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*May 29, 30, 31
*June 20

HIS MAJESTY THE KING
(PLAINTIFF IN PRINCIPAL ACTION)
APPELLANT IN PRINCIPAL ACTION;

AND

THE MONTREAL TELEGRAPH COMPANY
(DEFENDANT IN PRINCIPAL ACTION;)
(PLAINTIFF IN ACTION IN WARRANTY.)
RESPONDENT IN PRINCIPAL ACTION;
APPELLANT IN ACTION IN WARRANTY;

AND

THE GREAT NORTH WESTERN TELEGRAPH CO. OF CANADA
(INTERVENANT IN PRINCIPAL ACTION;)
(DEFENDANT IN ACTION IN WARRANTY.)
RESPONDENT IN ACTION IN WARRANTY.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Taxation—Companies—Tax imposed by provincial statute—Telegraph company and company working a telegraph system—Agreement between two telegraph companies—One company operating whole system of the other for agreed remuneration—Whether liable for tax —Dismissal of claim for tax against operating company—Action in warranty by the latter against other company—Such action conse-

*PRESENT: Rinfret C.J. and Kerwin, Hudson, Taschereau and Estey JJ.

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quently dismissed—Defendant in warranty also intervening in the principal action—Question of the costs of action in warranty as between the two telegraph companies.

The King, in right of the province of Quebec, claimed from the Montreal Telegraph Company (hereinafter called M.T.C.) $38,375.85, representing an annual tax of $1,000 for the years 1908-1909 up to 1938-1939, plus interest. This amount was alleged to be due by that Company under the *Corporation Tax Act,* which imposed a tax on "every telegraph company and every other company working a telegraph system for the use of the public". By an agreement, dated August 17, 1881, between the M.T.C. and the Great North Western Telegraph Company of Canada (hereinafter called G.N.W.T.C.), the latter Company undertook for a period of ninety-seven years to work, manage and operate the system of telegraph owned and, before that date, operated by M.T.C. Under that agreement the G.N.W.T.C. bound and obliged itself to pay all costs and expenses of the M.T.C.'s system and to keep the property free and clear from all liens and encumbrances arising from taxes and assessments. On the ground that the tax claimed by the appellant was a tax included in, and covered by, the above conditions of the agreement, the M.T.C. took an action in warranty against the G.N.W.T.C. to have the latter condemned to indemnify it against any condemnation which the Crown might obtain upon its claim. While the G.N.W.T.C. pleaded to the action in warranty and denied its obligation to indemnify the M.T.C. and prayed for the dismissal of the action in warranty, it, nevertheless, filed an intervention in the main action and prayed that the latter be dismissed with costs. The trial judge dismissed the main action and recommended that the appellant pay the defendant's and intervenant's costs; and, on the ground that the action in warranty was nothing else than the exercise of an action in indemnity and therefore subordinate to the fate of the principal action, he dismissed that action with costs against the M.T.C. The appellate court affirmed this judgment in the main action and dismissed the intervention with costs for the reason that the intervenant had, at the same time, contested the action in warranty and intervened in the main action, which was held to be inconsistent; the action in warranty was also dismissed with costs against M.T.C., that action being held to be without legal basis as the principal action had been dismissed. The Crown on the main action and the M.T.C. on the action in warranty appealed to this Court.

Held, affirming the judgments of the Courts below on the principal action, that the Crown, appellant, cannot maintain its claim against the M.T.C. for a tax imposed by *The Corporation Tax Act.* The statute clearly contemplates, not alone a telegraph company, but a company doing business in the province and working there a telegraph system for the use of the public. The M.T.C. does not come within such description: that company, by the sole fact it made the agreement with the G.N.W.T.C. and collects the agreed remuneration, is not doing business in the province.

Held, also, that the M.T.C. cannot be brought within the general clause of the taxing statute, concerning an ordinary "incorporated company carrying on any undertaking, trade or business" which is not otherwise taxed.

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Held, further, in as much as the principal action had been dismissed, that a decision on the merits of the action in warranty has become unnecessary and that the M.T.C.'s appeal from the judgment dismissing that action should also be dismissed (*Archbald* v. *de Lisle,* 25 Can. S.C.R. 1, followed), so that nothing remains between the parties to that action but a question of costs.

Held that, under the circumstances of this case, while the G.N.W.T.C. should not be condemned to pay the costs of the M.T.C. in the action in warranty, it should at least get none of its own costs of that action against the M.T.C.; and the latter's appeal on that action should be allowed to the extent that the judgment of the appellate court should be modified accordingly.

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, E. M. McDougall J. and dismissing an action by the Crown against the Montreal Telegraph Company for taxes amounting with interest to $38,375.85; and

APPEAL from the judgment of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, E. M. McDougall J. and dismissing an action in warranty taken by The Montreal Telegraph Company against The Great North Western Telegraph Company of Canada.

The material facts of the case and the question at issue are stated in the above head-note and in the judgment now reported.

Aimé Geoffrion K.C. and *L. E. Beaulieu K.C.* for the Crown appellant.

Geo. A. Campbell K.C. and *John W. Long K.C.* for the respondent in the principal action; and for the appellant in the action in warranty.

Gustave Monette K.C. and *L. Côté K.C.* for the respondent in action in warranty.

The judgment of the Court was delivered by

THE CHIEF JUSTICE.—His Majesty the King, in right of the province of Quebec, claimed from the Montreal Telegraph Company the sum of $38,375.85, with interest from the 12th of January, 1939, as taxes alleged to be due by that Company under the *Corporation Tax Act* of Quebec, 45 Victoria, ch. 22, statutes of 1882 and

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amendments (6 Edward VII, ch. 10; 7 Edward VII, ch. 13; sections 1345 to 1359 inclusive of R.S.Q. 1909, and ch. 26 of R.S.Q. 1925).

It was contended by the appellant that, under the above statutes and subsequent amendments, there was imposed, prior to the year 1908, on all telegraph companies and other companies working telegraph systems, an annual tax of $1,000, which remained in force throughout the years 1908-1909 up to 1938-1939, and for which the respondent was liable, such tax, together with interest for each of the years from 1908 to 1939, making up the total claimed by the action.

It was further alleged that the tax in question constitutes a privileged debt, ranking immediately after the costs of justice, and that, by the resolution adopted on the 27th of June, 1938, the respondent renounced any prescription that may have been applicable to the claim so made.

By an agreement between the respondent and the Great North Western Telegraph Co. of Canada, bearing date of the 17th August, 1881, the latter Company undertook for a period of ninety-seven years from the 1st of July, 1881, to work, manage and operate a system of telegraph owned, and, before that date, operated by the respondent. One of the conditions and considerations of the said agreement, so it was alleged, was that the Great North Western Co. bound and obliged itself to pay all costs and expenses of operation of the respondent's telegraph system of every description, and to keep the property free and clear from all liens and encumbrances arising from taxes and assessments. On the ground that the tax now claimed by the appellant was a tax included in the costs and expenses agreed to be paid by the Great North Western Telegraph Co., it was the respondent's contention that it was entitled to call upon that Company to indemnify the respondent against the appellant's claim. Accordingly, the respondent called upon the Great North Western Telegraph Co. to warrant the respondent against the appellant's demand. While the Great North Western Telegraph Co. pleaded to the action in warranty and denied its obligation to indemnify the respondent and prayed for the dis-

missal of the action in warranty, it, nevertheless, filed an intervention in the main action and prayed that the latter be dismissed with costs.

In the result, in the Superior Court at Montreal (E. M. McDougall J.) the main action was dismissed and the respondent and the intervenant were successful in establishing their defence, the learned trial judge recommending, as is usual in such cases, that the appellant pay the respondent's costs and also those of the intervenant.

By judgment, rendered concurrently with that on the main action, the learned trial judge considered that it necessarily followed from the dismissal of the main action that the action in warranty was left without basis and could not accordingly be maintained, and it was dismissed with costs.

In the Court of King's Bench (Appeal Side) the judgment on the main action was affirmed. The intervention was dismissed with costs for the reason that the intervenant had, at the same time, contested the action in warranty and intervened in the main action, which was held to be inconsistent. As for the action in warranty, it was considered as being nothing else but the exercise of an action in indemnity, subordinate to the fate of the principal action, and, as the plaintiff in warranty was not condemned, the principal action having been dismissed, the warranty action was held to be without legal basis, and it was dismissed with costs.

The intervenant does not appeal from the judgment dismissing its intervention, but both His Majesty the King, on the main action, and the Montreal Telegraph Co., on the action in warranty, filed an appeal against the judgments of the Court of King's Bench (Appeal Side).

Both the principal action and the action in warranty were consolidated for purposes of evidence and trial and both appeals were also consolidated before this Court.

Before discussing the judgments, it is necessary to analyze the agreement of the 17th of April, 1881, between the respondent and the Great North Western Telegraph Co. It recites that the Montreal Telegraph Co. owns and operates lines of telegraph in Canada and in the

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United States; that the Great North Western Telegraph Co. is willing and has agreed to undertake the working of the lines of the Company at a fixed rate of remuneration and upon the terms and conditions hereinafter provided. The fixed rate of remuneration is referred to as an annual guaranteed dividend of eight per cent. upon the capital stock of the Montreal Telegraph Co. of two millions of dollars. Upon other conditions mentioned in the body of the agreement, the Great North Western Co. undertakes for a period of ninety-seven years from the 1st of July 1881, to work, manage and operate the system of telegraph owned and heretofore operated by the Montreal Telegraph Co. This is to be done by means of its own employees and operators; and the Great North Western Co. is to conduct the business thereof in all respects as efficiently as the Company has hitherto operated the same. The rates and charges for messages are to be collected in the name of the Montreal Telegraph Co. according to the tariffs the latter shall establish from time to time, the whole to be done in such manner as to perform to the fullest extent all the obligations of the Montreal Co. towards the public.

The Great North Western Telegraph Co. is to have the right to use and occupy, during the continuance of the agreement, all the offices, stations, buildings and property of the Montreal Co., save and except the board room of the Company at Montreal with the adjacent secretary's room, and a portion of the vaults for the purpose of preserving and keeping in safe custody the books and muniments of the Company.

Then it was covenanted and agreed that, upon the requisition of the Great North Western Co., the Montreal Co. shall, from time to time, change their tariff of fees and rates in such manner as shall be stated in such requisition, provided that the Montreal Co. shall not be required or bound to make such alteration in the said rates as shall make the transmission of a message of ten words over the present extent of the lines of the Company in Canada or any part thereof, cost more than twenty-five cents, but subject to be adequately increased generally or locally in the event of any charge or tax being at any time imposed by any Parliament or local enactment or

authority, beyond the amount now payable by the Company, or in the event of the Great North Western Co. being legally compelled to substitute or provide other means than those now in use by poles for carrying their wires through cities and towns.

The Great North Western Co. obliged itself to pay to the Montreal Co., quarterly, during the continuance of the agreement, the sum of $41,250 on the first days of October, January, April and July in each year from out of the proceeds of the operations and use of the Montreal Company's lines and property, which proceeds the Great North Western Co. warranted should amount to the sum of $41,250 per quarter, or $165,000 per annum.

The Great North Western Co. also bound and obliged itself to pay all costs and expenses of operation of every description, including municipal taxes and assessments on property owned by the Montreal Co. and occupied by the Great North Western Co., and to keep the property of the Company free and clear from all liens and encumbrances arising from taxes and assessments, or from any act of the Great North Western Co. itself during the continuance of the agreement.

The Great North Western Co. further agreed and bound itself at all times, during the continuance of the agreement, faithfully to execute and perform all the contracts, covenants and agreements of the Montreal Co., and to save and hold harmless and indemnified the Montreal Co. from such covenants, contracts and agreements, of which it acknowledged to have received communication.

Then there are provisions that, if the Great North Western Co. fails to make the quarterly payments, the Montreal Co. shall have the option, in its own discretion, to resume possession of its lines and property, and the agreement shall be determined, the Great North Western Co. forfeiting and surrendering to the Montreal Co. for its use and benefit all additions and improvements which may have been made upon the lines and property herein referred to.

By the agreement, all contracts heretofore made by the Montreal Co. for future deliveries of supplies and material were assigned to and accepted by the Great North Western

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Co. which undertook and agreed to carry out the conditions of such contracts to the entire exoneration and discharge of the Company.

Any balance remaining over and above the sum of $165,000 per annum, payable by the Great North Western Co. to the Montreal Co. under the agreement, is to become and remain the property of the Great North Western Co. as a remuneration for the obligations undertaken by it under the agreement.

We may now consider the statute under which the appellant made his claim against the respondent. It reads as follows (Ch. 26, R.S.Q., 1925):—

An act to impose taxes upon corporations, companies, partnerships, associations, firms and persons.

By section 3, of Division 1, it is stated:—

3. In order to provide for the exigencies of the public service, every one of the following companies, corporations, partnerships, associations, firms and persons, doing business in this province, in his or its own name or through an agent, namely:

(1) Every incorporated company carrying on any undertaking, trade or business therein;

(2) Each of the following companies, whether incorporated or not:

* * *

Every telegraph company and every other company working a telegraph line in the province for the use of the public;

* * *

shall, annually, pay the several taxes mentioned and specified in section 5, which taxes are hereby imposed upon each of such corporations, companies and persons, or upon each such partnership, association, firm or agent, respectively.

By force of section 4, subsection (9), of the same Division, the words "Doing business in this province" and "carrying on any undertaking, trade or business therein", when these expressions relate to an incorporated company, mean "exercising any of its corporate rights, powers or objects in the province".

Then, section 5 of the Act is the section which imposes the annual taxes payable by the corporations, companies, partnerships, associations, firms, persons and agents mentioned and specified in section 3. It includes subdivisions concerning incorporated companies, banks, insurance companies, loan companies, navigation companies, telegraph companies, telephone companies, express companies, city

passenger railway or tramway companies, railway companies, sleeping or parlor car companies, trust companies, and partnerships, associations, firms, or persons, whose chief office or place of business is outside of Canada, and which are not taxed under any other provisions of this Act.

As to telegraph companies, the wording is:—

> Every telegraph company and every other company working a telegraph system for the use of the public, one thousand dollars.

In the Superior Court, Mr. Justice McDougall held that, during the period with which the Court is here concerned, the tax was imposed upon a Telegraph Company and every other Company working a telegraph line for the use of the public; and that the member of the phrase "working a telegraph line" cannot be divorced from its context "A Telegraph Company", as counsel for the appellant contended. He said the tax was imposed not purely upon a Telegraph Company as such, but upon a Telegraph Company which "works" a telegraph line. Having so construed the statute, he further held that, under the agreement of August 17th, 1881, the respondent in the main action was not working the telegraph system in question, nor was it subject to the tax. He stated further that, however needful it may be to the taxing authority to collect taxes for the public service, it is none the less true that the tax payer may only be held liable for the tax when the wording of the taxing levy imposes the burden upon him. As was said by Lord Cairns in *Partington* v. *The Attorney General* (1):—

> * * * if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.

(See also *Versailles Sweets Ltd.* v. *Attorney General of Canada* (2)).

Now, the statute clearly contemplates not alone a telegraph company, but a company doing business in the

(1) (1869) L.R. 4 H.L. 100, at 122.

(2) [1924] S.C.R. 466, at 468.

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province of Quebec, and working a telegraph system for the use of the public.

The respondent herein in the principal action neither does business in the province, nor works a telegraph system for the use of the public. It does not come within the description of Telegraph Companies upon which the tax is imposed. Therefore, the appellant cannot maintain a claim for that tax against the Montreal Telegraph Co. The agreement between it and the Great North Western Co. has not the effect of creating of the latter Company an agent of the former. In my view, the agreement in question, to all intents and for the purposes of working a telegraph system for the use of the public, places the Great North Western Co. in the shoes of the Montreal Telegraph Co. I have analyzed the agreement above and I cannot find in it any provision which would make it an agency contract. Under it, the Great North Western Co. works the telegraph system for its own account, and its only obligations towards the Montreal Co. is to pay the agreed remuneration of $165,000 per annum. For the operation thereof, it is in no way to account to the Montreal Co.. Outside of very special cases where it is authorized to say a word with regard to the tariff of rates, the Montreal Co. has no right under the contract, so long as it is being performed by the Great North Western Co. within its terms, but to receive the stipulated remuneration. It cannot be said to be working the telegraph system, either within the meaning of the statute or within any possible sense of the word.

This disposes of the main action, because, under such construction of the statute, so that a telegraph company may come within it, it must be a telegraph company working a telegraph system for the use of the public; and it is not sufficient, as was suggested by counsel for the appellant, that it be a telegraph company as such doing business in the province.

Of course, it is essential, for the existence of the tax, that the Company should be doing business, and I cannot agree with the suggestion that, by the sole fact the Montreal Co. made the agreement with the Great North Western Co. and collects the remuneration therein provided, it is doing business in the province.

As a result of the agreement, the Montreal Co. must be looked upon merely as the owner of the telegraph system which agreed with the Great North Western Co. to put entirely in the hands of the latter the working and operation of the telegraph system, for which it receives the remuneration mentioned. That, in my view, is a mere ordinary civil contract, exactly similar to that of the owner of a house who leases his property to another person and for which the lessee pays a certain amount to the owner. That, having received the specified remuneration, the Montreal Co. subsequently distributes the amount as a dividend among its shareholders, is due exclusively to the fact that this is a company having shareholders. The shareholders are the owners and they get their share of the stipulated remuneration. In the case of an individual, as he is entitled to the whole of the remuneration, of course, he keeps it for himself.

So that, in any view suggested by counsel for the appellant, the tax is not due by the respondent in the principal action, and that action was rightly unanimously dismissed by both Courts.

Counsel for the appellant alternatively suggested that, if the Montreal Co. did not come under the taxing statute as a telegraph company, it could be reached by the statute as an ordinary incorporated company carrying on an undertaking, trade or business, which is not otherwise taxed and for which a tax is provided of one-tenth of one per cent. upon the amount of the paid up capital of the Company.

But, the declaration in the present case is distinctly a claim for the $1,000 yearly tax imposed upon telegraph companies working a telegraph system for the use of the public, and it cannot be extended to cover a claim for a tax upon an ordinary incorporated company carrying on any undertaking, trade or business which is not otherwise specially taxed; not to say anything of the fact that, in the case of the present Company, the tax would not be $1,000, but $2,000, and of the further fact that, as the taxing statute specifies what telegraph companies are to be taxed, it is extremely doubtful whether it could be brought within the general clause concerning ordinary companies.

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Furthermore, there would still be a question whether, in any event, the Montreal Co., in view of the agreement it made with the Great North Western Co., could be held to carry on an undertaking, trade or business, which, in my view, it is not carrying on.

It follows, on that point, I find myself in complete agreement with both Courts below.

I have now to deal with the action in warranty brought by the Montreal Co. against the Great North Western Co. Both in the Superior Court and in the Court of King's Bench (Appeal Side) this was dismissed because it was nothing else but the exercise of an action in indemnity and it was, therefore, subordinate to the fate of the principal action.

There is no doubt that this is a case of simple, or personal, warranty, where, under article 186 of the Code of Civil Procedure, the warrantor cannot take up the defence of the defendant, but can merely intervene and contest the principal demand, if he thinks proper.

As the object of the present action in warranty was merely that the respondent in warranty be condemned to intervene and contest the principal demand and to cause such demand to cease and terminate, and to fully protect and defend the appellant in warranty therein, and that, in any event, the respondent in warranty be condemned to warrant and indemnify the appellant in warranty against any condemnation which might be rendered against it as a result of the principal action, and to pay the amount of any such condemnation to the complete exoneration and discharge of the appellant in warranty; and as both these demands of the appellant in warranty have ceased to have any object since the respondent in warranty did intervene as prayed for and the principal demand has been dismissed, with the result that the appellant in warranty now has no condemnation against it, nor any amount to pay as a result of it and there is, therefore, no occasion for the respondent in warranty to either warrant or indemnify the appellant in warranty, there really remains, between the two parties in the action in warranty, nothing but a question of costs. The substantive point whether, in view of the agreement between them, the Great North Western Co. might have

been obliged to indemnify the Montreal Co. in case the appellant in the main action had succeeded against it, has now disappeared, and upon that issue, in accordance with the jurisprudence of this Court and following the rule laid down by the Privy Council, it has become a mere academic question, in respect of which we should not entertain an appeal.

The Montreal Telegraph Co. has no claim against the Great North Western Co. for its costs in the principal action, since His Majesty the King is condemned to pay those costs; and, moreover, the result, in the main appeal, is to the effect that the principal action was wrongly brought, and even if the Great North Western Co. is the warrantor of the Montreal Co., it could not be held in an action which was erroneously introduced against its warrantee.

The jurisprudence of this Court on such a point has been established as early as the year 1895 in the well-known case of *Archbald* v. *de Lisle* (1). In that case it was held that, in circumstances such as the present one where the principal action has been dismissed, the action in warranty consequently fails whether the defendant in warranty was warrantor or not. It was said that if it was not warrantor, *cadit quœstio,* and, if it was, it could only be of condemnations that might have been given against the warrantee and not of all false accusations or unfounded complaints that the warrantee might be subject to. It is not the fault of the respondent in warranty if an unfounded action has been taken against its warrantee. It is likewise not its fault if the warrantee did not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff. In France, the Cour de Cassation has invariably decided that when once the principal action is dismissed there is no longer any grounds for warranty, but the same Court also decided that the plaintiff in the principal demand who fails may be condemned to the costs of the action in warranty on the sole ground that such action was caused by the principal demand and without the Court having to appreciate the merits of

(1) (1895) 25 Can. S.C.R. 1.

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the action in warranty. (Sirey, 68, 1, 217; 68, 1, 41; 67, 1, 109).

In the *Archbald,* case (1), no costs of the action in warranty were asked against the principal plaintiff. In the province of Quebec, the principal action having been dismissed, the action in warranty is also dismissed, but it may be with costs against the plaintiff in warranty. (*Peck* v. *Harris* (2); *Lyman* v. *Peck* (3)). In the case of *Aylwin* v. *Judah* (4), the Court having dismissed the principal action, held on the action in real warranty that the Court could not consequently adjudicate upon it, and ordered the costs thereof to be paid by the plaintiff in the principal action.

It is clear that a decision on the merits of the action in warranty has become unnecessary, and, following the decision of this Court in *Archbald* v. *de Lisle* (1), there seems to be no other course open to us but to dismiss the appeal on the action in warranty.

There is, however, a special feature in this case which was not present in the *Archbald* case (1). In the latter, some other parties had intervened to support the case of the plaintiffs in the principal demand as they were joint owners; and it was held that the intervenants, having espoused the cause of the plaintiffs, they must bear the consequences of the defeat of the action, and, the principal appeal having been dismissed, the appeal on the intervention for the purpose of supporting the principal appeal should likewise be dismissed with costs *distraits* to the attorneys of the respondents in that appeal.

In the present case the situation is different. The respondent in warranty filed a plea contesting its obligation to warrant the appellant in warranty and, notwithstanding the stand so taken by it, the respondent in warranty filed an intervention, as prayed for in the action in warranty, and for the purpose of contesting the principal demand. I would not say that, on account of that stand, the intervenant was ill-advised to file the intervention. It was really carrying out what the appellant in warranty had asked him to do. In a sense, if not strictly speaking, it

(1) (1895) 25 Can. S.C.R. 1.
(2) (1862) 6 L.C.J. 206.
(3) (1862) 6 L.C.J. 214.
(4) (1857) 7 L.C.R. 128.

was a confession of judgment—a compliance with the conclusions of the action in warranty. It rendered the whole dispute on the action in warranty unnecessary, since the respondent in warranty immediately complied with the prayer in that action.

Moreover, it cannot be said that the action in warranty was altogether useless, since it had the effect of bringing into the litigation the Great North Western Co., which, if only sued in warranty subsequently, might have pleaded against that action that, if the Montreal Co. had been condemned in the principal action, it was due to the fact that it had not properly defended itself.

There is no denying the fact that, if the respondent in warranty had contented itself with intervening in the principal demand, as it has done, and if it had not filed a contestation of the action in warranty, not only would it have avoided this useless litigation, but it would not have put the appellant in warranty to the costs which it has had to incur.

In the circumstances, I think the situation is a special one. It was not obligatory for the respondent in warranty to file a defence in the action in warranty just because it wanted to raise the question whether, in the premises, it was or not a warrantor. In the first place, I think it had to take one stand or the other; it could not, at the same time, pretend that it was under no obligation to warrant and, having taken that stand, act as a warrantor in filing its intervention. Moreover, if it had decided to intervene, it was a simple matter for it to do so in such terms that would reserve, as between it and the Montreal Co., its right to contend that it was under no obligation to indemnify the Montreal Co. in any event. It would then have meant that the Great North Western Co. was taking steps to have the principal action dismissed in any event and reserve its right to dispute its obligation to indemnify subsequently as regards the Montreal Co., if it had been condemned.

It seems to me that that is a good reason for holding that while the Great North Western Co. should not be condemned to pay the costs of the Montreal Co. in the action in warranty, it should at least get none of its own costs of the said action against the Montreal Co. The

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appeal on the action in warranty should therefore be allowed to this extent, that is to say, that the judgment of the Court of King's Bench (Appeal Side) should be modified so that the Montreal Telegraph Co. will have no costs to pay to the Great North Western Co.

For all these reasons, the appeal on the principal demand should be dismissed with costs, and the appeal on the action in warranty should be allowed and the judgment modified as above stated. I think the course which I take in the matter of the action in warranty is justified by what was said by Sir Elzéar Taschereau, delivering the judgment of the Court in *Archbald* v. *de Lisle* (1) and, as the appellant in warranty achieves a substantial success, its appeal should be allowed with costs of the appeal in warranty both here and in the Court of King's Bench (Appeal Side).

Appeal in principal action dismissed with costs.

Appeal in action in warranty allowed with costs.

Solicitors for His Majesty the King: *Genest, Champeau & Guertin.*

Solicitors for The Montreal Telegraph Company: *Harold, Long & Puddicombe.*

Solicitors for The Great North Western Telegraph Company of Canada: *Harwood & Côté.*

(1) (1895) 25 Can. S.C.R. 1.