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JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

OCTOBER 29TH, 1909.

THE STEAMSHIP "PRESCOTT" v. THE STEAMSHIP "HAVANA."

Shipping—Collision—Ships Entering Canal at Same Time—Undue Speed—Defective Equipment—Liability.

Present at the hearing: LORD MACNAGHTEN, LORD COLLINS, LORD GORELL and SIR ARTHUR WILSON.

Nautical Assessors: ADMIRAL SIR ARCHIBALD L. DOUGLAS, G.C.V.O., K.C.B., COMMANDER W. F. CABORNE, C.B., R.N.R.

Delivered by LORD MACNAGHTEN.

This is an appeal from the Supreme Court of Canada.* The action which has given rise to the appeal was brought by the owner of the S.S. "Havana," a lake freight steamboat, or "coarse freighter," as such boats are called in the Upper Lakes, to recover damages for injuries sustained in a collision with a passenger steamer called the "Prescott." The action was tried before the Deputy Local Judge for the Admiralty District of Quebec, assisted by a nautical assessor. The Trial Judge, concurring with the assessor, found the "Prescott" solely to blame, and gave judgment on all points in favour of the "Havana."

* EDITOR'S NOTE.—See the report of the case at first instance reported in 5 E. L. R., 219, and on appeal to the Supreme Court of Canada, reported in 6 E. L. R., 100.

The collision occurred at the entrance of the Lachine canal, in the harbour of Montreal, on the 2nd of July, 1907, about 7 p.m., while it was yet daylight.

The "Havana," bound from Quebec to Erie with a cargo of pulp wood, was just about to enter the canal. Her bow had reached the north wing wall of the entrance to the south lock (No. 1), and she had landed two of her men on the wall for the purpose of making fast her lines, when the acting lock-master ordered her to keep back and let the "Prescott" pass in first. The "Prescott" was coming up immediately behind the "Havana," but her approach had not been noticed by those on board the "Havana." She was entitled to priority of passage, ranking as a vessel of the "first class," under the definition contained in the "Canal Regulations of 1st of May, 1895," made by the Governor-General in Council.

In obedience to the order of the lock-master, the "Havana" reversed her engines and was going astern. The "Prescott," without waiting for the "Havana" to get clear out of the way, "crushed past," as some of the witnesses expressed it, between the pier and the "Havana," scraping hard against the fenders on the side of the pier and jamming the "Havana" against a lumber barge lying up against the south wing wall. She entered the lock at great speed. Some of the witnesses—lock-men who had been employed at the lock for ten years or so—deposed to the effect that they had never before seen a vessel going in so fast. And then, by some accident, owing to defects in equipment and to unskilful management, her speed was actually increased. She went on without stopping and crashed through the upper gates, bringing down the contents of the basin above. The rush of water swept her out of the lock and dashed her against the "Havana," which had begun to move across to her former position as soon as the "Prescott" was clear of the lower gates.

On the appeal to the Supreme Court, the learned Judges were all of opinion that the "Prescott" was in fault. On that point they did not call upon the counsel for the "Havana." But they were divided equally—three to three—on the question whether the "Havana" was also to blame. And so the judgment of the trial Judge was affirmed, and affirmed with costs.

The leading judgment in support of the decision of the trial Judge was delivered by Davies, J., with whom Idington and Duff, JJ., agreed. There are no notes of the opinions of the learned Judges who took the opposite view. The judgment of Davies, J., is clear and concise, and their Lordships agree with it entirely.

On the appeal before this Board it was, of course, hopeless for the learned counsel for the appellants to contend that the "Prescott" was not in fault. Their argument was that under the Canal Regulations it was the duty of the "Havana," when passed by the "Prescott," to move to some point not less than three hundred feet from the entrance to the lock. They said, what was very true, that, if the "Havana" had not been there in the way, she would not have been involved in the catastrophe.

The regulation on which they relied is sub-sec. (*d*) of sec. 19. It is in these words:—

"When several boats or vessels are lying by or are waiting to enter any lock or canal, they shall lie in single tier and at a distance of not less than three hundred feet from such lock or entrance, except where local conditions may otherwise require, and each boat or vessel for the purpose of passing through shall advance in the order in which it may be lying in such tier, except in the case of vessels of the first class to which priority of passage is granted as above."

Assuming that under the circumstances the appellants could shelter themselves under such a defence or counter-charge, the answer to their contention is very simple, as Davies, J., points out.

In the first place, the conditions under which the regulation comes into operation were not present on this occasion. There were not several boats or vessels lying by or waiting to enter the lock. The lumber barge, which might have claimed to enter before the "Havana," had waived her turn and was not going forward at the time. The only vessel then about to enter the lock was the "Havana." In the next place the local conditions do not require that vessels waiting to enter should lie by at the distance prescribed so long as there is accommodation at the wing walls. There are snubbing posts along both walls, and it was proved that it was the recognized practice for vessels waiting to enter the lock to lie up there. The south wall was occupied by barges, but there was room against the north wall, and that was the

proper place for the "Havana" to wait for her turn. The regulation in question was intended to preserve order among vessels competing for entrance. It was not designed to secure space and room for the erratic and dangerous movements of a vessel over which those in charge lose all control.

The conduct of the "Havana" seems to have been proper in every respect, and such is the opinion of the nautical assessors.

Their Lordships will therefore humbly advise His Majesty that the appeal must be dismissed.

The appellants will pay the costs of the appeal.

Appeal dismissed.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

OCTOBER 28TH, 1909.

SAINT JOHN PILOT COMMISSIONERS ET AL. v. THE CUMBERLAND RAILWAY AND COAL CO.

Shipping — Pilotage—Barges Towed by Tugs — Exemption from Pilotage Dues—Motive Power—R. S. C. c. 80, secs. 58 and 59—"Ship"—"Navigate."

Present at the hearing: THE LORD CHANCELLOR, LORD ASHBOURNE, LORD COLLINS, LORD GORELL and SIR ARTHUR WILSON.

Delivered by LORD GORELL.

The question for determination on this appeal * is, whether certain vessels belonging to the respondents were, when entering and leaving the port of St. John, New Brunswick, liable to pilotage dues under the provisions of the Pilotage Act, Revised Statutes of Canada, 1886, ch. 80, secs. 58 and 59.

Those sections are as follows:—

58. Every ship which navigates within either of the pilotage districts of Quebec, Montreal, Halifax or St. John, or within any pilotage district within the limits of which the payment of pilotage dues is, for the time being, made

* EDITOR'S NOTE.—See the case in the Courts below, 37 N. B. R., 406; 38 S. C. R., 169.

compulsory by Order in Council under this Act, shall pay pilotage dues, unless either—

(*a*) Such ship is on her inward voyage, and no licensed pilot offers his services as a pilot, or

(*b*) She is exempted under the provisions of this Act from payment of such dues.

2. If such ship is on her outward voyage and the owner or master of such ship does not employ a pilot or give his ship into the charge of a pilot, such dues shall be paid, if in the pilotage district of Quebec, to the corporation of pilots for and below the harbour of Quebec, and if in any other pilotage district, to the pilotage authority of such district. 36 Vict. ch. 54, sec. 57, part.

59. The following ships, called in this Act exempted ships, shall be exempted from the compulsory payment of pilotage dues:—

(*a*) Ships belonging to Her Majesty;

(*b*) Ships wholly employed in Her Majesty's service, while so employed, the masters of which have been appointed by Her Majesty's Government, either in the United Kingdom or in Canada;

(*c*) Ships propelled wholly or in part by steam employed in trading from port to port in the same province, or between any one or more of the provinces of Quebec, New Brunswick, Nova Scotia or Prince Edward Island and any other or others of them, or employed on voyages between any port or ports in the said provinces or any of them and the port of New York, or any port of the United States of America on the Atlantic, north of New York; except only in the ports of Halifax, Sydney pilotage district, Miramichi and Pictou,—as respects each of which ports the pilotage authorities of the district may, from time to time, determine, with the approval of the Governor in Council, whether any, and which, if any, of the steamships so employed shall or shall not be wholly or partially, and, if partially, to what extent and under what circumstances, exempt from the compulsory payment of pilotage dues;

(*d*) Ships of not more than eighty tons, registered tonnage;

(*e*) Any ship of which the master or any mate has a certificate granted under the provisions of this Act and then in force, authorizing him to pilot such ship within the limits which she is then navigating;

(*f*) Ships of such description and size, not exceeding two hundred and fifty tons, registered tonnage, as the pilotage authority of the district, with the approval of the Governor in Council, from time to time, determines to be exempt from the compulsory payment of pilotage in such district; Provided always, that this paragraph shall not apply to the River St. Lawrence, where all ships registered in Canada, if not more than two hundred and fifty tons registered tonnage, shall be exempt. 36 Vict., ch. 54, sec. 57, part;—38 Vict., ch. 28, sec. 1;—40 Vict., ch. 20, sec. 3.

By section 2 (*b*) of the Act the expression "ship" includes "every description of vessel used in navigation, not propelled by oars."

In or about the year 1893 the respondents had built for them five vessels for the purpose of carrying coal sent from the respondents' mines at Spring Hill and shipped from Parrsboro, Nova Scotia, to the port of St. John and other ports along the East Coast of Canada and the United States of America.

The vessels were each of about 440 tons, and were described as "schooners" in the builders' statements and claims for drawbacks, and the certificates of registry in Nova Scotia certified that they had within themselves the power of independent navigation, though the facts shew that this statement cannot be treated as being sufficiently explicit. They were constructed with two short masts, which were fitted as derricks, with gaffs for discharging cargo, and carried small, triangular sails and a jib. These sails were used to steady the vessels and assist them in strong breezes. The vessels could run before the wind, but could not be safely navigated as sailing vessels in the ordinary way, and were intended to be, and, in fact, were, towed from port to port. Each had a captain and crew, and was fitted with steering gear and anchors. If they had been fully rigged they would have been navigable by sails as ordinary schooners.

The barges or schooners whichever they are called, were towed by a steam tug from Parrsboro to St. John, and also on the return voyage. In summer there might be two or three in a line, but in winter only one at a time appears to have been towed.

The appellant Commissioners are the pilotage authority for the pilotage district of St. John and entitled to collect the pilotage dues. The payment of these dues is made com-

pulsory in the cases specified in the Act, but it is not compulsory upon an owner or master of a ship to employ, or give his ship into the charge of, a pilot, either on the ground of his being compelled to pay pilotage dues to any person or otherwise. (See sec. 57 of the Act.)

From 1893 to 1903 the respondents' said vessels were engaged in carrying coal to St. John in the way above referred to, and a dispute existed between the Commissioners and the respondents as to whether the vessels were liable to pilotage dues. During this period it appears that the respondents, while refusing to take pilots on their vessels, were compelled to pay pilotage dues in order to obtain the clearance of the vessels, and, in fact, paid the dues under protest. The amount thus paid between April 24th, 1893, and May 4th, 1903, was $15,680.08, of which $7,487.58 were paid more than 6 years before the commencement of the present suit, and $8,192.50 between September, 1897, and May, 1903, that is to say, within 6 years before the commencement of this suit. In consequence of a decision in the case of the ship "Grandee," hereafter referred to, pilotage dues were not paid in respect of the said vessels after May, 1903, but, if payable, the amount thereof in and from May, 1903, to the time of the action was $735.

In September, 1903, the respondents brought this suit against the Commissioners to recover the pilotage dues paid as aforesaid. They sued on the common counts. The defendants pleaded "never indebted" and the Statute of Limitations, and also claimed the said sum of $735.

The trial took place before McLeod, J., and on the 9th of October, 1905, he found in favour of the respondents that the vessels were not liable to the pilotage dues, and he directed a verdict to be entered for the plaintiffs for the sum of $8,192.50. He held that the rest of the plaintiffs' claim was barred by the Statute of Limitations, and he gave leave to the defendants to move to enter a verdict on their behalf for the $735. The ground of the decision was that, in the opinion of the learned Judge, following the case of the ship "'Grandee," the vessels came within the exemption of sec. 59 (*c*) of the Act of 1886, as ships propelled by steam.

The defendants moved the Supreme Court of New Brunswick to set aside the verdict and enter a verdict for the defendants, or for a new trial. The motion was heard before Tuck, C.J. and Barker, Hanington, and McLeod, JJ., and

was, on February 10th, 1906, refused, the Chief Justice dissenting. He expressed himself as differing entirely from the conclusion that, where a ship is being towed, and has no steam propelling power within herself, she is propelled wholly or in part by steam within the meaning of the Act. The other Judges concurred with the judgment below.

An appeal was then taken to the Supreme Court of Canada, and heard before the Chief Justice and Davies, Idington, Maclennan and Duff, JJ. On the 26th of December, 1906, the judgment of the Court was given by Davies, J., dismissing the appeal on the ground that the vessels either were not vessels "which navigate" within sec. 58, as they had not practically the power of independent motion, or were "ships propelled by steam" within sec. 59. It is to be noticed that the view of the Court upon the first alternative was not that entertained in the Court of New Brunswick.

Before considering the language of the statute it may be desirable to refer to the case of the "Grandee," decided in 1902, and reported in 8 Exchequer Court Reports, at p. 54, and on appeal at p. 79. The "Grandee" was a coal barge of about 1,000 tons register, employed in carrying coal from Sydney, Nova Scotia, to Quebec. She had no motive power of her own, either by sails or steam, and was towed by a steam collier. She was held exempt from pilotage dues in the pilotage district of Quebec. There does not seem to be any substantial difference between that case and the present, for although, in that case, it seems to have been stated that the vessel had no motive power of her own, the vessels in the present case had, for practical purposes, no motive power of their own which would enable them to make their voyages in safety. The case was heard before Routhier, J., the local Admiralty Judge for Quebec, who gave three reasons for his opinion: First, that a pilot was practically useless on such a vessel. This reason is to be found in some of the judgments in the present case, but it would, if correct, seem to apply equally to any vessel, though fully rigged, which was under the necessity of being towed into port. Second, that the tug (which is exempt) and tow are one vessel. This, however, cannot be correct, though for some purposes, e.g., steering and sailing rules, they may to some extent be so regarded. Third, that the vessel was only an accessory or "chargement"—an object transported or dragged, as a carriage by a horse, and was not, properly speaking, a ship. This reason

does not give effect to the term "ship" as used in the Act, and, indeed, the judgment is based on what may be termed practical reasons, and not upon sufficient consideration of the language of the Act. On appeal to the Exchequer Court of Canada, Burbidge, J., affirmed the decision on grounds which are substantially the same as those given by Mr. Justice Davies in the present case.

It may be observed that the statutes have been revised and re-enacted with some modifications in 1906. The Statute of that year, ch. 1, sec. 21, sub-sec. 4, provides that:—

"Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating, or amending the same, be deemed to have adopted the construction which has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language."

The legislation on the subject of pilotage in Canada extends back for many years. The Pilotage Act of 1873 repealed a number of old statutes in none of which, so far as their Lordships can trace, is there any enactment which would shew any distinction between barges or schooners of the kind and size of those in question used for the purpose of sea-going voyages, and towed in or out of port, and any vessel of the ordinary sailing powers similarly towed. There is a provision in 12 Vict., ch. 117, sec. 23, which in one case gives a lower rate of pilotage for vessels towed, for under it a Montreal pilot only had half rates when a vessel was towed by a steamer, but the General Act of 1873 does not appear to contain any similar provision. The Act of 1873 was revised in 1886, and some important changes were made by sec. 59 of the Revised Statute with regard to the exemptions which were specified in sec. 57 of the Act of 1873. There would seem to be no reason for placing different constructions upon the words "ships propelled wholly or in part by steam" used in these two sections. In the earlier it may be noticed that these words are used in relation to vessels proceeding on certain lengthy sea voyages upon which, in 1873, vessels without any motive power of their own would probably not be used. In the later section it may be further noticed that the word "steamships" is expressly used in the latter part of sub-sec. (*c*).

The statutory provisions in question appear to have originated in times when vessels were either sailing vessels or steamships or river craft, and before barges of such a size as

the respondents' vessels were used for sea-going purposes. Exemptions from pilotage of vessels of small size are to be found in the Acts. It would seem from the letter of 19th January, 1903, from the Pilotage Authority of St. John to the Deputy Minister of Marine and Fisheries, Ottawa, that these large barges, or schooners, were a new development, and it is probable that the explanation may be thus found of the fact that no special provision in the Acts is to be found dealing with cases of towage of such vessels. There is nothing in the evidence which would justify an assumption that the legislature, in framing the Acts, had in view the relief of a class of large barges moved by towage alone from pilotage dues, and the question is whether the statute uses language which does or does not do so.

Before turning to the actual words of the statute it may be useful to refer to the other Shipping Acts of 1886, Nos. 72 to 80, in which "ship" is defined in a manner substantially the same as that above stated, and "steamship or steamer" is in ch. 73, sec. 1 (*d*), defined as including "any ship propelled wholly or in part by steam or other motive power than sails or oars." Steamboat is defined in ch. 78, sec. 2 (*a*), as including "any vessel used in navigation or afloat on navigable water and propelled or movable wholly or in part by steam," and in ch. 79, sec. 1 (*c*), the expression "steamship or steamboat" includes "every vessel propelled wholly or in part by steam or by any machinery or power other than sails or oars." Sec. 2 of this Act also provides in articles 4 and 6 as to the lights to be carried by vessels towing and being towed. In these definitions the word "propelled" is used with reference to the motive power possessed by the vessel, but the attention of the Courts below does not appear to have been called to this.

The first question is, whether the 58th section imposes the compulsion upon these barges unless they are exempted by sec. 59. It applies to "every ship which navigates within" certain districts, unless exempted under the provisions of the Act, or when there is no opportunity of obtaining a pilot. The word "ship" being defined to include every description of vessel used in navigation not propelled by oars, these barges are ships within the meaning of the section. Then comes the question whether they are ships which "navigate" within the district of St. John. The word "navigate" is, of course, used in the sense of "is navigated." From

the context it appears that it is not used as descriptive of any particular kind of ship, or with any reference to her motive power, but is used in relation to something which a ship is caused to do; that is to say, so far as affects the present case, to perform a voyage into or out of the Port of St. John.

There is nothing in the words of the section, when the definition of the word "ship" is considered, to indicate that at the time of moving in the pilotage waters a ship, to be under compulsion, must at the time possess independent practical power of moving herself. If that were so, it would seem to follow that any ordinary sailing vessel which was necessarily towed into port would not be within the section, and this can scarcely be the true meaning of the section. The argument that, because the barges are towed, they do not need a pilot, will not alter the express language of the section, and, moreover, it is reasonably clear that, although a pilot may not be so useful on large barges in tow of a tug as he would be if they were capable of making their own way into or out of port, yet the same argument would apply to any case of towage, even of a properly rigged sailing vessel, and yet, wherever pilotage is compulsory, the pilot is usually found on the tow where he can exercise such control of the navigation as is possible and give such directions and assistance as may be required. The fact that the tug may have more vessels than one in tow does not alter this position.

Their Lordships consider that the 58th section applied, and that the vessels in question were liable to the payment of pilotage dues unless exempted by the 59th section.

That section exempts "the following ships," and then in sub-sections (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) it enumerates the ships exempted. It is important to notice again the use of the word "propelled" in the definition of the word "ship," for the second question turns mainly on the use of that word in sub-section (*c*). In the definition clause the word "propelled" is obviously used in its ordinary sense, and does not embrace the idea of traction. It is used as it was by Cicero —"propellere navem remis"—with reference to the motive power possessed by the vessel herself, and in this sense it is, in their Lordships' opinion, used in sub-section (*c*). "Ships propelled wholly or in part by steam" are steamships which have either no motive power but their steam engines, or have steam engine power and some sailing power, and this is made plain by the actual use of the word "steam-

ships" in the latter part of the said sub-section, where this word is used as equivalent to "ships propelled wholly or in part by steam." This express reference to steamships has a very important bearing on the construction of the earlier words of the sub-section, but the arguments and judgments given in the record do not touch upon it.

Provision is made in sub-section (*d*) for the exemption of ships of not more than 80 tons registered tonnage, and in sub-section (*f*) for the exemption in certain cases of ships not exceeding 250 tons registered tonnage. These provisions meet the case of ordinary barges within the limits of tonnage mentioned, but do not assist the respondents owing to the size of their barges. If the masters or mates of the barges had the necessary pilotage certificates, the barges would be exempt under the provision in sub-section (*e*).

The statutes were again revised in 1906, and the 58th and 59th sections of the Pilotage Act (Revised Statutes of Canada, 1886, ch. 80), were re-enacted in the Canada Shipping Act, 1906, ch. 113, secs. 475 and 477, with some alteration which, however, do not seem to make any alteration with regard to the liability or exemption of such vessels as those in question. If it were material to consider this Act, the language used in the definition clause and other clauses would support the views now being expressed.

Their Lordships, after giving very full consideration to the case, have come to the conclusion that they are compelled to differ from the decisions below, which, as they at present stand, have been reached by placing a construction upon the Act which is founded on practical considerations (according to which it might be thought reasonable so to construe the Act that, having regard to the peculiar circumstances attending their navigation, the barges in question should be exempted from pilotage) rather than upon a natural construction of the words used, and for the reasons given above they think that the construction which has been adopted is not in accordance with the proper and ordinary meaning of the language used in the statute. If it be thought right that these large, sea-going barges should be exempted from pilotage dues, the matter will have to be dealt with by the legislature.

Their Lordships will therefore humbly advise His Majesty to order that the verdict entered for the respondents

and the judgments in the Courts below be set aside, and the verdict and judgment be entered for the appellants for $735 with costs in the said Courts, to be paid by the respondents to the appellants.

The respondents must pay the costs of the appeal.

Appeal allowed.

DOMINION OF CANADA.

SUPREME COURT. OCTOBER 20TH, 1909.

CHAMBERLIN v. THE KING.

Government Railway — Negligence — Sparks from Engine— Fire—Meaning of Phrase "On a Public Work" in sub-sec. (c) of R. S. C. ch. 140.

An appeal from the Exchequer Court of Canada. Case below is reported in 5 E. L. R. 441.

Curry, K.C., and Mott, K.C., for appellant.

Chrysler, K.C., and McAlpine, K.C., for respondent.

THE CHIEF JUSTICE:—In a long series of decisions this Court has held that the phrase "on a public work" in sec. 20, sub-sec. (c), of the Exchequer Court Act, must be read, to borrow the language of Mr. Justice Duff in The King v. Lefrançois, 40 S. C. R., p. 436, "as descriptive of the locality in which the death or injury giving rise to the claim in question occurs" and that to succeed the supliant must come within the strict words of the statute. See per Taschereau, J., in Larose v. The King, 31 S. C. R. 206. See also Paul v. The King, 38 S. C. R., p. 126, and cases there cited.

In this case the property destroyed by fire, previous to and at the time of its destruction, was upon the land of the suppliant, some distance from the right of way of the Intercolonial Railway and was not property on a public work. As to the objection that this question was not raised in the Court below, I refer to McKelvy v. Le Roi Mining Co., 32 S. C. R., p. 664. If questions of law raised here for the first time appear upon the record we cannot refuse to decide them

where no evidence could have been brought to affect them had they been taken at the trial. The point was taken by the pleadings if not urged at the argument below. The appeal must be dismissed with costs.

GIROUARD, J., agreed with the Chief Justice.

DAVIES, J.:—This was an action brought in the Exchequer Court on a claim for damages arising out of the destruction of the property of the suppliants claimed to have been caused by sparks from the smokestack of an Intercolonial Railway engine.

The property destroyed was previous to and at the time of the destruction upon the land of the suppliant some distance from the right of way of the railway, and was not property on a public work.

The learned Judge, Mr. Justice Cassels, who delivered the judgment of the Court of Exchequer, had not heard the witnesses, who had given their testimony before the late Mr. Justice Burbidge.

The suppliants were desirous to avoid the expense of a rehearing, and with the assent of the respondent, the case was fully argued before Mr. Justice Cassels on the evidence taken before Mr. Justice Burbidge.

The learned Judge found as a fair conclusion to be drawn from the evidence that the fire originated from a spark or sparks emitted from the engine, but he was unable to find that it was caused through any defect in the engine for the existence of which, and the failure to remedy which, the Crown could be held liable for the losses claimed.

On this appeal the jurisdiction of the Court of Exchequer over the claim in question was challenged and denied by Mr. Chrysler, his contention being that such jurisdiction was limited to claims against the Crown arising out of injuries to the person or property on a public work, and did not extend to injuries happening away from a public work, although caused by the operations of the Crown's officers or servants.

The cases in which the question has already come before this Court for consideration were all referred to.

We are all of the opinion that the point has already been expressly determined by this Court, particularly in the case of Paul v. The King, 38 S. C. R. 126. In that case the ma-

jority of the Court held after the fullest consideration that clause (*c*) of the 16th section of the Exchequer Court Act which alone could be invoked as conferring jurisdiction, only did so in the case of claims "arising out of any death or injury to the person or property on any public work, resulting from the negligence of any officer or servant of the Crown, while acting within the scope of his duties."

Claims for injuries, not within these words of the section, and occurring not on, but away from a public work, although arising out of operations wheresoever carried on, were held not to be within the jurisdiction conferred by the section.

With the policy of Parliament we have nothing to do. Our duty is simply to construe the language used, and if that construction does not fully carry out the intention of Parliament, and if a wider and broader jurisdiction is desired to be given the Exchequer Court, the Act can easily be amended.

Under these circumstances we must, without expressing any opinion upon the conclusions of fact reached by the learned Judge, dismiss this appeal with costs.

DUFF and ANGLIN, JJ., concurred.

Appeal dismissed with costs.

DOMINION OF CANADA.

SUPREME COURT. OCTOBER 5TH, 1909.

BURCHELL v. GOWRIE AND BLOCKHOUSE COLLIERIES CO.

Contract—Sale of Coal Mining Areas—Principal and Agent —Commission on Sale — Uncompleted Contract — New Agreement—Right of Agent to Recover Commission.

Appeal from the Supreme Court of Nova Scotia.

The case below is reported in 6 E. L. R. 420, sub nom. Burchell v. Gowrie Mines.

Mellish, K.C., and Burchell, for appellant.

Newcombe, K.C., and Robertson, for respondents.

THE CHIEF JUSTICE and GIROUARD, J., were of opinion that the appeal should be dismissed.

IDINGTON, J. (dissenting):—The determination of this appeal must turn upon the interpretation of the correspondence between the parties.

If the two instances of a demand for a 10 per cent. commission, and all relating thereto, had been omitted or could not be deleted from that, voluminous and prolonged as it is, can anyone doubt that it must then inevitably be read as containing a contract to pay the appellant for the service of finding a purchaser?

Does what relates to these incidents make any difference?

The respondent, through its chairman, whose authority is not disputed, wrote, in August, 1905, to the appellant, then their manager, a long letter of which the pith as quoted in the respondent's factum, is as follows:—

"You asked me some time ago if I would be prepared to sell, and my object in writing the present is to say that I am authorized to instruct you to make a sale on the following conditions: £125,000 with 3 per cent. commission to you, or in case of need £120,000 less 2½ per cent. commission to you. I realize that we are not able to spend sufficient additional capital on this undertaking to make it the success it deserves, and I hope you will find a buyer for me."

The appellant replied at length and said, amongst other things, as follows:—

"Of course you will understand that I am not an expert in that line of business, but at your request I will look around and try and place the property in the hands of parties that would interest purchasers."

Later the £120,000 price was reduced to a £105,000 limit, without varying the terms of commission. The very language used, as well as this act, tends to shew that the nature of the contract was, as I submit, a general employment to find a purchaser.

One Pearson, a promoter, was induced, by the appellant, to take the matter up, after others, the chairman had pointed to, as possible purchasers, and I infer others again not so pointed out had failed to respond.

The recognition given the appellant to continue though he had failed to get either of the prices named by the chairman, and the wide discretion given him in negotiating during the many changes of the negotiations when they proceeded on the basis of a ten per cent. commission which the avarice of the appellant extorted from his employer's extreme neces-

sities then disclosed to him, all go to shew that from the beginning there was intended a general retainer to find a purchaser.

When there came an end to the specific proposals less ten per cent. commission the appellant was thereafter apparently as a matter of course in several letters treated by the respondent as its agent, for sale. One of these, on the 17th August, 1906, three months after the options had expired and nothing definite yet in sight, contained this: "From our letters received e'er this you will have seen we are leaving the matter of the sale of the collieries in the hands of Pearson and yourself."

This is the same Pearson whom the appellant had as already stated induced to take hold of the matter and later to buy options from which the respondents reaped $15,000 less than ten per cent. commission, and who, with considerable tenacity and versatility, finally succeeded in completing a purchase by The North Atlantic Collieries Company, Limited, from the respondent for a price upon which the appellant claims ten per cent. commission as he did when the transaction was closed.

I agree with Mr. Justice Drysdale that the appellant's "general employment to procure a purchaser was never cancelled, and he never ceased trying to interest purchasers and make a sale of the property."

I think, however, it began some months before ten per cent. was spoken of, and proceeded upon the basis first fixed, which must be still looked upon as that by which the appellant's compensation should be fixed or measured now; notwithstanding the incidental offers in the meantime, in certain cases limited to the express conditions therein named, and falling therewith.

I am unable to see how such a general retainer so begun and continued as this was, can be changed by an abortive temporary and conditional departure therefrom, specifically and mutually agreed to in the middle of its express continuation.

Nor can I see how the sale to The North Atlantic Collieries Company in 1907 is so related to the proposal made in 1902 before it existed and so abandoned then as to be forgotten in 1905, even though the person making it was a shareholder in the company that finally purchased, as to deprive

the person engaged meanwhile to find a purchaser, of his legal rights.

There was nothing either in the appellant resisting in the interest of his employers the acceptance of the reduced terms finally accepted to deprive him of his commission. If he felt a sacrifice was being made it was his duty to point that out.

Nor can I comprehend how a transaction which all concerned speak of as a sale or purchase, when they come to reduce it to a concrete legal form, and in truth was a sale, can by a loose use of language be so held a something else as to deprive the appellant of his commission.

The respondent sold this property it had for part cash and what as to part was in effect a charge on it and other properties, and the remainder in stock in the buyer's company which might perchance have been stock in some other company, or shares in a bank.

I think the appellant entitled to a commission of two and one-half per cent. of all those, instead of ten per cent. as given by the referee, and if needed that amendment be made.

The appeal must be allowed, but without costs so substantially is success divided.

DUFF, J.:—I am of opinion that this appeal should be dismissed.

ANGLIN, J.:—Upon the whole evidence I am satisfied that the retainer of the plaintiff was limited to a sale of the mines of the defendant company for a stated consideration, of which at least the sum of $325,000 should be payable in cash. This essential condition of his employment was never departed from. The absolute need of the defendants for this amount of money was the reason for their employing the plaintiff to bring about a sale. He never procured for them such a purchase as he was retained to effect. A barter for bonds and stocks, it is manifest, could always have been obtained; that, as stated by the plaintiff himself, "would have been a simple matter." It is incredible that a commission of 10% would have been promised for the disposal of the mines on any such basis. The barter for securities—for such it really was—was eventually made by the defendants not on any suggestion of the plaintiff, but against his protest, and only when they were satisfied that he had hope-

lessly failed to bring about any sale such as he had been retained to procure. The defendants were within their rights in treating his limited mandate as then terminated. The plaintiff's efforts with Pearson may possibly have been a causa sine qua non of the disposition eventually made of the defendants' mines; but they were not the efficient cause. Miller v. Radford, 19 T. L. R. 575, 576. The causal relation found here is not what is requisite to sustain a claim for commission, and the equally necessary contractual relation the plaintiff has wholly failed to establish. (Judgment of Lord Watson in Toulmin v. Miller, 58 L. T. R. 96.) An amalgamation of the defendants' property with the North American Collieries was not at all within the scope of the plaintiff's mandate.

The appeal, in my opinion, fails and should be dismissed with costs.

Appeal dismissed with costs.

PRINCE EDWARD ISLAND.

SUPREME COURT OF JUDICATURE.

CHAMBERS. NOVEMBER 12TH, 1909.

HEWITT v. GRAY.

Absent Debtor Act — Affidavit for "Goods Bargained and Sold"—Not Sufficient to Obtain Attachment — Before whom Affidavit to be Sworn—Practice.

J. A. Mathieson, K.C., for the plaintiff.
J. J. Johnston, K.C., for absent debtor, defendant.

FITZGERALD, J.:—In this case it is sought to set aside an absent debtor attachment on three grounds:—

1st. That the defendant was not in fact an absent debtor.

2nd. That the affidavit on which the attachment issued is bad, in that it joined the cause of action for goods bargained and sold, with that for goods sold and delivered, claiming one amount due on both counts.

3rd. That the affidavit is also bad, in that it is sworn before the deputy prothonotary of King's County, instead of before a commissioner for taking affidavits in that county.

Upon a review of the affidavits filed in this application, I do not think that at the time this attachment was issued the defendant was an absent debtor within the meaning of the Act. The facts therein sworn to, make it apparent that he left this province for a temporary purpose—a business trip to Boston—with an intention of returning; leaving here on the 30th of August, and returning on the 3rd of September following; an absence from the province of five days in all.

The deed of his property executed by him on his return, does not appear to me to affect the matter.

As to the two technical grounds argued, I think the first is also a ground on which the attachment should be set aside.

Under our practice an attachment can only be issued upon such an affidavit as would enable a plaintiff to sue out bailable process.

It has long been held that an affidavit which states that a party is indebted for goods bargained and sold, without stating that they are delivered, is not sufficient to hold to bail; largely it would appear on the ground of the hardship of holding a party to bail, for the value of goods sold by one, who at the same time retained the security of the same in his own hands—Hopkins v. Vaughan, 12 East 398, Lascar v. Morioseph, 1 Bing. 357, and Pontifex v. De Malzoff, 1 Ex. 436; and as in this case it cannot be ascertained whether the arrest was made for goods sold and delivered, or for goods bargained and sold, or how much was due upon one, or the other, this affidavit is, in my opinion, insufficient.

On the last ground I am unable at the present time to ascertain definitely what the practice of the Court has been. But whatever the practice, our statute regulating the issue of bailable process, 12 Vic. cap. 17, sec. 2, only authorises the Judges of the Court or "a commissioner empowered to take affidavits" to administer the necessary oaths, while the Imperial Statute, 12 Geo. I. c. 29—regulating the English practice—also makes "the officer who shall issue the process" a person before whom such affidavits may be sworn.

Our legislation, and the Imperial, are upon the same subject-matter; and the deliberate omission in the former

of any authority to such officer, appears to me to warrant no practice in this Court but that prescribed in our provincial statute.

The writ of attachment will be set aside and discharged.

Costs only of the errors in the affidavit allowed, to be paid by plaintiff and fixed at $5.

PRINCE EDWARD ISLAND.

COURT OF CHANCERY.

CHAMBERS. OCTOBER 27TH, 1909.

IN RE CAIRNS.

Will—Exercise of Power under—To what Extent—Surplus Moneys on Sale under Mortgage—To whom Payable.

Application under 63 Vic. cap. 2 for surplus moneys paid in by mortgagee.

G. Gaudet, for applicant.

W. A. O. Morson, K.C., for prior judgment creditor.

FITZGERALD, V.C.:—John Cairns, by his will dated August 17th, 1871, proved April 8th, 1872, devised all his property real and personal to his wife for life, with remainder over to his "surviving children to be equally divided between them;" with a proviso empowering his widow and his executors, if the rents, &c., were not sufficient to maintain her and her children, "to lease, mortgage, sell, or otherwise dispose of such part or parts thereof, and so much of the real estate as may be sufficient for that purpose;" and to execute a good and valid conveyance of the same, notwithstanding such devise.

On the 14th of November, A.D. 1905, a mortgage of part of the lands so devised was given by the widow and the executors to secure repayment of the sum of $500, borrowed for the purposes and under the above described power.

On the 27th June, 1908, the land so mortgaged was sold under the power of sale therein for the sum of $1,400.

After payment of the amount due on the mortgage and of a one-fifth share of the balance to four of the five surviving children of the said late John Cairns, there is now paid into Court, of the surplus of the sale moneys, the sum of $157.57, representing the share of John H. Cairns, the remaining surviving child of the said late John Cairns.

Previous to the giving of this Mortgage, and on the 7th day of November, 1904, a judgment was recovered against the said John H. Cairns at the suit of Jane White, upon which is now due a balance of $308.83. And after the date of such mortgage, and on the 30th day of June, 1908, a further judgment for $312.34 was obtained against the said John H. Cairns at the suit of Charles Patterson, on proceedings by attachment taken against the said John H. Cairns, as an absent debtor.

The widow died in the year 1908.

An application is now made by the attaching creditor—Charles Patterson for payment to him of this surplus; against which Jane White—the judgment creditor shews cause, claiming this $157.57, as a prior judgment creditor of John H. Cairns.

In this mortgage given by the widow and executors, they are called "the mortgagors," and the amount loaned is spoken of as "lent by the mortgagee to the mortgagors." It is a short form mortgage under 57 Vic. ch. 11, with clause 12 of this form written in it.

This clause covers under the statute full powers of sale, and requires the mortgagee to pay the mortgagors their executors, administrators or assigns the surplus, if any. I use the word "mortgagors," though this word is in the singular in the form, because it must be read in this security as thus written to have any sense or meaning.

I was pressed on the argument with the case of Jones v. Davies, 8 Ch. Div. p. 205, in which it was held under the circumstances in that case that there was no resulting trust of the surplus in a mortgagee's hands.

In that case the question turned on the difference between the uses declared in the proviso for redemption, and the trust declared with regard to the surplus moneys in a mortgage given under a power of appointment in a marriage settlement. And the Court held that the mortgagors having power to do what they liked with the property, their creation of a different trust with regard to the surplus

moneys than that declared in the proviso for redemption could not be questioned, there being no ambiguity in the language used.

That does not appear to be the case before me. Under this will, the widow had power in case of deficiency of income to raise sufficient moneys to maintain herself and her children. Under and reciting this authority, she borrows on this mortgage security $500 for her then present necessities—and the executors join in it, "being satisfied"—as they expressly say therein "that the money advanced on the security of these presents is required for the support and maintenance of the said Belthiar Ruth Cairns" (widow).

The making the surplus in such a conveyance payable to herself and the executors does not I think show an intention to create a new trust as regards it; nor of an exercise of the power given her under the will to raise money for her own support, further than to the extent of $500. The surplus going to the widow with the executors, in a document showing that she required only the money loaned for her personal maintenance, is not evidence of an intent to disturb the devise of the remainder as set forth in the will; but on the contrary is rather in accord therewith—she herself being an executrix.

She had the power undoubtedly of so dealing with the whole estate as to leave nothing for the remainder man. She exercises it, however, only to a limited extent, and by a mortgage, silent as to in whom remains the equity of redemption, but explicit in the direction that the surplus moneys shall be paid to herself and the other executors of her husband's will. No Court could find in this, an intention to deal otherwise with the estate, or to exercise the power given in the will, than to the extent so expressed, leaving the property and the testament otherwise unaffected.

The case of Jones v. Davies does not apply here. We are rather governed by the principle established in Jackson v. Innes, 1 Bli. 126, viz., that a mere reservation in the proviso for redemption, which would carry the estate from the owner, does not necessarily exclude a resulting trust.

We are here now concerned only with an equity of redemption, which, unless it has been dealt with under the power given to the widow, belongs unquestionably to the estate of the late John Cairns, and is subject to his will.

It has not I conceive been so dealt with. The judgment against John H. Cairns, one of the remainder men entered before the mortgage given by the widow, bound his interest as such, legal as well as equitable under our Statute 36 Vic. ch. 16. That interest being unaffected except as to the amount of the money borrowed, remains bound by this judgment. It must therefore be paid, as a first lien or charge on the money now in Court representing his, the said John H. Cairns', portion of this equity of redemption.

The order will therefore be to pay the said sum of $157.57, and accrued interest, less registrar's expenses, to the said judgment creditor Jane White.

There will be no order as to costs.

NOVA SCOTIA.

MEAGHER, J. SEPTEMBER 17TH, 1909.

CHAMBERS.

HUBLEY v. CITY OF HALIFAX ET AL.

Municipal Corporations — Sale of Land to Manufacturing Concern — Conveyance for Unauthorized Purposes — Injunction.

Motion for an injunction to restrain the city from conveying land in aid of a manufacturing enterprise.

E. P. Allison, in support of motion.

H. Mellish, K.C., contra.

MEAGHER, J.:—The land in question was expropriated by the city in 1893 for "the extension and improvement" of the water system of the city, at a cost of $1,050. A pipe line was carried through it since then. The proposed sale is for the original cost, but it is intended to reserve a strip a few feet wide on each side of that pipe and to give the purchaser a right of way over it.

It is clear that while the city may devote land so acquired to temporary uses which will not interfere with the express purposes for which it was obtained, it cannot apply it to any purpose inconsistent therewith.

This view was not controverted upon the hearing, nor was it disputed that the city might determine it was no longer required for the object originally designated, but it was contended that this determination could only be evidenced by an express resolution to that effect.

The resolution passed by the Council with the view of being enabled to make this sale, declared that this land was not required for water extension purposes, but was silent on the other branch, viz., the improvement of the water system. The two things are quite distinct. The city therefore has never determined that it may not be necessary for improving the water system, and consequently is not in a position to make a legal sale thereof, and should therefore be restrained from doing so.

It is a wholesome principle in relation to municipal bodies which restrains them from disposing of lands acquired for a designated purpose, or devoting them to any use inconsistent with such declared purpose. If it were otherwise a door would be opened for such bodies to become speculators in land, a position wholly foreign to the objects for which they were created, and one involving considerable danger to civic interests.

It was urged that the City was not vested with a general power of sale over lands not required at the moment for any particular civic use; and in this connection it was contended that section 640 of the present City Charter, which provided that the city may sell any land "so expropriated" not required for the purpose for which the expropriation was made, must be limited to lands expropriated under the sections prior to 640 in the new charter, and therefore as these lands were expropriated under an earlier charter, that section did not apply, and consequently inasmuch as the city did not possess a general power of sale, there was no power in the present instance to make the contemplated sale.

There is considerable force in this contention, but I do not deem it necessary to formally decide the point, and I have therefore only given it a slight examination.

It was also argued that there was no material before the Council upon which it could properly or at all exercise

a judgment upon the question as to whether it was required for the purposes originally declared, or either of them. I do not conceive I have anything to do with that aspect. So long as the council exercises an honest discretion without fraud (gross misconduct may perhaps be added), it is not liable to have its determination of matters within its jurisdiction overturned or disregarded by the courts. I dealt with this aspect at some length in The Attorney-General ex rel. Mackintosh v. The City of Halifax.

One may be convinced that the action of the council is altogether stupid and unwise in the general civic interests, but even that conclusion would not constitute ground for judicial interference.

It seems to me quite evident that the day is not at all remote when this land will probably be needed in connection with the water system. The supply is none too great for present needs in very dry seasons. The evidence in Fenerty v. The City of Halifax, which I tried not very long ago, tended strongly to prove that position if it did not do so conclusively.

I find it difficult to conceive how the very cogent reasons given by the City Engineer in his report for retaining this area could reasonably be disregarded by those who regarded the needs and interests of the city in a calm disinterested way, or who should at any rate have viewed them from that standpoint. An affidavit before me shews, however, that the affiant, although wholly inexperienced, deems himself quite as competent a judge of purely technical matters as the engineer.

It is obvious there are many useful purposes, some of them necessary ones I dare say, for which this land will be required by the city in the near future, apart altogether from any use for which it is liable to be needed in connection with the water system. In this aspect it surely would be but ordinary business and common sense for the city to retain it and thus have it available when the need arises, either in connection with the water system or otherwise; and if otherwise I assume no difficulty would occur in obtaining any legislation necessary in that behalf.

If the city parts with it as proposed, there are strong grounds for believing it will at a comparatively early day at the furthest, be compelled to acquire other lands near by

and in that event will have to pay a far larger price for them than it will receive under the proposed sale, to say nothing of the expenses of further expropriation and further borrowing. Moreover there are other lands available for the Chair Company nearby, and there is therefore, so far as I can see, no good reason why a majority of the Council should be so anxious to dispose at a loss of the land the city already owns. It has held it for sixteen years and now proposes to part with it at its original cost, although it has presumably increased in value substantially meanwhile.

I am quite convinced that not one of the aldermen who voted for the sale would have done so if he stood, as a private individual, in the same position as the city does.

There seems to be a tendency to convert the city into a sort of business enterprise, to make it a nursing hospital for every lame duck or needy or greedy individual or corporation that appeals to it for assistance to help out purely private business objects at the expense of the taxpayers, not one in hundreds of whom will ever receive directly or indirectly any benefit whatever from such schemes.

The credit of the city has, I believe, been materially impaired by burdens undertaken in aid of similar projects. It is not, of course, the mere additional burden thus imposed which affects the credit of the city; it is the fear on the part of lenders that it will be repeated again and again, and that it is becoming a habit on the part of the city to be seduced into such transactions.

If Halifax is well adapted for manufacturing concerns, then they neither need nor deserve gifts from the pockets of the taxpayers, but on the other hand if it is not, then any aid the city may give cannot ensure their success.

It is a well known fact, and city representatives would do well to remember it, that the great manufacturing industries of Amherst and New Glasgow have thriven exceedingly well without bonuses or assistance of any kind from these towns, other than perhaps lower valuation for a limited period for water rates and possibly assessment purposes, and that only in a few instances at most. In many respects Halifax is perhaps more favorably situated than either of those towns for business purposes, although the action of the City Council in voting gifts and bonuses and exemptions suggests that its opinion is unfavorable to Halifax in contrast to the towns named.

The evidence in Fenerty v. The City of Halifax convinced me that the city occupies a delicate and somewhat dangerous position in regard to the storage of water in the city dams for dry seasons, arising from the rights owner by the mill owners in connection with the several mills between the head of the arm and the nearest city dam on the lakes. These rights should be acquired without delay so that the supply for dry seasons may be augmented at the pleasure of the city without liability to damages or an injunction, or the still greater risk to which citizens are exposed in very dry periods from an inadequate supply of water. This is especially true if the population increases at all rapidly, or a heavy drain is put upon the supply by large manufacturing concerns. If these rights are not acquired soon, an additional supply must be sought elsewhere, and in that event this land will be most useful, if not essential. A very considerable sum will require to be borrowed for either project. A general public slaughter house, and a public market, are most urgently needed in the very material interests of public health and cleanliness, and in addition the market is needed to relieve several streets from the obstructions and litter which fill them on market days to the very great inconvenience of those having to use such streets, and to the great loss of those whose business premises are on them.

It would be well to execute these purposes before the credit of the city is further injured by unwise bonusing and gift giving, and aldermen would be better serving the city and more faithfully observing their obligations by attending to them than devoting civic property to purposes which cannot well be justified in the circumstances.

The restraining order will be continued to the hearing.