baxter, it was executed at Fox River. Now, if Weir's account of what took place is the true account there is no ground, it seems to me, for holding that the agreement was entered into under any compulsion, or that any advantage was taken of the master of the *Dracona*. The terms of the agreement were settled on board of the *Avalona*. That vessel belonged to the company that owned the *Dracona*, and while the *Avalona* was present the *Dracona* was not dependent upon the services of the *Eureka* for assistance. The offer to give the three hundred and fifty dollars per day was made by the masters of the two ships after ample time for consultation and deliberation, and Captain Baxter admits that at the time he thought the amount reasonable.

If, on the other hand, Captain Baxter's account of the circumstances under which the agreement was made, is correct, it would appear that it was concluded on board of the *Dracona* after the *Eureka* had returned from the *Avalona*. We are not told whether that was before or after the *Avalona* had left for Montreal. If before, her presence would relieve the master of the *Dracona* from any pressure or compulsion to which he otherwise might have been subjected. If afterwards, we are forced to believe that while he was yet in negotiation with Weir, who was demanding, as he thought, an exorbitant amount for the use of the

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Eureka, and before anything was concluded the *Avalona* was allowed to depart. That, it seems to me, is not at all probable; and even if it were true it would go to show that in the opinion of the two masters the services of the *Eureka* were not so urgently necessary as to permit of Weir subjecting Baxter to any pressure or compulsion as to the terms of the proposed agreement.

Then as to the amount agreed upon. Captain Baxter admits, as we have seen, that he thought it reasonable. His view at the time was that if the service should continue for two or three days, as was anticipated, three hundred and fifty dollars per day would be a fair and reasonable amount to pay. In that view he was, it seems to me, in the right. Neither party at the time the agreement was made expected that the services of the *Eureka* would be required for more than two or three days. They might in fact not have been needed beyond one day, and in the meantime the *Eureka* might have lost a much more profitable engagement. If the *Lord Stanley* had arrived as expected and the *Eureka* had been able to render important services as she might have done in assisting to get the *Dracona* off the reef, it would not, I am sure, have occurred to any one to consider the rate agreed upon unreasonable or exorbitant. On the contrary it would, I have no doubt, have appeared to constitute a moderate and reasonable compensation for such services. It turned out, however, that the *Lord Stanley* did not arrive for six days. But that was not the fault of the *Eureka*. Captain Baxter had, by the agreement, taken the risk of that contingency; Mr. Weir, the chance that the service might have come to an end the next day, and that in the meantime he might lose a more remunerative engagement. Looking at the agreement from the standpoint of the parties to it, at the time they entered into it, and having regard to the services

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that they had in contemplation then, the agreement cannot, it seems to me, be said to be unjust or unreasonable. The rate agreed upon was, it is true, considerably higher than that usually charged for a suitable tug sent from Quebec to the assistance of vessels in like situations of peril, but in such cases the tug is paid for the service from the time she leaves Quebec until she returns, and that makes a great difference. A tug plying on the lower St. Lawrence would not, it seems, be justified in charging upon a vessel which she takes under her care the full expenses incurred while she was so plying (1). Yet the fact that she has incurred such expenses, and is on hand ready to lend assistance, and that extra expense would necessarily be incurred in procuring a tug to render a like service, ought, it seems to us, to be taken into account in such cases as this. If, on the one hand, the tug ought not to take an undue advantage of the fact that she is at hand ready to perform the required service, she ought not, on the other hand, to be deprived of all the benefit resulting from that circumstance. Where the actual service may not continue for more than three or four days, a rate of three hundred and fifty dollars per day may, in reality, be quite as reasonable as one of two hundred dollars for that time and three or four days additional occupied in going to and coming from the place where the service is to be performed.

I agree with the learned Judge of the Quebec Admiralty District that the agreement in question in this case ought to be upheld, and I dismiss the appeal, with costs.

Judgment accordingly.

Solicitors for the appellants : *W. & A. H. Cook.*

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

(1) *The Graces*, 2 Wm. Rob. 294.

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Oct. 27.

THE ACTIESELSKABET (THE COMPANY OF THE OWNERS OF THE) "*PRINCE ARTHUR*," (PLAINTIFFS) ..... APPELLANTS;

AND

HENRY JEWELL AND OTHERS, OWNERS OF THE TUG "*FLORENCE*," (DEFENDANTS)..... RESPONDENTS.

Maritime law—Tow and tug—Negligence of both pilots—Liability.

A sailing vessel in tow of a steam-tug was passing up the St. Lawrence River. The pilot of the tow and the pilot of the tug were both at fault in not having the course changed after passing a certain point in the river. The pilot of the tow discovered the mistake and gave notice to the tug, by executing the proper manœuvre in that behalf, but not until it was too late to avoid an accident which befell the tow.

Held, that the owners of the tow could not recover in such a case from the owners of the tug.

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

The appeal was argued at Quebec on Friday, the 29th May, 1896.

A. H. Cook, for the appellants:

The real cause of the accident was the gross negligence of those in charge of the tug in not keeping a look-out. It is true the engineer and stoker came up occasionally for air, but their duties were not those of a look-out and the pilot's duty was at the wheel. The pilot of the tow instructed the pilot of the tug to steer by compass, watch the lights, passing ships, and also the tow. These instructions were not carried out. The finding of the court below, and of the assessor, is that the tug was at fault in not maintaining a proper look-out.

(1) Reported *ante*, p. 151.

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Argument of Counsel.

The *consensus* of authority establishes this doctrine: That the tow and tug are to be held as one ship only for the purpose of having one chief person in control of the whole. In other words, the pilot of the tow is charged with the supreme command of the vessels, and his orders must be obeyed; so that *quoad* the rights of third persons the tow must be held solely responsible if an accident, such as a collision, occurs. But that is not this case. In such a case as this there is no artificial rule making the tow liable in any event. If the tug asks for no directions, and none are given, the tug takes the responsibility of the course. *Inter se*, the tug is then responsible when an accident happens. (*Smith* v. *St. Lawrence Nav. Co.* (1); *Spaight* v. *Tedcastle* (2); The *Robert Dixon* (3); *Sewell* v. *B. C. Towing Co.* (4).)

We were not guilty of contributory negligence in not having done something earlier that might have avoided the effect of the defendants' negligence.

Radley v. *L. & N. W. Ry. Co.* (5); *Dowell* v. *Steam Nav. Co.* (6); *Tough* v. *Warman* (7).

Appellants should have the costs of this appeal.

C. A. Pentland, Q.C.:

As to costs, in such a case as this, costs should properly be borne by each party.

This court will not disturb the finding of the judge below as to what was the primary cause of the accident, nor his application of the law determining who is responsible for it. The learned judge has not erred either in fact or in law. The tug is clearly exempt from blame and responsibility. (The *Emma* (8); The *Electric* (9).)

(1) L. R. 5 P. C. 313.
(2) 6 App. Cas. 217.
(3) L. R. 5. Prob. D. 54.
(4) 9 Can. S. C. R. 527.
(5) 1 App. Cas. 758.
(6) 5 E. & Bl. 195.
(7) 5 C. B. N.S. 573.
(8) 2 Wm. Rob. 315.
(9) 1 Stu. Ad. R. 333; Pritchard's Adm. Dig. 165.

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Argument of Counsel.

It is contended that the pilot gave general directions as to the course to be steered by the tug. That did not relieve him from the necessity of giving special directions at any particular time. His business was to personally control the course of the two vessels. Nothing he might say or do would relieve him from that responsibility. His omission in this respect was the proximate cause of the accident. (The *Niobe* (1); *McKeown* v. *Bain* (2); The *Englishman and Australian* (3).) The tug and tow are one ship under the control of the pilot who is on the tow. (*Spaight* v. *Tedcastle* (4); *The Thrasher Case* (5).)

The proper method of controlling the course of the tug is by changing the course of the tow—"girting" the tug, as it is called. (*Abbott on Shipping* (6); *Marsden on Collisions at Sea* (7); The *Energy* (8); *Marsden on Shipping* (9); *Maclachlan on Shipping* (10).)

Mr. *Cook* replied:—The authorities cited by counsel for the defendants do not apply to this case. They are cases arising out of salvage and collision claims, while this one subsists in a breach of contract for safe towage.

It cannot be too strongly insisted on that in the absence of directions by the pilot of the tow, the tug was responsible for the course steered. (*Newson on Shipping* (11); *Pollock on Torts* (12).)

THE JUDGE OF THE EXCHEQUER COURT now (October 27th, 1896) delivered judgment.

This is an appeal by the plaintiffs from the judgment of the Judge in Admiralty of the Quebec Admi-

(1) L. R. 13 Prob. D. 55.
(2) [1891] App. Cas. 401.
(3) [1894] Prob. D. 239.
(4) 6 App. Cas. 217.
(5) 1 B. C. L. R. 189; 9 Can. S. C. R. 527.
(6) Ed. pp. 194 to 198.
(7) P. 199.
(8) L. R. 3 Ad. & E. 49.
(9) Pp. 137-181.
(10) Pp. 274 to 277.
(11) Pp. 21, 22.
(12) P. 279.

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ralty District, dismissing an action brought by them against the defendants to recover damages for the loss of the barque *Prince Arthur*, which, on the 27th of June, 1893, while being towed by the defendants' tug, the *Florence*, was run on shore on Red Island Reef, in the St. Lawrence River, and became a total loss.

The accident happened because the course of the tow and the tug was not altered as it should have been after passing Red Island light-ship. As to that, the pilot of the tug was at fault from that time until the accident was inevitable. There is no question about that. The pilot of the tow was also at fault for a time after passing the light-ship. That too, is, I think, beyond question. But he discovered the mistake that had been made before the accident actually happened and hailed the tug, directing it to change its course. Failing to make himself heard or understood he had the helm of the barque put hard-a-starboard, the effect of which was to bring the vessel upon her proper course, and at the same time to indicate to the pilot of the tug that he too should change his course. That was, it is clear, the proper thing to do under the circumstances, and the only question is, was it done in time to avoid the accident? The learned Judge of the Quebec Admiralty District has found that it was not. Referring to the pilot of the barque, he says:

> I am of opinion that the evidence shows that the pilot was negligent and grossly in fault throughout. His statement that twenty minutes before the accident, or even fifteen, he commenced to starboard his helm with a view of keeping the tug on the starboard bow of the ship and continuing in that condition up to a period shortly before the accident, when he put the helm hard-a-starboard, is entirely incredible. It is impossible that any such movement on the part of the ship would not have been at once felt by the man at the wheel of the steamer, and it is incredible to suppose that after feeling the effect which such a motion on the part of the tow would have had on the tug that he should have continued his course without putting his own helm to starboard, and the only result that I can deduce from the fact

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is that the pilot did not perceive his danger until he gave the order to the man at the wheel to hard-a-starboard, when it was evidently too late to save the vessel from going on the reef.

I have examined the evidence carefully. It is no doubt conflicting and contradictory, but as a whole it justifies, it seems to me, the finding on the question of fact to which I have referred.

The tug was also in fault in not having a proper look-out. But that was not the cause of the disaster, and it could not have contributed to it if the directions which the tow gave to change the course were given too late to avoid it. That incident would have been a material fact in the case if the pilot of the tow had discovered the mistake in time to avoid the consequences of such mistake, and for want of the look-out the tug had not observed and followed the directions given to it as quickly as it otherwise would have done. But if the fact is, as it has been found to be, that the mistake was not discovered and the directions to change the course were not given until it was too late to avoid the accident, the absence of a proper look-out was not in any sense the cause of the accident and did not contribute thereto.

The case is an extremely hard one for the plaintiffs, and I should be glad, in dismissing the appeal, to dismiss it without costs, if it were proper for me to do so. I think, however, that there are no sufficient reasons for me to depart from the ordinary and usual rule as to costs.

The appeal is dismissed, and with costs.

Judgment accordingly.

Solicitors for appellant: *W. & A. H. Cook.*

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

TORONTO ADMIRALTY DISTRICT. 1896

HER MAJESTY THE QUEEN.....PLAINTIFF; April 16.

VS.

THE SHIP "*CITY OF WINDSOR*".....DEFENDANT.

AND

GEORGE ALLAN SYMES.....PLAINTIFF;

VS.

THE SHIP "*CITY OF WINDSOR*".....DEFENDANT.

Maritime law—Crown's rights in enforcing maritime lien—Priority of master's lien—Writ of Extent—Costs.

Where the Crown invokes the aid of a Court of Admiralty to enforce a maritime lien, it is in no higher position than an ordinary suitor, and its rights must be determined in such court by the rules and principles applicable to all claims and suitors alike.

2. Where the Crown had sued the owners of a steamship for damages to a Government canal occasioned by the ship colliding therewith, but had obtained judgment subsequent in date to one obtained by the master of the ship upon a claim for wages and disbursements accrued and made after the time of such collision, the latter judgment was accorded priority over that held by the Crown.

3. Where a party in an action *in rem* has incurred costs which have benefited not only himself but parties in other actions against the *res*, the costs so incurred by him will, if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in court before any other payment is made thereout.

Semble, where the Crown pursues its remedy by Writ of Extent against the owners of a ship, it can only take under the Writ of Extent the property of the debtor at the time of the issue of the Writ. If the debtor has assigned his property before that, the Crown can realize nothing under the Writ in respect to the *res*.

THIS was a motion made on behalf of the Crown in the cause first above mentioned. In this action the

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Crown recovered judgment against the said ship for the sum of $3,581.65, and costs of action, and the said ship, her tackle, apparel and furniture was condemned in the said sum and the costs of the action.

Prior to this action an action was instituted against the said ship on behalf of one George Allan Symes and judgment was given in his behalf for the sum of $1,341.04; the facts in regard to which are set out more particularly in the judgment of the Local Judge in Admiralty reported in 4 Ex. C. R. 362, which judgment was affirmed on appeal to the Exchequer Court (1).

The present motion was one made on behalf of the Crown to settle the question of priority between these two claims as against the proceeds of the said ship, which were insufficient to satisfy both claims.

The motion came on for argument on the 26th day of March, 1896.

R. Gregory Cox for the Crown:

The claim of the Crown is twofold. It is based upon the maritime lien of the Crown for injury to the Crown's property, and is also based upon the Canal Regulations. The question in dispute is the priority of this lien over the master's wages.

The accident occurred through the faulty condition of the engine or the negligence of the engineer.

A lien for damages takes priority to claims ex-contractu and the master's claim is ex-contractu. [*Williams & Bruce* (2) and cases there cited; The *Elin* (3).]

A lien for subsequent wages was postponed to a lien for damages. The cases supporting this relate to foreign ships, but the rule is the same, I submit, in the case of British ships (4).

(1) *See* 4 Ex. C. R. 400.
(2) Adm. Prac. 2nd ed. 80.
(3) 8 P. D. 39, 129.
(4) Stockton's Adm. Dig. 120, and citations from *Roscoe*.

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As to the effect of the Canal Regulations, I refer you to section 29 thereof.

The defence sets up the giving of a bond, but see the *Merle* (1), and see the *Enterprise* (2) as to priority of lien for damages over master's wages.

As to the costs of sale and the costs of the writ and arrest, these I admit should be paid in priority of all claims.

J. F. Canniff for George A. Symes.

The priority of a damage lien to a lien ex-contractu is only allowed in those cases where the ship is a foreign one, and the owner is not bankrupt. But in this case the evidence shows the ship is a British one, and the owner is insolvent. The Crown took possession under its statutory right to seize and sell the ship. The ship was then released upon a bond being given for $5,000, the bondsmen being indemnified by the mortgagees of the ship who intervened in the case of *Symes* v. *Windsor* (3). The bond was taken because the Crown knew that the ship might become subject to other maritime liens. The Crown having then set free the ship to incur these liens, first protecting themselves by the bond, should not be given priority over the master's claim for wages, &c., accruing after the date of the accident to the canal; the master having no other source to look to for his claim. The *Elin* (4); the *Chimæra* (5); the *Linda Flor* (6); the *Benares* (7); the *Duna* (8).

These are all cases of foreign ships where there was no suggestion of the owner's bankruptcy.

Maclachlan on Shipping (9); *Coote's Ad. Prac.* (10);

(1) 2 Asp. ML. C. 402.
(2) 1 Lowell 455.
(3) 4 Ex. C. R. 362.
(4) 8 P. D. 129.
(5) Ibid.
(6) Swab. 309.
(7) 7 Not. of Cas. (Suppl). 53.
(8) 5 L. T. N. S. 217.
(9) 4 Ed. p. 742.
(10) P. 137, 138, 139, 140, 141, 142.

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Kay on Merch. Shipping (1); *Foards on Merch. Shipping* (2); and Mr. Coote's article in 49 *Law Magazine*, p. 146-153.]

The Crown having submitted to the jurisdiction of the court must conform to its rules and practice relative to the disposal of the ship's proceeds.

[*Attorney-General* v. *Radloff* (3); *Zoe* (4); *Secy. State for War* v. *Chubb* (5); *H. M. S. Thetis* (6); *The Athol* (7).]

Then as to the costs, the master is in any event entitled to his costs of the action up to and inclusive of procuring the payment of the proceeds into court; these costs having been incurred by him for the benefit of all claimants to the fund.

[*The Panthea* (8); *Immacolata Concezione* (9); *The Sherbro* (10); *Williams and Bruce's Ad. Prac.* (11).]

R. Gregory Cox, in reply.—I cite *Merchants Bank* v. *Graham* (12); and *The Gordon Gauthier* (13).

As to the effect of taking a bond it is well known that the taking of security does not release the statutory lien unless it is the intention of the parties.

McDougall, L. J., now (April 16th, 1896) delivered judgment.

This is a motion to determine the priorities between the claims of the plaintiffs in the above two actions, and came on to be argued before me on the 25th March last. A brief recital of the facts is necessary to a consideration of the questions involved. The *City of Windsor* is a British ship. She plied on Lake Ontario, between St. Catharines and Toronto in the summer of

(1) P. 380, 519, (1894).
(2) P. 217, (1880).
(3) 10 Ex. 84.
(4) 11 P. D. 72.
(5) 43 L. T. N. S. 83.
(6) 3 Hagg. 14.
(7) 1 Wm. Rob. 374.
(8) Asp. Mar. Law Cases, 133.
(9) 9 P. D. 37.
(10) 5 Asp. Mar. Law Cases, 88.
(11) P. 468.
(12) 27 Grant. 524.
(13) 4 Ex. C. R. 354.

1894. Her owner, who was insolvent, was one S. T. Reeves. The Third National Bank and the Peninsular Savings Bank, both of Detroit, were mortgagees for a sum in excess of her value. On the 30th May, 1894, through the negligence of the engineer of the *City of Windsor* the vessel ran into and greatly damaged the gates of one of the locks of the Welland Canal, a government work. The *City of Windsor* was immediately seized by order of the Government Superintendent of the Canal and held to answer for the damage occasioned by the collision. This seizure was made pursuant to Section 29 of the Canal Regulations which is as follows:—

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"29. All vessels.....as aforesaid shall be liable for any injury or damage they may do to any lock, bridge, boat .....whether the same may arise from the fault, neglect or mismanagement of the master or person in charge or from his inattention to the Canal Regulations or from accident; and every penalty which may be duly imposed under these regulations by the superintending engineer and declared in the regulations as against the owner, navigator or person in charge of any vessel.....as aforesaid, whether the same be for non-payment of tolls or for any fine duly imposed, or for any sum demanded by the superintending engineer, or person in charge, of any canal as compensation for any injury done shall be chargeable upon such vessel.....as aforesaid. And the superintending engineer of the canal is authorized and required to seize and detain any such vessel.....as aforesaid with her cargo and appurtenances at the risk of the owner or owners until the payment of such tolls, penalty or compensation as aforesaid, and in default of such payment thereof the superintending engineer or person in charge of the canal may proceed to sell by public auction any such vessel.....after

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having first given two weeks notice of the day of such intended sale, such notice to be inserted in one or more of the public newspapers published in or near the place where such seizure shall have been made, at least two clear weeks prior to the day of sale."

Section 30 enacts that:—Any vessel incurring a fine or doing damage in any of the canals may be stopped or detained until the fine or compensation for injury done shall be paid or until security be given for the payment thereof.

On the 21st day of June, 1894, the Superintendent of the Canal took a bond from the owner in two sureties in the penal sum of five thousand dollars to secure the payment of the sum of thirty-five hundred dollars, the estimated damage. The bond contained a clause that the taking of such bond would in "no wise release or discharge any maritime or other lien on said vessel for the said damage." The condition of the bond was that if the obligor should pay the full amount of damages, costs and expenses within thirty days after an account thereof in writing should have been delivered or sent by mail to the obligors or one of them, the obligation was to be void; otherwise to remain in full force.

On the 27th of August, 1894, the mortgagees, the Third National Bank and the Peninsular Savings Bank, took possession of the vessel under their mortgages. On the 31st day of August, 1894, the master commenced an action against the *City of Windsor* for wages and disbursements. On the 3rd day of December, 1894, an action was commenced by the Crown against the ship *City of Windsor* for the damages occasioned by the collision in May, 1894. In January, 1895, the action of the master against the *City of Windsor* was tried, and subsequently judgment was pronounced in favour of the plaintiff for $1,341.04 and costs, and the

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vessel directed to be sold pursuant to the usual practice of the court. An appeal was taken from this judgment to the Exchequer Court, which appeal was subsequently dismissed on the 7th day of September, 1895.

On the 18th day of July, 1895, the case of *The Queen* v. *The City of Windsor* was tried; the master, Symes, and the mortgagees, The Third National Bank and the Peninsular Savings Bank of Detroit, intervened as defendants, and a decree was pronounced in favour of the Crown for $3,581.65 and costs, and the vessel directed to be sold. But a clause in the decree directed that if the sum realized by the sale should be insufficient to realize the plaintiff's claim, the rights of the plaintiff against the sureties in the bond should not be affected. The defendants, The Third National Bank and the Peninsular Savings Bank, were ordered to pay the costs of the action; and a further clause of the decree directed that all questions of the priority of the liens and marshalling of the assets and costs against the defendant Symes should be reserved. The plaintiff in the action of *Symes* v. *The City of Windsor* conducted a sale of the said vessel as having obtained the first decree. The vessel was sold on the 6th day of December, 1895, $3,500, being a sum insufficient to satisfy all the claims against her, covered by these judgments. This motion is now made for further directions and to determine the rights and priorities of the successful plaintiffs in the above actions to the fund in court, which consists only of the proceeds of the sale of the ship. At the outset of the argument Mr. Cox, counsel for the plaintiff in *The Queen* v. *The City of Windsor*, conceded that the costs of the warrant, arrest and costs of the sale should be allowed as a first charge upon the proceeds in court, as all the parties benefited by this expenditure; but he claimed priority for the lien for damages in the action of *The Queen* v. *The*

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City of Windsor to the claim of the master for wages and disbursements, and for any costs other than as above admitted. He argued that a claim for damages took precedence to a claim ex-contractu, citing *The Elin* (1).

I have procured a certificate from the Registrar which shows that as to the master's claim, items amounting to $260.68 are for items for indebtedness which arose before the date of the collision with the canal gates in May, 1894; but that items amounting to $1,080.36 represent the wages and disbursements which accrued after the 30th May, 1894, the date of the collision. It was admitted that the claim of the Crown constituted a maritime lien; it was also admitted that if the canal authorities had chosen to pursue their statutory powers they could have sold the *City of Windsor* at the time they seized the vessel if the owner refused or neglected to pay the sum the Superintendent assessed as the amount of the damage done to the lock. This course was not followed, but the vessel was released and the bond taken. It is true that the Crown in the bond expressly reserved their maritime lien, but they are now compelled to come into court in order to realize their lien, and invoking the aid of the court and being now before it, they are in no higher position, I take it, with reference to their claim, than any private suitor and must have their rights determined by the rules and principles applicable to all claims and suitors alike (2). This is not a proceeding by Writ of Extent but is an action by the Crown to realize, acccording to the usual practice of the court, a maritime lien for damages arising from a collision causing injury to Crown property. A Writ of Extent, as such,

(1) 8 P. D. 129.

(2) *Attorney-General* v. *Radloff*, 10 Exch. 93; *Zoe*, 11 Prob. 72; *Clarkson* v. *Attorney-General of Canada*, 15 O. R. 632; also reported 16 Ont. App. 202; *Secy. of State for War* v. *Chubb*, 43 L. T. N. S. 83.

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will only bind the owners' interest in the ship and will not touch the interest of the mortgagees. The Crown can only take under the Writ of Extent the property of the debtor at the time of the issue of the writ. If the debtor has assigned or transferred his property, of course the Crown cannot take it (1). Here the owners' interest in the ship at the time of the injury was practically nothing, for the mortgages, executed by the owner long before the collision, were far in excess of the value of the ship. The Crown could not retake the ship under its statutory powers having taken security and released her. The ship was under arrest in another action in December, 1894, when the Crown commenced its action, and the present contest, therefore, relates entirely to the proceeds which have been brought into court in the case of *Symes* v. *City of Windsor*. To reach these funds the Crown is compelled to come into court, and as I have said before, is, I think, bound to submit to the practice of the court as to the disposition of the proceeds.

Then as to the priority of the liens for damage or liens in the nature of reparation for wrongs done, how do they rank? *Maclachlan on Merchant Shipping* (2), says:

> They have their origin in positive law and in the policy of quieting strife, by distributing compensation for injuries done at the expense of the wrongdoer. They are severally co-extensive with the statutory tonnage rate, and failing a fund otherwise supplied, rank against ship and freight. Of two successive collisions with the same ship, sufferers by the earlier standing to the sufferers by the later in no relation of demerit or obligation, retain their priority of claim against the fund on the principle of the legal maxim, *Qui prior est tempore, potior est in jure.* Such liens rank against the ship and freight in derogation of any rights of ownership, or rights by mortgage or beneficial lien existing at the time of the collision. They acquire thereby priority over mortgages, prior bottomry, wages, pilotage, towage and salvage and subsist adversely to proprietary interest and claims.

(1) *Ex-P. Postmaster General*, in Re Bonham, 10 Chy. D. 595 and 603.

(2) 4th ed. p. 741.

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The writer then goes on to say:

A far more difficult question relates to the attachment on the *res* of subsequent beneficial liens. These considered in relation to merit appear *primâ facie* entitled to priority over all interests of any kind that have shared in the advantage, and taking into account the fact that damage-plaintiffs are not confined to a suit *in rem* for their remedy, there would be like difficulty in according to beneficial liens this precedence but for the case of foreign ships and the bankruptcy or insolvency of a British owner.

In the case of foreign ships subsequent wages have been refused priority over damage-plaintiffs (1), because the mariners could recover against the foreign owners.

There has, however, been no express decision as to the position of a claim for wages earned subsequent to the collision, where the *res* is a British ship, especially where as here the owner is insolvent. Maclachlan says, at page 742:

Under the bankruptcy of a British owner their claim presents a different aspect suggestive of equitable considerations favourable and unfavourable to the seamen. They have been the active cause of the damage. The sufferer is thereby thrown for compensation upon a deficient fund. That fund, however, such as it is, has benefited by their services. In a very extreme case therefore the court may take account only of the services rendered since the collision happened, disregarding the surplus of the claim due to them at common law and modify even that estimate in consideration of the dividend to be expected from the rest of the bankrupt's estate. *Coote's Admiralty Practice*, at page 142, states "that where the owners of a damaged vessel are insolvent so that the only fund for the payment of maritime liens is the *res* upon which they are charges, it would appear (though I can find no adjudicated case) that the court would apply some different principle.....If, therefore, a different principle, which is not stated, (referring to the *Benares*, 7 Notes of Cases, Supplement 53) applies to cases where the owners of the ship which has done damage are insolvent, it becomes necessary to inquire what such principle is and what are the extent and limits of its application. It can be no other than an equitable principle, and its object must therefore be to protect third parties having a *bonâ fide* interest in the *res* owing to their having conferred a benefit from being left without

(1) *The Elin*, 8 P. D. 129; *The Linda Flor*, 4 Jur. N. S. 172.

remuneration through the all-absorbing claim for damage. But in what way can this be done except at the expense of the suit or in damage? He therefore must abate so much of his claim as will compensate those who have preserved what the law has made his own *res*, or have rendered it available for his use by navigating and bringing it home, *i.e.* wages, pilotage, and towage must be made in the first instance.

Kay on Merchant Shipping at page 380 says:

A wages lien yields priority to the lien which attaches to the ship for damages done by collision *except perhaps in the case of a British ship with respect to wages earned after the date of a collision.* In the case of a foreign ship, the seamen's lien for wages earned after the collision, but not on a subsequent voyage, is postponed to the damage lien on the principle that there is less hardship in leaving a foreign seaman to seek his remedy in person in a foreign court than there would be in leaving a sufferer from collision to the like course, but the result might be modified if the foreign owner were shown to be bankrupt.

Again at page 519 the same author remarks:

The damage lien takes precedence of the liens of pilotage, bottomry and wages except where earned on a British ship subsequent to the collision.

Mr. Coote, the author of *Coote's Admiralty Practice*, in an interesting article in 49 *Law Magazine*, page 153, (1853) says, (speaking of the same subject):

I think it probable that subsequent salvage would be entitled to be paid before the damage in all cases, and wages, pilotage and towage would be equally entitled in cases where the owners are bankrupt and the *res* is insufficient to meet all demands.

It appears to me, in the light of these dicta, and from a perusal of the cases cited in support of the views above propounded, that it may be safely laid down as a principle to be applied to the two cases I am considering, that in the case of a British ship, even where the owner is insolvent, the damage lien will take precedence to all antecedent liens; but that such damage lien will be postponed to a claim for wages earned after the collision on that voyage, and it will also be postponed to the claims for

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subsequent wages, salvage and pilotage. The facts in these two cases against the *City of Windsor*, however show a course of dealing and claims arising thereunder of a different character; the wages or claims for services arising immediately after the collision and relating to the bringing of the vessel into port safely in continuation of the voyage during which the alleged damage is said to have arisen. In this case the vessel was plying between local ports, part of the time making two trips a day. The sufferer from the damage did not allow the vessel to proceed on the voyage after the wrong doing. In pursuance of the extraordinary statutory powers which the Crown possesses, the ship causing the injury was immediately arrested and detained. It was in the power of the Crown within a couple of weeks to sell the vessel, and out of the proceeds of any such sale to satisfy all claims for damage. The vessel was detained for about three weeks and the Crown then chose of its own motion to release her on receiving a bond as security for their claim. The vessel resumed her regular series of voyages and the master employed another engineer in the place of the man guilty of the negligence contributing to the accident causing the damage complained of, and on the faith of the damage claim having been secured by a bond, the master contracted new liabilities and made a number of proper disbursements for the successful management of the ship after the release. He has duly recovered a judgment for these wages and disbursements, and it was declared that he had a maritime lien for the same, and the ship was ordered to be sold to satisfy his judgment in respect of them. After the date of the master obtaining his judgment, the Crown brings its action to trial and recovers a judgment for its damage claim. Under such circumstances would it be equitable or just to postpone it to the later claim of

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the Crown for damages? The principle which underlies all the decisions establishing the priority of damage claims is that the person receiving the injury is commonly without redress except by proceeding against the ship itself, and further, as to wages due at the date of the collision, the master and seamen's existing claims for wages are postponed to the damage claim because being in charge of the ship at the time of the doing of the damage they are themselves considered wrong-doers and the sufferer from their assumed negligence has therefore upon ordinary equitable principles a prior right to be paid his damages.

No real question arises in the present cases as to wages earned before the date of the collision, the master's whole claim for wages and disbursements, except to the extent of $260.68, (according to the certificate of the Registrar) accrued after the collision. It may be that if priority is given to the master's claim and costs, beyond the sum of $260.68, the effect will be to practically absorb the whole fund in court. If this is the result, it is unfortunate; but it must be remembered that the Crown still possesses a remedy upon the bond given by the owner, the giving of which by the owner procured for him release of his ship. The owner was shown by the evidence to have been insolvent at the date of the collision; and during the period when the master's present claim accrued. The master's lien for wages and disbursements for which priority is sought arose after the collision. The best opinion I can form is that all claims arising after the release of the vessel in the nature of the maritime liens for wages earned or disbursements made by the master in or in preparation for the subsequent voyages, should take priority to the claim of the Crown for damages arising from the collision on the 30th May, 1894, and

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represented by their judgment recovered in this court on the 18th July, 1895.

Next arises the question as to the master's costs, whether these should not be given priority in any event? The general doctrine may be stated to be that where a party in an action *in rem* has incurred costs which have benefited not only himself but parties in other actions against the same property, the costs so incurred by him for the benefit of all, will, if the proceeds of the property are insufficient to satisfy all claims in the various actions, be paid to him out of the fund in court in priority and before any other payment is made thereout (1). In the present cases, the fund has been placed in court as a result of the action of *Symes* v. *The City of Windsor*. It is admitted by counsel for the Crown that costs of the arrest and possession money, and costs of sale, should be allowed priority; but he contends that the costs in connection with the master's action down to the decree, other than as above, should not be allowed priority but should form part of his general claim and rank with it. This, no doubt, might be a proper direction if the ship had been sold prior to decree and before the trial of the master's action and the proceeds brought into court, but in the present cases the mortgagees who had intervened would not consent to any sale of the ship and the ship was accordingly in the possession of the marshal until the final decree was pronounced in *Symes* v. *City of Windsor* and until after the appeal from that judgment had been heard and adjudicated upon.

I do not see in view of these facts how I can with justice make any apportionment of these costs, but must hold that both as to the costs of his action and the costs of the arrest and the sale of the said ship, the

(1) The *Panthea*, 1 Asp. Mar. 9 P. D. 37. The *Sherbro*, 5 Asp. L. C. 133. *Immacolata Concezione* Mar. L. C. 88.

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master is equally entitled to a first claim therefor on the fund in court. As to the costs of this motion, I direct that the costs of the proctor for the master be taxed and allowed him and paid out of the fund in court, and after that is paid, the amount of the master's said judgment and costs, except the said sum of $260.68. If there is any portion of the fund remaining in court after these payments, I direct that the costs of the Crown on this motion shall be first paid out of such balance, and any further balance remaining in court should be paid out to the Crown on their judgment in the action for damages in priority to the said $260.68, the part of the master's judgment herein which accrued before the date of the collision.

Judgment accordingly.

Solicitors for G. A. Symes: *Caniff & Caniff.*

Solicitor for Crown: *J. C. Eccles.*

Solicitors for ship and interveners: *Wigle & Rodd.*

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Nov. 16.

GEORGE JULIEN.....SUPPLIANT;

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs law—Breach—Seizure of vessel—Controller's decision—Reference to court—Petition of right—Jurisdiction—Damages for wrongful seizure and detention.

The Controller of Customs had made his decision in respect of the seizure and detention of a vessel under the provisions of *The Customs Act*, confirming such seizure. The owner of the vessel within the thirty days mentioned in the 181st and 182nd sections of the said Act gave notice in writing to the Controller that his decision would not be accepted. No reference of the matter was made by the Controller to the court as provided in section 181, but the claimant presented a petition of right and a *fiat* was granted. The Crown objected that the court had no jurisdiction to entertain the petition, and that the only procedure open to the claimant was upon a reference by the Controller to the court.

Held, that the court had jurisdiction.

2. Damages cannot be recovered against the Crown for the wrongful act of a customs officer in seizing a vessel for a supposed infraction of the Customs law; but the claimant is entitled to the restitution of the vessel.

PETITION of Right to recover possession of a schooner alleged to have been wrongfully seized into the hands of the Crown for a supposed infraction of the Customs laws.

The case came on for trial at Halifax on the 3rd day of October, 1895, when the Crown failed to establish that the suppliant had been guilty of any infraction of *The Customs Act*, and the court made an order in the nature of a preliminary judgment directing that the vessel be restored to the suppliant upon his personal undertaking to re-deliver the same to the Crown if the order then made should thereafter be set aside. Amongst other things, leave was reserved to the Crown

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to move to set aside the order on the ground of want of jurisdiction in the court to entertain the petition. Leave was also reserved to the suppliant to move for judgment for damages arising from the arrest and detention of the vessel.

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

September 22nd, 1896.

The motions upon the questions reserved now came on for argument at Halifax.

W. B. A. Ritchie, Q.C., for the respondent:

The petition must be dismissed because the only remedy the suppliant had was upon a reference to the court by the Controller of Customs under the 182nd section of *The Customs Act*. Unless the Controller saw fit to grant an appeal from his decision to the Exchequer Court, his decision under the provisions of the said section was conclusive of the claim, no court could re-open the questions in controversy. It is not possible that the suppliant could pursue two remedies concurrently in respect of the one claim—he could not have a reference and a *fiat* at the same time. The section of *The Customs Act* quoted contains specific provisions touching the procedure in Customs cases, and, therefore, the general provisions of sec. 23 of *The Exchequer Court Act* do not apply.

G. A. R. Rowlings (with whom was *W. E. Thompson*), for the suppliant:

The provisions of *The Customs Act* referred to by counsel for the respondent relate solely to departmental procedure, and do not affect the courts. [*McDonnell* v. *The Queen* (1).]

As to damages, the suppliant is entitled to *restitutio in integrum*. [*Tobin* v. *The Queen* (2); *Feather* v. *The*

(1) 1 Ex. C. R. 119.

(2) 16 C.B. N.S. 386.

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Queen (1); *The Inflexible* (2); *Shelby* v. *The Queen* (3); *Clode on Pet. Right* (4); *The Petition of Right Act* (5); *Brady* v. *The Queen* (6); *Farnell* v. *Bowman* (7).]

W. B. A. Ritchie Q. C. replied, citing *Halifax City Ry. Co.* v. *The Queen* (8); *Clode on Pet. Right* (9); *Audette's Prac. Ex. Ct.* (10).

THE JUDGE OF THE EXCHEQUER COURT now (November 16th, 1896) delivered judgment.

The suppliant brought his petition to recover possession of the schooner *Rising Sun*, which had been seized for an alleged infraction of the Customs laws of Canada, and for damages arising from such seizure.

The Controller of Customs had maintained such seizure, and the suppliant, within the thirty days mentioned in the 181st and in the 182nd sections of *The Customs Act* (11), had given notice in writing that the Controller's decision would not be accepted. The Controller, however, did not refer the matter to the court, but the suppliant was given a *fiat* for his petition of right. At the trial which took place at Halifax on the 3rd of October, 1895, I came to the conclusion that a case had not been made out for the forfeiture of the vessel; and I ordered that it should be forthwith restored and delivered up to the suppliant with her tackle, upon his filing with the registrar of the court a personal undertaking that the vessel would be re-delivered to the Crown if the order then made should eventually be set aside and judgment be entered in favour of the respondent. The Crown also had liberty on the first day of the next sitting of the court at Halifax to move to examine a witness who could not

(1) 6 B. & S. 292.
(2) 2 Swab. & Trist. 204.
(3) 1 Ex. 354.
(4) 1st ed. pp. 88-89.
(5) Sec. 1; sec. 12, s.s. 2.
(6) 2 Ex. C.R. 273.
(7) 12 Ap. Cas. 649.
(8) 2 Ex. C.R. 433.
(9) 1st ed. pp. 53 to 63.
(10) Pp. 55 to 75.
(11) R. S. C. c. 32.

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be produced at the hearing on the 3rd day of October, 1895. The personal undertaking I have mentioned was given by the suppliant, and the vessel with her tackle was delivered to him. The witness whom the Crown had desired to examine was not produced at the next sitting of the court, but counsel for the Crown, in pursuance of leave reserved, moved to set aside the order made on the ground of want of jurisdiction in the court to entertain the petition. The suppliant at the same time, in pursuance of leave reserved to him moved for judgment for damages for the arrest and detention of the vessel.

With reference to the first question, it is argued for the Crown that where the Minister or the Controller of Customs makes his decision in respect of any seizure or detention, penalty or forfeiture, and the claimant, within the thirty days prescribed by statute, gives him notice in writing that his decision will not be accepted, the court has no jurisdiction over the matter unless it be referred to the court by the Minister or the Controller. With that contention I cannot agree. The 15th section of *The Exchequer Court Act* provides that the court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might in England be the subject of a suit or action against the Crown; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown. And by the 23rd section it is provided that any claim against the Crown may be prosecuted by petition of right, or may be referred to the court by the head of the department in connection with the administration of which the claim arises, and if any such claim is so referred no *fiat* shall be given on any petition of right in respect thereof. If in the present case the Controller had made a reference then there could not have been a

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petition of right, but in the absence of such a reference there cannot be any doubt that a petition will lie. In this case a *fiat* has been granted, the petition has been filed, and upon the evidence taken it has appeared that no offence had been committed whereby the property in the vessel in question has passed from the suppliant to the Crown. It is therefore a case in which the property of the subject is in the possession of the Crown, and I entertain no doubt of the jurisdiction of the court in such a case.

With reference to the other question which arises upon the motion made by the suppliant for damages, I am of the opinion that the suppliant cannot succeed. It is well settled law that no petition will lie against the Crown for damages for the wrongful act of an officer of the Crown except in cases where the liability exists by virtue of some statute. There is, so far as I know, no statute which makes the Crown liable for the wrongful act of a customs officer in seizing a vessel for a supposed infraction of the customs laws. In such cases, except so far as the officer is protected by law, he is himself personally liable for his act, and in an action against him the suppliant may, no doubt, recover his damages; but I know of no authority for his recovering damages against the Crown in such a case as this. As I have before pointed out, if property wrongfully seized is in the possession of the Crown the owner may have his petition to recover the same, and so far in this case the suppliant's action has been maintained; but there is no authority for allowing him as against the Crown damages for the wrongful act of its officer.

I think both motions should be dismissed, and under the circumstances, without costs to either party.

Judgment accordingly.

Solicitors for suppliant: *Rowlings & Thompson.*

Solicitor for respondent: *J. A. Chisholm.*

THE AUER INCANDESCENT LIGHT MANUFACTURING COMPANY (LIMITED) ..... PLAINTIFFS;

AND

WILLIAM P. O'BRIEN..... DEFENDANT.

1897
Jan. 11.

Patent of invention—Illuminant device—Infringement—Process—Reissue—Equivalents—Manufacture—Importation—Price.

An inventor, in the specification to his first Canadian patent, after disclaiming all other illuminant appliances, for burners, claimed: "An illuminant appliance for gas and other burners consisting of a cap or hood made of fabric impregnated with the substances hereinbefore mentioned and treated as herein described." In the specification the substances and the proportions in which they might be combined were stated. Eight years afterwards the owner of the original patent surrendered the same and obtained a reissue, the specification whereof differed from that of the original only in respect of the claim, which was as follows:—"The method herein described of making incandescent devices, which consists in impregnating a filament, thread or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent, and then exposing the impregnated filament, thread or fabric to heat until the combustible matter is consumed."

Held, that although in the claim of the reissue there were no words of reference or limitation to the refractory earths mentioned in the specification, yet the words "salts of refractory earths" occurring in the claim must be limited or restricted to such refractory earths as were mentioned in the preceding part of the specification, or to their equivalents.

2. That the reissue was for the same invention as that which was the subject of the earlier patent.

3. The reissue being for the same invention as the original patent, delay in making the application for the reissue did not invalidate the same.

4. That the Act 55-56 Vict. c. 77, passed for the relief of Von Welsbach and Williams, the original patentees, was effective although at the time it was passed others than they were interested in the patent.

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Argument of Counsel.

5. To give the Commissioner jurisdiction to authorize the reissue of a patent it is not necessary that the patent be defective or inoperative for some one of the reasons specified in sec. 23 of *The Patent Act*. It is sufficient to support his jurisdiction that he deems the patent defective or inoperative for any such reasons, and his decision as to that is final and conclusive.

6. That it was open to the owners of the patent to import the impregnating fluid or solution mentioned in the specification of their patent, without violating the provisions of the law as to manufacture.

7. That although the plaintiffs had at the outset put an unreasonable price upon their invention, yet as it was not shown that during such time any one desiring to obtain it had been refused it at a lower and reasonable price, the plaintiffs had not violated the provisions of the law as to the sale of their invention in Canada.

8. That it is not open to anyone in Canada to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiffs' patent.

ACTION to restrain the infringement of a patent of invention.

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

The case was heard before the Judge of the Exchequer Court, at Montreal, on the 19th, 20th and 21st days of November, 1896.

C. A. Duclos for the plaintiffs:

The first inquiry that I will take up is, what was the invention, from a scientific standpoint, of Dr. Carl Auer von Welsbach? Dr. Auer von Welsbach discovered a law of nature, hitherto not only unknown, but which, according to the scientists we have heard in the box, would at that date have been almost declared non-existent. But it was not sufficient for Dr. Auer von Welsbach to discover a law of nature, for that he could not patent. The important discovery that he made, and which bore practical fruit, and

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which he could patent, was the application of this wonderful new law of nature to a practical result. That it was a practical result, and a useful result and a commercial and valuable result, has not been called in question by the defence in their evidence; but it has been superabundantly proved by the plaintiff in this case.

The next inquiry we have is this, did the patentee set forth his discovery or invention correctly? When we come to the question of the patent, the word "invention" probably is the more proper term. Did the patentee set forth correctly his invention? First, did he do so in the original Canadian patent? I think it is only necessary to read the patent to see that he clearly, fully and exactly set forth what he could patent. That is to say, a practical mode, method or process of carrying out his scientific discovery; and giving, at the same time, an example of carrying out this particular process.

I would call the court's attention especially to the following matters in construing this patent. The inventor first states: "My invention relates to the manufacture of an illuminant appliance;" indicating thereby a method of producing an illuminant. Then he sets forth the formula of a particular impregnating solution. The terms used show the office that these earths were to fill. "For applying the substances mentioned as an illuminant I use a fine fabric, preferably of cotton, previously cleansed by washing with hydrochloric acid," etc. There is no doubt that there he has fully set forth a method of carrying out his discovery; and I submit that it agrees with what the experts have said was the discovery.

A second inquiry might be at this point, whether this is also sufficiently set forth in the claim in the reissued patent. Of that there can be no doubt. The

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descriptive part of the reissued patent is absolutely the same; therefore, we say that Dr. Von Welsbach's invention was fully set forth in both patents.

The next inquiry is, did the patentee cover the whole of his invention by his claim; and now I am referring to the original patent, No. 23523.

I submit, that in the construction of a patent, as in the construction of any other contract, the court will not presume a dedication or a gift or a gratuity, if intention or intendment has anything to do with it. I think that the court would be justified, where an inventor has made a valuable discovery and has clearly set it forth, in construing the language of his claim to fully protect that invention. The court will give it such a construction, more especially if, as has been shown in this case, the invention is a primary invention, not a secondary one, or merely an improvement on a previously known substance or machine, but one striking out in an entirely new path.

Bearing in mind this canon of construction, I come to the claim of the original patent. Before I deal at length with the claim, I would simply refer, in a few words, to the disclaimer; because some mention has been made as to the effect of that disclaimer. I submit the disclaimer is nothing more than an acknowledgment of what the law would silently do of itself. It gives him no more than he claims. He disclaims what he has not claimed. That is all there is in it. It is tantamount to saying: "I hereby disclaim anything that is not included in my claim." So we are thrown back to a construction of the claim.

What is the claim in the original specification? An illuminant appliance for gas and other burners, consisting of a hood made of fabric impregnated with the substances mentioned and treated as described. This claim may be construed in two ways. Taking

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first, what I might perhaps say is the least favourable construction, that it was merely for an illuminant appliance. I submit that even if the claim were for an illuminant appliance, if that illuminant appliance is claimed as having been made in a particular method specified in the descriptive part of the patent, that method is thereby made as much a part of the claim as the illuminant or product itself. [Cites *Smith* v. *The Goodyear Vulcanite Company* (1); *Merrill* v. *Yeomans* (2).]

The same doctrine is also treated at length in the *Telephone* Cases, which take up the whole of volume 126 of the United States Reports.

The claim is for a product, being the result of a particular process described in the specification. But there is another construction that may be placed upon this patent, and it is this, that it is a double claim; it is both for the product and the process. The words "treated as hereinbefore described" undoubtedly claim the process thereinbefore described.

As to this point I rely upon the English case arising upon this patent. The English patent, so far as the descriptive part of the specification is concerned, is almost word for word identical with the Canadian patent. As to the claim, there is merely a slight difference of words, such a difference only as would occur if two minds were trying to state the same thing. In effect and in substance the claims are identical, and there can be no question that His Lordship Mr. Justice Wills and the Court of Appeal, in England, in construing this very patent, construed it as a process patent. The only difference is that in the English patent the claim starts out thus: "the manufacture of an illuminant appliance," and we say: "an illuminant appliance" treated in such a way. In other words, it is the manufacture of an illuminant appliance; the process of manufacturing this particular product.

(1) 93 U. S. R. 486. (2) 94 U. S. R. 568.

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As to the validity of the reissued patent, I think the position is this, that the action of the Commissioner is conclusive, unless it were evident, from a mere comparison of the two documents, that there was such repugnancy that it must be construed or decided as a matter of law that the Commissioner exceeded his jurisdiction, and that it was not for the same invention. It cannot be maintained for one moment that we fall within that category. That is the limit, I think, of the proposition; that it must appear as a matter of law from the comparison or examination of the two documents, that there was an excess of jurisdiction. In that case it is clear that they would not be for the same invention. We lay much stress upon the claim of the original, because the two specifications themselves are identical; there is no difference in the invention described in either the original or the reissued patent. I submit to the court that the claim of the reissue is nothing more than the statement in express terms of what the law would construe the claim of the original to have been. In other words, that the claim of the original being for a process and the invention being of the character of the one described, namely, a primary invention, the patentee would be entitled to the fullest benefit of the doctrine of equivalents as known in the patent law.

To look at the results. I submit that the greatest reproach, if any reproach is applicable to the reissue, is this, that it is useless. That is the greatest reproach, that the claim of the reissue is co-extensive with the original and unnecessary. I do not know that we should suffer for having gone to needless expense; and on that point, of course, the doctrine is that the action of the Commissioner is conclusive. [Cites *Allan* v. *Brunt* (1); *Curtiss' Law of Patents* (2); *Simpson* v.

(1) 3 Story, 742.

(2) P. 622, section 471 A.

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The West Chester Rail. Co. (1); *Woodworth* v. *Stone* (2); *Jordan* v. *Dobson* (3); *The Rubber Company* v. *Goodyear* (4).]

The decision of the Commissioner would also appear to be conclusive as to the identity of the invention, unless there is such repugnancy between the old and new patents, that it must be held to be a matter of legal construction.

We submit that, having claimed an appliance made in a specific way, which way was referred to and set out in the descriptive part of the specification, that process became thereby as much a part of the claim as the product and would be considered as a process patent; therefore, that the claim of such original and reissue are co-extensive and for the same thing.

Then applying the doctrine of equivalents, I will confine myself first to the original claim. I cannot put it in a briefer form than I find the statement of the doctrine laid down in a little manual called *Hall's Infringement Outline* (5), which seems to me to be a *résumé* of the whole doctrine on this point.

In a few words, the doctrine is that equivalents unknown at the time of the original invention, and subsequently invented and made the subject of an invention, might be an infringement of such original invention.

I do not think that in this case we require the full benefit of that doctrine, because from the evidence it is clear that these equivalents were known at the time, most probably known to Dr. Auer himself, and in the mind of a chemist, if not to the lay mind, suggested by the patent itself.

[He cites *Knight's Patent Manual* (6); *Tilman* v. *Proctor* (7); *The National Type Company* v. *The New*

(1) 4 How. 380.
(2) 3 Story, 749.
(3) 2 Abbott's U.S.R. 398.
(4) 9 Wall. 788.
(5) P. 13.
(6) Page 93.
(7) 102 U. S. R. 728.

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York Type Company (1); *The McCormick Harvesting Machine Company* v. *Altman* (2).]

The doctrine of equivalents, which in some of the cases I have cited was applied to machines, is more especially applicable, as in the case of *Tilman* v. *Proctor*, to process patents.

Dealing now with the facts of the case in hand, the evidence has made it conclusive that the solution, used by the defendant, of thorinum and cerium is the equivalent of the solution or compound mentioned in the Canadian patents, equivalent in its physical properties and equivalent in the office which it performs with respect to this particular process, equivalent in the fullest sense. Then we find an illustration in the same patent, namely, the substitution of the asbestos thread for the platinum wire. In one sense platinum and asbestos cannot be said to be equivalent, that is in the limited sense, or I might say, almost theoretical definition of an expert witness of the defendant who gave us the Latin definition of equivalent; but in the sense of the patent law, the substitution of asbestos thread for the platinum wire is an equivalent, because it performs the same office and is relied upon for the same physical qualities. [Cites *Morley Machine Company* v. *Lancaster* (3).]

As to the question of manufacture, I would refer to a case decided in the Court of Appeal of Douai, France, upon this very patent. The French Patent Act of 1844 on this question of manufacture is more strict than our own. [Cites *Malapert*; "Lois sur les Brevets d'invention" (4).]

The particular application of the French case (5) to the case in point is this :—"L'exploitation du brevet

(1) 56 U. S. Of. Gaz. p. 661.
(2) 73 U. S. Of. Gaz. p. 1999.
(3) 129 U. S. R. 273.
(4) At p. 54.
(5) Le Droit, Jour. des Trib. No. 148, June 25, 1896.

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commence seulement au moment de l'imprégnation du tissu, laquelle se fait en France." They hold that the manufacture of the patented invention begins at the moment of impregnation, and that being done in France, the whole manufacture was there; and that case also deals with the question of importation. There it is specially held that this fluid is a raw material *quoad* the patent.

J. E. Martin for the defendant: The plaintiffs in this case rely somewhat upon the interpretation that the English courts have put upon the English patent which has been put in. I think it but fair, perhaps, at the opening, to point out one or two distinctions which appear to me to be material between that patent, as it was taken out, and their first Canadian patent, of which the one in question is the reissue.

In the British patent No. 15286, which has been put in as an exhibit, there is no disclaimer, while in the Canadian patent, which was the basis of the present reissue, there was a special disclaimer in these terms:

"I hereby disclaim all illuminant appliances for burners, except that included in the following claiming clause."

There is that distinction which must be borne in mind, and there is an additional distinction in the wording of the claim. The claim in the British patent is for the manufacture, substantially as therein described, of an illuminant appliance for gas and other burners consisting of a cap or hood made of a fabric impregnated with the substance mentioned, and treated as set forth. What is claimed in the Canadian patent was not the manufacture "substantially as herein described." These words are left out; but after disclaiming everything the patentee says: "I claim an illuminant appliance." I point out these distinctions which appear to me to be material when

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reading or considering the remarks of the learned judges who decided the case in England, and if the original Canadian patent were identical in terms with the British patent, which has been a subject of litigation there, I do not think I would have very much to say, and probably could not impress the court very much with whatever I might say, respecting the question of the invalidity of the patent that has been passed upon by English courts. But I do say that there are these two very material distinctions: that in the British patent there was no disclaimer; and, in the British patent there was the claim of the manufacture in express terms: "I claim the manufacture substantially as hereinbefore described of the appliance." While in the Canadian patent, what appears to have been the thing that was covered by the patent, the thing which the patentee had in his mind, was the "illuminant appliance."

I submit, bearing in mind these two very material distinctions, that the English and Canadian patents are not analogous.

There are one or two preliminary points as to the *locus standi* of the plaintiffs which I submit for consideration. The first is the question of the effect of the statute which is cited by the plaintiffs themselves in their statement of claim and invoked by them as giving them a standing before the court, or, in other words, as giving their patent a legal existence. The statute in question was passed on the 9th of July, 1892, or after a lapse of five years from the taking out of the Canadian patent. The payment on the patent was only made for that partial period of five years, the statute was passed in 1892 and purports to grant relief for the neglect in fulfilling the provisions of the law on the part of Carl Auer von Welsbach and Frederick de la Fontaine Williams.

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The point I wish to make is that from the documents put in of record, the assignments, that neither Carl Auer von Welsbach nor Frederick de la Fontaine Williams, at that date, had any title or interest or right whatsoever in respect of that patent. The statute only granted relief to those two individual persons, and those two individual persons were in no need of asking for relief, and had no right to ask for relief, and the relief cannot avail to anyone who did not ask for it, and who was not granted it, who were not the owners of the patent at the time. It is evident from these documents that long previous to that date, in fact before the patent issued—the original inventor had parted with his interest in the patent; and it is in evidence that long before that statute passed, Frederick de la Fontaine Williams had parted with all his interest in the patent. The preamble of the Act throws some light upon that. They asked for relief because they say they were out of the country; and I assume from that that they plead ignorance of the law. But that same reasoning would not apply to the present company plaintiff, nor to the Welsbach Incandescent Light Company, who obtained the reissue. They were in the country and they are presumed to know the law. The Parliament of Canada would not have granted them any relief. Therefore, I submit that the statute is invalid in so far as granting relief, because the persons to whom it purported to grant relief had no interest in asking for it.

[BY THE COURT: This reissue was not made in pursuance of that statute in any way, was it?]

Not made in pursuance of the statute, but if the statute had not been passed, my lord, certainly the Commissioner of Patents would never have issued it.

The next objection which I make to the patent in question is, that the title of the reissue specification is

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illegal and misleading. The patentee in the specification of the original patent says: "My invention relates to the manufacture of illuminant appliances in the form of a cap or hood;" and he claims illuminant appliances consisting of a cap or hood. The title of what is termed the amended specification, which was in the application for the reissue but which was identical and word for word with the first specification, except as to the claim, is in the same words. He says that he has invented a certain new and useful appliance for gas and other burners, and it relates to the manufacture of an illuminant appliance in the form of a cap or hood. That is the title of the invention. Now the preamble and claim of the original specification are I submit, therefore, identical with the preamble of the reissue specification, and relate to an illuminant appliance; whilst the claim of the reissue specification relates solely to the method or process of making these incandescent devices. [Cites *Agnew's Law and Practice of Patents of Invention* (1); *Johnston's Epitome of Patent Law and Practice* (2).] If in what they term their amended specification, they amended the preamble or title of the specification in so far that it would give a true idea of what they claimed, namely, the method in the reissue, then it would not be open to this fatal objection. I submit that it is open to that objection, and that under those authorities it is bad. [He cites *Cochrane* v. *Smithhurst* (3).]

The question was raised by my learned friend as to the scope of the power of the Commissioner of Patents in respect of granting a reissue, and as to whether the court can inquire into his acts, as regards that reissue, as to whether he has acted within the statute in granting it. In other words, is the decision of the Commissioner final in respect to granting the reissue?

(1) P. 143. (2) P. 21.
(3) 1 Abb. Pr. C. 228.

As to this point I cite *Ridout on Patents* (1) where a number of American cases are collected; and I cite particularly a case of *Giant Powder Company* v. *The California Powder Company* (2). The ruling in that case, as well as the remarks of Chief Justice Field, seem to me to be directly in point with this case. The language in that case is applicable here, because we come back to the question of the application for the reissue. There is no mistake, no error, and no inadvertence, I submit, disclosed by the amended specification. The only thing which was done at all, if anything, was to alter the patent from an appliance to a process. They claimed in their original patent an appliance, and they say that the words "treated as hereinbefore mentioned" cover all this delicate process which was the gist and the substance of the invention. I submit that the words "treated as hereinbefore mentioned" do not cover the process, but that they cover the treatment of the cap or hood after it was manufactured. After it was manufactured into an illuminant appliance it had to be subjected to a certain treatment mentioned in the patent. The claim of the patent is clearly in respect of the article, to the illuminant appliance; and, after it is made into an illuminant appliance in the shape of a cap or hood, it is subjected to certain treatment mentioned in the body of the specification.

The reissue must be for the same invention. I do not think that that principle can be controverted. [Cites *Ridout on Patents* (3).]

It was decided in *Wicks* v. *Stephens* (4) that neither inadvertence, accident or mistake had caused the omission, and that the reissued patent could not be sustained.

I cite the case of *Powder Company* v. *Powder Works* (5). A patent for a process cannot, after a con-

(1) P. 184.
(2) 4 Fed. Rep. 720.
(3) Pp. 183, 184 and 185, and cases cited.
(4) 3 Bann. & A. 318.
(5) 98 U. S. 126.

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siderable lapse of time, be reissued as a patent for a product. If we take the converse of that rule, and apply it in the present case, it seems to me we are justified in saying that a patent for a product cannot, after a considerable lapse of time, be reissued for a process. The claim of the reissue being, as is manifest on reading it, solely for the method, I submit that that is an entirely different subject-matter from the claim of the original patent. That it is, in other words, for a different invention; and, that it is not authorized by section 23 of *The Patent Act*, which requires that the reissued patent shall be for the same invention.

I submit, further, that having disclaimed in the original patent all illuminant appliances except the particular appliance which he described in that patent, it was not open to him eight years afterwards to have patented a method which would embody all the elements disclaimed formerly.

By the surrender of the original patent he has abandoned all claim to the appliance, and he has no longer any protection in respect of that. His reissued patent comes back to the question of the method generally of making these illuminant appliances, irrespective of the form or the materials, composing the appliance. I speak of the incandescent materials.

It seems to me in reading the claim of the reissued patent, that in so far as it is a process, and that I think must be conceded, there is no doubt that the reissue expands the original patent, or expands whatever could be, by any possible construction, deemed to have been included in the original patent as a process. It expands the claim of the original patent in so far as the form of the appliance that is made is concerned. In the first patent the patentee says, "I make an illuminant appliance in the form of a cap or hood;" in the reissue he says, "I want to make an incandescent

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device, consisting of a filament, thread or fabric, no matter what shape, no matter what form, any kind of a filament, thread or fabric; I am going to make and adapt this process to it." There is an expansion of the original claim here, and an expansion after a special disclaimer is put in. I do not think that the doctrine of equivalents, in so far as creating the incandescent fluid with which to impregnate this mantle, has really very much application in this case. I submit that on the question of the doctrine of equivalents, it would be only equivalents known at the time of the invention. [Cites *Heath* v. *Unwin* (1).]

That would apply if the original patent were still in force, and if they still had a patent on the appliance; but, I submit that by the reissue they have surrendered all claim to the appliance, and they have restricted themselves solely and wholly to the method. What we must look at is the pith and marrow, the material substance of this patent. The substance of this patent was finding that you could take certain fluids and impregnate the fabric in the manner indicated. Dr. Carl Auer von Welsbach himself does not appear to have thought at the time he took out the first set of patents that thorinum was a substance that would answer the purpose; but he says in his patents which are produced afterwards, that continuing his researches he found that another substance may be substituted for one of those mentioned in the specification to make the illuminant, and such other substance is the oxide of thorinum, in combination with those that he had already mentioned.

The plaintiffs are occupying here a weaker position than they would have occupied if their original patent had subsisted. They have, by their surrender, surrendered their patent on the appliance. They have

(1) 5 H. L. C. 505.

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surrendered the original patent, and they have abandoned with that surrender, the claim to the appliance itself; and, they restrict themselves altogether now to the method. And, I submit, that is not for the same invention. I cite on this point *Merrill* v. *Yeomans* (1), that has already been cited by my learned friend, but, I submit, it is really a case that bears in our favour. This is an authority to show that a claim must be definite and plain so that the public may know what is and what is not included under the patented invention. It is the public who should clearly know this, not an eminent chemist or an eminent expert that the public have to employ to interpret what is the patented invention. It is the ordinary individual, the public, who is entitled to know what is really the patented invention, and if a layman, if a man not versed in chemistry, were to take up the specifications of the original patent, I hardly think he would inquire, and I hardly think that even Dr. Welsbach himself imagined, that thorinum was a good substitute for making that mantle. [Cites *Miller* v. *Brass Co.* (2).] To claim a certain improvement, and to omit to claim other improvements, is in law a statement that an improvement which is not claimed, either is not the patented invention or is dedicated to the public.

Then, the patentee has also expanded and broadened the claim in the reissue by claiming the filament, thread or fabric of different form, and so on, while in the original claim he has restricted himself to an appliance in the form of a cap or hood. [Cites *Mahn* v. *Harwood* (3); *Flower* v. *Detroit* (4); *Electric Gas-light Company* v. *Boston Electric Light Company* (5); *James* v. *Campbell* (6).] A patent for a machine

(1) 94 U. S. R. 568.
(2) 104 U.S.R. 350.
(3) 112 U.S.R. 354.
(4) 127 U.S.R. 563.
(5) 139 U.S.R. 481.
(6) 104 U.S.. 356R.

could not be reissued for the process of operating that class of machine, because if the claim for the process is anything more than the use of the particular machine patented, it is for a different invention.

I submit that a consideration of these two claims is very material in determining what is covered by the Canadian original patent and by the reissue, because, while the American patent relates to the appliance, the same as the original Canadian patent, this patent which was taken out in the United States in 1890, but for which application was made as early as 1886, relates to the method, and the claim of this American patent for the appliance was made in 1886. The American patent is taken broadly from this patent, and included in the reissue of the Canadian patent.

In 1886, after Dr. Welsbach had patented the appliance in England, had patented the appliance in the United States, under patents almost similar to the first Canadian patent, he proceeds in the United States to patent the method, and this is the claim of such method patent: "the method herein described of making incandescent devices which consist in impregnating a filament, thread or fabric of combustible material, with a solution of metallic salts of refractory earths, suitable when oxidized for an incandescent," and so on. That is the claim, I think, with all the words alike, even to the function that is contained in the claim of the reissue Canadian patent, upon which the plaintiffs rely in this case.

I submit that it was not competent for the plaintiffs to apply for a reissue embodying that new invention, which had been patented in the United States for upwards of four years. [He cites *Béné* v. *Jeantet* (1).]

Another objection I make to the claim of the reissue is that it is ambiguous. It is in evidence here by the

(1) 129 U. S. 683.

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experts that the salts of all refractory earths will not make an incandescent, and that it is only by resorting to experiments you can tell.

You have the example in the reissue. If in his claim the patentee attempts to put a blanket upon any discovery that may come after him, his claim is too broad, I submit. If he says, as it is said here, that you can take the metallic salts of refractory earths as generally suitable when oxidized for incandescent purposes, without indicating which are suitable, that leaves the subject-matter of the patent, and what is claimed by the patent, open only to be determined by resorting to experiments.

I come now to another point, which I will just touch on briefly. The plaintiffs say that their patent is a process patent. That is the one they are acting under. The English courts decided in effect that the English patent was a process patent, but I call the court's attention to certain of the remarks of the judges and of the learned counsel. Mr. Moulton for the respondent says:—"The patentee's method is to get a solution of the nitrates; the oxides do not dissolve." And, then, he goes on to say that the patentee gives three essentials of his process as forming the soluble nitrate. He argues that if this is to be treated as a process patent that the plaintiffs must practise the process which is the subject of the invention, they must practise it in all its essential elements; and, the evidence there went to show that they did not practise the process in respect of an essential element of forming the solution, viz., nitrate. These remarks run through the judgment too. In the English case, as will appear from the evidence quoted by the learned judges, and from their remarks, there is a process from start to finish. They take this specification of the patent, and they go through the process

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and make the article in which this process results; but here the plaintiffs in the present case did not do any such thing, and it is only such eminent men as Dr. Morton and Professor Chandler, and such men who are able, by experimenting in their laboratories, to make this solution and to practise the process from the beginning to the end.

I say that the plaintiffs here, not making the fluid, not being able to make the fluid, do not practise the process in its entirety. If they were building a machine, or if they were doing anything which could be done under the patent, they would be required to do all that was required to make the patented invention.

On the question of the refusal to sell at a reasonable price, the evidence, I submit, makes out a case against the plaintiffs on this head. The cost of the article produced is established, by the witness Granger, at about thirty-four cents. He says that up to January, 1893, I think, (the transfers will establish that) they asked $100 for this patented article. I think his evidence goes further and says that they did not find any purchasers at that price. I submit that this is very material in determining that such was not a reasonable price. The patent is forfeited, if any person desiring to use it cannot obtain it or have it caused to be made for him at a reasonable price. Can it be contended that for an article which only costs thirty-four cents complete, one hundred dollars is a reasonable price? The best evidence that it was a most unreasonable and arbitrary price is the fact that the very same article costing not one cent more to manufacture, is to-day selling for $3.50.

[BY THE COURT: Is the cost of manufacture material?]

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Of course, in the *Telephone* Cases (1), it was decided there must not be a refusal to sell. I think the question of leasing came up there, and it was decided that an offer to lease was not a compliance with the provisions of *The Patent Act*. In fact, I believe that the refusal to sell telephones was always coupled with a statement that we do not sell them, but we lease them, and that was held insufficient. I think I am correct in saying that; and, here, I do not think that the mere leasing would fulfil the terms of the statute. They are bound to sell at a reasonable price, and the demanding of an unreasonable price like $100 for this article is tantamount to a refusal to sell.

There is only one other point I will touch on briefly and that comes up with reference to one branch of the plaintiffs' case. The infringements complained of are with respect to importation and sale, and with respect to manufacture. Now, adopting the construction which the learned counsel for the plaintiffs put upon their reissued patent, and reading that by the light of their abandonment of whatever claim they had to the appliance under the original patent, it seems to me that the most they can contend for is that their reissued patent only relates to the process. In fact, I understood that to have been the position taken by my learned friend Mr. Hellmuth at the opening, and the position assumed by my learned friend Mr. Duclos, in summing up, that their reissue was solely for the process.

The point which I make is that if they have by their surrender of the original patent abandoned the claim to the appliance, that there can be no infringement against a party who imports and sells the manufactured article which is made in some other country. In other words, that the importation and sale of an

(1) 126 U. S. R. 1.

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article, the article itself not being protected by the patent, is not the practising of a process, when the process and that alone is covered by the patent. That would be material only for one branch of the defence; because the plaintiffs charge infringement both as regards the manufacture and as regards the importation and sale, and ask for an injunction against us in respect to both; and if their patent can only be construed as a process patent, and I submit there can be no question about that, and it is all that anybody can contend for on their behalf, the process patent does not protect the article itself, and that if it is manufactured in some country where their patent does not reach, say in Russia or in India, where they have no patent at all, and is brought in here and sold, that they have no legal machinery by which they can protect themselves.

J. F. Hellmuth, in reply:—As to the refusal to sell. I do not know that it requires a very ample answer, for this reason: *The Patent Act* does not say that a person shall not put an unreasonable price, even if it were that, upon an article, but it says that the inventor or the holder of the patent, under the amendment which is practically the same as the original Act, (section 37 of the Act of 1892) must be in readiness to supply it to any person desiring to use it upon payment of a reasonable price. Why, the very first thing that must be done under that section in order to bring anybody under the penalties of the Act is to show some person who desired to use it; and then, show the refusal to sell to that person at a reasonable price. There has been no pretense whatever that there was any person who ever desired to use this in the sense of purchasing it and it was refused him, and they have put one person into the witness box, and that person has proved what? First, that he made an application to purchase, if at all, not a mantle, but he asked the

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plaintiffs to perform an operation which was no part of their manufacture, to fit a light upon a machine or gallery which he took to them and asked them to deal with. Supposing a haberdasher were obliged to sell gloves, and I go in there and say, put them on my hands, of course, he can say I will do nothing of the kind. Suppose a grocer is obliged to sell apples, I ask him to send them to my house, he says, I will not do anything of the kind. If this witness wanted, even at that date, to make a case, he might have shown that he had applied for the simple purchase of a mantle, the mantle covered by this patent, if anything is covered by it, and had been refused. So that I submit there is nothing whatever before the court here to show that there has been such a refusal.

The next point which I wish to take up is as to the effect of the statute of 1892, and upon that I have but very few words to say.

I ask the court to look at the preamble, because that statute shows that Dr. Carl Auer von Welsbach had disposed of part of his interest in this patent at the very time that he made the application to the Welsbach Incandescent Light Co., the father, so far as the chain of title goes, of the plaintiffs before you now. What concealment was there in this? Parliament were advised that he had parted with part of his interest, but he has still an interest, as I am advised. It may be as a stockholder or in some other way that he has an interest in this company, and furthermore, he did pay the fee to the Commissioner of Patents, and when the court looks at the patent it will be seen that it acknowledges the receipt from Dr. Carl Auer von Welsbach of that fee. The patent was renewed; but, if he had not been named, if this company had not been named, surely the Act is conclusive on that point, and you cannot go behind it. That receipt only

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appears upon the original, and the certified copies. It is only the original patent. There is no question about this, the object and purport of the Act was to admit, as your Lordship has said, this patent to be kept alive practically in whatever hands it might come into, and to allow it to be extended, and not to work a forfeiture; but if it were not, what right has this defendant to complain? He was not a party or privileged in any way. He is not injured by whoever took out the patent, whether Dr. Welsbach or the company, and he cannot, I submit, be heard here to question the right of the company, or of anybody else, who has a proper chain of title from Dr. Carl Auer von Welsbach, to take out the extended term of the original patent.

Then, in addition, the Commissioner was the proper authority. He says, under the very Act, by his own receipt, "I have received this fee." Can any doctrine be invoked which would ask a court of justice to proceed upon the question that the Commissioner had exceeded his duties in doing that? The Commissioner could not have taken the fee without the Act. He got the power to take the fee by the Act, and he took it, and granted the extension.

My learned friends have said that the Welsbach Company were not the owners at the time of the surrender. I find that at the date of the surrender, the entire title to the patent, not only in the province of Quebec which would be quite enough perhaps for this purpose, but throughout the Dominion of Canada, the last one coming in being the city of Halifax, had come into the Welsbach Company; and, therefore, it is not necessary for me to dwell upon that further than to say that if they had not been at that date, at which this document conclusively shows they were, the sole owners of the patent, and if they had not the sole interest, the only party that could complain would be

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the other party who had an interest; but, if the other party, and that is all my learned friend can say, is the Auer Light Co., the plaintiffs in this action, the defendant cannot be heard, when the plaintiffs come here and say, we claim our interest in the patent by subsequent assignments. And, there again, the action of the Commissioner, I submit, was conclusive.

Now, when I come down to what might be termed the marrow of the case, we find this extraordinary fact almost admitted, that under the first patent, if we had that alone, we would be in a position to restrain the defendant; and that under the second patent, if we had that alone, the reissued patent, we would be in a position, except as to one branch, to also restrain the defendant. We would be able, if we had been content with patent No. 1, to stop manufacturing; we would have been able, had we only taken out the reissued patent, No. 2, to stop him. Now, if that is the case, must not there be some very close connection between the two patents? It follows, as it seems to me, as a matter of natural deduction, that if we could have restrained this defendant from performing the work he proposes to do under either patent, there must necessarily be the very closest connection between the two; and, when you come down to the patent, the first thing, I submit, that you are met with is, can the court say by any construction of these two patents, the patents themselves and nothing else, that they are, therefore, a different invention? Is there any question that they are not for the same invention? It is the identical specification and process set out in a somewhat more or less minute detail. Can anyone say that Dr. Carl Auer von Welsbach had in one patent one invention, and in another patent another invention, unless he had in one patent the appliance, and in the other the process. It seems to me that the invention described

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is exactly the same. The discovery certainly was the same. The court has said that it may be that the first patent is the broader patent, and that the second patent is the narrower patent. I have been of two or three opinions myself, as to that. The only safe ground that I felt I could tread upon was that the second patent was in no sense broader than the first, and might be somewhat narrower; but, that it certainly was not broader, and that is all we are concerned with, because if the first patent was a wide patent, and the second patent was a confined patent in any way, for part only of the same invention, we would have a perfect right to take it out at any time, even assuming that the action of the Commissioner of Patents was not conclusive.

I submit the two patents are identical in law. They are in law absolutely identical. I have, as I say, varied in opinion, but after spending as much time as I could devote to this, and looking at the authorities, I could not come to any other conclusion than the conclusion I now submit to the court, that, as a matter of law, those two patents are the same. The first patent claims, unquestionably, the appliance made and constructed by the process described in the patent; and as a matter of law, from the description in that and following what is cited by my learned friend Mr. Duclos, that would cover and must cover the process. The distinction being simply this, that if a person simply patents a product irrespective of the methods by which it is brought into existence, he does not cover, of course, the process; but if he identifies his product by making it the product only of a certain process, he has made that process as much a part of his patent as the product itself. That is the distinction as I draw it from the American cases that have been cited. Therefore, I submit that we had in our first patent a patent

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for a product of a process, and in that way, necessarily, as a matter of law, the process itself. Then, if that were so, in what respect, if any, did we alter that by the second patent?

I confess that by the simple wording of the second patent, the reissued patent, we appear to claim merely the process, and we appear to have waived—I am speaking now of the English patent as it simply would strike the lay mind, if I may say so, reading it the first time—we appear to have given up the product; but, as a matter of fact, and as a matter of law, we did not. We really continued to hold the product only of that process, I admit. Not a product made by an entirely different process, following other steps, but we did hold, as a matter of law, the product of that process.

I submit that the American authorities do show some difficulty in keeping a product under a process patent, protecting a product under a process patent; but the English decisions, and where they conflict on this point with the American decisions, I assume the court will follow the English decisions—the English decisions have gone to a very great length in protecting from importation abroad the product of a defined process where the patent only covers the process.

[Cites *Elmslie* v. *Boursier* (1); *Wright* v. *Hitchcock* (2); *Van Heyden* v. *Neustadt* (3).]

In one of these cases a proposition was fought out very strongly, and it arose from the manufacture of a product that was comparatively common, and the counsel put it to the court in this way: Supposing a man discovered a new process for making flour, and the result of that process was a flour of a particular kind, could you stop the importation of flour from

(1) L. R. 9 Eq. 215. (2) L. R. 5 Ex. p. 37.
(3) L. R. 14 Ch. D. 230.

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abroad, say if one went over to France and procured it made by that process? The court said it could. I confess it was very startling to me, but they said, otherwise what refuge has a patentee? As soon as you patented a process, a man might step over to France, or Belgium; or Holland, where there are no patent laws, and manufacture the article and send it in.

On that point I would call attention to the fact that the English judges have had a great deal more difficulty in bringing the law to mean what I have endeavoured to say that it does now mean, because the English Act only deals with the making and working of an invention, whereas our Act deals with the vending and use. The English judges said they might find some difficulty in the case of a man who imported for his sole and only use, without any intention of selling, an article made abroad according to a process, because they had nothing in their Act but the making and working of the invention, but they held the vending covered work. Now our Act mentions both use and vending. Its use is made an infringement.

I said, to return for a moment, that the two patents were alike; the second patent covers the process and, as a matter of law, affords protection to the product of that process. The first patent covers the process and the product only of that process. There was, therefore, in law, no distinction between the two; but there was in the reissue a better and clearer, and more definite and accurate, statement of the steps of that process than were put into the first patent; and, it is only in that respect, I submit, that the two patents are at all different or vary, and that they have no different legal effect. The purpose of the reissue was that it might be beyond peradventure shown to the world at large what exactly our invention was by its claiming clause, without causing them to go back and read over

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the specification. The common man would have learned it if he had gone back and read over our first specification, but the common man could not learn it so easily from our first claim, without doing that, and he could learn it more easily from our second claim by the way in which it was therein set out. And, we find that it has been followed here by a person who certainly cannot be called a chemist—this defendant, in the production of mantles. It is useless, I think, to attempt to say that our directions are not amply sufficient to enable anyone to practice the process therein set out; and the point that there are two inventions covered by this separate patent, I submit, falls to the ground entirely. I submit that no little weight must be attached to the fact that this is a master or pioneer patent. Mr. Justice Bowen, in *Procter* v. *Bennis* (1), has dealt with this question of pioneer patents in one case, and in this particular case the English counterpart of this case was dealt with by the Court of Appeal; they do not indulge in any sneer at the term "master patent" or "pioneer patent," and although they do say it is somewhat of a slang term, they add the dignity of that court to the slang, and use it and give it its weight in determining the question of equivalents.

We had a right under the first patent to the process therein set out, which consisted of several steps, and we say that we had, as a pioneer or primary discovery, or invention, the right to take all the natural equivalents, or substitutes for the various steps, and in that direction to perform our process substantially as therein set out.

I think it was in *Clark* v. *Adie* (2) in which Lord Cairns laid down the rule, that although a process or a method of manufacture might consist of twelve or thirteen steps, even if anyone subsequently endeavour-

(1) 36 Ch. D. 764. (2) 2 App. Cas. 315.

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ed to obtain the result brought about by that method or process of manufacture, and left out—he went as far as to say four or five of the steps—left them out altogether, but took into effect and substance the invention that had been patented, that he would be held an infringer. That case was cited with approval in the judgment of the Court of Appeal in the English case involving this patent. There they left out the lanthanum. Here, we do not find that any of the steps have been omitted. Every step detailed in the original patent has been practically and substantially followed, and the only thing that the defendant has done is to alter, in the minutest way, the character of the solution. If a patentee said: One of my methods is, or one of the steps in my process is, to soak a handkerchief in water; and somebody came along afterwards and said: I do not follow your process, because I soak the handkerchief in milk or ammonia, and if milk or ammonia were the chemical equivalents for water, and not the physical equivalents in the mere question of saturation and moisture, nobody could for a moment say that that person was not infringing the patent in bringing about the result. That is really what is done here. I am not very much concerned whether Dr. Welsbach knew or did not know at the moment that this patent was taken out, although I think, my lord, I can show you that he must have had a very good idea, that thorinum would do the same work, perhaps, although not to the extent he subsequently discovered it would do, but, as I say, I am not very much concerned whether he did know or did not know it, at that time. The real question is, is thorinum nitrate and cerium an equivalent to-day, a physical equivalent in this patent for this lanthanum and zirconium? That, it seems to me, is the test. The Court of Appeal laid by no means the stress that even

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Mr. Justice Wills, who gave judgment for the plaintiff, laid upon the solution. Your lordship will notice that they treat it, as I submit it should be treated, as simply one step in a long and complicated process, and Lord Justice Smith, I think it is, says that the counsel for the defendant has treated this case as if it were the patent for the making of a compound. I entirely dissent from him. It is nothing of the kind.

[BY THE COURT: Mr. Justice Wills was, it appears, inclined to treat it somewhat in that way, because they apparently had considerable evidence as to how far you could vary the formula.]

Yes, but your lordship will notice in the Court of Appeal that they took the broader and wider view of it, and in fact one of the judges said: The defendant leaves out lanthanum and does not put in any equivalent. I am not going to treat it as a matter of equivalent.

Our position is that under the first patent we would have had a perfect right to stop anybody from using a solution of these rare earths in such a manner as to be the equivalent—the physical equivalent of our solution. The evidence is conclusive. The evidence is not seriously combated that thorinum and cerium form the physical equivalents for the lanthanum and zirconium mentioned in the patent.

My learned friend laid some stress on the fact that we rely on the English patent, and that the English patent differed from our first patent in that there was no disclaimer in the English patent. Now, the disclaimer in the patent has absolutely, I submit, no effect whatever. The law would oblige us to disclaim, if we did not do so, just exactly what we do disclaim. We have stated in words what the law would have attached to our patent in any event. What does he say? Having thus fully described the

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nature of my invention, and in what manner the same has to be performed, he says: "I hereby disclaim all illuminant appliances for burners, except that included in the following claiming clause." He could make no claim to any burner except that included in the following claiming clause, because the claiming clause is a claim for all burners treated in that way made by that process, and he had a right to no other burners except those treated in that way, and made by that process. I submit that the disclaimer helps them in no way. It is immaterial whether it is there or not. The law would not have given them any more, and he did not perform any act of generosity to the public by what he did. What is not claimed unquestionably is dedicated to the public whether there is an express disclaimer or not.

Counsel for the defendant have raised some question about the title of the reissue, as to it being misleading. I think it is fair to your lordship to say that in that respect they have been citing English cases, under the English law, which is entirely different in that respect from the Canadian law. Of course our Patent Act resembles, in its complexion and in its bearing, much more closely the American than the English Act, follows it much nearer. Of course they have no such things as reissues at all in England.

[Cites *Curtis on the Law of Patents* (1).]

As to the scope of the power of the Commissioner in granting the reissue. Counsel for defendant has practically admitted that all the cases will warrant is that if upon a bare comparison of the documents the court can say, (and that is, I am satisfied, the ruling of the courts of last resort in the United States) if from a bare comparison of the two documents your lordship can say they do not cover the

(1) 3rd Ed. p. 201.

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same invention, that a man has invented one better, and he wants to get it in, and it is not the same equivalent at all, then you can say the Commissioner has erred. But if it is not that, there is no authority, I submit, that goes to the extent of allowing a court to intervene or interfere, until it is perfectly apparent from the mere instruments themselves that there is not the same invention. Then I admit at once, the court is entitled to say, we have got two inventions, and we must determine then the question of whether they have broadened their claim or not; or whether they have gone into something entirely new. It cannot be urged for one moment, after the admission, that either patent would protect us against this infringement, that we have two inventions here. Can it be suggested, with the specifications that are in, that there is anything like two inventions? Therefore, I submit that the action of the Commissioner in this matter is final and conclusive, and that this court has no more jurisdiction, with all deference, to review that decision, than a court that had been constituted as your lordship's is in many cases, a court of final resort, than any other court would have a right to take up a matter that was not appealable from your lordship.

Then as to the case of the *Powder Company* v. *The Powder Works* (1), cited by counsel for defendant. He maintained that a patent for a process cannot be reissued as a patent for a product, after a considerable length of time. It should have been the opposite, I think. It should have been the case of a patent for a product cannot be issued, and reissued as a patent for a process after a considerable length of time.

Can anybody say that Welsbach's first patent here could have been made by one person at one time, and that the reissued patent could have been made by an

(1) 98 U. S. R. 137.

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other person at another time, and both issued as good patents? Why, the case just shows that it was for a product of a different process, and it is an authority, not against us, but one that makes strongly in our favour.

Perhaps it is not necessary to say anything in regard to the question of the practising of the process here. But the French case that Mr. Duclos has cited shows that the process commences at the moment you start impregnating the filament or thread, and just as we can buy the cotton, or thread, or asbestos, so, I think, we have conclusively shown by the evidence that this thorinum nitrate is a commercial article. And I care not whether it be only for the purpose of incandescent light, or other purpose, it is a commercial article for sale in the United States and abroad, and we have a perfect right to buy it and use it. I would ask the court to consider, at all events, that the plaintiffs' case is meritorious in this respect, that they come here as the legitimate successors of the discoverer Dr. Carl Auer von Welsbach in respect of a discovery which was world-famed, and has had world-wide results. And we meet as their opponent in the case a man who has absolutely made no investigation whatever, who has been an employee of their own, who has endeavoured to get from them the advantage which they were entitled to under the patent that they had purchased at a great expense from Dr. Carl Auer von Welsbach; and that he is not entitled to any meritorious consideration other than what the very strictest interpretation of the law will warrant him.

At the conclusion of the argument, by permission, Mr. *Martin* cited the following cases upon the point that the importation and sale of an article is not the practising of a process. *Cochrane* v. *Damer* (1); *Roper* v. *Chicago Manufacturing Company* (2).

(1) 94 U. S. R. 789. (2) 20 Fed. Rep. 853.

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THE JUDGE OF THE EXCHEQUER COURT now (January 11th, 1897) delivered judgment.

The plaintiff company brings this action to restrain the defendant from infringing letters patent number 46,946, granted on the 1st of September, 1894, to the Welsbach Incandescent Gas Light Company (Limited), and for an account of the profits made by the defendant by the manufacture, sale and use of lights or devices for lights manufactured in accordance with the process protected by such letters patent. This patent is a reissue of letters patent numbered 23,523, that on the 2nd of March, 1886, were granted to one Frederick de la Fontaine Williams as assignee of the inventor, Dr. Carl Auer Von Welsbach. The patent of March, 1886, was surrendered when that of September, 1894 was issued, and the first question to be determined is: Whether the latter is a valid and subsisting patent, the protection of which the plaintiff company, as assignee of the patentee, is entitled to invoke in this action?

But before considering that question it will be convenient, I think, to compare the two patents and to see what the invention was and wherein they differ. The letters patent of March 2nd, 1886, numbered 23,523, were issued for "an improvement on illuminant appliances for gas and other burners." In the first paragraph of the specification, the inventor, Dr. Carl Auer Von Welsbach, of Vienna, in the Empire of Austria, alleges that he has invented a "new and useful illuminant appliance for gas and other burners" of which he proceeds to give "a full, clear and exact description." "My invention," he continues, "relates to the manufacture of an illuminant appliance in the form of a cap or hood to be rendered incandescent by gas or other burners so as to enhance their illuminating power." For this purpose he uses a compound of the

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oxides of certain rare earths that he mentions, which substances he states "in a finely divided condition when they are heated by a flame give out a full, large almost pure white light without becoming volatilized or producing scale or ash after being kept incandescent for many hours, but remain efficient without deterioration even when they are long exposed to the air." He then gives the proportions in which such substances may in compounding be varied, and which he has found suitable.

Then comes a description of the process of making the illuminant appliance, the cap or hood. The description is as follows:—

For applying the substances mentioned as an illuminant I use a fine fabric preferably of cotton previously cleansed by washing with hydrochloric acid. I saturate this fabric with an aqueous solution of nitrate or acetate of the oxides above mentioned, and gently press it until it does not readily yield fluid, so that in stretching or opening out the fabric, the fluid does not fill up its meshes. The fabric is then exposed to ammonia gas, and when it has been dried it is cut into strips and folded into plaits. In order to give the fabric thus prepared a suitable shape, a fine platinum wire is drawn through the meshes of the net and bent to the form of a ring so as to give the fabric the shape of a tube, the edges of which are then sewn together with an impregnated thread. The cap or hood thus formed can be supported on cross wires in the chimney of the lamp, or the platinum ring may be attached to a somewhat stronger platinum wire serving as a supporting stem by which the hood can be secured to a holder on the burner tube, the platinum ring of the hood being thus held about an inch or more above the burner.

On igniting the flame the fabric is quickly reduced to ashes, the residuum of earthy matters nevertheless retaining the form of a cap or hood.

After stating that "obviously fabrics of various forms or construction may be employed according to the character of burner to which they are applied" and giving directions as to the means that may be adopted to protect the fabric and prevent its rupture when exposed to a strong current of gas, the inventor dis-

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claiming all other illuminant appliances for burners' claims:

An illuminant appliance for gas and other burners consisting of a cap or hood made of fabric impregnated with the substances hereinbefore mentioned and treated as hereinbefore described.

The patent of September 1st, 1894, numbered 46,946, and the specification attached thereto and made part thereof, differs from the surrendered patent in respect only of the claim, which in the reissue, is as follows:—

I claim the method herein described of making incandescent devices, which consists in impregnating a filament, thread or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent and then exposing the impregnated filament, thread or fabric to heat until the combustible matter is consumed.

The specification of the English patent No. 15,286, granted to Dr. Von Welsbach for his invention, and which has been sustained in England by Mr. Justice Wills and by the Court of Appeal, is substantially the same as that contained in the first Canadian patent. In the specification of the English patent the inventor claims as his invention the manufacture substantially as described of an illuminant appliance for gas and other burners, consisting of a cap or hood made of fabric impregnated with the substances mentioned and treated as set forth. The description of the substances to be used in impregnating the fabric, and of the process of manufacture and treatment, are the same in the English and in the two Canadian patents. The differences occur in the language used in the specification to describe the claim. In the English patent the inventor claims as his invention the manufacture in a specified method of an illuminant appliance. In his first Canadian patent he claims the illuminant appliance manufactured in a specified method, and in the second Canadian patent he claims a specified method

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of manufacturing such illuminating appliances; the method in each case being the same and described in identical terms. The method or process of manufacturing the illuminant appliance was, it is clear, new and useful, and the illuminant appliance the result or product of that method or process of manufacture was also a new and useful appliance. The process is not useful for any other purpose than the manufacture of such illuminant appliances, and apart from a question of equivalents, to which it will be necessary to refer presently, there is no known way of manufacturing or producing such illuminant appliances, except that which the inventor has described.

The rare earths particularly mentioned in the specification are the oxides of lanthanum, zirconium and yttrium, or to use the names by which such oxides are known, lanthana, zirconia, and yttria. The proportions in which these substances are to be compounded to obtain the solution with which to saturate the cotton fabric may, it is stated, be varied within certain limits, and the following proportions are given as suitable:—

60 per cent zirconia or oxide of zirconium;

20 per cent oxide of lanthanum;

20 per cent oxide of yttrium.

The oxide of yttrium may be dispensed with, the composition being then:—

50 per cent zirconia;

50 per cent oxide of lanthanum.

Instead of using the oxide of yttrium, ytterite earth, and instead of oxide of lanthanum, cerite earth containing no didymium, and but little cerium may be employed.

For part of the zirconia a mixture of magnesia and zirconia may be employed with a little loss of intensity of the light given out.

In these particulars also the two Canadian patents and the English patent are identical.

The formula given affords five examples of the compound that may be used. If magnesia is added the number is increased to ten. Cerite earth and ytterite

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earth, it appears, contain rare earths other than those mentioned, such as erbia and thoria, and if the proportions of the several substances mentioned be varied the number of compounds that may be used is increased indefinitely.

The invention, the subject of these patents, is described by one of the plaintiffs' witnesses, Mr. Waldron Shapleigh, in the following terms:—

> The invention consists in the discovery of the fact that when certain of the oxides of rare earths are exposed to high heat in the filamentary form, they were coherent; so that after saturating say, a cotton fabric in a solution of such rare earths for producing said filamentary form, there would remain on burning out the carbonaceous and driving off the volatile matter, an exact duplicate of the original structure in the oxides of these rare earths, and that owing to the coherence of the particles, the structure would hold its shape, and owing to its durability and refractory quality, can be utilized as an incandescent.

Dr. Morton and Professor Chandler have in their evidence stated substantially the same thing in other words. It was known of course prior to Dr. Auer Von Welsbach's discovery that you could saturate a cotton fabric with a solution of certain salts, and that on burning out the cotton the earthy matter would be left in the form of the fabric. It was also well known that owing to their refractory quality the oxides of the rare earths mentioned, or most of them, became highly incandescent when exposed to heat. But it was not known that the oxides of such rare earths that would be left after the vegetable matter was burned out would have sufficient coherence and flexibility to be of any practical use as an incandescent. Dr. Morton says that it was a radical discovery to find that these refractory earths treated in this way would act in a manner that to-day to the scientific man is mysterious; that it was an utterly unexpected thing and not for a moment to be anticipated from anything then known. With that view Professor Chandler agrees. Referring

to the hood or mantle made according to the process described in the patent, he says that it differed from any device which had ever been introduced before for artificial illumination in its peculiar physical condition. Every thread, even the most minute fibres of the combustible tissue primarily employed for constructing the hood, was reproduced in the refractory earths. No one could, he says, have foreseen that the refractory earths would replace atom for atom every particle of the fabric, and that it would cohere. It was known that if one attempted to moisten any one of these refractory earths and knead them together to produce an incandescent fabric the result would be a failure because of want of coherence, and no one could have foreseen that the refractory earths produced by the ignition of the nitrate in the cotton tissue would possess properties so different from those which the earths prepared in another way exhibited. That, he adds, was a discovery of Von Welsbach.

The patent of the 2nd of March, 1886, was granted to Williams and his assigns for the period of fifteen years, but the partial fee required for the term of five years only was paid; and the parties entitled to the patent failed to pay the further fee required to keep the patent in force during the residue of the term of fifteen years. It being impossible after the expiry of the five years for the persons entitled to the patent to obtain from the Patent Office, in accordance with the provisions of section 22 of *The Patent Act*, a certificate from the Commissioner of the payment of such further fee, a special Act was passed to confer upon the Commissioner certain powers for the relief of Carl Auer Von Welsbach and others (1). This Act was assented to on the 9th of July, 1892, and authorized the Commissioner, notwithstanding what had happened, to

(1) 55-56 Vict. c. 77.

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accept from the said Von Welsbach and Williams the applications and usual fees for the renewals or extensions of such letters patent for the remainder of the term of fifteen years from the date thereof; and to grant and to issue to such Von Welsbach and Williams the certificate of payment provided by *The Patent Act.*

It appears from the assignments in evidence that prior to the date of this Act, Williams had assigned his interest in the patent to one Arthur O. Granger for all of Canada, excepting the provinces of Quebec, New Brunswick, Nova Scotia, and Prince Edward Island, and to Messrs. Pearson & Buck, of Boston, in respect of the provinces named; and it is objected that this Act is not effective because the title to the patent was not at that time either in Von Welsbach or Williams. I do not think, however, that this objection should prevail. Williams retained at least a partial interest in the patent until the 2nd of April, 1892; and by the second section of the Act referred to, it was provided expressly that any person who had during the period between the 2nd of March, 1891, and the date of the extensions or renewals authorized by the Act, acquired by assignment or otherwise any interest or right in respect of the invention should continue to enjoy such interest or right as if it had not been passed—showing very clearly that it was the intention of Parliament to permit the payment of the usual fee for renewal or extension of the patent irrespective of the person who at the time the Act was passed would be entitled to the patent.

The question as to whether the Welsbach Incandescent Gas Light Company (Limited) were, on the 1st of September, 1894, the persons entitled to the new patent is also in controversy. Mr. Hellmuth for the plaintiff company thinks that the assignments in

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evidence show that at that date the Welsbach Incandescent Gas Light Company (Limited) were solely entitled to the patent; but on this point, after examining the several assignments, I agree with Mr. Martin that there was an outstanding interest in Arthur O. Granger in respect of the provinces of Quebec, New Brunswick, Prince Edward Island, and Nova Scotia, excepting the city of Halifax. Granger, however, as appears from his affidavit of the 25th of August, 1894, made in support of the application for the reissue, was the general manager of the company, and in his affidavit he declares that the Welsbach Incandescent Gas Light Company (Limited), were at that date the sole owners of the said patent. I infer, therefore, that he had either assigned his interest to such company by some instrument not before the court, or that he was under the assignment mentioned merely a trustee for the company, and for this reason I think the objection that is made against the patent of September, 1894, on that ground, fails.

Another objection taken to the validity of the patent of September, 1894, is that the Commissioner had no authority or jurisdiction under the circumstances of the case to cause such patent to be issued. By the 23rd section of *The Patent Act*, it is provided that:

Whenever any patent is deemed defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a right to claim as new, but at the same time it appears that the error arose from inadvertence, accident or mistake, without any fraudulent or deceptive intention, the Commissioner may upon the surrender of such patent and the payment of the further fee hereinafter provided, cause a new patent, in accordance with an amended description and specification made by such patentee, to be issued to him for the same invention for any part or for the whole of the then unexpired residue of the term for which the original patent was or might have been granted.

The first occasion on which we find any provision in any Canadian statute on this subject is in the Act

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of the old Province of Canada, 12 Vict. c. 24, section 7, which enacts as follows:—

That whenever any patent heretofore granted or hereafter to be granted as aforesaid shall be inoperative or invalid by reason of a defective or insufficient description or specification, if the error have or shall have arisen from inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the patentee to surrender such patent, and to obtain a new patent to be issued to him for the same invention for the residue of the unexpired period of the original patent, in accordance with the patentee's corrected description and specification.

This provision was no doubt taken or adopted from the thirteenth section of the United States Patent Act of 1836, by which it is enacted:

That whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention more than he had or shall have a right to claim as new; if the error has or shall have arisen by inadvertency, accident or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the Commissioner upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification (1).

The defendant claims that the Commissioner had in the present case no authority to issue a new patent because the surrendered patent was not defective or inoperative by reason of insufficient description or specification or by reason of the patentee claiming more than he had a right to claim as new; that there was no error in that respect and that therefore it could not be said that the error had arisen from inadvertence, accident or mistake. The plaintiffs' answer to that is that the decision of the Commissioner is conclusive. Referring to this question as it arises upon the United

(1) Walker on Patents 3rd Ed., p. 594.

States Patent Law it is said in the third edition of *Walker on Patents*, section 221, that

> It is still an unsettled question whether the decision of the Commissioner that the existence of the statutory ground for a reissue exists when he grants a reissue is conclusive; or is a subject of review and possible reversal in a suit for infringement of a reissue.

In a note to the section referred to will be found collected for the use of counsel who have occasion to argue, and of judges who have occasion to decide, the question, a long list of the principal cases that support the negative of the proposition, and also a list equally long of those that support the affirmative. The same question arises upon the Canadian statute, but there is not, it seems to me, in the form in which the provision is now enacted, so much room for a difference of opinion and for a conflict of authority as there is in the United States. By the Canadian Act, as it was passed in 1869, and has been re-enacted since, the Commissioner may entertain the application for a reissue if the patent is deemed defective or inoperative for any of the causes mentioned. The use of the word "deemed" imports that a discretion, a judgment, is to be exercised. [*De Beauvoir* v. *Welch* (1).] But by whom? In the first place, perhaps, by the applicant; but in the end, and as a foundation for his jurisdiction, by the Commissioner. His jurisdiction does not depend upon the patent being in fact defective or inoperative for the reasons specified; but upon the patent being deemed for such reasons to be defective or inoperative. How is the court, in an action for the infringement of the new patent, to try out the question as to whether or not the Commissioner deemed the surrendered patent to be defective or inoperative by reason of insufficient description or specification, or by reason of the patentee claiming more than he had a

(1) 7 B. & C. 278.

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right to claim as new? The patent might be neither defective nor inoperative, and yet the applicant and the Commissioner might be honestly mistaken and might in good faith deem it to be defective or inoperative. Must not the question in such a case be concluded by the action of the Commissioner? It seems to me that it must at least in an action for infringement of the reissued patent. In respect of the question as to whether the first Canadian patent in this case was in fact defective or inoperative for any of the reasons mentioned in the statute, I should, if it were necessary for me to come to any conclusion upon it, be inclined to agree with Mr. Martin that it was neither defective nor inoperative. But that, as I have said, is not the question upon which the jurisdiction or authority of the Commissioner of Patents is founded. That may be true, and still it may also be true that the Commissioner deemed it to be defective or inoperative for some one of the specified reasons; and in that case he had jurisdiction to entertain the application, and his action and decision must, I think, be taken to be final and conclusive.

Another objection to the patent, and perhaps the most important, is that the new patent is not for the same invention as that which was the subject of the earlier patent. The difference, as we have seen, between the two patents lies in the statements of the claim. In the patent of March, 1886, the inventor after stating in his specification, amongst other things, that his invention relates to the manufacture of an illuminant appliance, claims as his invention an illuminant appliance for gas and other burners consisting of a cap or hood made of a fabric impregnated with certain substances therein mentioned and treated as therein described. This is, it seems to me, a claim for an illuminant appliance manufactured in the way

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or method specified and described in the patent. We have seen that the illuminant appliance which could be produced by the process described was a new and useful appliance, and that the process was also new and useful. In that state of circumstances the inventor was, it seems to me, entitled to a patent either for the process by which the appliance was produced, or for the appliance produced by that process, or for both; and that so long as it happens to be the case that the process described is not useful for any other purpose than that to which the inventor had applied it, and the appliance cannot be made by any other process, it is immaterial whether the patent is issued for the process by which the appliance is produced, or for the appliance produced by the process, or for both. In the new patent, the patentee claims, as has been seen, the method, described in the specification, of making incandescent devices which consist in:—

impregnating a filament, thread or fabric of combustible material with a solution of metallic salts of refractory earths suitable when oxidized for an incandescent, and then exposing the impregnated filament, thread or fabric to heat until the combustible matter is consumed.

The method or process here claimed is a method or process described in identical terms in the specification to the first patent. The word "device" is used instead of the word "appliance," but I do not see that the use of the former word instead of the latter in any way enlarges the claim. In respect of the use, in the process of manufacturing the hood or mantle, of certain refractory earths there is in the claim in the patent of September, 1894, no word of reference or limitation to the refractory earths mentioned in the specification; but it is conceded by counsel for the plaintiff that the words "salts of refractory earths" occurring in the statement of claim in his patent must be limited or restricted to such refractory earths as are mentioned in

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the preceding part of the specification, or to their equivalents. If this is a true construction of the specification, and I agree that it is, then the claim in this respect is not larger than the claim made in the patent of March, 1886; for while that claim is in its terms for an appliance made by impregnating a cap or hood with the substances mentioned in the specification, the law would give the patentee protection against the use of any such substances as would be the equivalents of the refractory earths so described. That has, I think, been determined in the English case before Mr. Justice Wills, and in the Court of Appeal, to which I have referred (1). There the defendant claimed not to have infringed the English patent to which reference has been made, because in making the impregnating solution lanthana was omitted and erbia substituted therefor; but it was held that notwithstanding this departure from the formula, if I may use the term, which the inventor had given for the making of his solution, the defendant in that case had infringed the patent. I am of opinion, therefore, that the new patent issued in this case was issued for the same invention as that for which the earlier patent of March, 1886, was issued.

It is also contended that the reissued patent is invalid because the applicant was guilty of laches in making his application for the reissue. The doctrine that the right of a patentee to a reissue is lost in certain cases by lapse of some time after the date of the expiry of the original patent and before the application for the reissue, has been established in the courts of the United States and recognized in Canada. The doctrine itself has no statutory support. The legislature has not either in the United States or in Canada

(1) *The Incandescent Light Co. Ltd.* v. *The De Mare Gas Light System Ltd.* 13 R. Pat. Cas.

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required that an applicant for a reissue should come to the Commissioner within any definite or specified time. It is a doctrine that rests wholly upon the authority of decided cases. The object aimed at by the rule is good; but the rule is, I think, open to some objection when enforced by a court. If it were applied by the Commissioner there would not be the same objection; for if he refused to issue the new patent because the application had been made too late, the patentee would not have surrendered his original patent, and would still have the benefit of it, whatever that might be. But if the rule is enforced by a court very grave injustice may be done. Take, for illustration, a case in which there was a perfectly good and valid patent, but which was deemed defective or inoperative for some reason. The question whether it was defective or not might be a very abstruse and difficult question. The Commissioner deems it to be defective, and though a long time has elapsed he accepts the surrender of the original patent, one which was in fact good and valuable, and causes a new patent to be issued. Later the reissue comes in question in the court, and the more valuable the patent is the more likely it is to be infringed and to be brought into question, and the court says to the patentee: You were too late in making your application to the Commissioner for the reissue and for that reason, and that reason only, we refuse to sustain the new patent notwithstanding that the legislature has not imposed any such terms or conditions upon you or the Commissioner, and notwithstanding that we are not able to restore to you the use and benefits of your surrendered patent.

That is a rule that I should not care to adopt or follow unless compelled to do so by the clearest

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authority. If the reissue gives the patentee something that he was not entitled to, then he should be held not entitled no matter how promptly the application was made; but if nothing more is granted to him than that to which he was entitled when the original patent issued and the only effect of the reissue is to correct some error in the specification that arose from inadvertence, accident or mistake, I do not see why, after the issue of the new patent by the Commissioner, he should be prejudiced by any delay in making his application. But holding the view that I do in this case that the new patent is for the same invention as the surrendered patent, and that properly construed it is not a larger patent and does not extend to the patentee any greater rights or protection or monopoly than the surrendered patent, I think I have no occasion to come to any conclusion as to whether or not I am bound in dealing with such a case to apply the doctrine of laches.

It is also objected to the validity of the patent that the patentees have imported the invention contrary to the provisions of *The Patent Act* and that they have not manufactured it in accordance with the provisions of such Act. The principal objection on this ground is that they have imported the fluid for impregnating the cotton fabric, and have not manufactured it in Canada. I do not think I need add anything to what I said at the hearing as to that. I do not see that the plaintiffs are in any way bound by the statute to manufacture this fluid. I think it is open to them to buy it where and from whom they please, and that it is no breach of the conditions of this patent to import it. I am supported in that view by the reference that counsel gave me to a decision of the Court of Appeal of Douai, France (1), upon a like

(1) Le Droit, Jour. des Trib. No. 148, June 25th, 1896.

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question arising in respect of the importation of this fluid into that country.

It was also made an objection to the validity of this patent that the patentees did not sell the illuminant appliance or any product of the process for which the patent issued, to any person in Canada desiring to use it. The case that was attempted to be made out on this point totally failed. It turned out that the witness who spoke of the matter, and who had been sent to the plaintiffs' office after this action was commenced did not ask to purchase one of their mantles or hoods, but asked to have such mantles or hoods attached to galleries that he took with him to their office. That the company's officers refused to do, but they did not refuse to sell, and they were at the time selling the cap or hood to anyone who desired to obtain it at what has not been challenged as a reasonable price. It turned out, however, in the course of the examination of one of the company's officers that at first the price for the hood or mantle was put at $100, and that, it seems to me, might well be held not to be a reasonable price. But it was not shown that at that time any person desired to obtain one of the hoods or mantles, or that any demand was made for it, or that there was any refusal to sell it at a lesser price. If at that time and before the price was reduced, which was very soon after, anyone desiring to use or obtain the mantle had demanded it and had been refused except at the price mentioned, the question must of necessity have arisen as to whether or not the condition upon which the patent is held had not been broken. On the whole, I am of opinion that I ought not to declare the patent forfeited for any breach of the condition to manufacture in accordance with the provisions of the statute.

We come now to the question of infringement, and as to that the plaintiffs concede that unless they could have succeeded under the patent of March, 1886, in

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restraining the defendant from doing the acts complained of, they cannot succeed under the patent of September, 1894, that is, unless the thoria and ceria solution used by the defendant is an equivalent of the solution indicated and described in the specification to the first Canadian patent, the patent has not been infringed. Upon the evidence before the court, I find that the thoria and ceria solution used by the defendant is the equivalent of the solution mentioned in the specification to the first Canadian patent.

Before leaving this question of infringement I ought, perhaps, to refer to the contention made on behalf of the defendant that under any circumstances he would at least be entitled to import for use or sale illuminant appliances made in a foreign country in accordance with the process protected by the plaintiffs' patent. With that view, however, I cannot agree. I think that the law is well settled to the contrary, and I need only refer for this purpose to the cases cited by Mr. Hellmuth, viz.: *Elmslie* v. *Boursier* (1); *Wright* v. *Hitchcock* (2); *Von Heyden* v. *Neustadt* (3).

That, I think, disposes of the principal matters in controversy in this case. There were, however, some other objections that were taken at the hearing, but it is not necessary to add anything to what was then said. In the result, I find all the issues in favour of the plaintiffs, for whom there will be judgment with costs. The plaintiffs are also entitled to an injunction, and to an account of the profits made by the defendant in manufacturing, selling, letting or hiring of the illuminant appliances made in accordance with the process protected by the patent in question in this case.

Judgment accordingly.

Solicitor for plaintiffs: *C. A. Duclos.*

Solicitors for the defendant: *Foster, Martin & Girouard.*

(1) L. R. 9 Eq. 217.
(2) L. R. 5 Ex. 37.
(3) L. R. 14 Ch. D. 230.

GEORGE GOODWIN.....CLAIMANT; 1897

Jan. 11.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Public work—Contract—Progress estimate—Satisfaction of Engineer—How to be expressed—Dictum of Appeal Court followed.

By clause 25 of the claimant's contract with the Crown for the construction of a public work, it was, *inter alia*, provided: "Cash "payments, equal to about 90 per cent. of the value of the work "done, approximately made up from returns of progress measure- "ments and computed at the prices agreed upon or determined "under the provisions of this contract, will be made to the con- "tractor monthly on the written certificate of the engineer that "the work for, or on account of, which the certificate is granted "has been duly executed to his satisfaction and stating the value "of such work computed as above mentioned—and upon approval "of such certificate by the Minister for the time being; and the "said certificate and such approval thereof shall be a condition "precedent to the right of the contractor to be paid the said 90 "per cent. or any part thereof." The certificate upon which the claimant relied was expressed in the following words: "I hereby "certify that the above estimate is correct, that the total of work "performed and materials furnished by G., contractor, up to the "30th November, 1895, is three hundred and seventy-six thousand "nine hundred and seventy and $\frac{40}{100}$ dollars; the drawback to be "retained thirty-seven thousand six hundred and ninety and "$\frac{40}{100}$ dollars; and the net amount due three hundred and thirty- "nine thousand two hundred and eighty dollars, less previous "payments."

The terms of the clause and the form of the certificate above recited were the same as those discussed in the case of *Murray* v. *The Queen* (26 Can. S. C. R. 203), in respect of which the opinion was expressed in the judgment of the court that the certificate was not sufficient to maintain the action.

Held, (following the expressed opinion in the case cited) that the certificate in this case was not sufficient.

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Statement of Facts.

THIS was an action to recover certain moneys alleged to be due to the claimant upon a contract for the construction of a public work.

The claimant was the contractor with Her Majesty for the construction of certain works on Sections 4, 5, 6 and 7 of the Soulanges Canal under a contract dated the 9th of May, 1893, and the specifications and drawing annexed thereto or referred to therein.

By his statement of claim the claimant sought to recover ninety per cent. of the amount claimed to be payable under a progress estimate, alleged to have been given on the 28th of February, 1896, under the written certificate of the Engineer. It was alleged by the claimant that this progress estimate and certificate was given pursuant to, and in full compliance with, clause 25 of the contract.

The claim was referred to the court on the 7th of May, 1896, by the Minister of Railways and Canals, under the provisions of section 23 of *The Exchequer Court Act*, which enacts as follows: "Any claim against the "Crown may be prosecuted by petition of right, or may "be referred to the court by the Head of the Depart- "ment in connection with which the claim arises, and "if any such claim is so referred no *fiat* shall be given "on any petition of right in respect thereof."

Reference is directed to the reasons for judgment for a statement of all the material facts of the case; but the pertinent clauses of the contract, the progress estimate and certificate in dispute, and the report of the resident engineer in reference to such estimate and certificate are given in full below.

[EXTRACTS FROM CONTRACT.]

8. That the Engineer shall be the sole judge of work and material in respect to both quantity and quality, and his decision on all questions in dispute with regard to work or material shall be final, and no works or extra or additional works or changes shall be deemed to have been executed, nor shall the contractor be entitled to payment

for the same, unless the same shall have been executed to the satisfaction of the Engineer, as evidenced by his certificate in writing, which certificate shall be a condition precedent to the right of the contractor to be paid therefor.

25. Cash payments equal to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of this contract, will be made to the contractor monthly on the written certificate of the Engineer that the work for, or on account of, which the certificate is granted has been duly executed to his satisfaction and stating the value of such work computed as above mentioned—and upon approval of such certificate by the Minister for the time being and the said certificate and such approval thereof shall be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof. The remaining ten per cent. shall be retained till the final completion of the whole work to the satisfaction of the Chief Engineer for the time being, having control over the work, and within two months after such completion the remaining ten per cent. will be paid. And it is hereby declared that the written certificate of the said Engineer certifying to the final completion of said works to his satisfaction shall be a condition precedent to the right of the contractor to receive or be paid the said remaining ten per cent., or any part thereof.

26. It is intended that every allowance to which the contractor is fairly entitled, will be embraced in the Engineer's monthly certificates; but should the contractor at any time have claims of any description which he considers are not included in the progress certificates, it will be necessary for him to make and repeat such claims in writing to the Engineer within thirty days after the date of the despatch to the contractor of each and every certificate in which he alleges such claims to have been omitted.

27. The contractor in presenting claims of the kind referred to in the last clause must accompany them with satisfactory evidence of their accuracy, and the reason why he thinks they should be allowed. Unless such claims are thus made during the progress of the work, within thirty days, as in the preceding clause, and repeated, in writing, every month, until finally adjusted or rejected, it must be clearly understood that they shall be for ever shut out, and the contractor shall have no claim on Her Majesty in respect thereof.

33. It is hereby agreed, that all matters of difference arising between the parties hereto upon any matter connected with or arising out of this contract, the decision whereof is not hereby especially given to the Engineer, shall be referred to the Exchequer Court of Canada and the award of such court shall be final and conclusive.

PROGRESS ESTIMATE AND CERTIFICATE.

Folio 658.

RAILWAYS AND CANALS.

No. of Estimate, 24.

SUMMARY of the Estimates in favour of George Goodwin, Contractor, for work done and materials delivered up to 30th November, 1895, at Sections Nos. 4, 5, 6 and 7, Soulanges Canal.

AUTHORITY BY DEPARTMENT OF RAILWAYS AND CANALS.

Date of Letter.	Number of Letter.	Name of the person to whom the Letter authorizing the expenditure is addressed.	Amount Authorized.

	$	cts
	376,970	40
On extra work ordered to be proceeded with by letter No. dated		
On extra work ordered to be proceeded with by letter No. dated		
Less drawback, 10%, say.....	37,690	40
	$ 339,280	00
(In pencil)	266,020	00
	73,260	00

Less

Amount returned for pay-lists and accounts.....	
Amounts returned for work done under other contracts, or for extra work authorized and not included in present summary.	
Amount returned under present summary.....	
Forming the total amount certified up to date against sum authorized.....	

Dept. of Railways and Canals, FEBY. 28, 1896. Accountant's Office.

I hereby certify that the above estimate is correct, that the total value of work performed and materials furnished by Mr. George Goodwin, contractor, up to the 30th November, 1895, is three hundred and seventy-six thousand nine hundred and seventy and $\frac{40}{100}$ dollars; the drawback to be retained thirty-seven thousand six hundred and ninety and $\frac{40}{100}$ dollars; and the net amount due three hundred and thirty-nine thousand two hundred and eighty dollars, less previous payments.

(Sgd.) THOS. MUNRO.

Dated COTEAU LANDING, P.Q.,
26th February, 1896.

Signed by me subject to conditions stated in my letter of 26th Feb., '96.

T. M.

Total amount certified on this contract.....$376,970.$\frac{40}{100}$

COLLINGWOOD SCHREIBER.

Certified as regards item No. 5 in accordance with letter of Deputy Minister of Justice, dated 15th Jan., 1896.

Ottawa, 27th Feb., 1896. *Chief Engineer.*

ENGINEER'S AUDIT OFFICE,
Department of Railways and Canals.
Examined and checked,
G. A. MOTHERSILL,
27-2-96.
Progress and final estimate sheet.

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Statement of Facts.

[RESIDENT ENGINEER'S SPECIAL REPORT.]

SOULANGES CANAL, ENGINEER'S OFFICE, COTEAU LANDING, P.Q., 26th February, 1896.

SIR,—I have your letter of the 20th ult., with copies of correspondence respecting a claim of George Goodwin, contractor, in reference to the embankments on sections Nos. 4, 5, 6 and 7, of the Soulanges Canal.

There is no precise statement of this claim in my possession, but I understand that a decision has been given by the late Hon. Minister of Justice, to the effect that all the embankments on these sections must be paid for as water-tight throughout, and this decision must govern the preparation of the progress estimates.

The last of these was up to the 30th November, 1895. This shows the total earth excavation to be 1,103,713; water-tight banks 450,733. Should the whole be paid for as if made into water-tight embankments, the estimate would be as follows :—

Excavation as above 1,103,713 c. y. As all this went into the banks, the amount of the latter would be (with 10 per cent. deduction for shrinkage) 993,340 c. y. As a matter of fact, however, the balance of 542,607 c. y., now returned as water-tight, is spoil bank, made up partly of sand, sod, loam and other pervious materials standing upon the unmucked surface of the natural ground. It was merely designed to back up the water-tight lining of the inside slope of the prism, which was put in as specified. This amount of 542,607 cubic yards was not intended to be made water-tight, nor was it ordered to be made water-tight, nor has it been made water-tight in accordance with the agreements of clause No. 11 of the specification written by me for sections 4, 5, 6 and 7 of this canal.

This question appears to me to be one of fact only, and I therefore respectfully desire to state my firm adherence to the views which I have previously expressed on the matter. I have, however, prepared the accompanying estimate at your request, with the distinct understanding that my responsibility in reference to it does not extend further than what would attach to a mere statement of quantities.

I am, sir,

Your obedient servant,

THOMAS MUNRO,

M. Inst. C.E.

COLLINGWOOD SCHREIBER, Esq., C.M.G.,
Chief Engineer of Canals, Ottawa.

The case was tried before the Judge of the Exchequer Court on the 19th and 20th June, 1896; and at the

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conclusion of the hearing a preliminary judgment, under Rule 124, was ordered to be entered for the claimant, upon the merits, for $58,260; leave being reserved to the claimant to move to increase the amount of judgment to $73,260, and to the Crown to move to set it aside or to reduce it.

On the 27th and 28th of October, 1896, the motions upon the questions reserved to both parties were argued.

B. B. Osler, Q.C., in support of claimant's motion to increase amount of judgment:

We now press upon the court that we are entitled to recover herein the amount shown by the progress certificate, the amount forwarded by the Deputy Minister to the Audit Department for payment. This substantially is a motion to increase the finding of your lordship by the sum of about $15,000.

Now, acting upon the spirit, if not the letter of the 26th and 27th clauses of the contract, this claim was persistently brought before the Crown. True, the Crown never despatched, under the strict terms of clause 26, the estimate; but, nevertheless, we came to know of what was being allowed, and we made, as I think my learned friends will concede, a constant claim, and presented our evidence and argument why they should be allowed. By virtue of such a claim being made under the 27th clause of the contract, and there being a matter of law arising, in the view of the Department of Railways and Canals, it appears to have been referred to the Minister of Justice, and upon his opinion, the ultimate opinion formed, a certificate was given, properly signed by the Chief Engineer, approved of by the Minister, as shown by his affidavits and by the evidence of Mr. Schreiber, and forwarded to the Auditor's Department certified by the two letters of the

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28th February, one to the Secretary of Railways and Canals by the Chief Engineer, the other by the Deputy Minister to the Auditor-General asking for the specific cheque, being the amount we sue for.

Then, why should that not be treated as a definite action of the Crown under the contract? Why should not the Crown pay? It is a deliberate action of the Crown. No error can be charged. They had all the facts before them. Evidence had been taken before the Department—the evidence of the resident engineer. There was the strong view of Mr. Schreiber. These matters being such matters as my learned friends now urge, were urged before the Department. It is not as if they made any erroneous judgment from want of sufficient facts before them. The whole contention of my learned friend was vigorously put before the Department, and it was upon the weighing of the merits of the contention on both sides, that a conclusion was arrived at. Of course no wrong-doing can be, or is, suggested, on the part of any officer. But supposing the Department of Justice came to an erroneous conclusion, is it for this court to correct it? Can this court correct it? Can this court sit as an upper chamber over departmental decisions, where those departmental decisions are approved of by the Minister of the Department? Is the action of the Minister subject to review? Can this court say that the Minister was wrong, and that he ought not to have given such an opinion, that the Deputy Minister, acting on the knowledge of his Minister, should have stated such an opinion? Are these matters subject of review by the court, or are they only subject to review by the court of parliament and public opinion? So I submit with great confidence the proposition that all we have to do is to show that the requirements of our contract have been fulfilled; and that it is not competent for

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this court to say Mr. Munro's opinion was right, or Mr. Schreiber's original opinion was right, or that we will weigh the opinion given by one Minister of Justice against the opinion given by another Minister of Justice. I submit that such is no function of this court. This court has simply to be satisfied that the requirements of the contract have been complied with. Is there a certificate? What does it call for? Has it been approved by the Minister? Upon the answer to those questions, quite apart from the merits, entirely distinct from any merits, we may not be entitled to one farthing on your lordship's view of the facts, and if that was the case we were not entitled to a farthing, and if we have got the certificate by anything false, anything fraudulent on the part of the contractor, then the Crown could by its own suit review the certificate and set it aside, but that is not this case.

[*By the Court:* But possibly they might, in a proper action, have it reviewed where it had been issued through inadvertence, or through some error, without fraud on the part of any one?]

Well, it cannot be said, with the discussion and argument – the departmental discussion and argument —that has taken place here, that there was any improvidence or inadvertence in issuing the certificate. That is not the case made. The case counsel for the Crown make is this: Under this contract the proper construction does not give this item to the contractor. Supposing that was a legal question of nicety, and the Department had decided it in the opinion of this court wrongly, could the court review it? That brings us merely to the argument I presented a few minutes ago, that your lordship cannot say that because you have a different view of the law upon the facts that are disclosed in this case, therefore you are able to say

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the certificate was issued improvidently and should not have been given.

I might argue now that we have nothing to do with either the adverse or favourable opinions of any Minister of Justice; that our contract calls for a certificate by the Chief Engineer, and an approval by the Minister of Railways and Canals. That we say we have. We do not care how it was obtained. Now, the Crown has never repudiated or called back that certificate. On the contrary, the Crown passed it on to the Auditor-General for payment. The Crown has never instructed the Engineer and said, you have made a mistake, make up another document; but the Crown comes here and says the Engineer was wrong in certifying, and the Minister was wrong.

If this court can sit in review on the action of the Minister of Railways and Canals in allowing a payment on a contract, could not this court assume to itself the function of reviewing the propriety of each payment certified to the Auditor-General in any department? That is what the court is asked to do here. The Minister of the Crown acts for the Crown, the Crown has approved of the payment through its proper Minister, and now Her Majesty's judge, Her Majesty's court, is asked to say that Her Majesty was wrong in the departmental details upon which that certificate was founded. If money is obtained from the Crown by fraud or wrong, of course there is a method of getting it back through this court. But as this case stands, I simply propose to ask your lordship to come to the conclusion that a certificate has been given, which has been approved by the Crown, and there we rest, and we ask that effect should be given, full effect should be given, to that certificate.

Now does certificate "23" bar us in any way? We submit, having regard to the provisions of clauses

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26 and 27, it does not. We submit that the direction is to the contractor to keep pressing his claim until it has been adjusted, and that this matter has been now adjusted, and that the certificate is sufficient.

Then with reference to the approval by the Minister. Now while the Engineer must give a "written certificate," the word "written" precedes the word "certificate" of the Engineer; but no such word precedes the word "approval" of such certificate by the Minister. There is no pretence for saying that the Minister must approve in writing. Contrast the words "on the written certificate of the engineer," and "upon the approval of such certificate by the Minister for the time being."

We get the approval of the Minister by the formal action of his Department, if it is only formal, the forwarding for payment. The forwarding for payment is the approval of the Department of which the Minister is the head. We have it *vivâ voce* here from Mr. Schreiber, that the Minister did approve of this payment. We have it upon the affidavit of the then Minister, The Honourable Mr. Haggart; but, I submit, that the approval of the Deputy is necessarily the approval of the Minister. *The Interpretation Act* to which your lordship has been referred, the provisions of the Railways and Canals Act, show that the terms are interchangeable in the various functions to be performed by the Minister and by the Deputy. That would render a case for me to rest upon the Deputy's letter of the 28th of February to the Auditor-General as an approval. The approval of the Minister, upon such a letter, would be presumed. I submit that your lordship can neither amend Mr. Munro's measurements, or Mr. Schreiber's approval of them, by deducting 100,000 yards, or a yard; but that the certificate must stand for all that it calls for.

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That the certificate is sufficient in form we refer to *Hudson on Building Contracts* (1).

The principal case there quoted is *Harman* v. *Scott* (2). There is also reference to the case of *Wyckoff* v. *Meyers* (3). The contract in the latter case called for the work to be done "in a good workmanlike and substantial manner to the satisfaction and under the direction of the architect." "To the satisfaction, &c.," is the wording of our document. (In the American case the certificate is: "This is to certify that the last payment of $1,800 is due, etc., etc., as per contract," signed by the architect.) That was held sufficient. That covered satisfaction. And, generally, it may be laid down that if a certificate of payment and satisfaction is required a certificate for payment will imply a certificate of satisfaction. It necessarily must. Coleridge, C.J. in *Laidlaw* v. *Hastings Pier Co.* (4), speaking of the matters which are conditions precedent, says: "they are to be taken into account, it seems to me, by the engineer, the agent of the defendants, to protect them, and when a request is made for the sending in of an account, the right to which is to be ascertained by certificates, the engineer is to go into all these matters, is to satisfy himself that the conditions precedent to the rights of the defendants have been fulfilled, and he would have neglected his duty if he had certified for any work, if any of the stipulations of the contract which he, as the agent of the defendants, was to enforce, had not been complied with."

So that in that extract from the judgment of Lord Coleridge he gives the reason why a certificate for payment must necessarily be a certificate of satisfac-

(1) 2nd ed. vol 1, p. 294.
(2) 2 Johnston's New Zealand Reports 407.
(3) In 44 N.Y., 143.
(4) Jenk. & R. Arch. Leg. Hdbk. 4 ed. App. p. 238.

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tion. It must be borne in mind too in considering the nature of the certificate that should be granted, that this contract differs, and this certificate differs, from that class of progress certificate that is treated of in *Hudson*. A progress certificate upon a lump sum contract is a totally different thing to a progress certificate on a schedule of quantities and prices; and the cases must be carefully distinguished as to that. [Cites *Hudson on Building Contracts* (1).]

It is only 10 per cent of that which has gone before that can be the subject matter of the final certificate. Under this contract quantities cannot be corrected in the final certificate. The quantities given by the progress certificate are final. (Refers to clauses 26 and 27 of the contract.)

The authority or the jurisdiction of the Engineer in dealing with this matter, I submit, is perfectly clear upon the contract. The clause under which the Chief Engineer gets his authority to deal, apart of course from the payment clause, is clause 8 of the contract. That clause as originally constructed, and as it appears, I think, in almost all the contracts which have been passed or entered into by the Department of Railways and Canals, and in fact all the departments of the Government prior to some of the more recent works, such as the Soulanges Canal, embodies the lines which have been struck out in this contract.

Under that contract what the Chief Engineer had to pass his opinion upon was as to how much work has been done, and whether the quality of the work was according to the contract. That is to say, consistently with the power which he has under the other clause of the contract, of saying to the contractor, this work you have done is not up to what the contract calls for, it is bad material, or it is bad workmanship.

(1) 2nd ed. vol. 1, p. 288.

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He has a right, and he has the absolute right, to pass upon that matter. He has also the right to pass upon the question of quantity; but as to the question of classification, or as to the question of the construction of the contract or interpretation of the plans, drawings or specifications, he has no authority whatever under this contract.

He has dealt and did deal properly in this certificate with the question of quantity, and with the question of quality. He has no objection to make, he has no complaint to make, as to the way in which the contractor carried out the orders that were given to him. He carried out the work as he was told to do it. There is no pretence that he did not. As to the quantity there is no question and no dispute. The only question as Mr. Schreiber himself says, in his evidence, was one of the question of the construction of the contract or of the specification. That he says in so many words. That he says was the only dispute with reference to the matter. That being the case, upon whom did it devolve to settle that matter. It devolved upon the parties to agree upon it if they could; not upon Mr. Schreiber to agree with Mr. Goodwin about it; not with Mr. Schreiber to say I do not agree with you, and therefore you must come to the court. It is, in the event of a dispute, not between the Chief Engineer and the contractor, but under clause 33 it is agreed:—

"That all matters of difference arising between the parties hereto upon any matter connected with or arising out of the contract, the decision whereof is not hereby especially given to the Engineer, shall be referred to the Exchequer Court of Canada."

Now has that point ever arisen, or has that case ever arisen where it could be said there was a dispute between the proprietor, the Government in this case,

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and the contractor, that would necessarily drive us or refer us to this court? I submit not.

A. Ferguson, Q.C. followed for the claimant: I only wish at this time to put forward one branch of the case. I say the point had not arrived when the case could be taken out of the course that has been taken by the Crown. The time had not arrived when under clause 33 the case should have been referred to the court. The Engineer had given his certificate, and it was a matter properly within his jurisdiction under the contract.

Then so far as the approval of the Minister is concerned, I really think it is only necessary to submit the principle that evidence of any sort, with reference to any matter, only requires to be in writing if it is provided by the contract or by statute that it must be in writing. Oral evidence is just as good as written evidence but for the provision of a statute, or but for the provision of a contract. There is nothing to prevent oral evidence being given in any case as well as written evidence except where it is distinctly provided that it shall be in writing. I would only refer to two authorities upon that which is with regard to the construction of a certificate being in writing. If a certificate need not be in writing, surely there is a greater reason why the approval of the Minister need not be in writing.

[Cites *Roberts* v. *Watkins* (1); *Kain* v. *Stone Company* (2).]

Then counsel for the Crown have in their notice of motion raised a question—I think it was contended also at the trial—that there was no right of action upon a progress estimate.

[*By the Court*: I am bound to hold that there is, in view of the *Murray case* (3).]

(1) In 14 C. B. N. S. 592. (2) 39 Ohio, 1.
(3) 26 Can. S. C. R. 212.

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And in view also of express English authority, I cite *Pickering* v. *Ilfracombe Railway Company* (1), which was relied on in the *Murray case*.

The Solicitor-General of Canada, against the motion to increase judgment:

Counsel for the claimant contend that in so far as the branch of the case with which we are now dealing is concerned, he must succeed for the whole of the amount of the certificate. That is to say, that the certificate substantially is conclusive as between the parties. Our argument will be that we concede the point that the Engineer's certificate is an essential requisite to enable the claimant to succeed, and we grant that he must succeed for the total amount of the certificate, so far as this branch of the case is concerned, or not at all.

My argument will be, therefore, first, that the Engineer's certificate is requisite, and in that respect I go with my learned friend, perhaps not altogether in the same direction, but so far as to say that if the certificate is good and valid, it is binding upon both the parties to the case.

I contend now that there is no certificate at all upon the record; and there being no certificate, of course there is no case, and the suppliant cannot succeed, not only as to the total amount of the certificate, but as to any portion of it.

The contract which determines the rights and duties of both the parties was made on the 9th of May, 1893, as my learned friend Mr. Osler said a moment ago. Under that contract it is provided that Goodwin, the claimant here, is to perform certain works in connection with the construction of the Soulanges Canal. He is to perform these works for the Government of

(1) L. R. 3 C. P. 235.

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Canada. The obligation on his part is to perform the works according to the plans and specifications, the plans and specifications being part of the contract entered into between them. By the contract, which is the law of the parties and which is the measure of the rights and liabilities upon both sides, it is provided that the works so to be done by this contractor for the Government of Canada are to be so done and performed, not only in accordance with its specifications, but in accordance, to a certain extent, with the directions of a man who is upon the ground for the purpose of seeing that Goodwin performed his duties under the contract. It is also provided that the Government of Canada is to pay him for the work so to be done at a certain price. As is customary, as is usual, it is provided that the amount to be paid to Goodwin for the work so to be done by him is to be ascertained and determined by a man chosen by consent by the two parties to the contract, and by whose finding both parties agree to be bound. There is nothing unusual in this contract. It is one of those contracts, it follows in the line of those which have been before the court a dozen times. Then I submit, as a matter of law, about which there can be no doubt that if the matter is not complicated by any other issue, as the contract provides that the certificate of the Engineer is to be final and binding between the parties and a condition precedent to the right to bring the action, then until such time as such certificate of the Engineer is obtained, there is no right of action at all in the first place, no right to bring the matter before the court, no money due and exigible under the contract; and, secondly, that by that certificate of the Engineer, final and conclusive as I contend, both parties are bound, the contractor as well as the Government.

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There is no necessity of citing authority upon that point. I have several to which I might refer, but the court is aware the matter is so well settled now it may be absolutely considered to be beyond the point of argument.

What are the conditions here? It is provided here, first, that the specifications annexed to the contract are part of the contract. Then, by section 8, the Engineer is to be the sole judge of the work. By section 35, payments are made on the certificate of the Engineer; the certificate is a condition precedent. Section 1 defines what is meant by the term "Engineer." The work is done under the contract, and a certificate is given by the Engineer under the contract on the 30th November, 1895. Subsequently, what I might call the classification of the work is altered, or the price to be paid for it is altered. The Engineer in the exercise of the undoubted powers conferred upon him by the contract, measures and ascertains the quantity of work done by the contractor, and says that quantity of work so done by you entitles you to receive from the Government a money payment of so much. That is the act of the Engineer practically chosen and selected by the parties, and that is the finding of this Engineer, uninfluenced, uncontrolled by anything except by that which appeals to his own individual judgment. Not being content with the view of the contract taken by the Engineer, an appeal is made to the Minister of Railways and Canals. He then refers the matter, acting for the Dominion of Canada, for one of the parties to the contract, to the Department of Justice and gets from the Department of Justice an opinion as to the construction to be put upon the contract. That is to say, he substitutes the Department of Justice, represented by the Minister of Justice, for the Engineer chosen by the parties to determine what were the rights and

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duties of the parties under the contract. I grant at once that authority will be found for the proposition that an Arbitrator may seek light outside of himself, and get information which will enable him to come to a conclusion upon the point submitted to him to be decided, provided that he adopts the information or adopts the opinion that he gets from the outside, makes it his own, and finds accordingly. The court's attentention will no doubt be drawn to the case of *Rolland* v. *Cassidy* (1), a case decided in the Privy Council, a case which came from the province of Quebec. I may draw the court's attention to the fact that that case is not in point at all, because that was a case where the arbitrators acted, according to a well known rule with us, as *amiables compositeurs*, where they practically have the right to do anything they choose; but there is authority outside of that, where it is stated that it is open to the arbitrators to seek light. Let me draw your lordship's attention to the broad distinction between that case and the case that is before you. Whereas it is open to an arbitrator perhaps to seek for information elsewhere in order to enable him to come to a conclusion himself, provided he, taking that information, makes it his own and then acts as if the information had emanated from himself, yet mark the difference between that case and this, where the arbitrator, doing that which the contract says he had no right to do, persisting in the conclusion to which he comes at the suggestion or at the dictation of one of the parties to the contract, does that which in his own judgment he ought not to do. Not only does he not adopt the advice that is given to him by one of the parties to the contract, but rebels against it, protests against it, and says: "In defiance of what you say to me, I simply

(1) 13 App. Cas. 770.

act in this matter as if I did nothing further than simply perform a ministerial act."

If it was open to the Department of Justice to advise, not the arbitrator but the Department of Railways and Canals, so as to influence them to do that which in this case may be construed as favourable to one of the parties to the contract, and if that is conclusive and binding, what becomes of the position of the party who contracts with the Government, and who feels that notwithstanding that he accepts a contract under which a third party who is acceptable to him is to be an arbitrator between them, that that third party, whatever may be his own judgment and his own conclusion, would be forced to come to an entirely different conclusion at the dictation of an employee of one of the parties to the contract?

My learned friend has argued very strenuously that this progress estimate was not in truth what is generally known as a progress estimate, but that is practically a final estimate, that it was to be dealt with as such. I say that in my judgment that contention is correct, because the classification of the work, or the scheduling of the prices of the work, was conclusive and could not be altered, under the authority of *Murray* v. *The Queen* (*supra*), by any subsequent action, in case anything had been paid to him to which he was not entitled. If that be the case, if this in reality was a final estimate, if under the authority of the *Murray case* it was a final estimate, was the Engineer when he gave his estimate not *functus officio*, and had he the right, having given an estimate in that way, to subsequently alter and change the circumstances under which he did alter it, that is to say, at the dictation of the Department of Justice? He certified the certificate simply because he is made to do

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so in consequence of instructions received from the Department of Justice.

To what extent is a certificate given under these conditions a compliance with section 25 of the contract? I say that it is no compliance whatever; that it does not in any way comply with the terms of that section; and it affords no relief, it affords no grounds to the contractor upon which he can rely to obtain payment from the Government, because if it is open to the Government to force the Engineer in consequence of advice obtained in this way to do that which he has done in this particular instance, it would be again open to them to force this arbitrator, to influence him in a direction hostile to the contractor, and to take from him, to dispossess him of, the character of arbitrator which the parties clothed him with at the time they signed the contract.

We are, therefore, reduced to the point that the only question to be dealt with by your lordship is whether or not that certificate is a good certificate within the meaning of the terms of the contract. Upon this point I refer to *Goodyear* v. *The Mayor of Weymouth* (1); *Roberts* v. *The Bury Improvement Company* (2).

C. H. Ritchie, Q.C., followed, against the motion:

The argument in respect of the certificate may be summarized shortly in this way:—

First, it is not a binding certificate, because at the time the Engineer gave the certificate he was *functus officio* in respect to the classification referred to therein inasmuch as he had, in a prior certificate, No. 23, dealt with the same matter and disallowed the claim of the contractor.

What I particularly desire to direct your lordship's attention to is that estimates Nos. 23 and 24 deal with just the same amount of work. In other words, esti-

(1) 35 L. J., N. S., 13. (2) L. R. 5 C. P. 310.

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mate No. 23 deals with the amount of the work done up to a certain date, viz. up to the 30th November, 1895. In that estimate the Engineer allows the total quantity of excavation as 1,103,713 cubic yards, and he allows as earth in water-tight banks 450,733 cubic yards. Then after that the matter was again pressed by Goodwin upon the Department of Railways and Canals, and, as my learned friend pointed out, after it was then pressed, a reference was made to the Minister of Justice, who, on the 15th of January, 1896, expressed his view to the Railways Department, or the Minister of Railways and Canals, that the claim was one that ought to be entertained. Then we have certificate No. 24 given. No. 24, if your lordship will look at it, is a certificate given on the 28th February, 1896, and is an estimate of work done up to the 30th November, 1895. In other words, dealing with exactly the same amount of work, because there is no pretence there was anything else embraced in this certificate; dealing with the same thing. Then we find the Engineer, on that date, making a different classification.

We have then to discuss the question in this aspect: Was it a matter that the Engineer was entitled to deal with under the terms of the contract and specification? Was the matter of classification one that came within his province under the contract and specification? If so, and if both parties assented that he, owing to his peculiar knowledge and skill as an Engineer, should determine that, and there I agree with my learned friend, that it is a progress estimate that must be final. It is not dealing with a contract for a lump sum, but dealing with a contract in respect of schedule rates, and to that extent I agree with my learned friend, that where he gives a progress estimate it must be treated as final.

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If it came within the scope of the duty of the Engineer, under the contract, to decide it, and he had decided it, then I say that certificate No. 23 is final, and the matter could not be reopened. I will go further and say, even supposing the Engineer, after reconsideration, had changed his own opinion, I submit it would be still final; but that is not the case presented here. The case presented here is not that the Engineer, the person to whom the contracting parties agreed should be, by reason of his special knowledge, the judge—not that he was saying that his prior certificate was wrong, that is not pretended for one moment, it is admitted on all hands that the Engineer did not change his opinion, but he undertook in deference to the view of the Minister of Justice to cancel, if I may use that expression, cancel his former certificate and give a certificate entitling the contractor to something like 500,000 cubic yards more than he had formerly allowed as earth in water-tight banks.

Who determined the prices under the provisions of the contract? The Engineer, the moment he decided that was earth in a water-tight bank, determined that that was the price to be paid for it. It would not be necessary to put in the word "determined" at all. They say: "at prices agreed upon." It is the prices agreed upon determined under the provisions of this contract. The moment the Engineer, who was the judge, says there is only so much earth in water-tight banks, as soon as he has determined the quantity, he determines the prices, because there is a certain price for earth in water-tight bank.

Now, I submit, that in computing he has first to determine under what head this work will come, and having determined the class of work, the contract fixes the price, and then it is for him to compute the

amount; and, I submit, that on these two documents together it was clearly the intention of the contracting parties that the Engineer should be the judge as to that.

The Resident Engineer signs the certificate subject to the provisions existing in a certain letter. Then the Chief Engineer signs it, and in the classification, as I pointed out to your lordship, on the 2nd page, there is a foot note reference to item No. 5 saying that is classified in accordance with the Minister of Justice, see letter of 15th of January, 1896, signed by T. M. Now Mr. Munro signs it in accordance with the decision. Then when Mr. Schreiber comes to sign it, he signs underneath Mr. Munro and he says: "Certified as regards item No. 5 in accordance with letter of Deputy Minister of Justice, dated 15th of January, 1896."

Now can it be said that that is a certificate upon which the suppliant here is entitled to any cause of action? Is it not, reading the whole thing together, the same as if Mr. Collingwood Schreiber had said, I entirely agree with Mr. Munro, I approve of what he has done. Mr. Schreiber certifies, formally certifies, but says while he attaches his name as evidencing a certificate, that the contractor is not entitled to the amount, because it is not earth in water-tight bank.

I submit that the certificate of the Chief Engineer goes no further and cannot be construed as going any further, so that we have a cause of action presented by the claimant based upon a certificate signed, it is true, by the Chief Engineer, signed it is true also by the Resident Engineer, but signed with this modification, with this qualification, that while we sign that, we do not sign it as evidencing our judgment or opinion; our judgment and opinion is just the reverse. What I urge is this; that when we have the Resident

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Engineer signing it—supposing he had stated in that note, at the foot, I certify this, but I desire to add that this certificate is not given by me in the exercise of my judgment, but is given by me in deference to an expression of opinion by somebody else. Ought we not read it as saying: "I certify that my view is that the contractor is not entitled to that amount." Is not that what it amounts to?

I say if an inference can arise from the certificate, that inference must be in the entire absence of evidence indicating that the Engineer was not perfectly satisfied; whereas, in this case, the court has before it evidence to show that he was not satisfied, that it was not the expression of his opinion, that he ought not to be paid upon that. So, I submit, your lordship must not read out of the contract the words which were put there for the protection of the Crown, and that it is only reasonable and fair in these cases that the Engineer should be forced to say that it was entirely to his satisfaction.

The case of *Wyckoff* v. *Meyers* (1) cited by the other side does not apply.

Counsel for claimant referred to sections 26 and 27 and said that under these sections certificate No. 23 would not be a bar to the claimant's recovery in this action.

Now what does section 27 mean? Does it not mean, beyond all question, that the moment that these claims are considered and adjudicated upon, and once adjusted or rejected, that that is final? Surely they could not, after they had brought the whole matter to the Department where witnesses had been examined and an adjudication made, either allowing the claim or rejecting it—surely they could not open the matter

(1) 44 N. Y. 143.

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up and make it the subject of a future reference. They are to do so up to the time it is adjusted or rejected.

There is another position I think that the Crown is entitled to take, and it is this:—I submit that that certificate is one upon which the claimant in this case cannot succeed for this reason, that it was recalled long before it was ever acted on. All that was done was this:—It was not a certificate given to the contractor upon the faith of which he altered his position in any form, but in deference to the view of the Minister of Justice, an officer of the department, the Chief Engineer sends over this certificate to the Auditor-General's office and there it stops; it is still within the control of the Crown. It is produced in this case from the custody of the Crown.

The moment the Auditor-General gets it, he declines to pay it. A certificate had already been given upon which payment had been made; certificate No. 23 was accepted by Goodwin, and the money was paid upon the faith of it. When the Auditor-General finds another certificate issued dealing with and embracing the same amount of work, nothing beyond that, he says, this cannot be done. What right have you to defer to the opinion of the Minister of Justice? I, Auditor-General, decline to pay it. It has never been issued to him. It has never been delivered in the sense of delivery to him. Is the claimant in this case entitled to come into court and ask us to produce a document that passed between one officer of the department and another? Counsel for the claimant says the estimates must be delivered to him. I say, unless there is a delivery, it can be recalled.

B. B. Osler, Q.C. in reply, on motion to increase: Where an Engineer makes a mistake, then it is within his jurisdiction to correct it. The court cannot revise

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that, unless it is a mistake touching his jurisdiction. [Cites *Peters* v. *The Quebec Commissioners* (1).]

[*By the Court:* But suppose it was a mere clerical error. Suppose he intended to certify for 125,000 yards, and certified for 100,000, and he discovers it?]

I think he could correct it then.

[*By the Court:* I understand you to concede that?]

Yes, but the court will not correct mistakes in fact, or mistakes in law of an engineer within his jurisdiction.

The next question raised by counsel for the Crown is the recall of the certificate. (Reads clause 25 of contract.) There is no necessity, in the wording of section 25 of the contract, for the delivery of a certificate. The Engineer had published it; he communicated it formally to the Secretary of the Department who has statutory functions, one of which is to receive just such an estimate and take notice of it. In the Department of Railways and Canals, the Secretary has a statutory position, and it was with regard to that statutory position he had that the formal notice was sent to him by the Chief Engineer. Then, furthermore, that very letter, the letter written by the Secretary of the Department, is in itself a final certificate. It is a certificate of satisfaction.

Further, I would submit that the mere fact that an officer continues in his own personal opinion, but has come to some conclusion in deference to the opinion of the proper officer, that nevertheless, that is his certificate.

Now apart from certain *dicta* of one of the learned judges in the *Murray case* (2), that case does not help us, and this court cannot be bound by that expression of opinion which was given on the point and not argued,

(1) 19 Can. S. C. R. 685. (2) 26 Can. S. C. R. 203.

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and which goes to the root of the whole of the certificates that had been issued and acted upon from time to time, probably since Confederation.

Now, just in connection with the document the claimant relies on as his certificate, and adding to that the approval of the Minister, verbal or otherwise, it is important to draw attention to what is said in *Hudson on Building Contracts* (1):—"If you employ an architect who does not know his business, and who certifies that he is satisfied when he ought not to express satisfaction, you must be bound by his mistake. [Citing *Goodyear* v. *Weymouth* (2).] But where the architect's certificate overrides some other provision in the contract for the certificate to be conclusive, it must be clear that the certificate was intended to be final and binding on both parties."

Now, is that not this case? Was it not intended, whether there was power or not - was it not intended by the action of the Engineer, by the action of the Minister, that what was done should be final and binding between the parties? They close the matter up. Now, even if it overrides the contract, even if it was to some extent outside the contract, nevertheless if that which was done was intended to be final and binding between the parties, then the *Goodyear case* applies.

The motion, on behalf of the Crown, to set aside the preliminary judgment of June 20th, 1896, was then argued.

Mr. *Ritchie*, Q.C. and Mr. *Chrysler*, Q.C. for the motion;

Mr. *Osler*, Q.C. and Mr. *Ferguson, contra.*

THE JUDGE OF THE EXCHEQUER COURT now (January 11th, 1897) delivered judgment.

(1) 2 ed. p. 304.

(2) 35 L. J. C. P. 12.

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Reasons for Judgment.

The claimant is the contractor for the construction of sections numbered 4, 5, 6 and 7 of the Soulanges Canal. On the 26th of February, 1896, a progress estimate or certificate in his favour for $376,970.40, for work done under his contract, was signed by Mr. Thomas Munro, the engineer in charge of the work. On the 27th of February, Mr. Schreiber, the Chief Engineer of the Department of Railways and Canals, also signed the certificate, which was given in pursuance of the provisions of the twenty-fifth clause of the contract. That clause provided that cash payments equal to about ninety per cent. of the value of the work done, approximately made up from returns of progress measurements and computed at the prices agreed upon or determined under the provisions of the contract, would be made to the contractor monthly on the written certificate of the engineer that the work for, or on account of, which the certificate is granted, has been duly executed to his satisfaction, and stating the value of the work computed as above mentioned; and upon approval of such certificate by the Minister for the time being. It also provided that such certificate and such approval thereof should be a condition precedent to the right of the contractor to be paid the said ninety per cent. or any part thereof. The certificate added to the estimate of the 26th of February, 1896, is as follows:—

"I hereby certify that the above estimate is "correct, that the total value of work performed and "materials furnished by Mr. George Goodwin, con- "tractor, up to the 30th of November, 1895, is three "hundred and seventy-six thousand nine hundred and "seventy $\frac{40}{100}$ dollars; the drawback to be retained, "thirty-seven thousand six hundred and ninety $\frac{40}{100}$ "dollars, and the net amount due, three hundred and

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"thirty-nine thousand two hundred and eighty dollars, "less previous payments."

Mr. Munro signed this certificate, subject to conditions stated in his letter of the 26th of February, 1896, and Mr. Schreiber signed in accordance with a letter of the Deputy of the Minister of Justice, dated 15th of January, 1896. By the fifth item of the schedule of prices the contractor was entitled to be paid fifteen cents per cubic yard for "earth in water-tight embankments," and the contractor claimed that this price should be applied to all the earth in any embankment that had to be made water-tight, while Mr. Munro and Mr. Schreiber were of opinion that it applied only to the earth in that part of the embankment that was made water-tight. That was, I understand, their contention, though Mr. Munro's previous certificates failed, I think, to give the contractor all that he was entitled to under that view of the matter. The question in controversy depended upon the true construction of the contract, and that was a matter that had not been left to the Engineer. The usual provision in contracts of this kind has been that the Engineer shall be the sole judge of work and material in respect of both quantity and quality, and that his decisions on all questions in dispute with regard to work or material, or as to the meaning or intention of the contract and the plans, specifications and drawings, shall be final. By the eighth clause of the present contract the Engineer is made the judge of the work and material in respect of both quantity and quality, but not of the meaning and intention of the contract. On a reference of the question in dispute to the Minister of Justice, the contention of the contractor was in the end upheld, and the words added by Mr. Munro and Mr. Schreiber to the signatures to the progress estimate or certificate of the 26th of February,

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1896, were intended to indicate, and indicated, that they signed in deference to the opinion of the Minister of Justice as to the proper construction to be placed upon the contract.

Reasons for Judgment.

If this certificate is a good certificate under the contract, the claimant is entitled to judgment for seventy-three thousand two hundred and sixty dollars, the amount certified for, less the drawback, and less previous payments.

In the first place it is argued for the Crown that the certificate is not good because it was given in deference to the opinion of the Minister of Justice, and does not give expression to the views of the Chief Engineer, by whose decision the parties to the contract had agreed to be bound. But by reference to the contract it will be seen that it was only in respect of the quality and quantity of the work done that the parties had agreed to be bound by his judgment. There was no question as to the quality of the work. It had admittedly been done to the satisfaction of the engineer in charge of the work and of the Chief Engineer. Neither was there any dispute as to the quantity of work done. The question in controversy was as to whether or not, for certain work done to the satisfaction of the Engineer, the contractor was, under the schedule of prices embodied in and forming part of the contract, entitled to be paid fifteen cents per cubic yard as "earth in water-tight embankments." That was a question of law arising upon the construction of the contract. It might have been referred, as we shall see, to the Exchequer Court. But that was not the only course open to the parties. By *The Revised Statutes*, chapter 21, section 3, it is, among other things, made the duty of the Minister of Justice to advise the Crown upon all matters of law referred to him by the Crown; and, by the fourth section, as Attorney-General of Canada,

to advise " the heads of the several departments of the Government upon all matters of law connected with such departments." The question to which I referred arose upon a contract between the claimant and the Crown, represented by the Minister of Railways and Canals. It was a question connected with the Department of which the Minister was the head ; and it was, I think, as much his duty to seek the advice of the Minister of Justice as it was the latter's duty to give advice. Not only was there no objection to adopting that course, but it was in every way fitting and constitutional to adopt it. The advice of the Minister of Justice having been given, it was equally proper that the Minister of Railways and Canals, and the Chief Engineer of the Department should follow such advice. With regard to the quantity of work done there is no contention that the certificate does not give expression to the views of the Engineer by which the parties have agreed to be bound.

It is also contended that the certificate is not sufficient to sustain the action in this case for the reasons stated in the judgment of the Supreme Court in *Murray* v. *The Queen* (1).

By the twenty-fifth clause of the contract, to which reference has been made, three things are, as will have been observed, made conditions precedent to the right of the claimant to recover :—

1. There must be a certificate of the engineer that the work for, or on account of, which the certificate is granted, has been duly executed to his satisfaction.

2. The certificate must state the value of such work computed according to the prices stated in the contract.

3. The certificate must be approved of by the Minister for the time being.

(1) 26 Can. S. C. R. 203.

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The approval of the Minister of the certificate has been proven; and there is nothing in the contract requiring it to be given, or evidenced by any writing. Mr. Justice Fournier, in *McGreevy* v. *The Queen* (1), appears to have been of opinion that the approval of the Minister could in a like case be given by acquiescence. Here we have more than that. We have the actual approval of the Minister to the Chief Engineer giving the certificate, and the letter of the Deputy Minister transmitting the certificate, in the usual course of business, to the Auditor-General, and requesting that a cheque for the amount due thereon should be issued to the claimant. If, however, it is necessary for the Minister's approval to be evidenced by some writing under his hand either on the certificate or on some other document, the claimant has not made out any case here. I say if, because I am not sure that the Supreme Court in *Murray* v. *The Queen* (*supra*) intended to decide that it was necessary.

Then the certificate states the value of the work done computed according to the prices stated in the contract. The only possible objection on that score is that it gives the value of all the work done up to that date, from which are to be deducted "previous payments," instead of giving the amount of work done since the last estimate or certificate. But why is that an objection? For what reason is the certificate bad because it gives the total value of the work done, the rest being the simplest matter of account for the Auditor-General, or whoever else may have to give effect to the certificate?

It is true, however, that the certificate does not in terms state that the work for which it was given had been executed to the satisfaction of the Engineer, and, if that is a requisite, this certificate is bad, undoubt-

(1) 1 Ex. C. R. 321.

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edly. It is contended, however, that the satisfaction of the Engineer is to be implied from the giving of the certificate in the terms, for the purposes, and under the circumstances existing in this case. I should, so far as my own view goes, have been inclined to accede to that contention but for the expression of opinion to the contrary that occurs in the judgment of the court in *Murray* v. *The Queen* (1). In that case, in which the clause of the contract and form of certificate in question were the same as they are in this, I was of opinion that the claimants could not succeed because they had no certificate of the Engineer stating the value of the work done computed according to the contract. They had been paid all that the Engineer had certified for. There was no other or further certificate that the Minister could approve of, and of course there was and could be no approval of the Minister. These objections which the Crown insisted upon in the Exchequer Court made it impossible, in my opinion, for the claimants to recover an amount that otherwise I thought they were entitled to. In the Supreme Court the Crown waived the objections to the certificate that had been relied upon in the court below, and the claimants had judgment. The objections to the certificate having been waived, it was not perhaps necessary to express any opinion as to whether it was good or bad. But the question was discussed, and the opinion expressed that the certificate, though good for the purpose of audit, did not comply with the contract and was not sufficient to maintain an action. One of the reasons given was that it did not state in terms that the work had been executed to the satisfaction of the Engineer. The certificate in this case is open to the same objection. It is argued that under the circumstances I am not bound by the expression of opinion occurring in the

(1) 26 Can. S. C. R. 212.

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judgment of the Supreme Court. But however that may be, it is fitting, I think, that I should follow it, leaving to that court on appeal to modify or qualify the opinion expressed, if upon principle or in view of the authorities that have been cited it thinks there is any occasion for any modification or qualification.

That brings me to the question as to whether or not the claimant may in this case, without a certificate of the Engineer approved of by the Minister, recover what the court thinks him entitled to upon the merits. The contention that he may is rested upon the thirty-third clause of the contract, which provides that all matters in difference arising between the parties thereto upon any matter connected with or arising out of the contract, the decision whereof is not thereby especially given to the Engineer, shall be referred to the Exchequer Court of Canada, and the award of such court shall be final and conclusive. Is the present reference made in pursuance of that provision? I think not. The contingency on which a reference could be made has not arisen. The parties to the contract are the claimant and the Crown, represented by the Minister of Railways and Canals. At the time the reference in this case to the court was made there was no such matter in difference between such parties. There had been a matter of difference between the claimant and the Government engineers as to the construction of the contract, but that question had been decided in the contractor's favour by the Minister of Justice and the Minister of Railways and Canals, and the Chief Engineer had accepted that decision, as no doubt it was proper to do, and had acted upon it. There was at the time of the reference a matter in difference between the claimant and the Auditor-General. But the Auditor-General was not a party to the contract, and he did not as to the matter in controversy represent

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the Crown. The provision that the matters in difference mentioned in the thirty-third clause of the contract shall be referred to the Exchequer Court, and that the award of such court shall be final and conclusive, is, so far as I know, new. This is the first contract that has come before me in which the provision occurs. How it is to be worked out, whether there may be references from time to time while the contract is pending, or whether the reference must be made after the work embraced in the contract is finished, need not at present be discussed. All I need now say is that I do not think the question that arose as to the construction of the contract, and which was in the end determined by the Minister of Justice in the contractor's favour, is now properly before me for decision under that provision. Not being before me for decision, I cannot in entering upon the final judgment in this case give effect, without the consent of the parties, to the views I hold as to that question. The parties do not consent, and the judgment must be entered for the full amount of the certificate given by the Chief Engineer, or for nothing. But as I have already, at the hearing, expressed my view as to the merits of the question in controversy, it may not be out of place now to add a word or two to the opinion I then expressed, and which I see no reason to change. On the one hand I do not agree with the view that the claimant is entitled to be paid fifteen cents per cubic yard for all the earth in the water-tight embankments. From the total quantity there must, I think, be deducted, as I said at the hearing (1), the earth that came from the mucking; (2), any sand or material that would not class as "selected material;" and (3), any material that was not laid in substantial accordance with the specification. On the other hand I do not agree with the engineers that they had prior to the certificate in

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controversy in this case allowed the contractor for all the "earth in water-tight embankments" for which he was entitled to be paid under the contract. That is now practically conceded by the Crown. The two assistant engineers adopted under Mr. Munro's instructions different methods of ascertaining the quantity of such earth to be paid for at the prescribed rate. Both methods, under the circumstances, cannot be right. Both may be, and are, I think, wrong. The least sum to which the claimant would be entitled, under the facts proved in this case, would be represented by the value at fifteen cents per cubic yard, less previous allowances, of all the earth in the water-tight embankments lying above that portion of the base of the embankment that was mucked. I adhere, however, to the view I expressed at the hearing that the placing of the mucking stakes, without more, was not on the part of the engineers in charge of the work a sufficient compliance with the provision of the specification that made it their duty to lay out the portion of the embankment that was to be made water-tight, giving the heights and slopes of such portions. If, in addition to placing the mucking stakes, the contractor, or some one properly representing him, had been clearly given to understand that the water-tight portion of the embankment was to be built above the portion of the base of the embankment that had been mucked, there would be some reason to accept that as the equivalent of what the contract and specification called for in that behalf. There is, it is true, some evidence in the case of something of that kind having been done. But it is not, I think, satisfactory. It is the evidence of the engineers who neglected in the present case to indicate upon the plans in use the portion of the embankment that was to be made water-tight. That was a simple, easy and obvious way to

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avoid all disputes. And that not having been done, and disputes and difficulties having arisen in consequence thereof, the evidence of those in fault must, I think, be taken with some reserve. At least I should like, before coming to a conclusion adverse to the claimant on that point, to hear what his superintendents or overseers have to say as to what was done and said by the Government engineers. There is no pretence that there was any notice or communication of the kind to the claimant himself.

In the result the preliminary judgment entered in this case on the 20th of June last will be set aside and judgment entered for the defendant, but under all the circumstances of the case, without costs.

Judgment accordingly.

Solicitor for the claimant: *A. Ferguson.*

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

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Jan. 18.

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

AND

EMMANUEL ST. LOUIS.....DEFENDANT.

Prerogative—Res judicata—Chose Jugée—Effect of when pleaded against the Crown.

The doctrine of *res judicata* may be invoked against the Crown.

INFORMATION to recover certain moneys alleged to have been improperly received by the defendant.

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

The case was tried before the Judge of the Exchequer Court on the 20th, 21st, 22nd, 25th and 26th days of June and on the 3rd, 4th, 5th days of December, 1895, and was argued on the 27th and 28th days of November, 1896.

B. B. Osler, Q.C., for the plaintiff:

A judgment in favour of the Crown against a subject is a very different thing from a judgment between subject and subject so far as its operation on the rights of the parties are concerned.

In the very nature of things it is only a method by which the Crown's court advises the Crown as to what is right with reference to the subject's claim. That is all it can amount to. I want to clearly distinguish, in the opening, the position a suppliant is in, upon recovery, from that of any one else. Supposing, for instance, after a judgment of the Court of Exchequer, after an ultimate judgment, a confirmed judgment by the Privy Council, it appeared most con-

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clusively to the law officers of the Crown that the whole thing was founded upon forgery, and that evidence clearly came out, would the Crown be bound? The Crown would simply say, this recommendation of our court is founded upon the material which was before it. We are now asked to pay, but we are asked to pay under circumstances, new circumstances, which, had they been before the court, the order never would have been made.

Are we to look to the law of the Province of Quebec, or are we to look to the law of the Province of Ontario?

[*By the Court:* Is there any evidence where it was signed? It was a contract made by correspondence, was it not? A contract to be performed in the Province of Quebec?]

Yes, the contract was created, according to the pleading, when the tenders were duly accepted by the Department of Railways and Canals for Canada.

[*By the Court:* Up to the present moment we have proceeded upon the view that the case was governed by the law of Quebec?]

Well, we take exception to that. We have not conceded that and we desire to submit to your lordship the proposition that it is governed by the law of England with reference to the position of the Crown, and not by the law of Quebec.

What are we doing here? We are seeking to recover back moneys paid on false pretences; obtained, so to speak, by conspiracy between the contractor and certain employees. We paid the moneys in Ottawa. We issued the cheques there. The Crown in its domicile here in Ottawa was asked to pay.

[*By the Court:* Do you think the Crown is domiciled in Ottawa? Is not its domicile as much in Montreal as Ottawa?]

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Well, the headquarters are here. The place where the Crown transacts its financial business is in Ottawa.

[Mr. *Geoffrion:* What about the French Treaty? We have our laws in the Province of Quebec by treaty, and the Crown must respect them.]

But it is a transaction which takes place in Ottawa and is governed by the law of England.

I rely upon the principle which is best illustrated by the case of *R.* v. *Brisac* (1).

Of course we say that the Crown is not bound by estoppel, or *res judicata*, in any way. We say that the authorities are clear upon that point. The judgment of the Supreme Court in *St. Louis* v. *The Queen* (2) does not preclude us here.

[Mr. *Geoffrion:* The Crown is not bound by laches or estoppel; but that is not the case in regard to a judgment. That is a judicial contract, and the Crown is bound by its contract.]

I submit the position this court is in with reference to the judgment of the Supreme Court is this, that in so far as their lordships have found law, this court is bound by it; in so far as they have found facts, and those facts are identical with the facts on this record, I could not ask your lordship to reverse such facts; but if there are added facts, no matter how trifling, while your lordship cannot reject the facts which have been passed upon by the other court as insufficient, this court has a right to add those facts to the new facts and come to a different conclusion than the Supreme Court. It is perfectly clear that a party in one case may make out merely a case of strong suspicion, almost amounting to proof; and in another he is able to supplement such evidence by circumstances making the proof complete.

(1) 4 East 164.

(2) 25 Can. S. C. R. 649.

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I want to make this further point with reference to the finding of fact by their lordships in the court above. I desire to say that where the judge has taken an erroneous view of the evidence, that is to say, he has stated facts upon which, and from which, he draws a conclusion, but where it is manifest that he is mistaken in stating those facts, then a court is not bound either in law or *ex comitate* to follow that judgment.

Now, in two or three places in the judgment of the court above it is manifest that their lordships were in error as to the facts upon which they were passing, and to that extent this court has to consider how far their conclusions are founded upon manifest error. For instance, an important item in one of the judgments which I will refer to in a moment is the finding of the fact that the suppliant had his original pay-rolls in his possession on which he paid his men, and that he did not produce that original pay-roll because he did not want to show the figures named. Now, that is manifestly and clearly an error. He says that they were produced, these very original pay-rolls, produced in the court, and the only hesitation about producing them was the fact that they did not wish to show just what they had paid their men. Now, how important a fact that is. That these pay-rolls existed, that they were produced, that they were acted upon, that they were shown to the Crown with that limitation. Now, if we analyse the evidence there is enough to show that the judge might naturally have made the mistake, but it is perfectly clear from reference to the evidence that no such document existed; and that one of their lordships was in entire error, and that the document referred to was one of the epitomes of the evidence made at the trial, nothing more. The error which the learned judge made in coming to

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his conclusions, might be and probably was the very turning point of the view that was taken by the court of the evidence.

Mr. Justice Girouard's judgment at page 675 of 25 Can. S. C. R. proceeds in this way:—"But "there is more. During the examination of the appel- "lant on discovery, which is made part of the case, "the appellant was requested to produce his pay-lists. "He has done so, and has placed them in the hands "of the counsel for the Crown, with the understanding "that the prices that he paid to the workmen were not "to be made known, a reservation which was perfectly "legitimate as it was none of the business of the "Crown or of the public to know what the appellant "really paid the men he had contracted to supply to "the Government. It is a very remarkable thing that "we have never heard of the result of this production "by the appellant, and of the comparison which the "respondent had the opportunity to make between the "pay-rolls sent to Ottawa and the pay-lists showing "what was actually paid to the men; and this alone "seems to me a strong presumption that these pay- "rolls must be correct. This fact was established "beyond doubt during the trial."

Now the learned judge is entirely in error, a radical error as to the facts. The pay-roll was a copy of the compilation made at the trial with simply the prices of the contractor put against them; an *ex post facto* compilation, not a compilation upon which the men were paid. Of course if it was the pay-list upon which the men were paid, it should have all the weight given to it which his lordship gives; but there is no such document. My learned friends cannot argue there is such a document. My learned friends cannot argue that his lordship is right in his facts He relies upon a document which was not in evidence. It was one

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of the copies which had not the extension at the Government price, but an extension at the paying price only.

Then I draw attention to an erroneous conclusion by Mr. Justice Taschereau at page 662:—"The respondent appears to lay some stress on the fact that five or six of the appellant's time-keepers have been charged to the Crown as masons or stonecutters. Now the appellant did that openly and with the acquiescence of the Government officers. These men were really in the Government's employ. He paid even the foremen engaged directly by the Government, as appears by Connolly's evidence. The only fault of the appellant is that he inserted them under a classification so as to have them covered by the contract. I cannot see any evidence of fraud in this. No one with a claim against the Government is to be called a thief because he may have illegally charged, in an account of over $200,000 of this intricate nature, a couple of thousand dollars of doubtful legality. If one claims, say $200,000, but proves only $190,000, his claim is not to be dismissed *in toto* because he failed to prove the difference of $10,000, even if the claim for these $10,000 were tainted with fraud. Fraud in what is not proved is no defence to what is proved."

Now, if that conclusion was to prevail, no deduction should have been made by the Supreme Court. But while his lordship came to that conclusion in his judgment, the court did not. The court did not come to that conclusion, because he afterwards says at page 665:—"The appeal is allowed with costs, but from the amount claimed by the appellant we have, after further deliberation, come to the conclusion that the charges for his copyists and time-keepers are not covered by the strict letter of his contract and should

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" therefore not be allowed. The parties have not fur-
" nished us with their own figures on this point, and
" I am not satisfied that it is possible for us upon the
" record to ascertain the precise amount of these
" charges, but a sum of $1,800 is, we think, amply
" sufficient to cover them. Judgment will, therefore,
" be entered for $61,842.29, with interest from the
" 2nd of December, 1893, the date of the petition of
" right, and costs." And at page 662 he says: "These
" men were really in the Government's employ. He
" paid even the foreman engaged directly by the
" Government. The appellant did it openly and
" with the acquiescence of the Government officers,
" who knew of it." What Government officer, by the evidence, knew of it?

[Mr. *Emard:* The foreman.]

Who acquiesced in it? Villeneuve. He, by virtue of his being a Government officer during the summer, engaged during the year, is covered with the mantle of Government office all the time that he is receiving the pay of his brother-in-law to act as his time-keeper, and that is the acquiescence of the Government officer that is alluded to there.

Their lordships in the Supreme Court seem to say that the evidence of the Crown's witness, McLeod, was largely based upon his experience as a commissioner on the enquiry before the case came into the courts, and they say that his evidence must be treated as hearsay. But surely that is an error. He founded his evidence upon the examination and range of the work done, upon the plans, specifications, alterations, actual measurements; the false-works as executed are taken in and allowed; and he speaks upon the evidence of the original surveyor and engineer, Papineau, of the quantities. It seems incredible that the conclusion of the Supreme Court could have been reached

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with the evidence that was there before them at the moment of conclusion.

W. D. Hogg, Q.C., followed for the plaintiff:

It seems to me that the question of estoppel, or of *res judicata*, is one at the threshold of the enquiry here. This court has decided in two reported cases that the doctrine of estoppel cannot be invoked against the Crown. [Cites *Humphrey* v. *The Queen* (1); *Burroughs* v. *The Queen* (2).

The action here is to recover moneys obtained by fraud or false pretences from the Crown. The cause of action, therefore, does not arise in the Province of Quebec and the case is to be determined by the principles of English law. Even if the case arose within that province, the code is silent concerning the question of *res judicata* as urged against the Crown, and the law of England would, I submit, prevail.

The authorities are clear that estoppels do not bind the Crown, and *res judicata* falls within the classification of estoppel by record. Chitty in his *Prerogatives of the Crown* speaks very precisely upon this point (p. 381):—"The King is not bound by fictions or re-"lations of law; or by estoppels, even though such "estoppels would affect the party through whom the "Crown claims. But this does not prevent the King "from taking advantage of estoppels." In support of this statement of the doctrine, he cites *Coke's Case* (3). [See also *Everest & Strode on Estoppel* (4); *Cababé on Estoppel* (5); *Brooke's Abridgement* (6); *Manning's Exchequer Practice* (7).

As to the right of the Crown to recover back this money improperly paid to the defendant, I cite *Barry* v. *Croskey* (8); *Hill* v. *Lane* (9); *Ramshire* v. *Bolton* (10).

(1) 2 Ex. C. R. 386.
(2) 2 Ex. C. R. 293.
(3) Godbolt 299.
(4) P. 299.
(5) P. 9.
(6) Vol. 10, pp. 432 and 478.
(7) Pp. 106 and 122.
(8) 2 J. & H. 23.
(9) L. R. 11 Eq. 215.
(10) L. R. 8 Eq. 294.

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J. U. Emard for the defendant:

The contract was made in Montreal and executed in Montreal. Then the law of the Province of Quebec is the *lex loci solutionis*.

As to the question of *res judicata*, there is no doubt that the several conditions required to constitute *res judicata* exist in this case—conditions that create the defence either at Common Law or under the Civil Code. The Articles of our code which apply to the subject are 1239, 1240 and 1241. Our only enquiry is, whether the three conditions prescribed in the code exist between the two actions? As to the first—identity of persons, there is no doubt about that being fulfilled. As to the second—identity of cause—the action here is based upon the same contract as was the former action, and the issues are the same. As to the third—identity of object—we say that it must be held that the object is substantially the same in both actions. In both the Crown sought to get money alleged to have been improperly received by the contractor. [Cites *St. Louis* v. *The Queen* (1).]

As to the finding of fact in the reasons of judgment in the former case being conclusive against the Crown here, I cite *Taylor on Evidence*, 9th ed. secs. 1695, 1699, 1700, 1701, 1702. We have also the French law to rely on. By French law the reasons are incorporated in the judgment. Not only does the formal judgment contain the enacting part, but also the reasons. [Cites 5 *Marcadé* (sur l'Article 1351 du C. N.) p. 167; 30 *Demolombe*, Nos. 282, 296, 299, 304; 20 *Laurent*, Nos. 30, 45, 46; 5 *Larombière*, Nos. 46, 48, 50, 57, 59, 63; 2 *Mourlon*, Nos. 1619, 1620, 1621, 1623; 11 *Fuzier Herman*, *Repertoire* vo. 'Chose Jugée,' Nos. 213, 227, 228, 251, 253, 259, 260; 8 *Aubry & Rau*, p. 390, No. 769, Note 33; *Code Napoléon*, Art. 1351; *Sirey*, *Codes Annotés*,

(1) 25 Can. S. C. R. 649.

Art. 1851, Nos. 209, 224, 230, 270, 302, 310, 311; *Broom's Legal Maxims* ('Nemo debet bis, &c.') p. 316; 2 *Smith's* L. C., 10 ed. p. 409; C. C. L. C. Art. 6; *Fonseca* v. *Attorney General* (1); *Exchange Bank* v. *The Queen* (1); *Pollock on Contracts*, p. 404, 405; *Addison on Contracts*, p. 509, Nos. 1408, *et seq.*; *Best on Evidence*, p. 268; 5 *Pothier* (par *Bugnet*) p. 113, Nos. 140 *et seq.*; 5 *Larombière*, Nos. 28, 31; 31 *Demolombe*, Nos. 284 *et seq.*]

C. A. Geoffrion, Q.C.: The positions we take in this case may be classified thus: (1). That the prerogatives of the Crown do not enable it to disregard a plea of *res judicata*. (2). The record shows that the issue in this case is *chose jugée*. (3). That this being an action *condictio indebiti*, the burden was on the plaintiff to prove its case positively and affirmatively.

The contract was executed—and when I say executed, I mean signed and formed—in the Province of Quebec; and though the money was sent by cheque from Ottawa, the money reached the Province of Quebec and was paid to our client in the Province of Quebec. As the payment took place in the Province of Quebec, where the receipt was given for it, the action *condictio indebiti* must be governed by the law of the place. Now the right has accrued, as far as the civil law is concerned, in the Province of Quebec. Your lordship has already held, in the other case, that it was the law of procedure of the Province of Quebec that was to apply.

When it was attempted by the Crown in their defence in the other case to make a counter-claim, pure and simple, at the conclusion of their plea, a demurrer or objection was taken on our behalf that it could not be properly pleaded. We contended that according to the rules of our Code of Procedure it must be by an incidental demand, or a contra demand and contain

(1) 17 Can. S. C. R. 612-619. (2) 11 A. C. 157.

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all the allegations of a demand. Then in view of this objection the Crown immediately moved to withdraw the counter-claim. It would have been a proper plea, I understand, under the laws of the Province of Ontario, or under the Common Law; but it was not the proper plea according to the laws of the Province of Quebec.

We claim that we have already from this court a decision that it is the law of the Province of Quebec, either as to procedure or as to the rights of the parties, that applies in cases such as this; and the opposite side has agreed and submitted to that, in the way I have just mentioned.

My learned confrère Mr. Osler referred to a reported case, the *Brisac Case* (1), where it was purely and simply a question of jurisdiction, and also jurisdiction as to a criminal offence. It was a case of conspiracy on the high seas and the money was obtained as the result of a conspiracy in London; and it was held, to give jurisdiction to an English court of justice, that it was not necessary that the conspiracy should have taken place where the party is arrested or brought to justice. It was a question of jurisdiction.

In the present case, by virtue of a special statute, this court in Ottawa has jurisdiction all over the Dominion. If this court had not been in existence, for instance, if it had been before the first petition of right Act was passed, the jurisdiction in this case would have to be found within the courts of the different provinces. At that time St. Louis could not have been summoned to Ottawa. Having been unduly paid money in Montreal, the court of first instance would have been in the Province of Quebec.

And we received the authorization upon which the money was paid to us, where? It was a voucher

(1) 4 East 164.

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from the Crown for us to receive our money in Montreal; and it was in Montreal where we gave a receipt for work executed in Montreal, in connection with a contract signed and passed in Montreal.

We claim that we have to look to the law of France as it was at the time of the cession of the country, and I do it, based upon a decision of the Privy Council in the case of the *Exchange Bank of Canada* v. *The Queen* (1), where it is held that the Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them.

The *ratio decidendi* of the *Exchange Bank* v. *The Queen* (2) is that the privileges of the Crown known as the "minor prerogatives" are matters falling within the scope of municipal law, and are, therefore, not governed by public law. The Crown is bound by express words or necessary implication in a statute. Our Civil Code is a statute, and Article 6 says that the Crown is bound by every Article in the Code. [Cites C. C. L. C. Arts. 1047 to 1052.] By the laws of the Province of Quebec as soon as the judgment in the prior case was delivered its obligations had to be interpreted by the provisions of the Code. [Cites C. C. L. C. Arts. 1239, 1240, 1241.] Article 1241 of our Code deals with the question of *res judicata*, and under its provisions the Crown is bound by a prior judgment the same as a subject is. The rule that the Crown is not subject to estoppels is grounded very largely on the more elementary principle that the Crown cannot be guilty of laches. In the constitution of the doctrine of *res judicata* the element of laches does not enter. It cannot be said that the Crown was guilty of laches in not having the former judgment in its favour. And so the elements which constitute true estoppels not all being present in *res judicata*, indeed, the most im-

(1) 11 App. Cas. 157. (2) 11 App. Cas. 157.

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portant one, so far as matters affecting the Crown is concerned, that of laches, being omitted, the doctrine cannot be invoked to the prejudice of the defendant's rights in this action.

As to the venue of the action, the Crown has no particular domicile, the realm is its domicile; and whenever the Crown is in controversy with a subject, the legal objections arising between them must be determined by the laws of the particular territory where the cause of action has arisen. Now, under Quebec law, the Crown has no special precedence over the subject when its rights and those of the subject are equal. The ordinary incidents of the law govern the parties in such a case.

I venture to lay down the proposition that a judgment upon a petition of right is a law for the Crown as well as for the subject. The Crown must be bound by the doctrine of *chose jugée* or there would be no end to litigation. [Cites *Marriott* v. *Hampton* (1); C. C. L. C. Art. 505; *Broom's Legal Maxims* (2); *Bournat* v. *Vignon* (3); *Dalloz*: *Codes Annotés*, Art. 1351, Nos. 209, 224, 230, 270, 302.

The Solicitor-General of Canada for the plaintiff:

The principle that we contend for is that the rule of law as to *res judicata* which is applicable between subject and subject is not applicable to the Crown. The reason why it should not be applicable to the Crown in a case such as the present one is quite apparent. Take the case, for instance, that Mr. Geoffrion quoted from *Smith's Leading Cases*, where after a party is condemned to pay a certain amount he discovers that he is possessed of a discharge which would go to show he had paid the amount, and that there should be no recovery for it. Take that rule and apply it to

(1) 2 Smith L. C. 409. (2) P. 316.
(3) Sirey, [1839] pt. 1, 119.

the present case, and see what an absurdity would follow. What is the result of the judgment, as my learned friend, Mr. Osler, pointed out, that your lordship has rendered in the other case? The result is that you report to Parliament, substantially, that a certain amount is due by the Crown to Mr. St. Louis. Then it is for Parliament to provide the money necessary to liquidate this obligation, the existence of which has been reported by you. In the interval between the time that you have made this report and the time that Parliament is called upon to provide the funds necessary to pay it, it is discovered that the amount has been paid previously. Would it be argued or contended for one moment that under these conditions Parliament would have the right to pay it, ought to pay it, and would be justified in paying it? Can it be contended for a moment that Parliament could do such a thing as that? That is to say, go to the public exchequer and take out of it moneys to pay a claim that had been already paid before?

I contend that the judgment is not a judgment in the ordinary sense of the word. I assume that it is merely a report. It cannot be considered as a judgment in the ordinary acceptation of the term, because it is a judgment that can only be made effective, that is to say, can only be made payable, by the act of an ultimate body, by the finding of an ultimate body, of the means necessary to liquidate the judgment. As a matter of fact this judgment cannot be payable without the action of Parliament. Parliament will have to provide the money necessary to enable it to do it, because this is the execution of a public work.

Then, as to the question as to which of the laws and systems of law is applicable to the present case, whether that of Ontario or that of Quebec, I will have to point out in a moment that I think there is no

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difference between the two ; but if there be a difference, what is the nature of this case? This is an action brought by the Crown practically to recover back from St. Louis a sum of money paid to him by means of a fraudulent conspiracy, substantially between himself and some of the employees of the Government. Where did the cause of action arise? The question here is not as to where the work was done, where the contract under which the money was paid was entered into; the question is, where was the payment made? What was the determining cause of the payment? Where did that determining cause operate? I say that the determining cause was here in Ottawa, where the pay-lists were sent, after having been made; the fact of their reception here was the determining cause for the issue of the cheque for the payment of the money. The cause of action originated at the place where the pay-roll was handed in to the Government in exchange for which the cheque went out. It is not the making of the pay-rolls in Montreal, it is not the signing of them there, it is not the doing of the work; that has absolutely nothing to do with it. It is on the faith of the pay-roll that the cheque issued. If this be the case, the court then will have to apply the well established rule of English law.

Assuming that the matter is one to be governed by the law of the Province of Quebec, what is the law of that province?

My learned friends referred to the case of the *Exchange Bank* v. *The Queen* (1) I may say to your lordship that there is another case, that of *Attorney-General* v. *Monk* (2), where you will see the same question discussed.

In that case the point is argued admirably, but that is not our case. In fact, that case makes in our favour, the *Exchange Bank Case* makes in our favour.

(1) 11 App. Cas. 157. (2) 19 L. C. J. 71.

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In the *Maritime Bank Case* (1), a Privy Council case also, the distinction is drawn between the law of the Province of Quebec and the law of the other provinces, so far as the prerogatives of the Crown are concerned. The *Maritime Bank Case* is a subsequent case to the *Exchange Bank Case.*

There, then, is the principle that we contend for made applicable to Quebec. Of course, the prerogatives of the Crown are the same in Quebec as anywhere within the limits of the Dominion. That is laid down in undoubted terms in that case.

My learned friend says, and your lordship will remember, that the case of the *Exchange Bank* turned entirely upon the true construction to be put upon Section 10 of Article 1994 of the Code, by which the Crown contended they were not bound, and in that contention they were maintained by the Court of Appeal reversing the judgment of the Superior Court.

There is no provision of our Code applicable to the present case, except what my learned friends have been able to gather from Article 6 of the Civil Code.

The Articles of the Civil Code that have an especial bearing on the question of limiting the prerogatives of the Crown, are 2032, 2086, 2211, and 2216.

If I am correct in my statement, that there is nothing affecting this case in the same way as Article 1994, paragraph 10, affected the *Exchange Bank Case*, then comes the operation of the rule I contended for a moment ago, that the prerogative of the Queen, when not limited by statute, is as extensive in all Her Majesty's Colonial possessions as in Great Britain. Then I say that the English law is applicable, and that all the authorities my learned friend has quoted find their application in this case. And to take this case out of the operation of that rule, the rule of the

(1) 11 App. Cas. 437.

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English law, my learned friend has got to rely upon Article 6 of the Civil Code.

If you take this Article, and then read Article 9 of the Code, you will find again the application of the rule that where the law is silent, the general rule as to the prerogatives prevails. Article 9 clearly says, no act of a legislature affects the rights or prerogatives of the Crown unless they are included therein by special enactment.

Mr. *Osler*, replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 18th, 1897) delivered judgment.

The information is exhibited to recover back from the defendant the sum of $143,881.00 and interest, being parcel of an amount of $220,550.21 paid to him on certain contracts made between him and the Crown, whereby he undertook to furnish labour and stone for the construction of the Wellington Street Bridge and the Grand Trunk Bridge over the Lachine Canal at Montreal, and for the construction of Lock No. 1 of the said canal. The total amount of the claim made by the defendant under such contracts was $284.192.50, of which the Crown paid to the defendant the sum of $220,550.21. For the balance of $63,642.39 the defendant prosecuted a petition of right [*St. Louis* v. *The Queen* (1).] The Crown defended the petition on the ground that the defendant had not in fact furnished labour and material to the amount for which he claimed, and alleged that the pay-lists presented by the suppliant, the defendant here, were improperly and fraudulently prepared, inasmuch as many of them contained the names of large numbers of workmen who were not employed or engaged upon the work of constructing the said bridges, and who were never in

(1) 4 Ex. C. R. 185; 25 Can. S. C. R. 649.

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fact supplied by the suppliant to Her Majesty for the purposes mentioned in the contract. The Crown also asked that an account be taken, and that it have judgment for such an amount as should thereupon appear to have been overpaid to the suppliant. A question having arisen upon the argument as to whether or not the Crown's counter-claim had been sufficiently pleaded, a motion was, after argument and before judgment, made on behalf of the Crown to strike out of the statement in defence so much thereof as set up any counter-claim, but without prejudice to the right of Her Majesty to prosecute an action in respect of such claim. The application was not opposed by counsel for the defendant and was allowed. That left for consideration the question only of the suppliant's right to recover the balance which he claimed. But it is obvious that before he could recover any balance he must establish the fact that he was entitled to what had been paid to him, that also being in issue. The burden of proof was upon the suppliant and I was of opinion on the facts of the case that he had not discharged that burden, and there was judgment in this court for the Crown. An appeal from the judgment of the Exchequer Court was taken by the suppliant to the Supreme Court, and the Crown filed the present information to recover back from the defendant the moneys that were alleged to have been overpaid to him. The issues in this case were in substance the same as those that had been raised in the proceeding by the petition of right. The case came on for hearing on the 20th, 21st, 22nd, 25th, and 26th of June, 1895, and on the 3rd, 4th, and 5th of December, 1895. It was set down for argument on the 9th of December, but on motion of the defendant's counsel the argument was postponed until after the judgment of the Supreme Court should be given in the appeal from the judg-

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ment of this court on the petition of right. That judgment was rendered on the 18th of February, 1896, reversing the finding of the Exchequer Court on the question of fact in issue, and determining in substance that the suppliant had discharged the burden of proof that rested upon him, and that he was entitled to recover from the Crown the sum of $61,842.29, with interest. That finding, it is to be observed, applies to the whole claim, to that part which had been paid as well as to the balance for which the judgment was given. The balance claimed by the suppliant was $63,642.29, the amount allowed $61,842.29, the difference of $1,800.00 being a deduction because certain clerks of the suppliant had been improperly and falsely entered on the pay-lists rendered to the Crown, as foremen or workmen upon the works. The finding of the court was in substance, and must in this action be taken to be, that the suppliant had under his contracts with the Crown, to which reference has been made, supplied labour and material to the value of $284,192.50. After judgment in his favour in the first action the defendant applied to this court, and was given leave, to amend his statement in defence and to set up a plea that the Crown was concluded by that judgment; that the matters in issue here were *res judicata*. The application was made on the 7th of March, 1896, and the amendment on the 18th of that month; and the first question to be determined now is as to whether or not it constitutes a good defence to the further maintenance of this action by the Crown.

It is contended for the Crown that it does not, and that the Crown is entitled to the judgment of the court for the following reasons:—

1. That it is not bound by the former judgment. That the doctrine of *res judicata* cannot, because of the

Crown's prerogatives, be applied against it in any case in which it is a party.

2. That there is in this case additional evidence that the pay-lists on which the defendant was paid are false and not true accounts of the labour he supplied under his contracts with the Crown.

3. That Mr. Justice Taschereau, in his reasons for judgment in the Supreme Court, did not attach sufficient importance to the incident that the defendant had by false entries in his pay-lists obtained payment from the Crown for the services of his own clerks rendered to him.

4. That Mr. Justice Girouard had fallen, it is alleged, into the error of supposing that the pay-lists produced by the defendant on discovery in the former action, were the pay-lists on which the men had actually been paid, and that but for this his judgment might have been in favour of the Crown.

5. That by the order of this court, under which the statement in defence in the former case was amended, and so much thereof as set up any counter-claim struck out, the Crown had leave to prosecute this action without prejudice.

Dealing first with the last objection it is only necessary, I think, to observe that the reservation had reference to the fact that the Crown had set up its counter-demand in the first action, and that it should be permitted to prosecute this action as though that had not been done, and without prejudice from the fact that it had been done. The Crown is therefore in the same position as though no such counter-claim had been set up; but in no better position.

With reference to the 3rd and 4th contentions of the Crown, it is clear that what we have to do with here is the judgment of the court. The reasons given for the judgment are to be looked at, but the question in

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the end is: What was the judgment? What does it decide? One judge may attach too much or too little importance to this fact or that fact, to this incident or to that incident, but that does not invalidate or affect the finding. As Lord Chancellor Halsbury says in *The Universal Stock Exchange* v. *Strachan* (1):—

"One does not adequately discuss the question of "the amount of evidence by taking each part of the "case by itself and dissecting the case and disposing "of this or that piece of the evidence as if it were to be "looked at alone. The whole transaction has to be "looked at."

Taking the evidence as a whole in the case of *St. Louis* v. *The Queen*, (*supra*) I thought that the suppliant had not made out his case. Taking the evidence as a whole, the Supreme Court were of opinion that he had made out his case and was entitled to succeed; and unless the Crown's contention that it is not bound by the principle of *res judicata* should prevail, its action in this case is barred by that finding. The fact that there is in this case further evidence of fraudulent entries in the pay-lists makes no difference, if the Crown is concluded by that finding. It is immaterial whether it is or is not in fact true that the suppliant had supplied labour and material under his contracts with the Crown to the value of $282,392.50; it must now, upon the finding of the Supreme Court, be taken as between the Crown and the defendant to be true, unless, as I have said, the Crown is entitled to succeed upon its first and main contention, that it is not bound by the judgment of the court. With reference to another question discussed, as to whether, notwithstanding that judgment, the Crown may refuse to pay the amount, or any part of the amount, awarded to the suppliant, it would, I think, be improper for me to express any opinion. As

(1) [1896] A. C. 171.

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to that I have no responsibility. If the issues of fact in this action are concluded by the finding of the court of appeal in the former action, my only duty is to give effect to that judgment.

For the Crown it is contended that it is not bound by estoppels, and that the doctrine of *res judicata* is a branch of the law of estoppel. It must be conceded at once that it is well settled law that the Crown is not bound by estoppels; but it is not so clear why or how the principle of *res judicata* came to be considered a part of the law of estoppel. But without entering upon that discussion, the Crown is, I think, bound, and, in that sense, estopped, by the judgment of a competent court in a proceeding to which it is a party, or where the proceeding is *in rem*, whether it is a party or not.

And first that must, I think, be the case on principle. As to that I agree fully with an observation of Mr. Justice Gwynne in his reasons for judgment in *Fonseca* v. *The Attorney-General of Canada* (1), where he says:—

"I can see no sound reason why the Government "of the Dominion should not be bound by the judg- "ment of a court of justice in a suit to which the "Attorney-General, as representing the Government, "was a party defendant, equally as any individual "defendant would be, if the relief prayed by the in- "formation is sought in the same interest and upon "the same grounds as were adjudicated upon by the "judgment in the former suit; and I am not prepared "to admit the proposition that in such case the "Government would not be affected by the judgment "in the former suit to be well founded in law."

In 1875, by the Act 38 Victoria, chapter 12, intituled "An Act to provide for the institution of suits against the Crown by petition of right, and

(1) 17 Can. S. C. R. 619.

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respecting procedure in Crown suits," after reciting that it was expedient to make provision for proceeding by petition of right and to assimilate the proceedings on behalf of the Crown, as nearly as may be, to the course of practice and procedure then in force in actions and suits between subject and subject, a procedure was provided whereby petitions of right might be prosecuted in the superior courts of the several provinces. By the 15th section of the Act it was provided that it should be lawful for the Minister of Finance, and he was thereby required, to pay the amount of any money and costs as to which the judgment or decree, rule or order, should be given or made, that the suppliant in any such petition of right was entitled thereto, and of which judgment or decree, rule or order, the tenor and purport should have been so certified to him, out of any moneys in his hands for the time being legally applicable thereto, or which might thereafter be voted by Parliament for that purpose. In the same year by 38 Victoria, chapter 11, the Supreme Court of Canada and the Exchequer Court of Canada were constituted and established. In the next session of Parliament by the Act 39 Victoria, chapter 27, *The Petition of Right Act*, 1875, was repealed and another Act passed in lieu thereof providing for the prosecution of petitions of right in the Exchequer Court. Both in the Act of 1875 and in that of 1876 there was a provision that nothing should prejudice or limit, otherwise than as therein provided, the rights, privileges, or prerogatives of Her Majesty or Her successors (1); but one of the things provided by the Act, and the main thing provided, was that the subject might, in accordance with the provisions of the Act, maintain an action against the Crown by a petition of right. To that extent the Crown's rights are affected.

(1) 38 Vict. c. 12, sec. 21; 39 Vict. c. 27, s. 19.

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One of the objects of these Acts was to assimilate the proceedings on such petition as nearly as might be to the course of practice and procedure then in force in actions or suits between subject and subject. And it is, I think, fair to infer that it was the intention of Parliament that the ordinary incidents of actions between subject and subject should attach to actions between the Crown and the subject. From the decision of the Exchequer Court there was an appeal to the Supreme Court, and thence, as in other cases, an appeal by leave to Her Majesty in Council. By the Act 50-51 Victoria, chapter 16, intituled "An Act to amend the Supreme and Exchequer Courts Act, and to make better provision for the trial of claims against the Crown," the jurisdiction of the Exchequer Court was enlarged; and it was given exclusive original jurisdiction in certain cases, and in other cases concurrent jurisdiction with the courts of the several provinces. From its decision, as formerly, there is an appeal to the Supreme Court and thence by leave to Her Majesty in Council. Now, under such circumstances, it appears to me that the procedure established by these Acts, and the remedies thereby given by Parliament, would in a measure be defeated if it were held that a judgment rendered in this court, from which no appeal was taken, or the judgment of the Supreme Court or of the Judicial Committee, on appeal, was not final and conclusive between the parties.

By the old practice a Writ of Error lay on a judgment on an extent to the Exchequer Chamber, and then after the determination of a Writ of Error in the Exchequer Chamber a case might have been taken into the House of Lords; and I can hardly conceive that in a case that had gone to the Exchequer Chamber and to the House of Lords, any one for the Crown would thereafter have contended that the Crown was not

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bound by the decision of the House of Lords upon the question in issue; and there is of course no difference in this respect between the decision of the House of Lords and that of the lower courts from which no appeal is taken. So far as I know, there is no record of any one ever having contended that in such a case the Crown would not be bound. It would, I think, be against public policy and the fair administration of justice to allow the Crown to bring in question again in another proceeding between the same parties, a matter that had been once determined in a court of competent jurisdiction. The principle of *interest reipublicae ut sit finis litium* applies in such a case with no less force than to actions between subject and subject. It is a well established rule of criminal law that the Crown is bound by the judgments of its courts. The pleas of *autrefois acquit* and *autrefois attaint* or *convict* are grounded upon the maxim that a man shall not be brought in danger of his life for one and the same offence more than once. (Hawkins' *Pleas of the Crown*, Vol. II, pp. 515, 524.) The author, at page 515, says:—"From whence it is generally "taken by all the books as an undoubted consequence "that where a man is once found 'not guilty' on an "indictment or appeal free from error, and well com-"menced before any court which had jurisdiction of "the cause he may, by the common law, in all cases "whatsoever plead such acquittal in bar of any sub-"sequent indictment or appeal for the same crime."
The maxim, which on its face bears evidence of a time when most offences were punishable by death, is not, it is needless to say, limited to such offences. It is the assertion in criminal matters of a general principle which in civil proceedings is expressed by the maxim *nemo debet bis vexari pro unâ et eâdem causâ;* and the latter is a statement of one of the two grounds upon

which the doctrine of *res judicata* rests, "the one public policy, that there should be an end of litigation; the other the hardship on the individual that he should be twice vexed for the same cause." (Broom's *Maxims*, 6th Ed. 318.)

In a proceeding by inquest of office it is the law that if office be found against the King a *melius inquirendum*, or further inquiry under the former commission, may be awarded for the King. "But in good discretion," says Chitty, in his *Prerogatives of the Crown*, at pp. 258, 259, "No *melius inquirendum* shall be "awarded in such case, without sight of some record, "or other pregnant matter for the King to show the "former was mistaken. And by pregnant matter for "the King is meant matter pregnant with evidence "of the King's right. But if the *melius inquirendum* "be found against the King, he is thereby precluded "from having another *melius inquirendum*, for if this "were allowed it would lead to infinity, for by the "same reason that he might have a second he might "have them without end."

The reason that the Crown might have a *melius inquirendum* was that while a subject could traverse an office found the Crown could not. That appears from *Stoughter's Case* (1), where it was determined that if on a *melius inquirendum* office again be found against the King, the King shall not have a new writ of *melius inquirendum*, and for three reasons.

"(1) Because then there would be no end thereof; "but such writs would issue infinitely, and *infinitum* "*in jure reprobatur*; (2) As if a writ of *diem clausit* "*extremum* or *mandamus*, &c., is found against the "King, there shall not be a new writ of *diem clausit* "*extremum* or *mandamus* awarded: so if upon the "*melius* it be found against the King, no *melius* shall

(1) 8 Co. 168 a.

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" be further awarded. (*Vide* 12 Eliz. Dyer (a) 292, the " *melius* is in the nature of the first writ of *diem* " *clausit extremum*) ; (3) If office be found for the King, " the party grieved may traverse it ; and if the traverse " be found against him it makes an end of the busi- " ness. So if it be found for him who tenders the tra- " verse, it shall bind the King as to this matter. And " so when the first office is found against the King, " and the *melius inquirendum* also, the King thereby " is bound from having another *melius inquirendum* for " the same matter."

In the case of *The Attorney-General* v. *Norstedt* (1) decided in the Court of Exchequer in 1816, the question raised was whether or not the Crown was bound by a sale of a vessel under the order of the Instance Court of the Admiralty. An offence had been committed in respect of the ship by virtue of which she became forfeited to the Crown. Subsequently she became derelict and was taken into the port of Scilly, and was sold under a commission of appraisement and sale issued from the High Court of Admiralty, in pursuance of an order of the court to pay the demand of salvage and other expenses. In these proceedings the Procurator-General of the King in his office of Admiralty did not object to the proceedings. The fact that an offence had been committed whereby the vessel had become forfeited to the Crown was not then known. Subsequently, proceedings were taken by the Attorney-General to have the vessel declared forfeited notwithstanding the judicial sale that had taken place ; but after full argument it was decided that the Crown was bound by the decision of the Admiralty Court and that its claim to have the ship forfeited was not for this reason well founded. Of course it is to be borne in mind that the proceeding in the Admiralty Court

(1) 3 Price 97.

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was *in rem*, and that such proceedings bind all the world. But the principle established is, I think, the same, namely, that the Crown is bound by the decision of a court of competent jurisdiction; if the decision is *in rem*, whether it is a party or not; if *in personam*, where it is a party. In the case to which I have referred, the Crown, although appearing in its right to claim the ship as derelict, did not appear in its right as claiming the ship as forfeited for an offence committed, and it appears from the judgment of the court, I think, that its decision would have been the same had there been no appearance for the Crown in the Admiralty Court.

The question as to whether or not the principle of *res judicata* is applicable to proceedings in which the Government of the United States is a party, has been considered in the Court of Claims and in the Supreme Court of the United States in a number of cases, and it has been held that the Government is bound by the judgment of a court of competent jurisdiction. In *O'Grady's Case* (1), Mr. Justice Clifford, in delivering the opinion of the Supreme Court, says (at p. 144):

"It is clear that the judgments of this court, "rendered on appeal from the Court of Claims, are "(apart from any Act of Congress to the contrary) "beyond all doubt the final determination of the "matter in controversy; and it is equally certain that "the judgments of the Court of Claims, when no "appeal is taken to this court, are under existing laws "absolutely conclusive of the rights of the parties "unless a new trial is granted by that court, as pro-"vided in the before mentioned Act of Congress."

In *Fendal's Case* (2), Nott, J., in delivering the opinion of the court, says, (pp. 251, 252):

(1) 10 C. C. R. 134. (2) 14 C. C. R. 247.

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While there are cases in which it may be questioned whether the Government will be concluded, like an ordinary corporation, by an estoppel in pais, and while there are varying decisions as to whether the Government will be concluded like an individual by an estoppel by deed (Bigelow on Estoppel, 246, and cases cited), it has never been doubted, so far as we know, that it, like ordinary suitors, is subject to the principle of *res judicata*. By the case of *The United States* v. *The Bank of the Metropolis* (1), it was settled that when the Government becomes a party to commercial paper, it must be held to the same diligence and be bound by the same principles of the law merchant that would govern individuals. In the case of *The United States* v. *The State Bank of Boston* (2), the Supreme Court went still further, and held that the rules of law applicable to individuals are to be applied to the Government in courts of justice, if its sovereignty be in nowise involved. In *Tillon's Case* (3), the Supreme Court conceded in effect that the Government would have been concluded by a former verdict offered in evidence if the court wherein the verdict was rendered had had jurisdiction to render a judgment against the Government on the verdict. In *Lane's Case* (4), the Supreme Court again conceded that a decree against the Government in a Court of Admiralty might conclude it in another suit in another court. And in *O'Grady's Case* (5), the Supreme Court expressly held that a judgment of this court from which no appeal had been taken was conclusive upon the Government, and that the Government could not subsequently assert a lien upon the subject-matter of the former action which by ordinary rules of pleading should have been then asserted as a matter of defence.

The question was discussed as to whether the cause of action in this case arose in the Province of Ontario or in the Province of Quebec, and whether the matters in controversy were to be determined by the law of England or the law of Lower Canada. I have heard nothing in the argument of the case to lead me to conclude that in respect of the principle of the law of *res judicata*, or *chose jugée*, applicable to this case, there is any difference in the law of the two provinces; and I have thought it unnecessary to consider the question as to where, under the facts proved, the cause of action arose.

(1) 15 Pet. 377.
(2) 96 U. S. 30.
(3) 6 Wall. 484, 7 C. C. R. 18.
(4) 8 Wall. 185, 7 C. C. R. 97.
(5) 22 Wall. 641, 10 C. C. R. 134.

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Reasons for Judgment.

Both upon principle and authority, it seems to me clear that the Crown is in this case bound by the decision of the Supreme Court in the former case, and that the defendant is entitled to judgment upon the plea or defence of *res judicata*.

As to costs, the Crown would be entitled to judgment but for the defence of *res judicata*. It is not necessary to ascertain the amount, but it would in any view of the case be considerable. I am of opinion, therefore, that the costs of all the proceedings prior to the 7th of March, 1896, when the defendant applied to amend his statement in defence, should be given to the Crown, and that all costs subsequent to that date should be allowed to the defendant, and set off against the former; and if the amount of the costs taxable to the Crown exceeds the amount taxable to the defendant, as it is probable it will, the Crown will have judgment for the balance. Either party may apply for further directions.

Judgment accordingly.

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

Solicitor for defendant: *J. U. Emard.*

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BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

THE SHIP "*VIVA*".....DEFENDANT.

Maritime law—Behring Sea Award Act, 1894—*Infraction by foreigner.*

The punitive provisions of the *Behring Sea Award Act*, 1894, operate against a ship guilty of an infraction of the Act, whether she is "employed" at the time of such infraction by a British subject or a foreigner.

THIS was an action *in rem* for the condemnation of a ship for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

By the statement of claim it was alleged as follows:—

1. The British ship *Viva*, Mark Pike, master, was seized by an officer of the United States Steamer *Rush* on the 24th day of August, 1896, in latitude 57 deg. 30 min. N., longitude 171 deg. 2 min. 30 sec. W. from Greenwich, at a point within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article One of the first schedule to the *Behring Sea Award Act*, 1894.

2. The ship *Viva* at the time of the seizure aforesaid was fully equipped for fur seal hunting and was employed in killing, capturing and purchasing the animals commonly called fur seals within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule to the *Behring Sea Award Act*, 1894, and the master, hunters and crew of the said ship did capture and kill a number of the animals commonly called fur seals within the said prohibited zone.

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Statement of Facts.

3. The said ship *Viva* is a British ship registered at the port of Victoria, in the province of British Columbia.

4. The said ship *Viva* with the said Mark Pike as master set sail from the port of Victoria, British Columbia, on a sealing voyage on the 11th day of January, 1896.

5. At the time of the seizure aforesaid the said ship *Viva* had 70 fur seal skins on board, of which 16 had been captured on the day prior to the said seizure.

6. The said ship *Viva* after the seizure as mentioned in paragraph 1 hereof was ordered to proceed to Unalaska whence she was directed by Ernest Fleet, the commander of Her Majesty's ship *Icarus*, to proceed to Victoria and report to the Collector of Customs. The said vessel arrived at the port of Victoria on the 15th day of September, 1896.

Algernon J. Hotham a Lieutenant in H.M.S. *Impérieuse* claims the condemnation of the said ship *Viva* and her equipment and every thing on board of her and the proceeds thereof, on the ground that the said ship was at the time of the seizure thereof within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule to the *Behring Sea Award Act*, 1894, fully manned and equipped for killing, capturing and pursuing the animals commonly known as fur seals, and that the said ship was employed in killing, capturing and pursuing within the prohibited zone aforesaid the animals commonly called fur seals, and did within such prohibited zone capture and kill a number of the animals commonly called fur seals.

1. The defendants admit paragraphs 3, 4, 5, and 6 of the statement of claim herein.

2. The defendants deny the 1st and 2nd paragraphs of the statement of claim herein.

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Statement of Facts.

3. The defendants deny that they or their said ship *Viva* were or was at any time in the year 1896 within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article One of the first schedule to the *Behring Sea Award Act*, 1894.

4. If it should be proved that the said ship was at the time of her seizure mentioned in the first paragraph of the said statement of claim within the prohibited zone, then the defendants say that neither the said ship nor any of her equipment, nor the crew thereof nor any person on board of her, was engaged or employed in capturing, pursuing or killing and that no person on board of the said ship captured, pursued or killed, any animals commonly called fur seals or any other animals within the said prohibited zone.

And by way of counter-claim, the Victoria Sealing and Trading Company Limited, the owners of the said ship, say :—

While lawfully prosecuting their business in the high seas, their ship was unjustly seized and detained and that the grounds for such seizure and detention were not reasonable, and that the defendants suffered damages and they claim the benefit of the provisions of section 104 of 17 & 18 Vic. c. 104, and pray that the court may award payment to them of costs and damages, and make such other order in the premises as it thinks just.

Issue joined.

The case came on for trial at Victoria, B. C., on 2nd December, 1896, before the Honourable M. W. Tyrwhitt Drake, Deputy Local Judge for the Admiralty District of British Columbia.

C. E. Pooley, Q. C., for the Crown ;

P. Æ. Irving and *L. P. Duff*, for the ship.

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THE QUEEN v. THE SHIP VIVA.

Reasons for Judgment.

DRAKE, D. L. J., now (December 7th, 1896) delivered judgment.

The *Viva*, a schooner registered at the Port of Victoria, was seized on 24th August, 1896, in latitude 57 deg. 30 min. N., longitude 171 deg. 23 min. 30 sec. W. from Greenwich, at a point within the prohibited zone 35 miles from N. W. end of St. Paul's Island.

The vessel was boarded by the U.S. S. *Rush* about 6 a.m., at which hour all the boats were aboard and hunters at their breakfast.

The master asked if he might put his boats out, which was refused; the object of making this request is not apparent unless it was to accentuate the ignorance of the master of being within the prohibited zone.

The official log of the *Viva* shows the capture of 16 seals on the previous day, and the master details the course he had taken between the hour he got his boats on board and the time of his seizure and says his position was latitude 57 deg. 44 min., longitude 173 01 sec. W., and, on the previous day, latitude 57 deg. 47 min., longitude 172 deg. 50 sec. He kept no ship's log but laid down on the chart his position in pencil day by day; taking those positions as correctly showing his daily change of position, he on the 24th was only 6 miles further west than he was on the 23rd.

The real position where he was seized varies from the alleged position on his chart by many miles.

The master states that he got an observation on the 16th and none since, except an imperfect one on the 22nd which shows his position so greatly different from what he calculated it was that he did not rely on it,—what it was is not entered anywhere. There are no entries to show whether his dead reckoning was reasonably calculated, neither course of vessel, direction or force of wind being entered.

His chronometer was slow. The master by some manœuvres difficult to follow satisfied his own mind

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that on the 25th day of July his chronometer was two minutes slow and was losing two seconds a day; and he allowed for this error when he obtained a sight for longitude on the 14th August. When the vessel arrived at Unalaska, on the 26th day of August, his chronometer was found 12 minutes and 11 seconds slow; and it was shown by Lieutenant Daniels that if he had obtained an observation for longitude with the chronometer as it was, he must have been more than 100 miles to the east of his position as laid down on his chart.

How this sudden change in his chronometer arose is not explained further than stating that it took a jump occasionally.

The evidence as to sealing in the zone is proved by the captain. He, on the 23rd, was only 6¼ miles from his position, on the 24th when he was seized, which was 35 miles only from the N. W. end of St. Paul's Island, he captured 16 seals on that day. They therefore were captured in the prohibited waters, as he was at least 19 miles inside the limit.

The defence set up is that by Article One of the first schedule, the Act only applies to British subjects and there was no proof that the master of the *Viva* was a British subject; and by section 1, sub-section 2, it is declared to be a misdemeanour, if any person commits, procures, aids or abets, any contravention of the Act; therefore it was necessary before a vessel could be condemned that it must be shown that a British subject was employing the ship.

If the master was proceeded against for a misdemeanour it would be necessary to prove that he was subject to the penal clauses of the Act, but the contravention being once established the vessel employed being a British ship becomes liable to forfeiture. If every man employed on the vessel was a foreigner

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it would not relieve the liability of the ship once a breach was proved.

The defendant further claims exemption on the ground of want of proof of any intention on the master's part to contravene the Act. A man's intention is judged by his acts, and when once a vessel is found within the prohibited zone taking or having taken seals, then the master has to satisfy the court that he took all reasonable precautions to avoid any breach of the regulations.

Did the *Viva* do so? According to the master he had no observations from the 16th August, he kept no ship's log showing the weather, wind and courses. His supposed position is marked only from day to day in pencil on his chart, and he sealed on the 16th, 22nd and 23rd of August without knowing where he really was. This can hardly be considered as taking all reasonable precautions. He apparently never attempted to establish his position by lunar observations or other modes known to navigators. It cannot, therefore, be said that he took reasonable precautions.

It has been argued that the masters of the vessels engaged in sealing cannot be expected to be scientific navigators and to be able to ascertain their position with accuracy. This is no doubt true, but when owners entrust valuable property to men without the necessary qualifications, the responsibility is theirs, and if they chose to run this risk they cannot relieve themselves by pleading want of knowledge in their servants.

I, therefore, adjudge the *Viva* and her equipment to be forfeited, and allow her the same relief as in the case of the *Ainoko* (*post p.* 371) on payment of £400 and costs within 30 days.

Judgment accordingly.

Solicitors for the Crown: *Davie, Pooley & Luxton.*

Solicitors for the ship: *Bodwell & Irving.*

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Dec. 7.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

THE SHIP "*AINOKO*".....DEFENDANT.

Maritime law—Behring Sea Award Act, 1894—*Contravention—Ignorance of locality on part of master—Effect of.*

Under the *Behring Sea Award Act*, 1894, it is the duty of a master to be quite certain of his position before he attempts to seal. If he is found contravening the Act, it is no excuse to say that he could not ascertain his position by reason of the unfavourable condition of the weather.

THIS was an action *in rem* for condemnation of the ship for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

By the statement of claim it was alleged as follows:—

1. The ship *Ainoko*, George Heater, master, was seized by an officer from the United States steamer *Perry* on the 5th day of August, 1896, in latitude 55 deg. 57 min. North, longitude 170 deg. 25 min. West from Greenwich, being a point within the prohibited zone of 60 miles round the Pribilof Islands, as defined by Article One of the first schedule to the *Behring Sea Award Act*, 1894.

2. The master, hunters and crew of the ship did, on the said 5th day of August, 1896, within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule of the *Behring Sea Award Act*, 1894, pursue, kill and capture one hundred and eight of the animals commonly called fur seals.

3. The ship *Ainoko* is a British vessel registered at the port of Shanghai.

4. The said ship, with the said George Heater as master, set sail from the port of Victoria, British

Columbia, on a sealing voyage towards the North Pacific Ocean on the 21st day of June, 1896, having on board a seal hunting outfit.

5. The said ship *Ainoko* at the time of the seizure, as set forth in paragraph one hereof, was fully manned and equipped for the purpose of killing, capturing and pursuing the animals commonly called fur seals, and had on board thereof one hundred and thirty-nine fur seal skins and was engaged in pursuing, capturing and killing the animals commonly called fur seals within the said prohibited zone.

6. The said ship *Ainoko* after the seizure as mentioned in paragraph one hereof was ordered to proceed to Unalaska whence she was directed, by Albert Clinton Allen, the Commander of H.M.S. *Satellite*, to proceed to Victoria and report to the Senior British Naval Officer at Esquimalt. The said vessel arrived in the Port of Victoria on the 7th day of September, 1896.

Algernon J. Hotham, a Lieutenant in H.M.S. *Impérieuse*, claims the condemnation of the said ship *Ainoko* and her equipment and everything on board of her and the proceeds thereof, on the ground that the said ship was at the time of the seizure thereof within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule of the *Behring Sea Award Act*, 1894, fully manned and equipped for killing, capturing and pursuing the animals commonly known as fur seals, and that the said ship was employed in killing, capturing and pursuing within the prohibited zone aforesaid the animals commonly called fur seals, and did within such prohibited zone capture and kill a number of the animals commonly called fur seals.

The statement of defence was as follows :—

1. The defendant does not admit paragraphs one and two of the plaintiff's statement of claim nor any of the allegations therein contained.

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Statement of Facts.

2. The defendant admits paragraphs three, four and six of the plaintiff's statement of claim.

3. The defendant does not admit so much of paragraph five as alleges that the said vessel at the time of seizure was engaged in pursuing, capturing and killing the animals commonly called fur seals within the said prohibited zone.

4. In answer to the plaintiff's claim, the defendant says that the vessel *Ainoko* was seized by an officer from the United States steamer *Perry*, on the 5th day of August, A.D. 1896, in latitude 55 deg. 34 min. North, longitude 171 deg. 25 min. West, from Greenwich, a point not within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article One of the first schedule to the *Behring Sea Award Act*, 1894.

5. In the alternative the defendant says that if it be proved that the said vessel was when seized in latitude 55 deg. 57 min. North, longitude 170 deg. 25 min. West, from Greenwich, as alleged in paragraph one of the statement of claim (which the defendant does not admit) the master was ignorant of the fact that the said vessel was within the said prohibited zone and that the position of the said vessel, when seized, was due to the fact that up to the time of seizure, and for two days previous thereto, the weather prevented the master from taking any observations, in consequence whereof the master of the said vessel *bonâ fide* believed that the said vessel's position was as in paragraph four hereof is alleged.

6. The defendant further says that none of the said fur seals found on board the said vessel at the time of seizure were killed, captured or pursued in contravention of the provisions of the said *Behring Sea Award Act*, 1894.

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Reasons for Judgment.

7. The defendant further says that the said schooner was at no time used or employed in contravention of the said Act or of any regulation made thereunder.

Issue joined.

The case came on for trial at Victoria, B. C., on 30th November, 1896, before the Honourable M. W. Tyrwhitt Drake, Deputy Local Judge for the Admiralty District of British Columbia.

C. E. Pooley, Q. C., for the Crown;

H. D. Helmcken, Q. C., for the ship.

DRAKE, D. L. J., now (7th December, 1896) delivered judgment.

This is an application to condemn the above vessel for breach of the provisions of the Behring Sea regulations incorporated in chapter 2 of the Imperial Acts of 1894.

The provision which, it is alleged, has been violated is the 1st Article which forbids the citizens of the United States and Great Britain, respectively, killing or pursuing at any time and in any manner fur seals within a zone of sixty miles around the Pribilof Islands, in Behring Sea.

The vessel in question was seized by the United States vessel *Perry*, on the 5th August, 1896, about 7.40 P.M., land time, in latitude 55 deg. 57 min. N., longitude 170 deg. 30 min. West, a point 14 miles within the zone.

Capt. Heater, the master of the schooner, states that he got no observation after the first of August. On the second of August he was boarded by the United States cruiser *Rush*, and their positions were exchanged and he found his so nearly identical with that of the *Rush* that he was satisfied with the accuracy of his observations. On the 3rd he went South S.E. and then tacked to the Westward, the wind increasing.

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Reasons for Judgment.

On the fourth there was a strong gale from the South with thick fog and high sea, wind S. by E. On the 5th at midnight it was calm with light airs from S. W.—the boats were off at 5 A.M. and returned at 6 P.M. with 108 seals. At the time the *Ainoko* was first sighted by the *Perry* she was coming southerly and westerly about six miles off. This would bring her out of the zone apparently at the nearest point. The wind was very light according to the log and, according to Captain Heater, he had directed his boats to seal South and West, as he intended to follow in that direction. According to the position given by the United States navigating officer, he must have been some considerable way within the prohibited limit at the time the boats were put over, and they gradually sealed outwards. A fresh killed seal was on the deck when the vessel was seized. I, therefore, find as a fact that the *Ainoko* was sealing and killed seals during this day within the prohibited zone. Captain Heater's defence is that he was unwittingly carried by a northerly current and a South-East gale into the zone and according to his reckoning he was 17 miles out-side. He had calculated his course by dead reckoning, allowing two points for lee way.

It is remarkable that the *Perry* was able to take, and get, observations on the 3rd, 4th and 5th of August, but Captain Heater said the fog prevented him.

Captain Heater states that he was not aware of a northerly current setting up towards the islands, but it appears to be generally known to sealers that there was such a current. He had been sealing round the islands before on the North side and had met Northerly currents then, but he says he had not sealed South of the islands.

His remuneration was $50 a month as master and 50 cents a skin. This inducement to make as large a

catch as possible may possibly have had some effect to do with his inability to take observations.

A good deal of stress was laid on an error in the chronometer both of the *Ainoko* and the *Perry*. This error in no way caused the mistake in the reckoning of the position of the schooner, because no observations were taken after the 1st of August, and the chronometer is not used in estimating dead reckoning.

The error in the case of the *Perry's* chronometer made a difference of five miles but still left the *Ainoko* 14 miles within the prohibited ground; and instead of the seizure taking place in longitude 170 deg. 25 min., it took place in longitude 170 deg. 30 min. West, a difference of 31 miles between the schooner's actual position and the position she thought she was in.

It is the duty of the master to be quite certain of his position before he attempts to seal. It is no excuse to say that the state of the weather was such that he could not ascertain his position. The mere fact of being within the zone is not an offence, it is killing, capturing or pursuing seals in the zone that creates the offence.

If the excuses of inadvertence and inability to obtain an observation are allowed, the regulations could never be enforced. They are passed for the purpose of preventing all sealing within the defined radius, and vessels offending will not be relieved from the penalties imposed by the Act by any such excuses. I therefore declare the *Ainoko* and her equipment forfeited, but in case of payment of the sum of £400 and costs within 30 days she may be discharged.

Judgment accordingly.

Solicitors for the Crown: *Davie, Pooley & Luxton.*

Solicitors for the ship: *Drake, Jackson & Helmcken.*

BRITISH COLUMBIA ADMIRALTY DISTRICT.

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Dec. 7.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

THE SHIP "*AURORA*".....DEFENDANT.

Maritime law—Behring Sea Award Act, 1894—*Circumstances justifying arrest—Burden of proof.*

A vessel had on board, within prohibited waters, certain skins with holes in them which appeared to have been made by bullets.

Held, that this was sufficient reason for the arrest of the vessel, and that the burden of showing that fire-arms had not been used was imposed on such vessel.

THIS is an action *in rem* for condemnation of the ship for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

C. E. Pooley, Q.C., for the Crown;

H. D. Helmcken, Q.C., for the ship.

By the statement of claim it was alleged as follows:

1. The ship *Aurora* is a British vessel registered at the Port of Victoria, in the province of British Columbia.

2. The said ship *Aurora*, Thomas H. Brown, master, was seized by W. H. Roberts, a Captain in the Revenue Cutter Service of the United States, commanding the United States Revenue steamer *Rush* on the 10th day of August, 1896, in the Behring Sea, in latitude 55 degrees 44 min. 30 secs. N., longitude, 172 degrees 11 min. W. from Greenwich.

3. The said ship *Aurora* at the time of her seizure as aforesaid was fully manned and equipped for the purpose of killing, capturing or pursuing seals, and had on board thereof fire-arms and ammunition, loaded cartridges, powder and shot, and ball, and had also on board at the time of her said seizure one hundred and twelve fur seal skins including four fur seal skins

which had been killed in the Behring Sea by the use of fire-arms by some person in such ship.

4. The said ship *Aurora* was continually engaged in fur seal fishing from the first day of August to the tenth day of August, 1896, inclusive of the date of the seizure aforesaid and during all this time had on board guns, rifles, shooting implements and loaded cartridges and empty cartridge cases for use in the said guns and rifles, and also powder and shot and the necessary apparatus for filling cartridges; and during the times between the said first day of August and the said tenth day of August did employ and use the said guns and fire-arms and explosives in the fishing for, and for the purpose of, killing the said fur seals or some or one of them within the waters of the Behring Sea aforesaid.

5. The said ship *Aurora* was sent to Unalaska by the said Captain W. H. Roberts and from thence she was ordered by Ernest Fleet, the Commander of Her Majesty's ship *Icarus*, to proceed to the Port of Victoria and report to the Collector of Customs where she arrived on the fifteenth day of September, 1896.

Algernon H. Hotham, a Lieutenant in Her Majesty's ship *Impérieuse*, claims the condemnation of the said ship *Aurora* and her equipment and all on board of her and the proceeds thereof, on the ground that the said ship at the time of the seizure thereof was in the Behring Sea fully armed and equipped for taking fur seals, and was engaged in fur seal fishing in the Behring Sea from the first day of August, 1896, to the tenth day of August, 1896, (inclusive) continuously and during the whole of the said time had on board the said ship *Aurora* fire-arms and explosives and numerous fur seal skins, and did, during the said time, use the said fire-arms and explosives for the purpose of killing the said fur seals contrary to the provisions of the *Behring Sea Award Act*, 1894.

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THE QUEEN v. THE SHIP AURORA.

Statement of Facts.

The statement of defence and counter-claim were as follows:

1. The defendants admit paragraphs 1, 2, and 6 of the plaintiff's statement of claim.

2. The defendants do not admit so much of paragraph 3 as alleges that at the time of seizure the said ship *Aurora* had on board four fur seal skins which had been killed in the Behring Sea by the use of fire-arms by some person in such ship.

3. The defendants do not admit so much of paragraph 4 as alleges that between the first and tenth days of August the said ship did employ and use the said guns and fire-arms and explosives as therein mentioned in the fishing for, and for the purpose of killing, the said fur seals or some or one of them within the waters of the Behring Sea.

4. The defendants say that at the time of her clearance at the Port of Attu and at the time of her seizure the said schooner had in addition to the guns, implements and explosives mentioned in paragraphs 3 and 4, thirty four spears and seventeen spear poles.

5. The said vessel employed 6 boats for the purpose of killing, capturing and pursuing the said animals known as fur seals.

6. The defendants in answer to the whole of the plaintiff's claim say that the said four fur seal skins were killed in the manner as is by the provisions of the *Behring Sea Award Act*, 1894, allowed and not otherwise.

COUNTER-CLAIM.

7. By way of counter-claim the defendants say as follows:—They repeat the several allegations hereinbefore made and say:

1. That the officers making the seizure had no reasonable cause to believe that the said vessel *Aurora*

had been used or employed in contravention of the *Behring Sea Award Act*, 1894, or any of its provisions.

2. That at the time of the said seizure the said schooner was engaged in lawfully pursuing the killing of fur seals, and at no time during the times alleged was the said vessel engaged or employed or used contrary to the said Act.

3. That the said seizure was illegal.

4. That when the said vessel was under seizure at Unalaska one sealing boat was stolen therefrom with a quantity of provisions amounting in value to $100.

5. That the defendants have suffered damage by reason of the said seizure and detention of the said vessel.

The defendants claim, 1—the restitution of the said vessel *Aurora* and her cargo and everything on board of her as on the day of seizure.

2. Judgment against Her Majesty for the damage occasioned to the defendants by the seizure and detention of the said vessel *Aurora* and for the costs of the action.

3. Payment of the said sum of $100.

4. To have an account taken of such damage.

5. Interest at the rate of 6 per cent on the amount allowed from the 20th day of September, A. D. 1896, until judgment.

6. Such further and other relief as the nature of the case may require.

Issue joined.

The case came on for trial at Victoria, B.C., on the 3rd December, 1896, before the Honourable M. W. Tyrwhitt Drake, Deputy Local Judge for the Admiralty District of British Columbia.

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THE QUEEN v. THE SHIP AURORA.

Reasons for Judgment.

DRAKE, D. L. J. now (7th December, 1896) delivered judgment.

This vessel, a British schooner, had been sealing round Japan and arrived at Attu, in Behring Sea, on the 20th July, 1896. She had arms and ammunition on board. The Captain requested Lieut. Barry, of the United States ship *Grant*, to inspect the arms and ammunition, and a record of all that was then produced was entered in the official log.

They commenced sealing on 1st August in Behring Sea. On 10th August she was boarded by the *Rush*, and the attention of the officer who boarded her was called to four skins which had been put aside as having holes caused by gaffs. He said he did this in pursuance of instructions from Lieut. Berry, of Attu.

The skins were sent on board the *Rush* and after a careful examination by the officers of the *Rush*, the conclusion arrived at was that these seals had been shot.

The guns and ammunition were examined and checked and some small discrepancy was discovered, which was explained afterwards.

This examination was just as ineffective as the first one spoken of because there was no search of the vessel, and no evidence to show that there was not other ammunition on board. The vessel was ordered to Unalaska, and a further count of ammunition made. While there two of the crew deserted and took away one of the ship's boats and some provisions, a claim for which was made against the Crown by way of counter-claim.

From the evidence adduced, the conclusion I have arrived at is that the seals whose skins were in question had been shot. They had also been speared, but the evidence did not in my opinion establish the fact that the seals had been shot by those on board the schooner.

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THE QUEEN v. THE SHIP AURORA.

Reasons for Judgment.

The reason for putting these skins to one side was difficult to appreciate. The Captain said that the United States officer at Attu had asked him to put aside all skins that had shot or gaff holes in them. As it appears that the majority of seals speared have to be brought to the boat by the gaff, it must follow that gaff holes, if carefully searched for, would be apparent in the majority of skins. The Captain denied that these seals were shot; but stated the holes were only gaff holes, and that the holes which were in the skins when taken on board the *Rush*, and which are apparent now, were made by rats. Without discussing the evidence in detail there was in my opinion sufficient reason for the arrest of this vessel, and the burden of showing that fire-arms had not been used was imposed on the vessel.

I therefore dismiss the claim with costs.

With regard to so much of the counter-claim as relates to a boat and provisions being stolen while the schooner was in charge of the authorities at Unalaska, it was shown that the master was in command and had full control of the crew and that two of the crew deserted and stole a boat and some provisions.

The seizure of the vessel, therefore, had nothing to do with the stealing of the boat. I therefore dismiss the counter-claim, without costs.

Judgment accordingly.

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Dec. 7.

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HER MAJESTY THE QUEEN.....PLAINTIFF;

AND

THE SHIP "*BEATRICE*".....DEFENDANT.

Maritime law—Behring Sea Award Act, 1894—*Infringement—Mistake by master.*

A master takes upon himself the responsibility of his position; and if through error, want of care or inability to ascertain his true position, he drifts within the zone, and seals there, he thereby commits a breach of the *Behring Sea Award Act* 1894.

THIS is an action *in rem* against the ship for condemnation for an alleged infraction of the regulations respecting the taking of seals in Behring Sea.

By the statement of claim it was alleged as follows:

1. The British ship *Beatrice*, A. H. Jones master, was seized by an officer of the United States Ship *Perry* on the 5th day of August, 1896, in latitude 55 deg. 49 min. North, and longitude 170 deg. 31 min. West of Greenwich at a point within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article one of the first schedule to the *Behring Sea Award Act*, 1894.

2. That the said ship *Beatrice* at the time of the seizure aforesaid was fully equipped for seal hunting and was employed in killing, capturing and pursuing the animals commonly called fur seals within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article one of the first schedule to the *Behring Sea Award Act*, 1894, and the master, hunters and crew of the said ship did capture and kill fifty-eight of the animals commonly called fur seals within the said prohibited zone on the said 5th day of August, 1896.

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THE QUEEN v. THE SHIP BEATRICE.

Statement of Facts.

3. That the said ship *Beatrice* is a British ship registered at the port of Victoria, in the Province of British Columbia.

4. That the said ship *Beatrice*, with the said A. H. Jones as master, set sail from the port of Victoria, British Columbia, on a sealing voyage on the 20th day of June, 1896.

5. At the time of the seizure aforesaid the said Ship *Beatrice* had thirty-four seal skins on board, and fifty-eight additional seal skins were brought on board the said ship by the ship's hunters during the time that the boarding officer was on board the said vessel.

6. The said ship *Beatrice*, after the seizure as mentioned in paragraph one hereof, was ordered to proceed to Unalaska, whence she was directed by Albert Clinton Allen, the Commander of Her Majesty's Ship *Satellite*, to proceed to the port of Victoria and report to the senior British Naval Officer at Esquimalt. The said vessel arrived at the port of Victoria on the 7th day of September, 1896.

Algernon J. Hotham, a Lieutenant in Her Majesty's Ship *Impérieuse*, claims the condemnation of the said ship *Beatrice* and her equipment and everything on board of her and the proceeds thereof on the ground that the said ship was at the time of the seizure thereof within the prohibited zone of 60 miles around the Pribilof Islands, as defined by Article one of the first schedule to the *Behring Sea Award Act*, 1894, fully manned and equipped for killing, capturing and pursuing the animals commonly known as fur seals, and that the said ship was employed in killing, capturing and pursuing within the prohibited zone aforesaid the animals commonly called fur seals, and did within such prohibited zone capture and kill a number of the animals commonly called fur seals.

The statement of defence was as follows:—

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1. The defendant does not admit paragraphs 1 and 2 of the plaintiff's statement of claim or any of the allegations therein contained.

2. The defendant admits paragraphs 3, 4, 5, and 6 of the plaintiff's statement of claim.

3. The defendant in answer to the whole of the plaintiff's statement of claim says that the said vessel was seized by the said steamer *Perry* on the 5th day of August, A. D. 1896, in latitude 55 deg. 11 min. N. and longitude 170 deg. 39 min. W., a point not within the prohibited zone of 60 miles around the Pribilof Islands, as defined in Article one of the first schedule to the *Behring Sea Award Act*, 1894.

4. The defendant in further answer to the plaintiff's claim says that on the day of the seizure the alleged position given to him by the officer of the United States steamer *Perry* was latitude 55 deg. 46 min. N. and longitude 170 deg. 33 min. W., and that after the said vessel had left for Unalaska as ordered by the said United States steamer *Perry*, the said steamer on the following day overtook the said vessel and gave the alleged position as of the day of seizure as latitude 55 deg. 48 min. N., and longitude 170 deg. 31 min. W.

5. In the alternative the defendant says that if it be proved that the said vessel when seized was in latitude 55 deg. 49 min. N. and longitude 170 deg. 31 min. W. of Greenwich, as in paragraph one of the plaintiff's statement of claim is alleged, which the defendant does not admit, the master was ignorant of the fact that the said vessel was within the said prohibited zone and that the position of the said vessel was due to the fact that up to the time of seizure and for two days previous thereto the weather prevented the master from taking any observations, in consequence whereof the master of the said vessel *bonâ fide* believed that the said vessel's position was as in paragraph 3 is alleged.

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6. The defendant says that none of the said fur skins found on board the said vessel when seized were killed, captured or pursued in contravention of the provisions of the said *Behring Sea Award Act*, 1894.

7. The defendant says that at no time was the said vessel used or employed in contravention of the said Act or of any regulation made thereunder.

Issue joined.

The case came on for trial at Victoria, B.C., on the 1st December, 1896, before the Honourable M. W. Tyrwhitt Drake, Deputy Local Judge for the Admiralty District of British Columbia.

C. E. Pooley, Q.C. for the Crown ;

H. D. Helmcken Q.C. for the ship.

DRAKE, D. L. J., now (December 7th, 1896) delivered judgment.

This vessel was seized on the 5th August, 1896, by the United States vessel *Perry* in very much the same neighbourhood as the *Ainoko*.

She was seized in latitude 55 deg. 50 min. N., longitude 170 deg. 37 min. W., some seven miles within the zone. While the officer was on board the boats returned with fifty-eight skins.

The defence was the same as the *Ainoko*—no observations after the 2nd of August and a strong S. W. wind until the afternoon of the 4th, the position of the vessel being calculated by dead reckoning ; but as the schooner had no log line by which to determine her speed it rendered the calculation more than usually inexact.

The navigator of the schooner, Captain Pinckney, kept no ship's log but had a memo. book in pencil according to which he had an observation on the 3rd,

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of longitude 172 deg. 8 min.; and according to him her position on the day of seizure was latitude 55 deg. 11 min. 11 sec., longitude 170 deg. 39 min. W. This was a mere estimate based on his idea of her speed from looking over the side, and his log book shows evident marks of alteration. If the vessel had been properly found with a log line of any description, the error would have been greatly reduced and her position more nearly approximate to what it eventually turned out to be. In his evidence he says that he got his last observation on the 2nd, which differs from his log. A master takes upon himself the responsibility of his position and if through error, want of care or inability to ascertain his true position, he drifts within the zone, and seals there, he thereby commits a breach of the regulations.

There appears to be a discrepancy in the position as given by the cutter *Perry* on the day of seizure and that subsequently given as the correct locality, and it arose in this way: The position as given on first seizing was calculated from the last observation taken that morning, and allowing for dead reckoning up to the time of seizure. This was subsequently corrected after another observation had been taken in the afternoon, but in giving this correction on working over the calculations again a clerical error, which made a difference of some four to five miles, was discovered, and this error was communicated to the schooner, and the official log corrected afterwards. On arriving at Unalaska the *Perry's* chronometer was rated and the exact error ascertained, and the several positions were gone over again and the result was that the exact position at the time of the seizure was latitude 55 deg. 50 min. longitude 170 deg. 37 min. This made the *Beatrice* seven miles within the prohibited limits; the previous calculations made the vessel within the zone, but not

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quite so far in,—she was not therefore in any way prejudiced by the corrections made.

It was proved that there was a current running N. which might vary from half a mile to two miles, depending on the wind and swell. The *Beatrice* had not allowed sufficiently for this, but that is not a sufficient excuse. No attempt to take seals should be made unless the master is certain of his position. I, therefore, declare the *Beatrice* and her equipment forfeited but allow her to be redeemed on payment within 30 days of the sum of £400.

Judgment accordingly.

Solicitors for the Crown: *Davie, Pooley & Luxton.*

Solicitors for the ship: *Drake, Jackson & Helmcken.*

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Mar. 22.

THE AUER INCANDESCENT LIGHT MANUFACTURING COMPANY (LIMITED) ..... } PLAINTIFFS;

AND

HERMAN DRESCHEL AND MARY VAIL MELICK..... } DEFENDANTS.

Infringement of patent—Actions taken in different courts—Dismissal of application for interim injunction—Nemo bis vexari debet pro unâ et eâdem causâ.

Where the Judge of the Exchequer Court was asked to grant an *interim* injunction to restrain an infringement of a patent of invention, and it appeared that similar proceedings had been previously taken in a provincial court of concurrent jurisdiction, which had not been discontinued at the time of such application being made, this court refused the application upon the principle that a defendant ought not to be doubly vexed for one and the same cause of action.

THIS was an application for an *interim* injunction to restrain an alleged infringement of a patent of invention.

The plaintiffs had taken an action in the Superior Court of the Province of Quebec against the same defendants, in which, amongst other grounds of relief, they asked for an *interim* injunction similar to that asked for on the present application. It is not necessary for the purposes of this application to set out the facts of the main case.

The application came on for argument before the Judge of the Exchequer Court, at Montreal, on the 15th day of March, 1897.

C. A. Duclos, in support of the application: We contend that as the validity of the plaintiffs' patent had been determined recently in the Exchequer Court, and that the affidavits upon which the present application was based showed that the defendants in this case had been guilty of infringement, the court should have no

hesitation in granting the *interim* injunction asked for.

J. E. Martin, contra, cites 55-56 Vict. c. 24, sec. 1; 15 and 16 Vict. (Imp.) c. 83; and sec. 4787 of *The Revised Statutes of the United States.*

C. B. Carter, Q.C., followed, contending that the plaintiffs, having taken proceedings in the Superior Court of the Province of Quebec in which they sought the same relief as that which they asked on this application, should have discontinued such proceedings before they came into this court seeking to obtain an injunction. Furthermore, he contended that there had been an unusual and unreasonable delay since the institution of the action in the Superior Court before they took any steps to obtain an injunction. An unreasonable delay to prosecute an infringer after having acquired information of the infringement will induce the court to refuse an *interim* injunction. (Cites *Am. & Eng. Ency. Law*, Vol. 18, pp. 81-82.)

Mr. *Duclos*, in reply: The decree of the Superior Court will only extend to the Province of Quebec, whilst the process of the Exchequer Court will run all over the Dominion. An injunction of the Superior Court would not stop the defendant in Ontario.

THE JUDGE OF THE EXCHEQUER COURT now (March 22nd, 1897) delivered judgment

In this case, I think that the objection taken by Mr. Martin and Mr. Carter for the defendants, that there is an action pending in the Superior Court of the Province of Quebec against the same defendants, in which the plaintiffs seek an injunction against the defendants on the same grounds as are now put forward, ought to prevail. It is true, of course, that the process of this court runs farther than a writ of the Superior Court, but I do not see that that makes any difference in the principles on which this application should be decided.

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Reasons for Judgment.

I think the application should be dismissed, and with costs; but the plaintiffs have liberty to renew the application if the action in the Superior Court of the province is discontinued. The plaintiffs should, it seems to me, elect either to prosecute the matter in the Superior Court or in this court. To allow both suits to proceed at the same time would contravene the principle that a defendant ought not to be doubly vexed for one and the same cause of action.

Judgment accordingly.

Solicitors for plaintiffs: *Atwater, Duclos & Mackie.*

Solicitor for defendants: *J. E. Martin.*

THE QUEEN ON THE INFORMATION OF THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA..... PLANTIFF;

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Mar. 22.

AND

JOHN A. FINLAYSON, ALEXANDER GRANT AND JOHN ESDON DEFENDANTS.

Third party procedure—Crown suit—Jurisdiction—Costs.

In an action by the Crown upon two Customs export bonds the defendants applied for an order to bring in a third party, and it appeared that such bonds were given by the defendants personally and did not indicate that the person against whom the third party order was sought was in any way liable to the Crown in respect of said bonds. The defendants, however, claimed that in giving the bonds they were only acting as agents for such person, and that he had agreed to indemnify them against the payment thereof.

Held, that the court had no jurisdiction to try the issue of indemnity between the defendants and such proposed third party, and that the application should be dismissed with costs to the Crown in any event.

THIS was a summons to show cause why, in an action instituted by the Crown by information, the defendants should not be allowed to bring in a third party.

The information in this case was exhibited to recover the total amount of two bonds given by the above named defendants to the Customs authorities in respect of the export to St. Pierre, Miquelon, of certain spirits which, at the time of giving said bonds, were warehoused at the port of Montreal. It was alleged in the information that the spirits were never exported to St. Pierre, but that they were illegally, and with intent to defraud the Government of Canada, landed, from the vessel on which they had been shipped, at a

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Statement of Facts.

certain place on the shores of the Lower St. Lawrence, and so entered into consumption in Canada. By their statement in defence the defendants, amongst other things, alleged that they had entered into the said bonds only in the capacity of warehousemen and agents for one Henry Corby, of Belleville, Ontario, who was the owner of the said spirits; and that they were entitled to be indemnified by him in respect of any damage or loss they might be put to by reason of a breach of any of the conditions of the said bonds. They also alleged that they had nothing to do with the spirits after they delivered them from their warehouse to persons designated by the said Henry Corby, and upon his express order therefor.

W. D. Hogg, Q.C. in support of motion:

If it is conceded for the purpose of argument that this application is governed by the provisions of the Code of Procedure of the Province of Quebec, and if it is further conceded that it is in the nature of a dilatory exception, and as such, under Article 120, ought to have been filed within four days after the return of the writ, I submit that the Judge of the Exchequer Court has power under rule 255 of the Exchequer Court Rules to enlarge the time for taking the exception. However, I contend that this is not in the nature of a dilatory exception, and that there is no provision in the Code of Procedure affecting the question of bringing a third party into an action, and that therefore the English Judicature practice must prevail. The defendants do not seek to delay the action; on the contrary, their object is to expedite it by bringing all the parties who will be affected by the adjudication in the case before the court, and so enable the court to dispose of the matter once for all.

J. M. Ferguson, contra: If the defendants have any rights in respect of the ground upon which this

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Argument of Counsel.

motion is based, they are in the nature of a right to exercise a recourse in warranty against a third party. [Cites C.C.P., L.C., Art. 120; *Pigeau*, vol. 1, 167; *Belle* v. *Dolan* (1)]. That being so, it is in the nature of a dilatory plea, and must be filed within four days after the service of the writ. The information was served on the 2nd of January, 1897, and the defence was filed before we were aware that they intended to make this application. There being no writs in the Exchequer Court procedure, by analogy, I contend that the dilatory exception should have been filed and served within four days after the service of the information. [Cites *Durocher* v. *Lapalme*, (2); *Block* v. *Lawrence*, (3)]. Further, this action is in the nature of a penal action and there is no recourse in warranty in the case of a penal action. [Cites *Normandin* v. *Berthiaume*, (4); *Couvrette* v. *Fahey* (5).]

The court has no jurisdiction to grant this order. It has no jurisdiction to try out the issue of indemnity between the defendants and Corby, the person whom they desire to make a third party. The action is based upon two Customs bonds which do not disclose Corby's liability to the Crown in any way. The Crown could not sue Corby on the bonds, and therefore this court has no jurisdiction between the defendants and the proposed third party.

Mr. *Hogg* replied, citing *Carshore* v. *North Eastern Ry. Co.* (6).

THE JUDGE OF THE EXCHEQUER COURT now (March 22nd, 1897) delivered judgment:

The question raised on this application is an important one, and I have given the matter very careful

(1) 20 L. C. J. 302.
(2) M.L.R. 1 S. C. 494.
(3) M.L.R. 2 S. C. 279.
(4) M.L.R. 1 S. C. 393.
(5) M.L.R. 2 S. C. 423.
(6) 29 Ch. D. 344.

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consideration. Apart altogether from the question as to procedure, and the time within which the application should have been made, which, in the view I take of the matter, I need not deal with, the application fails, I think, on the ground of want of jurisdiction. The action is brought on two bonds, and the allegation of the defendants is that they are entitled to be indemnified by one Henry Corby against any sum that may be recovered against them. But that is an issue over which the court has no jurisdiction. It has concurrent jurisdiction with the provincial courts in any case in which the Crown is plaintiff or petitioner. In the only case in which I have made a third party order the Crown was defendant and came in as a petitioner asking that the other party be made a third party to the action, and in that case all the parties consented to the order. See *Magee* v. *The Queen* (1). It does not appear from the bonds relied on in this action that Corby is in any way liable to the Crown. The statement of defence says that he is bound to indemnify the defendants, but that, as I have said, is a matter over which I have no jurisdiction. That being so, I think I should dismiss the application with costs to the Crown in any event.

Judgment accordingly.

Solicitor for the plaintiff: *J. M. Ferguson.*

Solicitors for the defendants: *O'Connor & Hogg.*

(1) *Post.*

JOHN BUCHANAN MAGEE AND WILLIAM CLARENCE MAGEE... } SUPPLIANTS; 1897 Mar. 29.

AND

HER MAJESTY THE QUEEN.....RESPONDENT;

AND

THE CITY OF ST. JOHN (THIRD PARTY)..... } DEFENDANT.

Public work—Injurious affection where no property taken—Deprivation of access—Compensation.

An interference with the right of navigation in a harbour, which the owner of a wharf suffers in common with the public, is not sufficient to sustain a claim for compensation for the injurious affection of the property on which the wharf is situated resulting from the construction of a public work.

2. But where the interference affects a private right of access which the owner has to and from the water of the harbour, or with the use of such water for the lading and unlading of vessels at his wharf, the claimant is entitled to compensation.

PETITION OF RIGHT for damages arising from the construction of a public work.

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

The case came on for hearing before the Judge of the Exchequer Court at St. John, N.B., on the 21st, 22nd and 23rd days of January, 1897.

W. Pugsley, Q.C., for the suppliants, cited *Chamberlain* v. *The West End of London and Crystal Palace Ry. Co.* (1); *Metropolitan Board of Works* v. *McCarthy* (2); *The Queen* v. *Barry* (3); *Caledonia Ry. Co.* v. *Walker's Trustees* (4); *re Wadham and the N. E. Ry.*

(1) 2 B. & S. 605.
(2) L. R. 7 H. L. 273.
(3) 2 Ex. C. R. 333.
(4) 7 App. Cas. 259.

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Co. (1); *Herring* v. *Metropolitan Board of Works* (2); *Parkdale v. West* (3).

W. W. Allen followed, citing *Pion* v. *North Shore Ry. Co.* (4).

C. N. Skinner, Q.C. (with whom was *H. A. McKeown*) for the respondent and third party, cited 3 L. & P. S. N. B., p. 999.

Mr. Pugsley replied.

THE JUDGE OF THE EXCHEQUER COURT now (March 29th, 1897) delivered judgment.

The petition is brought by the suppliants to recover a sum of five thousand dollars for damages which they allege that they have sustained by reason of the depreciation in value of certain lands and premises of which they are lessees, situated in the City of St. John and the Province of New Brunswick. This property adjoins that which came in question in the case of *Robinson* v. *The Queen* (5), to which for convenience I shall refer as the Robinson property, and like the latter, was injuriously affected by the construction within the City of St. John of an extension of the Intercolonial Railway. There was a wharf on the property and buildings which at the time when this extension was made were in possession of the suppliants under a lease from one Stephen Blizzard, for five years from the 28th of March, 1892, with a right to purchase the property for eight thousand five hundred dollars. The suppliant John Buchanan Magee, and a brother since deceased, had first gone into possession of the property in 1886, under a similar lease, from the same lessor, and had fitted the property up

(1) 14 Q. B. D. 747.
(2) 19 C. B. N. S. 510.
(3) 12 A. C. 602.
(4) 14 A. C. 612.
(5) 4 Ex. C. R. 439; 25 S. C. R. 692.

for carrying on their business as coal dealers, and had made improvements and additions to the property to the value of three thousand dollars. The option of purchasing the property was not exercised during the term limited in the first lease, but before the expiration thereof the second lease to which I have referred was entered into. According to the evidence, the value of the property as a whole immediately before the construction of the extension of the Intercolonial Railway across that portion of the river or harbour of St. John on which the property fronted, was eleven thousand five hundred dollars. The lessor's interest therein was represented by the sum of eight thousand five hundred dollars, at which he had agreed to sell to the suppliants, and the lessees' by the sum of three thousand dollars, the cost of the additions and improvements that had been made. The effect of the construction of the extension has been to depreciate the value of the property as a whole. The suppliant John Buchanan Magee estimates that depreciation as equal to one-half the value of the property before the public work was constructed. Mr. Joseph A. Likely, a witness called by the suppliants, places the depreciation at twenty-five per centum of the former value of the property, and I adopt his view. It seems to me to be a fair and reasonable estimate of the damages, and according to it the suppliants, if entitled to succeed, are entitled to judgment for two thousand eight hundred and seventy-five dollars.

Are the suppliants so entitled? The Robinson property is forty-five feet wide, and the present case differs from the Robinson case in this principally that it is fifty-five feet further removed from the extension or trestlework which interferes with its free use as a wharf property.

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In the first place there is in this case, as there was in the Robinson case, an interference with the right of navigation. Every vessel that comes to, or goes from, the suppliants' wharf has to pass through the draw that has been constructed in the extension or trestle on which the railway has been built, and cannot as formerly, when the tide permits, pass freely and directly to and from its berth at the wharf. That, however, so far as it is a mere question of navigation, is an interference with a right common to the public, which, if there was nothing more, would not sustain the suppliants' claim. They and other owners of wharfs within the trestlework may, and probably do, suffer in a greater degree than others of the public from the interference with this right, but the interference is in each case of the same kind or character. But there is, I think, in this case more than that. There is, it seems to me, some interference with the right of access to and from this property which the owner had, and with the use thereof for the lading and unlading of vessels. The property, like many other wharf properties at St. John, can only, it is true, be advantageously used by occupying at and for reasonable times the water in front of adjoining wharfs or properties. That is a matter, however, that is left to the direction of the harbour master, under the harbour regulations of the port. Before the construction of the public work referred to, the suppliants, by arrangement with the owner of the Robinson property and the concurrence of the harbour master, or without such arrangement by the direction of the harbour master, could place a vessel at their own wharf that would not only overlap the Robinson wharf, but extend westerly into water now occupied by the railway trestlework. That is not now possible, and a smaller class of vessels has to be used, and the value

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of the suppliants' property has for that reason more particularly been lessened.

The distinction between the public right and the private right incident to the ownership of a wharf on a river or harbour is clearly stated in *Lyon* v. *The Fishmongers Company* (1). In that case Lord Chancellor Cairns said: (P. 671.)

"Unquestionably the owner of a wharf on the river "bank has, like every other subject of the realm, the "right of navigating the river as one of the public. "This, however, is not a right coming to him *quâ* "owner or occupier of any lands on the bank, nor is it "a right which *per se* he enjoys in a manner different "from any other member of the public. But when "this right of navigation is connected with an exclu-"sive access to and from a particular wharf it assumes "a very different character. It ceases to be a right "held in common with the rest of the public, for "other members of the public have no access to or "from the river at the particular place, and it becomes "a form of enjoyment of the land, and of the river in "connection with the land, the disturbance of which "may be vindicated in damages by an action, or "restrained by an injunction."

In the case now under consideration there has been, in my opinion, an interference with a right incident to the ownership of the property of which the suppliants were in possession under the conditions mentioned, and they are, I think, entitled to the judgment of the court.

There will be judgment for the suppliants for two thousand eight hundred and seventy-five dollars and costs.

It is conceded that the Crown is, under its agreement with the City of St. John, entitled to be indem-

(1) 1 App. Cas. 662.

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nified by the city against any amount for which the Crown is liable to the suppliants.

There will, therefore, be judgment against the City of St. John in favour of the Crown for the sum mentioned and costs, and also for any costs to which the Crown has been put in this action as between itself and the city.

Judgment accordingly.

Solicitor for suppliants: *W. W. Allen.*

Solicitor for respondent: *H. C. McKeown.*

Solicitor for third party: *C. N. Skinner.*

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May 3.

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

AND

NICHOLAS K. CONNOLLY, MICHAEL CONNOLLY AND JOHN CONNOR ..... DEFENDANTS.

Practice—Judgment by default—Reference to registrar.

Upon a motion for judgment in default of pleading to an information by the Crown it appeared that the information while showing that the Crown was entitled to judgment, did not show clearly the amount for which judgment should be entered, and a reference was made to the registrar to ascertain, upon proof, the amount of the claim.

MOTION for judgment in default of pleading in an action of assumpsit.

April 17th, 1897.

E. L. Newcombe, Q.C. (D.M.J.) for the motion.

THE JUDGE OF THE EXCHEQUER COURT now (May 3rd, 1897) delivered judgment.

This is a motion for judgment against the defendants Nicholas K. Connolly and Michael Connolly only, for the sum of $21,649.52 with interest thereon since the 13th day of July, 1896, the defendant John Connor having by arrangement between the parties been given further time to file and serve his statement in defence.

The motion is made in pursuance of the 80th rule of this court, which provides that if the defendant makes default in delivering a defence or demurrer, the Attorney-General or plaintiff may set down the action on motion for judgment, and such judgment shall be given as upon the information, or statement of claim, the court shall consider the Attorney-General or plain-

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tiff to be entitled to. The practice of the High Court of Justice in England as well as of the High Court of Justice in Ontario is to give judgment upon the facts as stated in the information or statement of claim, though there has been some difference of opinion as to whether or not the court might receive evidence, or was bound to give judgment upon the information or statement of claim alone. A different practice has, it appears, been followed in the High Court of Justice in Ireland on a like rule. *Crisford* v. *Dodd* (1). It has been my practice since I have sat in this court to require an affidavit of the amount due, or a copy of some entry of the transaction, as kept in the books of the Government, to be filed. That practice is, I think, a safe one, and the costs of the affidavit or copy of the entry in the books of the Government does not add greatly to the expense of the proceedings. There may, however, be cases in which the information or statement of claim would show so clearly, not only that the plaintiff was entitled to judgment, but the amount for which he was so entitled, that no affidavit or other evidence would be necessary. But the present, I think, is not a case of that kind. The information as a whole shows, I think, that while the Crown is entitled to judgment, some further inquiry is necessary in order to establish the amount for which judgment should be given.

It seems to me that in this case either one or the other of two courses may be conveniently adopted: First, that there be judgment for the plaintiff against the defendants Nicholas K. Connolly and Michael Connolly, with costs, and a reference to the registrar to ascertain the amount for which judgment should be entered; or, secondly, that there be judgment for the plaintiff against the defendants Nicholas K. Connolly

(1) 15 L. R. Ir. 83.

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and Michael Connolly, with costs, the amount of the judgment to be determined at the same time as the trial of the issues between the plaintiff and the defendant John Connor. If the plaintiff prefers to take judgment against Nicholas K. Connolly and Michael Connolly, with a reference to the registrar, I see no objection to the amount being determined by filing an affidavit of the amount due from the defendants to the plaintiff.

1897

May 3.

AUGUST PETERSON .....PLAINTIFF;

AND

THE CROWN CORK AND SEAL COMPANY ..... DEFENDANTS.

Patent of invention—Action to avoid—Default of pleading—Judgment—Registrar's certificate—Practice.

Upon a motion for judgment for default of pleading in an action to avoid certain patents of invention, the court granted the motion, but directed that a copy of the judgment should be served upon the defendants, and that the registrar should not issue a certificate of the judgment for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office until the expiry of thirty days after such service.

MOTION for judgment in default of pleading in an action to avoid certain patents of invention.

April 17th, 1897.

J. F. Smellie for the motion.

THE JUDGE OF THE EXCHEQUER COURT now (May 3rd, 1897) delivered judgment.

This is a motion that Letters Patent Nos. 42,745, 42,746, 42,866, and 42,980, respectively mentioned in the statement of claim, be declared and adjudged to be null and void, and that defendants be ordered to pay the costs of this proceeding. The motion is made under rule 80 of the rules of this court, to which I have made some reference in the case of *The Queen* v. *Connolly, et al* (1). In this case the plaintiff is, I think, taking the allegations in the statement of claim to be true, entitled to the judgment prayed for, and I am of opinion to grant the motion, but upon these conditions: That a copy of the judgment shall be served upon the defendants, and that no certificate of the judgment shall be issued by the registrar for the purpose of entering the purport thereof on the margins of the enrolment of the several patents in the Patent Office, until thirty days after such service.

(1) 5 Ex. C. R. 397.

JOSEPH MATTON.....SUPPLIANT; 1897

May 25.

AND

HER MAJESTY THE QUEEN.....RESPONDENT.

Customs duties—Drawback—Materials for ships—Refusal of Minister to grant drawback—Remedy.

By the Customs Act, 1877 (40 Vict. c. 10), section 125, clause 11, it was enacted, *inter alia*, that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Vict. c. 11, section 11, the Governor in Council was further empowered to make regulations for granting a certain specific sum in lieu of any such drawback. (See also *The Customs Act*, 1883, s. 230, clause 12, and *The Revised Statutes of Canada*, chapter 32, s. 245 *m*.) By an order of the Governor-General in Council, dated the 15th day of May, 1880, it was provided as follows: "A drawback may be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada, and built and exported from Canada under Governor's pass, for sale and registry in any other country since the first day of January, 1880, at the rate of 70 cents per registered ton on iron kneed ships or vessels classed for 9 years, at the rate of 65 cents per registered ton on iron kneed ships or vessels classed for 7 years, and at the rate of 55 cents per registered ton on all ships or vessels not iron kneed." By an order in council of the 15th of November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on said vessels when built and registered subsequent to July, 1893."

Held, that a petition of right would not lie upon a refusal by the Controller of Customs to grant a drawback in any particular case.

Semble.—That the provision in an order in council that the drawback "may be granted" should not be construed as an imperative direction; it not being a case in which the authority given by the use of the word "may" is coupled with a legal duty to exercise such authority.

PETITION OF RIGHT for moneys recoverable as Customs drawback.

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Argument of Counsel.

A. R. Angers, Q.C., for the suppliant: The petition is based upon the order in council of 15th November, 1883, (See Bligh's *orders in council* (1). By virtue of that order the suppliant is entitled to drawback on the vessels built by him at Sorel and mentioned in his petition of right. The new regulations, which limit the time for presenting claims, made on the 15th May, 1893, do not affect the suppliant's case because his claim for drawback was made in the month of March of that year. Then again, the regulations of 1893 were made by the Controller of Customs, whereas they could only validly be made by the Minister.

E. L. Newcombe, Q.C. (D. M. J.) for the respondent: The claim to drawback depends upon the provisions of *The Customs Act*, and that Act enables the Governor in Council to issue regulations concerning the drawback. Now, none of the orders in council give an absolute right to drawback, they merely empower the Minister of Customs to pay the drawback, if he sees fit, at a certain rate or upon a certain basis. The orders in council only say "a drawback *may* be granted." They are permissive, merely, and no petition of right will lie to compel the Minister to grant the drawback. *Julius* v. *Bishop of Oxford* (2); *Cooper* v. *The Queen* (3); *Kinlock* v. *Secretary of State for India* (4); *The Interpretation Act* (5).

Furthermore, the *onus* is upon the suppliant to establish his right to drawback by showing that he has paid duty. He has not discharged that burden. The question is not one of bounty, it is one of remission of Customs duties that must have first been paid.

The Solicitor General of Canada, for the respondent: The drawback that comes into question here is a

(1) P. 105.
(2) L. R. 5 App. Cas. 214.
(3) L. R. 14 Ch. D. 311.
(4) L. R. 7 App. Cas. 619.
(5) R. S. C. c. 1.

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drawback upon certain materials imported into Canada for use in the construction of a ship; it is not a drawback payable in respect of the ship itself, and that is the way the suppliant has shaped his claim. He cannot bring himself within the operation of *The Customs Act* until he proves that he has paid duty on materials imported for use in constructing a ship, and this he has failed to do. The petition must be dismissed.

Mr. Angers replied.

THE JUDGE OF THE EXCHEQUER COURT now (May 25th, 1897) delivered judgment.

The petition of right in this case is filed to recover the sum of $301.60 alleged to be due from the Crown to the suppliant as a drawback on materials used in the construction of three vessels built by the suppliant and registered in Canada.

By *The Customs Act*, 1877, (40 Vict. c. 10) sec. 125, clause 11, it was among other things provided that the Governor in Council might make regulations for granting a drawback of the whole or part of the duty paid on materials used in Canadian manufactures. In 1881, by an amendment made by the Act 44 Victoria, chapter 11, section 11, the Governor in Council was further empowered to make regulations "for granting a certain specific sum in lieu of any such drawback." (See also *The Customs Act*, 1883, s. 230, clause 12, and *The Revised Statutes of Canada*, chapter 32, s. 245 (*m*).

On the 15th May, 1880, an order in council was passed which provided, among other things, "that a "drawback might be granted and paid by the Minister "of Customs on materials used in the construction of "ships or vessels built and registered in Canada, and "built and exported from Canada under Governor's "pass, for sale and registry in any other country since

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" the 1st day of January, 1880, at the rate of seventy " cents per registered ton on iron kneed ships or vessels " classed for nine years, at the rate of sixty-five cents " per registered ton on iron kneed ships or vessels " classed for seven years, and at the rate of fifty-five " cents per registered ton on all ships or vessels not " iron kneed." By an order in council of the 15th of November, 1883, an addition was made to the rates stated "of ten cents per net registered ton on such vessels when built and registered subsequent to July 1st, 1883." The first of these orders in council was passed prior to the amendment of 1881 referred to, and the latter thereafter. The regulation embodied therein was again approved by His Excellency in Council on the 25th day of July, 1888, and appears in Chapter 11 of *The Consolidated Orders in Council of Canada*, the 10th section of which is in the following terms:—

" Sec. 10. A drawback may be granted and paid by " the Minister of Customs on materials used in the " construction of ships or vessels built and registered in " Canada, and built and exported from Canada under " Governor's pass, for sale and registry in any other " country at the rate of 85 cents per registered ton on " iron kneed ships or vessels classed for 9 years, at the " rate of 75 cents per registered ton on iron kneed " ships or vessels classed for 7 years, and at the rate of " 65 cents per registered ton on all ships or vessels " not iron kneed.

" O. C. May 15th, 1880; November 15th, 1883."

Of the vessels, on the materials used in the building of which the drawback is claimed, the " Arthur P.," of 181 tons register, was built at Sorel in 1882 and registered at the port of Montreal on the 7th March, 1883; the " Saint Joseph," of 103 tons register, was built at Sorel in 1884 and registered at the port of Montreal on the 11th of July, 1884; and the " Albina," of 180 tons

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register, was built at Sorel in 1887 and registered at the port of Montreal on the 12th of May, 1887. The declaration on which the claim for a drawback on the materials used in the construction of these vessels was made was declared to on the 25th March, 1893, on forms supplied by the Customs authorities, which bear this heading: "Statement and claim for drawback "on ships' material payable under authority of sec. 10, "chap. 11, Consolidated Orders in Council."

In 1893 there was no Minister of Customs, that office having ceased to exist on the third day of December, 1892, when the Act 50-51 Victoria, chapter 11, *An Act respecting the Department of Customs and the Department of Inland Revenue*, was brought into force by a proclamation of His Excellency the Governor-General.

By the fourth section of that Act it is provided that "whenever by any Act any duty is assigned to, or any "power conferred upon, the Minister of Customs or "the Minister of Inland Revenue, such duty shall be "performed or such power shall be exercised by the "Controller of Customs or the Controller of Inland "Revenue respectively, but any duty or power as-"signed to the Controller of Customs or the Control-"ler of Inland Revenue shall be performed or exer-"cised subject to the supervision and control of the "Minister of Trade and Commerce, or of the Minister "of Finance, as the Governor in Council directs." I have nothing before me to show what direction the Governor in Council has given in this matter, but I have always understood that the "supervision and control" mentioned is exercised by the Minister of Trade and Commerce. On the 15th of May, 1893, the Controller of Customs, without reference, it appears, to the Minister of Trade and Commerce, made certain regulations respecting the drawback on ships' materials,

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which if they were good and applicable to this case would, it is clear, defeat the suppliant's claim. I am of opinion, however, that they are not so applicable. When they were made the claimant had the right to the drawback claimed which he could enforce by his petition, or he had not any such right. If he had not, there is an end of the matter. If he had, the regulation, even if good, would not affect it. But so far as I can see the regulations are in excess of any authority that appears at the time to have been vested in the Controller of Customs. The important fact remains, however, that neither the Controller of Customs nor the Minister of Trade and Commerce has granted the drawback in question to the suppliant.

Passing over some criticisms to which the orders in council relied upon are open, and construing them most favourably to the suppliant, we have so far as their provisions affect this case, in short this: that the Governor in Council exercising a statutory power to make regulations for granting a certain specific sum in lieu of a drawback of the whole or part of the duty paid on articles that have been used in Canadian manufactures, has directed that a drawback may be granted and paid by the Minister of Customs on materials used in the construction of ships or vessels built and registered in Canada at a rate per registered ton varying from eighty-five cents per ton to sixty-five cents per ton, according to the class or character of the ship or vessel. The suppliant made a claim for this drawback in respect of three vessels that he had built. There is some question as to whether they were vessels to which the regulation was applicable. But for the present it may be assumed that they were vessels of a class and character mentioned in the regulation. At the time when the claim was made there was no Minister of Customs. The Controller of Cus-

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oms had, subject to the supervision and control of the Minister of Trade and Commerce, succeeded to the powers and duties vested in or assigned to the Minister of Customs by any Act of Parliament. There was no mention of duties imposed or powers conferred by any regulation or order in council. But passing over that and assuming that the Controller of Customs, subject to the supervision and control of the Minister of Trade and Commerce, was the successor of the Minister of Customs, he has not entertained the claim made. He has not granted the drawback.

Will a petition of right lie to recover the amount thereof? Is it a "claim against the Crown arising under a regulation made by the Governor in Council?" (1). Is it a claim against the Crown; that is, one that may be maintained against the Crown and for which the Crown is liable to answer in this court?

In the first place it is to be observed that the claim rests upon the regulation, and that the court must take the regulation as it finds it, and may not enlarge it or alter its terms. What does it provide? Not that a drawback shall be granted and paid by the Crown in the cases provided for, but that it may be granted and paid by a minister of the Crown specially designated to exercise the power. The money with which the minister would pay must of course be furnished by the Crown. But it is the minister and not the Crown that is to grant and pay. It was forcibly argued by Mr. Angers that the word "may" in the regulation should under the circumstances be read as "shall." But even if he were right as to that the question would not be concluded. This is not a proceeding against the minister to compel him to perform his duty, or an action against him for a breach of such duty. If it were, the question would arise first as to

(1) The Exchequer Court Act, s. 16, *(d)*.

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whether or not the regulation had created a duty in a proper case to grant and pay the drawback, and then whether the minister was in any way answerable in this court for the failure to perform such duty. These are questions that I have no occasion at the present to determine. It may not, however, be out of place for me to add that I am inclined to the view that this is not one of the cases in which to the authority given by the use of the word "may" is coupled a legal duty to exercise such authority. The subject dealt with in the regulation is one of the refund or drawback of customs duties. The power conferred upon the minister is similar to that exercisable by the Governor in Council by the 78th section of *The Consolidated Revenue and Audit Act* (1), whereby when he deems it right and conducive to the public good he may remit or refund any duty, toll, forfeiture or penalty. That gives no right to any one to any refund or remission in any particular case. In the same way the regulation does not, it seems probable, confer upon any one a right enforceable at law to the drawback in any particular case. If the minister fails in a proper case to grant and pay the drawback he must answer to the Governor in Council, or to Parliament; but it is a question if he is answerable to any court of law. But that, as has been said, is not the question here. The question is whether a petition will lie against the Crown for the amount of the drawback if in a proper case the minister refuses to exercise the power vested in him, and that question must, it seems to me, be answered in the negative.

Judgment for the respondent, with costs.

Solicitors for the suppliant: *Angers, de Lorimier & Godin.*

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

(1) R. S. C. c. 29, s. 78.

GEORGE B. BRADLEY.....PLAINTIFF; 1897

AND April 26.

HER MAJESTY THE QUEEN.....DEFENDANT.

Civil servant—Extra work—Hansard reporter—The Civil Service Act, sec. 51—Application.

The plaintiff was Chief Reporter of the Debates staff of the House of Commons and, as such, was paid an annual salary out of moneys voted by Parliament. He was employed by the chairman of a Royal Commission to report the evidence and perform other work connected with the execution of the Commission at certain rates of remuneration fixed by agreement between him and the chairman—the same to be paid out of a sum voted by Parliament to meet the expenses of the Commission.

Held, that he was entitled to recover such remuneration notwithstanding the provisions of sec. 51 of *The Civil Service Act* that no extra salary or additional remuneration of any kind whatsoever shall be paid to any deputy head, officer, or employee in the Civil Service of Canada, or to any other person permanently employed in the public service.

THIS was a claim for moneys alleged to be payable to the claimant for certain work performed in and about the execution of a Royal Commission.

The plaintiff was Chief Reporter of the Debates staff of the House of Commons of Canada and received a yearly salary in respect of such office payable out of moneys voted by Parliament. On the 21st of July, 1892, he was employed by the Chairman of the Royal Commission appointed in that year to inquire into the state of the liquor traffic in Canada, to report the evidence taken thereunder. He entered upon the work of reporting the evidence, and the further work of editing the same, at certain rates of payment agreed upon between him and the chairman of the Commission. Payments on account of these services were made to him

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by cheques signed by the chairman and secretary of the Commission, but at the conclusion of the work there was a balance due the claimant at the rates so fixed by agreement, and the Department of Finance declined to authorize the payment of such balance alleging as reasons therefor that the rates charged by claimant were excessive, and that the claimant was not entitled to the amount claimed inasmuch as he was a permanent officer in the public service and was prevented by section 51 of *The Civil Service Act* from receiving any other moneys than his salary unless they were first voted by Parliament. These were also the substantial grounds of defence set up in the pleadings, and relied upon at the trial.

The following is the section of *The Civil Service Act* upon which the case turns :—

"51. No extra salary or additional remuneration of "any kind whatsoever shall be paid to any deputy "head, officer, or employee in the Civil Service of "Canada, or to any other person permanently employed "in the public service."

April 24th and 26th, 1897.

The case came on for trial at Ottawa.

W. D. Hogg, Q.C., for the plaintiff;

E. L. Newcombe, Q.C., (D.M.J.) for the defendant.

At the conclusion of the trial and argument, judgment was delivered by

THE JUDGE OF THE EXCHEQUER COURT :—

I think the plaintiff is entitled to recover, notwithstanding anything contained in the 51st section of *The Civil Service Act*. If I am wrong in this view the Crown will have the benefit of its objection upon an appeal to the Supreme Court of Canada, if an appeal should be taken.

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We come then to the question of the amount, and I am of opinion to allow the following items: First, with reference to the evidence, the rates of 30 cents per folio for ten copies and 25 cents per folio for eight copies, which should give the claimant in addition to the amount already allowed him, a sum of $677.70. 2ndly. The amount which was allowed and paid to him as assistant secretary, viz.: $288.00. 3rdly. The amounts which aggregate the sum of $1,967.00. These were allowed and paid to him for editing and revising certain work for the commission, in connection with which he was employed 281 days at $7.00 per day. These two amounts, $288.00 and $1,967.00, have already been paid, but, in a later adjustment of the accounts, were deducted. I think they should be allowed. 4thly. I also think that the evidence shows that the claimant is entitled to $105.00, that is $7.00 per day for 15 days while employed in doing similar work, but for which he was not paid; and also the other amount claimed of $93.60 for 117 hours at 80 cents per hour, which is the equivalent of $7.00 per day. This makes in all $3,131.30. From this certain deductions should be made. For the 281 days mentioned the claimant has been allowed $3.50 per day as a living allowance, for which I think there was no authority. That will make a deduction of $983.50. In the same way and for the same reason there should be a deduction of $52.50 in respect of the allowance made for 15 days at $7.00 per day. Then, I think, too, that the amount paid by claimant to his colleagues (part of the $1,000 referred to in the evidence) was not paid to his colleagues by the claimant as agent for the Government, but in pursuance of a private arrangement between the members of the Hansard staff, and that the claimant has been improperly credited in his accounts with

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these payments, and the amount should be deducted. These sums have been stated as amounting to $833.25, and, subject to correction, that may be taken as representing the actual amount for which credit has been given in respect of these payments. This makes a total amount of deductions of $1,869.25, leaving the judgment to go for $1,262.05, and costs. The amount, however, of $1,262.05 may be adjusted in settling the minutes of judgment in case there should be any error in the figures as stated.

*Judgment for claimant, with costs.**

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

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

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*REPORTER'S NOTE—Affirmed on appeal to the Supreme Court, 17th October, 1897.

QUEBEC ADMIRALTY DISTRICT.

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Aug. 3.

THE BELL TELEPHONE COMPANY OF CANADA, (LIMITED), PLAINTIFFS;

AND

THE BRIGANTINE "RAPID," HER CARGO AND FREIGHT.

Trespass—Interference with submarine cable—Notice—Damages.

By the regulation passed by the Quebec Harbour Commissioners in 1895 and subsequently approved by the Governor in Council and duly published, the Commissioners prohibited vessels from casting anchor within a certain defined space of the waters of the harbour. Some time after this regulation had been made and published, the Commissioners entered into a contract with the plaintiffs whereby the latter were empowered to lay their telephone cable along the bed of that part of the harbour where vessels had been so prohibited from casting anchor. No marks or signs had been placed in the harbour to indicate where the cable was laid. The defendant vessel, in ignorance of the fact that the cable was there, entered upon the prohibited space, and cast anchor. Her anchor caught in the cable, and in the effort to disengage it the cable was broken.

Held, that she was liable in damages therefor.

THIS was an action for damages arising from an interference with a submarine cable in the harbour of Quebec.

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

The case was tried before Mr. Justice Routhier, Local Judge for the Quebec Admiralty District, on the 30th day of July, 1897.

C. A. Pentland, Q.C., for the plaintiffs: The part of the harbour where the interference occurred being set off by law as a place where ships might not cast

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anchor, the defendant vessel was a trespasser and became, *ipso facto*, liable for any damage she might do. He cited *The Clara Killam* (1); *The Submarine Telegraph Company* v. *Dickson* (2); *The Czar* (3).

A. H. Cook and *C. E. Dorion*, for the ship, contended that the negligence of the plaintiffs in not giving notice that their cable was placed at this particular place contributed to the accident. Moreover, as laid, the cable constituted an interference with navigation. They cited *Submarine Telegraph Co.* v. *Dickson* (4).

ROUTHIER, L. J., now (August 3rd, 1897) delivered judgment.

L'action est *in rem*, au montant de $5,000, pour dommages causés au câble sous-marin de la compagnie demanderesse, lequel, posé dans le St-Laurent entre Québec et Lévis, a été brisé et considérablement endommagé le 30 juin dernier par le *Rapid*, défendeur.

La défense à cette action admet que l'ancre du vaisseau *Rapid* s'est accrochée dans le câble sous-marin de la demanderesse, mais nie lui avoir fait aucun dommage ; et elle allègue de plus :

Que la demanderesse avait bien le droit de poser son câble dans le St-Laurent, mais sans nuire à la navigation et aux droits des navires de vaquer dans le port de Québec ;

Qu'aucun avis et qu'aucune marque n'indiquaient l'endroit où se trouvait placé dans le port de Québec le câble de la demanderesse ;

Que le défendeur n'a commis aucune faute, ni négligence, et que c'est la demanderesse qui est en faute pour avoir posé son câble dans le port sans indiquer l'endroit où il est ;

(1) L. R. 3 A. & E. 161.
(2) 15 C. B. (N. S.) at p. 775.
(3) 3 Cook's Ad. R. 11.
(4) 33 L. J. (N. S.), C. P. 139.

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Et le défendeur réclame lui-même des dommages pour arrêt du navire et de sa cargaison.

La demanderesse réplique : Qu'en vertu d'un contrat avec les Commissaires du Havre du 9 juillet 1896, elle a posé son câble dans un certain espace du fleuve où il est défendu aux vaisseaux de jeter l'ancre, par un règlement des Commissaires, passé en 1895, approuvé par le Gouverneur en Conseil, le 2 mars 1896, et publié dans la *Gazette Officielle* et dans d'autres journaux.

Telle est la contestation liée entre les parties.

Voici maintenant quels sont les faits prouvés :

1. Le règlement allégué par la demanderesse et son contrat avec les Commissaires du Havre sont produits, et ils établissent qu'il est défendu aux navires de jeter l'ancre dans un espace du port de Québec, y décrit et mesurant 400 verges, et que la compagnie demanderesse a été autorisée à poser son câble dans cet espace du port ;

2. Que de fait le câble a été posé à l'endroit convenu, et s'y trouvait le 30 juin ;

3. Que ce jour-là le *Rapid*, par *gaucherie* de son *pilote*, a été ancré dans l'espace prohibé et que son ancre s'est accrochée dans le câble de la demanderesse. Il importe peu que l'ancre se soit ainsi accrochée dans le câble, parce que le vaisseau a dérivé et traîné son ancre, ou parce que l'équipage voulant changer de mouillage a retiré la chaîne de façon à laisser traîner l'ancre sur le lit du fleuve. Ce qui est sûr, c'est que le vaisseau s'est trouvé mouillé dans l'espace prohibé, et que la marée l'ayant fait monter et descendre le cours du fleuve, le câble s'est trouvé enroulé à double tour sur l'ancre.

4. Que pour décrocher l'ancre et dégager le câble les employés du *Rapid* ont dû les soulever tous les deux jusqu'à la surface de l'eau, au moyen d'un treuil à vapeur (steam-winch) avec une force telle que les

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chaînes et autres attaches du câble au quai Richelieu ont été arrachées, que le câble lui-même a été brisé et endommagé en plusieurs endroits, et que son extrémité a été entraînée au fond du fleuve;

5. Que les employés de la demanderesse ont été obligés de relever ensuite le câble pour le réparer et le tendre de nouveau, à grands frais; que ce câble a par-là même perdu de sa valeur, et que la demanderesse en a souffert des dommages et des pertes, dont il restera à fixer le montant si le *Rapid* doit être tenu responsable.

C'est sur cette question de responsabilité que cette cour est maintenant appelée à se prononcer.

Précisons d'abord deux points de droits débattus par l'avocat de la demanderesse et que les avocats du défendeur ne paraissent pas contester. En premier lieu les Commissaires du Havre ont tous les pouvoirs que possédait autrefois *La Maison de la Trinité* (Trinity House) et notamment celui de faire des règlements qui obligent les navires relativement à l'usage et à la jouissance du port de Québec.

En second lieu, le pilotage compulsoire ayant été aboli, les pilotes sont aujourd'hui des agents des propriétaires de navires et ceux-ci sont en conséquence responsables des actes de leurs pilotes.

La vraie question légale à résoudre en cette cause est celle-ci :

Le pilote du *Rapid* ne connaissant pas l'endroit précis où gisait le câble de la demanderesse sur le lit du fleuve, et la demanderesse n'ayant indiqué cet endroit par aucune marque, ni aucun avis, le *Rapid* est-il responsable du dommage qu'il a causé au câble ?

L'avocat de la demanderesse a soutenu l'affirmative et a cité les précédents suivants : *The Clara Killam* (1);

(1) 3 L. R. A. & E. pp. 161-165.

The Submarine Telegraph Co. v. *Dickson* (1); *The Czar* (2).

Mais ces précédents n'ont qu'une application assez éloignée à la présente cause, et le second est aussi invoqué par les avocats de la défense.

Il a été seulement décidé dans ces causes :

1. Que la compagnie de Télégraphe avait, de son côté, le droit de poser son câble où il était ;

2. Que d'un autre côté, le navire avait le droit de mouiller où il l'avait fait ;

3. Que par conséquent toute la question était de savoir si les employés du navire avaient apporté les soins et l'habileté ordinaires pour dégager leur ancre sans endommager le câble télégraphique. Les juges décidèrent qu'il y avait eu négligence, ou faute, de leur part et condamnèrent le navire.

Dans la cause du *Czar*, les employés du navire avaient vu le câble, avaient été avertis, et c'était par négligence qu'ils l'avaient brisé en n'amarrant pas solidement leur vaisseau.

Comme on le voit, la cause qui m'est soumise diffère matériellement de celles qu'on a citées, et c'est sous un aspect différent que je l'envisage.

Il est en matière de responsabilité un principe que je crois incontestable et fondamental : c'est que tout homme est responsable des conséquences de sa faute et des dommages qu'elle a occasionnés, lors même qu'il n'aurait pas voulu ni prévu ces conséquences et ces dommages.

Citons deux exemples :

Je jette un objet lourd dans la cour de mon voisin. Je ne sais pas qu'il y a là quelqu'un ; j'y ai même regardé et je n'ai vu personne. Cependant quelqu'un s'est trouvé là ; l'objet est tombé sur lui et l'a blessé ou tué. Je suis responsable.

(1 15 C. B. 775-776. (2) 3 Cook's Adm. R. p. 11.

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Je passe sur un pont réservé aux piétons seuls avec une voiture lourdement chargée ; le pont s'écroule et blesse ou tue un pêcheur qui pêchait dessous sans contrevenir à aucune loi, ni à aucun règlement. Je suis responsable.

Dans ces cas, je n'ai ni vu, ni prévu, ni voulu les conséquences de mes actes à l'égard des victimes. Pourquoi suis-je responsable ? Parce que mes actes étaient illicites, et que ceux de mes victimes ne l'étaient pas.

C'est la doctrine du droit commun reconnue par tous les auteurs, et applicable à toutes les causes basées sur le principe de la responsabilité en matière civile, commerciale ou maritime.

S'il en était besoin, je citerais les auteurs suivants dont je résume quelques passages :

20 Laurent, No 384—" Il faut, pour qu'il y ait responsabilité, non seulement un *fait dommageable*, mais une *faute*, quelque légère qu'elle soit."

20 Laurent, No. 401—" La *faute* existe du moment que le fait dommageable est *illicite*. *Id.* 402. Il est illicite s'il est en violation d'une *loi*, ou (id. 403) d'un simple règlement administratif.

1 Sourdat (1) ; Dalloz, vbo. responsabilité :

No. 86.—" Les *faits non permis par la loi* qui causent du dommage sans que celui à qui ils sont imputables ait agi avec intention de nuire, et sans que la loi pénale leur ait appliqué une sanction, sont des quasi-délits. Ils supposent une faute, une négligence, une imprudence."

Dès lors, il y a lieu a responsabilité et réparation.

Faisons maintenant l'application de ces principes à la présente cause et nous en viendrons à la conclusion que l'action de la demanderesse est bien fondée.

(1) Respons. Nos 412-414-419.

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THE BELL TELEPHONE COMPANY OF CANADA v. THE BRIGANTINE RAPID.

Reasons for Judgment.

En mouillant dans l'espace prohibé du port de Québec, le *Rapid* a commis un *fait dommageable* à la demanderesse et *illicite*. Ce fait le rendait même passible d'une pénalité.

De son côté, la demanderesse n'a commis aucune telle faute. Elle n'a transgressé ni loi, ni règlement administratif. Elle a posé son câble où elle avait le droit de le poser. Rien ne l'obligeait à en donner avis, ni à en marquer l'endroit. Et si l'on prétend que c'était pour elle une mesure de prudence, elle peut répondre : " J'ai usé de la prudence ordinaire en posant mon câble dans cet espace du fleuve où il est défendu aux navires de mouiller, et j'avais droit de compter que cette défense serait respectée. J'étais justifiable de ne pas redouter les ancres des navires dans un endroit où la loi leur défend de jeter l'ancre."

La conclusion qui s'impose est que le *Rapid* et sa cargaison doivent être tenus responsables des dommages causés à la demanderesse, et condamnés à les payer après qu'ils auront éte établis en la manière ordinaire, que l'action doit en conséquence être maintenue, et la contre-réclamation du défendeur renvoyée, le tout avec dépens contre ce dernier.

Judgment accordingly.

Solicitors for the plaintiffs : *Caron, Pentland & Stuart.*

Solicitors for the ship : *Miller & Dorion.*

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Oct. 11.

THE DOMINION ATLANTIC RAILWAY COMPANY..... } CLAIMANTS;

AND

HER MAJESTY THE QUEEN.....DEFENDANT.

Practice—Submission to Arbitration—Award—Rule of Court—Judgment.

The Exchequer Court has no jurisdiction to entertain an application to make an award under a submission to arbitration by consent in a matter *ex foro*, a judgment of the court.

THIS was an application to make an award under a submission to arbitration in a matter not before the court, a judgment of the court.

October 4th, 1897.

C. J. R. Bethune, in support of motion;

F. H. Gisborne, for the Crown, opposing only as to costs.

THE JUDGE OF THE EXCHEQUER COURT now (October 11th, 1897) delivered judgment.

This is an application on behalf of The Dominion Atlantic Railway Company to make an award made in matters in difference between the company and the Crown a judgment of this court. By the agreement of submission between the parties it was, among other things, provided that the award should, upon the application of either of the parties, be made a judgment of the Exchequer Court of Canada. Counsel appeared for the Crown upon the application and consented that the order asked for should be granted, provided it were made without costs. So there is nothing in the way of granting the application if the court has the necessary jurisdiction or authority;

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THE DOMINION ATLANTIC RAILWAY COMPANY v. THE QUEEN.

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but if it has not the agreement or consent of the parties will not give jurisdiction.

Before the statute 9-10 William III, chap. 15, when persons were out of court they could not by any agreement bring themselves into court and create a jurisdiction to issue process of contempt. (1). By that statute it was provided that merchants and others desiring to end any controversy by the submission of their suits to the award or umpirage of any person might make the submission a rule of any of His Majesty's Courts of Record which the parties should choose. A like provision occurs in the 17th section of *The Common Law Procedure Act*, where it is provided that: "Every "agreement or submission to arbitration by consent, "whether by deed or instrument in writing, not under "seal, may be made a rule of any one of the superior "courts of law or equity at Westminster, on the appli- "cation of any party thereto, unless such agreement or "submission contain words purporting that the parties "intend that it should not be made a rule of court, and "if in any such agreement or submission it is provided "that the same shall or may be a rule of one in par- "ticular of such superior courts, it may be made a rule "of that court only....." There is a like provision in the Statutes of Ontario and some of the other provinces (2). There is, however, no statute conferring any such jurisdiction upon the Exchequer Court of Canada, and in the absence of a statute the court has no jurisdiction. This view will, I think, be strengthened by reference to section 23 of *The Exchequer Court Act*, which provides that: "Any "claim against the Crown may be prosecuted by peti-

(1) *Nichols* v. *Chalie*, 14 Ves. Jr. 265; *Steers* v. *Harrop*, 1 Bing. 133 *t.*; *Lyall* v. *Lamb*, 4 B. & Ad. 468.

(2) R. S. O. c. 53, ss. 13-15; R. S. N. S. 5th s., c. 115, s. 21; 21 Geo. III (P. E. I.) c. 4.

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THE DOMINION ATLANTIC RAILWAY COMPANY v. THE QUEEN.

Reasons for Judgment.

" tion of right, or may be referred to the court by the " head of the department in connection with the ad- " ministration of which the claim arises." It is, I think, clear that without a *fiat* or a reference by the head of a department of a claim against the Crown there can be no proceeding in this court which would result in a judgment against the Crown.

Application refused.

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INDEX.

IN THE EXCHEQUER COURT OF CANADA.

General Rules and Orders.

In pursuance of the provisions contained in the 55th section of "The Exchequer Court Act," it is hereby ordered that the following Rules in respect of the matters hereinafter mentioned shall be in force in the Exchequer Court of Canada:—

1. Rule 1 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

Rule 1.

In all suits, actions and matters in the Exchequer Court of Canada, not otherwise provided for by any Act of the Parliament of Canada, or by any General Rule or Order of the Court, the practice and procedure shall,—

(*a*). If the cause of action arises in any part of Canada other than the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's High Court of Justice in England; and

(*b*). If the cause of action or suit arises in the Province of Quebec, conform to and be regulated, as near as may be, by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's Superior Court for the Province of Quebec; and if there be no similar suit, action or matter therein, then conform to and be regulated by the practice and procedure at the time in force in similar suits, actions and matters in Her Majesty's High Court of Justice in England.

2. Schedule A. mentioned in Rule 6 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

SCHEDULE A.

RULE No. 6.

(*Form of Information*).

IN THE EXCHEQUER COURT OF CANADA.

Between

THE QUEEN on the information of the Attorney-General for the Dominion of Canada,

Plaintiff;

and

JOHN SMITH,

Defendant.

Filed on the day of A.D. 189——.

To the Honourable the Judge of the Exchequer Court of Canada :—

The information of the Honourable Her Majesty's Attorney-General for the Dominion of Canada, on behalf of Her Majesty,

Sheweth as follows :—

(*Here state facts concisely*).

Claim :

The Attorney-General, on behalf of Her Majesty the Queen claims as follows :—

(*a.*)

(*b.*)

(Signature), E. B.,

Attorney-General.

3. Rule 7 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 7.

How suits other than by information, petition of right and reference are to be instituted.—Suits in the said

Court other than suits by the Attorney-General or by the Crown, by petitions of right and references from the head of any Department of the Government of Canada are to be instituted by filing a statement of claim which may be according to the form given in Schedule B to these Orders, and which shall conform to the rules of pleading hereinafter prescribed, and to the system and mode of pleading from time to time in force in Her Majesty's High Court of Justice in England.

4. Rule 23 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 23.

Service out of Jurisdiction.—When a defendant is out of the jurisdiction of the Court, then upon application, supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, the Court or a Judge may order that a notice of the information, petition of right or statement of claim be served on the defendant in such place or country or within such limits as the Court or a Judge thinks fit to direct, and the order is, in such case, to limit a time (depending on the place of service) within which the defendant is to file his statement in defence, plea, answer, exception or demurrer or otherwise make his defence, according to the practice applicable to the particular case, or obtain from the Court or a Judge further time to do so.

FORMS IN CONNECTION WITH RULE 23.

No. 1.

Order for service out of jurisdiction.

(Style of Cause [Short]).

Upon hearing , and upon reading the affidavit of , filed on the day of 18——, and ; I do

order that the plaintiff be at liberty to issue a notice of the (*information, statement of claim or petition of right, as the case may be*) for service out of the jurisdiction against ; and I further order that the time within which the said defendant is to file his statement in defence, plea, answer, exception or demurrer or otherwise make his defence according to the practice applicable to this case, be within days after the service thereof, and the costs of this application be

Dated at this day of A. D. 18——.

No. 2.

Notice in lieu of service to be given out of the jurisdiction.

(Style of Cause [Full]).

To G. H. of

Take notice that A. B., of has commenced an action against you, G. H., in the Exchequer Court of Canada, by an information (*petition of right or statement of claim, as the case may be*), filed in the said Court on the day of A.D. 18——, which said information (*petition of right or statement of claim, as the case may be*) reads as follows: (*Recite here the office copy of the information, petition of right or statement of claim, as the case may be, duly certified by the Registrar as provided by Rule* 14), and you are hereby required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action by causing a statement in defence, plea, answer, exception or demurrer, to this action or otherwise make your defence according to the practice applicable to this case, and in default of you so doing, the said A. B. may proceed therein, and judgment may be given in your absence.

(Signed) L. M.,
Solicitor.

5. Rule 26 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

NO APPEARANCE REQUIRED—PLEADINGS.

RULE 26.

No appearance required—How pleadings are to be filed.—No appearance to any information, petition of right or statement of claim shall be required; but a defendant who is served with an information, petition of right or statement of claim, shall file his statement in answer, demurrer or other defence to the information, petition of right or statement of claim, conformably to the procedure and mode of pleading hereby provided for as the first step in his defence.

6. Rule 27 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 27.

Time for filing statement in defence, answer or demurrer.—The statement in defence, answer or demurrer shall be filed within four weeks after the service of the information, or statement of claim or within such further extended time as the Court or a Judge may order.

7. Rule 58 of the Exchequer Court of Canada is hereby amended by inserting after the words "or plaintiff may," in the second line thereof, the words "upon præcipe and."

8. Rule 74 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 74.

When demurrer to whole of petition, information or statement allowed, costs of action to be paid.—If a demurrer to the whole of an information, petition of right or

statement of claim be allowed, the Crown, petitioner or plaintiff, as the case may be, subject to the power of the Court to allow an amendment, shall pay to the demurring defendant the costs of the action, unless the Court shall otherwise order.

9. Rule 82 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 82.

Default by Attorney-General.—In case the Attorney-General makes default in filing any pleading in any action or proceeding within the prescribed time, the plaintiff may apply to the Court or a Judge on motion for an order that the action be taken as confessed, or for an order giving him liberty to proceed as if the Attorney-General had filed a statement in answer, traversing or denying the case made, and upon either of such orders being made, the case may thenceforth proceed accordingly.

10. Rule 106 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 106.

Notice of admission.—Any party to a cause or matter may give notice, by his pleading or otherwise, that he admits the truth of the whole or any part of the case of any other party.

11. Rule 113 of the Exchequer Court of Canada is hereby amended by inserting therein the word "plaintiff" for the word "petitioner" wherever the latter occurs.

12. Rule 125 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 125.

Findings of fact and directions of Judge to be entered by Acting Registrar.—Upon every trial, where the officer present at trial is not the Registrar by whom judgments ought to be entered, the Acting Registrar shall take down all such findings of facts as the Judge may direct to be entered, and the directions, if any, of the Judge as to judgment, and shall, forthwith after trial, transmit such notes, duly certified under his signature, to the Registrar of the Court, at Ottawa.

13. Rule 126 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 126.

Where Judge directs the Acting Registrar to enter judgment in favour of any party absolutely.—If, under the circumstances mentioned in Rule 125 hereof, the Judge shall direct that any judgment be entered for any party absolutely, the minutes of trial, duly certified by the Acting Registrar to that effect, shall be a sufficient authority to the Registrar to enter judgment accordingly.

14. Rule 128 of the Exchequer Court of Canada is hereby amended by striking out the words "with or without a jury," where the same occur in the said Rule.

15. Rule 130 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 130.

Copy of Judge's notes, when to be made.—After the trial of any action or issues by a Judge, the Registrar shall, if so directed by the Judge, cause a copy of the Judge's notes of the evidence to be made, and after careful examination of the same he shall cause such copy to be filed with the other papers in the cause.

16. Rule 138 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

NEW TRIALS.

RULE 138.

Application for new trial.—A party desirous of obtaining a new trial of any cause must apply for the same to the Court by motion for an order calling upon the opposite party to show cause at the expiration of *eight days* from the date of the order, or so soon after as the case can be heard, why a new trial should not be directed. Such motion shall be made within *ten days* after the trial, or within such extended time as the Court or a Judge may allow.

17. Rule 140 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 140.

Not to be granted on certain grounds.—A new trial shall not be granted unless in the opinion of the Court some substantial wrong or miscarriage has been occasioned in the trial of the action ; and if it appear to the Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only.

18. Rule 149 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 149.

Application for new trial or to set aside judgment.—Where at or after the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply for a new trial, or to set aside the judgment, and to enter

any other judgment upon the ground that the judgment so directed is wrong.

19. Rule 150 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 150.

How and when motion under preceding Rule to be made.—On every motion made pursuant to leave reserved to move to set aside or vary any judgment, or made without leave under the next preceding Rule, the order shall be returnable in *fourteen* days. The motion shall be made within *thirty* days after the trial, or within such extended time as the Court or a Judge may allow.

20. Rule 154 of the Exchequer Court of Canada is hereby amended by striking out the words "or jury," wherever they occur.

21. Schedule O. mentioned in Rule 156 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

SCHEDULE O.

FORMS OF JUDGMENT.

1. DEFAULT OF DEFENCE IN CASE OF LIQUIDATED DEMAND.

IN THE EXCHEQUER COURT OF CANADA.

Monday, the day of A.D. 18——.

Present :

The Honourable Mr. Justice

Between

A.B.,

Plaintiff;

and

C. D. and E. F.,

Defendants.

The defendants not having filed any statement of defence,

This Court doth order and adjudge that the said plaintiff recover from the said defendants the sum of $, and costs to be taxed.

2. JUDGMENT IN DEFAULT OF DEFENCE IN ACTION FOR RECOVERY OF LAND.

(Heading as in Form 1).

No defence having been filed to the information herein,

This Court doth order and adjudge that the plaintiff recover possession of the land in the information mentioned.

3. JUDGMENT IN DEFAULT OF DEFENCE AFTER ASSESSMENT AND DAMAGES.

(Heading as in Form 1).

The defendants not having filed a statement of defence, and the cause having been referred to to assess the damages which the plaintiff was entitled to recover, and the said having, by his report, dated the day of 18——, reported that the said damages have been assessed at the sum of $

This Court doth order and adjudge that the plaintiff recover the sum of $ (and the costs to be taxed).

4. JUDGMENT AT TRIAL.

(Heading as in Form 1).

This action coming on for trial, at the City of this day, (or on the days of, A.D. 18——), before this Court, in the presence of Counsel for the plaintiff and the defendants (*or if some of the defendants do not appear, for the plaintiff and the defendant C. D., none appearing for the defendants E. F. and G. H. although they were duly served with notice of trial, as by the affidavit of filed on the day of appears*) upon hearing read the pleadings herein (*and such other documents as may be material, or any exami-*

nation taken before trial, by commission or otherwise) and upon hearing what was alleged by Counsel on both sides, (*when case reserved add as follows*:—this Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment).

When judgment in favour of plaintiff.—This Court doth order and adjudge that the said plaintiff is entitled to recover from Her Majesty the Queen the sum of $, and costs to be taxed.

When action dismissed.—(Same as for first part). This Court doth order and adjudge that the said plaintiff recover nothing against the said defendant, and that the defendant recover against the plaintiff her (*or his*) costs of the action to be taxed.

5. JUDGMENT AT TRIAL WHEN ACTION INSTITUTED BY PETITION OF RIGHT.

IN THE EXCHEQUER COURT OF CANADA.

Monday, the day of A.D. 18——.

Present :

The Honourable Mr. Justice

In the matter of the Petition of Right of

A. B.,

Suppliant;

and

Her Majesty the Queen,

Respondent.

The petition of right of the above named suppliant having come on for trial, at the City of this day (*or as the case may be, on the day of A.D.* 18) before this Court, in presence of Counsel for the suppliant and the respondent, upon hearing read the pleadings herein (*or such other documents as may be material or any evidence taken before trial by commission or otherwise*) and upon hearing the evidence adduced

at trial, and what was alleged by Counsel aforesaid (*when case reserved add*:—this Court was pleased to direct that this action should stand over for judgment, and the same coming on this day for judgment).

When relief granted.—This Court doth order and adjudge that the said suppliant is entitled to recover from the said respondent the sum of $ being the relief (or part of the relief, *as the case may be*) sought by his petition of right herein, and costs to be taxed.

When relief refused.—(Same as for first part). This Court doth order and adjudge that the said suppliant is not entitled to the relief sought by his petition of right herein, and that the said respondent recover from the said suppliant Her costs herein, to be taxed.

6. JUDGMENT ON MOTION GENERALLY.

(Heading as in Form 1).

This action having this day (*or as the case may be, on the day of A.D.* 18——,) come on before this Court on motion for judgment on behalf of and upon hearing Counsel for the (*when motion reserved add:*—this Court was pleased to direct that this matter should stand over for judgment, and the same coming on this day for judgment),

This Court doth order and adjudge that, etc.

22. Rule 166 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 166.

Proceedings where judgment against the Crown directing payment of money.—No execution shall issue on a judgment against the Crown for the payment of money. Where in any proceeding, there may be a judgment against the Crown directing the payment of money, for costs or otherwise, the Judge may, on application, certify to the Minister of Finance the

tenor and purport of the judgment, and such certificate shall be by the Registrar sent to or left at the office of the Minister of Finance.

23. Rule 180 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 180.

Writs of Fi. Fa. may be issued 15 *days after judgment, except in certain cases.*—Every person to whom any sum of money or any costs shall be payable under a judgment, shall after the expiration of 15 days from the time when the judgment was duly entered, be entitled to sue out one or more writ or writs of *fieri facias* against goods and against lands to enforce payment thereof, subject nevertheless as follows:—

(*a.*) If the judgment is for payment within a period therein mentioned, no such writ as aforesaid shall be issued until after the expiration of such period.

(*b.*) The Court or a Judge at the time of giving judgment or the Court or a Judge afterwards, may give leave to issue execution before, or may stay execution until any time after the expiration of the periods hereinbefore prescribed.

24. Rule 197 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

RULE 197.

Form and effect of.—Such writ of sequestration may be in the form given in schedule R. hereto, and it shall have the same effect as the writ of sequestration in use in Her Majesty's High Court of Justice in England has, and the proceeds of the sequestration, subject to the provisions of these Rules, may be dealt with in the same manner as the proceeds of writs of seques-

tration are dealt with according to the practice in that behalf, from time to time in force in Her Majesty's said High Court of Justice.

25. Rule 214 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 214.

Sittings of Judge in Court.—A Judge, when not elsewhere engaged, shall sit in open Court, at Ottawa, every Monday, or on the next juridical day in the event of any Monday being a holiday, for the purpose of hearing the argument of demurrers, special cases, motions for judgment, appeals from the report of the Registrar or other officer of the court, and all other motions, applications and business which cannot be transacted by a Judge in Chambers.

26. Rule 223 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 223.

Notice may be served without special leave in certain cases.—The Attorney-General, plaintiff or petitioner shall, without any special leave, be at liberty to serve any notice of motion or other notice, or any petition or summons upon any defendant, who, having been duly served with the information, petition of right or statement of claim, has not answered within the time limited for that purpose.

27. Rule 228 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 228.

Provisions as to costs.—The costs of and incident to all proceedings in the said Exchequer Court, shall be in the discretion of the Court or a Judge and shall fol-

low the event unless otherwise ordered. The Court or a Judge may also direct the payment of a fixed or lump sum in lieu of taxed costs.

28. The tariff of costs contained in Schedule T., as mentioned in Rule 229 of the Exchequer Court of Canada, is hereby repealed, and the following substituted therefor:—

SCHEDULE T.

Exchequer Court Tariff.

Fees and charges to be allowed to counsel, attorneys and solicitors in the taxation of costs between party and party.

Instructions.

1. For informations, statements of claim and petitions of right	$5 00
2. For special cases, demurrers and answers thereto	5 00
3. To amend any pleading, when the amendment is proper and not occasioned by error or default	2 00
4. For brief, for moving, for injunction	2 00
5. For interrogatories and *vivâ voce* examinations of parties or witnesses	2 00
6. For special petitions or motions in interlocutory matters	2 00
7. For special affidavits, including affidavits on production, in the discretion of the Registrar	1 00
8. For brief in suits by information, statement of claim or petition of right in cause coming on for trial or hearing	2 00
9. To defend proceedings commenced by information, statement of claim or petition of right	5 00

10.	To revive or add parties.....	2 00
	The preparation of pleadings and other documents.	
11.	Drawing informations, petitions of right or statements of claim, not exceeding 20 folios.....	5 00
12.	Drawing defence, answer or other pleading not specially mentioned, not exceeding 5 folios in length.....	2 00
13.	Engrossing any pleading so drawn, for printer, or in case of pleading not required to be printed, engrossing a clear copy thereof, per folio	10
14.	For examining and correcting the proof of any pleading or affidavit or other paper required to be printed, per folio.	05
15.	Preparing joinder of issue, and filing same..	1 00
16.	Suggestion as to the death of parties and the like	1 50
17.	Affidavit of service of information, statement of claim or petition of right.....	1 50
18.	Special affidavit not exceeding 5 folios.....	1 50
19.	Every bill of costs not exceeding 5 folios.....	2 00
20.	Copies of all documents or papers, per folio	10
21.	Notice of motion.....	1 50
22.	Certificate to appoint guardian *ad litem*.....	1 50
23.	Summons to attend Judge's Chambers	1 50
24.	Notice for service out of jurisdiction.....	1 50
25.	Advertisements to be signed by Registrar, not exceeding 5 folios in length.....	1 50
26.	Every writ of mesne or final process, not exceeding 5 folios.....	2 00
27.	Suing out subpœna ad testificandum.....	1 00
28.	Suing out subpœna duces tecum.....	1 25
29.	For every folio beyond the number provided for in any case, and for drawing or amending every other proceeding, notice, petition	

	or paper in a cause requiring to be drafted, not herein specially provided for, per folio of necessary matter.....	20
	(The above charge does not include engrossing, or copies to file and serve.)	
	Perusals.	
30.	For perusing the print of an information, petition of right, statement of claim or amended information, petition of right or statement of claim not exceeding 20 folios	1 00
31.	For every folio, exceeding 20 folios.....	05
32.	For perusing an amended information, petition of right or statement of claim when amended in writing.....	1 00
33.	(The same rate as above for perusing answers in print or amended answers in writing.)	
34.	To the attorney or solicitor for perusing interrogatories, not exceeding 20 folios....	1 00
35.	For every folio, exceeding 20 folios.....	05
36.	(Perusing all special affidavits filed by opposite party, including, in the discretion of the Registrar, affidavits on production, and examination of party, at the same rate.)	
37.	For perusing copy of supplemental statement and copy of order to revive, each...	1 00
38.	In cases where pleadings or papers are printed, the amount actually and properly paid the printer is to be allowed, not exceeding per folio.....	30
	Attendance.	
39.	To inspect or produce for inspection documents pursuant to notice to admit or order for inspection ;	
40.	On taxation for costs. Each, per hour.....	1 00

41. To examine and sign admissions;
42. To obtain or give undertaking to defend. Each 1 00
43. On a reference or examination of witnesses or parties, per hour;
44. On a summons at Judge's Chambers;
45. In Court on motion, per hour;
46. In Court on demurrer, special petition or application adjourned from Judge's Chambers, when set down for hearing or likely to be heard;
47. On consultation or conference with Counsel, if Registrar think the same reasonable and proper;
48. On hearing or trial of any cause or matter, per hour;
49. To hear judgment when same adjourned;
50. For order made at Judge's Chambers, and get same entered, each;
51. To settle draft of any judgment, decree or order;
52. To pay money into Court, each..... 2 00
53. Every other proper attendance..... 50

Briefs.

54. For drawing brief, per folio, for original and necessary matter..... 20
55. For drawing brief, per folio, for matter not original but necessary..... 10
56. Copy of documents, per folio..... 10
57. Copy of brief for second Counsel, when fee taxed to him, per folio..... 10
(But nothing shall be allowed for any copy of any pleading included in such brief, or of any document which the Registrar thinks was not reasonably and necessarily included therein, and the Registrar

may in any case in which he sees fit, allow a lump sum instead of, but not exceeding, the per folio allowance above provided for.)

Letters.

58. All necessary agency letters, in the discretion of the Registrar, (besides postage).... 50

Counsel.

59. Fee on drawing or settling pleading, and advising on evidence..... 5 00
60. Fee on motion in Court, not to exceed..... 10 00
61. Fee on argument of demurrer, not to exceed. 20 00
62. Fee with brief on trial of issues or hearing, not to exceed 50 00
63. (No more than two counsel fees to be taxed without an order of a Judge.)
64. Fee on motion for judgment, not to exceed... 20 00
65. (The above fees to Counsel may be increased by order of the Court or a Judge.)

Services.

66. For services on a party or witness, such reasonable charges and expenses as may be properly incurred.

Oaths and Exhibits.

67. To Commissioners for oaths 20
68. To the attorney or solicitor for preparing each exhibit..... 20
69. To Commissioners for marking each exhibit 10

Disbursements.

70. Besides the Registrar's fees, reasonable charges shall be allowed to attorneys and solicitors for necessary disbursements, and postage on services of notices, motions, subpœnas, translations, printing of the

same, copies, and other incidental proceedings.

71. In cases of special references where, by order of the Court or a Judge, the enquiry is to be proceeded with at some place other than Ottawa, or when the referee does not reside at the place where the enquiry is made, he shall then be allowed his actual travelling expenses, and a per diem sustenance allowance of..... 4 00

72. For drafting report on reference, per folio... 30

73. Per diem fee during the time employed on the reference..... 10 00
(To be increased by order of the Court or a Judge.)

74. In actions under $400, a deduction of one-third of the amount of the fees (other than disbursements) above allowed, shall be made by the taxing officer, unless otherwise ordered by the Court or Judge.

75. In any case where the defendants sever in their defence the plaintiff's attorney, counsel or solicitor shall receive, on each additional issue, one-half of the sum which he would have received had there been but one issue; the whole amount to be payable, in equal proportions, by the party or parties to each issue.

76. When the proceedings are carried on according to the practice of Her Majesty's Superior Court in the Province of Quebec, and where the foregoing tariff may not provide for, or be applicable to, any such proceedings, the fees shall be taxed according to the tariff from time to time in force in the said Superior Court.

29. Schedule U. mentioned in Rule 230 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

SCHEDULE U.

(RULE 230).

Fees and allowances to witnesses.

To witnesses residing within three miles of the court-house, per diem (not including ferry and meals).....	$1 00
Barristers, attorneys and physicians, when called upon to give evidence in consequence of any professional services rendered by them, or to give professional opinions, per diem.....	5 00
Engineers, surveyors and architects, when called upon to give evidence of any professional services rendered by them, and to give evidence depending upon their skill or judgment, per diem.....	5 00

If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one cause they will be entitled to a proportionate part in each cause only. When witnesses travel over three miles they shall be allowed expenses, according to the sum reasonably and actually paid, which in no case shall exceed 20 cents per mile one way.

30. Schedule V. mentioned in Rule 237 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor:—

SCHEDULE V.

(*a.*) SUBPŒNA.

IN THE EXCHEQUER COURT OF CANADA.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

1. To
2.
3.
4.

Greeting:

We command you, that all excuses ceasing, you and each of you, do personally be and appear before the at on the day of at o'clock in the noon, to testify the truth according to your knowledge in a certain cause depending in Our Exchequer Court of Canada, wherein is and is , on the part of and hereof fail not at your peril.

Witness the Honourable Judge of Our Exchequer Court of Canada, at the day of in the year of Our Lord, one thousand eight hundred and and the year of Our Reign.

Registrar.

(*b.*) SUBPŒNA DUCES TECUM.

The same as the preceding form, adding before the words "and hereof fail not at your peril," the words "and that you bring with you and then and there produce before the said Judge (Registrar, Referee or Commissioner, *as the case may be*) the following documents, viz.:—(*here state the documents required to be produced*) and show all and singular those things which you know, or which the said paper writing doth import of, in or concerning the present cause now depending in our said Court."

(PRÆCIPE FOR WRIT OF SUBPŒNA.)

(Title of Case.)

Seal Writ of Subpœna on behalf of

(Signature),

Solicitor for.....

31. Schedule X. attached to the Rules of the Exchequer Court of Canada and being the tariff of fees to be paid to the Registrar by stamps, is hereby repealed, and the following substituted therefor:—

SCHEDULE X.

1.	On filing every information, statement of claim and petition of right	$ 2 00
2.	On filing every plea, answer, demurrer and exception to above.....	10
3.	On filing every document, proceeding or paper not specially provided for.....	10
4.	On marking every exhibit filed at trial on reference or on examination.....	10
5.	On sealing and issuing every writ (besides filings)	2 00
6.	On certifying every office copy of information, statement of claim or petition of right, and affixing seal of the Court when necessary	2 00
7.	On every writ of subpœna.....	1 00
8.	Præcipe for writ of subpœna or any other præcipe not otherwise provided for.....	10
9.	Amending every writ or other proceeding or paper.....	30
10.	Every ordinary rule or order.....	50
11.	Special rule or order, not exceeding six folios	1 00
12.	Each additional folio.....	25
13.	Every judgment or Court order and entering the same.....	2 00

14.	Taxing every bill of costs (besides filings), per hour	1 00
15.	Every allocatur	1 00
16.	Every reference, enquiry, examination or other special matter referred to the Registrar, for every meeting not exceeding one hour	1 00
17.	Every additional hour or less	1 00
18.	For every report made by the Registrar upon such reference, &c	1 00
19.	Upon payment of money into Court, every sum under $200	1 00
20.	On $200 to $400	2 00
21.	On $400 and over	5 00
22.	Receipt for money in margin of answer, plea, &c	25
23.	Every other certificate required from Registrar (including any necessary search), and seal of the Court when necessary	1 00
24.	Exemplification or office copy of proceedings, per folio (A folio shall consist of 100 words.)	10
25.	Every search for special paper, or a general search in one cause	25
26.	Every search in any book	25
27.	Every affidavit, affirmation or oath administered by Registrar	25
28.	Every commission or order for examination of witnesses	1 50
29.	Entering or setting down any cause for trial or hearing on demurrer, special case, petition of right, information, statement of claim or otherwise	2 00
30.	Setting down a case by default	50
31.	Every fiat or summons	50
32.	Every appointment made by a Judge	50

33. Every enlargement on application to Judge in Chambers or on return of summons or otherwise		25
34. Every appointment for taxation of costs or otherwise made by Registrar		25
35. Enlargement of same		10
36. Comparing, examining and certifying transcript record (case) on appeal to Supreme Court of Canada	5	00
37. Comparing any document, paper or proceeding with the original on file or deposited in the Registrar's office, per folio		03
38. On each opposition for payment or claim above $1,000	2	50
do do above $400 but under $1,000	1	60
On each opposition for payment or claim of $400 or under	1	40
39. On each opposition to secure charges to annul or withdraw:—		
In actions above $1,000	2	50
do $400 but under $1,000	1	60
In actions of $400 or under	1	40
40. For preparing judgment of distribution	8	00
41. For drawing *procès verbal* upon improbation	2	50
42. On every deposition of every witness taken in writing (long-hand) for every folio		10
43. For taking down in writing, answers to interrogatories upon articulated facts	1	00
If over ten folios, for each additional folio		10
44. Approving or taking bond, or recognizance.	4	00

32. Rules, 8, 9, 10 and 11 of the Exchequer Court of Canada, made by the General Order of the 15th day of December, 1888, are hereby repealed, and the following substituted therefor:—

SHORTHAND WRITERS.

1. Every shorthand writer employed under the authority of the Court, shall, if directed by the Judge, Registrar, Referee or Commissioner before whom the examination of any witness is taken, or if requested by any party to the proceeding, furnish to such Registrar, Referee, or Commissioner, four copies of the notes of evidence, one of which shall be handed to the Judge, one filed on record in the Court, and the others given to the plaintiff and defendant respectively, when paid.

2. For taking and transcribing such examination or notes of evidence, there shall be paid to the Registrar, Acting Registrar, Referee or Commissioner, per folio, $0.15, and if the copies are supplied daily the same may, in the discretion of the Registrar, be increased to, per folio, $0.20. If for any reason the evidence is not required to be transcribed, for each hour occupied by the examination, $1.50.

3. If such notes of evidence are furnished as hereinbefore provided by direction of the Judge, Registrar, Referee or Commissioner, the fee last mentioned shall be paid by the party who called the witness, but if furnished at the request of either party, then by such party.

4. If any fee herein mentioned is not paid by the party liable therefor it may be paid by any other party to the proceeding and allowed as a necessary disbursement in the cause, or the Judge may make such order in respect of such evidence and the disposal of the action or proceeding as to him seems just.

5. Any Acting Registrar, Referee or Commissioner to whom any such fee is paid shall forthwith transmit the same to the Registrar of the Court.

RULE 33.

Bailiff's Fees.—Bailiffs who serve any process or paper by direction of any party to any cause or matter,

shall not be paid the fees prescribed for sheriffs and coroners, but the fee or fees allowed to bailiffs for a like service in the Superior Court of the Province in which the service is made.

34. Rule 260 of the Exchequer Court of Canada is hereby amended by inserting and adding thereto the following paragraph :—

9. The expression "plaintiff" occurring in any Rule of the Exchequer Court of Canada, includes the Crown or the party prosecuting any proceeding, and the suppliant in a petition of right.

10. The expression "defendant" occurring in any Rule of the Exchequer Court of Canada, includes the Crown or the party defending any proceeding and the respondent in a petition of right.

35. Rule 261 of the Exchequer Court of Canada is hereby repealed, and the following substituted therefor :—

RULE 261.

Rules applicable to Province of Quebec.—Rules numbered 1 to 27, both inclusive, 29, 57 to 65, both inclusive, 78 to 157, both inclusive, 159 to 195, both inclusive, 199 to 257, both inclusive, 259 and 260 of the Rules and Orders made on the 4th day of March, 1876; and the Rules and Orders respectively made on the 25th day of April, 1876 ; on the 28th day of February, 1877 ; on the 12th day of February, 1884 ; and also all the general rules and orders made since the 1st day of October, 1887, bearing the following dates, respectively : on the 7th March, 1888 ; on the 15th December, 1888 ; on the 12th January, 1891 ; on the 13th November, 1891 ; on the 5th December, 1892 ; on the 8th February, 1894, and also these present Rules and Orders (May 1st, 1895) shall apply to any actions in which the cause of action arises in the Province of Quebec.

36. Rule 264 of the Exchequer Court of Canada, made by the General Order of the 10th September, 1877, is hereby repealed, and the following substituted therefor :—

RULE 264.

The Judge of the Court may from time to time, by general order, name and appoint a person at any place who shall, if the Registrar is not himself present thereat, act as Registrar of the Court at any sitting held at such place, and if no such appointment has been made, or if the person so appointed is not in attendance, may appoint any other person to act as Registrar at such sitting, and the person so acting as Registrar at any such sitting shall, for the purposes thereof, have all the powers of the Registrar.

During the absence from the City of Ottawa, of Louis Arthur Audette, Esquire, the Registrar of the Exchequer Court of Canada, or until further order, the functions and duties of the said Registrar, including the taxation of costs, shall be performed by Charles Morse, Esquire, Barrister-at-law, an officer of this Court.

37. The Rules and Orders of the Exchequer Court of Canada, respectively numbered 2, 117, 148, 258 and 263, are hereby repealed

38. Rules 2 and 3 of the Exchequer Court of Canada, made by the General Order of the 7th March, 1888, and the Forms B, C, and D therein referred to, are hereby repealed.

39. Rule 1 of the Exchequer Court of Canada, made by the General Order of the 7th day of March, 1888, is hereby amended by striking out from the fifth line thereof the letter "A" after the word "Form" and substituting therefor the letters "CC." The Schedule to the above Rule is also hereby amended by entitling it "Form CC" in lieu of "Form A" as heretofore.

40. OFFER TO SUFFER JUDGMENT BY DEFAULT.

Offer by defendant to suffer judgment for specific amount.—If the defendant in any action files in the office of the Registrar an offer and consent in writing, signed by himself or his attorney of record, to suffer judgment by default, and that judgment shall be rendered against him for a sum by him specified in the said writing, the same shall be entered of record, together with the time at which it was tendered, and the plaintiff or his attorney may at any time, within fifteen days after he has received notice of such offer and consent, file a memorandum in writing of his acceptance of judgment for the sum so offered, and judgment may be signed accordingly with costs; or, if after such notice, the Judge, for good cause, grants the plaintiff a further time to elect, then the latter may signify his acceptance as aforesaid at any time before the expiration of the time so allowed, and judgment may be rendered upon such acceptance as if the acceptance had been within fifteen days as aforesaid.

41. *Effect of offer as to costs.*—If in the final disposition of any such action, wherein such offer and consent have been made by the defendant, the plaintiff does not recover a larger sum than the one so offered, not including interest from the date of such offer, the defendant, whatever the result of the action, shall be entitled to his costs by him incurred after the date of such offer.

42. *Such offer or consent, if not accepted, shall not be evidence against the party making the same.*—No such offer or consent made as above mentioned, which has not been accepted, shall be evidence against the party making the same, either in any subsequent proceeding in the action in which such offer is made, or in any other action or suit.

43. *Notice to Registrar by party appealing.*—Whenever an appeal is taken from a decision of the Exchequer Court to the Supreme Court of Canada in pursuance of the provisions of "*The Exchequer Court Act*," the appellant shall, within the time limited in section 51 of the said Act for the deposit of security for costs on such appeal, or such further time as may be allowed under the provisions thereof, give notice in writing to the Registrar of the Exchequer Court, stating that he intends to prosecute an appeal; and if such appeal is thereafter discontinued or abandoned, the appellant shall give notice in writing to the Registrar of the Exchequer Court of the discontinuance or abandonment of such appeal.

44. *Dismissal of action for want of prosecution. Notice of trial.*—If the plaintiff does not within three months after the close of the pleadings, or within such extended time as the Court or a Judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or Judge to dismiss the action for want of prosecution; and on the hearing of such application, the Court or a Judge may order the action to be dismissed accordingly, or make such other order and on such terms as to the Court or Judge may seem just.

(E. O.–XXXVI. R. 12.)

45. *Joinder of causes of action in information of intrusion.*—Proceedings to recover profits or damages for intrusion may be joined to proceedings to remove persons intruding upon the Queen's possession of lands or premises.

EXTENT.

46. *Writs of Immediate Extent and Diem Clausit Extremum may issue on affidavit of debt and danger and debt and death.*—A commission to find a debt due to the

Crown shall not be necessary for authorizing the issue of an Immediate Extent or writ of Diem Clausit Extremum; and an Immediate Extent may be issued on an affidavit of debt and danger and a writ of Diem Clausit Extremum may be issued on an affidavit of debt and death, and in either case on the fiat of the Judge of the Exchequer Court of Canada. (For forms of affidavit, order and writ, see Schedule Y. hereto.)

28-29 Vic. (U.K.), c. 104, sec. 47, and following.

SCHEDULE Y.

(1). *Form of affidavit for writ of Immediate Extent in chief.*

IN THE EXCHEQUER COURT OF CANADA.

(Heading as in Form 1, Schedule O.)

I, A.B. (insert residence and occupation) make oath and say as follows:—

1. I am (*state if he is an officer of the Crown, and in what capacity and under what authority he is acting herein.*)

2. That the said defendant is indebted to the Crown in the sum of $, or thereabouts (*state here in what manner it arose, and that it is in danger of being lost; and it should contain not only a general allegation of the defendant's insolvency, but also some particular fact or instance, such as that he has committed an act of bankruptcy, or stopped payment, or absconded, or that an execution has issued against him. Where against a bond debtor to the Crown, the affidavit should contain a distinct, positive and unequivocal allegation of the breach of the condition of the bond*, etc.)

3. The deponent further says he verily believes, that unless some method more speedy than the ordinary course of proceeding at law be had against the said defendant , for the recovery of the sum

of $, or thereabouts, the same is in danger of being lost.

Sworn, etc.

(2). *Form of fiat or order for issue of an immediate Extent.*

IN THE EXCHEQUER COURT OF CANADA.

Before the Honourable Mr. Justice ,

In Chambers.

(Style of Cause).

Upon hearing A. B. of Counsel for Her Majesty the Queen, and upon reading the affidavit of C. D., let a writ or writs of Immediate Extent issue against the said defendant for the recovery of the sum of $

Dated at Ottawa, the day of A.D. 18——.

(3). *Form of writ of Immediate Extent.*

(Heading as in form 1 of Schedule O.)

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith.

To the Sheriff of

Greeting:

Whereas by the affidavit of C.D., it appears that A.B., of , is indebted to Us in the sum of $, lawful money of Canada for , which said sum of $ still remains due and unpaid to Us as by reference to said affidavit filed in our said Exchequer Court more fully appears.

Now we being willing to be satisfied the said sum of $ so due to Us with all the speed We can, as is just, do command you that you omit not by reason of any liberty, but enter the same and summon the said A. B. to appear in our said Exchequer Court at Ottawa on the day of A.D. 18——, and that you diligently inquire what lands and tene-

ments and what yearly values the said A.B. now hath in your bailiwick, and what goods and chattels, and of what sources and prices, and what debts, credits, specialties and sums of money the said A.B., or any person or persons to his use or in trust for him now hath or have in your said bailiwick and that all and singular the said goods and chattels, lands and tenements, debts, credits, specialties and sums of money in whose hands soever the same now are, you diligently appraise and extend, and do take and seize the same into Our hands, there to remain until we shall be fully satisfied the said debt, according to the form of the Statute made for the recovery of such Our debts. And lest this Our command should not be fully executed, We further command and empower you by these presents to summon before you such persons as you shall think proper and carefully examine them in the premises, and that you distinctly and openly make appear to Our said Exchequer Court immediately (*unless a special day of return is mentioned in the fiat*) after the execution hereof, and in what manner you shall have executed this Our command, and that you then have there this writ; provided that what goods and chattels you shall seize into our hands, by virtue hereof, you do not sell or cause to be sold until We shall otherwise command you.

Witness the Honourable . . . Justice of Our Exchequer Court of Canada, at Ottawa, this day of A.D. 18——.

By the warrant of Mr. Justice.....

47. *Sheriffs executing Extents need not enquire by the oaths of jurors.*—The sheriff in executing a writ of Immediate Extent or a writ of Diem Clausit Extremum need not enquire by the oaths of good and lawful men in his bailiwick, but shall execute the said writ or writs in the same manner as is provided for the execu-

tion of writs of *fieri facias* against goods and lands or of sequestration.

CHANGE OF SOLICITORS.

48. *Change of attorney or solicitor.*—A party suing or defending by an attorney or solicitor shall be at liberty to change his attorney or solicitor in any action, cause or matter, without an order for that purpose, upon notice of such change being filed in the office of the Registrar, and upon payment of his attorney's or solicitor's costs; but until such notice and some document evidencing such payment are filed, and a certified copy thereof served and left in the said office, the former attorney or solicitor shall be considered the attorney or solicitor of the party.

49. *Death, etc., of attorney or solicitor.*—Upon the attorney or solicitor of one of the parties ceasing to act as such, either in consequence of being appointed to a public office incompatible with his profession, or of suspension or death, notice must be given to the opposite party of the appointment of the new attorney or solicitor before the latter can proceed in the action. If the party who employed the deceased attorney or solicitor neglect to appoint a new one after notice, the opposite party may proceed in the action as if the party were his own attorney or solicitor.

Dated at Ottawa, this 1st day of May, A.D. 1895.

GEO. W. BURBIDGE,
J. E. C.