

1931

CANADA
LAW REPORTS

Exchequer Court of Canada

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1931

JUDGES
OF THE
EXCHEQUER COURT OF CANADA

During the period of these Reports:

PRESIDENT:

THE HONOURABLE ALEXANDER K. MACLEAN.

(Appointed 2nd November, 1923)

PUISNE JUDGE:

THE HONOURABLE LOUIS ARTHUR AUDETTE.

(Appointed 4th April, 1912)

**LOCAL JUDGES IN ADMIRALTY OF THE EXCHEQUER COURT OF
CANADA**

The Honourable	ARCHER MARTIN, British Columbia Admiralty District—appointed 4th March, 1902.
do	CHARLES D. MACAULAY, Yukon Admiralty District—appointed 6th January, 1916.
do	F. E. HODGINS, Toronto Admiralty District—appointed 14th November, 1916.
do	W. S. STEWART, Prince Edward Island Admiralty District—appointed 26th July, 1917.
do	SIR J. DOUGLAS HAZEN, New Brunswick Admiralty District—appointed 9th November, 1917.
do	HUMPHREY MELLISH, Nova Scotia Admiralty District—appointed 25th November, 1921.
do	LOUIS PHILIP DEMERS, Quebec Admiralty District—appointed 3rd November, 1928.

DEPUTY LOCAL JUDGES:

do	W. A. GALLIHER—British Columbia Admiralty District.
do	J. A. CHISHOLM—Nova Scotia Admiralty District.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE HUGH GUTHRIE, K.C.

SOLICITOR-GENERAL FOR THE DOMINION OF CANADA:

THE HONOURABLE MAURICE DUPRÉ, K.C.

On the 14th day of December of this year, The Honourable Mr. Justice Audette, having attained the age of seventy-five years, was retired under the provisions of the Exchequer Court Act.

ERRATUM

Errors in the cases cited in the text are corrected in the Table of Names of Cases cited.

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2. "*Eurana*", *The, and Burrard Inlet Tunnel and Bridge Co.* (1930) Ex. C.R. 38—appeal allowed and cross-appeal dismissed.
3. *King, The, v. The Canadian Pacific Railway Co.* (1930) Ex. C.R. 26; (1930) S.C.R. 574—appeal allowed.
4. *King, The, v. Carling Export Brewing and Malting Co.* (1929) Ex. C.R. 130; (1930) S.C.R. 361—appeal allowed.
5. *Sun Life Assurance Co. v. Superintendent of Insurance* (1930) Ex. C.R. 21; (1930) S.C.R. 612—appeal allowed.

B. To the Supreme Court of Canada:—

1. *Canadian Goodrich Co. Ltd. v. Lightning Fastener Co. Ltd.* (1931) Ex. C.R. 90—appeal and cross-appeal dismissed.
2. *Canadian Gypsum Co. v. Gypsum Lime and Alabastine Co.* (1931) Ex. C.R. 180—appeal abandoned.
3. *City of St. John v. The King* (1931) Ex. C.R. 188—appeal pending.
4. *DeForest Phonofilm of Canada, Ltd. v. Famous Players Canadian Corp. Ltd.* (1931) Ex. C.R. 27—appeal dismissed for want of prosecution.
5. *Fares et al v. The King* (1929) Ex. C.R. 144—appeal allowed.
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7. *King, The, v. Consolidated Distilleries Ltd.* (1931) Ex. C.R. 85, appeal pending.
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10. *King, The, v. National Fish Co.* (1931) Ex. C.R. 75—appeal discontinued.
11. *King, The, v. Quebec Skating Club* (1931) Ex. C.R. 103—appeal pending.
12. *King, The, v. Henry K. Wampole Co.* (1930) Ex. C.R. 7—appeal dismissed.
13. *Royal Trust Co. v. Minister of National Revenue* (1930) Ex. C.R. 172—appeal allowed.
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15. *Waterous v. Minister of National Revenue* (1931) Ex. C.R. 108—appeal pending.
16. *Western Clock Co. v. Oris Watch Co.* (1931) Ex. C.R. 64—appeal pending.

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CASES
DETERMINED BY THE
EXCHEQUER COURT OF CANADA
AT FIRST INSTANCE
 AND
IN THE EXERCISE OF ITS APPELLATE
JURISDICTION

CLINTON W. ROENISCH.....APPELLANT;
 VS.
 THE MINISTER OF NATIONAL }
 REVENUE } RESPONDENT.

1930
 Sept. 22.
 Oct. 30.

Revenue—Income—Sec. 6 Income War Tax Act—British Columbia Taxation Act, 1922—Exemptions

Held, that the amount of Income Tax paid by a taxpayer to the Province of British Columbia, under the British Columbia Taxation Act, 1922 (R.S., B.C., Ch. 254) is not a disbursement or expense “wholly, exclusively and necessarily laid out or expended for the purpose of earning the income,” and such amount cannot be legally deducted from the total income of the taxpayer in arriving at the income which is taxable by the Dominion Government under the Income War Tax Act, 1917, and that the appeal herein should be dismissed.

(2) That exemption from taxation is a case of exception which must be strictly construed.

APPEAL by the appellant from the decision of the Minister of National Revenue refusing to allow the appellant to deduct the sum of \$459.40 from the total income returned, which sum was paid on income to the British Columbia Government under the British Columbia Taxation Act. The appeal was heard before the Honourable Mr. Justice Audette, at Vancouver.

No oral evidence was adduced, but the appeal was heard upon an agreed statement of the facts, which is given verbatim in the reasons for judgment printed below.

J. K. MacRae, K.C., for appellant, argued: That by Sec. 6, S.S. (a) of the Income War Tax Act (Dominion) a taxpayer was permitted to deduct from his total profits or gains all disbursements or expenses “wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.” That under the British Columbia

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Taxation Act, 1922, the appellant had been obliged to pay the British Columbia Government a sum of \$459.40 as a tax on his income, and that by section 44 of said Act, in order to ascertain the income taxable under said Act, he was allowed to deduct any amount paid to the Dominion Government for income tax on the same income. That in ascertaining the amount of income taxable by the Dominion he should be permitted to deduct the amount paid to the Provincial Government as aforesaid, under the provisions of subsection *a* of section 6, inasmuch as it was necessary for him to pay this amount to carry on business and therefore earn the income. The following authorities were cited by Mr. MacRae in support of his contentions:—

Wallace Realty Co. Limited v. City of Ottawa (1930) S.C.R. 387; *Lawless v. Sullivan* (1881) 6 A.C. 373; *Stevens v. Durban-Roodepoort Gold Mining Co.* 5 T.C. 402; *In re Guarantee Construction Coy's. Appeal*, 2 U.S., B.T.A.R. 1150; *British Insulated & Helsby Cables v. Atherton* (1926) A.C. 205; *Smith v. Lion Brewery Co.* (1911) A.C. 150; *Ushers Wiltshire Brewery Co. v. Bruce* (1915) A.C. 433; *Lothian Chemical Co. v. Rogers*, 11 T.C. 508; *Gresham Life Assur. Co. v. Styles* (1892) A.C. 309.

C. F. Elliott, K.C., for respondent, argued *contra*.

That Income Tax is a personal tax, and before any income tax can be imposed the income must first have been earned. The above sum was not laid out for the purpose of earning the profit or gain,—That income tax paid to any jurisdiction is not an expense within the meaning of sec. 6, ss. (*a*). The application of profits though compulsory does not reduce income for Dominion Income tax purposes. The following authorities were cited:—

Colville v. Com. of Inland Rev. 8 T.C. 442; *Jackson's Trustees v. Lord Advocate* 10 T.C. 460; *Ashton Gas Co. v. Attorney-General* 1906 A.C. 10; *Dowell's Income Tax* 9 Ed., p. 595; *Jones v. Wright* 13 T.C. 221; *Dillon v. Corp. of Haverford-West* 3 T.C. 31, at p. 36; *Dublin Corp. v. McAdam* 2 T.C. 387, at p. 400; *Attorney-General v. Scott* 1 T.C., 55; *Mersey Docks & Harbour Board v. Lucas* 1 T.C. 386, at p. 409; *Hudson's Bay Co. v. Stevens* 5 T.C. 424, at pp. 436-7.

The facts are admitted and said admissions are set out in the Reasons for Judgment.

AUDETTE J., now (October 30, 1930), delivered judgment.

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This is an appeal, under the provisions of The Income War Tax Act, 1917, and Amendments thereto, from the assessment of the appellant, for the year 1927, upon the ground of the respondent's refusal to allow a deduction of \$459.40, representing the amount of the Income Tax, paid by the appellant, to the province of British Columbia, on the net income arising therein for and in respect of the 1927 Provincial Income Tax Assessment.

Under the British Columbia Taxation Act, 1922, Ch. 254, R.S.B.C., provision is made for taxing the income of the individual; but by section 44 thereof, for the purpose of ascertaining such income, a deduction is allowed of all income tax payable to the Crown in the right of the Dominion. There is no such corresponding text in the Dominion Income War Tax Act respecting Provincial Income Tax and the appellant under the circumstances of the case seeks a similar relief or remedy under section 6a of the said Act.

There is, indeed, nothing to prevent either one legislature, or two legislatures, if they have jurisdiction over the subject matter, imposing different taxes upon the same subject matter. *Stevens v. The Durban Roodepoort Mining Co. Ltd.* (1); *Colville v. Commissioner of Inland Revenue* (2).

The parties filed, at trial, the following admission viz:

STATEMENT OF FACTS AGREED UPON BETWEEN COUNSEL

1. That the Appellant was in 1927 and is now presently resident in Canada.

2. That the Appellant filed a Return of Income on the prescribed form for 1927 with the Dominion Government. That the income of the Appellant was determined to be in the sum of \$19,905.78 for the said taxation period, and that Notice of Assessment was issued on the 22nd March, 1929, assessing the Appellant in respect of said income in the sum of \$1,019.94.

3. That in assessing income the Minister disallowed as a deduction the sum of \$459.40, being amount of Income Tax paid to the Province of British Columbia on the net income arising therein for and in respect of 1927 Provincial Income Tax Assessment.

4. That the Appellant had an interest in a partnership—the partnership fiscal period ending the 30th June, 1927.

5. That in respect of the said fiscal period of the partnership, the income derived from the partnership was assessed by the Province in the said sum and \$459.40 was paid on the 6th December, 1927, by the Appellant to the Provincial Government . . .

(1) (1909) 5 T.C. 402, at p. 407. (2) (1923) 8 T.C. 442.

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Now subsection (a) of section 6 of the Dominion Income War Tax Act, upon which the appellant rests his claim in seeking to obtain this deduction of \$459.40, reads as follows:

6. In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of:

(a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.

The appellant contends that this provincial income tax was paid to earn the profits and gains shewn in his total income return filed under the provisions of section 33 of the Dominion Act.

These statutory provisions of section 6, like those in the English Act, do not affirmatively state what disbursements and expenses may be deducted and there is in words no deductions allowed at all unless indirectly. They merely furnish negative information, that is, they direct that after having ascertained the amount of the profits and gains there may be deducted therefrom only such disbursements or expenses as were *wholly, exclusively and necessarily* laid out or expended for the purpose of *earning the income*.

However, the taxation is the rule and the exemption is a case of exception which must be strictly construed. *Wylie v. Montreal* (1); *Endlich, Interpretation of Statutes*, No. 356; *Cooley on Taxation*, 146; *Ville de Montréal-Nord v. Commission Métropolitaine de Montréal* (2); *O'Reilly v. Minister of National Revenue* (3); *Sanders, On Income Tax in England*, 83, 85 and 86.

It is self-evident that the amount of the income tax paid to the province is not an expense for the purpose of earning the income, within the meaning of 6a. When such payment of taxes is made to the province, it is not so made to earn the income, it is paid because there is an income showing gain and profit. The word profit is to be understood in its natural and proper sense, in the sense in which no commercial man would misunderstand it. And when a person has ascertained what his profits are, the use or destination of these profits is immaterial. *Gresham Life Assurance Co. v. Styles* (4); *Alianza Co. Ltd. v. Bell* (5).

(1) (1885) 12 S.C.R. 384 at p. 386. (3) (1928) Ex. C.R. 62.
 (2) (1927) Q.O.R. 43 K.B. 453. (4) (1892) A.C. 309.
 (5) (1906) A.C. 18.

As was said, in the case of *The Crown v. D. and W. Murray Ltd.* (1), the remarks made by Sir Henry James, when Attorney-General, in the case of *Last v. London Assurance Corporation* (2), apply to the present case. He says: The test is this—if there is an expenditure which would be made in any case, from which profits may accrue, the expenditure may be deducted; but an expenditure which will not be incurred unless there is a profit is not an expenditure in order to earn a profit.

This provincial income tax is not an expenditure which was necessary to earn a profit. Profits must be shewn before the tax is imposed. There is no tax if there is no assessable profits. *Wallace Realty v. City of Ottawa* (3); *Lawless v. Sullivan* (4). The profit of a trade is the surplus by which the receipts from the trade exceed the expenditure necessary for the purpose of earning those receipts. This tax is not an expenditure for the purpose of earning income; but it is an expenditure which is made necessary by statute, and chargeable upon and out of profits earned without it. The profits must be made before the tax can come into existence and the tax is the Crown's share of the profits which have been made.

In the ordinary sense and meaning, "profit" would be what could be properly described as "profit of the concern" and that surely would be all the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned or received. *Mersey Dock and Harbour Board v. Lucas* (5).

In the case of *Harris, Scarfe Ltd. v. Commissioner of Taxation* (6), it was held

that the income tax, or tax paid under the Dividend Duties Act, 1902, is not expenditure for the purpose of earning receipts. The profits must be made before the tax can come into existence and the tax is the Crown's share of the profit which has been made.

That view and the reasons supporting it seem to have been taken from the case of *The Crown v. D. and W. Murray Ltd.* (7), which also considered and determined, in like manner, this question of "an expenditure necessary to earn profits."

And as was said, in a manner most apposite to the present case, by the Earl of Halsbury, Lord Chancellor, in the

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(1) (1909) 11 W.A. Law Reports
92, at p. 95.

(2) (1885) 10 A.C. 438.

(3) (1930) S.C.R. 387.

(4) (1881) 6 A.C. 373.

(5) (1883) 2 T.C. 25, at p. 28.

(6) (1923) 26 W.A.L.R. 96.

(7) (1909) 11 W.A.L.R. 92.

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case of *Ashton Gas Company v. Attorney-General et al* (1):

The fallacy has been in arguing as if you can deduct from the income tax which you have got to pay something which alters what is the real nature of the profit. Now the profit upon which the income tax is charged is what is left after you have paid all the necessary expenses to earn that profit. Profit is a plain English word; that is what is charged with income tax. But if you confound what is necessary expenditure to earn that profit with the income tax, which is part of the profit itself, one can understand how you get into the confusion which has induced the learned counsel at such considerable length to point out that this is not a charge upon the profit at all. The answer is that it is. The income tax is a charge upon the profits; the thing which is taxed is the profit that is made, and you must ascertain what is the profit that is made before you deduct the tax—you have no right to deduct the income tax before you ascertain what the profit is. I cannot understand how you can make the income tax part of the expenditure.

And further on, after citing the case of *Last v. London Assurance Corporation* (2), the Lord Chancellor adds. "You must ascertain first the income, you must ascertain what the income tax is levied upon; that is to say, the profit of the undertaking is first to be ascertained, and when you have found out what the profit of the undertaking is, you have then to tax that as profit. Really the whole question comes back to the definition of the word 'profits.' When once you have defined what the word 'profits' means, it is perfectly clear what the result of the case must be."

The position is indeed quite different under the federal and the provincial tax Acts, because there is a text, a provision, in the provincial statute allowing a deduction of this kind; but there is no similar provision in the federal tax Act. All deductions and exemptions are specifically mentioned in the latter Act and no such deduction or exemption as those claimed in this case are therein mentioned.

I have therefore come to the conclusion, relying on the authorities above mentioned and upon what I think the proper construction and interpretation of the federal Act, that the amount of provincial income tax is not an expenditure for the purpose of earning the income and should not be deducted in arriving at the amount of the tax payable under the federal Act.

The appeal is dismissed with costs.

Judgment accordingly.

(1) (1906) A.C. 10, at p. 12.

(2) (1885) 10 App. Cas. 438, 445.

HIS MAJESTY THE KING.....PLAINTIFF;

1930
Nov. 24.
Nov. 29.

AND

HENRY K. WAMPOLE & COMPANY, }
LIMITED } DEFENDANT.

Revenue—Sales Tax—Sections 86 (a) and 87 (d) of Special War Revenue Act, R.S.C. (1927) c. 179—Samples—Meaning of “Used by”—Free distribution—Interpretation of statutes.

The defendant put up in special small packages, samples of its products, which were distributed amongst the physicians and druggists for the purpose of acquainting them with the character and quality of these products. These samples were distributed free, as a part of a well defined policy, and in the ordinary course of business. The cost of production of the same was paid by the company as a necessary expense of business and was treated in their books as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company had paid the sales tax.

Held, on the facts and circumstances of this case, that the samples in question herein were not produced for use of the defendant in the sense contemplated by the Special War Revenue Act (R.S.C. (1927) c. 179, sec. 87), and that the defendant was not liable for the consumption or sales tax on or in respect of the same.

2. That words of a statute, when there is a doubt as to their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature had in view, but the language of the statute must not be strained to make it apply to cases which were not in view at the time the enactment was drawn.

INFORMATION exhibited by the Attorney-General of Canada, to recover from the defendant a certain sum for consumption or sales tax, under the Special War Revenue Act (R.S.C., 1927, c. 179).

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

No oral evidence was adduced, the facts material and relevant to the issues being admitted, in a special case filed.

Those particularly applicable are cited in the reasons for judgment.

F. P. VARCOE, K.C., for plaintiff argued that by distributing samples as aforesaid, defendant was manufacturing goods for his use, within the meaning of the statute (R.S.C. (1927) c. 179, sec. 87, ss. “d”) and he referred to the definition of the word “use” to be found in the Oxford dictionary.

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H. A. O'DONNELL for defendant, argued that the "use" referred to in the statute, was use *by* the manufacturer and not *for*, that is actual use. That if it was intended to cover goods given away for any purpose, the statute could easily have said so. The statute refers to certain specific uses, but is silent as to distribution of free samples, and it must therefore be inferred that it was not the intention of Parliament to consider such distribution as a use within the meaning of the Act. *Expressio unius est exclusio alterius*. That in view of the mode of carrying on business by defendant, and its method of bookkeeping, set out in paragraphs 3 and 4 of the admissions, printed below, to tax these samples would amount to double taxation. He cited *In Re Billings v. United States*, (1914) 232 U.S. 261.

THE PRESIDENT, now (November 29, 1930), delivered judgment.

This is a special case stated for the opinion of the Court. Paragraphs 3 and 4 of the stated case reveal the relevant facts to be as follows:

3. The defendant in the course of its business as a manufacturer of pharmaceutical preparations put up in special small packages, samples of its products to be distributed amongst physicians and druggists as specimen or trial samples for the purpose of acquainting the physicians and druggists with the character and quality of the aforesaid pharmaceutical supplies. The said samples were, as a part of a well defined policy and in the ordinary course of business, distributed free of charge amongst the said physicians and druggists.

4. The cost of producing such samples was paid by the company as a necessary expense of business, and the company in its books treated such expense as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company has paid sales tax.

The question for the opinion of the Court is whether on the facts disclosed in the stated case, the defendant is liable to pay to the plaintiff, on or in respect of the samples referred to, a consumption or sales tax, under the provisions of the Special War Revenue Act, R.S.C., 1927, chap. 179, sections 86 (a) and 87 (d). I have arrived at the conclusion that the question ought to be answered in the negative.

The important sections of the statute are as follows:

86. In addition to any duty or tax that may be payable under this Act or any other statute or law, there shall be imposed, levied and collected a consumption or sales tax of four per cent on the sale price of all goods

(a) produced or manufactured in Canada, payable by the producer or manufacturer at the time of the sale thereof by him.

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

* * * *

(d) such goods are for use by the manufacturer or producer and not for sale;

the Minister may determine the value for the tax under this Act and all such transactions shall for the purposes of this Act be regarded as sales.

It has been laid down that the words of a statute, when there is a doubt as to their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which Legislature had in view, but the language of the statute must not be strained to make it apply to cases which were not in view at the time the enactment was drawn. In this case it is quite clear that the primary purpose of the enactment was to impose, *inter alia*, a consumption or sales tax on the sales price of all goods manufactured or produced in Canada. Anticipating that some goods were likely to be manufactured or produced and disposed of by the manufacturer or producer in a way other than by absolute sale to a purchaser, or, under conditions which would render it difficult to determine the value thereof for the purposes of the consumption or sales tax, the Legislature by sec. 87 of the enactment gave to the Minister administering the Act, the power to determine in certain cases the value of the goods for the purposes of this tax. This power was granted to the Minister, (a) where goods were leased and the use but no right of property passed; (b) when goods were subject to a royalty, and the royalty being uncertain it was difficult to estimate the value of the goods, (c) when goods were manufactured by contract for labour only and did not include the value of the material entering into such goods, and lastly, that which I have already mentioned, (d) when "such goods are for use by the manufacturer or producer and not for sale." In all such cases the transactions were for the purposes of the Act to be regarded as sales. The real point for decision therefore is the meaning to be given to ss. (d) of sec. 87 of the Act.

While one cannot be dogmatic as to the proper construction of the provision of the statute in controversy here, yet I am strongly of the opinion that it is not applicable to the

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facts of this case. I think that sec. 87 was intended to meet unusual transactions such as are set forth in ss. (a), (b) and (c), of section 87, and cases where a manufacturer or producer, for one reason or other, used or consumed his own productions; that, I think, was generally the intention of sec. 87 (d). To make the consumption or sales tax easy of enforcement it was to be applied and collected at the source of production upon sale, but as might and does happen, some persons produce goods largely or solely for their own use and not for sale, and so the Legislature in such cases sought to make such goods taxable, in order to place such producers and consumers upon a parity with other producers and consumers. I mean to express the idea, that the Legislature must have had something like that in mind when the enactment was made; certain obvious cases of that nature were intended to be met and the language of the enactment is to be limited to the purpose which was in view when the enactment was made. The promotion of trade or sales by the distribution of samples is widely practised in all countries, in fact, though I do not speak from experience, products like grain, sugar, cotton, wool, etc., are probably bought and sold very largely upon sample. This practice is also adopted as a form of advertising and is calculated as an item in the cost of production of goods, just as in newspaper advertising, or the hire of a travelling salesman; in this case the samples distributed were calculated as a business expense. If the Legislature had in mind to tax samples of goods distributed by manufacturers among potential customers, for the purpose of making known their products, I think it would have said so, but as is probable, it never contemplated such a thing, and consequently did not definitely designate or include distributed sample goods as among those upon which the Minister might affix a value for taxation purposes. I venture to think that when the statute was drafted, and if it had been the intention to include free sample goods as taxable goods, that plain and clear words would have been used to indicate this intention. It is to be presumed that the Legislature was cognizant of the very general practise of distributing samples of goods, and it being generally considered a proper business practice and not barter

or sale or anything more than an ordinary business expense, I should think that the Legislature would have used very precise language had it intended to tax such transactions and would not have expressed that intention by placing transactions of that character in the same category as those where the producer was also the user or consumer of his own goods. I do not think such a thing was contemplated and I do not think I would be warranted in reading into the statute such a meaning or intention.

Moreover, I do not think one can say that the defendant's sample goods were produced for the use of the defendant in the sense contemplated by the statute. What happened was this: a small fraction of a variety of goods produced for sale were abstracted from the mass and distributed for the purpose of acquainting certain classes of persons with such goods so produced for sale, and not for the use of the producer. When the statute says "because such goods are for use by the manufacturer or producer and not for sale," I do not think it is to be inferred that "use" there, was the kind of "use" made by the defendant in this case, but was intended to mean an actual use or consumption by the manufacturer or producer to meet in whole or in part his own requirements of particular goods, and which otherwise he would have been obliged to purchase from other producers. The defendant did not "use" his samples, he gave them away to some one else as a sample of goods which they might purchase. In a very technical sense only can it be said that the defendant made "use" of the samples for advertising purposes, but that kind of use is not in my opinion the "use" which the statute speaks of. Another thing that weighs with me in my interpretation of the intention of the Legislature is the fact that it cannot reasonably be said that the Legislature would contemplate that the revenue from this particular source would suffer by the practice of free distribution of sample goods, or, that the failure to tax sample goods would be an invidious exemption in favour of one class of producers and therefore onerous upon another class. The practice of distributing sample goods is designed to promote the sale and consumption of goods, and the practice is open to all producers of the same class. On the other hand, if a

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consumer produces his own goods instead of purchasing them from another producer, one can understand the Legislature saying, as I think it did, that the consuming producer should pay a sales tax as well as he who produces for another consumer, thus making the incidence of taxation fall evenly, but that is not, I think, this case; I say that in the broad sense; I have not in mind particular cases and possibly there may be many proper exceptions to that construction of the section of the statute here in question.

My conclusion therefore is that the defendant is not liable to pay to His Majesty the consumption or sales tax referred to in paragraph 3 of the stated case. * * * *

Judgment accordingly.

1930
 Dec. 29.

IN THE MATTER OF the application of William D. Skitch No. 435,035 for pension,

1931
 Jan. 2.

AND

IN THE MATTER OF a reference by the Honourable the Minister of Pensions and National Health pursuant to the provisions of subsection 8 of section 51 of the Pensions Act as enacted by section 30, Chapter 38 of the Statutes of 1928.

Reference by Minister under Pension Act—Application by Minister to withdraw reference—Vested rights—Effect of repeal—Interpretation Act.

In May, 1929, the Minister of Pensions and National Health, under sec. 30, ss. 8 of 18-19 Geo. V, c. 38, being an Act amending the Pensions Act (R.S.C., 1927, c. 157, s. 51), referred to this court, a dispute as to the jurisdiction of the Appeal Board to render a certain judgment. The Reference was duly filed in court on June 14, 1929, and on October 23, 1930, the widow of the soldier in whose favour the judgment was given filed her statement of claim. The Minister now applies for an order permitting him to withdraw the Reference, on the ground that the Act under which it had been made had been repealed, and that the court had now no jurisdiction to proceed with the same.

Held. That the jurisdiction of a court of record, when it has once obtained, cannot be ousted by any forced interpretation, and that the jurisdiction of this court to proceed with the present Reference was not taken away by the statute of 1930, (20-21 Geo. V, c. 35).

2. That a decision or judgment having been rendered by the Federal Appeal Board, in this matter, it was not one which came under the provisions of section 15 of 20-21 Geo. V, c. 35, which provides a means of dealing with appeals remaining undisposed of at the date of the coming into force of the Act.

APPLICATION by the Minister of Pensions and National Health, to withdraw the Reference made as aforesaid, and duly filed in this court.

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 SKITCH.

The matter was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

Mr. Miall for the Minister, argued that the Act of 1930 ousted the court of the jurisdiction given it by the Act of 1928, amending the Pensions Act (R.S.C., 1927, c. 157). That the matter was one of procedure; that by the new Act new procedure was substituted for the old. He referred to the Interpretation Act, sec. 19, s.s. 2. ("a" and "b"). That this was not a departmental reference under section 37 of the Exchequer Court Act.

Mr. R. Quain for the claimant argued that the court could not grant the Minister's request. That his client has a judgment in her favour, and that the jurisdiction of the tribunal which rendered this judgment having been questioned, the matter was referred to this court. The claimant has a vested right which was not taken away by the Act of 1930. That the matter was not one of procedure but of substantive right. If Parliament had intended to take away claimant's right under the judgment, it would have done so by explicit terms. That the section of the new Act provides for dealing with appeals undisposed of at the time of the coming into force of the Act, which is not the case before the court.

Mr. C. Reilly was also heard for claimant. He argued that the decision of the Pension Appeal Board was a judgment, and that the section of the Pension Act referred to conferred a right on the claimant, which was to be heard before this court, and to have her claim determined by it. He also concurred in the remarks by Mr. Quain.

The further facts and questions of law raised are stated in the Reasons for judgment printed below.

THE PRESIDENT, now (January 2, 1931), delivered judgment.

This is a matter coming before me for adjudication upon a summons issued on behalf of the Minister of Pensions and National Health to show cause why a Reference to the Exchequer Court of Canada by the said Minister should not be withdrawn from the records of the Court.

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The summons sets out the grounds of the application. It calls upon the claimant "to show why the cause or matter above mentioned, referred by the Honourable the Minister of Pensions and National Health to this Honourable Court should not, in view of the provisions of section 51 of the Pension Act as enacted by section 14 of Chapter 35 of the Statutes of 1930 and of section 15 of the said Chapter 35, now be withdrawn."

The Reference in question was signed by the Minister of Pensions and National Health on the 29th day of May, 1929, and was filed in the court on the 14th June, 1929. The Reference up to the present time has not been proceeded with. The claimant filed a statement of claim on the 23rd October, 1930, but the question of her right to do so does not call for decision on the present application. Neither the power of the Minister to make the Reference nor its validity are attacked in this application, and the sole question that falls for decision by me is whether the provisions of Chapter 35, Statutes of Canada, 1930, oust this court of jurisdiction to proceed with the Reference.

Counsel for the Minister relied on the provisions of sections 14 and 15 of the above mentioned Act of 1930 as supporting his contention that the Reference should be withdrawn for lack of jurisdiction in this Court to proceed with it.

The power of the Department of Pensions and National Health to refer disputes as to the jurisdiction of the Federal Appeal Board to the Exchequer Court under sec. 30 of the statute of 1928 amending the Pensions Act (18-19 Geo. V, Chap. 38), appears to be taken away by the Act of 1930.

An examination of section 14 discloses that provision is there made for procedure in matters coming before the Board of Pension Commissioners, the Pension Tribunal and the Pension Appeal Court, and that Parliament has not in that section by any express words interfered with any matter referred to the Exchequer Court previous to the Act of 1930 coming into force. Conceding this, counsel for the Minister contended that under the provisions of the Interpretation Act in the Revised Statutes of 1927, chapter 1,

section 19, subsection 2 (a) and (b), the new procedure set up by the Act of 1930 must be substituted for the procedure by way of a reference to the Exchequer Court.

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I cannot accede to this contention as regards this reference for two reasons: First it is met by the fundamental rule of construction that the jurisdiction of a court of record, when it has once obtained, cannot be ousted by any forced interpretation. "It is supposed that the Legislature would not make any important innovation, without a very explicit expression of its intention." (Maxwell on Statutes 7th ed., p. 113). Secondly, there is a question of substantive and vested right on the part of the claimant involved in the decision of the Reference before this court, namely, the maintenance of a decision or judgment by the old Pension Appeal Board, and by the terms of the very section of the Interpretation Act relied on by counsel for the Minister, I find that where an enactment is repealed, unless a contrary intention appears, the repeal is not to be taken as "affecting any right . . . acquired . . . under the Act . . . so repealed." I refer to section 19, subsection 1, clause (c).

As to the bearing of sec. 15 of the Act of 1930 on the right to withdraw the Reference, I also fail to agree with the contention of counsel for the Minister. The section reads:

15. All appeals heretofore taken to the Federal Appeal Board and remaining undisposed of at the date of the coming into force of this Act shall be deemed to have been referred thereunder for hearing by the Pension Tribunal and shall be dealt with accordingly.

The appeal to the Federal Appeal Board by the claimant was not undisposed of *at the date of the coming into force* of the Act of 1930. The judgment of the Board was pronounced on the 3rd August, 1926, the Act came into force on the 30th May, 1930.

The summons will be dismissed with costs to the claimant.

Ordered accordingly.

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 Dec. 11.  
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 1931
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HIS MAJESTY THE KING.....PLAINTIFF;

vs.

FRASER COMPANIES LIMITED.....DEFENDANT.

*Revenue—Sales Tax—Manufacturer using its goods in its business—
 Special War Revenue Act (R.S.C., 1927, c. 179—Sec. 87, ss. (d)).*

The defendant at all times material herein was engaged, *inter alia*, in the production and manufacture of lumber, and of its sale to the trade, and was the holder of a sales tax licence, duly issued. During the said period it was also engaged, in the course of the development of its business, in the construction and building of pulp mills and the repair thereof; and in the building and repair of houses, etc., for its employees, and for said purposes used and consumed some of the lumber manufactured by it for sale. Such lumber was taken from stock in the yards and in no instance had said lumber been manufactured especially for the purpose for which the same was used. The plaintiff now claims to be entitled to recover sales tax on the value of the lumber so used, under Sec. 87 ss. (d) of the Special War Revenue Act.

Held, that the goods intended to be taxed under section 87 ss. (d) of the Special War Revenue Act, are only goods expressly manufactured for the use of the manufacturer and wholly used for the purpose for which they were made.

This provision of the statute was not intended to relate to goods produced for sale but partially diverted to the producer's use for purposes not contemplated when the same were produced.

INFORMATION exhibited by the Attorney-General of Canada to recover a certain sum for Sales Tax alleged to be due to the Crown by the defendant company.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

No witnesses were heard, the parties filing a statement of the facts admitted, signed by counsel for both parties. The facts material herein are set forth in paragraphs 2 and 3 of said statement, which paragraphs are cited in the Reasons for Judgment which follow.

F. P. VARCOE, K.C., for the plaintiff argued: That the true construction of section 87 of the Special War Revenue Act is to apply the tax to all goods manufactured and used. The object of the legislation was to equalize the burden of taxation as between those who purchase the goods they use and those who, for any reason, have themselves produced the goods used. The tax is a consumption and sales tax, and extends over the whole field of production and consumption. The tax is payable in the event of manufacture and use, and not in the event of manufacture for use. Therefore, the intention of the taxpayer at the time of manufacture is of no importance.

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The construction claimed for by the defendant, that goods taken out of stock were not manufactured for use, and are therefore not taxable, would result in discrimination.

The case undoubtedly falls within the introductory words of section 87, because the value for tax is always difficult to determine when there is no sale price, as in the case of goods consumed by the manufacturer.

The case of *The King v. The Bank of Nova Scotia* (1929, Ex. C.R. 155) was cited.

R. B. HANSON, K.C., for the defendant, argued that the question of "sale" was the only one contemplated at the inception of this legislation. "Consumption" was not then in mind. That although later the tax was described a "consumption or sales" tax, yet the section only imposes a "sales" tax. No "sales" tax is affirmatively imposed under section 86 (a). That the word "consumption" is only descriptive. In no part of the statute is there any tax made payable on "consumption." Section 87 does not apply, because the goods were not manufactured under circumstances rendering it difficult to determine the value—and they were not produced for the use of the producer. That the Act does not provide for taxing goods manufactured for sale, put in stock, and then taken into consumption. That if there is a consumption tax no time is fixed for payment. He cited *Crawford v. Spooner*, 6 Moo. P.C. 9; *Pinkerton v. Easton*, (1873) L.R. 16 Eq. 490; *Whitely v. Chappell*, (1868) L.R. 4 Q.B. 147; *Gwynne v. Bunnell*, (1840) 7 Cl. & F. 572, at p. 696; Craies, Statute

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Law, p. 105; *Oriental Bank v. Wright*, (1880) 5 A.C. 842 at p. 856; *In re Micklethwaite*, (1855) 11 Ex. 452; *Partington v. Attorney-General*, (1869) 38 L.J. Ex. 205; *Attorney-General v. Selborne*, (1902) 1 Q.B. at 396; *Whitely Limited v. Burns*, (1908) 1 K.B. 705; *Lord Advocate v. Fleming*, (1897) A.C. 145, at p. 152; *Tenant v. Smith*, (1892) A.C. 150; *Pryce v. Monmouthshire Canal Co.*, (1879) 4 A.C. 197; *Attorney-General v. Carlton Bank*, (1899) 2 Q.B. 158 at 164; *Ormond Investment Co. v. Betts*, (1928) 97 L.J., K.B. 342.

THE PRESIDENT, now (January 3, 1931), delivered judgment.

This is a special case stated for the opinion of the Court. The plaintiff seeks to recover from the defendant an assessment levied against the latter under the provisions of the Special War Revenue Act, now Chap. 179, R.S.C., 1927. The facts material here are set forth in paragraphs 2 and 3 of the Stated Case and are as follows:

Para. 2: During the period from the 1st day of February, 1924, to the 31st day of August, 1928, the Defendant was engaged, *inter alia*, in the production, manufacture and sale to the lumber trade of long and short lumber and was in possession of a sales tax licence issued to it under the provisions of Section 5 of Chapter 68, 14-15 George V (1924) An Act to amend the Special War Revenue Act, 1915, (now section 95 of the Special War Revenue Act, Chapter 179, Revised Statutes of Canada, 1927).

Para. 3: During the said period the Defendant was also engaged in the course of the development of its business in the construction and building of pulp and other mills and in the repair thereof and in the construction, building and repair of houses and other structures for employees of the company, and in the course of such construction, building and repairing the Defendant during the period aforesaid used or consumed certain quantities of long and short lumber in such work. All of such long and short lumber was taken from stock in the yards of the company, and produced and manufactured for sale and in no instance had been produced or manufactured especially for the purpose for which the same was used.

It is under sec. 87 of the Special War Revenue Act that the assessment levied against the defendant is sought to be sustained. That section in its entirety is as follows:—

87. Whenever goods are manufactured or produced in Canada under such circumstances or conditions as render it difficult to determine the value thereof for the consumption or sales tax because

(a) A lease of such goods or the right of using the same but not the right of property therein is sold or given; or

(b) such goods having a royalty imposed thereon, the royalty is uncertain, or is not from other causes a reliable means of estimating the value of the goods; or

(c) such goods are manufactured by contract for labour only and not including the value of the goods that enter into the same, or under any other unusual or peculiar manner or conditions; or

(d) such goods are for use by the manufacturer or producer and not for sale;

the minister may determine the value for the tax under this Act and all such transactions shall for the purpose of this Act be regarded as sales.

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It is only ss. (d) together with the first and last clauses of the section that are relevant here. It is possible, as was contended, that ss. (d) was drafted and inserted after the balance of the section had been settled upon, as most of the words in the first clause seem of little importance when read with ss. (d). Ordinarily there should be no real difficulty in determining the value of goods produced by a manufacturer or producer for his own use and not for sale, whereas there might be difficulty in so doing where the goods were manufactured under the conditions set forth in subsections (a), (b) and (c). On the other hand it is conceivable that in some instances, in applying ss. (d), considerable difficulty would be encountered in fixing the value of the goods for the purposes of the Act. However, this point is of no importance in construing the section. For present purposes the language of the statute might, with strict accuracy I think, be restated in the following words: Whenever goods are manufactured or produced in Canada and such goods are for use by the manufacturer or producer and not for sale, the Minister may determine the value for the tax under this Act, and all such transactions shall for the purposes of this Act be regarded as sales.

I have no doubt that ss. (d) was intended to strike at some particular class of cases, which the authors of the section had in mind, and the statute in terms limits that to goods manufactured or produced for the use of the manufacturer or producer and not for sale. This did not refer to partially manufactured goods, that is, goods that were to be wrought into other goods which were subject to the tax, for the statute provides that in such cases the tax does not apply, or, provision is made for a refund. So then ss. (d) must have been intended to refer to something else. Some business concerns do manufacture or produce goods solely for their own use and not for sale, and usually in such cases the goods are required in connection with some major business activity of the producer. In my opinion it was only in cases of such a character that the legislature intended to apply the tax. That is in fact how the statute

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reads. It was to have application to cases where the goods were specifically produced for the producer's own use, and of course the goods must go into use before the tax would apply; I do not think it was intended that the manufacturer was required to pay the tax when the goods were manufactured because that would be contrary to the spirit of the whole Act. In the case under consideration, it is agreed that the goods in question were not manufactured primarily for the defendant's use, they were taken from a mass of lumber manufactured for sale; they were used by the defendant, accidentally it may be said, because the defendant company had decided upon a program of business expansion involving capital expenditures and necessitating the erection of additional manufacturing plant, and houses for its workmen. The Crown's case involves the proposition that if a manufacturer or producer appropriates to his own use, a small or a large quantity of goods, from a stock of goods manufactured for sale, at irregular periods that the manufacturer is liable for the sales tax upon such goods when used. Was that the intention of the Act?

It is only by putting a forced construction upon the language used that the conclusion can be reached that if a producer uses his own goods as in the circumstances of this case that the same are taxable, and one is not warranted in importing into the statute words that are not there, and words which I do not think were intended to be there, in order to make the goods subject to the tax. It is my interpretation of the statute that it was not intended by the legislature to impose the sales tax upon a casual or occasional use of a producer's own goods in the conduct of his business, and that construction of the statute is not weakened if it does transpire that the use of his goods by the producer was substantial in quantity or value or otherwise. It is hardly necessary to state that there is a wide distinction between an enactment saying that goods manufactured for the manufacturer's use, and used, shall be taxable, and saying that a manufacturer producing goods for sale shall be liable for the sales tax upon any portion of such goods as may be diverted to his own use; if the legislature intended to impose the sales tax as in the latter case, it might easily have been expressed; but there is no hint

whatever of such an intention. It seems to me that it would be as reasonable to assume that an intention to do so was considered by the taxing authorities and abandoned on account of the manifest administrative difficulties inherent in its adoption, as to say that the language of ss. (d) was intended to express such an intention. I think that ss. (d) was deliberately designed to meet the plain case of a person or business concern definitely producing goods for his or its own use, the use running concurrently with the production, because if there was no user there would be no production. And that use, for the purposes of the Act, was to be treated as a constructive sale. It is the case of a manufacturer or producer primarily producing goods for sale, who occasionally diverts a portion of such goods to his own use, that the statute has not dealt with at all. And if the statute does not provide for such a case, it is not for the Court to do so. It may be discriminatory in its incidence to tax one producer using his own goods and not another, or, it may be sound public policy to refrain from taxing a producer's goods occasionally used in the expansion of his own business, thereby increasing his sales and accordingly the volume of revenues deriveable from the sales tax, but all such considerations are for the legislature. There is nothing strange in the fact that the statute does not in express language cover the case of the defendant. The Act has only a limited application as will be observed from the numerous exemptions which are made by the statute. The Act was bound to contain many seeming inconsistencies in that regard, but that has to do with public policy, and not with the construction of a provision of the statute.

I think it is quite clear that the goods intended to be taxed under ss. (d) are only goods expressly manufactured for the use of the manufacturer and wholly used for the purpose for which they were made. This provision of the statute was not intended to relate to goods produced for sale, but partially diverted to the producer's use for purposes not contemplated when the goods were produced. It is therefore my opinion that the defendant is not liable for the assessment levied against it.

The defendant will have its costs of the action.

Judgment accordingly.

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Jan. 12.
Jan. 17.

ROSCOE R. MILLER.....SUPPLIANT;

VS.

HIS MAJESTY THE KING.....RESPONDENT.

Superannuation—Civil Service—Crown—Contract—Discretion—Jurisdiction of court

Held, that a civil servant, retired or removed from office, has no right of action to recover any allowance under the Superannuation Act, such allowance being entirely in the discretion of the executive authority. That no contractual relationship arises between the Crown and its servants with respect to such allowances. To create such contractual relationship would require express statutory enactment.

PETITION OF RIGHT to have it declared that the superannuation allowance given the suppliant herein was wrongly calculated, was too small, and should be increased, and further for damages.

The petition was heard before the Honourable Mr. Justice Audette at Ottawa.

Mr. R. R. Miller appeared personally.

C. P. Plaxton, K.C., for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (January 17, 1931), delivered judgment.

The suppliant having entered the federal civil service and served therein for a period of twelve years and eight months, and his position having been abolished, he was retired from the service, under the authority of an Order in Council, and his "name was placed on the list of persons eligible for the class of positions from which he was laid off or for any other position for which he may have qualified." 10 Geo. V, ch. 10, sec. 5; now R.S.C., 1927, ch. 22, sec. 54. Furthermore, by Order in Council, he was granted, under 14-15 Geo. V, ch. 69, a pension or annual retiring allowance of \$499.57.

He therefore claims a larger pension and concludes his petition by praying that:—

1. That this Honourable Court may, definitely, fix and determine the proper amount of "retiring allowance," to which your suppliant has been, is at present, and, will be entitled, in future, calculated at \$2,800 per annum;

2. That this Honourable Court may definitely fix and determine the amount of arrears to which your suppliant is entitled, in respect to the said annual "retiring allowance," believed to amount to the sum of \$8,051.50, as of October 1st next; and, that it may order payment thereof, to your suppliant, forthwith; and,

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3. That this Honourable Court may fix and determine the amount of relief to which your suppliant is entitled, in consequence of maladministration of federal public services, resulting in damages estimated to amount to \$100,000, and calculated as follows, viz,—

(a) Prescriptive earning capacity	\$60,000
(b) Menial services	10,000
(c) Forceible ejection from office.....	10,000
(d) Damages to health.....	20,000

It may be said here, but not as determining the issue herein, that the suppliant has failed to prove the material allegations of his petition.

However, the paramount question to be determined is as to whether or not this Court has jurisdiction, in a case of this kind, to review the decision of the Governor in Council with respect to such allowance.

In the case of *Balderson v. The Queen* (1), (and cases therein cited), it was held that employees retired or removed from office have no absolute right to any superannuation allowance under the Act, such allowance being entirely in the discretion of the executive authority. The Courts have persistently adhered to the view that no contractual relation arises between the Crown and its servants with respect to superannuation allowances, unless some statute expressly creates such a relationship and so far Canada has not made such change in the law.

This decision of our Canadian Courts must be taken as conclusive of the whole matter; but it may be useful to mention the following decisions in the English Courts.

The case of *Nixon et al v. The Attorney-General* (2) recently decided by the House of Lords, holds also that a civil servant's expectation of superannuation allowance is not a legal right and cannot be enforced by legal proceedings.

It was further held in the case of *Denning v. The Secretary of State for India* (3), that a Crown servant, against whom no misconduct is alleged, is liable to dismissal at the

(1) (1897) 6 Ex. C.R. 8, confirmed on appeal to the Supreme Court of Canada, 28 S.C.R. 261. (2) (1930) 47 T.L.R. 95.
 (3) (1920) 37 T.L.R. 138.

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pleasure of the Crown without notice, even if the form of agreement under which he has been engaged implies that, except in case of misconduct, the engagement can be terminated only by notice.

In the case of *Yorke v. The King* (1), it was also held that under the Superannuation Act the decision of the Commissioner of the Treasury either as to whether a person is entitled to a superannuation allowance or as to the basis upon which an allowance shall be calculated, is final, and no Court of law has jurisdiction in the matter.

See also *Cooper v. The Queen* (2).

In the case of *Hales v. The King* (3), it was held that the principle that a servant of the Crown is liable to be dismissed at pleasure is not affected by any special contract unless such contract is incorporated in a statute.

There will be judgment declaring that this Court has no jurisdiction to review the decision of the Governor in Council when exercising his statutory discretion with respect to any superannuation allowance. Therefore this Court does order and adjudge that the suppliant is not entitled to the relief sought by his Petition of Right herein.

Judgment accordingly.

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Jan. 27, 28.
Feb. 7.

THE G. E. PRENTICE MANUFACTURING COMPANY } PLAINTIFF;

VS.

C. R. KENNY ET AL. DEFENDANTS.

Patents—Invention—Utility—Novelty—Impeachment—Costs

The patent for invention in this suit is for a "new and useful improvement in separable fasteners."

Held that the fact that a patented device, consisting of an improvement on similar devices to be found in the prior art, has been generally adopted by the public, is strong evidence of its novelty and usefulness and of its being an advance in the art.

2. That the increased security in a fastener, when applied successfully to remedy an old defect, with the discovery of the cause for such defect, would seem to amount to invention, and the novelty of an invention is not impeached by the fact that the same results may be achieved in a different way.

(1) 1915, 1 K.B. 352. (2) (1880) 14 Ch. Div. 311.

(3) (1918) 34 T.L.R. 589-341.

3. That a Court should not be too astute to find reasons for impeaching a document under the Great Seal, and that where any doubt exists it should be resolved in favour of the patentee.
4. Plaintiffs having at trial, abandoned their action against one of three of the defendants, the Court ordered that one-third of the costs to be taxed against the defendants be deducted upon taxation.

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ACTION by the plaintiff to have it declared that the defendants have infringed its patent for Invention Number 286,528, and dated the 15th January, 1929. The defendants denied the infringement and asked that it be declared that the patent sued on was invalid, null and void.

The action was tried before the Honourable Mr. Justice Audette at Ottawa.

*D. L. McCarthy, K.C.*, and *S. A. Hayden* for plaintiff.

*O. M. Biggar, K.C.*, for defendants.

AUDETTE J., now (February 7, 1931), delivered judgment.

This is an action for an alleged infringement by the defendants of the plaintiff's Canadian Patent No. 286,528, bearing date the 15th January, 1929, and which is now held by the said plaintiff company under assignment from the inventors.

The grant covered by the patent is for "new and useful improvements in separable fasteners."

A patent case always primarily involves a question of fact followed by a question of law, and in no case more than the present can it be said more truly that every such case must stand on its own merit.

The field of the prior art relating to this subject matter is large and covers a number of very narrow patents. The plaintiff's patent is, indeed, also very narrow and should receive a narrow construction.

However, the evidence establishes that the defendants have infringed the plaintiff's patent by the shipment into Canada of the trivial quantity of one dozen of such fasteners.

The defendants assert that this dozen of fasteners are not the fasteners which they manufacture under their patent and that such shipment is the result of a defective plug and die used when manufacturing them and that they were sold without their knowledge at the time, a fact which, according to them, they only became aware of at trial,

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when they then undertook not to manufacture any more fasteners of such description in the future.

The plaintiff, on the other hand, abandons its action against the defendant Kenny and further abandons any demand for taking any account and for any damages—its claim narrowing down to the compass of a demand for injunction and costs.

The defendants, however, maintain their claim for impeachment on the ground of anticipation.

As a test of the difference between success and failure the evidence discloses that the plaintiff's device—notwithstanding the large field of the prior art—has proved a great success commercially and that such device has become in use, in preference to all others, when applied to golf bags, as giving better results where others have failed. The general adoption of the improvement, with increased productivity, is a strong evidence of its novelty and usefulness and would seem to have advanced the art. The increased security in a fastener, when applied successfully to remedy an old defect with the discovery of its cause, would seem to amount to an invention and the novelty of an invention is not impeached by the fact that the same results may be achieved in a different way.

The principle in all these devices is the same, but it is carried out with some small mechanical devices differing from one another, and the prior art is especially conspicuous with the apparent narrow dissimilarity, if any, among them.

It would seem that in a case of this kind one should not be too astute in finding reason for impeachment of a document under the Great Seal and that the doubt, if any, should be resolved in favour of the patentee. *Consolidated Car Heating Company v. Came* (1).

Coming to the question of costs, considering that the plaintiff has abandoned his case against defendant Kenny who must have been put to some expense in defending and which somebody must satisfy, it would seem unjust that this expense of a successful opposition should be borne by the party succeeding. *Hill's Patent* (2); in re *Johnson's Patent* (3).

(1) (1903) A.C. 509.

(2) (1863) 1 Moore's P.C.N.S.  
258, at p. 271.

(3) (1871) L.R. 4 P.C. 75.

Therefore there will be judgment declaring that the defendants Beddoe and The Jiffee Sales Company have infringed in the manner above mentioned and that the plaintiff is entitled as against them to the injunction prayed for, and with costs in favour of the plaintiff, but one third of the said cost to be deducted therefrom.

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Judgment accordingly.

DE FOREST PHONOFILM OF CAN- } PLAINTIFF;  
ADA LIMITED ..... }  
vs.  
FAMOUS PLAYERS CANADIAN COR- } DEFENDANT.  
PORATION, LIMITED ..... }

1930  
April 30-  
May 1-15.  
1931  
Feb. 13.

Patents—Infringement—Nullity—Specifications—Vague and ambiguous—  
Subject-matter—Anticipation—Combination

The patents for invention in question herein are two in number. The first relates to "means for recording and reproducing sound," and in the specification filed with his application for patent in 1923, the patentee describes a "small arc lamp" as the source of light to be used for recording sound on a film photographically. In 1925, in a divided application, he claimed as the light source "an enclosed luminous gas discharge device." At the trial the patentee testified that neither the light from an arc discharge lamp, nor a positive glow lamp, were suitable for his purposes, and claimed that a negative glow lamp alone was suitable. It was contended on behalf of the plaintiff that the light source described in the specification as "a small arc lamp" was a negative glow lamp. The second patent relates to an arrangement for combining sound and picture projecting machines, putting the elements forming the sound head into a separate attachment, or unit, so that it could be easily applied to a standard picture projecting machine. The plaintiff also claimed invention in the sound film gate which guides and presses the film close to the slit as it passes from the film magazine, preventing lateral movement which would be fatal.

Held that where the specification uses language which, when fairly read, is avoidably obscure or ambiguous, the patent is void, whether the defect be due to design, or to carelessness, or to want of skill; nothing can excuse the use of ambiguous language when simple language may easily be employed, due allowance, of course, being made where the invention is difficult to explain.

- 2. Where the terms of a specification are so ambiguous that its proper construction must always remain a matter of doubt, it is the duty of the Court to declare the patent void.
- 3. Specifications must be read in their ordinary and natural sense, though it may sometimes happen that in construing the same the Court may be justified in understanding the language not according to its ordin-

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- ary meaning but in the way in which it would be understood by skilled workmen. Such specifications, moreover, must be intelligent to ordinary workmen possessing that degree of skill, intelligence and knowledge fairly to be expected of them in respect of that branch of the useful arts to which the invention relates, and they are not required to possess that great skill, scientific knowledge or power of invention, which would enable them by themselves to supplement a defective description or correct an erroneous description.
4. Where a specification contains various statements calculated to mislead persons to whom it is addressed, or renders it difficult for them without trial or experiment to comprehend in what manner the invention is to be performed, the specification is bad.
  5. Moreover, where a specification describes two things, one practicable and the other impracticable, or where it directs two alternative ways of constructing or using an invention and one is impracticable or useless, the patent is bad.
  6. The patentee must make it perfectly clear what it is he claims as his monopoly; the public are entitled to know at once what it is, by reason of the patent, they are excluded from doing. If he describes something not new, it must distinguish that which is old from that which is new and claim the latter only; if claim is made to anything which is old, the specification will be bad and the patent void on the ground that the patentee has claimed something lacking the essential feature of novelty.
  7. That the patentee in his present specification having chosen to designate as his light source an arc lamp, there being such a lamp, now not claimed as his invention, and failing to mention by its well known name the useful negative glow lamp, now claimed as his invention, and having failed to describe the latter even in general terms so that those to whom the specification was addressed might readily recognize the invention as a negative glow lamp and nothing else, his specification fails in this to comply with the requirements of the law, is too vague, indefinite and misleading and the patent is in consequence null and void.
  8. That uncertainties and deficiencies in the specification cannot be amended or explained away years afterwards when the same is questioned in an action, and the patented lamp being capable of being used either as a glow lamp, or as an arc discharge lamp, according to the pressure of gas and other conditions, and the patentee not having directed the exclusive use of the lamp as a glow lamp and not having explained that an arc discharge light was unsuitable and how it could be avoided, the specification is for this reason also bad, and the patent void.
  9. Persons to whom the specification is addressed are not expected to possess that skill and knowledge, or to perform that amount of experimental work which would enable them to ascertain the one source of light which would be suitable for the purpose of recording sound on a film, or to ascertain that the other light was unsuitable for the purpose.
  10. That as regards the second patent there was no ingenuity of invention in making a separate unit of the sound head to be easily applied to the picture head.
  11. At trial, it was claimed that there was invention in the sound film-gate, one of the elements of the sound head combination. *Held*, that in a combination patent particularly if invention is claimed for any

integer in the combination it must be described and claimed as new, and clearly claimed, otherwise the invention can only be in the combination, if at all. That, moreover, the film-gate being known, there was no invention in selecting one way of a score of slightly different ways which would easily suggest themselves to anyone skilled in the art.

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ACTION by the plaintiff, as assignees of Dr. Lee de Forest, to have it declared that Canadian Patents for Invention Numbered 252,491 and 279,863, are valid and infringed by the defendant. The defendant denied that it was infringing plaintiff's patents, and that, even if it was found that the device used by it was an infringement of the said patents, it had perfect right to use it, inasmuch as the plaintiff's said patents were null and void for the reasons mentioned in the reasons for judgment printed below.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*H. N. Chauvin, K.C.*, and *Frank Chauvin* for the plaintiff.

*O. M. Biggar, K.C.*, *R. S. Smart, K.C.*, and *O. S. Tyn-dale, K.C.*, for the defendant.

The facts material and the questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (February 13, 1931), delivered judgment.

The plaintiff in this action claimed infringement, by the defendant, of eight different patents; at the beginning of the trial the plaintiff abandoned his action in respect of six of the eight patents and proceeded to trial upon the remaining two patents. The first to consider is patent no. 252,491 which issued to Lee de Forest, the plaintiff's patentee, on August 11, 1925, upon an application dated April 24, 1923, and relates to "Means for Recording and Reproducing Sound". The alleged invention was directed to subject matter already described in a former application for patent made by de Forest in October, 1920, and from which the subject matter of the patent in question was divided; further reference will shortly be made to this application. The other patent in suit is no. 279,863, which issued on May 1, 1928, upon the application of the same

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patentee, Lee de Forest, dated the 24th of April, 1923, and it relates to "Talking Moving Picture Attachments."

Adverting now to the first mentioned patent no. 252,491. The patentee states that one of the objects of his invention was the provision of electrically controlled means for photographically recording sound. The specification refers to the co-pending application as follows:—

In my co-pending application from which the subject matter of this present case is divided, I have shown and described means for recording sound waves upon a photographic film such as an ordinary film employed in motion picture photography, and I have therein set forth and described that a source of light may be directly controlled in the intensity, pitch and volume of sound in such a manner that the fluctuations caused by sound waves in the intensity of light emitted from the source may be photographed upon the film.

The patentee describing his invention states:—

In accordance with my present invention, I employ a small arc lamp 52, preferably consisting of two heavy tungsten ball electrodes 50 and 51, separated by a small gap, for example, 0.5 millimeters, mounted in the small vessel 52, either evacuated or filled with some gas, such as nitrogen, mercury vapour, etc., to make the light from such arc as rich as possible in ultra violet rays. The light rays from the arc lamp pass through the lens 3 in the usual well-known manner and in addition thereto, if desired, through a colour filter 4, which colour filter is preferably of a dark blue, as I have found that the best results of recording sound waves photographically are thus secured. A photographic film 7 is passed by the lens and film 3 and 4 respectively in the usual well-known manner and the light emanating from the lamp is recorded on the film, preferably in the nature of a minute ray obtained from a pin point aperture or focused to a point by a lens. I energize the arc lamp 52 from a source of high frequency current, the frequency of which must be well above the audible limits and modulate the high frequency currents supplied the arc lamp with alternating or pulsating currents set up by and in accordance with sound waves.

Then follows a description of what is said to be a well known form of high frequency generation circuit and which need not be repeated. He then proceeds:—

The alternating or pulsating currents produced by the microphone 5, which is included in circuit with a current source 6 and one coil 17 of a transformer, the other coil 18 of which is included in the input circuit of an audion amplifier 90 and thus amplified are supplied by the output circuit of the audion amplifier 90 to the transformer coil 91 included therein, and thence to the transformer coil 92 included in the grid filament circuit of the oscillion 60, thereby affecting a modulation of the high frequency oscillations generated by the balance of the oscillion systems, and the modulated high frequency oscillations vary the degree of brilliancy of light emitted from the arc light by the unmodulated high frequency currents, which variations are proportional in every respect to the original modulating audible frequency alternating or pulsating currents in the microphone circuit.

Claim 7 which is typical of all other claims relied upon is as follows:—

Means for photographically recording sound waves comprising an enclosed luminous gas discharge device, means for constantly maintaining said device effectively luminous, and means for varying the luminosity of said device by and in accordance with sound waves, and means for directing the light from said device to a sensitized element.

I might at once state that the invention claimed to be infringed relates only to the light source or lamp, a small arc lamp, as described in the specification. A very considerable amount of evidence was taken in the case, and there are so many matters of fact in dispute, that it becomes necessary to discuss the case at some length.

As already stated, de Forest made application in Canada for letters patent on October 29, 1920, which included the subject matter of the patent in suit. The corresponding application was made in the United States in September, 1919. The subject of this invention was stated to be "Means for Recording and Reproducing Sound." The specification states:—

It is among the special purposes of my present invention to record sound waves upon a photographic film such as an ordinary film employed in motion picture photography. This can be accomplished in many ways. I have discovered, however, that a source of light may be directly controlled by the intensity, pitch and volume of sound in such a manner that the fluctuations caused by sound waves in the intensity of light, emitted from the source may be photographed upon the film. My investigations have revealed that certain light cells are more sensitive to the ultra violet rays of the spectrum than others.

It also states:—

The invention consists substantially in the construction, combination, location and relative arrangements of parts, all as will be more fully hereinafter set forth, as shown by the accompanying drawing and finally pointed out in the appended claims.

In the application de Forest described two light sources, one being a small incandescent filament lamp. Referring to this lamp he stated:—

It is highly important that the filament should be as small as possible and that every facility for conducting the heat away from the filament should be provided. I prefer therefore to use nitrogen, or other gas filled lamp to a high vacuum lamp . . . Moreover, the light from a nitrogen filled lamp is much richer in violet and ultra violet rays which most actively affect both the photographic film, and the photo-electric cell.

He then proceeds to describe the second source of light in the following language.

In place of the above described incandescent lamp method of controlling by sound waves the light intensity, I may use a small arc lamp as shown in fig. 6. Such lamp preferably consists of two heavy tungsten

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ball electrodes 50 and 51, separated by a small gap, for example, 0.5 millimeters, mounted in a small glass vessel 52, either evacuated or filled with some gas such as nitrogen, mercury vapour, etc., to make the light from such arc as rich as possible, in ultra violet rays.

At the instance of the Commissioner of Patents it was directed that the application be limited to one of the two described sources of light, so as to comply with a Rule of the Patent Office restricting any application for patent to one invention only; this was the reason, or one reason, assigned to me at the trial for the division of the application, but upon an examination of the Record File, I was unable to find any record of such a direction.

Upon the original application a patent issued on July 14, 1925, and in this patent the light source to be employed was described as a small incandescent filament lamp. A fresh application for patent was filed on April 24, 1923, wherein the light source to be employed was described as "small arc lamp". A patent issued upon this application on August 11, 1925, and is this patent which is presently under consideration. It is to be observed that the specification of the latter patent, in so far as the description of the light source is concerned, is practically as it appeared in the original application; however, subsequent to the application new claims were added, among them being claims 7, 8, 9 and 10, the first of which I have already quoted, and these are the claims now solely relied upon by the plaintiff. The important feature of the new claims is that the light source, the small arc lamp, mentioned in the specification, is for the first time claimed as "an enclosed luminous gas discharge device." These new claims, I was informed, were submitted by way of amendment only in May, 1925, five years after the date of the original application and about two years after the date of application for the patent in question.

I have already quoted at some length from the two specifications, de Forest's description of his invention presently under discussion. Upon the trial he gave evidence further explanatory of his invention and its operation, and evidence of the same nature was also given by Mr. Dyer on behalf of the plaintiff. It may be useful to refer to certain portions of this evidence, reserving until later any comments in respect of the same. Dr. de Forest stated that at the time he conceived the invention in question, in



1918, he had under consideration three methods of recording sound photographically on a motion picture film. He had considered recording the fluctuations of a gas flame, and also the light fluctuations from a fine incandescent filament lamp, in an envelope filled with some rapidly cooling gas, like nitrogen or hydrogen. The third method was the following as explained by de Forest:

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The third method, the one that is disclosed in this patent, was to use a glow lamp, a lamp in which the electrodes were close together, a glass vessel containing two electrodes close together, partially filled with a gas, the light from which when illuminated by the passage of electricity between the electrodes should be highly actinic, have a high photographic value, rich in violet and ultra-violet rays.

Being asked to explain under what conditions his invention would most successfully function he stated:—

The electrodes should be near together, first of all. The glow should be confined to the juxtaposed surfaces. The negative glow should be used entirely. The gas pressure should be somewhere between .8 millimeter and 7 millimeters of mercury pressure. The gas must contain a good proportion of nitrogen. I have found that a mixture of 80 per cent nitrogen and 20 per cent argon is the best combination. The electrodes should be of material which does not easily disintegrate under the ionic bombardment. I am not speaking of the rapid disintegration which takes place when a hot arc passes, but even in the true glow discharge there is a certain slow disintegration of the anode or the cathode material, and for that purpose we prefer to use tantanium or molybdenium as the cathode material. Tungsten is very good for the purpose also, etc.

Explaining the construction of the lamp de Forest stated:

The vessel 52 is filled with a suitable gas, for example nitrogen or argon or a mixture of the two, and partially exhausted until an electrical discharge can pass between the two electrodes. When such electrical discharge passes between the electrodes, the gas in between becomes luminous. When you look at this device you will see that both balls are covered with a soft velvety light, which is more intense in the space between the electrodes. The brilliancy of this light depends upon the current passing. This light is known in physics as the negative glow. The useful light for photographing sound waves is always the negative glow, in other words the light which surrounds the negative electrodes, and is distinguished from the positive glow.

With lamps such as I use and such as the defendant uses, the negative glow is the only light which is visible while the electrodes are close together. If the electrodes are separated a long distance we have the negative glow surrounding the negative electrode, and also a positive glow.

Dr. de Forest further explained the preparation of his lamp in the following language:—

First the tube is exhausted of air. Then the tube is filled with nitrogen, argon, or whatever gas combination is to be used, at atmospheric pressure. Then the pump is set to work, and the pressure of the gas in the tube is greatly reduced. At this stage of the process the electric

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potential which is to be used with the tube in actual practice, say 450 or 500 volts, is connected to the terminals of the tube. The exhaustion process then continues until the tube lights up, due to the passage of electrical current between the electrodes. The exhaustion process is continued until the tube is illuminated to its maximum.

Being asked by counsel for plaintiff to explain what was new in the lamp described in his specification, he stated:—

Glow tubes of various sorts, Geissler tubes they were usually called, are very old in the electrical art; but prior to my invention no one had used or described or constructed a glow tube where the electrodes were close together, the tube filled with a partially exhausted nitrogen gas for the purpose of photographically recording the fluctuations of such a light. It was only by virtue of the fact that the electrodes were close together and the negative glow therefore being the only glow to consider, that this device became useful as a sound recording element.

Mr. Dyer, one of the plaintiff's expert witnesses, explaining the invention stated:—

Now when Dr. de Forest showed this glow light, in my opinion it would be perfectly obvious that it was intended to be operated with a cathode glow. It was known perfectly well that the cathode glow could be increased and enlarged by very substantially reducing the pressure; . . . . But there is another way to increase the cathode glow effect or in other words to suppress the positive column, and that is to put the electrodes very close together, so that there is not any room for a positive column. And that is what Dr. de Forest has done; so that he has made this lamp with the electrodes so close together that we have only a negative glow.

He also stated:—

The light which is described in patent no. 1 (the patent in question) is a glow lamp. Such lights have been known for 70 or 75 years. They have been the subject of much investigation, and large books have been written about them. . . .

Because these things were old and well known, and, as I have said to your Lordship, large books have been written on the subject; and people know that every gas has its own colour and every gas has its own conducting pressure, and that you cannot get a glow unless you make that pressure within the limits through which the current will pass.

It might not be inappropriate here to explain that in practice there are two general methods of recording sound in connection with the production of sound motion pictures; in one method the sound is recorded on a wax disc similar to the well known phonograph record, in the other method the sound is photographed on a standard motion picture film. In either of these methods, the sounds are translated into electrical energy by means of the microphone and these sounds now in the form of electrical variations are amplified through several stages of vacuum tube amplifiers to the degree necessary to actu-

ate the recording means. In recording sound upon a standard motion picture film the amplified sound in the form of electrical variations is changed into light variations, that is to say, a light source or lamp appearing in the electrical circuit is modulated or fluctuated in intensity according to the variations of the electric current from the microphone; thus the intensity of the light is modulated or controlled in exact accordance with the sound waves which fall on the microphone. These variations are transmitted through an aperture or light gate upon a film which is passing before the aperture or light gate. The negative when developed will disclose a sound record on the film. Different methods are employed in conducting the light variations to the film. There is the constant light, that used by the plaintiff and also by the defendant, the brilliancy of which can be directly modulated, as I have explained, by electrical energy. In some cases a light valve or light gate is interposed between the source of light and the film, and the amount of light it allows to pass through, and the frequency of the variations in this light, is a function of the valve. Then there is the rotating mirror method employed, I understand, by the Radio Corporation of America, but I need not explain this; I believe there are other methods. There are, as I understand it, two principal methods of recording the sound upon a film by means of light variations. In one method the record is comprised of lines varying in density or darkness and occupying the full width of the sound track, that is, they are of uniform amplitude, the record being produced by the admission of light to the film in the degree of intensity determined by the loudness of the sound; this is known as the variable density method and it is one of the chief characteristics attributed by the plaintiff to sound films produced by the de Forest invention under discussion, and it is also said to be characteristic of the infringing device. The other method is known as the variable amplitude or variable area method; here the recording is of the zigzag form, the loudest sounds or vibrations recorded occupying the whole width of the sound track, while vibrations of lesser amplitude are recorded in narrower and varying lines. The number

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of bands or lines in the variable density record, and the number of irregular lines or peaks in the variable area method, is, I believe, proportional to the frequency.

Much was said in this case about arc lamps and glow lamps, and in fact this case turns largely upon whether the specification was intended to describe and direct the use of an arc discharge lamp or a negative glow lamp, and therefore a brief reference to arc lamps and glow lamps is unavoidable. The ordinary open arc lamp, with which the lay public was at one time more familiar than at present, is an electrical apparatus in which two electrodes, a negative and a positive, usually of carbon, are struck together and then automatically separated by a short distance, thereby establishing an arc which gives a brilliant illumination; an arc lamp may however, be closed, it may be filled with gas, and the composition of the electrodes may be other than carbon. The chief characteristic of an arc lamp when used as such, is, that, in operation a substantial current is necessary for its maintenance and most of the light emitted from the electrodes—ninety per cent it is said—is due to the fact that the electrodes are incandescent. Owing therefore to the high temperatures prevailing in an arc lamp, it is necessary that the electrodes which are placed closely together be of a material with a high melting point, if the melting point be low the electrodes would rapidly burn away. An electric arc lamp, it is agreed, if operated as such, is not satisfactory for recording sound photographically, because the arc flame is bright and rigid and does not modulate or respond so readily to high frequency changes in current fluctuations, as does a glow lamp, which I shall early describe. The light from the incandescent electrodes shows little of the far blue and ultra violet end of the spectrum, and for this reason it is not rich in actinic properties, which is a distinguishing feature of some glow lamps.

Glow lamps, or glow discharge lamps as they are frequently called, are usually of the same type, but are recognized under two different conditions; in one case the light comes from the negative glow and in the other from the positive glow or positive column. Generally a glow lamp consists of a glass enclosure containing two electrodes and filled to the required degree with a gas such as nitro-

gen, argon, helium, etc., or a mixture of gases. On a difference of potential being applied to the electrodes, a suitable gas being used and a low gas pressure being employed, an electrical discharge passes between the electrodes. The gases being thus excited electrically, a soft velvety light appears near or around the cathode which is the negative electrode; this light is known in physics as the negative glow and always appears close to the cathode, the glow arises in the gas itself. The negative glow is rich in the ultra-violet rays, or, as it is said, is rich in actinic properties; the most desirable light for photographically recording sound is always the negative glow light. If the envelope between the cathode and the anode or positive electrode is constricted in any way, or if the electrodes are widely separated, then a different luminosity develops in that section near the anode end of the tube. This is called the positive column, and is distinctly brighter and distinguishable in appearance from the negative glow. In a dumb-bell shaped tube, constructed with two small glass bulbs with a short piece of glass tube between them, both electrodes in the bulb ends would show a negative glow with an alternating current, but only at one electrode on a direct current, and the positive column would appear in the constricted tube between the bulb ends. With both electrodes substantially spaced in the same shell or envelope, and with an alternating high frequency current, the negative glow would alternately show at either electrode, and practically nothing of the positive column would be shown, but with a direct current the negative glow would only appear around the cathode, and the positive glow would appear between the cathode and the anode. If the electrodes are placed closely together, say five to ten millimeters, only the negative glow would appear either on an alternating current or a direct current, but apparently in practice the direct current only is necessary and therefore the most desirable. It is to be remembered that it is one of the claims of the plaintiff, made in support of its patent, that where the electrodes are placed closely together in a gas filled lamp, only the negative glow appears, and that the placing of the electrodes closely together in a gas filled lamp was the invention made by de Forest. Briefly, in the case of a glow lamp, the use of certain gases

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is essential and not optional; a relatively low gas pressure is necessary; the light comes substantially from the gas and not from the electrodes as in an arc lamp; the electrodes are heated but not substantially, the heat being in the gas; the temperature is low; the current necessary to maintain a glow lamp is comparatively small with that required to maintain an arc lamp; the negative glow is rich in violet and ultra violet rays and therefore possesses a high actinic or photographic value. It is common ground that the positive column is unsuitable for photographically recording sound upon a film.

The phenomenon of the negative glow and the positive glow was explained by some of the expert witnesses and possibly I should briefly refer to this in further detail, in order to indicate in a general way the origin of each, the distinction between them, and also because it may assist in a proper appreciation of just what it is that is here claimed as the invention. I shall have particular reference to the evidence of Dr. Johnson upon this point. In the case of glow discharge lamps the electrical current is conducted to the gas by electrons and by positive ions, and the glow phenomenon arises in the gas itself. Some of the electrons come from the cathode, the negative electrode, and they gain such velocity that when they strike an atom in the gas, the atom is broken up into an electron and a residuary part of the atom which is known as a positive ion. These new electrons again collide with other atoms, and thus a great many atoms in the gas are broken up into electrons and ions which assist in the conduction of the current. Some of these electrons and ions recombine again, because they attract each other and form in atom and in that reformation of the atom a light is emitted, a certain electrical resonance is set up in the atom which gives rise to the emission of light, and this gives the glow phenomenon which arises in the gas itself. Further it was explained that the electrons which leave the cathode require to pass through a certain space before gaining sufficient velocity to ionise the atoms, that is to break up the atoms, and in that space there are few ions and very little reformation of atoms and consequently no light. That space is a thin layer near the cathode, from which little light comes, and this is called the cathode dark space, or Crooks

dark space. It is beyond that dark space, ordinarily half a millimeter wide in ordinary discharges, where the electrons from the cathode strike the atoms of gas and new electrons and ions are made, and their reformation as explained makes what is called the negative glow—described as a sheaf of luminosity—surrounding the cathode and separated from it only by the dark space. This glow or luminosity extends to a limited distance in the direction of the sides of the tubes and beyond that there is another dark space, known as the Faraday dark space, in which the electrons travel slowly. Beyond that dark space will appear the positive column—so called because when first observed it was in a long tube and resembled a column—at the anode end of the lamp, depending much, as I have already explained on the shape and construction of the lamp, whether an alternating or direct current is used, and the separation of the electrodes. Near the anode end of the tube, the speed of the electrons is still fairly low, the conductivity of the gas is high and the electrons do not so much break up the atoms into electrons and ions as they do in the negative glow, but they simply disturb the electrons in their orbits around the atom, and that disturbance sets up a resonance which is emitted as light in the positive glow, and the larger part of the light in the positive glow is emitted in that way. All this, of course, was long well known to physicists. It will be observed that the negative glow is always a cathode glow and the positive glow appears apart from the negative glow. The spectroscopic difference is that the positive column is rich in the red and yellow end of the spectrum, and the negative glow is rich in the blue end of the spectrum. In the Neon street signs, it is the positive column that is used. The tubes carrying the electrodes are concealed behind the signs and the only light seen is the positive column. As I have already made clear, what is claimed as the invention of de Forest, is that he was able to exclude, by the particular construction of his lamp, the undesirable positive column by placing the electrodes so closely together that there was room only for the negative glow, the desirable light for sound photography.

For more than one reason it is perhaps desirable that I should describe the infringing lamp, known as the A.E.O.

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lamp, and also explain its origin and development. The A.E.O. lamp was produced originally by Case Research Laboratory Inc. of the State of New York; later, in 1926, I understand this concern became associated with the Fox Company of New York, and the combined concerns became and are known as the Fox-Case Company, and are, I think, now the makers of the infringing lamp. Early in November, 1922, de Forest was using in his experimental work a dumb-bell type of lamp, a lamp having the positive column and working on fairly high voltages; he had used the same lamp in the previous January. On or about March 11, 1922, de Forest approached T. W. Case and informed him that he was having trouble with his lamp, in its going out on modulation, and sought his assistance in overcoming this difficulty; they had business relations prior to this in connection with a thallified cell produced by Case. Concerning this incident Case states in his evidence:

Thinking the matter over it occurred to me that if we wanted a low voltage tube we would have to use something on the electrodes which would facilitate the discharge. I had happened to make, in the invisible secret signalling apparatus, some tubes that we used in a peculiar circuit, which had an oxide coated filament on them. These tubes worked with the filament hot, and they had also worked with the filament cold, at relatively low voltages, that is I mean 100 to 200 volts. I had some of these tubes in the drawer, they were designed to work in a circuit to produce an audio frequency discharge. As they were doing that they had a glow in the tube. They were filled with argon gas. It occurred to me that these worked on such a low voltage that we might possibly be able to use something like that for a light which you could modulate easily on low voltages. That was part of the idea . . . I loaned the two I had, and then we started to make more of them experimentally, and tried to find out how to make them so that we could work up to where we would get the same light intensity and same results out of them. . . . Commercial results I mean, something that would really take the film above the level of the ground noises and would be a commercially practicable thing.

The invisible signal apparatus referred to by Case was used by him while in the United States Naval Service during the war. The glow mentioned by Case as showing in his tube was, I understand, a negative glow. By the early part of 1923 Case had developed his first tube or lamp of the A.E.O. type. Explaining the principal characteristics of the A.E.O. tube, Case stated:—

To get light from this tube nitrogen is the very best thing you can use. Now nitrogen is a gas which is a very poor conductor of heat. If you use nothing but nitrogen your cathode, if it is small, will heat up, and you will come into an arc discharge. Therefore you



must use a gas in there together with the nitrogen, which is a good conductor of heat. Therefore we used helium as the only gas we could find to put in with the nitrogen so as to take the heat away fast enough so that it would not go into an arc discharge . . . . The form of electrode is merely one which is about the only form we can use and coat with oxide material in the way in which we want it. . . . The oxide material in the present light is a photo-active material. I believe that is the reason that we get the high frequency from our A.E.O. lights that you do not get from a light that is not photo-active. I have never heard of an uncoated electrode that has the balance at high frequency compared to low that is not photo-active.

Case, I should state, had been interested for many years in the photography of sound, and had also for several years been engaged in research work on light reactive materials. It is agreed that the oxide coated electrode has utility. The evidence indicates that early in 1923 de Forest, having got Case's lamp, made sound film records with it, and the same were publicly exhibited. It was stated and not contradicted, that de Forest was using the Case lamp at the date of his application for the patent in question, and that he continued its use until some disagreement took place between Case and himself, when, it is claimed, de Forest adopted the use of the Tri-Ergon lamp, a German lamp. I should perhaps proceed a little further in my description of the infringing lamp. The gas pressure used in the A.E.O. lamp is close to 20 millimeters, the percentage of helium used is about 97 per cent and of nitrogen about 3 per cent, it does not employ heavy tungsten ball electrodes but uses a hairpin filament for the cathode and a plate spaced away from the anode, one of the electrodes is coated with barium nitrate, the electrodes are separated by four or five millimeters, and it is operated by a direct current and not by a high frequency current. Such are the chief characteristics of the infringing lamp and the history of its appearance in this litigation.

The validity of the plaintiff's patent is questioned upon several grounds. The point most strenuously contested upon trial was whether the specification, which states the light source to be "a small arc lamp," describes or directs the use of a negative glow lamp. The defendant contends that the specification describes and was only intended to describe an arc lamp, which it is claimed is a source of light different from a negative glow lamp, or any luminous gas discharge device; that if it was in-

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tended to describe a light source functioning as a negative glow lamp, the specification is void for want of sufficient description and for lack of directions as to the construction and operation of such a lamp, and that consequently the specification does not fulfill, in that respect, the statutory requirements; that the specification is ambiguous and therefore bad; that the specification directs the use of the lamp either "evacuated," or "filled with some gas" and as the first alternative is impracticable, the patent is void; that the plaintiff's lamp may be used as an arc discharge lamp which for the purposes of this case admittedly lacks utility, or it may be used as a negative glow lamp, depending upon the pressure of gas and other conditions, and as the specification gives no directions how to obtain the one or avoid the other, without an unreasonable amount of experimental or research work, the patent is bad; that the claims relied upon are void because they include something not mentioned or described in the specification, an enclosed luminous gas discharge device, and because such claims are so wide as to include other known enclosed luminous gas discharge devices, and consequently there has been anticipation of any device so widely claimed. It is also claimed that at the most the plaintiff's invention relates only to some particular new method of applying a well known principle, and if there be invention it is only for an improved method of attaining an old object, and that there has been no infringement because the defendant has not used the plaintiff's method, but another and different method. Again the defendant contends that it has not infringed the plaintiff's patent because it has not used the plaintiff's lamp, but has at the most used a positive film printed from a negative film made in the United States by a third party, in the production of which the plaintiff's lamp was used, and the plaintiff's patent does not purport to claim, and cannot in law claim, invention in the product of that lamp; it may not be necessary to consider this last point but I think it should be mentioned.

This might be a convenient stage at which to state briefly the legal principles that have been laid down, and gener-

ally accepted, relative to the construction of the specification of a patent. The specification must "clearly and fully describe the invention and its operation or use as contemplated by the inventor" and it must "set forth clearly the various steps in . . . the method of constructing the machine, manufacture, etc." This was an obligation of the Common Law and it is now an obligation by Statute. If the specification uses language which when fairly read, is avoidably obscure or ambiguous, the patent is void, whether the defect be due to design, or to carelessness, or to want of skill; nothing can excuse the use of ambiguous language when simple language may easily be employed, due allowance of course, being made where the invention is difficult to explain and there is a resulting difficulty in the language. If the terms of a specification are so ambiguous that its proper construction must always remain a matter of doubt, it is the duty of the Court to declare the patent void. The specification must be read in its ordinary and natural sense, though it may sometimes happen that in construing a specification the Court may be justified in understanding the language not according to its ordinary meaning, but in the way in which it would be understood by skilled workmen called upon to act according to its directions. The specification must be intelligent to ordinary workmen possessing that degree of skill, intelligence and knowledge fairly to be expected of them in respect of that branch of the useful arts to which the invention relates; and while the specification is not addressed to people who are ignorant of the subject matter, yet they are not required to possess that great skill, scientific knowledge or power of invention, which would enable them by themselves, unaided, to supplement a defective description or correct an erroneous description, but this of course would not be applicable to slight defects and errors which any workman of ordinary skill and experience would perceive and correct. A specification also is bad, if it contains statements calculated to mislead the persons to whom it is addressed, or if it renders it difficult for them without trial and experiment to comprehend in what manner the patentee intends his invention to be performed. If a person of skill is to come in, and by means of his skill and experience without experiment is to correct mistakes or supply important omissions in a specification,

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or decides that the directions of the specifications are not to be followed, then the specification is bad because it has not in reality given any useful or valuable information to the public. Further, if a specification describes two things, one practicable and the other impracticable, or if it directs two alternative ways of constructing or using an invention and one is impracticable or useless, the patent is bad, and if a skilled workman would know the impracticable thing or the useless alternative which could not be acted upon, and so would confine himself to the other, that would not warrant giving effect to the specification, because that would not be to construe a specification according to the language of the workman instead of according to our ordinary language, but to reject something claimed by the patentee, because a workman would know that it was an impractical direction or claim. The patentee must make it perfectly clear what it is he claims as his monopoly; the public are entitled to know at once what it is by reason of the patent they are excluded from doing. If a specification describes anything which is not new, it must distinguish that which is old from that which is new, and claim only the latter; if claim is made to anything which is old, the specification will be bad and the patent void, on the ground that the patentee has claimed something which lacks the essential feature of novelty. All this will be found in practically the same words in the following authorities: *Simpson v. Holliday* (1); *Beard v. Egerton* (2); *Natural Colour Kinematograph Co. v. Biochemes* (3); *Neilson's Patent (Neilson v. Harford)* (4); *Plimpton v. Malcolmson* (5); *Parke B. in Neilson's Patent* (6); *French Complex Ore Reduction Co. v. Electrolytic Zinc Process Co.* (7).

Whether the specification of de Forest discloses the invention it is claimed he made, that is, a negative glow lamp, and whether the same is sufficiently described in his specification may first be considered. The question for determination is not whether the plaintiff's lamp under certain conditions might not function as a negative glow lamp, it is whether

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| (1) (1866) L.R. 1 E. & I. App. 315. | (4) (1841) 1 W.P.C. 331, at p. 341.  |
| (2) (1847) 2 C. & K. 667.           | (5) (1876) L.R. 3 Ch. D. 531, 568.   |
| (3) (1915) 32 R.P.C. 256.           | (6) (1841) 1 W.P.C. at pp. 314, 315. |
|                                     | (7) (1930) S.C.R. 462.               |

the specification sufficiently describes and directs the use of a negative glow light as a light source, in the recording of sound upon a film, and whether it sufficiently sets forth the various steps in the construction or manufacture of a negative glow lamp and its operation or use. It was admitted by de Forest that neither the light from an arc discharge nor a positive glow were suitable for attaining the object of his alleged invention, and that a negative glow light alone was useful; he must therefore be taken to mean, and it is in fact so contended, that in his specification he did describe as his invention, a negative glow lamp, its method of construction and its operation or use. There is a vital distinction between these several mentioned lights, and de Forest was aware of the distinctive characteristics of each, at the time of his alleged invention. It was, de Forest stated, because, in a glow lamp, he had placed the electrodes so closely together in a gas filled lamp that the negative glow became the only light to consider,—the positive glow being suppressed by this construction—and that for this reason his lamp was new and useful as a sound recording light source. Now if that was the intention, it would appear to me, that nothing could conceivably be easier than for de Forest to describe with clarity and in very specific terms in his specification, as he did years later in his evidence in this action, the nature of the light source he had discovered as being new and useful in the photography of sound, the light source he alleges to have ultimately selected in preference to a gas flame, or a fine incandescent lamp filament, both of which he says he had considered and abandoned in favour of a negative glow lamp. There was no occasion, it seems to me, for ambiguous or uncertain language, in expressing a description of the invention and its method of construction, upon the ground that the invention was difficult to explain, for it was not difficult to explain. Nor was there any difficulty in setting forth in plain language all the directions reasonably necessary to the successful operation of the alleged invention.

Let us now examine the language of the specification which states, "I employ a small arc lamp"; gas may be used to "make the light from such arc as rich as possible in ultra violet rays." We find many references in the specification to an arc lamp, and the light from an arc

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lamp, and there is no suggestion in terms of any other lamp, or a light from any other lamp. Several of the claims in the application for patent, but not those relied upon in this action, speak of "an electrically lighted lamp." It is to be assumed that de Forest knew as much about his invention in 1920, when it is claimed it was first described in a specification, as he did at the date of the trial of this action; any new methods of using his small arc lamp, or any new and useful ends to which it might be applied, since discovered or invented, cannot be relied upon to support the invention with which he entered the Patent Office in 1920; he must leave the Patent Office with nothing more than the invention which he brought there, and as described in his specification. Now, if de Forest chose to designate as his light source an arc lamp, there being such a lamp and ordinarily characterized by the incandescence of the electrodes, but which lamp he now says was not useful for his purposes and was not his invention: if he fails to mention by its well known name the useful lamp, which he says was his invention,—a glow lamp showing the negative glow only—and if he fails to describe it even in general terms so that those to whom the specification was addressed might readily recognize the invention as a negative glow lamp and nothing else, then, it seems to me the patentee is confronted at the start with the very formidable challenge that he has failed to describe properly and sufficiently his invention. There can be no justification for reading this specification otherwise than in its natural and ordinary sense. It is not a case, I think, where it becomes necessary to enquire what meaning the skilled workman would attach to the specification. If there be any doubt as to the meaning of the specification, the patentee must suffer the consequences of a doubtful or ambiguous specification, even if such defects were altogether innocent. It seems to me that there is doubt in this case as to the meaning of the specification, because, if for no other reason, the patentee describes the source of light as "a small arc lamp," and that is now claimed to mean and to be "a negative glow lamp," another and well known source of light, and long known as such it is admitted by the plaintiff. The entire absence of reference to, or description of, a negative glow lamp or an enclosed luminous gas discharge lamp or

device, the thing which de Forest says he invented, and the failure to plainly direct the use of a negative glow light as a source of light, is I think, fatal to the patent. If the term "arc lamp" was at the time of the alleged invention so used as to comprehend a positive glow lamp, a mercury vapour lamp, and possibly various other sources of light, as is claimed by de Forest, then clearly it was all the more necessary to designate by name, or to reveal in general terms at least, the negative glow lamp, not only that the invention might very definitely be known to others, but because a negative glow light was different from some other light sources falling, it is alleged by the plaintiff, within the popular designation of "arc lamps", but none of which were suitable for the purposes which de Forest had in mind. I have already explained that a glow lamp is one in which the light comes chiefly from the gas therein contained and which is excited electrically, and not from the electrodes. Dyer stated in his evidence, as also did de Forest, that glow lamps were old and well known as such, and the former testified that much had been written concerning them in the past half century or more, but all that is a very good reason why such a lamp should be named and described in an application for a patent, if its selection or construction constituted an invention, and also because it is imperative that the public have a clear understanding of the monopoly claimed. The phenomenon of the glow light doubtless was long since known, and also the distinction between the negative glow and the positive glow, but in truth to a very limited circle, nevertheless the negative glow lamp was not so old or well known in its application to the photography of sound; the use of any source of light for recording sound photographically was a comparatively new art, and that would be a reason why the particular light source claimed here as an invention should have been designated by its well known name, or at least should have been so generally described as to be at once recognizable as a negative glow lamp, and distinguishable from other lamps with which it might popularly be confused. That which was and is known as a glow light, either negative or positive, was never confused, in my opinion, with any other light source, and there is no satisfactory evidence supporting such a contention. If one looked to

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the application of 1920, which is in evidence, and wherein the patent in suit is alleged to have been first described, there is nothing whatever to suggest the use of the small arc lamp, as a negative glow lamp, or as a luminous gas discharge device, as is now claimed. The source of light there is variously referred to in the application as a sound controlled light, a light emitting device, an electric lamp, an incandescent filament lamp, and an alternating current lamp; in my opinion, all this does not remotely describe a negative glow lamp, or a luminous gas discharge device.

Counsel for the defendant contended that certain circumstances disclosed in the evidence supported the view that the specification was not intended to describe what de Forest now claims to be his invention, and that he had not made his alleged invention when his specification of 1920 was prepared. While, in the result, this adds nothing to what I have already said, still it is of some importance, and might conveniently be mentioned here. It was pointed out that de Forest admitted, that in 1919, he had abandoned experiments with the incandescent filament lamp because it appeared to be of no value. Defendant's counsel argued from this, that inasmuch as de Forest had abandoned the incandescent filament lamp as a light source the year before his application for patent in Canada in 1920, and then in that application having mentioned the use of the small arc lamp with which we are here concerned as well as the incandescent filament lamp which had proven not to be useful, that he could not have experienced any useful results from either light, otherwise the application for patent would not have put both lamps on the same footing, and the application would have been confined to the lamp from which the patentee had obtained useful results. Again it was pointed out that in 1921 de Forest made application in the United States for a patent of another light source, which was not a negative glow light, but a positive column light, and which was intended to be used only with the positive column light. If de Forest had ascertained prior to October, 1920, that his small arc lamp functioned as a negative glow lamp because the electrodes were placed closely together, and could be successfully used for recording sound, it seemed rather incredible counsel argued, that



he should have applied in the United States in March, 1921, for a patent for a positive column lamp to be used for the purpose of recording sound, which lamp lacked utility for his purposes, and which positive column light he now claims to have invented means of avoiding in a glow lamp, prior to 1920. A Canadian patent issued to de Forest for the positive column light source just mentioned. Then defendant's counsel proceeded to argue that de Forest could not have invented a negative glow lamp in the year 1922, because he admitted having adopted in that year in his experimental work for photographically recording sound, a dumb-bell lamp, which has the positive column light, and with this light he gave in that year a demonstration to the press in Berlin. It was urged that it was inconceivable that one who had discovered in 1919 that the only useful lamp for his avowed purposes was a glow lamp showing only the negative glow, should in 1921 apply for a patent of a lamp to be used with the positive column, and in 1922 use another positive glow lamp, the dumb-bell lamp. It was claimed by Mr. Chauvin, counsel for the plaintiff that it was the cathode bulb of the dumb-bell lamp that was used or exposed before the film. Even if that be correct the dumb-bell lamp did have the positive column and was the kind of light that de Forest claims his small arc lamp altogether suppressed. The invention claimed in this case is a glow lamp that has the negative glow only and does not show the positive column. Then it was said that de Forest in the autumn of 1922 after returning to New York from Berlin with the dumb-bell lamp as the most advanced and practical lamp of which he had knowledge for the purposes in which we are interested, got into communication with Case, from whom he obtained a lamp operated with a negative glow and, it is claimed I think, that this was the first purely negative glow lamp that de Forest ever used in his experimental work. In 1923 de Forest used the Case lamp in a demonstration or sound motion pictures in New York. When de Forest and Case became estranged in their business relations, de Forest ceased using the Case lamp, and adopted the use of the Tri-Ergon lamp so called, controlled by European patents, which was a negative glow lamp, and which I under-

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stand is the lamp the plaintiff now uses. All these considerations I must say, strengthen my impression, that de Forest had not in 1919 or 1920 consummated an invention of the light source which he now claims to have then invented, and consequently he could not in 1920 properly or sufficiently describe it, but if he did then make the invention he failed to describe it in the manner the law requires.

But that is not all that lends weight to the contention that the specification is void for uncertainty. Referring to the diagram of the lamp shown in the drawings accompanying the application of October, 1920, and that of June, 1923, both being the same, it will be seen that the lamp is represented as spherical in shape. Two expert witnesses for the defence stated that usually in gas discharge devices used in recording sound, the electrodes are placed in a narrow or cylindrical tube, and as near the end as possible, so that the light source may be as near as possible to the film, whereas in the case of an arc discharge lamp it is usually necessary to keep the electrodes as far from the glass surface of the tube as possible, to avoid damage to the tube by overheating, in which case, a spherical tube might be very desirable. In fact, de Forest at first used a lamp of the shape appearing in the drawings but later he adopted a cylindrical shaped lamp, although he says this was owing to the fact that it was more convenient for the tube manufacturer to make the complete lamp in that form. I think it is a fact and it seems reasonable, that in a glow lamp, the glow should be as near as possible to the film or optical system, and it is equally reasonable that in the case of an arc discharge lamp, the arc stream should be some distance from the envelope. By itself I would not attach much importance to this point. Again expert witnesses have testified that the preferred use of "two heavy tungsten ball electrodes" indicates an arc discharge lamp which invariably produces high temperatures which the electrodes must withstand, whereas in a negative glow lamp, the electrodes do not become hot and there would be no advantage in using metal electrodes with a high melting point. Then it was urged that tungsten electrodes are not desirable in a glow discharge lamp, because the bombardment of the ions cause the tungsten to sputter; and that

the separation of the electrodes by the specified space of only one half a millimeter indicates the use of an arc discharge because it would require a smaller potential to break down the gap, whereas, in a glow lamp they might be separated from five to ten millimeters. In the case of the A.E.O. lamp, as presently used, it was stated that the separation was about eight millimeters, and such a separation had the advantage of tending to localize the glow between the electrodes rather than surrounding them, and de Forest admits he obtained better results from a separation of three or four millimeters, approximately the separation originally used in the Case lamp. The filter which is mentioned in the specification, it is admitted by de Forest, is of no use in a glow lamp, whereas according to some witnesses it might be of advantage in an arc discharge lamp in screening out undesirable rays, and also in modifying the intense light coming from such a lamp, which makes modulation indistinct. Dr. de Forest states in his specification that he had best results in recording sound by using a colour filter, preferably a dark blue filter. It was also suggested that because de Forest did not give fuller directions as to the gas or gases to be used, the pressure of gas and other particulars relating to the operation of a glow discharge lamp, that it was a reasonable inference that he must have intended the lamp to be used as an arc lamp or he would have given more precise information upon these points to the public. I think also that the fact that the patentee did not claim as his invention, "an enclosed luminous gas discharge device," until 1925, possibly earlier in the United States, is also a circumstance of weight against the plaintiff. There is no description of a light source in such terms in the specifications of 1920 and 1923. All this lends weight to the contention that the specification in question is obscure and ambiguous.

One point raised by the plaintiff may be mentioned here. It is claimed that a glow light must have been intended by de Forest because no means are provided for striking the arc lamp. Striking means for securing an arc discharge would not be necessary if the lamp were filled with gas. The evidence perhaps is not clear as to whether the arc could be struck if the lamp were evacuated. If the lamp were evacuated and striking means were necessary, then, it is as reasonable to say that this was an omission of the

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patentee, or that he thought it unnecessary to mention it because the necessity of it would be obvious to those competent in the art, as to say that the omission of striking means is an indication of a glow lamp. That is not I think a good answer to an ambiguous or defective specification.

It is agreed that the use of gas is imperative to make operable a negative glow lamp and that the plaintiff's lamp would not successfully operate if evacuated. The specification does not state that a gas filled lamp must be used to make the invention operable. The use of gas is only alternatively suggested. The specification states, "I employ a small arc lamp . . . , either evacuated or filled with some gas, such as nitrogen, mercury vapour, etc., to make the light from such arc as rich as possible in ultra violet rays." A glow lamp being one in which gas is illuminated by the passage of electricity between two electrodes, I find it difficult to believe, in view of this language, that the patentee really intended to describe and direct the use of a negative glow lamp, but at least I am certain that he has not sufficiently done so. To say that a lamp may be filled with gas is not to say that it is to be operated as a negative glow lamp. Assuming that "either evacuated," or "filled with some gas" does not imply complete evacuation, or that the tube should be completely filled with gas, yet these words, in my opinion, can only be read to mean that the lamp might be evacuated so that a residual air only remained and thus used,—and de Forest says he did so use it—or alternatively, that gas or gases might be introduced to improve the actinic qualities of the light. There is no ground for construing these words to mean, as was suggested, a direction that the tube was to be exhausted and then filled with gas, and again exhausted to secure that pressure of gas under which the lamp would function as a glow lamp. That would be straining the language of the specification to supply something either not described in the specification at all, or something ambiguously described. I have already quoted from the specification of 1920, the description of two light sources, one being a small incandescent filament lamp, the other a small arc lamp. The patentee had, I think, the same conception regarding both forms of lamp, that is, they might be used either evacuated or filled with gas. One of the reasons why he expressed a preference for the use of gas in the incan-

descent filament lamp was to improve the actinic qualities of the light, and that light was clearly not a glow light. For the same reason, and none other, he suggests the use of gas in a small arc lamp. There is no possible ground for the suggestion that the lamp was directed to be used exclusively as a glow lamp, and therefore always to be filled with gas, in fact the language of the specification directly negatives such a suggestion. The use of gas in an arc lamp does not constitute a description of a glow lamp, nor is it a direction to use a lamp as a glow lamp. Therefore, in my opinion the specification means and was intended to mean, that the small arc lamp might be used evacuated. If the lamp could not be used satisfactorily if evacuated, and this is agreed upon, then the specification is clearly bad, because it specifies two methods of using or operating the lamp, one of which is impracticable and useless for the purpose the patentee had in view.

The small separation of the electrodes is now emphasized as the real merit of the invention, and I have already quoted from the patentee's own evidence, and that of Dyer, showing that it is the provision of such means that is now claimed as the real merit of the invention. But if this was so, it was imperative, I think, that the patentee should have stated in very clear language that such was his invention, that he had invented a new and useful way of constructing a negative glow lamp, a well known source of light, so as to exclude altogether the presence of the positive glow, that is, by using electrodes separated by a small gap, in a gas filled lamp used as a glow lamp. And probably he should have claimed it as being something new in a combination of many old elements, although I am not so deciding. If it was clearly in the patentee's mind that he had invented a new and useful way of constructing a glow lamp which permitted only the negative glow and excluded the positive column, is it possible that he could have failed to have so stated the fact in his specification? I do not think that such a thing is conceivable. Had that been done it might at once have identified the lamp as a negative glow lamp, and its construction would perhaps have been sufficiently described. A specific separation of the electrodes is mentioned of course, but no particular quality or value is ascribed to that separation, and there is a complete absence of any claim to invention in the separation of the

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electrodes, in any of the claims. The selection of a separation of the electrodes by one half a millimeter is in itself not decisively suggestive of an intention to use a negative glow lamp, rather it would seem to restrict unnecessarily the natural area of the glow, particularly I think when one takes into consideration the dark space surrounding the cathode. In fact, de Forest later used a wider separation which he said was more preferable. Furthermore, the electrode separation specified would be equally satisfactory, if not more so, for the use of the lamp as an arc discharge lamp. If the spirit of the invention lay in placing the electrodes closely together for the purpose of securing the negative glow only, and eliminating the positive column, then I say that the specification is singularly deficient in pointing out what was the real invention for which a monopoly was claimed. It is begging the question to say as did Dyer, that when de Forest showed a glow light it was obvious that he intended that the lamp was to be operated with a cathode glow. I do not think de Forest did, to use the words of Dyer, show a glow light or a cathode glow.

It is common ground that the plaintiff's lamp, if filled with gas, might be operated either as an arc discharge lamp or as a glow lamp, depending upon the pressure of gas and voltage. This was admitted by de Forest, and he stated that the pressure favourable for an arc discharge was two-thirds of an atmosphere, whereas for a glow it was about five or six one-thousandths of an atmosphere. That fact makes this case an unusual one, but it does not alter the requirements of the law, as to the description of an invention. If the specification describes a tube which will function successfully as a negative glow lamp if certain gases are used and a certain pressure of gas is employed, as an arc lamp if another pressure of gas is used, and not at all if no gas is used, and there are no specific directions as to the appropriate gases to be used or the approximate pressure of gas to be employed, in order that the lamp might function successfully as a glow lamp, then I think the specification is again bad. And particularly would this be so where the light source is described as an arc lamp, and where there are no directions to use exclusively a gas filled lamp. If the matter of gas pressure or voltage is a condition for the successful operation of the plaintiff's lamp as a negative glow lamp, that pressure should be described

and stated, at least in general terms, if the light source is not mentioned and described as a negative glow light. All that is left to others to ascertain. As the specification now stands, any person attempting to construct and operate the plaintiff's lamp would, in my opinion, require to do a very considerable amount of experimental work. In the first place, he would probably experiment with the lamp not filled with gas, and would fail it is agreed. He then would experiment with a gas filled lamp, and he has not very definite instructions what gas or mixture of gases to use, because the inventor has not given the results of his experiments with gases, he not only does not express a preference for any gas or gases, but states his directions as to the use of gas in a very casual and general way. One gas seems to have the same value as another, and there is no suggestion as to a mixture of gases. He would have to ascertain the proper gas or mixture of gases by experimental work. Then in his experimental work he would be as liable to get an arc discharge light as a negative glow light, having no directions as to gas pressure, and if he got an arc discharge which he probably would if he followed the method of filling the lamp described by de Forest, he would have no reason for not believing that that was the light the patentee described in his invention; and if he got a negative glow light there would be no reason for his feeling confident that that was the source of light the patentee had in mind. The maker of the lamp is not the person who photographs sound upon a film, variable area and variable density is a closed book to him and the specification and claims say nothing about it, and therefore these factors could not assist him in constructing the patentee's lamp. Had the specification stated a negative glow light was to be used, and had explained the purpose the patentee had in mind respecting the spacing of the electrodes, the one doing the experimental work, if a person having knowledge of the phenomena resulting from the passage of electricity through gases and how affected by varying gas pressure, voltages, etc., might succeed with but a reasonable amount of experimental work. But as the specification stands, the person to whom the specification is addressed, seeking to construct the plaintiff's lamp, without any other aid or knowledge, would require to have all the knowledge and inventive skill of the patentee. It is no answer to say that any competent

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person would know that the patentee meant the use of a glow lamp, the use of the cathode glow, and should know what pressure of gas and what voltage should be used to obtain either an arc discharge or a glow discharge. I do not think he would or should be expected to know so much. That in my opinion is not the qualification which a skilled workman, called upon to construct the invention from the specification, is supposed to possess. That would put the skilled tube maker on the same plane as the inventor. The scientifically trained man in this particular art with a slight hint might possibly construct a negative glow lamp, but if he did so, it would be because of his own skill, knowledge and experimental work, and not because the specification taught him how to do it. But in my opinion the specification is not addressed to that class of persons. Uncertainties and deficiencies in a specification cannot be amended or explained away years afterwards at a trial, that is too late. The law requires that to be done unequivocally in the specification. The plaintiff's lamp therefore being capable of being used either as a glow lamp, or as an arc discharge lamp, according to the pressure of gas and other conditions, and the patentee not having directed the exclusive use of the lamp as a glow lamp, and not having explained that an arc discharge light was unsuitable and how it could be avoided, this, I think, renders the specification bad. The persons to whom the specification is addressed are not expected to possess that skill and knowledge, or to perform that amount of experimental work, which would enable them to ascertain the one source of light which would be suitable for the purpose of recording sound upon a film, which is the alleged invention, or to ascertain that the other light was unsuitable for the same purpose.

The validity of the plaintiff's patent is also challenged upon the ground that the language of all the claims relied upon are so wide as to include any enclosed luminous gas discharge device, that is, any lamp in which there is a luminosity produced by an electric current passing through gas, and that the claims thus so broadly stated include and describe devices that are old and are therefore bad. I have already quoted one of the four claims relied upon, and there is really no distinction between them. Assuming that de Forest had invented a negative glow lamp, an enclosed luminous gas discharge device, just as he described it in



his evidence, are the claims relied upon valid? De Forest stated in evidence that glow tubes of various sorts were very old. There can be no doubt but that the mercury arc lamp, or more properly speaking the mercury vapour lamp, usually referred to as Aron's lamp at the trial, a positive column light, is a luminous gas discharge device; this was in express terms admitted by Dyer, one of the plaintiff's expert witnesses. This lamp, and there are many of the type, was used and known prior to any date referable to the alleged invention of the plaintiff's patentee, and in connection with the recording of sound upon a film. Then there is the Gehrcke tube, a negative glow lamp, which may also be properly described as a luminous gas discharge device. It was urged that the area of the glow in the Gehrcke tube varied, that is to say, that as the current fluctuated the lateral length of the negative glow contracted or extended, while the glow in the plaintiff's lamp does not so vary; but that did not make it any the less an enclosed luminous gas device, and the claims do not distinguish between the lateral extension of the negative glow and the intensity variation of the glow. Ruhmer and Lauste, when working together prior to the date of the plaintiff's alleged invention, had used a two electrode gas filled tube made by Ruhmer, and a luminous discharge passed between the electrodes. Dr. Tykociner had used long before de Forest a Geissler tube as a glow discharge tube, and he also used the Von Lieben tube, a gas discharge tube of the thermionic type, and described in the patent to Von Lieben, Ries and Strauss; these two light sources were gas discharge lamps, and would fall within the description of "an enclosed luminous gas discharge device." In the Stocks patent, a United States patent, which was prior in date to de Forest, the light source is described as preferably a mercury vapour lamp, the record on the film when developed being one of variable density; the source of light described in this patent also falls within the ambit of the plaintiff's wide claims. Then there is the Swiss patent, issued to Vogt, Engl and Massole, the object of which was to record sound frequencies upon a film. The application for this patent was made in Switzerland in March, 1921, and the priority date of March, 1919, was claimed, based upon an application made in Germany on that date. In this patent the source of light is described as being "preferably a luminous

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gas discharge, for example, a mercury vapour lamp or any other gaseous tube with a luminous discharge." It is not necessary to make further reference to the prior art, or to prior user, upon this point. The claims of the patent cover a positive column light as well as a negative glow light, in fact any luminous gas discharge device. It appears to me therefore that de Forest, in his claims, does not distinguish between what is old and what is new. His wide claims to "an enclosed luminous gas discharge device," for the purpose of recording sound photographically upon a film, includes, in my opinion, old and well known devices falling within such claims; in other words, there has been anticipation. The claims are so wide as to include any conceivable kind of a gas discharge lamp, whereas the patentee alleges that all he invented was a new and useful negative glow lamp. Upon this ground I think the claims relied upon are bad. They are of course also bad because they include something that is not described in the specification.

By reason of the conclusions which I have already expressed, it is not necessary that I should express any opinion upon any of the remaining defences raised by the defendant at the trial, because it follows from what I have stated, that the plaintiff's action for infringement in respect of this patent must fail.

The second patent, which is alleged to be infringed by the defendant, is patent No. 279,863. This patent was applied for in April, 1923, by Lee de Forest, and issued on May 1, 1925, and is described as "Talking Moving Picture Attachments." The specification states that the invention consists of "substantially the construction, combination, location and relative arrangement of parts." Again the patentee explaining his invention in his specification states:—

It will be seen from the foregoing that I have provided an exceedingly simple and efficient arrangement for combining sound photography with motion picture photography as practiced with the present types of motion picture projectors or cameras and one which makes it possible to convert standard projectors or cameras into talking moving picture projectors or cameras at minimum expense and with minimum alteration, and at the same time permitting the normal operation of the operation or projector when desired for either purpose, without interference by the attachment while at the same time having the attachment at all times available for combined operations where desired.

There are altogether fourteen claims, the first seven of which describe the alleged invention as a combination comprising a motion picture machine, a film magazine and an intermittent feed sprocket, a light controlled sound reproducing apparatus positioned between the magazine and the sprocket, and means for controlling the speed of travel of the film through the apparatus. That describes, if I am not mistaken, a complete and unified sound and picture projecting device. The remaining claims relate to a sound picture attachment for motion picture machines, comprising a casing provided with a film path passing through it and separating the casing into chambers, aligned slits forming part of the film path, and means for causing the film to pass between the aligned slits under tension. What the last seven claims describe as an attachment, is the same thing as the specification describes as an arrangement for combining sound photography with motion picture photography, and what the first seven claims describe as a light controlled sound reproducing apparatus. I doubt whether the word "attachment" as used in the specification and claims is appropriate.

In reproducing sound that has been photographically recorded upon a film, back into the original sound waves impressed upon the microphone, and in projecting the same upon the screen, a certain mechanism or apparatus is required, consisting of a lamp or light source, lenses, a film path, film magazines, an intermittent feed sprocket, a photo-electric cell, etc.—it is not necessary to describe all this in detail—and that combination or apparatus for reproducing sound recorded upon a film was referred to throughout the trial as "a sound head." The patent claims refer to it as "a sound picture attachment," and it is the thing which at the trial was claimed as the invention and said to be infringed. The apparatus which projects a picture upon the screen is usually called a motion picture projecting machine, and this machine during the course of the trial was usually designated as "a picture head." It will probably be convenient for me to continue the use of these terms as meaning respectively the sound reproducing mechanism, and the motion picture projecting mechanism. By combining the picture head and the sound head, and by the introduction into the combination of a film magazine, an intermittent feed sprocket and

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a picture and sound film, it is possible to combine sound photography with motion picture photography, so that sound and picture may synchronize and be projected together upon the screen. It is claimed that de Forest first conceived the idea of putting the elements forming the sound head into a separate attachment, or unit, so that it might be applied to a standard picture head; that is what is claimed to constitute the invention in this patent.

The plaintiff's sound picture attachment is itself a combination of many elements, and speaking generally at least they were old and well known. The statute requires that in the claims the patentee shall state distinctly what it is he claims as new. In this case, it appears to me, no claim was distinctly and definitely made to invention in respect of any one or more of the elements of the sound head or attachment. However, at the trial it was claimed that there was invention in the sound film gate, one of the elements in the attachment or sound head combination, and that point may first be considered. In a combination patent particularly, if invention is claimed for any integer in the combination it must be described and claimed as new, and clearly claimed; otherwise the invention can only be in the combination, if at all. I very much doubt if this has been done or that the law in this respect has been complied with but it is not necessary that I should express a definite opinion upon the point. As I have just stated, it was contended at the trial, that invention was to be found in the particular construction of the film gate or path, that is to say, the patentee claims that he has invented new and useful means for guiding and pressing the film close to the light slit, a small aperture through which light is emitted upon the film as it passes on its way from the film magazine,—and the film must of necessity pass in front of the light aperture—thus preventing any lateral movement of the film, which would be fatal, as it rapidly passes in front of the light aperture. This film gate, it is claimed, does not interfere in any way with the speed of the film or with the rest of the mechanism. I do not think there is any invention whatever in the construction of what is called the film gate. The film must pass in front of the light aperture, and rapidly. It is quite obvious that as the film passes the light aperture its speed must not be impeded, it must be under tension, there must be no move-

ment of the film except the onward movement, and it must be kept in close contact with the light aperture. Some means is probably desirable and necessary at this point, to guide and control the film with unfailing fidelity in its predetermined motion and position, as it passes in front of the light aperture. The provision which the plaintiff's patentee makes in this regard, and which it is now claimed constitutes invention, might obviously be done in a score of slightly different ways, but I do not see room for invention in selecting one way over another. I very much doubt if there could be invention in any conceivable means that might be adopted to perform this function. Something, I should say, was necessary to guide the film and press it against the light aperture. If it was not necessary to do this at all, then that would be the end of this issue. Prior patents refer to means of the same nature for performing the same function. Possibly it was not even necessary for a patentee to say in his specification how this should be done, although it might be proper to say that it should be done if found necessary. It would occur to anybody, I should think, that some device should be employed to conduct the film past the light aperture rigidly and so as to ensure only a forward movement. I should think that any competent workman asked to construct some means of performing the function of the plaintiff's film gate would do so without difficulty.

To combine a sound head and a picture head, so that each would function in the combination so as to produce sound and picture upon a screen was not new. This was described in prior patents, for instance, those issued to Bullis and Ries in the United States, but, it is said, they were described as being structurally united and could not be readily separated. Assuming then that the prior art shows a sound head and a picture head in combination with the other essential elements in a sound and picture projection device, but structurally so united as to constitute one unit, is there invention in the construction of the sound head as a single unit with provision for attaching it to a standard motion picture projecting machine or picture head? The sound head and the picture head, and all the other integers in the combination, each perform the same function however they are united, whether the sound head and picture head are constructed as two units and then

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made one by attaching them together in some way, or whether they are so assembled together in the first instance that they cannot easily be separated. The invention claimed at the trial was not in combining a sound head and a picture head so that they might function as a sound motion picture machine, that in my opinion was old in any event, although the first seven claims would seem to claim that as the invention. The invention claimed at the trial was in constructing the sound head as a single unit, for the sake of convenience and cost, it was said, so that it might readily be attached to a picture head. I do not think that constitutes invention, and at the same time I might also say that I do not think that invention is to be assumed or established because the sound head is positioned either above or below the picture head. I do not mean to say that in combining together a sound head and a picture head, along with the other necessary elements, so as to project sound and picture simultaneously and in synchronism upon the screen, did not when first made public produce a new and useful result, but that is not this case. The combination of sound and picture heads projecting sound and picture was not new, that as I have already said had been described in the prior art, but the claim is that in such prior art the sound and picture heads were structurally tied together, whereas in de Forest the sound head is a unit by itself and designed to be easily attached to or detached from a picture head. If the heads are built as units, it would be necessary to unite them by some means before they could in combination produce the desired result. The process of uniting the sound and picture heads so as to function in combination, so far as I can see, is practically the same, whether they are originally constructed as units and then united, or whether they are in the first instance united; in the first instance a different arrangement of some of the parts might be necessary. The sound head and picture heads are, I think, two separate things to start with, and for the purposes in which we are interested, they must be united so as to work in combination. When that is known I do not think there is invention if one decides to take a standard picture head and unite it with a sound head, that in reality was what would be done had they been structurally united at the start. I do not think that the plaintiff's attachment

advances the prior art sufficiently forward as to justify one in saying that there is invention.

Let us assume however that there was room for invention in constructing a sound head as a single unit. Bullis in his specification states that "the mechanism for moving the films and projecting the pictures may be of the conventional construction". I have no doubt whatever that Bullis had in mind and meant by these words to say, that the standard motion picture machine might be used and that a sound head could be attached to or united with it to function in combination. Considering that the motion picture projecting machine long preceded the introduction of sound motion pictures, it is more than probable that the mind of any person interested in the development of the art of sound and picture projection in synchronism would at once turn to the conventional picture projecting machine as a start. The reproducing sound apparatus described and used by Tykociner in 1922 was designed for either a Simplex or a Pathé projecting machine, which were types of projecting machines then used in motion picture theatres. Lauste in his work used a Pathé projecting machine. So if the plaintiff's alleged invention be regarded as a mere attachment, a sound head constructed as a unit to be attached to a picture head, the idea was not a new one, and had been anticipated. It was not contended that the plaintiff's attachment was so much better than any other prior and known attachment, that the improvement constituted invention; the case was not put on that footing, it was claimed that the plaintiff's single unit attachment was the first to be invented.

I am therefore of the opinion that the plaintiff fails in its action for infringement in respect of this patent, as well as in the other, and costs will follow the event.

*Judgment accordingly.*

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WESTERN CLOCK COMPANY.....PETITIONER;

VS.

ORIS WATCH COMPANY, LTD.....RESPONDENT.

*Trade-marks—Expunging—Calculated to deceive—Abandonment—  
Intention*

By its action, Petitioner, owner of the trade-marks "Big Ben", "Baby Ben", "Pocket Ben", "Glo-Ben" and "Ben Hur", seeks to have the trade-mark "Bentima", owned and registered by the defendant, expunged, on the ground that the same was liable to confuse and deceive the public.

*Held*, that as the trade-marks in question consisted of distinctive names and were printed in such a conspicuous place and manner, there could not be any confusion as to which was which, and the public, even the unwary and incautious purchaser, could not be made or led to purchase the goods of the defendant for that of the plaintiff; that the defendant's trade-mark was not liable or calculated to confuse or deceive the public, and was properly registered and should not be expunged.

2. That the fact of non-user of a trade-mark alone does not establish the abandonment thereof; to succeed in such contention, it must be established that the original owner of the mark, not only discontinued its use, but also intended to abandon the same.

PETITION to have the trade-mark "Bentima" expunged.

The petition was heard before the Honourable Mr. Justice Audette at Ottawa.

*W. D. Herridge, K.C.*, for plaintiff, argued that the use of the trade-mark "Bentima", as applied to watches created confusion in the minds of the public, accustomed to buy plaintiff's products. The use of the syllable "Ben" with any prefix or suffix constituted infringement of plaintiff's trade-mark. That the use of "Ben" by defendant would lead the public to believe that the goods so marked were the plaintiff's, being of the same type of articles. That moreover the respondent had never any intention of using the trade-mark in question and, in fact, had never used it, or, if at any time the trade-mark was used, it had been abandoned. He cited:

Kerley—pp. 266, 269-272, 275, 301 to 305, 458, 459, 462 and 463, also pp. 119 and 120.

*Williams Candy Co. v. Crothers* (1925) S.C.R. at p. 380.

*Pugsley, Dingman & Co. Ltd. v. Proctor & Gamble Co.* (1929) S.C.R. 442.

*American Druggists Syn. v. Bayer Co.* (The Aspirin case) (1923) Ex. C.R. 65; (1924) S.C.R. 558 *et seq.*



*O. M. Biggar, K.C.*, for defendant, argued that there could be no confusion between the marks; that the defendant's mark was not calculated to deceive and was properly registered. That the onus of proving abandonment was on the plaintiff, and he must prove there was no intention of using the mark, that mere non-user is not abandonment. That "Bentima" was a new and invented word.

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The facts are stated in the Reasons for Judgment.

AUDETTE J., now (February 23, 1931), delivered judgment.

This is an action to expunge from the Canadian Register the objecting party's specific trade-mark registered on the 8th October, 1929, and consisting of the fancy word "Bentima" "to be applied to the sale of *watches and parts of watches*," upon the ground that it so nearly resembles the petitioner's trade-mark as to be calculated to deceive and upon the further ground of non user and abandonment.

The petitioner's five specific trade-marks are as follows:—

- "Big Ben" to be applied to the sale of clocks, watches and other timepieces. 22nd January, 1910.
- "Baby Ben" to be applied to the sale of clocks, watches and other horological instruments. 30th May, 1912.
- "Pocket Ben" to be applied to the sale of watches, clocks and time-keeping instruments and parts and components thereof. 3rd July, 1918.
- "Glo-Ben" to be applied to the sale of watches, clocks and timekeeping instruments and parts and accessories thereof. 20th May, 1919.
- "Ben Hur" to be applied to the sale of clocks, watches, timekeeping instruments and parts thereof. 4th January, 1927.

There is no trade-mark for the word "Ben" by itself,—the syllable "Ben" is used with either a prefix or a suffix.

While the origin of these names used as trade-marks by the respective parties has nothing to do with the present controversy, it may be said that the evidence discloses that the word "Bentima" has been coined from the word "Ben"—the Hebrew for "son"—and the English word "time",—thus "son of time" which was changed to "tima".

The word "Big Ben" at once reminds us of the name of the immense bell of 13½ tons placed in the Westminster Tower, London, England, in 1858, and thus baptized both

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from its enormous mass and from the abbreviation of the name "Benjamin", after Sir Benjamin Hall, First Commissioner of Works, at the time when the clock was erected.

Now the plaintiff's other four trade-marks, besides "Big Ben", present three of them with a prefix to the syllable "Ben" and one, "Ben Hur", with a suffix.

A fancy or coined word must speak for itself, it must be a fancy word of its own inherent strength. One could not take the word "spade" and make it a fancy word. And, as was held in *Davis and Company v. Stribolt and Company* (1), the word used in a foreign country as the common term to describe and denote an article is not a fancy word within the meaning of the Act.

None of the plaintiff's trade-marks is for the syllable "Ben", but with prefix and suffix attached thereto.

Moreover, the syllable "Ben" by itself is a French, English, Scotch and Arab word. Whether one can take the ownership of a word from the French and English languages, monopolize it and say to others you cannot use that word, is a question which need not be considered here.

The plaintiff even carries his contention further and says you cannot, because of my trade-marks, use the syllable "Ben" in any word you wish to make a trade-mark of to identify your merchandise. Is it to say that from the existence of the plaintiff's trade-marks, there results an inhibition from any one using as a trade-mark any word or syllable of either the French or English language, which would embody the infiltration of the syllable "Ben", be that word of any number of syllables? This would be arbitrarily trenching on the rest of the trade and on our language and grammar.

Moreover, it is argued, on behalf of the plaintiff, that the objecting party's goods and merchandise are of the same class as that of the plaintiff. That is not quite accurate, these goods are in the same line of business, the same type or kind; but not of the same class. The plaintiff's watch, sold under the trade-mark "Pocket Ben", is decidedly of its own poor and inferior class, selling as low at \$1.75. It is made of inexpensive material, with neither jewel or precious stone. How can there be confusion between such

(1) (1888) 59 L.T.R. 854.

a watch and the ordinary, real, common, every day watch used by the public and to which it is accustomed?

In addition to this fact, it must be noticed that the plaintiff's trade-marks cover both clocks and watches, while the defendant's trade-mark is limited to watches and part of watches only.

There is no doubt that the objecting party started using his trade-mark after the plaintiff was using his own; but that has nothing to do with the case as presented, the question to be determined here is that of the probability of confusion or deception as resulting from these respective trade-marks. Is the name of one so nearly resembling the name of the other as likely to confuse or deceive, that is the question which the Court has to try and the Court must not surrender its own independent judgment in that respect.

- Among others, in several cases, it was held that
- Aquatite* was not too near *Aquascutum*,
- Colonial* was not too near *Colonel*,
- Limit* was not too near *Summit*,
- Herogen* was not too near *Ceregen*,
- Mendit* was not too near *Mendine*,
- Swankie* was not too near *Swan*,
- Lavroma* was not too near *Lavona* or *Lovona*,
- Motrate* was not too near *Filtrate*,
- Night Cap* was not too near *Red Cap*.

See *Kerly*, on Trade-Marks, 5th Edition, 307, 308.

Now, it is well to bear in mind that, unlike a patent or copyright which relates to the substance of an article, a trade-mark differs from them and does not protect the substance of the article to which it is attached from being imitated; but it identifies an article and indicates the source to which that article is to be attached. The function of a trade-mark is to identify the goods of an individual.

Distinctiveness is of the very essence and is the cardinal requirement of a trade-mark, which is used to distinguish the goods of a trader from the goods of all other traders.

Distinctiveness means adoption to distinguish. *Sebastien*, 5th Edition, 55. The trade-mark does not lie in each of its particular parts, but "*dans son ensemble*." It is the appeal to the eye which is to be considered and which must

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determine the difference or similarity in the "get up" of each article. And in the present case there is no special "get up," the trade-mark cannot be ascertained at a distance; because one could detect what is written on the dials, in very small type, only upon paying special attention and drawing closely to the article, to actually read what is written thereon.

There are on the market many clocks and perhaps watches of the same class and description, but there is no evidence that such articles would be similar to the "Bentima" watches of the defendant.

The essential characteristic of the trade-marks in question in this case is respecting a name, by itself, printed on the dials of clocks and watches.

The user of a trade-mark does not result in what the person who makes use of it may have in his mind; but what the public would obviously understand when the name or trade-mark is impressed or printed upon the goods. And considering that the trade-marks in question consist of a distinctive name printed and displayed in such a conspicuous place and manner, there cannot be any ambiguity as to which is which, and the public, even the unwary and incautious purchaser, could not be made or led to purchase the goods of one party for that of another. The difference between the names is so accentuated, that no one could be deceived because it is the name itself which strikes the eye upon looking at the merchandise. There is no imitation, the two marks are quite different and the evidence establishes that the plaintiff's trade-marks were not known to the objecting party when they adopted theirs.

Considering the distinction in the name of the parties, the trade-marks, their appearance, their sound, the nature of the goods involving such striking difference in prices, the difference between the marks and the surrounding circumstances, one is necessarily led to the conclusion that there is no likelihood, no reasonable probability of confusion or deception.

In a case of this kind, the circumstances must be such as to satisfy the Court that confusion and deception are probable, and when that is not adequately made out, relief must be refused. There is obviously no attempt to deceive in

this case and the names are distinctive and sufficiently distinguishable. *Andrew McLean Company v. Adams Manufacturing Company* (1).

Having found that there is no probability of confusion and deception, it might be unnecessary to consider the other questions raised at trial; however, it may be well to say briefly a few words respecting the plea of non-user and abandonment.

It was held (in the case of *Madame Irene v. Schweinburg* (2) ) that it is well settled that the mere non-user of a trade-mark does not establish abandonment thereof; but that one who contends that the mark has been abandoned must establish that the original owner of the mark not only discontinued its use, but intended to abandon the same.

The *onus* of establishing the non-user and the abandonment rests upon the plaintiff who relies upon it. The only evidence in this respect is the statement by two employees of the plaintiff that they never saw or heard of the use of the word Bentima, and that is far from sufficient. The evidence adduced under the Letter of Request to Switzerland issued in this case only establishes, when properly read, that the witnesses there could not say when "Bentima" was sold in Canada and in what quantity, "this could be found from the order books, but that would necessitate many days work."

A Court cannot lightly cancel and annul a document under the Great Seal of Canada, upon such evidence. The plaintiff has failed to discharge the *onus* of proving non-user and abandonment.

Therefore, there will be judgment dismissing the action and with costs in favour of the objecting party.

*Judgment accordingly.*

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(1) (1908) 31 App. D.C. 509.

(2) (1912) Off. Gaz. (U.S.) p. 1043.

1930

TORONTO ADMIRALTY DISTRICT

May 31.  
Oct. 24.  
Nov. 5.

JOHN NICHOLSON, JR., AND PETER }  
J. SHAW ..... } PLAINTIFFS;

AND

THE SHIP "JOYLAND" ..... DEFENDANT.

*Shipping and Seamen—Marine Superintendent—Maritime Lien*

*Held*, that services performed by a man engaged to superintend the installation of machinery in a ship, to have charge of all the operations of fitting out, purchasing supplies, and finding occupation for the ship, etc., do not create in his favour, a Maritime Lien.

His subsequent assumption of the duties of Master involving the navigation of the vessel would, if properly proven, create a Maritime Lien for his services during the period when he was engaged in carrying out his duties as Master.

ACTION brought by the plaintiffs, one claiming as Marine Superintendent, and the other as Master.

The Action was tried before The Honourable Mr. Justice Hodgins, Local Judge in Admiralty for the Toronto Admiralty District, at Toronto.

*Loftus E. Dancey* for plaintiffs.

*J. Grayson Smith, K.C.*, for defendant.

The facts and questions of law raised are stated in the Reasons for Judgment.

HODGINS L.J.A., now (November 5, 1930), delivered judgment.

This action is by Jno. Nicholson suing as "Marine Superintendent" for \$20,408.54 for his "wages and disbursements" and by Shaw suing as Master for \$133 his wages and disbursements, \$40.75. The defendant ship is described as a self-propelling hydraulic dredge, and was arrested under a warrant in this action on the 4th March, 1929, at Burnt Island in Port Huron.

I need not pursue in detail the course of this vessel as the questions to be determined are largely legal in their character. The first is the claim of the plaintiff Nicholson for a maritime lien. He claims to have been appointed "Marine Superintendent" at a salary of \$10,000 per annum by his brother R. M. Nicholson in February, 1925. At the time of the contract the vessel was not purchased

and the plaintiff's duty was to buy a vessel (pursuant to which he bought the *Joyland*), to superintend its fitting up for the work of excavating and transporting gravel and then to find suitable deposits and customers to whom the gravel got from these deposits might be sold. In July, 1925, the Dominion Government prohibited the export of gravel and thereafter the plaintiff's work consisted largely of superintending repairs and making excursions to find suitable gravel. No business appears to have been done and only unsuccessful attempts made.

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The plaintiff signed no ships articles at any time and there were on board not only a Master (Shaw) but two or three engineers and a crew. When the plaintiff, Shaw, the Master of the Ship, left in December, 1925, his co-plaintiff says he navigated the ship in its peregrinations in search of gravel or between certain ports. In describing his duties throughout the plaintiff Nicholson explains that he was ordered on board as Marine Superintendent to instal machinery, that he had charge of all operations, superintended the machinery, hired and discharged the crew, purchased supplies, tested gravel and saw that "concrete aggregate" was made on board.

His position resembled closely that of a ship's husband or supercargo or both, with additional duties in seeing to the manufacture referred to being carried out on board. (See Maclachlan on Shipping, 6th Edition, p. 132.)

In this there is nothing giving a maritime lien on the vessel. There was a Master, the plaintiff Shaw, who is described in the log produced as Exhibit 3 as Master, so that the plaintiff's navigation of the ship must be subsequent to the Master leaving the ship. From the log produced and from the evidence it is far from clear that he had any status as Master because he contends that he was at all times marine superintendent and entitled to a salary of \$10,000 due by his brother, M. D. Nicholson, who in the witness box admitted this claim. The fact that he did navigate the ship in its ramblings round in search of gravel after the Master left in December, 1925, has of course to be considered.

No navigation except in tow of a tug is evident from the log during 1926. On May 31st, 1927, after installing ma-

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chinery to go to Duck Island, his services were dispensed with and he claims a month's notice.

Apart from this the ownership of and the dealings with the vessel indicate that such a claim as is made by the plaintiff is not sustainable as against the vessel at least before 1926. The registry is Montreal and the owners on 26th March, 1929 (see Exhibit 1), are shown to be the Maitland Sand and Gravel Co. subject to a mortgage.

The plaintiff's brother sold the vessel to this company on the 7th August, 1925, and yet the plaintiff does not claim against this company, with whom he does not appear to have had any contract, but rather asserts a claim on F. Wilson and Col. Hatch who with his brother M. D. Nicholson, according to him were financing the vessel and himself from March and April, 1925, down to March 10, 1927. Hatch gives evidence which is to the effect that the vessel was sold through the Sheriff at Detroit at his suit, to himself in the fall of 1926, and that early in 1927 he sold it to the Peerless Dredging Co., Ltd., whose secretary, Rosen, makes an affidavit on production in this action in which he asserts that his company is owner of the vessel. The appearance however is for the ship, not for the owners whoever they are.

Whether or not these transactions took place just as stated or whether sufficient proof of them has been given, they have nevertheless an important bearing on the plaintiff's rights. Up to the time Hatch bought in the autumn of 1926 from the Sheriff the relation of the plaintiff and the owners, the Maitland Co. was that the former was Marine Superintendent and on a salary owing by his brother as General Manager of the Company. No evidence is given showing any liability in the Maitland Co. but some suggestion is made that Wilson and Hatch assumed the brother's contract. I can find no sufficient evidence to warrant any such finding.

On Hatch's purchase, if his evidence is accepted, he became the sole owner, and while the plaintiff stoutly maintains that his salary ran on, I can find no agreement by Hatch to assume it on his own behalf as such owner. It was at the end of 1926 that M. D. Nicholson says he ceased to act as General Manager of the Maitland Co. This company, the plaintiff Nicholson says, was "interested" in the



ship till June, 1927, but if so, it does not seem to have displayed in a corporate capacity any signs of it. But if the brother or Hatch agreed, after Shaw left, that the plaintiff should navigate the ship and do other duties—an inference which I think I may draw—the vessel would be liable notwithstanding subsequent transfers, if any, to the extent of the disbursements made by him and to such salary as an Acting Master might demand.

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While I decline to accept the plaintiff Nicholson's evidence in many respects, I think I should deal with the facts of the case as they appear to me and give him whatever rights appear to arise thereout. And these rights seem to be such, owing to the meagre evidence given before me, as to require further elucidation. A copy for the log produced for the season of 1926 is as follows:

Season 1926.

- May 31/26. 6.30 p.m. Departed Port Huron for Marine City Dry dock to undergo repairs to Hull and New Smoke Stack. Tug *Victory* of Thompson Tug line, Pt. Huron, Mich.
- June 25/26. Full Marine Insurance of 100,000 placed on stmr. Port Risk by Romeyn and Co. Brokers at Toronto.
- July 3/26. Fitting out Stmr. *Joyland*. have full engine room crew, Capt. and mate engaged.
- Aug. 5/26. Discharged crews vessel waiting on orders.
- Nov. 6/26. Departed *Marine City* for Ojibway Ontario to lay up for winter. Tug *Sarnia City* of Sarnia towed vessel to destination.  
 Departed *Marine City* 9.30 a.m., arrived Windsor Ont. 6 p.m.
- Nov. 15/26. Stmr. *Joyland* in Winter Berth. Steel Companys slip fully layed up and in charge of watchman.

Two ship carpenters working all winter reconditioning Str. *Joyland's* hull.

From this it would appear that the plaintiff Nicholson's duties may have begun on July 3, 1926, and therefrom as shipkeeper on board. As to 1927 there is very little evidence of value. The account filed by the plaintiff Nicholson indicates very little.

I think in the order I propose making I am perhaps erring on the side of generosity in view of the very extraordinary way in which he presented his case and his conception of legal liability.

I direct that it be referred to the Registrar of this Court in Toronto (1) to determine during what time from and after July 3, 1926, and in the year 1927 up to May 31 the plaintiff Nicholson was himself employed in navigating the

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defendant ship or in doing work properly appertaining to the position of Master or work properly done in the repair, fitting out or laying up of the defendant ship as Master up to May 31, 1927, and to report what is a proper sum due to him therefor, less payments made to him on account thereof by Hatch, Wilson, M. D. Nicholson or Rosen or by any one on their behalf or on the behalf of the Peerless Dredging Company.

(2) To take an account of his proper disbursements in regard to the foregoing work during the aforesaid period less such amounts as were received by said plaintiff on account thereof from Hatch, Wilson, M. D. Nicholson or Rosen, or from any one on their behalf or on behalf of the Peerless Dredging Company, and to report what sum was properly expended by the said plaintiff in regard to the foregoing work and what, if anything, still remains due to him over and above the moneys received by him as above or for which he is properly accountable.

In view of the exceedingly unsatisfactory evidence of the plaintiff Nicholson, and to the extraordinary claim made by him, the reference hereby directed must be taken at his own expense.

Judgment will be entered for the plaintiffs by the Registrar after the making of his report for a sale of the ship to satisfy the claim of the plaintiffs and such other claims as have been or are, after such notice, if any, as he deems necessary, filed with or proved before the Registrar at such sums as may be found by the Registrar in his report.

There will be no costs throughout owing to the great delay and confusion in the evidence as to the rights and actions of all the parties hereto, except that the plaintiffs may have the necessary costs of action up to and including the seizure of the ship.

I think Shaw as Master is entitled to judgment for his claim \$133.20 and \$40.75 for disbursements as the claim of both parties together is over \$200. I do not think R.S.C., 1927, c. 33, s. 22 (a) applies in this case as I am unable to find as a fact that there is any subsequent bona fide purchaser or mortgagee. Hatch who gave evidence is not proved to be either, nor is the Peerless Dredging Co. If the prior registered mortgage to the Aube Co. is valid and in

force, as to which I am not advised, both plaintiffs' claims will be subject to it and the Registrar will notify the mortgagee of the terms of this judgment.

There will be no interest on the claim of either plaintiff.

*Judgment accordingly.*

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HIS MAJESTY THE KING..... PLAINTIFF;

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AND

Feb. 12.  
March 2.  
March 9.

NATIONAL FISH COMPANY, LTD..... DEFENDANT.

*Crown—Statutes—Regulations—Interpretation—Delegated Powers—Scope—Order in Council—Taxation—Licence fee—Prohibition—Discrimination.*

Section 69A of The Fisheries Act, as amended by 19-20 Geo. V, ch. 42, provided, among other things:—

That, under licence from the Minister a vessel registered as a British ship in Canada and owned by "a Canadian or a Canadian Company with its principal place of business in Canada," is allowed to use an "otter" or other similar trawl.

Moreover under this Statute, Rules and Regulations might be made by Order in Council, and the same were made providing that such licence could be granted only to "Canadian built" vessels and that after April, 1932, none but such would be eligible for licence, and further providing that after April 1, 1930, a licence fee of one cent a pound on the fish caught should be payable. This fee in the case of defendant would amount to between \$130,000 to \$150,000 a year.

*Held* that as the Regulations ignore the statutory limitation to British ships registered in Canada or owned by a Canadian, etc., and fix as the condition upon which the licence would issue that such ships be Canadian built, and such condition being obviously beyond the scope of the Act, and the delegated powers, such Regulations are ultra vires, unenforcible, null and void.

2. That Parliament had full and plenary powers to legislate both in respect of the provisions contained in the Act and in the Regulations, even if the result were prohibitive, oppressive or discriminative, and the only remedy is an appeal to those by whom the legislators are elected, but that statutory regulations made by the delegated power differ from the Statutes in that it may be open to the judiciary to question their validity, to examine if they have complied with the condition precedent and if they are reasonable.
3. That such Regulations cannot of their own inherent power control or originate matters of taxation.
4. That delegated authority of this kind must be exercised strictly in accordance with the power creating it, and in the spirit of the enabling Statute.

The distinction between a licence charge and a business tax discussed.

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INFORMATION by the Attorney-General of Canada seeking to recover the sum of \$21,422.61 from the defendant, as representing the amount due under the Regulations aforesaid and being one cent per pound on fish caught.

The action was tried before the Honourable Mr. Justice Audette at Ottawa.

*Hector McInnes, K.C., and N. R. McArthur, K.C., for plaintiff.*

*N. W. Rowell, K.C., and C. B. Smith, K.C., for defendant.*

MCINNES, K.C., argued that the act in question permitted the making of Regulations and that the Regulations as made were *intra vires*, proper, and that moreover the Court had no jurisdiction to pass upon their validity. He further argued that whether the effect of such Regulations was to make fishing thereunder practically prohibitive and whether the same was oppressive or discriminative was not a matter for the Court to deal with. That regulations made under a statute have the force of statute; and he cited: *Institute of Patent Agents v. Lockwood* (1894) A.C. 347; *The King v. Minister of Health* (1930) 2 K.B. 98; *In re Gray* (1918) 57 S.C.R. 150; *Fisheries Case* (1898) A.C. 700 at p. 713; *Pigeon v. Recorder of Montreal* (1889) 17 S.C.R. 495 at p. 503; *Youngblood v. Sexton* 32 Mich. Rep. 406 at p. 418.

N. W. ROWELL, K.C., argued that the right to fish on the seas was a matter of common law right. That Parliament by the Act in question only authorized the making of Regulations and the issuing of licences to that end and did not impose a tax nor delegate the authority to do so. That the power to licence and to fix the conditions upon which such licence may issue does not imply the power to charge a fee therefor nor to impose a tax, that such Regulations must be strictly within the power delegated by Statute. That the Regulations made by Order in Council are *ultra vires* because they do not strictly regulate but in effect actually prohibit; because they are in conflict with the Tariff Act; because the charge of one cent per pound is one made upon the business and not a condition precedent to issuing the licence and was a tax and not a

fee; because the Regulations are broader and go beyond the provisions of the Act and legislate upon matters not authorized by the same.

C. B. SMITH, K.C., argued upon the facts that the amount claimed as a licence fee would have the effect to prohibit and was oppressive and discriminative.

Mr. Rowell, K.C., cited: *Attorney-General of British Columbia v. Attorney-General of Canada* (1914) A.C. 153; Cooley, 4th Ed., vol. 1, pp. 94 and 108; Maxwell, 7th Ed., p. 245; *Attorney-General of Canada v. Attorney-General of British Columbia* (1930) A.C. 111; *City of Toronto v. Virgo* (1896) A.C. 88; *Ross v. Township of E. Nissouri* 1 O.L.R. 353; *Waterford v. Murphy* (1920) 2 Ir. Rep. 165; *Booth v. The King* 51 S.C.R. 20; *Belanger v. The King*, 54 S.C.R. 265; *Jonas v. Gilbert* 5 S.C.R. 356; Hals. vol. 27, p. 181; *Talbot v. Peterborough* 12 O.L.R. 358; *Reg. v. Pharmaceutical Soc.* (1899) 2 Ir. Rep. 132; *Rex v. Morris & Stimmel* (1923) 4 D.L.R. 955; *Rowland v. Collingwood* (1908) 16 O.L.R. 272; *Foster v. Raleigh* 22 O.L.R. 26; *Adler v. Whitbeck* (1866) 44 Ohio Rep. 539.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (March 9, 1931), delivered the following judgment.

This is an Information exhibited by the Attorney-General of Canada whereby it is sought to recover, from the defendant, the sum of \$21,422.61, for the months of April, May and June, 1930, representing the licence fee or tax alleged to be payable under a licence allowing the defendant to fish with a vessel using an "otter" or other trawl of a similar nature. The whole under the provisions of section 69A of The Fisheries Act (R.S.C., 1927, ch. 73) as amended by 19-20 Geo. V, ch. 42, and the regulations made thereunder.

To facilitate an understanding of the present controversy, it is thought advisable to recite the language of the above mentioned section of the Act and of the Regulations.

Section 69 of The Fisheries Act was amended by section 7 of ch. 42 of 19-20 Geo. V, by inserting section 69A immediately after section 69 thereof, and reads as follows, viz:

69A. (1) Every person shall be guilty of an offence, and shall incur therefor a penalty of not less than one hundred dollars and not more than

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two thousand dollars, recoverable with costs upon summary conviction, who at any time, except under licence from the Minister,—

- (a) with intent to fish or to cause any other person to fish with a vessel that uses an "otter" or other trawl of a similar nature for catching fish in the sea, leaves or departs from any port or place in Canada for the purpose of such fishing; or
- (b) knowingly brings into Canada any fish taken or caught in the sea beyond the territorial waters of Canada with any vessel that uses an "otter" or other trawl of a similar nature, or any vessel that uses an "otter" or other trawl of a similar nature for catching fish in the sea beyond the territorial waters of Canada, if the leaving or departure from Canada of such vessel constituted an offence under this section, and moreover the fish or vessel so brought in shall be confiscated to His Majesty for violation of this Act, in the manner provided by section eighty-two of this Act.

(2) No such vessel shall carry on fishing operations from or to any Canadian port or ports, unless such vessel is registered as a British ship in Canada and is owned by a Canadian or by a body corporate incorporated under the laws of the Dominion of Canada or of one of the Provinces thereof, and having its principal place of business in Canada.

(3) No such vessel shall carry on fishing operations from or to any Canadian port or ports, unless it restricts its fishing operations to waters that are at least twelve miles distant from the nearest shore on the Atlantic sea-coast of Canada. The proof that such fishing operations are so restricted shall at all times lie on the Captain of the vessel: Provided that this subsection shall not apply to small druggers operated by inshore fishermen if exempted from the provisions of this subsection by special permit which the Minister is hereby authorized to issue for that purpose.

(4) The Minister may determine the number of such vessels that shall be eligible to be licensed.

(5) Regulations may be made under the provisions of section forty-six of this Act,—

- (a) prescribing the form of licence;
- (b) specifying the evidence to be submitted with an application for a licence;
- (c) fixing the conditions under which a licence shall be issued;
- (d) making any other provisions respecting licences. \* \* \*

The Regulations made by the Governor in Council, under the provisions of section 69A and section 46 of The Fisheries Act, read as follows:

P.C. 2196

CERTIFIED to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 30th October, 1929.

The Committee of the Privy Council have had before them a report, dated 29th October, 1929, from the Minister of Marine and Fisheries, stating that, with a view to obtaining as complete information as possible as to the conditions under which fishing vessels using otter or other trawls of a similar nature should be permitted to engage in the fishing industry from Canadian Atlantic ports, he visited the various sections of such coast that are most directly affected by such method of fishing. He

also discussed the matter at a conference with the larger producers of fish on such coast.

The Minister, in the light of his investigations, and with the advice of the Deputy Minister of Fisheries, recommends, under the authority of section 69A of the Fisheries Act, which section was established by 19-20, George V, Chapter 42, that a licence to any fishing vessel which uses an otter or other trawl of a similar nature, will not be granted except under the following conditions:—

1. That such vessel was built in Canada and is now operating under temporary licence or was built in Canada subsequent to November 1, 1929.

Provided, however, that existing fishing vessels, other than Canadian built, which use otter or other trawls of a similar nature, and in respect of which temporary licences are now in force, shall be eligible for licence but only during the period ending April 1, 1932.

2. On and after April 1, 1930, a licence fee at the rate of one cent per pound, shall be payable by the owner or operator of any such fishing vessel that was not built in Canada, and, at the rate of two-thirds of a cent per pound, shall be payable by the owner or operator of any such fishing vessel that was built in Canada, under regulations approved by the Minister of Marine and Fisheries, on all cod, haddock and halibut that are caught and landed on the Atlantic coast of Canada by any such fishing vessel. In determining the weights of such fish, in the case of cod and haddock, such shall be done with the heads on, but with the entrails removed, and in the case of halibut, with the heads off and with the entrails removed; provided that no licence fee shall be payable on fish caught and landed during the months of January, February and March in each year, nor on scrod,—that is, fish with the heads on, but with the entrails removed, that weigh less than two and one-half pounds each.

The Committee concur in the foregoing recommendation and submit the same for approval.

These Regulations were amended, on the 7th January, 1930, by a further Order in Council reading as follows:

P.C. 39

AT THE GOVERNMENT HOUSE AT OTTAWA

Tuesday, the 7th day, of January, 1930.

PRESENT:

HIS EXCELLENCY THE ADMINISTRATOR IN COUNCIL

WHEREAS the Minister of Marine and Fisheries reports that the regulations adopted by Order in Council of October 30, 1929, (P.C. 2196) in connection with the licensing of fishing vessels using otter or other trawls of a similar nature, apply to small draggers operated by inshore fishermen as well, and the Minister of Marine and Fisheries states that this was not intended;

THEREFORE His Excellency the Administrator in Council, on the recommendation of the Minister of Marine and Fisheries and under the authority of the Fisheries Act, is pleased to amend the said regulations and they are hereby amended by adding thereto the following:

3. The provisions of sections 1 and 2 shall not apply to small draggers operated by inshore fishermen, for which draggers special licences may be issued by the Minister of Marine and Fisheries without the payment

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of a fee; provided that after April 1, 1932, any such dragger that was not Canadian built shall not be eligible for a licence.

The defendant, among other things, avers, by its statement in defence, as follows:

7. As to the whole of the information herein the Defendant says that the said Order in Council P.C. 2196, of the 30th October, 1929, is ultra vires the Governor in Council for the following reasons, viz:—

(a) Because the Governor in Council had no power or authority to prescribe the conditions set out in the said Order in Council.

(b) Because Section 69A (2) of the Fisheries Act as amended by Ch. 42 of the Statutes of Canada, 1929, provides for the licensing of British ships registered in Canada owned by a Canadian or a body corporate incorporated under the laws of the Dominion of Canada or one of the Provinces thereof, and having its principal place of business in Canada; and the Governor in Council had no power or authority to impose as a condition of the granting of a licence that such vessel be built in Canada or that existing fishing vessels other than Canadian built which use otter or other trawls of a similar nature in respect of which temporary licences were then in force, should be eligible for licence only during the period ending April 1, 1932.

(c) Because the so-called licence fee prescribed by the said Order in Council is not a licence fee, but is a tax or duty levied on the owners or operators of such vessels in respect of fish caught and landed on the Atlantic coast of Canada by them, and the Governor in Council had no power or authority to levy such tax or duty.

(d) Because under section 12 of the Customs Tariff Act, R.S.C. (1927), Ch. 44, fish caught by fishermen in Canadian fishing vessels is admitted into Canada free of duty and the Governor in Council had no power or authority under the Fisheries Act to impose a tax or duty thereon.

(e) Because the said Order in Council is not a regulation of the business of fishing with vessels using an otter or other trawl of a similar nature, but by reason of the amount of the so-called licence fee is a prohibition of such business, and the Governor in Council had no power or authority to prohibit such business.

(f) Because the said alleged licence fee is so large in proportion to the value of the fish upon which it is imposed that it exceeds any amount that Parliament could reasonably have contemplated being imposed by way of licence fee.

(g) Because the so-called licence fee is an imposition which in its very nature is discriminatory and bears unequally on individuals and corporations engaged in the business of fishing, and there is no statutory authorization to the Governor in Council to impose any such discriminatory licence fee or tax.

Before approaching the question of the amplitude of the power conferred upon the Governor in Council under the above mentioned Act, it is well to state that the Parliament of Canada has undoubtedly full and plenary power to legislate both in respect of the provisions contained in the Act and in the Regulations, even if in the result the tax or fee imposed were excessive, prohibitive, oppressive or discriminative. The suggestion made in this case that



the regulations are oppressive and prohibitive is not one that would induce a Court of law to inquire into the power of Parliament to authorize the making of such regulations, or to place any limitation upon the ability of Parliament to tax either oppressively or benignantly. The supreme legislative power of Parliament in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it were, the only remedy is an appeal to those by whom the legislature is elected. *The Fisheries Case* (1), *Attorney-General (Canada) v. Attorney-General for Quebec*, et al.

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However, it is quite otherwise in the case of a delegated power.

Statutory regulations differ from Statutes in that it may be open to the judiciary to question their validity, to examine if they have complied with the condition precedent and if they are reasonable (2). The Regulation cannot of its own inherent power control or originate matters of taxation. Such an extreme step would be contrary to the whole scheme and spirit of the B.N.A. Act.

The tendency of modern legislation is to lay down general principles and to avoid going into administrative details. And it is within the competency of Parliament to delegate its authority for the making of Rules and Regulations.

Delegated authority of this kind must be exercised *strictly* in accordance with the power creating it and in the spirit of the enabling Statute, and regulations which have fulfilled all the conditions precedent to their validity have the force of Statute (3).

But the validity of Regulations made by the executive or administrative departments of State depends on the due observation of the conditions imposed by the Statute as to their making, contents and publication; and if the statutory conditions are not complied with the Court will treat the Regulations as invalid. Craies on Statute Law, 3rd Edition, p. 261.

The proper method of construction is to read the original Act and its amendments together with the Regulations, and in this way any excess of power assumed by the body

(1) (1898) A.C. 700, at p. 713. (2) 27 Hals. 122.  
 (3) 27 Hals. 123.

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entrusted with the duty of making such Regulations would be revealed. They cannot enlarge or abridge the scope or substance of their delegated power. Such Regulations must be strictly construed. The Regulations must be so construed as to reserve to Parliament the initial power of taxation.

Parliament has entrusted to the Governor in Council the authority to make Regulations under section 69A of the Act; but it does not follow from that specific authority that it can endow with its own capacity a new legislative power not created by the Act to which it owes its existence. In re: *The Initiation and Referendum* (1).

In construing section 69A of the Statute one must be governed by the well known rule that, if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. If the text were ambiguous, recourse must be had to the contents and scheme of the Act.

The Governor in Council can only make Regulations within the limited sphere and authority of the subject and area of the Act, with the object of carrying the statutory enactment into operation and effect, but not beyond the scope of such enactments.

The Regulations must not conflict with the specific enactments of the Statute and cannot operate as an amendment to the same. They can only provide for something to be done consistent with the requirements of the Statute. The Act supplies the governing rule and the Regulation is subordinate to it. One may even go so far as to say that the Regulations are subject to an implied proviso that nothing in them shall be considered to sanction a departure from the Statute.

Having set out the mode or method of construing these Regulations, we now come to the consideration of the wording of both the Act and the Regulation in question.

Section 69A prohibits fishing with otter or trawl without a licence, but allows it with a "licence from the Minister." By subsection 2 of this section 69A it is enacted as a condition precedent that no vessel shall carry on such fishing operations, unless she is "*registered as a British ship in Canada and is owned by a Canadian or by a body*

corporate, incorporated, etc.” These are the statutory requirements for any vessel to obtain a licence from the Minister.

Yet the Regulations (Ex. No. 1) ignoring this statutory limitation to a British ship registered in Canada or owned by a Canadian, etc., fix and settle the condition of the licence on the basis of a *Canadian built ship or not*. This is obviously beyond the scope of the Act and the delegated power. The introduction of this condition of “Canadian built” is in absolute derogation to the Statute, which is quite silent in that respect and which has clearly stated and limited the conditions for allowing vessels to operate to those which are registered as a British ship in Canada. The Statute is a tyrant, it must be strictly adhered to. The Regulations must flow from the Statute.

The Governor in Council has no power, *proprio vigore*, to impose taxes unless under authority specifically delegated to it by Statute. The power of taxation is exclusively in Parliament.

In construing provisions imposing a duty, strict attention must be paid to the actual words used by the legislature. Reading the words of the Act in their natural, ordinary and grammatical sense, giving them a meaning to their full extent and capacity, it must be found that there is therein nothing to show that Parliament intended to deal with *ships built in or out of Canada*. Therefore, since Regulations are resting on this basic subject-matter, it must be found that they are dealing with a matter clearly inconsistent with the declared intention of Parliament.

The Regulations go still a deal further, because they provide that after the 1st April, 1932, only Canadian built vessels will be eligible for licence to fish with otter or trawl. This is also clearly *ultra vires* of the Governor in Council under the circumstances of the case.

This last provision is absolutely in conflict with the Statute; it almost abolishes trawling. A Statute cannot be evaded by doing indirectly that which it forbids to do directly, what you cannot do directly you cannot do indirectly. This last provision is a clear act of trespass on the Act. The author of this Regulation, labouring under the misconception of the true meaning of section 69A, overstepped the mandate by making Regulations beyond the

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scope of the Statute and the delegated power. These Regulations are an ineffectual display of authority and jurisdiction,—a *brutum fulmen*.

Therefore, it is ordered and adjudged that these Regulations do not fulfil the conditions precedent to their validity, that they are beyond the delegated power given by the Act, and they are unenforceable, null and void.

Having so found it may however be mentioned that by certain sections of the Fisheries Act it is provided that a licence must be obtained from the Minister before fishing and in all such cases a fixed sum, as a licence fee, is determined by the Act.

The real distinction between a licence charge and a business tax is that the non-payment of a licence charge normally renders the exercise of the business illegal, while the non-payment of a business tax does not. More broadly, it may be stated that a licence charge is a condition precedent, while a business tax is a condition (if a condition at all) subsequent. A licence charge, however, may be either a licence fee or a licence tax. When the licence is imposed to cover the *cost of regulation* or to meet the outlay incurred for some improvement of special advantage to the business, it may truly be said that the licensee gets a special benefit from the privilege, a special benefit measured by the cost. The charge would then be a fee. When, however, the charge for the licence is to *carry on a business*, which before the imposition of the restrictive law was open to any one, is purposely so high as to bring in a distinct *net revenue* to the Government above the cost of regulation, we can no longer properly speak of special benefits to the licensee, since the special benefit is converted into a special burden; the charge is then no longer a licence fee, but a licence tax.

In the present case the payment is not conditioned upon taking out the licence, but the Regulations impose the licence tax upon the business. The condition is not precedent but subsequent. *Cf. E. Seligman, Essays in Taxation*, 10th Edition, pp. 410, 411.

It would appear that the Regulations in this case have entirely ignored the spirit of the Act which when licences are required, fixes the fee in a lump sum and no tax imposed upon the business. Notwithstanding that the Act

makes trawling permissive, whether the Regulations impose such a heavy business tax upon trawling as to make it burdensome and practically prohibitive—because in this case the evidence discloses that the defendant would have to bear a yearly tax of between \$130,000 to \$150,000 which it cannot—is perhaps a question worthy of mention in the interests of trade and industry, but which need not be answered in the view I have taken of the case.

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There are a number of other important questions raised both at trial and by the statement in defence which would also militate in favour of the defendant; but having found upon the grounds above stated that the Regulations are *ab initio* null and void and *ultra vires*, it becomes unnecessary to pass upon these several other questions so raised.

There will be judgment dismissing the action with costs.

*Judgment accordingly.*

HIS MAJESTY THE KING..... PLAINTIFF;

AND

CONSOLIDATED DISTILLERIES LIM-  
 ITED ET AL..... } DEFENDANTS.

1931  
 Jan. 29.  
 March. 13.

*Revenue—Excise and Customs Acts—Bond—Interest—Jurisdiction*

This action is for the recovery of the sum of \$34,094 on a bond, such as has been described and discussed in the cases of *The King v. Vancouver Breweries Ltd.* (1929, Ex. C.R. 14); *The King v. Fidelity Insurance Co. of Canada* (1929, Ex. C.R. 1); *The King v. Canadian Surety Co.* (1929, Ex. C.R. 216). The defence denied liability on the bond and alleged that, in any event, the crown could not recover interest, and that the Court had no jurisdiction in the matter. That the matter was one of contract and not one arising out of the administration of the laws of Canada, and that the provincial courts only had jurisdiction.

*Held* that as the bonds sued upon herein were required by a law enacted by the Parliament of Canada in respect of a matter over which it had undoubted jurisdiction, namely Excise, this Court had jurisdiction to hear and determine the present action, and the Court condemned the defendants in the amount of their bond, but with interest only from the date of judgment.

- (2) That the condition of the bonds in question being for the performance of an act, recovery thereon is limited to the amount of the penalty, and interest only runs from the date of judgment.

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INFORMATION by the Attorney-General of Canada to recover from the defendants the sum of \$34,094, amount of the bond executed by them in favour of His Majesty.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*N. W. Rowell, K.C., and Gordon Lindsay* for plaintiff.

*Arthur Holden, K.C., and F. T. Collins* for defendants.

On the question of jurisdiction the defendants, by an amendment to their defence, which also gives the points argued by them, allege as follows:

(18) Without waiver of the foregoing the defendants specially allege that in any event the Exchequer Court of Canada has no jurisdiction to decide the matter at issue herein for the following reasons:

(a) The Exchequer Court of Canada is constituted under and in virtue of the Exchequer Court Act, being Revised Statutes of Canada, 1927, Chapter 34.

(b) The Exchequer Court Act was enacted under and in virtue of Section 101 of the British North America Act, 1867, which section reads as follows:

"The Parliament of Canada may, notwithstanding anything in this Act from Time to Time, provide for the Constitution, Maintenance and Organization of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

(c) That the words "Laws of Canada" in the said section 101 means laws enacted by the Dominion Parliament and within its competence.

(d) That the Parliament of Canada has under and in virtue of the said section 101 power only to establish additional courts for the better administration of the laws of Canada.

(e) That the matter at issue herein is simply a contract issue and the laws relating to and governing that contract issue are not the laws of Canada, but are laws of the Provinces of Canada.

(f) That under and in virtue of subsection 13 of the said section 92 of the British North America Act, 1867, "Property and Civil Rights in the Provinces" are matters assigned exclusively to the legislature in each province for the purpose of making laws relating thereto, and the contract issue between the parties herein is a matter relating to "Property and Civil Rights in the Provinces" and is governed solely by the laws of the province and not by the laws of Canada.

(g) That under and in virtue of subsection 14 of the said section 92 "The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts," are matters assigned exclusively to the Legislature in each Province.

(h) That under the British North America Act, 1867, the Provinces of Canada Exclusively have power to establish Courts to administer the laws relating to property and civil rights in the provinces, and more particularly to administer the laws relating to the contract issue between the parties herein and the Parliament of Canada has no power whatsoever to

give to the Exchequer Court of Canada jurisdiction to administer the laws relating to property and civil rights in the province, and more particularly the laws relating to and governing the contract issue between the parties herein.

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(19) That the Exchequer Court Act, being Revised Statutes of Canada, 1927, Chapter 34, and every section thereof, is unconstitutional and beyond the powers of the Parliament of Canada in so far as it purports to give to the Exchequer Court of Canada jurisdiction to decide matters not governed by the laws enacted by the Parliament of Canada and within its competence, and more particularly the defendants especially plead that the said Exchequer Court Act is unconstitutional in so far as it purports to give jurisdiction to the Exchequer Court of Canada to decide the matter at issue between the parties herein.

Maclean J.

(20) That the action of the plaintiff should therefore be also dismissed on the grounds set forth in paragraphs 18 and 19, saving in this regard however such recourse as the plaintiff may have in the Provinces.

N. W. Rowell, K.C., in reply argued that the words "notwithstanding anything in this Act" in Section 101, B.N.A. Act, applied to the second branch as well as to the first branch of the Section, namely, the "establishment of additional Courts." That "laws of Canada" means all laws, provincial as well as Federal. That Canada has power to legislate in respect to Customs and Excise, and has power to constitute a Court to deal with the better administration of those laws. That the Bonds herein are given under the conditions prescribed in the Act, and if they are not discharged in accordance with their conditions, Parliament can, for the better administration of this law, collect the amount and can provide for the collection under the law. He also argued that interest should be allowed.

The case of *City of Toronto v. The Toronto Street Railway* (1906) A.C. 117, was cited.

The facts and the questions of law raised are stated above and in the Reasons for Judgment.

THE PRESIDENT, now (March 13, 1931), delivered the following judgment.

This is an action, no. 9370, upon four bonds executed by the defendants in favour of the plaintiff.

[The learned President here discusses the matter of liability under the bonds in question, and finds the defendants liable for the amount of the said bonds. The learned President followed the decisions heretofore given in several cases, in this Court on similar bonds, among them being the cases referred to in the head-note. The learned President then proceeds as follows.]

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The defendants question the jurisdiction of the court in this action, and they rely upon the decision of the Supreme Court of Canada in *The King v. Consolidated Distilleries Ltd.* (1). I am unable to appreciate the argument which was addressed to me by counsel for the defendants upon this point. In the case just mentioned, the defendant company, the same defendant company as in this case, sought on motion, in the Exchequer Court, to bring in as a third party the Consolidated Exporters Co. Ltd., upon the ground that this corporation by agreement had contracted to indemnify the Consolidated Distilleries Ltd. against any loss, damages or expenses which it might suffer by reason of certain bonds which it had executed unto His Majesty, under the Excise Act, just as in this case. Audette J. set aside the third party notice upon the ground that the issue raised by the third party notice was separate and distinct from the issue raised between the plaintiff and the defendant in the action, and he held that if there was a separate cause of action flowing from the agreement of indemnity it must be tried in the provincial courts having jurisdiction in such matters, and that the Exchequer Court was without jurisdiction. There was an appeal from this decision to the Supreme Court of Canada, and the decision of Audette J. was upheld. That is all the Supreme Court of Canada dealt with. This is not a case which involves an agreement of indemnity given by a third party to the defendant company. There can be no doubt but that the Parliament of Canada had jurisdiction to legislate in respect of Customs and Excise, and the subject matter of this action directly arises from legislation enacted by the Parliament of Canada in respect of Excise.

The Chief Justice in delivering the judgment of the Court said:

While there can be no doubt that the powers of Parliament under section 101 are of an overriding character, when the matter dealt with is within the legislative jurisdiction of the Parliament of Canada, it seems equally clear that they do not enable it to set up a Court competent to deal with matters purely of civil right as between subject and subject.

That makes very plain the scope of the judgment of the court. The court held that the matter of a contract of indemnity between a defendant, in an action taken upon a bond by the Crown under the Excise Act, and a third



party, was a matter of civil right as between subject and subject, and was one purely of provincial jurisdiction. The contract of indemnity had not its origin in a law of Canada as distinguished from a law of a province. There can be no question as to the competency of the Parliament of Canada to legislate in respect of the subject of Excise, and I do not think there is any doubt as to the jurisdiction of this court in any proceedings arising under the Excise Act. In this particular matter the bonds sued upon were required by a law enacted by the Parliament of Canada in respect of a matter in which it had undoubted jurisdiction. In my opinion, the judgment of the Supreme Court of Canada is, without qualification whatever, against the contention of the defendants.

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The plaintiff claims interest at the rate of five per cent upon the total amount stated in the four bonds in question. The defendants contend that in law no interest is payable on such bonds, and I think this contention must be upheld. In similar actions it is true I did allow interest, but in such cases the claim for interest was not contested. It is admitted that in England the amount recoverable on a bond forfeited by breach of the condition is in all cases limited, both at law and in equity, to the amount of the penalty fixed by the obligatory part. The condition of the bonds in question was for the performance of an act, and in such cases a recovery is limited to the amount of the penalty, and interest only runs from the date of judgment. That, I think, is also the law in the United States. Counsel for the plaintiff referred to the Ontario Judicature Act, but we are not here concerned with a matter of procedure, but one of substantive law. The Ontario Judicature Act, and the case of *Toronto Railway Company v. City of Toronto* (1), which was cited do not seem to me to have any relevancy here. The Judicature Act of Ontario is invoked in this court in matters of procedure only; the obligation to pay interest is a matter of substantive law and not procedure. In reason, the claim for interest in respect of a bond of this character would appear to have no foundation. I therefore disallow the claim for interest.

(1) (1906) A.C. 117.

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There will be judgment for the amounts sued upon herein as appearing in the plaintiff's Information, but exclusive of interest, and costs will follow the event.

*Judgment accordingly.*

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Dec. 1.  
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LIGHTNING FASTENER COMPANY, } PETITIONER;  
LIMITED .....

AND

CANADIAN GOODRICH COM- } OBJECTING PARTY.  
PANY, LIMITED ,.....

*Trade-marks—Petition to register—"Zipper"—Descriptiveness*

*Held* that the word "Zipper" having become descriptive of slide fasteners generally and the public having come to associate this word with that type of fasteners, it is not a proper word to be registered as a trade-mark.

PETITION by the Petitioner herein to have the word "Zipper" registered as a trade-mark.

The petition was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*Harold G. Fox* for petitioner.

*Russell S. Smart, K.C.*, for defendant.

The facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (March 10, 1931), delivered the following judgment.

This matter comes before the Court under sec. 12 of the Trade-Marks and Designs Act, and involves four applications for registration of the word *Zipper*, as a trade-mark.

The petitioner, Lightning Fastener Co., Ltd., on September 30, 1927, made application for the registration of the word *Zipper* as a specific trade-mark to be used "in connection with the sale of Separable Fasteners, particularly of the slide controlled type." The Canadian Goodrich Company, which I shall hereafter refer to as the Goodrich Company, in February, 1929, applied for the registration of the word *Zipper* as a specific trade-mark to be

used in connection with "slide fasteners and articles containing same." This applicant made application for the registration of the word *Zipper* as a general trade-mark on October 17, 1927, but this was refused, and thereupon it applied for the specific trade-mark here in question. The Ripper Manufacturing Company, of Vancouver, on September 22, 1927, applied for registration of the word *Zipper* as a trade-mark to be applied to receptacle opening devices; this applicant did not appear at the hearing. The Clogard Wardrobe Company of Washington, D.C., on June 5, 1928, applied for registration of the word *Zipper* as a trade-mark to be used in connection with wardrobe bags. This applicant did not appear at the hearing. The G. E. Prentice Manufacturing Co. filed a statement of objections but at the trial it withdrew the same. One of the objections filed by this company was that the word zipper, if registered as a trade-mark, was calculated to mislead the public because by common usage all such separable fasteners were known in the trade as zip or zipper fasteners, and that had come to be a descriptive term of that type of fastener device. In the end the contest was limited to the petitioner and the Goodrich Company. The Commissioner declined to pronounce on these several conflicting applications for registration, until the rights of the several applicants were determined by the court, and in due course the issues arising from these conflicting applications for registration came before me in the way I have just stated.

The petitioner has for some years been engaged in the manufacture of a fastener device of the slide control type, at St. Catharine's, Ontario. This device consists of two opposed series of members adapted to be attached one on each side of an aperture in some article and adapted to interlock so as to close the aperture upon the slide being operated in one direction, and to separate so as to leave the aperture open upon the slide being operated in the opposite direction. This device is so well known that no further description of it is necessary; I shall refer to it as a slide fastener. The petitioner had for years used and applied the trade-mark Lightning to the fasteners which it manufactured, the same being applied in a manner I need not pause to explain; the petitioner however alleges

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that it commenced, on or about the first day of September, 1927, to use the word "zipper" as a word mark for its fasteners, that use commencing just shortly before its application for the registration of that word. Whether this use was extensive or not does not appear.

The Goodrich Company in 1923, became, by assignment I think, the registered holder of a specific trade-mark consisting of the word Zipper, to be used in connection with the sale of footwear. For some time it has been manufacturing in Canada a line of overshoes of different styles equipped with slide fasteners; in recent years, the petitioner has been supplying the Goodrich Company with the fasteners used in its overshoes and sold under the trade-name of Zipper. The Goodrich Company say that the word Zipper has become generally associated by the public in Canada, and throughout the world, with goods manufactured by the Goodrich Company, or by the B. F. Goodrich Company, the parent company, in the United States. It is doubtless true that this company has manufactured large quantities of overshoes in Canada under the trade-name of Zipper, and has expended substantial amounts of money in advertising the same. In its statement of objection to the petitioner's application, the Goodrich Company allege that it was in anticipation of the danger of a competitor, or some manufacturer of fasteners, applying for registration of the word Zipper to be used in connection with slide fasteners, which would lead the public into the belief that it was buying the footwear of the Goodrich Company, that it made application to register the word Zipper to be used in connection with slide fasteners and articles in which the same were used.

I have reached the conclusion that the applications of the petitioner and the Goodrich Company should be denied upon the ground that the word Zipper has become descriptive of sliding fasteners of the type in question, and that the public have come to associate the name Zipper with that type of fastener. It was urged that it was not generally true that the slide fastener was referred to by the public as Zipper and that it was only occasionally that it

was so described. I think there is sufficient evidence to justify one in holding that the word Zipper has in such degree become descriptive of slide fasteners as to preclude its registration as a trade-mark. It was upon this ground that the Prentice Manufacturing Company, in its filed statement of objections was purporting to resist the registration. No party to this proceeding was interested in establishing that the word Zipper had become descriptive of the slide fastener, and in that respect the hearing was not satisfactory; the public was not in any way represented. Counsel for the petitioner very plainly stated that its concern in the matter was not so much whether the Goodrich Company was permitted to register the word, but that third parties should not be permitted to register it. I have already stated the reasons assigned by the Goodrich Company for its application for registration; it was not so much that it wished the registration, but rather that it did not wish others to get it. However there is some evidence upon the point. The secretary of the Goodrich Company testified that it had, since 1924, many requests for fasteners under the name of Zipper, in fact there was put in evidence a letter from the Goodrich Company to the petitioner company inquiring about fasteners suitable for portfolios, and they were referred to as "Zipper Fasteners." On discovery, counsel for the petitioner made the admission, that the petitioner company received orders and letters from customers, going as far back as 1925, requiring shipment of fasteners, and describing them as Zipper Fasteners. Sundback, President of the petitioner company, admitted that letters were received at the office of that company describing the fasteners, as Zipper fasteners, and that occasionally in the company's factory, and upon the street, slide fasteners would be referred to as Zippers. He also stated that in the United States, this type of fasteners are occasionally referred to as Zipper fasteners, as in Canada; Sundback is also consulting engineer of a company manufacturing slide fasteners in the United States. I suspect that much stronger evidence was available upon this point, had any objecting party intervened to oppose seriously the applications, upon that ground. I have no

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doubt that in the trade it is a very common practise to refer to these fasteners as Zippers, and that it is a very common thing with the general public I have no doubt. The reason for that is this. The Goodrich company gave the word mark Zipper to its overshoes and it used, for the first time I understand, slide fasteners in such overshoes. The fastener was then a novel and patented device; it was probably nameless, but was bound to get a name. I do not mean the trade-mark name the makers would give it. It is probable that the public, from the start, would associate the word Zipper less with the overshoe which was not novel, than with the type of fastener, which was novel. The trade-mark of the overshoe came to give the same name to the fastener. That is what happened, and it was to be expected. But there is sufficient evidence to justify me in holding that the word Zipper is descriptive of slide fasteners, and that the word is not a proper trade-mark for slide fasteners. Makers and vendors of slide fasteners may easily adopt other word marks to distinguish their particular goods. There is no particular reason why any one should have the word Zipper for sliding fasteners. Upon this ground alone, I think, the applications for registration of the word Zipper, to be applied to the slide fastener itself, should be refused.

But some of the applicants desire to register the word Zipper for articles in which is employed the slide fastener, and not for the slide fastener itself. The application of Ripper Manufacturing Company Ltd., is for the word Zipper as applied to receptacle opening devices. It is just a little difficult to understand what was in the mind of this applicant; whether the mark was intended for the fastener, or for the article in which it was to be used, is difficult to determine, but that after all matters little. The Goodrich Company applied for registration of the word for slide fasteners, and also for "articles containing same"; I assume that means all articles manufactured or sold by the applicant. The Clogard Wardrobe Company ask for registration of the same word in connection with wardrobe bags. This means, that each of these three applicants, wish the same word mark for articles or receptacles which

open and shut by the use of a slide fastener. The applications are the proof of this. It is perfectly plain that they wish this word mark, because it indicates that the goods or articles to which the word is to be applied opens and closes by means of a slide fastener, whether a wardrobe bag, a tobacco pouch, a shirt, a coat, or any other article. Used in that way by itself, the word *Zipper* is in my opinion descriptive and is therefore not a proper mark for registration. It is my opinion that none of these applicants are now entitled to the exclusive use of that word, when applied to articles containing the slide fastener. I must not be understood as meaning that this remark is applicable to the registration of *Zipper*, applicable to footwear, belonging to the Goodrich Company. Whether or not a descriptive word is in terms barred by the Trade-Marks Act, it was always, I think, a principle of Common Law that descriptive words were not registerable as trade-marks.

Returning again to the application of the Goodrich Company. If any one is entitled to the registration of *Zipper* as a trade name for slide fasteners, it might fairly be said that it should be this applicant. It is true, I think, that from the start its *Zipper* overshoe contained the slide fastener, but the trade-mark *Zipper* might be applied by the Goodrich Company to an overshoe fastened with buttons, buckles, or any other kind of fastener, and to footwear generally. The trade-mark *Zipper* had no application to the form of fastening. While it may be true that it was the Goodrich Company's extensive business and advertising that was responsible for the public associating the name *Zipper* with the sliding fastener, yet that affords no ground at this stage for permitting the Goodrich Company to register that word as a trade-mark for that type of fastener, for the reasons I have already stated. If the Goodrich Company applications are refused in respect of the slide fastener, then that is the end of the whole of the application, because it is only in respect of articles into which a slide fastener bearing the mark *Zipper* enters, that the same word is asked to be registered for the article itself. If the application in its entirety were granted, that

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there would be confusion is quite certain from the evidence. Sundback testified that the word Zipper had already been used in Canada. He stated that back as far as 1925, he saw a moth-bag containing a slide fastener on sale at Eaton's Ltd., in Toronto, under the trade name of Zipper. The slide fastener itself would not likely be examined by purchasers of articles for the purpose of ascertaining whose make they were, it would I think, be the word mark Zipper attached to the article that alone would attract the eye; the word mark Zipper, on the article itself, would merely emphasize the fact that the article was one opened and closed by a slide fastener. There is no limitation in the application, as to the articles the Goodrich Company might manufacture and sell under the trade name of Zipper, it might be moth-bags with a fastener containing the mark Zipper, and the word Zipper on the bag itself. This would indicate how difficult it would be in such a case to distinguish the moth-bag of the Goodrich Company from the moth-bag mentioned by Sundback. There is now in use in Canada according to Sundback, the word mark Zip-On used on drawer leggings, and Zip-O-Gripp used in connection with luggage, and in which the slidefastener is employed. There are other similar words on the register, but whether associated with slide fasteners is not clear. I have no doubt these marks are but adaptations of the word Zipper.

In my opinion the applications for registration made by the petitioner and the Goodrich Company should be refused, as also should the application of Ripper Manufacturing Company and Clogard Wardrobe Company. Upon the facts, I think, I am within the spirit of the Trade-Marks Act in refusing these applications. There will be no order as to costs.

*Judgment accordingly.*

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IN THE MATTER OF A REFERENCE BY THE MINISTER OF PENSIONS AND NATIONAL HEALTH,

1931  
 Jan. 26.  
 Mar. 23.

AND

IN THE MATTER OF THE APPLICATION OF WILLIAM D. SKITCH FOR PENSION,

AND

PAULINE WADE .....CLAIMANT.

*Pensions Act—Federal Appeal Board—Jurisdiction—Board of Pension Commissioners—13-14 Geo. V, c. 62—14-15 Geo. V, c. 60—18-19 Geo. V, c. 38.*

In January, 1923, the Board of Pension Commissioners refused pension in the matter of one Skitch on the ground that his death was not attributable to military service. An appeal was taken to the Federal Appeal Board under 13-14 Geo. V, c. 62, sec. 10, and the latter found the death was due to military service. By 14-15 Geo. V, c. 60, sec. 10, the Appeal Board was required to give certain information in its judgment. The Commissioners, claiming the Appeal Board had not complied with the statute, refused to pay the pension. After some correspondence between the Boards in which the Appeal Board claimed to have complied with the statute, a dispute having arisen as to the jurisdiction of the latter Board, the Minister, under 18-19 Geo. V, c. 38, sec. 30, ss. 8, referred the matter to this Court for determination.

*Held* that the only matter referred to this Court for its determination was as to whether the Appeal Board had jurisdiction to hear the appeal in question. That the appeal having been heard and decided in 1926, the question of its jurisdiction must be determined under the law in force at that time, and that under 13-14 Geo. V, c. 62, sec. 10, the Appeal Board had jurisdiction to hear and determine appeals from the refusal of pension by the Board of Pension Commissioners.

2. That the provisions of sec. 29, c. 38 of the Statute of 1928 requiring a certain course of action to be taken by the Appeal Board when the medical classification in respect of which the Board of Pension Commissioners had refused a pension is considered by the Appeal Board to be in error, being passed subsequent to the hearing or decision by the Appeal Board, did not apply to said appeal.
3. That whether or not the Appeal Board in giving its decision complied with the statute did not go to the question of jurisdiction.

REFERENCE by the Minister of Pensions and National Health to this Court to have a dispute as to the jurisdiction of the Federal Appeal Board decided and determined by this Court.

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The matter was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*George F. Henderson, K.C.*, for the Board of Pension Commissioners.

*A. E. Fripp, K.C.*, for the Federal Appeal Board.

*Clifford B. Reilly, K.C.*, for soldiers concerned and for dependents of Skitch.

*Redmond Quain* for claimant.

The case was heard on questions of law, which questions of law material to the issues are stated in the Reasons for Judgment.

THE PRESIDENT, now (March 23, 1931), delivered the following judgment.

This matter comes before the Court in the form of a reference by the Minister of Pensions and National Health, dated the 29th May, 1929.

It is well to quote the terms of the reference as it clearly sets out the question falling for determination by this Court, and has the additional advantage of brevity:

#### IN THE EXCHEQUER COURT OF CANADA

IN THE MATTER of the application of William D. Skitch, number 435035, for pension.

A dispute having arisen as to the jurisdiction of the Federal Appeal Board to entertain and determine an appeal from the refusal of pension in this case by the Board of Pension Commissioners, the undersigned, pursuant to the provisions of subsection 8 of section 51 of the Pension Act, as enacted by section 30, chapter 38 of the Statutes of 1928, hereby refers the said question of jurisdiction to the Exchequer Court for determination, and transmits herewith copies of all documents in the possession of the Federal Appeal Board, and originals of all documents of the Department of Pensions and National Health relating to the matter.

Dated at Ottawa, this 29th day of May, A.D. 1929.

J. H. KING,

*Minister of Pensions and National Health.*

It is obvious that the sole question calling for determination under the reference is whether the Federal Appeal Board, as it existed on the date when it pronounced its decision on the appeal in this case from the Board of Pension Commissioners, namely, the 3rd August, 1926, had

jurisdiction to "entertain and determine" the said appeal. It will be convenient to refer to the Board of Pension Commissioners as Commission, and The Federal Appeal Board as Board.

A consideration of the language of subsection (8) of section 30 of Chap. 38, An Act to Amend the Pension Act, 1928, reveals beyond all manner of doubt that the Exchequer Court of Canada is not thereby authorized and empowered to entertain an appeal from the Federal Appeal Board as was suggested by Mr. Quain. What the Court is required to do where there is a dispute as to the jurisdiction of the Federal Appeal Board, and it is referred, as this case has been, is to decide whether the Federal Appeal Board had jurisdiction to entertain and determine the appeal from the Board of Pension Commissioners in question. If it was the intention of Parliament to give an appeal, as the term is understood in the law, then the draftsman of the Act was extremely unhappy in his phraseology. To construe the language used by Parliament as doing anything more than to enable the Court to settle a dispute between the Board of Pension Commissioners and the Federal Appeal Board concerning the jurisdiction of the latter would be to disregard the wisdom of the rule laid down by Baron Pollock in *The Queen v. The County Court of Lincolnshire* (1),

A judge cannot give himself jurisdiction by construing an Act of Parliament or a document wrongly.

Confining, then, the duty of the Court under the statute and the Reference made thereunder to answer the question, has the Federal Appeal Board jurisdiction "to entertain and determine" the appeal in dispute from the Board of Pension Commissioners, that question must be answered by reference to The Pension Act of 1919, as amended by Chap. 62 of the Statutes of 1923, and as further amended by Chap. 60 of the Statutes of 1924.

The Commission, in January, 1923, refused pension in the matter of the application of Skitch. The decision of the Commission was: "Death not attributable to service." By Chap. 62, sec. 10, Statutes of Canada, 1923, assented to June 30, 1923, the Federal Appeal Board was created.

(1) (1887) 20 Q.B.D. 167, at p. 170.

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This statute provided that upon the evidence and record upon which the Commission gave its decision, an appeal would lie in respect of any refusal of pension by the Commission on the grounds that the disability or death of the applicant for pension was not attributable to military service. Upon an appeal to the Board in the case of Skitch, upon the same evidence and record, pension was allowed on August 3, 1926, the decision being:

After consideration of the evidence and record of the Board finds that death in this case following severe chronic ulceration of the legs and stated to have been due to acute indigestion was attributable to military service.

At that time the statute (chap. 60, sec. 10, Stat. of Canada 1924), directed that any judgment rendered by the Board should contain certain information, including the medical classification of the injury or disease causing the liability in respect of which the appeal was made, the medical classification of the injury or disease causing the disability in respect of which the appeal was allowed or disallowed, and if the appeal was allowed whether the injury or disease was attributable to military service. The Commission declined to act upon the decision of the Board and refused to pay pension until it was definitely established whether death was due to the ulceration of the legs, or acute indigestion, and the Commission asked that the Board amplify their judgment by stating the medical classification of the disease resulting in death, as required by sec. 10 of Chap. 60, Statutes of 1924. Considerable correspondence passed between the Board and the Commission, the former insisting it had complied with the statute, the Commission being equally insistent that the Board had not done so. The Board seems to have been of the opinion that this statutory provision did not apply to death claims, no reference being made therein to death claims. If the statute is applicable to death claims, then there was some reason for the contention that the Board did not fully comply with the statutory directions. The Reference is to determine whether the Board had jurisdiction to entertain and determine the appeal of Skitch from the decision of the Commission. Now, to pronounce an opinion upon this question, one can only look at the statute

law as it was when the Board heard the appeal in June, 1926, or at the date of the delivery of its decision in August of the same year, it matters not which date. At that time sec. 51 of the present Pension Act, as amended by sec. 29 Chap. 38, Statutes of 1928, was not in force. Sec. 51 of the Pension Act prescribes that certain things be done by the Board as a condition precedent to the jurisdiction of the Board being exercised in the final disposition of an appeal, and this arises where the Board considers the medical classification upon which the Commission refused pension, to be in error. This, however, is not applicable to the matter now before me, because that statute had not been enacted when the Board heard the appeal in question, and it has no retroactive effect. In fact at that time there was no statutory provision for a reference to the Exchequer Court in the case of a dispute as to the jurisdiction of the Board to hear and determine appeals.

The whole question at issue seems to be this: Did the Board comply with sec. 10, chap. 60, Statutes of Canada 1924, now sec. 51, ss. 7 of The Pension Act, in rendering judgment upon the appeal mentioned in the Reference, and if not, does that fact affect the jurisdiction of the Board to entertain and determine the appeal? I do not think the question of jurisdiction arises at all in this matter. The observance of these statutory requirements was not a condition precedent to the jurisdiction attaching. A question of jurisdiction could hardly arise after the hearing of the appeal, if there was jurisdiction when it was heard, and this is not disputed. The Board had undoubted jurisdiction to hear and determine the appeal, of that I have no doubt. The judgment of the Board is not really questioned on the ground of lack of jurisdiction to entertain and determine the appeal; it is apparently attacked because the written judgment does not contain certain information which the statute directs should be therein contained. Whether the Board did or did not comply with the statute in that respect, does not go to the question of jurisdiction,—and that is the only point referred to in the Reference—it only raises the question as to whether or not the Board fulfilled its statutory duties. If the Board re-

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refused to furnish the information required by the statute in its written judgment, then it seems to me that the proper course to pursue in that situation would be to set in motion the proper judicial proceedings to enforce the observance of such statutory duties. Whether the Board did or did not perform such duties is not before me for decision, but assuming that the Board did not perform its statutory duties in this respect, that would not, in my opinion, retroactively rob the Board of its jurisdiction to entertain and determine the appeal. I should very much doubt if the statute ever intended, that a judgment rendered on an appeal, by the Board, should be of no effect, because the statutory directions which I have already mentioned were not complied with; it is perhaps unnecessary that I should go so far, because that point was not argued before me, and I am only required to decide whether the Board had jurisdiction to entertain and determine the appeal. At any rate, any such deficiency in the judgment, if such there was, could not affect the jurisdiction of the Board to entertain and determine the appeal. I am of the opinion therefore that the Board had jurisdiction to entertain and determine the appeal mentioned in the Reference at the time it heard and determined the same.

There will be an order declaring that the Pension Appeal Board as it existed on the date of the Reference herein had jurisdiction to entertain and determine appeals from refusal of pension by the Board of Pension Commissioners.

In the circumstances I think there should be no costs allowed. Strictly speaking there were no parties to the Reference. It is true Mrs. Wade, formerly the widow of William D. Skitch, filed a statement of claim in the Court, but I must assume that this was done *ex abundantia cautela*. Her claim had been finally disposed of by the decision of the Board, and there was no party on the Reference having status to file a defence.

*Judgment accordingly.*

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THE KING, on the information of the Attorney-General  
of Canada, upon the relation of the National Battle-  
fields Commission,

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Mar. 23.

PLAINTIFF;

AND

THE QUEBEC SKATING CLUB,

DEFENDANT.

*Expropriation—Market value—Title—Value to the owner—Servitudes*

The defendant derived its title to the lands expropriated under a grant from the Crown subject to two conditions: (1) that the building now being or lately erected by defendant on said lands be such as would be suitable for exhibition purposes and available at all times for the same, and (2) that certain water pipes on the lands should be diverted and relaid outside the area of said building.

*Held* that as property may under certain circumstances have a specially high value to the owner over and above its market value, and as it is the value to the owner which the party expropriated is entitled to receive and as the above mentioned conditions or servitudes would be less onerous to the owner than to anyone else in the community, the market value of the property in question was not the proper criterion of the amount to be allowed him for the same. [Pastoral Finance Association Ltd. v. The Minister (1914) A.C. 1083 referred to.]

2. That the Crown having in its grant aforesaid described the property in question as bounded for a part by a street, as also in the Statutes of 1891 and 1911, in the description deposited in the Registry Office under the Expropriation Act, and in the Information herein, such statement was practically an "aveu judiciaire" that such a street existed, creating a servitude in favour of the land so sold. That it is a sufficient specification in writing of the nature, the extent and the situation of the servitude to meet the requirements of Art. 551 of the Civil Code of the Province of Quebec. [Roberge v. Daigneau (1926) S.C.R. 191 referred to.]

INFORMATION exhibited by the Attorney-General of Canada to have certain properties expropriated for the National Battlefields Commission valued by the Court.

*Noël Belleau, K.C.*, and *L. E. L. Galipault* for plaintiff.

*Louis St-Laurent, K.C.*, for defendant.

The action was tried before the Honourable Mr. Justice Audette at Quebec.

The facts and questions of law raised are discussed and set out in the Reasons for Judgment.

AUDETTE J., now (March 23, 1931), delivered the following judgment.

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This is an information exhibited by the Attorney-General of Canada, whereby it appears, among other things, that a certain parcel or tract of land, described in the information and belonging to the defendant, was taken and expropriated by the National Battlefields Commission, for the purposes of the National Battlefields Park, under the provisions and authority of the Act respecting the National Battlefields (7-8 Ed. VII, chs. 57, 58, as amended by 9-10 Ed. VII, ch. 41; 1-2 Geo. V, ch. 5; 4-5 Geo. V, ch. 46) and of the Expropriation Act, by depositing of record, on the 5th March, 1929, a plan and description of the same in the office of the Registrar of deeds for the Registration Division of the City of Quebec, in which Registration Division the said land is situate.

The area taken consists of a rectangular piece of land of three hundred by one hundred and fifty feet, making a total of forty-five thousand square feet, for which 50 cents a foot is offered, i.e., \$22,500.

The defendant by its statement in defence avers that this offer is not sufficient and claims the sum of \$49,500, that is, at the rate of \$1.10 a foot.

Now in assessing compensation to be paid to a claimant whose land has been expropriated, the Court will look at the nature and character of the title as one of the criteria of value. *The Queen v. Carrier* (1).

The land in question formed part of Ordnance Property of Canada and by the Federal Statute 54-55 Vic., ch. 14 (1891) authority and power was given the Governor in Council to make a free grant of the said land to the Quebec Skating Club subject to such provisions and conditions as the Governor in Council deems proper. The preamble of this Statute recites, among other considerations, that the Club have undertaken and purpose, in the event of their receiving such grant, erecting thereon " a building suitable and which will be available for public exhibition purposes."

Under the Great Seal of Canada a grant of the said property was duly made in favour of the Quebec Skating Club subject, among others, to the following provisions and conditions, namely:

1st . . . . .

(1) (1888) 2 Ex. C.R. 36.



2nd. That the new building which is *now* being or has lately been erected by the Quebec Skating Club upon the lands hereinbefore particularly described must be one which in the opinion of Our Minister of the Interior will be suitable for Exhibition purposes, and shall at all times be available for the same.

3rd. That the Quebec Skating Club shall take up the water pipe or pipes conveying water to the Laboratory and Fulminate buildings of Our Cartridge Factory, and shall, to the satisfaction of Our Minister of Militia and Defence, properly divert and relay such pipe or pipes around the outside of the said new building erected or being erected by the said Quebec Skating Club, and that We, Our officers, servants and workmen shall have the right of passage on, through, over and across the said lands and all other rights necessary in connection with the inspection, maintenance and repair of such pipe or pipes.

It may be well to mention at this juncture that such a building was duly erected and exhibitions held therein. However, the building was destroyed by fire in 1918 and the land has remained vacant ever since; but in 1911, by an Act of the Parliament of Canada, 1-2 Geo. V, ch. 5, the National Battlefields Commission was authorized to purchase certain other lands than those included in the Schedule to ch. 58 of the Statute of 1908, namely the very land in question in this case and for which expropriation proceedings are now duly resorted to.

In the result, it is quite obvious that in view of this 1911 Statute, the Club could not reasonably consider rebuilding upon these premises after the fire in 1918, and it is only recently that steps were taken to revive the Club and for that purpose they have acquired land in that neighbourhood, namely on Laurier Avenue, for which they paid \$45,588.63 including the cost of buildings, besides the vacant lots; but with a title free from any conditions and encumbrances. The Statute of 1911 had the effect, after the fire, to dislocate the business of the Club, resulting in the delay in securing new premises under difficult circumstances. The old property now being expropriated contained 45,000 square feet, while the new one contains 41,640. The several lots of the latter property were bought at different prices and in the case of the Normandeau property they had to pay for the building thereon erected in addition to land, the whole as shewn on Plan exhibit B, and the statement filed of record giving the full details of these purchases.

The property in question must be assessed in view of the best uses to which it can be applied under circumstances

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consistent with the nature of the title. The defendants are entitled to a fair compensation to the extent of their loss, and that loss is to be tested by what was the value at the date of the expropriation of such parcel of land to them and not to the taker. *Sydney v. North Eastern Railway* (1); *Cedar Rapids Case* (2); *The King v. Lack* (3) and cases therein cited.

It is true that a property may under some circumstances have a specially high value to the owner over and above the market value to the rest of the community, and we have authority for that in the Judgment of the Judicial Committee of the Privy Council in the case of *Pastoral Finance Association Ltd. v. The Minister* (4). It can also happen, as in the present case, that certain conditions involving charges, easements or servitudes upon a property may be very much less onerous to the owner than they would be to any other member of the community, the result being that the existence of such conditions would adversely affect the market value; but again, in all cases, it is the value to the owner which is sought.

In the special circumstances of this case one must, in endeavouring to arrive at a proper compensation, always bear in mind that it is the value to the owner which is here sought.

Indeed, the conditions imposed by the Grant would have been almost impossible for any ordinary purchaser, for anyone of the public. No person, except the Club, would have sought a grant of the kind as the land could not have been used for ordinary purposes, that is for building lots, erecting a dwelling or even for gardening. But it is quite otherwise for the Club. The land as granted to them was indeed of a much greater value than it could be to a private individual. The fact of making their building available for exhibition, while to some extent an impediment or detriment to them is far from being a serious impediment in its nature, and so does not amount to much for the Club.

Then there is the question of the right of the Crown to lay pipes on the premises. That in itself did not seriously

(1) (1914) 3 K.B. 629, at p. 637.

(2) (1914) A.C. 569, at p. 576.

(3) (1920) 20 Ex. C.R. 113, at p. 116.

(4) (1914) A.C. 1083.

affect the Club in their use of the property but it is a detriment that would operate in decreasing the value of land, which would without it be worth more, and will have to be taken into consideration as well as the exhibition privilege, when coming to fix the compensation. These admittedly do affect the market value of the land but not to the extent contended by some of the witnesses, always from the standpoint of third parties.

It may perhaps be casually mentioned that all these conditions, easements or servitudes are now practically merged in the grantor and that the pipes are no more in use; but that does not affect the case, since it must be approached as if these were in full force and effect and which could, under the title, be exercised at any time.

There is this last question respecting the 135 feet between Grande Allée and the northern end of the property which it is admitted was never *procès-verbalisée*. In this respect it is well, first, to read the description of the property as given by the Crown through the grant. The description of this land—as well in the Statute of 1891, in the Grant, in the Statute of 1911 which refers to the description in the Act of 1891, in the description deposited in the Registry Office under the Expropriation Act and in the information—always refers to this first street and uses such street as a boundary to the land and that is repeated several times all through this description. Parliament by the Act of 1891 gave the defendant this land on the first street. This description is practically an *aveu judiciaire*. It is not in the mouth of the expropriating party, who after all represents the Crown, to say you cannot use that street as a street after deliberately stating all through that it is a street abutting on this land.

Under the decision of the Supreme Court of Canada in the case of *Roberge v. Daigneau* (1), it must be found that a servitude “par destination du père de famille” over these 135 feet has been created by such descriptions which are a sufficient specification in writing of the nature, the extent and the situation of the servitude, as required by Art. 551 C.C.

Having said so much there remains to be determined the amount of the compensation. And in that respect it

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(1) (1926) S.C.R. 191.

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may be said that the evidence adduced in respect of the value of land has not been in any wise controlled by the questions of law above mentioned which must determine the controversy; that is, by what is sought in this case, the value of the land to the owner and not to the public.

Under all the circumstances, considering, as disclosed by the evidence, the prices paid on Grande Allée, in Laurier Avenue and in the vicinity, I am of opinion that a valuation of seventy cents (70c.) a foot is a fair and just compensation.

Therefore, there will be judgment as follows:—

1. The lands expropriated herein are declared vested in the National Battlefields Commission as of the 5th day of March, 1929.

2. The compensation for the land so taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of \$31,500 with interest thereon from the 5th March, 1929, to the date hereof.

3. The defendant, upon giving to the National Battlefields Commission a good and satisfactory title, free from all mortgages, charges or encumbrances whatsoever—excepting however the charges and conditions above mentioned—are entitled to recover and be paid the said sum of \$31,500 with interest as above mentioned.

4. The defendants are also entitled to the costs of the action.

*Judgment accordingly.*

1931  
March 23.  
April 4.

DAVID JUNE WATEROUS.....APPELLANT;

AND

THE MINISTER OF NATIONAL }  
REVENUE ..... } RESPONDENT.

*Revenue—Income Tax—Dividends—Victory Bonds—Exemptions*

W. Ltd., having accumulated profits, declared a dividend, and by consent of the shareholders, paid the same in Victory Bonds. W., a shareholder, in his income return for that year, claimed he should not pay income tax on this dividend because it was paid in Victory Bonds which were exempt from income tax.

Held that the payment of the distributed dividend in question in this case, in bonds, does not bring the transaction within the "obligation" of the bond in question which introduces the exemption in taxes.

That such payment is not the payment of the capital of the bond at maturity nor is it the payment of interest upon presentation and surrender of coupons which is what is exempt from taxation. That the amount so received as dividend represented by said bonds was liable to income tax as profits and gains.

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APPEAL under the provisions of the Income War Tax Act from the decision of the Minister.

The appeal was heard before the Honourable Mr. Justice Audette, at Ottawa.

*W. T. Henderson, K.C.*, for appellant.

*C. Fraser Elliott, K.C.*, and *Stanley Fisher* for respondent.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (April 4, 1931), delivered the following judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, (R.S.C., 1927, ch. 97) from the assessment of the appellant, for the year 1928, on that part of his income which he received from the Waterous Limited, a company incorporated under the Dominion Companies Act, in the nature of a dividend of \$30,500, the proceeds of gains and profits made by the company, distributed among its shareholders and paid to them otherwise than in specie—that is, with their consent and agreement—in Canada Victory Loan Bonds at par.

The appellant contends that as this dividend so distributed was paid in a War Loan Victory Bond, herein-after recited, he is exempt from paying any income tax upon such dividend.

To facilitate a proper understanding of this question, it is thought advisable to recite the actual language of the Bond, which reads as follows:—

Series—T  
 No. H071813  
 CANADA'S VICTORY LOAN, 1918

\$

Dominion of Canada  
 War Loan.

15 years 5½ Gold Bond. Principal due 1st November, 1933.

The Dominion of Canada, for value received, will pay to the bearer or, if registered, to the registered holder hereof, the sum of

Dollars

on the first day of November, 1933, and will pay interest thereon at the rate of five and one-half per cent. per annum from the 1st day of November, 1918, semi-annually, on the first day of May and the first day

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of November, upon *presentation* and *surrender*, as they severally *mature*, of the coupons for such interest hereto annexed. Such principal sum is payable at the office of the Minister of Finance and Receiver-General at Ottawa, or at the office of the Assistant Receiver-General at Halifax, St. John, Charlottetown, Montreal, Toronto, Winnipeg, Regina, Calgary, Victoria. Coupons are payable free of exchange, at any branch in Canada of any chartered bank. Principal and interest are payable in gold coin that is legal tender in Canada. This bond is one of an issue of the Dominion of Canada, issued and to be issued of date 1st November, 1918, and payable 1st November, 1933. The obligation represented by this bond and the annexed interest coupons and all payments in discharge thereof are and shall be exempt from taxes—including any income tax—imposed in pursuance of any legislation enacted by the Parliament of Canada. This bond is issued under the authority of Statutes of Canada, “The War Appropriation Act, 1915,” “The War Appropriation Act, 1916,” “The War Appropriation Act, 1917,” “The War Appropriation Act, 1918.” This bond shall pass by delivery, unless it is registered in the owner’s name in the books of the Department of Finance and such registration is noted hereon by or on behalf of the Deputy Minister of Finance, Registrar of the bond of this issue. Transfer of registered bonds and discharge from the registry may be made, subject to the conditions endorsed hereon. This bond shall not be valid or obligatory for any purpose until countersigned on behalf of the Department of Finance.

In Witness whereof .....

From the reading of this bond, it appears clearly that the *obligation* resulting therefrom is *first* the payment of the capital thereof on maturity in 1933 and *secondly* to pay interest, upon presentation and surrender of coupons for the same.

Now what is it in this bond which is exempt from income tax? The bond says: “The obligation represented by this bond and the annexed interest coupons and all payments in *discharge* thereof are and shall be exempt from taxes—including any income tax . . . .”

The payment of the distributed dividend in question in this case in *bonds*, does not bring the transaction within the *obligation* of the bond above recited which introduces the exemption in taxes. It is not the payment of the bond at maturity, and it is not the payment of interest upon presentation and surrender of coupons. The bond passes by delivery, as appears by the recital in the bond itself.

Clearly the transactions in this case do not bring the bond to the stage when, in the discharge of its obligation, exemption can be claimed. The whole fallacy of the appellant’s contention lies in the fact that while this bond is a bond free from taxation, he has not shown circumstances upon which this exemption would obtain in his behalf at the present time.

The dividend paid and distributed from the gains and profits of the company remains a gain and profit in the hands of the shareholder, whether that dividend is paid in kind, specie or in bond; because it is all through a dividend from, and of, profit and gain; it remains of such nature in the hands of both the company and the shareholder. What you cannot do directly, you cannot do indirectly.

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The case of exemption from taxation provided as resulting from the obligation of the bond does not in any manner or form arise under the present circumstances. The dividend, the proceeds of gain and profit, has been invested in bonds and whoever may be the owner thereof will benefit by the exemption from paying income tax upon the interest paid upon the surrender of the coupon or on the capital at maturity.

The bond in the hands of the shareholder does not come into his hands under any of the circumstances flowing from the obligation of the bond and therefore he cannot claim exemption.

The appellant stands in the same position as any other shareholder, in any company, receiving a dividend which constitutes part of his income, and which he may after receiving invest in such bonds. There is no reason to discriminate against the latter who buys bonds himself from the proceeds of the dividend and the one who gives his consent to accept in dividend a bond which this company bought with profit and gain coming to him. The payment of the dividend in bonds did not alter the nature of the dividend which always remains a distribution of profits and gains of the company among the shareholders who receive it as an income subject to taxation, as the obligation of the bond to exempt from taxation does not evidently apply to such circumstances. The appellant, however, having agreed to allow the company to pay the dividend in bonds—to invest for him such dividend—he will hereafter be exempt from taxation on what he will derive from the bond itself. The exemption mentioned in the bond only attaches upon the revenues derived therefrom and not upon gains and profits of monies used in purchasing the same.

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When the company declared the dividend in question on its shares, a debt immediately became payable to each shareholder in respect of his dividend for which he could sue at law; but that does not make the company a trustee or agent in respect of the shareholder's dividend and the fact of converting the dividend into bonds does not change the nature of the dividend. The bond was only a means of liquidating to shareholders the liability of the company to pay the declared dividend. In re *Severn and Wye and Severn Bridge Ry. Co.* (1).

When the bond comes in the hands of the shareholder it must be treated in the same manner as if it were coming into the hands of the company, which acquires it out of profits and gain upon which they had to pay taxes. It comes into the hands of the shareholder as gain and profit and forms part of his income without exemption of taxation as provided in the bond. It is not the money that purchases the bond that is exempt from taxation, but only what is derived from the bond.

The company at the time could not pay the dividend in bond except by the consent of shareholders (*Palmer, Company Law*, 13th Ed., 231); but see now the Act of 1930, 20-21 Geo. V, ch. 9, sec. 14.

A very apposite decision in the United States is to be found in the case of *Hitner v. Lederer* (2), where it was held that for income tax purposes, value of first Liberty Bonds, received in payment of salary, is to be considered, notwithstanding the Act of April 24, 1917, declaring them exempt, both as to principal and interest, from all taxes \* \* \* ; salary in legal effect being paid in money.

There is also the opinion of the Attorney-General reported in *Alverson*, American Income Tax cases, 88, where it is said:

Corporate stockholders receiving dividends paid with non-taxable liberty bonds must include in the computation of net income subject to income tax the value of such bonds received as dividend payments, because the tax is not upon any part of the bond but upon it as a whole and cannot be evaded because the income or gain happens to be liquidated by the delivery of a certain number of . . . non-taxable securities.

Subsec. (j) of sec. 4 of the Income War Tax Act (R.S.C., 1927, ch. 97) provides, in dealing with exemptions and deductions, that "the income derived from any bonds or other

(1) (1896) 1 Ch. D. 559.

(2) (1926) 14 Fed. Rep. 2nd Ser 991.



securities of the Dominion of Canada issued exempt from any income tax imposed in pursuance of any legislation enacted by the Parliament of Canada" shall not be liable to income tax. But here again the provision is in confirmation of the obligation recited in the bond and that is that the exemption is upon the income derived from the bond and not upon the monies used in purchasing it.

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There were other questions raised at trial but in the view I have taken of the case it becomes unnecessary to pass upon the same.

Looking at all the circumstances of the case, it must be found that the real nature of the transaction in question was that the company intended to distribute and pay and did distribute and pay to the shareholders a dividend out of gain and profit realized in its business; but when it came to pay, it offered to the shareholders to liquidate such liability with war bonds instead of money or cheque and the shareholders accepted. The income tax sought is not upon any part of the bond, but it is upon the profits and gains of the company used in purchasing the bond which was handed over to the shareholder to liquidate its liability in respect of the dividend. The dividend was gain and profit in the hands of the company and in the hands of the shareholder and the question of exemption under the provisions of the bond and of the Act does not arise; because the payment in no manner can be said to be paid under such provisions.

There will be judgment dismissing the appeal with costs.

*Judgment accordingly.*

FRANCOIS XAVIER JOUBERT.....SUPPLIANT;

AND

HIS MAJESTY THE KING.....RESPONDENT.

1931  
Apr. 8.  
Apr. 15.

*Crown—Petition of Right—Negligence—Tort—Imprudence of deceased  
—Grace and bounty of Crown*

*Held* that no action in tort will lie against the Crown except where and when such right of action is given by Statute.

- 2. That in order to succeed in an action against the Crown, for damages resulting from the death of a son, on a public work, the onus is upon the Suppliant to prove that the accident occurred on a public work,

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and that there was an officer or servant of the Crown whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident.

3. That the act of the Crown in paying the expenses of and incidental to the funeral and burial, is referable to the grace and bounty of the Crown and did not constitute an acknowledgment by it of a right of action.

*Quære:* Would not a person who came to his death by drowning, in choosing to walk on and along the coping of the retaining wall of a wharf some 2 to 4 feet wide, on a dark night, with the knowledge of indentations therein where mooring posts were placed, and when he had ample room to walk on the inside of such coping be the victim of his own imprudence?

ACTION by suppliant claiming damages for the death of his son, alleged to be due to the fault and negligence of the Crown.

The action was tried before the Honourable Mr. Justice Audette at Three Rivers, Province of Quebec.

*M. G. LaRochelle, K.C.*, for suppliant.

*Frs. Desilets, K.C.*, and *L. D. Durand* for respondent.

The facts are stated in the reasons for judgment.

AUDETTE J., now (April 15, 1931), delivered the following judgment.

The suppliant, by his Petition of Right, seeks to recover the sum of \$12,473 for alleged damages arising out of the death of his son under the following circumstances.

The deceased Charles Wilfrid Xavier Joubert, at the time of his death was employed by the Department of Marine and Fisheries, on Barge No. 7 which was occupied by the Buoys Branch, in laying the buoys, etc. He was not part of the crew, but a labourer on board, called by one of the witnesses, a *spare*, helping generally in the work. He was paid so much an hour being fed and lodged on board the barge.

On the 25th April, 1929, after his day's work and after having taken his supper at 6 o'clock, the deceased, shortly after eight o'clock in the evening, in company with witness Lefebvre, who was engaged on board in similar work, left the barge moored at Bureau Wharf, at Three Rivers, to go to the theatre. It was beginning to be dark at the time.

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At eleven o'clock that same evening they returned to the Bureau Wharf for the purpose of sleeping on board of the barge for the night. When they arrived at the place where the barge was moored when they left at 8 o'clock, they found the mooring of the barge had in the meantime been changed,—she had been moved 800 or 900 feet west, although still at the Bureau Wharf.

The wharf in question, which is slightly over 2,000 feet in length, is built with a concrete wall and facing and the inside filled with earth. The top of this concrete facing, the flat coping immediately adjoining the water, which has been called the *Band* by some of the witnesses, is according to some of them 2 to 2½ feet, and by one witness placed at 4 feet, in width. The level of this coping was at some place irregular where nigger heads were installed.

When the deceased and witness Lefebvre realized that the barge had been moved, they walked along on this Band, or top of the wall. The deceased while walking thereon tripped on a nigger head, fell in the water and was drowned.

A nigger head is an iron post placed inside of an indentation in the top of the wall, the device being used for tying thereto the cable or rope by which a vessel is moored, and is, as said by someone at trial, in the shape of a saucer with a mushroom head in it. The efforts of Lefebvre in trying to rescue the deceased were fruitless; but with the view of marking the place where his companion fell he laid a stone at the nigger post and went up to the barge asking for help. They returned to the place in question so marked and identified without however achieving anything. The body was found long after.

The night was dark and the nearest light was at about 150 feet from the place of the accident. Under the circumstances the deceased was really guilty of recklessness in walking on that coping in the dark. Was he not the victim of his own imprudence?

The evidence establishes that the Bureau Wharf, at the place where the accident occurred, is entirely under the jurisdiction, management and control of the Harbour Commission of Three Rivers.

Now, approaching the consideration of the present controversy in its legal aspect, it is quite apparent that it is an action against the Crown sounding essentially for dam-

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ages in tort and in such a case where there is no statutory authority therefor, no such action lies against the Crown.

The suppliant, to succeed, must bring his case within the ambit of subsec. (c) of sec. 19 of the Exchequer Court Act (R.S.C., 1927, ch. 34) which reads as follows:

19. The Exchequer Court of Canada shall have *exclusive original* jurisdiction to hear and determine the following matters:—

- (a) . . . . .
- (b) . . . . .

(c) Every claim against the Crown arising out of any death or injury to the *person* or to property *resulting* from the *negligence* of any officer or servant of the Crown while acting *within the scope* of his duties or employment upon any *public work*.

To bring the case within the provisions of subsec. (c) of sec. 19, the injury must be 1st—on a public work; 2nd—there must be some negligence of an officer or *servant of the Crown* acting within the scope of his duties or employment; 3rd—the injury must be the result of such negligence.

There is not in this case a tittle of evidence upon the record establishing that there is a *public work* or that there was any particular *officer or servant of the Crown* whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident. From these facts, it necessarily follows that the Court cannot find that there was any *negligence* of any officer or servant of the Crown acting within the scope of his duties for whose *negligence* the Crown can be held responsible.

There is no evidence on the record to show that the Crown was in any manner, under any obligation to do anything which it failed to do in the circumstances of the case. *Mavor v. The King* (1); *McHugh v. The Queen* (2); *Harris v. The King* (3); *Municipality of Pictou v. Geldert* (4); *Sanitary Commissioners of Gibraltar v. Orfila* (5); *Hopwood v. The King* (6); *Theriault v. The King* (7).

At the time of the accident the deceased was not acting within the course or scope of his employment. After 6 o'clock in the evening he was perfectly free to do what he

(1) (1919) 19 Ex. C.R. 304, at p. 307.      (4) (1893) A.C. 524.  
(2) (1900) 6 Ex. C.R. 374.      (5) (1890) 15 A.C. 400.  
(3) (1904) 9 Ex. C.R. 206.      (6) (1917) 16 Ex. C.R. 419 at 421; 39 D.L.R. 95 at 97.  
(7) (1917) 16 Ex. C.R. 253.

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cared to do. No particular person can be found to be blamed for the accident which obviously was the result of the victim's own negligence in walking, in the dark, upon the coping of the edge of the wharf.

The suppliant's counsel alleged at bar that the Crown paid the expenses of the funeral, of the coffin of the deceased, etc., and thereby recognized its own liability resulting from the accident. But all that was done in that respect is referable to the grace and bounty of the Crown and does not constitute an acknowledgment of a right of action. *Martial v. The Queen* (1).

In the result it is quite clear that this action which is essentially one in tort for damages, in the nature of *quasi delicto*, will not lie against the Crown at common law, and in the absence of any statute making the Crown liable in such a case, the action cannot be maintained.

The suppliant has failed to bring the facts of the case within the provisions of sec. 19 of The Exchequer Court Act. There is no evidence that the injury complained of resulted from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment. The *onus probandi* was upon the suppliant and he has failed to discharge such obligation. His case has not been proven.

Therefore there will be judgment declaring that the suppliant is not entitled to the relief sought by his Petition of Right herein.

*Judgment accordingly.*

HIS MAJESTY THE KING.....PLAINTIFF;

AND

THE ATLANTIC DISTILLING COMPANY, LIMITED } DEFENDANT.

1931  
Jan. 21.  
March 26.

*Revenue—Inspection of Distillery—Proof of Shortage—Excise Act—Collection*

*Held*, That where an inspection of the stock of spirits in a distillery, made according to the directions of the statute, shows that on a given date a substantive quantity of spirits had in some way been removed from the distillery, and that the distillery stock books, required to be kept under the Act, did not show said deficiency to have been lawfully

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- removed, such evidence, unless rebutted by proper and legal evidence, will be proof that said shortage was unlawfully removed.
2. That it results from the proper reading of sections 53, 149, 151 and 152 of the Excise Act, that, upon it being shown that any distilled spirits have been unlawfully removed from a distillery, the excise duties thereon become payable forthwith.
  3. That it is no defence in the present action to show that the spirits had been unlawfully removed by its Sales Manager, who was also a Director, without the knowledge of the other Directors. That the Company is bound by the acts of such Sales Manager and that it cannot escape from the results of the illegal acts of its officers and servants.

*Quaere:* That from sections 149 and 151 of the Excise Act read together, does not "collection" therein mean a collection to be made when there has been a sale or removal of spirits from a distillery, and that being so where it is shown that a certain shortage occurred through a leakage in a tank in the distillery, no excise duties are payable on such shortage.

ACTION to recover excise duties from the defendant company.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Montreal.

*Gustave Monette, K.C., and Edouard Masson* for plaintiff.

*S. Jacobs, K.C., and L. Phillips, K.C.,* for defendant.

On behalf of the plaintiff, it was argued that the shortage is established by measurement and weighing as required by the Excise Act. How duties are ascertained and when payable is fixed by sections 50, 51 and 54. By section 51, duties accrue and are levied on the quantities made or manufactured, ascertained as provided by the Act and not on quantities delivered for consumption. They are collectible on the first of each month, but where they are warehoused, under a bond, the duties are paid only when the spirits are removed from warehouse. That duties are due on spirits forfeited, that is, over and above the penalty of forfeiture.

Mr. Phillips, K.C., for defendant, argued that certain car loads seized came from the distillery which accounts for shortage; that it came out without the knowledge of the Directors other than the one committing the irregularity. That such faulty act could not make the company liable for the duty. The duties are due on consumption, or when goods disappear, disappearance being tantamount to con-

sumption. The provision for payment monthly is obsolete, that being compelled to warehouse for two years, the duty is not payable till taken out of warehouse. Section 179 provides for seizure and forfeiture of goods removed from distillery, but does not impose a tax.

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He cited: *In re The Excise Act* (1929) 4 D.L.R. 155. *Attorney-General v. Reid* (1926) 1 D.L.R. 821. *Rex v. Busy Bee Wine and Spirits Co.* 60 D.L.R. 415. *Rex v. Lee Wine Co.* 61 D.L.R. 411. *Piché v. Quebec Liquor Com.* 70 D.L.R. 493. *Rex v. Nat Bell Liquors* 53 D.L.R. 482. *Rex v. Crawford* (1927) 2 D.L.R. 565. *Parker v. The King* (1928) Ex. C.R. 36. Sections 138, 167, 110, 111, 173, 179, 219, 225.

The facts and principal questions of law in the case are stated and discussed in the Reasons for Judgment.

THE PRESIDENT, now (March 26, 1931), delivered the following judgment.

This is an action for the recovery of excise duties from the defendant company, which at the times material here, was duly licensed to carry on the business of a distiller in the City of St. John, N.B., under the provisions of the Excise Act, Chap. 60 R.S.C., 1927. A certain quantity of spirits was manufactured by the defendant in bond pursuant to the licence, and the same became subject to excise duties.

The basis of this action is that upon two inspections of the distillery by an Inspector of Excise, to ascertain the quantity of spirits produced and entered for use, it was found that the stock of spirits on hand, and in process of manufacture, was less in quantity than that which with the quantity lawfully recorded and legally taken for use and accounted for, would be equal to the whole quantity of spirits produced in the distillery. In plain words, it is claimed that two deficiencies or shortages in the quantities of spirits distilled in the distillery were ascertained upon inspection conducted according to the directions of the Excise Act, viz., on July 13, 1928, 5,605·67 proof gallons, and on March 31, 1929, 554·35 proof gallons; and there was no satisfactory accounting for the deficiencies. That these deficiencies occurred is established beyond doubt.

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The Excise Act requires every person licensed as a distiller to keep a book or books, in a form furnished by the Excise Branch of the Department of National Revenue, wherein the distiller is required to enter day by day the transactions of the distillery, including, "the quantity of spirits distilled, manufactured or made by him or removed or brought into the distillery premises." All entries thus made in the distillery books, are verified by the excise officer in charge of the distillery. Pursuant to the provisions of the Excise Act, any spirits distilled in the defendant's distillery were weighed and tested by officers of excise, in the manner and at the times required by the statute and the regulations made thereunder. The defendant's annual inventory for the year ending March 31, 1928, showed 50,613·81 proof gallons of spirits in process of manufacture in the licensed premises. This inventory was signed and sworn to by the defendant's manager on behalf of the defendant, and verified by the excise officer in charge of the distillery. On April 23, 1928, the stock of spirits in the distillery was weighed and tested and a slight surplus of some 450 gallons was found. In May of the same year a slight deficiency was estimated, but the inspection was not a very careful one. Late in June the Excise Officer discovered what seemed to be a very substantial deficiency and there followed a complete and careful weighing and testing of the spirits in the distillery by excise officers in the presence of distillery representatives. On July 12, the inspection was completed, and a shortage of spirits was found in the distillery stock amounting to 5,605·67 proof gallons. There is no dispute as to this deficiency and nothing further need be said concerning it. Upon the annual stock taking of spirits in the distillery, for the year ending March 31, 1929, made in accordance with the statute and the regulations, a further deficiency of 554·35 proof gallons was found; the accuracy of this quantity was not seriously questioned. The facts as to the alleged deficiencies in the quantity of spirits in the distillery, as claimed by the plaintiff, are not seriously in controversy, and that is all that needs be said concerning this phase of the case.

It may be convenient here to mention the principal defences set up by the defendant. It appears two cars of



spirits were seized by the plaintiff, one at Moncton, N.B., and one at Montreal, P.Q., on April 17, 1928, and April 20, 1928, respectively. The Commissioner of Excise, in June following, wrote the defendant stating that the cars of spirits seized were suspected of being removed unlawfully from its distillery. The defendant, after an investigation, concluded that two car loads of spirits had been illegally shipped from its distillery at St. John, by persons unauthorized, and without its knowledge or consent, it is said. The defendant then requested that the two cars of spirits, amounting to 11,000 gallons, be returned to it, so that the same might be sold in due course and the proper excise duties paid thereon. The goods were not returned but were forfeited. The defendant now claims that the seized car loads of spirits came from its distillery, and were permitted to be taken therefrom unlawfully by its Sales Manager, one Fisher, who by the way was also a Director of the defendant company, and it further contends that this was done without the knowledge or approval of the defendant company. Shortly after this, Fisher fled from Canada and his whereabouts has since been unknown to the defendant, it claims. After investigation by some of the principal officers of excise, it was concluded that the seized goods did not originate from the defendant's distillery; other officers associated with the investigation still believe that the two cars of spirits did come from the defendant's distillery. That issue was not and could not be tried at the trial of this cause. In my opinion it was altogether irrelevant. This defence may as well be disposed of here as elsewhere. If I assumed the seized spirits came from the defendant's distillery, I do not see how that could improve the position of the defendant, in law. To say that the company is not bound by the act of its Sales Manager, a Director of the defendant company as well, assuming he fraudulently removed the seized spirits from the distillery, is hardly arguable. I think the defendant company cannot escape from the illegal acts of its officers and servants, particularly in cases of this kind, by saying that the illegal act was committed without its knowledge or sanction. It is the duty of licensed distillers to see that dutiable goods are not unlawfully removed from their premises. Sec. 126 of the Excise Act states that the payment of any penalty

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or forfeiture incurred under the Excise Act, shall not discharge the person paying the same from the obligation to pay all duties due by such person, and the same may be recovered as if such penalty had not been paid or incurred. I think this affords an answer to this defence. The defendant however pleads that the seized spirits accounts for the deficiency of 5,605·67 gallons found in the stock of spirits at the distillery, although the quantity of spirits seized was apparently double the quantity of that deficiency, and further that the plaintiff is not now entitled to demand from the defendant the sum of \$50,619.20 based on the shortage of 5,605·67 proof gallons. I do not think this plea is of any substance or force and I need not again return to it. The defence in reference to the shortage of 554·35 proof gallons is, that it occurred through a leakage in one of the tanks at the distillery, and that the defendant company was not aware at the time that this tank was in a defective condition or that the leakage was occurring; on this ground the defendant pleads it is not responsible for the payment of excise duties demanded by the plaintiff in connection with this deficiency. I shall again return to a consideration of this defence.

Coming now to a consideration of the Excise Act, which I always approach with some fear, because of its many and manifest obscurities and contradictions. Sec. 51 enacts that all duties of excise imposed by the Act shall accrue and be levied on all goods made or manufactured, and shall be ascertained in the manner provided by the Act. This section needs no discussion because the quantities of goods manufactured and liable to excise duties were ascertained as by statute directed, and there is in fact no dispute concerning this. Sec. 52 states that the duties imposed shall be due and payable on the first day of each month, for the quantity of each article produced during the preceding month. This section seems to be in conflict with succeeding sections, it is probably obsolete, and there is no suggestion that it was ever invoked against the defendant. Sec. 53 is, I think, of importance here; it is to the effect that no goods subject to a duty of excise, shall be removed from any distillery or warehouse until the duty on such goods has been paid or secured by bond. The goods in question here were in the distillery so far as I can gather from the evidence, but possibly a part of the distillery was treated

as a bonding warehouse; the evidence is not clear upon this point, but I do not think it is of importance. Spirits or other articles subject to excise duty may be deposited in a bonding warehouse, without payment of the duty imposed by the Act. Sec. 149 states that "there shall be imposed, levied and collected on all spirits distilled, the following duties of excise," and in this case the duty is fixed at \$9 on every gallon of the strength of proof by Sykes hydrometer. Then sec. 151 defines how the duty upon spirits shall be charged and computed; the quantity of spirits is to be ascertained at the tail of the first worm in which it is condensed into the closed spirit receivers, that is, where the spirits pass from the vapour to the liquid form; and ss. (e) enacts the duty shall be charged "upon the quantity of spirits sold or removed from any distillery by the distiller or by his agent or for his account." Sec. 152 ss. (d) defines how the quantity of spirits which passes from the first worm is to be ascertained, but no question arises concerning that point. Sec. 152, ss. (e) is to the effect that the quantity of spirits sold or removed from any distillery shall be the quantity recorded in the distillery stock book kept under the provisions of the Act, but any inspector of excise is not bound to rely solely upon this evidence. In this case the stock books did not disclose any sale or removal of spirits from the distillery explanatory of the major deficiency, but an inspection of the stock of spirits in the distillery, made according to the directions of the statute, in July, 1928, did show that a substantial quantity of spirits had in some way been removed from the distillery. The deficiency of some 5,605 proof gallons of spirits, in July, 1928, has been proven, though the distillery stock books of the defendant would still show that quantity in the distillery. Being once in the distillery and not being there in July, 1928, the goods must have been unlawfully removed from the distillery, because the books of the defendant which the Act requires them to keep, does not show that the goods were lawfully removed. In these circumstances, under sec. 151, ss. (e) the duty shall be charged upon the spirits removed. I think, when it is once shown that any distilled spirits have been unlawfully removed from a distillery, the excise duties thereon become payable at once. That, I think, is the purpose and meaning of sections 53, 149, 151 and 152 of the Excise Act. I

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therefore think the plaintiff is entitled to judgment for the recovery of the excise duties upon 5,605·67 proof gallons, calculated at the rate of \$9 per gallon.

In respect of the alleged shortage of 554·35 found upon inspection in March, 1929, the evidence given by Murphy, the excise officer in charge of the distillery, and being the only evidence on the point, is to the effect that this deficiency was due to a leakage in one of the tanks in the distillery, and there is no suggestion that that quantity was by any improper agency abstracted from the distillery. I am not sure that any deficiency occurring in this matter constitutes a "removal" from the distillery within the contemplation of the statute. The quantity of spirits, it is true, is ascertained at the tail of the first worm but the duty is computed upon "the quantity of spirits sold or removed from any distillery." The evidence is that there was no "removal" from the distillery, and that evidence was given by the plaintiff's own witness. I am not satisfied that the statute provides for the collection of duties upon spirits lost owing to such a cause in a distillery. It is true that sec. 149 states that duties of excise shall be "imposed, levied and collected on all spirits distilled," but then sec. 151 states that "the duties upon spirits shall be charged and computed" upon "the quantity of spirits sold or removed from any distillery." I think, reading the two sections together, "collection" means a collection to be made when there has been a sale or removal from a distillery. I do not see my way clear to allow this item of the plaintiff's claim.

The plaintiff will have his costs of the action.

*Judgment accordingly.*

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HIS MAJESTY THE KING,

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May 1.

PLAINTIFF;

vs.

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CONSOLIDATED DISTILLERIES LIMITED

AND W. J. HUME,

DEFENDANTS.

AND

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HIS MAJESTY THE KING,

PLAINTIFF;

vs.

CONSOLIDATED DISTILLERIES LIMITED,

AND F. L. SMITH,

DEFENDANTS.

*Practice—Appeal—Stay of execution—Discretion of judge as to amount of security*

Judgment was given against the defendants in the three cases for over \$700,000, and appeals have been taken therefrom to the Supreme Court of Canada. On motion of defendants for stay of execution, it was contended that the judge could in his discretion, in ordering security to be furnished, fix a smaller amount than that for which judgment was given.

*Held*, that Rule 208 of the General Rules and Orders of this Court did not apply to the subject-matter of this application.

2. That under Section 71, ss. "d" of the Supreme Court Act, the discretion conferred upon a judge granting a stay of execution refers only to the *form* or manner in which the security is to be given and does not extend to the *amount* of said security.

MOTION for Stay of Execution pending appeal to the Supreme Court.

The Motion was heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*Arthur Holden, K.C.*, for the motion.

*F. P. Varcoe, K.C.*, *contra*.

THE PRESIDENT, now (May 1, 1931), handed down the following reasons.

This was an application, under the provisions of Rule 208 of the practice of the Exchequer Court, by Mr. Holden, of counsel for the defendants, for a stay of execution in

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the above cases which were tried at the same time before me on the 29th and 30th days of January last. Mr. Varcoe opposed the application on behalf of the Attorney-General of Canada.

LTD.  
 AND  
 HUME.  
 Maclean J.

Judgments were delivered herein in the month of March last, whereby the informations filed by the Attorney-General were sustained, and the defendants found liable for the sums of money sued for in the several informations with the exception of the claims for interest, which were disallowed. Costs were also ordered to follow the event in each case.

Appeals to the Supreme Court of Canada have been launched by the defendants in each case. The aggregate of the amounts for which judgment was given in these cases exceeds \$700,000, a heavy burden upon the defendants if the security on stay of execution pending the appeal has to be given in an equal amount.

Mr. Holden submitted that under the provisions of Rule 208 of the Exchequer Court practice I might exercise discretion in ordering security and fix a smaller sum than the judgments find the defendants liable to pay to the plaintiff.

I am unable to accept Mr. Holden's contention that the Exchequer Court rule applies to the subject-matter of his application. That rule, it seems to me, is to be confined to applications for a stay of execution in cases where an appeal has not been taken to the Supreme Court from a judgment of this court. On the other hand, where an appeal to the Supreme Court has been launched, it seems to me that the provisions of section 71 (*d*) of the Supreme Court Act (R.S., 1927, c. 35), govern a Judge of the Exchequer Court in fixing security to be given on a stay of execution pending the appeal. Those provisions read as follows:

"71 (*d*) if the judgment appealed from directs the payment of money, either as a debt or for damages or costs, the execution of the judgment shall not be stayed, until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on such appeal."

If an application were made under this section I would be constrained to hold that the discretion conferred upon me there refers only to the *form* or manner in which the

security is to be given and does not extend to the amount of the security. No other interpretation can, it seems to me, be placed upon the words used. It is a burdensome rule but it is prescribed by an Act of Parliament and I could not depart from it by any forced construction in case of any party to litigation.

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The application as now made will be dismissed with costs.

*Ordered accordingly.*

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY  
 DISTRICT

1928  
 Sept. 13.  
 Oct. 18.

|                                                           |   |              |
|-----------------------------------------------------------|---|--------------|
| VANCOUVER ORIENT EXPORT<br>CO., LTD. (PLAINTIFF).....     | } | APPELLANT;   |
| AND                                                       |   |              |
| THE SHIP "ANGLO-PERUVIAN"<br>AND OWNERS (DEFENDANTS)..... | } | RESPONDENTS. |

*Shipping—Collision—Conflicting evidence—Weighing of evidence—Duty of Appeal Court to vary on facts*

Action by plaintiff to recover damages suffered by it by reason of defendant's ship coming into collision with one of its booms of logs in Burrard Inlet, North Vancouver, while the said ship was backing out of Empire Wharf.

*Held* (reversing the Judgment appealed from) that in cases of collision where the evidence is conflicting and nicely balanced, the Court should be guided by the possibilities of the respective cases which are set up, in weighing the evidence.

2. That it is next to impossible for one on a moving vessel, unless he is in a position to see her from stem to stern and at the same time maintain a complete and commanding view of the shore, to follow the course, speed or evolutions in the manoeuvres of a vessel; and that the plaintiff's witnesses being some on the boom and some on land overlooking the locus of the accident were in a better position to follow the course of the vessel than were those on board the same.
3. That though a Court always loathes to reverse the findings of another Court on questions of fact, this does not mean or imply that it should abdicate its right and duty to examine all the evidence, and, when there appears manifest error, to rectify the mistake.

APPEAL from the decision of the Local Judge in Admiralty for the British Columbia Admiralty District, dismissing plaintiff's action.

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 SHIP  
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 OWNERS.

The appeal was heard before the Honourable Mr. Justice Audette, at Vancouver, B.C.

*J. W. de B. Ferris, K.C.*, for appellant.

*R. H. Tupper, Esq.*, for respondents.

The facts and questions of law discussed are stated in the reasons for judgment.

AUDETTE J., now (October 18, 1928), delivered the following judgment.

This is an appeal from the judgment of the Local Judge of the British Columbia Admiralty District, pronounced on the 16th day of February, 1928, in a collision case, dismissing the action with costs.

The plaintiff claims, as per the endorsement on the writ, the sum of \$635.80 as representing the amount of damages suffered by him, as arising out of a collision between the defendants' ship *Anglo Peruvian* and the booming ground of the plaintiff situate at North Vancouver, Burrard Inlet, British Columbia, on the 27th December, 1927.

The *Anglo Peruvian* is a steamer of 430 feet in length, 58 feet beam, gross tonnage 5,435, registered tonnage 3,331, and painted grey and red.

The witnesses on behalf of the plaintiff, with great unanimity, testify seeing the *Peruvian* in actual contact with the plaintiff's boom and logs. The salient points of their evidence, using their own language as much as possible, are as follows:—

[The learned judge here analyses and discusses the evidence adduced by plaintiff, and concludes that the plaintiff has discharged the onus upon it to prove its claim, and then proceeds as follows:—]

\* \* \* \*

This closes the plaintiff's evidence which in my estimation, conclusively discharges the onus placed upon him of proving his case beyond any uncertainty. Were the case closed at this juncture, it would be quite impossible to do otherwise than to give judgment in favour of the plaintiff.

I shall now review the defendant's evidence, which absolutely denies any of the charges made by the plaintiffs and the testimony of all his witnesses. While doing so, I shall comment upon it as it develops, with the en-



deavour to reconcile it, if possible, with the plaintiff's evidence and fill the great gap between their respective contention.

The salient points of the defendant's evidence are as follows:

[The learned judge here discusses the defendant's evidence, and then proceeds.]

\* \* \* \*

The evidence of these last four witnesses,—two of them standing at the forecastle and two at the poop—should be carefully scrutinized to be understood. First, the vessel we know is of 58 feet beam,—half of that would be 29 feet—therefore if these four witnesses standing in the centre of the vessel, and the vessel was in a slanting position across A., if the centre of the poop and the forecastle were then at 20 feet from the logs, the midship must have been nine feet inside of the apex of the boom at A. That evidence indeed must also be read conjointly with the evidence of the plaintiff's witness Moore who said the *Peruvian* was lying right up against the point of the boom, and witness Penny said that both the stern and the bow of the vessel were clear of the logs. (See also witness Penny and the Pilot on that point.) All of that evidence read together confirms itself. Under that evidence to find that the two ends of the ship were clear of the logs would not be at all inconsistent with the plaintiff's evidence, which would therefore remain uncontroverted. All of this would materially fill the gap in the evidence and reconcile it.

It would also take away any reliability that could be placed upon the Pilot's evidence when he says the vessel went only 20 feet from the logs. By a mental effort, through mental reservation, he would be right, as to the bow and the stern. But is he thus telling the whole truth? Telling only part of the truth is worse than telling a whole falsehood.

The defendant's evidence thus scrutinized and analysed does not present that character of reliability that could in any manner shake the positive testimony of the plaintiff's witnesses who were in a better position for observation and who gave their evidence in a manner free from any suggestion of bias or bad faith.

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The judgment appealed from seems to have given preponderance to the witnesses for the defence for the alleged reason that being on board they had a better opportunity for exact observation of what actually occurred, than those of the plaintiff, standing on the shore. With that view I am unable to concur, for among reasons, those already mentioned and also and more especially because the witnesses on the shore were in a better position to follow the course and the manoeuvres of the vessel and their unanimity is also very convincing. I would further say that it seems that a deal of the evidence given by the crew was not from actual observation, but by deduction from casual observation at a given moment, relatively to their special position on the vessel.

One must not overlook the personal equation which necessarily arises where a person on a moving body attempts to estimate the distance between that body and a fixed point under observation. It is next to impossible for one on a moving vessel, unless he is in a position which allows him to see her from stem to stern, and at the same time maintain a complete and commanding view of the shore, to follow the course, or speed, or evolution in the manoeuvres of a vessel. *The Purdy* (1).

Moreover, in cases of collision "where the evidence on both sides is conflicting and nicely balanced (as it so often happens in Admiralty cases) the Court will be guided by the possibilities of the respective cases which are set up." *The Mary Stewart* (2); *The Ailsa* (3).

The physical facts of the case are that unless the vessel were prevented by skilful manoeuvring, she would, when leaving the dock, be taken down by the tide, right to the boom in question. These physical facts favour the plaintiff's view.

There can be no doubt that the four members of the crew who were, two at the extreme aft, at the poop, and two at the forecastle, could not see if the ship came in contact amidship on the port side: they had no vision of the port side at midship.

(1) (1919) 19 Ex. C.R. 212 at 229.

(2) (1844) 2 Rob. 244.

Confirmed by Supreme Court  
 of Canada.

(3) (1860) 2 Stuart's Adm. 38.

A question suggesting itself to me is why the Pilot, being in such danger on account of the vicinity of the boom which was a menace to his safety, did not back out further in the stream where he had clear and good water, remains unexplained and suggest to my mind that it was bad seamanship, backing out as he did and allowing himself to be drifted by the tide when he was quite aware the tide was absolutely drifting him towards the boom.

The trial judge, in dealing with this question of facts in the manner he did, did not have the advantage of seeing the demeanour of the four last witnesses in the witness box and in that respect I am in the same position as he was.

Moreover, I may cite here a well known rule of law, which, however, has recently been criticized by Professor Wigmore, in his Treatise on Evidence, with whom I am not entirely in accord, and that is: (as expounded in *Le-feunteum v. Beaudoin* (1), that it is a rule of presumption that ordinarily a witness who testifies to an affirmative is to be credited in preference to one who testifies to a negative, *magis creditur duobus testibus affirmantibus quam mille negatibus*, because he who testifies to a negative may have forgotten the thing that did really happen, but on the other hand where memory affirms the happening of the fact, positive testimony of the fact ought to be accepted rather than negative testimony, and this rule seems to be more applicable to the case because, repeating myself, those affirming were in a much better position to judge than those who are denying. This rule is not a mere *cliché*, but it has its obvious *raison d'être*.

The Court, it is true, always loathes to reverse the findings of another court on questions of fact; but it does not mean or imply that the Court in a proper case should abdicate its right and duty to examine all the evidence and, when there appears manifest error, to rectify the mistake. *Benner v. Benner* (2) and cases therein cited; *The Navarino* (3).

I find that the plaintiff has abundantly proved its case and that has not been controverted by the defendant's evi-

(1) (1897) 28 S.C.R. 89 at 93. (2) (1928) 3 D.L.R. 495, at p. 497.

(3) (1920) 2 Lloyd's L.L. 390.

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dence. The Pilot is the most interested witness in the case and I find his testimony unconvincing. The crew's evidence would seem to support the suggestion of mental reservation, linked in all circumstances to their relative position on the ship on the occasion and the question of the logs mentioned by them seems to be one suggested, without substantial evidence, to becloud the issue.

The testimony of the superintendent proving the amount claimed remains uncontroverted.

There will be judgment allowing the appeal with costs, and declaring that the plaintiff do recover from the defendant the sum of \$635.80, also with costs in first instance.

*Judgment accordingly.*

1931  
 Mar. 30.  
 Apr. 20.

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

THE STEAMSHIP "ELFSTONE" } APPELLANT;  
 (DEFENDANT) .....

vs.

CHICAGO TRIBUNE TRANSPORTA- } RESPONDENT.  
 TION CO., LTD. (PLAINTIFF).....

AND

CRETE SHIPPING COMPANY, LIM- } APPELLANT;  
 ITED (PLAINTIFF) .....

vs.

THE STEAMSHIP "CHICAGO } RESPONDENT.  
 TRIBUNE" (DEFENDANT).....

*Shipping—Collision—Right of way—Narrow channels—Rules 25 and 37 of the Rules of the Road for the Great Lakes*

*Held* (affirming the judgment appealed from) that when a danger of collision occurs, a vessel is not justified in arbitrarily and obstinately insisting on her right of way conferred under Rule 25. If in obstinately following out the letter of the Rules regulating the course, a collision thereby occurs, she becomes at fault under Rule 37.

2. That where the *E.*, coming down stream in a narrow channel of Lake St. Louis, and upon giving the two-blast signal, indicating she elected to meet green to green, received in answer a one-blast signal, amounting to cross signals, the *E.*, instead of persisting in her course and sounding a second two-blast signal, should under the rule have given a danger signal.

APPEAL from the Judgment of the Local Judge in Admiralty for the Quebec Admiralty District.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa, assisted by Commodore W. Hose, R.C.N., as Nautical Assessor.

*R. C. Holden* for appellants.

*Errol M. McDougall, K.C.*, for respondents.

The facts and questions of law raised are stated in the Reasons for Judgment of the Honourable Mr. Justice Audette as well as in the Reasons of Demers J. in the trial court, printed at the end of this report.

AUDETTE J., now (April 20, 1931), delivered the following judgment.

This is an Appeal from the judgment of the Local Judge of the Quebec Admiralty District, in the above mentioned two consolidated actions, pronounced, on the 20th October, 1930, in favour of the respondent Chicago Tribune Transportation Company Limited, and condemning the ship *Elfstone* and her bail and dismissing the action of the appellant Crete Shipping Company Limited against the ship *Chicago Tribune*.

On an appeal of this kind when there is evidence sufficient to support the finding of the trial judge, and no error can be assigned to his view, an appeal to vary his finding should not be entertained. There is in this case ample evidence to support the trial judge's finding.

As is usual in Admiralty cases which arise out of collision, the evidence of the respective parties is very conflicting. In such a case the Court must be guided by the balance of probabilities arrived at by a careful analysis of the credible evidence as a whole. All that evidence read together confirms itself. *Purdy case* (1).

After reviewing the evidence I must come to the conclusion that the respondent's vessel was properly manned and manoeuvred; while the same cannot be said of the *Elfstone* wherein the manoeuvre and management were left entirely in the hands of one man alone who did not see fit to call the Master under then dangerous circumstances. Too much was left for him to do and he seemed to have

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(1) (1919) 19 Ex. C.R. 212, at p. 228.

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been especially impressed with the sole idea of taking, as he said, his advantage of having the right of way as a downbound vessel.

He directed his vessel too much to the north, out of the channel, scraped the bottom as testified by witness Carter. Then in his endeavour to rectify his course he swung around and went to the south side of the fair-way, the collision taking place on the south of the channel near buoy No. 39. Knowing, as testified, that the *Elfstone* was liable to sheer or yaw, I can only ascribe the accident to the combined reason of bad manoeuvring and the tendency of the vessel to sheer or yaw.

Moreover, when a danger of collision occurs, a vessel is not justified in obstinately following out to the letter the rules regulating the course; and in the event of a collision occurring thereby, the vessel becomes at fault under Rule 37. In the present case, changing his course as he did, while endeavouring to swing into the channel, there was no justification in insisting to the last upon the other ship to be guided by his reckless course. *Richelieu and Ontario Navigation Co. v. The SS. Cape Breton* (1).

This was a narrow channel, where one would expect *prima facie* the vessels would pass red to red, without, however, finding any fault for passing green to green and departing from the General Rule. But the signals as given amounted to *cross signals* and the *Elfstone*, instead of persisting in her course and sounding a second two blasts should have, under the Rule, given a danger signal—when indeed, at that time, the vessels were distant enough from one another to have avoided the accident.

I find with the trial judge that the collision took place near buoy No. 39. The *Chicago Tribune* steered perfectly while the *Elfstone* was liable to some sheering.

Now when the *Elfstone* came out of the bend she went north very far—it was even contended she went out of the channel and touched or scraped over the bottom (p. 143). Leaving the bend she pursued a curve from the bend towards the north and then came back towards the south and it is this course of operation that brought on the collision. She did not keep to her side of the channel. From the bend she first showed her green light and in describ-

ing that curve, before colliding, she showed her red light and in the endeavour of straightening herself in the channel in thus swinging around, she again hid her red and showed her green light when the collision occurred. Did she fail to obey the rudder and sheered? She obviously occasioned the accident and she is the one to blame under circumstances of the case.

I have had the advantage in this case of being assisted by Commodore Hose, R.C.N., as Nautical Assessor, and I am pleased to say that he entirely shares my view in arriving at my conclusion.

There will be judgment dismissing the appeal with costs.

*Judgment accordingly.*

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Reasons for judgment of Demers J.

These cases have been united for proof, hearing and judgment, and by consent have been submitted upon the evidence taken before the Wreck Commissioner.

This collision occurred on the 29th of July, 1928, at four o'clock a.m., Eastern Standard Time, between Buoy No. 39 and 38, Lake St. Louis, off Lachine Ranges. It appears there is a cross current of about three miles an hour at that place.

The *Elfstone* was coming down and the *Chicago Tribune* was going up. Both ships were going full speed ahead up to the time that they saw that the collision was about to occur.

It is admitted that the *Elfstone* had the right of way; that she had the right to elect on which side she would pass the other ship.

The contention of the *Elfstone* is that she gave a two-blast signal; that the *Chicago Tribune* answered with one blast; that the *Elfstone* gave a second two-blast signal, and received the same answer from the *Chicago Tribune*; that the *Elfstone* kept as far as she could to her port side; that the *Chicago Tribune* caused the collision because:—

(a) she did not observe the *Elfstone's* right of way.

(b) the *Chicago Tribune* did not obey the *Elfstone's* two-blast signal.

(c) the *Chicago Tribune* gave a cross signal.

(d) the *Chicago Tribune* kept on at too high a rate of speed.

(e) the *Chicago Tribune* did not have a sufficient lookout.

(f) the *Chicago Tribune* did not have competent or sufficient officers and watch on duty.

(g) the *Chicago Tribune* broke Rules 22, 23, 25, 37 and 38 of the Rules of the Road for the Lakes and the St. Lawrence above Victoria Bridge.

(h) if the *Chicago Tribune* had exercised ordinary and reasonable care and prudence, no collision would have occurred.

The *Chicago Tribune*, on the contrary, contends that the first signal given by the *Elfstone* was one blast; that later the *Chicago Tribune* gave a signal of two blasts which was answered by a two-blast signal and hard-a-starboard on wheel, and the faults reproached to the *Elfstone* are that—

(a) the *Elfstone*, as the descending vessel navigated at an immoderate speed having regard to the wind and current.

(b) the *Elfstone* failed to keep to her own side of the channel.

(c) the *Elfstone* gave a two-blast signal after previously having given a one-blast signal.

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(d) the second signal of the *Elfstone* was improper and the manoeuvre thus indicated could not then be carried out.

(e) the *Elfstone* failed to keep a proper lookout, which, according to the location of vessel's bridge, in the after part of the ship was a default more serious even than usual.

(f) the *Elfstone* is so constructed as to be difficult to handle in narrow waters.

(g) the *Elfstone* was navigated in an improper and unseamanlike manner.

(h) the *Elfstone* improperly directed her course to port immediately preceding the collision.

(i) the *Elfstone* failed to blow a danger signal in the particular circumstances in which the vessels found themselves.

(j) the *Elfstone* negligently failed to observe rules 21, 22, 23, 25, 31 and 38 of the Rules of the Road.

The parties do not agree as to the place where the collision occurred. It appears to me, and to the Assessor, that it must be put half way between Buoys 39 and 38.

After the collision, the *Elfstone* must have continued towards 38 and the *Chicago Tribune* towards 39, and it explains the different versions.

There is a contradiction in the evidence of Pilot Chartier as to the place where he was when he gave the first signal. He contends at first that he was opposite the Dixie Lower Range Light, but at the end of his evidence, being cross-examined, page 50, he admits that he had passed the turn of Dixie Range by a quarter of a mile, and he was about half a mile from Buoy 38.

That would agree with the Log Book, though that Log Book has been written later on, and there is not much faith to be accorded to it, especially as to the time; but by the Log Book he had passed the Dixie White Gas Buoy since four minutes when he gave the two-blast signal, but this is not very important since everybody admits that when the first signal was given, both ships were at a fair distance, to wit, at least about half a mile.

I am of opinion that both ships gave the signals they contend they

gave, that the first signal of the *Elfstone* was two blasts, answered by one blast, and the second two blasts answered by two blasts.

I am also of opinion that the *Chicago Tribune* heard one blast as the first signal and she was not to blame when she answered one blast.

I agree with the Assessor that there was no fault in the fact that only one window in front was open in the *Chicago Tribune* wheel-house, as with too many windows open there is too much noise from the wind and a ship's whistle cannot be heard properly, especially with a cross wind.

The Master of the *Chicago Tribune* was in the best possible position in the wheel-house to hear the whistle of other steamers. The Master heard one signal in spite of the side windows being closed, and it is to be presumed that, on account of the innumerable duties of the pilot who was obliged to look to the lights, keep his wheel, attend to the telegraph and to the signals, it is only natural, under the circumstances, that the interval between the two should have been pretty short, and this is the best explanation, and lastly, at the distance where they were, that cross signal would cause no damage if the *Elfstone* pilot had followed Rule 22, he had, at that time, and that distance, plenty of time to give that signal, and he had also, in my opinion, time to give his two-blast signal.

It is not the violation of the Rule at that moment which was of consequence, but he blew his second two-blast signal when the ships were at a distance of between four and six lengths of each other, to wit, at about a minute of distance, as he said he insisted on his right of way.

As I have said, the answer was two blasts. He says that he heard only one.

Admitting that he heard one blast, then he disobeyed the rule as to cross signal for a second time.

It is evident that he changed his mind and decided to pass *port to port*, without giving any notice, this appears by the Log Book, otherwise he would have given the danger signal. The *Chicago Tribune*,



changing also her course to pass starboard to starboard as signalled, it is not surprising that a collision occurred. By whose fault? Evidently, by the fault of the *Elfstone*.

One might say that it is surprising that the *Chicago Tribune* saw the *Elfstone* so suddenly in front of her, but one must not forget that in those narrow waters the vessels are navigating in a very small space and that the course of a ship is altered pretty fast.

It may also be objected that when the second signal of two blasts was given, the Master of the *Chicago Tribune* hesitated for a moment, but it was very natural when, after receiving what he considered one blast, he received two; but he was not in doubt as to the intention at that time of the *Elfstone*; he could not foresee that the *Elfstone* would change her mind and without notice. At the time of the second blast, the *Elfstone* was going to port and what the *Chicago Tribune* had to do was to obey and this is what she did.

The only doubt I had was as to the speed of the *Chicago Tribune*. In the opinion of my Assessor, the descending ship at that place should never go full speed; for the ascending ship it was the proper

thing to do to go full speed, as the current at that particular spot has a tendency to push her side-ways, a fact which would have rendered the collision more serious; and the more speed she has, the easier it is for her to keep straight in the channel, and I feel disposed to adopt that view.

In resumé, the fault of the *Elfstone* is clear, repeated and voluntary, which is equivalent to *faute grossière*, and in my opinion the collision should be attributed to her exclusively.

Under the circumstances, it being clear that the *Elfstone* violated Rule 22; that if she had obeyed that rule there would have been no accident; the *Elfstone* having created the danger, it was incumbent upon her to show that the other ship was also in fault; this she has failed to do, in my opinion.

For these reasons, the action of the *Chicago Tribune Transportation Company Limited* against the *Elfstone* shall be MAINTAINED, with costs, and the action of the *Crete Shipping Company* against the *Chicago Tribune* shall be DISMISSED with costs against the *Crete Shipping Company*, and the case shall be referred to the Registrar for assessment of damages.

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HIS MAJESTY THE KING..... PLAINTIFF;

AND

MAX KRAKOWEC, DAHLBERG AND EKLUND AND CONTINENTAL GUARANTY CORPORATION OF CANADA, LIMITED ..... DEFENDANTS.

1931  
April 20.  
May 20.

*Revenue—Customs Act—Section 181—“Whether owner thereof or not”—Forfeiture—“Removed”—Interpretation of Statutes—Judicial observation.*

*Held*, that, inasmuch as by the first part of section 181 of the Customs Act, which deals with the penalty for having liquor in one’s possession illegally, it is provided that the offence exists “whether (the party is) the owner thereof or not,” and in the second part, where provision is made for the forfeiture of the liquor or vehicle in which it is being transported, the words “whether the owner thereof or not”

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are omitted, if it is proved that the vehicle used is the property of an innocent party who claims it, the Crown has no power to forfeit the same.

2. That the word "removed" used in said section means, in the case of a manufacture, the removal from the distillery or factory, and in the case of importation, from the vessel or train.
3. That in statutes imposing penalties and forfeiture, the language must be clear to charge the alleged offender with liability, and if there is a reasonable interpretation which would avoid the penalty or forfeiture in any particular case, that construction must be adopted.

*Judicial observation.* In view of the dissimilarity of the American and our Constitution, cases there determined would have no bearing, because by the first Article of the American Constitution, it is forbidden to pass any law impairing the obligation of contracts.

INFORMATION by the Attorney-General of Canada to have it declared that a certain vehicle seized under the provisions of section 181 of the Excise Act, is forfeited to His Majesty.

The action was tried before the Honourable Mr. Justice Audette at Ottawa, upon an admission of facts, no oral evidence being adduced.

*E. Miall* for plaintiff.

*Stanley Clark, K.C.*, for defendants Dahlberg, Eklund and Continental Guaranty Corporation of Canada, Limited.

No one appearing for Krakowec.

The statement of facts admitted are given at length in the Reasons for Judgment.

AUDETTE J., now (May 20, 1931), delivered the following judgment.

This is an information exhibited by the Attorney-General of Canada, whereby it is sought to have "a declaration and judgment that a Fargo Express vehicle,—alleged to have been seized under the provisions of section 181 of the Excise Act, R.S.C., 1927, ch. 60,—has become and is forfeited to His Majesty."

The case comes on for trial upon the following admission and submission, signed by counsel for the respective parties, viz:—

*Admissions of Facts*

It is admitted by counsel for the plaintiff and the defendants that:—

(1) Action has been instituted herein on the information of the Attorney-General of Canada for the purpose of obtaining, should the facts

warrant it, a declaration and judgment that the vehicle in the information described has become and is forfeited to His Majesty.

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(2) On December 5, 1929, S. A. Bovan, an Excise Officer carrying a Writ of Assistance, and C. E. Buck of the Prince Albert Town Station encountered at Albertville, Sask., one, Max Krakowec, then driving the truck described in paragraph 4 of the information.

(3) Bovan, under authority of the Writ, searching the truck found therein two bottles of spirits, one under the seat and one in the back, a third being found in Krakowec's pocket.

(4) Bovan seized the spirits and truck as forfeited under section 181 of the Excise Act, duly served notice of seizure on Max Krakowec and laid information before John Ashby, J.P., against Krakowec in respect of having in his possession spirits of unlawful manufacture contrary to section 181.

(5) At trial the same day before the said Ashby, J.P., and another, Rosser, Max Krakowec pleaded guilty and had sentence imposed.

(6) The truck remained in the custody of the non-commissioned officer in charge of R.C.M.P. Town Station, Prince Albert, Sask.

(7) On December 12th Messrs. Diefenbaker and Elder wired the Department of National Revenue as follows:—

“MAX KRAKOWEC ON DEC FIFTH PLEADED GUILTY TO OFFENCE UNDER SECTION 181 EXCISE ACT STOP FARGO TRUCK OWNED BY ACCUSED STILL HELD BY POLICE STOP PLEASE WIRE AUTHORIZATION TO PROPER OFFICIALS TO RELEASE SAID TRUCK TO THE ACCUSED.”

(8) On December 17, the department having been made aware of the circumstances, wrote in reply that “the truck is regarded as confiscated.”

(9) Under letter of December 23 Messrs. Dahlberg and Eklund submitted the following document which they held out as a true copy of the sales contract covering the said truck.

Attached to the Admission is the contract for the sale of the Fargo Express,—whereby, among other things, it appears by clause (d) of the agreement or contract that:—

(d) It is mutually understood and agreed that the property in and title to the said goods does not pass to the Purchaser, but remains in the Seller until the entire purchase price and interest (and all costs) are fully paid in cash; this is to include the payment of any notes given and any judgments secured.

(10) The said Dahlberg and Eklund were informed in reply that the Act sets out no qualification as to ownership and that the truck was regarded as confiscated.

(11) On January 24, 1930, the Continental Guaranty Corporation of Canada, Limited, issued unsealed warrant to one, S. C. Anderson, its bailiff, to take possession of the said truck. The said bailiff on the 25th of January, in attempting to seize the truck, handed the warrant to a constable and received the same back forthwith.

(12) The said truck was not then, or at any time by or on behalf of any defendant herein, removed from the possession of the non-commissioned officer above mentioned.

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(13) The said solicitors under letter dated January 25, 1930, forwarded the said copy of warrant to, and made demand for immediate delivery over of the said truck of, the Minister of Excise.

(14) By virtue of the claim to the said truck so laid and the provisions of section 125 of the said Act the automatic condemnation of the said truck was avoided and the right of the claimant to have his claim adjudicated upon preserved.

(15) The defendant Krakowec lays no claim and stands subject to having judgment signed against him on the pleadings.

(16) The defendants Dahlberg and Eklund have assigned to the Continental Guaranty Corporation of Canada, Limited, all interest of them or either of them in the said truck or arising out of the said contract of sale.

(17) The defendant the Continental Guaranty Corporation of Canada, Limited, claims the right to have delivered over to it the said truck or the sum of \$672.55, the moneys still owing in respect thereof by the said Krakowec on the grounds that as assignee it stands in the shoes of Dahlberg and Eklund the vendors, is entitled to all the rights before assignment enjoyed by the said vendors, including title to and power to repossess the truck for cause.

(18) The following question submitted in the pending summons is calculated to decide the claim put forward by the said Corporation defendant:—

Is the vehicle referred to in paragraph numbered 4 of the information filed seized under section 181 of the Excise Act in the circumstances set forth in paragraphs numbered 4 and 5 of the said information liable to forfeiture notwithstanding that the legal owners of the vehicle in question had, prior to the said seizure, no notice or knowledge of the illegal use which was being made of the vehicle by the defendant Krakowec when the same was seized as alleged in said paragraph numbered 4?

Section 181 of the Excise Act, R.S.C., 1927, ch. 60, reads as follows, viz:—

181. Every person who sells or offers for sale, or who purchases, or has in his possession any spirits unlawfully manufactured or imported, whether the owner thereof or not, without lawful excuse, the proof of which shall be on the person accused, is guilty of an indictable offence, and shall, for a first offence be liable to a penalty not exceeding two thousand dollars and not less than two hundred dollars, and to imprisonment, with or without hard labour, for a term not exceeding twelve months and not less than one month, and, in default of payment of the penalty, to a further term of imprisonment not exceeding twelve months and not less than six months, and for every subsequent offence to a penalty not exceeding two thousand dollars and not less than five hundred dollars, and to imprisonment, with hard labour, for a term not exceeding twelve months and not less than six months, and in default of payment of the penalty, to a further term of imprisonment equal to that already imposed by the court for such subsequent offence; and all spirits so unlawfully manufactured or imported wheresoever they are found, and all horses and vehicles, vessels, and other appliances which have been or are being used for the purpose of removing the same, shall be forfeited to the Crown, and shall be dealt with accordingly.

The information in this case appears to have been taken out under the provisions of section 124 of the Excise Act; but the proceedings required thereunder both by the Statute and Rules of Court 77, 78 and 79 of the Exchequer Court, have not been complied with. (Rules then in force). However, as all the parties are now before the Court, this failure to comply with any procedural requirements of the Statute and the Rules need not be taken into consideration.

Counsel for the plaintiff at bar relied upon and cited American cases in support of his case. Canadian Courts, like the English Courts, are accustomed to treat the decisions of the American Courts with great respect, although they are in no manner bound by them. However, in view of the dissimilarity of the American and our Constitution, cases there determined would have no bearing, because by the very first Article of the American Constitution, it is forbidden to pass any law impairing the obligation of contracts. The contract in this case between the defendants could not have been interfered with. See *Principle of Constitutional Law—Cooley*, 3rd Ed. 328 and XL.

A number of English cases have also been cited by the learned Counsel, but the British Excise Act which has a similar section (202) as the Canadian 181, has also section 264, which is not to be found in the Canadian, whereby the owner of the thing seized may have it returned to him on a mere affidavit—even on an affidavit by a third party swearing to the best of his knowledge and belief—that he is the bona fide owner of the same. See *Highmore's Customs Law*, 3rd Ed., 240, 292.

The submission of the present controversy is as to the effect of section 181 of the Canadian Excise Act.

The first part of that section deals with penalty and the latter part with forfeiture. The penalty has been imposed in this case because of three bottles of liquor found “in the possession” of the defendant and the Act provides that the offence exists “whether the owner thereof or not.” The present case has nothing to do with the question of penalties which has already been disposed of; but it has to do

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only with the last clause of the section dealing with forfeiture, viz:—

and all spirits so unlawfully manufactured or imported wheresoever they are found,—and all horses and vehicles, vessels, and other appliances which have been or are being used for the purpose of removing the same, shall be forfeited to the Crown, and shall be dealt with accordingly.

It will be observed that when the Statute is dealing with forfeiture, it does not use the language “whether the owner thereof or not” as it is used when it deals with penalties. It, therefore, must follow that it does not vest with the Crown the power to forfeit such goods if they are not the property of offender.

Moreover, dealing again with the question of forfeiture, one must, before pronouncing, endeavour to ascertain the meaning of the word “removing,” as applied by the Statute to the vehicle sought to be forfeited. To properly understand that meaning, the whole section must be read together. The section deals with spirits unlawfully manufactured—or imported. The meaning of the word “removed” as applied to either case would seem to be in case of manufacture—to the removal from the distillery or factory, and in the case of importation—from the vessel or train. Neither case indeed would apply to the circumstances of the present controversy, where only three bottles are found on a truck or express with a capacity of carrying  $1\frac{1}{2}$  ton, and there is no evidence in this respect upon the record where these goods were coming from or going to, how they were manufactured or imported. It must be found that these three bottles were not seized in the act of such removal as contemplated by the Statute. The forfeiture sought as a punishment for having three bottles in one’s possession seems to be out of all proportion, specially when dealing with innocent third parties.

Now, the facts and circumstances of the case do not clearly bring the controversy within that ambit of the Statute and in case of doubt, the doubt must be resolved in favour of the accused. Indeed, in Statutes imposing penalties and forfeitures, the language must be clear to charge the alleged offender with liability; the words must be clear and distinct. If there is a reasonable interpretation which will avoid the penalty or forfeiture in any particular case,

that construction must be adopted. *Craies, On Statute Law*, 3rd Ed. 441, 444; *Parker v. The King* (1); *The Queen v. The J. C. Ayer Company* (2). Innocent third parties should also be given the benefit of the doubt.

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The Courts in Canada have already had occasion to pronounce upon facts absolutely similar to those in question in this case and they have pronounced in favour of the release of the forfeiture in favour of innocent third parties, as in the present case. The cases are *Re Excise Act* (3); *Forget v. Forget* (4); *Le Roi v. Messervier* (5).

I have come to the conclusion to dismiss the action as against all defendants and to release the Fargo Express in question to be returned to its owners, to be dealt with under the contract between the vendors and purchaser of the same. *Smith v. Cropper* (6).

Coming to the question of costs, I must find that there was justification for the Excise Officers to interfere as they did and there will therefore be no costs to any of the parties herein.

Therefore, there will be judgment accordingly, dismissing the action as against all parties, each party paying his own costs.

*Judgment accordingly.*

WRIGHTS' ROPES LIMITED.....PETITIONER;

AND

BRODERICK & BASCOM ROPE CO.....RESPONDENT.

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May 28.  
June 23.

*Trade-marks—Expunging—Meaning of “mark”—Trade-Mark and Design Act, Ch. 201, R.S., 1927, Sec. 5.*

The trade-mark in question is a specific trade-mark to be applied to the sale of wire ropes, and consists of a yellow coloured strand running through the length of such ropes. The present action is to have said trade-mark expunged as not being a proper trade-mark within the meaning of section 5 of the Trade-Mark and Design Act.

*Held*, that a coloured strand woven into a wire fabric is a “mark” which may be used by any person carrying on a manufacture of wire rope for the purpose of distinguishing the article manufactured or produced or offered for sale by him from that of any other manufacture; and that the same is a “mark” within the meaning of section 5 of the Trade-Mark and Design Act.

- (1) (1928) Ex. C.R. 36, 40.
- (2) (1887) 1 Ex. C.R. 233.
- (3) (1929) 4 D.L.R. 154.

- (4) (1928) Q.R. 67 S.C. 78.
- (5) (1928) 34 Revue Légale 436.
- (6) (1885) L.R. 10 A.C. 249.

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PETITION by the petitioner herein to have the respondent's trade-mark, as described in the head-note herein, expunged.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*H. Gerin-Lajoie, K.C.*, for petitioner.

*O. M. Biggar, K.C.*, for respondent.

The questions of law raised and the facts are stated in the reasons for judgment.

THE PRESIDENT, now (June 23, 1931), delivered the following judgment.

This was a petition for an order that the respondent's trade-mark registered in Book No. 225, folio 48989 of the Register of Trade-Marks, be expunged.

The trade-mark in question is a specific mark to be applied to the sale of wire ropes and consists of a yellow coloured strand running through a length of wire rope. The respondent filed an answer to the said petition and counter-claimed for an injunction restraining the petitioner from infringing its mark, and for damages and such other relief as may appear just, together with costs.

The issue between the parties on the petition, and the question to be decided by the court, inheres in a construction of section 5 of the Trade-Mark and Design Act, Chapter 201, R.S., 1927. By that section it is provided that:

All marks, names, labels, brands, packages or other business devices, which are adopted for use by any person in his trade, business, occupation or calling, for the purpose of distinguishing any manufacture, product or article of any description manufactured, produced, compounded, packed or offered for sale by him, applied in any manner whatever either to such manufacture, product or article, or to any package, parcel, case, box or other vessel or receptacle of any description whatsoever containing the same, shall, for the purposes of this Act, be considered and known as trade-marks.

It is reasonable I think to reach the conclusion that a coloured strand woven into a wire fabric is a "mark" which may be used by any person carrying on the manufacture of wire rope, "such use being for the purpose of distinguishing the article manufactured or produced, or offered for sale by him" within the words of the Act and their literal meaning.



The modern word "mark" has its origin in the Anglian word "merc" which had the meaning of "a sign." "Mark" is defined in the Oxford Dictionary as "A sign affixed or impressed for distinction." It is defined in Webster's New International Dictionary as "an affixed, impressed or assumed distinguishing sign or token." In the same work a mark is said to be "a character, device, label, brand, seal, or the like, put on an article to show the maker or owner, to certify quality, for identification," etc. Then, again, it is no distortion of language to say that a yellow coloured strand of wire as an element of a woven wire rope falls within the designation of a "business device" as mentioned in the said section of the Act; such device being one "adopted for use by any person in his trade for the purpose of distinguishing the same as his manufacture or product."

It has to be borne in mind that there is a difference between the provisions of the present English Trade-Mark and Design Act and the Canadian Act, in that the English Act contains a section defining what a trade-mark is, while the Canadian statute does not. Hence it is necessary to be careful in applying the English decisions since 1905 to any construction of section 5 of the Canadian Act. But in supporting the contention that the yellow coloured wire is a mark within the meaning of section 5 of the Canadian Act, assistance is to be had from the cases decided in England before there was any statutory definition of a trade-mark. These cases would distinguish between colour as the whole subject of a trade-mark—such as a coloured label—and colour applied to one particular feature or element in a manufactured article. It was held in the case of *Harter v. Souvazoglu* (1), that a mark consisting of coloured threads in the end of a piece of manufactured cloth was a good mark. In *Carver v. Bowker* (2) it appears to be taken for granted that colour may form a material part of the mark. In *Bass Ratcliff Gretton Ltd. v. John Davenport & Sons* (3), it appears from the remarks of Romer L.J., (at p. 539) that in the case of an old mark colour may be an important element. In *Reddaway's Application* (4),

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(1) 1875, W.N. pp. 11 and 101.

(3) 1902 19 R.P.C. 529.

(2) 1877, Sebastian's Dig. 350.

(4) 1914 1 Ch. 856; (1914) 31 R.P.C. 147

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the case, it is true, arose under the English Act of 1905, but it is of assistance here because Warrington J., at p. 862, said: "I see no reason why three lines of colour woven into a fabric should not be a mark." And he held that "the weaving of the mark into the fabric" (a fact present in the wire fabric in the case now before me) was "*a user upon the goods*" of the mark "for the purpose of indicating that they are goods manufactured by the applicant." His finding under the English Act of 1905 that a mark of three colours capable of distinguishing the goods of the proprietor of the trade-mark was registrable, lends adequate support to a construction of section 5 of the Canadian Act which would qualify the yellow coloured strand in the wire rope sold by the plaintiff as a registrable "mark" or "business device."

I do not think it is necessary to pursue the authorities further, because the case before me does not involve any strained construction of section 5 of the Canadian Trade-Mark and Design Act in order to hold the mark in question registrable. I therefore find that the respondent's trade-mark, consisting of a "yellow coloured strand running through a length of wire rope," as applied to the sale of wire ropes is a registrable "mark" or "business device" within the meaning of the said section.

There will be judgment dismissing the petition with costs to the respondent. As to the issue of infringement raised by the counter-claim, I think the respondent is entitled to an injunction to restrain the petitioner from further infringing the respondent's trade-mark. There will be judgment accordingly upon the counter-claim, with costs to the respondent thereon.

*Judgment accordingly.*

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 Oct. 20-24.  
 1931  
 May 18.

HIS MAJESTY THE KING.....PLAINTIFF;  
 AND  
 MYERS CANADIAN AIRCRAFT COM- }  
 PANY, LTD., ET AL..... } DEFENDANTS.

*Patents—Action to impeach—Scire facias—Information—Exchequer Court Act—Commissioner of Patents—Patent Act, Section 48.*

*Held*, that the present action to impeach and annul certain patents of invention instituted in this Court by Information in the name of the Attorney-General of Canada was properly instituted under Rule 16

notwithstanding the provisions of section 37 of the Patent Act providing for procedure by *Scire Facias*.

2. That the Exchequer Court Act authorizes the Crown to institute proceedings upon the Information of the Attorney-General of Canada to impeach a patent of invention, without showing that it is otherwise a party interested.
3. That, upon the evidence in this case, the two patents in question herein should be annulled upon the ground that both alleged inventions lacked utility, and should be revoked.
4. That, the Commissioner of Patents has no authority to assess the compensation to be paid by the Government of Canada, for use by it of any patented invention, under section 48 of the Patent Act, unless the said Government admits its use and is a consenting party to such enquiry by the Commissioner.

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INFORMATION by the Attorney-General of Canada to set aside certain letters patent for invention granted to the defendant Myers and later transferred to Myers Canadian Aircraft Company Limited.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*W. L. Scott, K.C., Louis Côté, K.C., and C. Scott* for plaintiff.

*O. M. Biggar, K.C., and R. S. Smart, K.C.,* for defendants.

The essential facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (May 18, 1931), delivered the following judgment.

This is an action to annul patent no. 146,917, issued to the defendant Myers on March 25, 1913, and patent no. 187,882 issued on November 10, 1918, to the same person; the dates of application for the said patents are respectively, June 20, 1912, and July 25, 1917. I shall hereafter refer to these patents as no. 146 and no. 187 respectively. The defendant company is the assignee of the defendant Myers. This is one of three actions brought by the plaintiff to revoke patents of invention relating to alleged improvements in flying machines, granted to the defendant Myers, and these actions are officially numbered 7,024, 10,856, and 11,083. It was agreed that the evidence given in one action, should be evidence in the others, in so far as applicable thereto. While the patents involved in this

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particular action are sought to be voided upon many grounds, yet the chief ground of attack is, that the alleged inventions described in the specifications lack utility and are therefore void; but before considering that phase of the issue, there are one or two preliminary points to which I desire to make brief reference.

Macleod J.

At one stage of the trial I was disposed to doubt whether these proceedings were properly instituted. The Patent Act states that anyone desiring to impeach a patent must proceed by a writ of scire facias, and sec. 37 prescribes the exact procedure. In any action instituted in a Provincial Court to impeach a patent, I have no doubt but that the procedure prescribed by sec. 37 would have to be strictly observed. But the jurisdiction of this court in such a case is supplemented by the Exchequer Court Act. Sec. 22 gives the Exchequer Court, jurisdiction as well between subject and subject as otherwise, in all cases in which it is sought to impeach or annul any patent of invention. Then by sec. 30, the court is also granted concurrent original jurisdiction in Canada, in all cases in which it is sought at the instance of the Attorney-General of Canada, to impeach any patent of invention. The Exchequer Court Act empowers the judges of the Exchequer Court to make general rules and orders for regulating the procedure of and in the Exchequer Court. Pursuant to that power, Rule 16 was enacted, and that rule provides that any action to impeach or annul any patent of invention may be instituted by Information in the name of the Attorney-General of Canada, by Statement of Claim filed by any person interested, or by a writ of scire facias as provided by sec. 37 of the Patent Act. This proceeding was instituted by Information in the name of the Attorney-General of Canada. From all this I am satisfied that the proceedings herein were properly instituted. The Rules also require that with any Information to impeach a patent of invention, there shall be filed with the Registrar of the Court a sealed and certified copy of the patent and of the petition, affidavit, specification and drawings relating thereto. It will be seen therefore if the proceeding to annul a patent is by way of Information, it is grounded on the same record as if the proceeding had been by way of writ of scire facias.

The plaintiff alternatively asks for a declaration that the plaintiff had not during the war, or subsequent thereto, or at any time, manufactured or used aeroplanes which infringe any of the claims of the two patents in question. I am not satisfied that the Patent Act as it presently stands authorizes the commencement of that sort of action, although in effect that might follow in an infringement action. The statute plainly authorizes the commencement of an action by the Attorney-General, to revoke a patent, but it is not clear to me that the statute authorizes proceedings for a declaration that any aeroplane or seaplane used by the plaintiff does not infringe any or all of the claims of the patents in suit. I shall not however pronounce definitely upon the point, and it is not necessary for me to do so.

The plaintiff also urged that patent no. 147 was void for non-manufacture of the invention in Canada. I have considered this contention very carefully, but I am in doubt as to the effect of the statute in its present state, in respect of this patent upon the point of non-manufacture, or whether it is capable of satisfactory interpretation at all. Were it not, that in my view this action may be disposed of upon other grounds, I would request further argument by counsel upon the point.

The plaintiff uses a considerable number of aeroplanes and hydroplanes in the public services of Canada, and contends that he is a person interested in the annulment of the patents in suit for the following reasons. It appears that the defendant Myers, brought an action against Canadian Vickers Ltd., manufacturers of aeroplanes, for infringement of the patents in suit, and the action was settled without trial by Canadian Vickers Ltd., by the payment to Myers of a substantial sum, it is said. The plaintiff at the times material here, used aeroplanes manufactured by Canadian Vickers Ltd., and similar to those which Myers claimed infringed his patents here in question. Then the defendant Myers petitioned the Commissioner of Patents, under sec. 48 of the Patent Act, to determine the compensation payable by the Crown to Myers, on the ground that the Government of Canada had during the war and subsequent thereto manufactured and used aeroplanes which infringed the patents in question, par-

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ticularly claims 12, 14, 26 and 31 of patent no. 146, and claims 2, 3, 4, 6, 7, 8, 11 to 15, 17 to 19, and 25 of patent no. 187. I am satisfied that sec. 48 of the Patent Act does not confer any authority upon the Commissioner of Patents to assess compensation for the use of any patent, unless the Government of Canada was a consenting party. I think it is very clear that this provision of the statute was only intended to be invoked, in a case where the Government of Canada admitted the use of a patent, and that it was a consenting party to the enquiry by the Commissioner of Patents to assess the compensation. However, if an interest has to be shown by the Attorney-General in order to impeach the patents in suit, then I think Myers' petition, though futile, constituted a threat of infringement which the Crown is justified in repelling. However, I am inclined to the view that the Exchequer Court Act authorizes the Crown to institute proceedings, upon the Information of the Attorney-General, to impeach a patent of invention, without showing that he is otherwise a party interested.

Referring now to patent no. 146. The patentee states that his invention relates to flying machines and has, besides other objects, "the providing of an inherently stable aeroplane." The frame work of the aeroplane as described in the specification is comprised essentially of a series of flat annular or circular planes arranged one below the other, and of successively lessening diameter. These planes, which are held apart by braces, would present their edges to the air, if moving forward. Immediately below the series of annular aeroplanes is another plane, the lower part being of saucer shape, with a dome or top directly above, and forming a part of the same. The specification states that the whole of the forward portion of this plane normally presents its surface at an upturned angle of incidence, which I might at once observe is hardly correct because the top part of this plane has a negative angle of incidence. The propellers for driving the machine forward are placed on opposite sides of the car which underlies the annular planes, the car being an enclosed space for the operator and machinery. The propellers are operated by an engine supplied with power from a boiler, which is run on wheels over a track, and by running the boiler backwards or forwards

the aeroplane may be tilted on its transverse axis, and thus the centre of gravity of the machine may be changed and the aeroplane tilted to the angle desired, allowing the machine, it is said, to rise or fall when in motion through the air. By means of levers, the patentee states, the propellers may either be put out of action, or one made to go faster than the other, making it possible to turn the aeroplane to the right or left, thus making the propellers to act as rudders. It is also claimed that as each of the propellers are overlapped by the saucer shaped plane, the propeller on one side when in motion will throw a volume of air under that side of the plane, and tend to raise that side, and therefore would be of service in securing lateral equilibrium. It is also claimed that the two propellers may be turned in reverse directions, drawing more air under one side and thus lifting it, while at the same time depressing the other side. The patentee in his specification also describes an auxiliary plane, a parachute or safety device, which is attached to the top of the annular plane. This, I think, sufficiently describes the alleged invention set forth in this patent.

In patent no. 187, the invention is said to relate to certain new and useful improvements in flying machines. The aeroplane consists of a number of annular planes arranged in series one above the other, their diameters lessening from the topmost to the lowermost of the series, much as in patent no. 146. The drawings in this patent show a lesser number of annular planes, but no explanation is given for this particular change. Below the annular planes is a bowl-shaped or saucer-shaped aeroplane, the top being flat and without a dome, as in the alleged invention described in patent no. 146. The lower portion of the machine consists of an annular plane suspended by suitable rods from the upper structure or planes, and is provided with a walking board or car for the operator. To suitable uprights between the upper and lower structures are hinged one or more vanes, controlled by operating ropes, so that the vanes may present their flat surface to the wind, thus turning the machine to the right or left as desired. These vanes are really rudders, and are located a short distance in front of the main driving propellers. The machine is provided with two engines, oppositely disposed, and upon the hori-

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zontal shafts of these engines two driving propellers are mounted, on each side of the machine, and it is stated that the two propellers may be coupled to their shafts simultaneously so as to drive the machine forward, and by operating one of them, or by driving one of the engines faster than the other, the machine can be steered to the right or left. Stabilizing means are provided for by three propellers or helicopter screws on vertical axis, placed equidistantly around the platform of the machine, there being one vertical propeller in the front, and two near the rear. These propellers are actuated by ropes from the main engines, with clutches and levers for putting either of them in or out of action. By driving one of the two rear propellers the patentee claims to be able to tilt the machine laterally, and by driving the front propeller or the two back propellers simultaneously, it is claimed that the machine may be tilted fore and aft. By using the vanes, or by varying the speed of the engines, it is claimed the machine may be turned.

Experience has demonstrated that certain fundamental factors must necessarily be found in a heavier than air machine, before it can be successfully flown, and they may be briefly stated. As soon as an aeroplane is propelled forwards, the air-stream flows over the both surfaces of the wings or planes. The wings of an aeroplane must have what is known in aeronautics as an angle of incidence, in relation to some portion of the machine, as for example the axis of the propeller shaft, its thrust line, and the angle of incidence means, that the wings are normally inclined to the impinging air. The modern aeroplane is so organized that when standing on the ground, the horizontal line of the propeller shaft becomes an angular one. To get the maximum of effect out of the wings it is desirable that they meet the air at an angle, in order to be lifted, and accordingly when the plane is in the air and travelling horizontally, the set of the wings is such that the air will strike the wings at an angle, and it is that permanent inclination of the wings to the thrust line of the propeller, that is called the angle of incidence. The angle of incidence may be increased while in motion, by the action of the elevator, thus increasing the tilt of the machine, and this angle is then generally referred to as the angle of attack.



Then the planes should be cambered, which means that the surface of the planes or wings are curved in a fore and aft direction, which causes the air passing over the front part of the upper surface to be increased in velocity which causes a decrease in pressure over the surface of the wing; in the meantime the pressure on the lower surface has been increased by slowing up the air, the effect of these two changes in pressure is to give a lifting force upon the whole machine. Another desirable characteristic in a useful machine is that which is known as the "aspect ratio," that is to say, the wings should be long and narrow, that is, a long span with a relatively small fore and aft dimension. A good ratio gives a higher efficiency. Then there must be a fore and aft control, a lateral control, and a directional control, of the machine when flying, otherwise the machine would not be useful or operable. In most modern aeroplanes the lateral control is secured by what is known as "ailerons," movable sections of the rear end of the wings or planes; fore and aft control is secured by what is usually called "elevators," which are movable sections of the rear end of the tail planes; and the direction of the machine is controlled by the rudders. These different controls, or their equivalents, must be found in any useful aeroplane, otherwise it is not a useful or operable aeroplane.

Upon the evidence presented in this case, I am of the opinion, that the two patents in question should be annulled upon the ground that both of the alleged inventions lack utility. No aeroplane, constructed according to the specification of either patent, has ever been flown, or ever used. While the question of the utility of the alleged inventions described in these two patents is to be ascertained as of the date of the grants, yet the fact that since their issue no one has ever successfully used aeroplanes such as are described in these patents, adds strength to the evidence given on behalf of the plaintiff, which was to the effect, that the Myers aeroplanes described in the specifications here in question never possessed utility.

Referring specifically now to patent no. 146. Capt. Stedman, of the Royal Canadian Air Force, testified that in his opinion the invention described in this patent was not useful and lacked utility. He stated that generally the shape of the machine rendered it inefficient; that the annular

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planes being flat and without cambered surfaces were low in efficiency in the lift; that while the lower plane was cambered on both surfaces, it would produce very little lift because of its poor aspect ratio. It was claimed by the patentee that by driving one propeller faster than the other, it would cause more air to pass under the lower plane and thus elevate the machine. Capt Stedman was of the opinion, based on his own experience, that as the lower part of this plane has a downward camber, the additional air caused by the faster revolving propeller would not drive the machine upwards because of its shape, but would more likely pull it downwards, and he stated as his opinion that if this plane was flat it would be more efficient in lifting one side, if that side was low, and it was desired to elevate it. Then it was pointed out by Capt. Stedman, that if one propeller was driven faster than the other, this would create a rotary motion about another axis, which would have to be corrected and to do so the operator would require to speed up the other propeller, which would tilt the machine back into the position in which it was originally, and in the correction of which a rotatory motion was brought about. Further, he testified that in reducing the speed of any one propeller, the machine would lose height and in some circumstances, this would be obviously dangerous. He also expressed the opinion that the movement of the centre of gravity, by moving the boiler, for fore and aft control has never been successfully employed. In Capt. Stedman's opinion there was no efficient or practical fore and aft control, or lateral control, or directional control, in the alleged invention described in the specification, that it lacked lifting qualities because of its form of construction, and upon these grounds it was utterly lacking in utility. Mr. Brown, another expert witness called by the plaintiff, who gave his evidence in a very fair manner, concurred with Capt. Stedman in all this, and it is not necessary to review his evidence. Mr. Parkin, Assistant Director of Physics in the National Research Laboratory testified that this machine would be unstable longitudinally and laterally, which means that the machine could not be successfully operated. Then there is the evidence of Orville Wright given in respect of a United States patent granted to Myers, and which corresponds to patent no. 187, the second patent in

suit. I shall refer to this evidence when considering the next patent, but I think that everything Wright stated respecting that patent, is applicable to the patent presently under consideration. Upon the evidence before me, I am satisfied that the aeroplane described in this patent always lacked utility, and that the patent did not describe a new and useful invention and should therefore be annulled.

Coming now to patent no. 187. Mr. Parkin, Assistant Director of Physics in the National Research Laboratories, made an aerodynamic test of a model of the aircraft described in this patent. This test was made in what is called a wind tunnel, at Toronto University, and this is the standard method adopted in all countries for testing aircraft in respect of lift, drag or resistance, efficiency and centre of pressure; centre of pressure is that point on the plane where the resultant force, representing all the air forces, might be imagined to be applied. It is not necessary to describe the details of the test, but I perhaps should observe that a test of a model showing only the wings or the supporting surfaces, without the means of propulsion or control, is as satisfactory as if the whole machine had been thus tested. The air reaction on a model held stationary in an air-stream of a certain velocity, is the same as would be exerted on the model if it were moved at the same speed through still air. This test showed that the Myers aerofoil system has a maximum lift coefficient of about 0.26 at an angle of attack  $28^\circ$ , which is a very large angle, and this means that when landing, the Myers aeroplane would need to be tilted up at an angle of  $28^\circ$  to the horizontal. Normal planes have a much larger lift per unit area and this maximum occurs at smaller angles, at about  $16^\circ$ . The low lift of the Myers planes described in this patent, means that for the load usually carried per unit area of plane surface, the landing speed of the Myers aeroplane would be very high, whereas the landing speed should be low upon the ground of safety. The test shows that the resistance is almost half the lift, and that if the aircraft were allowed to glide without engine power, it would descend at an angle of 1 in.  $2\frac{1}{4}$  ft. which is a very steep angle; this means that in travelling  $2\frac{1}{4}$  feet horizontally the machine would drop 1 foot, which means that the machine is descending at a very steep angle with a high

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vertical velocity which is undesirable and indicates low efficiency, the resistance being nearly half the total weight of the machine. Therefore, in order to obtain the necessary lift, the Myers machine would need to be tilted up at a large angle as established by the test figures of Parkin. When in this position there would be a tendency for the machine to tip over backwards. It being thus unstable it would be necessary to correct this tendency by working the controlling helicopter propellers, in order to keep the machine in balance, but if the engine for some cause or other was not working, the helicopter propeller could not be operated, and the aircraft could not thereafter be maintained in control. The control therefore not being effective, the machine being unstable, it cannot well be said that the machine is operable or possesses utility.

Myers in his specification states that a wind gust striking the forward edge of the advancing outer periphery of the aeroplane, would tip up the front portion of the aeroplane, and then striking the rear portion of the inner periphery almost immediately afterward would lift up the rear portion of the aeroplane and thus re-establish the equilibrium. That would not be the case, according to Parkin, because the air after passing over the front portion of the annular plane would be deflected downwards. This deflection downwards of the air is called downwash, and is the direct result of obtaining lift. If we imagine the plane stationary and the air moving, then the air meets the plane, and is deflected downwards by the plane, at the same time causing a force on the plane which is the lifting force. In any one of Myers' annular planes, the air after passing the front section of the plane has produced lift on it, and has consequently been deflected downwards, so that by the time it reaches the rear section of the plane, it is already moving downwards, and consequently meets this rear section at a smaller angle than that at which it met the front section. This smaller angle means that the rear section must give less lift than the front section, because with all planes the lift increases as the angle of attack increases, up to a definite limit. In one of the tests made by Parkin it was demonstrated that the air passing out of the interior of the combined annular planes, passed over the top of the rear planes when the angle of attack was large, this no doubt being due to eddies formed at these large

angles. At smaller angles of attack the air passed out between the rear sections of the planes as I have already stated. Parkin stated in his evidence, that the tests he made indicate that the machine is unstable longitudinally and laterally, which means that when the machine is once displaced, the air forces on it tend to increase the displacement. It is a fair inference from the tests made by Parkin that this machine lacks utility.

Capt. Stedman's evidence in respect of the aeroplane described in this patent was that the annular planes had a low efficiency because they were flat, and that the bowl-shaped plane was definitely cambered downwards and would give a negative lift, that is, it would push downwards, unless inclined at some definite angle. He said the whole machine would be more efficient if turned upside down, and that in his opinion the machine was inefficient and inoperative. It was the opinion of Brown, another witness for the plaintiff that this machine lacked stability and utility. Coming now to the evidence of Orville Wright, a distinguished personage in the aeronautical world, who with his brother were the first to fly a heavier-than-air machine with a pilot aboard. He gave evidence at Dayton, Ohio, before the Deputy Registrar of this Court, acting as Examiner, respecting United States patent no. 1,226,985 issued to Myers, the specification of which describes the same invention as does the patent presently under discussion. I shall quote from his evidence, question and answer, but without comment.

Q. Is it your opinion that the Myers patent no. 1,226,985 discloses a practical or operative airplane?—A. It does not.

Q. Will you briefly give some of the grounds on which you base that opinion?—A. It is deficient in all of the important respects. It is inefficient dynamically. It is inefficient in control. It is inefficient structurally. The specifications and drawings show a large bowl or saucer shaped surface beneath the superposed annular planes. The annular planes themselves are very inefficient as compared with rectangular planes as used in flying machines generally. The large bowl with the convex side downward and the concave side upward at ordinary angles of flight would produce a negative lift; as this negative lift would necessarily have to be carried on the annular planes, the drag on the annular planes would be increased in addition to the increased drag on the bowl itself.

Q. You are looking at the drawings of the patent, Mr. Wright?—A. Yes, sir. The drawing shows plain instead of cambered surfaces. Plain surfaces are less efficient than cambered surfaces. The drawings and specifications show three lifting screws for maintaining the fore and aft and the lateral balance, F-1, F-13, and F-14 on Fig. 3 attached to the patent. Lifting screws are inefficient for lateral balance for several

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reasons. They necessarily will be slow in operation, because in order to get any appreciable lift, considerable velocity must be given to the propeller blades. They are inefficient because the propellers or lifting screws will have a large amount of drag when the machine is in forward motion. The downward draft of air created by the lifting screws in recovering or maintaining equilibrium also creates an additional drag to the machine. A column of air such as that produced in the wake of a propeller, offers a resistance similar to that of a solid body. The lifting screws are inefficient for equilibrium because when one screw is used for maintaining lateral balance, it tends to destroy the fore and aft balance of the machine. On the other hand, ailerons such as used in modern flying machines are very quick to respond to the controls of the pilot. They produce powerful correcting movements without appreciable increase of the drag of the machine.

Q. What effect has the stopping of the motor or control in a machine constructed with modern ailerons, and compare that with the effect in the case of the machine covered by the Myers patent?—A. The stoppage of the motor in machines using the aileron type of control has no effect on the use of the ailerons in maintaining and restoring equilibrium, while if the motor should stop in a machine of the type shown in the Myers patent with three lifting screws for maintaining equilibrium, all of the effect of the lifting screws for equilibrium would be destroyed or done away with.

Q. Suppose a machine constructed in accordance with the specifications and plans of this patent were equipped with the best modern engine or motor, would that enable the machine to fly, or to be flown?—A. It would not. I do not think it would be possible to lift a machine of the design shown and described in the Myers patent with any modern motor, using the common knowledge of 1903, and I very seriously doubt whether it would be possible to make such a machine lift, modified according to our latest scientific knowledge.

Q. You, I think, mentioned the inefficiency of an annular plane. Would that be less or greater with a superposed series of annular planes as in the patent?—A. There is always a loss in superposing one surface above another at all of the angles of attack used in flight.

Q. Is there anything shown or described in United States Patent 1,226,985 providing effectively for inherent stability, whether longitudinal or lateral?—A. I find nothing except the low centre of gravity. This, however, does not provide effectual inherent stability.

Q. How do you find in the patent that the lifting screws F-1, F-13 and F-14, Figure 3, are put into operation?—A. They are put into operation through means of clutches.

Q. Are ailerons ever operated through the means of clutches? I mean modern ailerons?—A. I have never known of any ailerons being operated in that way. In fact, such operation would be dangerous in the use of ailerons.

I have no difficulty in arriving at the conclusion that the flying machines described in these two patents are unstable, inoperative, lacking in utility, and do not constitute invention. The plaintiff therefore succeeds in his claim for a declaration that these patents of invention are null and void and should be revoked. Costs will follow the event.

*Judgment accordingly.*

HIS MAJESTY THE KING.....PLAINTIFF;

1931  
June 1.  
June 25.

AND

CARL DOULL .....DEFENDANT.

*Revenue—Customs Act—Discovery—Penal action*

The present action was one to recover a penalty to the amount of the duty paid value of goods harboured by D. unlawfully imported, and incurred under the provisions of the Customs Act. Plaintiff proved the finding of the goods in the premises of D. and the duty paid value thereof. D. offered no evidence at all.

*Held* that, by section 217 of the Customs Act, the burden of proving that the goods harboured were lawfully imported is upon the person in whose possession the goods are found, and section 262 provides that in case of any question relating to identity, *origin*, importation or payment of duty, the burden is on the owner or possessor of the goods, and that D. having failed to discharge the burden put upon him by law, plaintiff was entitled to judgment for the duty paid value of the goods so found on his premises.

2. The question of the right of the plaintiff in a penal action to examine the defendant on discovery, discussed.

INFORMATION by the Attorney-General of Canada to recover from the defendant a penalty incurred under the Customs Act for harbouring goods unlawfully imported.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Saint John.

*G. H. V. Belyea, K.C.*, and *G. A. Hutchinson* for plaintiff.

*R. M. Palmer* for defendant.

The points of law raised and the facts are stated in the Reasons for Judgment.

THE PRESIDENT, now (June 25, 1931), delivered the following judgment.

At the trial of this cause an objection was taken by Mr. Palmer, counsel for the defendant, to the reception, as part of the trial record, of the evidence on discovery of the defendant taken under order in that behalf granted by my brother Audette. Mr. Palmer contended that as the purpose of this action was to recover a statutory penalty, it was not permissible, under the English authorities, to order discovery of the defendant. Mr. Palmer relied on the cases

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of *Mexborough v. Whitwood* (1), and *Seddon v. Commercial Salt Co.* (2), as establishing his contention, and I think they confirm his point as to the practice in England.

The question then arises, does the English rule apply to actions in the Exchequer Court of Canada, and I mention it although it is not necessary for me to decide the point in reaching my judgment in this case. The object of the English rule when formulated was to protect parties to actions from being compelled to answer questions which may either incriminate them or render them liable to actions for penalties (*Bray on Discovery*, p. 309 *et seq.*). Now the Canada Evidence Act (section 5, R.S., 1927, c. 59), provides that no witness is excused from answering a question because the answer "may tend to criminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person." But while this enactment provides immunity to the witness from any criminal proceedings which may be based upon his evidence, there is no immunity afforded him in respect of penal actions of a civil nature. Whether the word *witness* is to be construed so as to include a party giving evidence on discovery may be open to doubt; and it is also to be noted that section 5 of the Act, while expressly providing immunity from criminal proceedings, does not do so for civil actions which may be based upon the answer of the witness. But the matter does not rest there.

The provisions of section 35 of the Canada Evidence Act are in effect that "In all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which such proceedings are taken shall, subject to the provisions of the Canada Evidence Act and other Acts of the Parliament of Canada, apply to such proceedings." This provision indicates the necessity of ascertaining the law of evidence as it obtains under the statutes of New Brunswick where this proceeding was taken; and by turning to the Revised Statutes of New Brunswick, 1927, c. 131, we find it provided by section 4 that:

On the trial of any issue or of any matter or question, or any enquiry arising in any suit, action or proceeding in any court, the *parties thereto* and the persons in whose behalf the action, matter or proceeding is

(1) (1897) 2 Q.B. 111.

(2) (1925) 94 L.J. Ch. Div. 225.



brought or instituted, or opposed or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter excepted, be competent and compellable to give evidence either *viva voce*, or by disposition according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding.

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Furthermore under Order 31 (a) of the New Brunswick Judicature Rules a party may be examined on discovery, and his examination used at the trial.

But further considerations arise which may displace the applicability of the New Brunswick law.

The Exchequer Court Act (R.S., 1927, c. 34, s. 87, as amended by Chapter 23 of the Acts of 1928) empowers the Judges of the Court to make general rules and orders for regulating the practice and procedure of and in the court, and by Rule 129 of the practice and procedure now in force it is provided that after a defence is filed, any party (other than the Crown or the Attorney-General) may be examined for the purposes of discovery. Rule 138 provides that such examinations may be used at the trial. But there is nothing in the Rules touching the privilege of a witness to refuse to answer questions that may incriminate him or make him liable to a penalty. The question under discussion is further embarrassed by the provisions of sec. 36 of the Exchequer Court Act which invokes the practice and procedure of the High Court of Justice in England, as of the year 1897, in cases where the Act itself or the Rules made thereunder do not provide for any particular matter. So that in the last result of a critical enquiry into the question raised, it may be proper to hold that the law of this court is that prevailing in England in 1897 and that it is not allowable to order discovery in penal actions.

I have given some attention to the point raised by Mr. Palmer because the condition of the law in that behalf would seem to demand some clarifying by the legislature.

As I have said before, it is not necessary for me to rely upon the discovery evidence in reaching my judgment, but if I deemed such evidence of controlling weight on the issues involved, I would be inclined to admit it on the ground that no objection was taken by the defendant in giving his evidence on discovery before the examiner, and I think it too late to take the objection at the trial. The privilege is that of the party as a witness and not of his counsel (*Taylor on Evidence*, 11th ed., p. 1007).

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The plaintiff's counsel did not however rely upon the discovery evidence to sustain this action, which is one for the recovery of a penalty in the sum of the duty paid value of certain liquors found in the possession of the defendant in January, 1929, at Moncton, N.B., and seized by Customs Officers. The nature and quantity of the liquors so seized are set forth in the Information. It was proven, regardless of the discovery evidence, that these goods were found on the premises of the defendant, and the duty paid value of the goods was also established by evidence to be \$12,090.25. The Information alleges that the defendant without lawful excuse harboured the goods in question, and which goods were unlawfully imported into Canada, that is to say, without the duties provided by the Customs Act, chapter 42, R.S.C., 1927, having been paid thereon.

Sec. 217 of the Customs Act provides that if any person, without lawful excuse, harbours or conceals any goods unlawfully imported, or whereon the duties lawfully payable have not been paid, the same shall be seized and forfeited without power of remission; the same section of the statute also provides that the proof shall be on the person accused to show that he did not harbour or conceal goods unlawfully imported into Canada or whereon the duties lawfully payable have not been paid. Sec. 262 of the Customs Act provides that in any proceedings instituted for any penalty under the Act, that in case of any question relating to the identity, origin or importation of any goods, or the payment of duties on any goods, the burden of proof shall lie upon the owner of the goods or the person in whose possession the goods were found, and not upon His Majesty or upon the person representing His Majesty.

The goods in question were found in the possession of the defendant, and he has failed to discharge the burden of proving that the goods were lawfully imported into Canada and that any duties lawfully payable thereon had been paid. The plaintiff must therefore succeed. There will be judgment for the plaintiff in the amount claimed in the Information, and costs will follow the event.

*Judgment accordingly.*

HILDA JOHNSON.....SUPPLIANT;

1931  
April 23.  
May 20.

AND

HIS MAJESTY THE KING.....RESPONDENT

*Crown—Responsibility—Petition of Right*

About 11.30 a.m. on February 10, 1928, suppliant, while entering the Ottawa Post Office to purchase stamps, was struck on the head by an icicle falling from the coping of that building, causing her injury. An employee of the Public Works Department who had full charge and care of the roofs of Government buildings, especially that of the Post Office, and whose duty it was to remove snow and icicles therefrom, passed the building twice on the morning of the accident, first between 8 and 8.30 and again between 9.30 and 10 o'clock, but claims no snow or ice needed to be removed.

*Held* that the omission of the officer, whose duty it was to keep roofs free of snow and ice, to notice the presence of icicles and to remove them, when he had ample time to do so before the accident, constituted negligence, making the Crown liable for the damage resulting from such careless omission.

PETITION OF RIGHT seeking to recover damages for personal injuries received while entering the Post Office of the City of Ottawa.

The action was tried before the Honourable Mr. Justice Audette at Ottawa.

*Gordon Henderson, K.C.*, for suppliant.

*H. A. Ayles* for respondent.

The facts are stated in the Reasons for Judgment.

Audette J. now (May 20, 1931), delivered the following judgment.

The suppliant, by her Petition of Right, seeks to recover damages for personal injuries received under the following circumstances.

On the 10th February, 1928, somewhere around 11.30 in the morning, on her way to purchase stamps at the Post Office, Ottawa, on Sparks street, while having one foot on the sidewalk and the other foot on the first step of the western entrance on Sparks street, she was struck upon the head by icicles which fell from the building. She saw on the sidewalk the icicle that struck her. This first step, according to witness Randall, overlaps the sidewalk, extending 2½ feet from the building and is on the cement pavement. On her way in she met witness, Miss Dumouchel, who testified seeing blood coming out of the petitioner's head—

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blood was streaming down her face. She brought her upstairs by the elevator and then Mr. Aiken asked her, with the aid of one employeé of the Post Office, to take the suppliant down to the hospital, which she did. Miss Dumouchel adds that the suppliant was nervous, a nurse came and gave her something and suppliant fell unconscious for a while.

The petitioner contends she was in a state of good health before the accident. She had, however, been treated before for weakness. Her doctor told her she was run down and to go to the hospital.

Dr. Fenton, of the staff of the Civic Hospital at Ottawa, treated her at the hospital on the 6th April, 1928, and found she was suffering from nervous exhaustion and diagnosed her disease as neurasthenia. She suffered from spells which are usually noticeable during pregnancy. There was no bone broken and no sign of epilepsy that he could observe and no permanent injury, and he filed as Exhibit No. 1 the analysis of her examination. The suppliant is married, the mother of five children and had a great deal of family trouble. She is separated from her husband.

Dr. Cathcarth examined the suppliant on the 19th March, 1931, and was of opinion, from the nature of her seizure, that she suffered from hysteria which he described as a functional disease of the nervous system, where there is no organic manifestation of the disease of the brain or spinal cord, and that such disease is not caused by ice that might fall on a person's head. His conclusion was that she was suffering from hysterical seizure, and that she did not suffer from epilepsy. Furthermore, that her injury, at the time in question, was a minor one.

Dr. Craig treated her in August, 1928, attending her when she had these seizures and from the reading of medical books, he thought they resembled epilepsy. He, however, testified he is unable to ascribe the accident as the cause of such seizures. He further added he had no personal experience with epilepsy and he could not verify epilepsy, for want of personal experience, in traumatism cause. He did not treat her often. He adds that neurasthenia will create hysterical crises.

The suppliant has had much family trouble. She gave birth to five children. Had a hard time generally, indeed

which would tend to make her nervous and develop neurasthenia; but under the medical testimony on record, I am unable to find she suffers from epilepsy.

Coming now to the question of liability of the Crown under the circumstances, it is necessary to bring her case within the ambit of sub-section (c) of section 19 of The Exchequer Court Act (R.S.C. 1927, ch. 34), which reads as follows:

(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

To bring the case within the provisions of the section, there must be 1st—a public work; 2nd—there must be some negligence of an officer or servant of the Crown acting within the scope of his duties or employment; 3rd—the injury must be the result of such negligence.

I find first that the Post Office is a public work of Canada.

Coming to the second and third requirements, the evidence of Mr. Shearer, the Superintendent of Public Buildings in Ottawa, established that it is part of his duties to remove snow and icicles on the Post Office. He testified that it is the duty of his men to remove any ice they see on the buildings. On hearing of the accident, he sent his Clerk of Works, witness Randall, to the Post Office, to enquire and report upon the accident, and he reported that there were icicles on the cornice.

This witness said he saw a few icicles, but none, in his view, that could injure anyone.

Witness Mayer, foreman roofer for the Department of Public Works, working under instruction from both witness Shearer and Randall, is in full charge of all roofs and specially that of the Post Office, at Ottawa.

The roof of the Post Office is so constructed that it is unlikely that snow or ice would gather there; but below the roof there are three cornices, one at each story, and snow and ice do gather and accumulate there and it is from such cornices that the ice, which injured the suppliant, fell on the day in question.

This witness Mayer testified that on the day of the accident, on the 10th February, 1928, he passed the Post Office twice, before the accident, viz., between 8 and 8.30 a.m. and between 9.30 and 10 a.m., and testified there was no

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accumulation of snow or ice on the *roof*. He said he saw no icicle that was worth removing, as there was no occasion to open the windows and freeze the inside of the building. He further added that he passed the Post Office *four times* that day, adding I always look up, as it is the *custom*. He said further, we remove snow and ice from cornices; sometimes, not once a month; it is one of these buildings that you need not pay much attention to. Yet another witness, anxious to prove too much, testified that it was the building they saw to first. Mayer said he did not walk around the building that morning, adding, because I know the nature of the building, it is not necessary for me to stop and look at the building. He knew, he said, those icicles would not become dangerous. This witness seemed to take too much for granted. The following question was put to him:—

Q. You did not go around the building and inspect it on any occasion to see if there was any icicle there or not?

and he answered:—

A. After report, I went around and there was nothing to see.

The icicles had then fallen.

The day previous to the accident it had been snowing. The day of the accident was a bright, sunny February day. It is true that with our sudden climatic changes, a reasonable time must be allowed for removing snow and ice, and that in such cases the negligence consists in allowing premises to remain an unreasonable length of time in an unsafe condition. But in the present case the negligence, and there is negligence, consists in witness Mayer taking too much for granted that the cornices were all right. He passed there twice before the accident, as above mentioned, and had he used ordinary care and caution, he would obviously have found the icicles that injured the suppliant and in omitting to do so he was derelict in his duties and the accident occurred through such negligence.

Other witnesses saw, on the sidewalk, broken pieces of icicles, which must have caused the accident and they were obviously large enough to injure a pedestrian passing near the Post Office. *Meredith vs. Peer* (1).

Counsel for the Crown cited at bar the case of *Leprohon vs. The Queen* (2), but that case must be distinguished from

(1) (1917) 35 D.L.R. 592.

(2) (1894) 4 Ex. C.R. 100.

the present one in that the Post Office in that case was situate around forty feet from the municipal sidewalk in the city of Three Rivers, P.Q. Here the Post Office abuts on the sidewalk and even overlaps it, according to the evidence.

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Approaching the question of damages, one finds that the Petition of Right does not mention any amount. However, I find that the suppliant has substantiated her claim; but there is no permanent incapacity resulting from the accident. She suffered the injury, was taken to the hospital, incurred medical expenses and lost time—although her occupation did not bring large return, yet it did some. Under all the circumstances of the case, I will fix the amount of damages at the sum of \$300.

Therefore there will be judgment declaring that the suppliant is entitled to recover from the respondent the sum of \$300 being the relief sought by her Petition of Right and with costs in her favour.

*Judgment accordingly.*

DAME FLORE LEGAULT..... SUPPLIANT;  
 AND  
 HIS MAJESTY THE KING..... RESPONDENT

1931  
 May 12.  
 May 26.

*Crown—Responsibility—Negligence*

At about 9 p.m. on the 15th November, 1921, one C. drove onto a wharf, Montreal Harbour, with his two children to visit some friends who were employed in transferring freight from a shed on the wharf, rented to private companies, to a warehouse in the city. C. had not been sent by his employer, had no business there and went solely to amuse himself. C. had been drinking and was under the influence of liquor. He was making a nuisance of himself and when told to go, got into his car and drove straight into the canal, and all were drowned.

*Held* that as C. had no business on the wharf on the evening of the accident and was there by tolerance, the Crown under such circumstances was under no obligation or duty to him.

2. *Held* further that the accident was the result of deceased's inebriated condition and that he was the victim of his own condition and conduct.

PETITION OF RIGHT seeking to recover \$15,000 damages for the death of the suppliant's husband who was drowned off one of the wharves in the harbour of the city of Montreal.

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The action was tried before the Honourable Mr. Justice Audette at Montreal.

*Maurice Gaudreau and Antonio Garneau* for suppliant.  
*J. L. St. Jacques, K.C., and Z. Fillion, K.C.,* for respondent.

The facts are stated in the Reasons for Judgment.

Audette J. now (May 26, 1931) delivered the following judgment.

The suppliant, by her Petition of Right, seeks to recover damages, in the amount of \$15,000, for the death of her husband and her two children resulting from the alleged negligence of the Crown and its employees under the circumstances hereafter related.

On the 15th November, 1929, the deceased, Willie Chagnon, a mechanic in the employ of one Albert Gariepy, without being asked or invited, and not in the course of his employment or drawing any remuneration at that time, drove in his automobile, accompanied by his two minor children, Antonio, eight years old, and Gerard, ten years old, to the Warehouse or Shed No. 2, on the south of Ottawa street, in Montreal, where Mr. Albert Gariepy's men and trucks were engaged in loading freight, that evening. The *locus in quo* of the accident and the sheds in question are shown on Plan Exhibit B. The sheds abut respectively on basins Nos. 1 and 2 and there is a space at the southern end of the sheds, and the passage between the two sheds is about 20 feet in width.

On the evening in question, the lights from the middle of the sheds towards Ottawa street were lighted. Chagnon arrived at Shed No. 2 around 9 or 9.30 that evening—with the object of visiting his friends and the chauffeurs and some of the witnesses said he helped some in loading freight on the trucks.

Mr. Albert Gariepy, the employer of these men, testified Chagnon that evening *avait pris un coup et il était gai*: he had taken a drink and was jolly. Witness Archambault saw Chagnon at the shed and said he worked, was amusing himself, playing and talking to the men. Witness Glaude said Chagnon worked, he played with him, tugged at one another, “il n'était pas à jeun, il avait pris un coup, il n'était pas ivre, c'est-à-dire un homme à terre.” He was not without drink, he had taken a drink, he was not drunk, that is, he:



was not dead drunk. He had taken a drink with him. Then he adds: "Pour moi, c'était pas mal difficile pour lui de marcher droit, je ne veux pas dire qu'il s'en allait comme un homme qui ne peut se tenir debout, cela paraissait toujours un peu qu'il chambranlait, je ne veux pas dire qu'il était soûl, qu'il était ivre." Witness Cyr testified they both had taken a glass of beer. Chagnon had some altercation with some of the men at the shed and I told him to go away and he did. Witness Lamontagne, a chauffeur also in the employ of Gariepy, testified Chagnon was tugging at the men without malice and came to him when witness told him it was not the time to do so. Chagnon became angry at that remark; he was more or less sober, he was not without drink. Witness Fortin said Chagnon looked very gay, he was playing with the men and had an altercation with a chauffeur and was talking very loud. Two or three of the men told him to go away and he went. It was quite noticeable that when all these witnesses, at trial, were speaking of Chagnon's inebriation they were doing so with a great degree of reticence and caution with the object of protecting their companion.

Chagnon having left his Ford motor between the sheds, got on board and started pretty fast. Witness Fortin testified he was out of the shed and saw Chagnon *un peu vite*, rather fast. He contends there was space to turn a Ford car between the sheds; but Chagnon drove straight down toward the canal and drove right into it with his two children and they were all drowned. It had rained that evening, rain had stopped at the time of the accident; but the ground was wet and the trace of his wheels showed that he travelled straight down into the canal.

Some witnesses said it was dark, others said the moon was out and gave some light. Moreover, no one could testify as to whether or not he had his light on his motor at the time of the accident; but witness Albert Gariepy, who came back to the shed that evening after the accident, testified he was present when the auto was withdrawn from the canal, at about 4 o'clock next day, and that the lights were on the motor, as the car was being brought up, one could see light and the lights were even still on when the auto was brought up on the pier.

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No one actually saw the accident. But no sooner had Chagnon started than someone cried that he had driven into the canal. The men rushed to his assistance. One of them threw a cable, which Chagnon did not catch; he was at about ten feet from the edge of the canal and with the help of the moon, the men could distinguish him, the water was bulging and they could distinguish his bald head when he came to the surface.

The suppliant charges the respondent with negligence in that there was not enough light at the end of the canal, at the south end of the shed; furthermore that there were no buoys, no poles and no means of saving him, but one of the chauffeurs threw him a rope. However, these sheds were rented to two companies who made use of them for their own purposes and Chagnon had no business there that evening, he was there entirely by tolerance and the Crown in such circumstances was under no obligation or duty toward the deceased. *Leprohon vs. The Queen* (1).

Now, approaching the consideration of the present controversy in its legal aspect, it is quite clear that this is an action against the Crown sounding essentially for damages in tort and in such a case where there is no statutory authority therefor, no such action lies against the Crown.

To succeed in a case of the kind, it is necessary to bring the case within the ambit of sub-section (c) of section 19 of The Exchequer Court Act (R.S.C. 1927, ch. 34), which reads as follows:

(c) Every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

Where a liability not existing at common law is created by statute, and the statute provides a particular remedy, that remedy must be followed. *Fort Francis Pulp & Paper Co. vs. Spanish River Pulp & Paper Co.* (2).

The first requirement has been satisfied as I find the canal to be a public work; but coming to the second and third requirements, I first find there was no officer whose special duties were to supply the precautions alleged by the suppliant and that there was no negligence. I may add, as was decided in the case of *Harris vs. The King* (3), that

(1) (1894) 4 Ex. C.R. 100, at p. 114. (2) (1931) 2 D.L.R. 97.

(3) (1904) 9 Ex. C.R. 206, at p. 207.

when the Minister of Railways and Canals, or the Crown's Officer under him whose duty it is to decide as to the matter, comes, in his discretion, to the conclusion not to have lights, gates, buoys, poles, etc., at the *locus in quo*,—it is not for the Court to say that the Minister or the Officer was guilty of negligence because the facts may even show that it was a dangerous place.

Suppliant's Counsel, in support of his contention of negligence cited the case of *The Grand Trunk Co. v. Boulanger* (1); but this case is not apposite and bears no analogy to the present one. In the Grand Trunk case, the victim was clearly an invitee and in the present case the victim had no business there, he was only allowed there by tolerance and the Crown owed him no duty for the neglect of which it could be held liable. The deceased voluntarily encountered the danger, if any, and was the victim of his own conduct.

The accident is obviously the result of the deceased's inebriated condition. He was not in a normal condition, both physically and mentally. Byrne's Law Dictionary says that a man may be held drunk for the purpose of an offence when he could not be held drunk for the purpose of another offence. When it comes to driving a motor car, a man whose physical and mental conditions are affected by the use of liquor is not fit to do so. Sir James Purves-Stewart, as related in the Law Journal, 1925, at p. 87, says: "A drunk person is one who has taken alcohol in sufficient quantity to poison his central nervous system, producing in the ordinary process of reaction to his surroundings a temporary disorder, which causes him to be a nuisance or danger to himself or others."

In some circumstances, nuisance is the chief consideration; in the motor car offences, which are now so numerous, it is the danger.

The deceased was much affected by drink, his normal condition had disappeared and he was the worse for drinking. When leaving the shed he lost all his bearings, he was absolutely *disorientated*, and getting in his car with his children, he dashed south instead of travelling north, and notwithstanding that the lights of his car were on, he threw himself in the canal. Under such circumstances, it is not in his mouth or in that of his representative and successor to charge the respondent of neglect for want of

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(1) Cass. Dig. 2nd Ed. 733; (1885) 14 R.L. 321; 11 Q.L.R. 254.

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attending to unnecessary precautions. He had abused of liquor, thereby making himself a danger to his children and himself and was ultimately the victim of his own condition and conduct.

There will be judgment ordering and adjudging that the suppliant is not entitled to the relief sought by her petition of right.

*Judgment accordingly.*

1931  
April 29.  
May 20.

JOHN F. PENTZ .....CLAIMANT;  
AND  
HIS MAJESTY THE KING.....RESPONDENT.

*Crown—Customs—Aeroplane—Forced landing—Reporting to Customs*

The aeroplane in question was seized by the Customs authorities on the ground that it had landed at a place other than an airport and for not reporting to a Customs Officer.

*Held*, that where the evidence establishes that an aeroplane was forced to land on account of engine trouble and to avoid a crash, she is justified in so doing at any place that such landing can be safely made and for the same reasons that a vessel in distress may enter a port for shelter.

REFERENCE by the Minister of National Revenue under the provisions of section 176 of the Customs Act.

The action was tried before the Honourable Mr. Justice Audette at Windsor, Ontario.

*E. C. Awrey, K.C.*, for claimant.

*N. L. Spencer* for respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

AUDETTE J., now (May 20, 1931), delivered the following judgment.

This is a Reference, by the Minister of National Revenue, under the provisions of section 176 of the Customs Act, of the claim of the said John F. Pentz, from the decision of the Minister maintaining the seizure of a Waco Biplane and that the deposit, made by him for the release of the same, do remain forfeited.

The claimant is a machinist who operates a school of aviation at the City of Lorraine, in the State of Ohio, one of the United States of America. On the 23rd day of November, 1929, while on a trip from Lorraine to Detroit, on a visit to some of his relatives, without any intention to land in Canada, he was forced to avoid crash to land at or near Kingsville, Ontario, on account of trouble with the throttle control of his Biplane. He was accompanied by his employee Voet who was actually flying the plane at the time of trouble, after having followed practically the same course as the flying boats from Cleveland.

Pentz testified he perceived the trouble as the motor would not come up to the proper revolutions. The motor slowed up and would not reeve up to the proper revolutions. The pilot, Voet, choosing a landing place, then started down, because, he states, when there is trouble in an aeroplane, no matter where you are, the first thing to do is to make a landing. You do not take a chance of going on any further. If you do, you may have a crash.

They began to nose down, losing altitude, and after making a couple of circles, landed in a field, on a farm, just east of Kingsville. On landing, he got out and being a machinist, attended at once to repairing the throttle. He explained, in his evidence, the nature of the trouble and the repairs he attended to. That is also confirmed by the evidence of the pilot Voet. And in that respect, his testimony is further corroborated by the people of the locality. Witness Keith Wigle said he lives just across the road from where the plane landed. His attention was directed to the plane by the motor roaring at intervals. The plane did not make the same noise as when flying, when it is an even drone. It was making a lot of noise when idling. He saw Pentz actually working at the repairs.

After attending to the repairs, Pentz said he knew that after landing in a foreign country he had to report to the Custom, and enquired where he could find a Custom House where he could report and how far it was, and while making this enquiry a young boy drove up in a Ford truck and Mr. Wigle said this boy will take you to town and he then so arranged with the boy and both Pentz and Voet, the pilot, drove to town in the Ford. The boy, who was engaged on this butcher delivery wagon, drove them in front of the

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butcher shop, which was situate quite close to the Customs House, directed them to the Customs Office and said that if they did not find the Customs Officer there, they would probably find him at the docks.

Pentz and Voet then went to the Customs House and finding there was nobody in the office—a fact which was also established by the Officer himself—they directed their steps towards the docks. On their way to the docks, a man, driving a Ford sedan, pulled up to the curb, opened the door and wanted to know where they were going. Pentz answered they were going to the docks to find a Customs Officer, to report as they had come in a plane.

Then the Officer told them to get into his car. The Officer said I suppose you wonder who I am. Pentz answered I do not know, but I suppose you are an officer of the law. The Officer then pulled his coat back and showed his badge to them. They then, under Pentz's direction, drove to the field where the plane was and afterwards returned to town, when the Officer, Raymond Petrie by name, took them to the residence of Mr. Pearsall, the Sub-Collector of Inland Revenue, at Kingsville, to have a witness as to the conversation which was to take place between Pentz and Petrie. Voet—who was heard as a witness—is very very deaf and is very hard to understand, the conversation took place between Pentz and Petrie.

Witness Pearsall testified that Petrie suspected these men to be rum runners. From the residence of this witness they drove down to the Customs House. Witness Pearsall contends that Pentz said he had come to make arrangements to transport liquor by aeroplane, *but not on this trip*. Witnesses Petrie and Filion declared that Pentz had made that statement before them, that is, that Pentz had said he had come to make arrangements to transport liquor to the United States.

Pentz denies having made the statement that he had come to Kingsville to make arrangements to transport liquor, he testified he never made such statement to either Petrie or Filion; but he testified he had said that a friend of his in Lorraine had said that if he ever came to Kingsville, to call on a man by the name of Hoffman that he might make arrangements with him for transporting liquor from Canada.

Now, we are faced on this fact with conflicting evidence and in such a case the Court must be guided by the balance of probabilities arrived at by a careful analysis of the credible evidence as a whole and must endeavour to face all the facts at their true value, dismissing any preconceived ideas.

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Is it probable that after Petrie had shown his badge to Pentz, Pentz would tell him such stories as would unnecessarily be against himself. Furthermore, witness Pearsall, the Sub-Collector, testified that, in referring to all this conversation that took place in his presence, he said that there was no statement of Pentz going to say he intended to transport liquor *on this trip*.

However, be all this as it may, the seizure of the Waco Biplane, as shown by the Customs Seizure Report, is made "for having landed at a place other than a designated airport and for not reporting to Custom."

The evidence abundantly shows that there would have been no justification for the seizure and forfeiture of the plane on the ground that Pentz was a rum runner and the seizure was not indeed made on that ground.

The seizure was made upon the ground that Pentz landed at a place other than a designated airport and for not reporting to Custom. The Aeronautics Act, 1927, R.S.C., ch. 3, sec. 4 (g) and sec. 5.

The making of a landing with a plane on account of trouble and to avoid a *crash* is in the same position as a vessel in distress entering a port for shelter. It has been established by uncontroverted evidence that Pentz's plane was forced down on account of throttle trouble, that he repaired the same. After having done so, he decided immediately to report, he enquired where a Customs Officer could be found, he is driven to Kingsville where he is told he will find one, he goes to the Customs House and finds the office empty; but having been told that if the Customs Officer is not there he would find him at the docks and directing his steps towards the docks, after having walked quite a distance, he meets this Customs Officer who shows him his badge, reports and relates to the Officer his trouble and takes him to the field where his plane stands. Pentz could not, under the circumstances, do more than he did and the seizure made of his plane because he did not re-

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port cannot stand because he did report and at the earliest possible moment. The Customs Officer in question seemed to have lost all sense of responsibility and proportion in so blindly and arbitrarily abusing of the little power or authority confided unto him. He was decidedly over zealous. Was he actuated to act as such by the advantage he might derive under the provisions of section 5 of the Aeronautics Act?

Yet under all these circumstances, Pentz and his pilot Voet were furthermore submitted to the indignity of being placed in custody of the police from 5.30 to 9 p.m., notwithstanding that Petrie had already detained their plane.

There will be judgment allowing the appeal from the Minister's decision, maintaining Pentz's claim, ordering and adjudging the seizure of the plane in question null and void, releasing the said plane and declaring that the claimant is entitled to be refunded and paid by the respondent the amount of the deposit made by him to obtain the release and possession of his plane: but without interest because the Crown is not liable to pay interest on the amount of duty or penalty illegally enacted under a mistaken construction of the Act placed by the Customs Officer. *Ross v. The King* (1); *Algoma Central Railway v. The King* (2). The whole with costs against the respondent.

*Judgment accordingly.*

1931  
 May 6.  
 May 27.

HIS MAJESTY THE KING.....PLAINTIFF;  
 vs.  
 GEORGE GORDON FROST.....DEFENDANT

*Expropriation—Compensation—Conflicting evidence—Balance of probabilities—Evidence of price of neighbouring properties.*

*Held* that where, in expropriation cases, the Court is faced with conflicting evidence of the optimists on the one hand and the pessimists on the other, it must be guided, in arriving at the true market value of the property, by the reasons supporting each witness' views, bearing in mind the soundness of the same, and the balance of probabilities.

2. That whilst the evidence of the price paid for properties in the neighbourhood is cogent evidence of value, such evidence must be approached with care and be regulated with reasonable judgment by

(1) (1902) 7 Ex. C.R. 287; 32 S.C.R. 532. (2) (1901) 7 Ex. C.R. 239



the Court, and cannot be based on common rumour or from hearsay. That class of evidence is only helpful when all the circumstances of such sales are clearly and exhaustively disclosed. Otherwise, it introduces a multitude of collateral issues, as no two pieces of land or property are ever exactly the same.

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INFORMATION by the Crown to have certain properties expropriated valued by the Court.

The action was tried before the Honourable Mr. Justice Audette at Belleville.

*C. A. Payne, K.C.*, for plaintiff.

*A. M. Fulton and H. D. Graham* for defendant.

The facts are stated in the Reasons for Judgment.

AUDETTE J. now (May 27, 1931) delivered the following judgment.

This is an Information exhibited by the Attorney-General of Canada whereby it appears, among other things, that a certain parcel or tract of land, belonging to the defendant, was expropriated by the Crown for the purposes of a public work of Canada, namely, an airport station, by depositing, on the 22nd day of October, 1929, a plan and description of the same, in the Registry Office, County of Hastings, at the City of Belleville, Ontario, in which county the said land is situate.

The area expropriated comprises a farm of 88½ acres with buildings thereon erected, an orchard and a patch of berries.

The plaintiff, by the information, offers the sum of \$11,588 as compensation for the said farm and the defendant, by his statement in defence claims the sum of \$32,315.

The defendant purchased this farm in 1920 for \$7,500 at a time when, some of the witnesses testified, farm lands were at their peak. Since acquiring this farm, the defendant expended a considerable sum of money for improvements, but many of these improvements are in the nature of maintenance, repairs, wear and tear and not in the nature of capital expenditure.

The values placed upon this farm as a whole, by the witnesses heard on behalf of the defendant, are as follows: Gordon Frost, the defendant, about \$30,000; Burke, \$20,000; Waldron, \$18,000; Reid, \$20,000, and Bush, \$22,000.

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While the values placed upon the same by the plaintiff's witnesses are as follows: G. Simmons, \$10,310; Weaver, \$9,775; Dr. Titus, \$8,500; W. Simmons, \$8,500.

There is a great gap between these valuations, a wide divergence of views and opinions as to what the market value is and as to how it should be estimated. The court, faced with this conflicting evidence of the optimist and perhaps the pessimist, must be guided by the reasons supporting each witness' views bearing in mind the soundness of the same and the balance of probabilities.

Much stress has been laid by Counsel for the Crown on establishing the compensation on the valuation of other properties in the neighbourhood. That class of evidence has been held by the courts to be quite cogent, but has been much criticized by some text writers on the subject of Eminent Domain. Such evidence must be approached with care and be regulated with reasonable judgment by the Court, because that evidence cannot be based on common rumour or from hearsay, and only when the witness has actual knowledge of the price paid and the circumstances of the sale. That class of evidence is only helpful when all the circumstances of such sale are clearly and exhaustively disclosed. Otherwise, it introduces a multitude of collateral issues, as no two pieces of land or property are ever exactly the same.

This property must be assessed, as of the date of the expropriation, at its market value in respect of the best uses to which it can be put, taking into consideration any prospective capabilities or value it may obtain within the reasonably near future. But it is only the existing value of such prospective capabilities at the date of expropriation that falls to be determined. *The King vs. Trudel* (1); *The King vs. Falardeau* (2).

There exists, perhaps, some contingencies or possibility of these farmers who own property on the Highway to occasionally sell some small lots on the front, or to the south, facing the Bay, but these lands obviously have not now reached the stage of being valued with the prospect of building lots. At the date of the expropriation they were all used for farming purposes. Moreover, there is

(1) (1913) 49 S.C.R. 501.

(2) (1913) 14 Ex. C.R. 265, at p 279.

an extensive marsh or swamp on the water front, on the Bay, which would seem to make the property undesirable for summer cottages.

Some of the witnesses on behalf of the defendant, and the defendant himself, have endeavoured to prove too much and in doing so they have weakened their testimony, in the result proving nothing.

This farm being situate close to Trenton and not very far from Belleville has the advantage of having a good market in the vicinity; but as a farm it is an ordinary farm with good buildings, and in some cases the buildings might be too expensive for a farm and may not add therefore anything to its market value. The farm has the great disadvantage of being crossed by a railway, which thereby severs the farm. The piece to the south is also severed by the Highway with its heavy and dangerous traffic. These severances act as a great detriment in the value of a farm, in that it makes it more difficult and expensive to operate and goes materially toward decreasing its market value. There is also some marsh land upon it.

It is impossible to fix the compensation with mathematical accuracy, but taking into consideration all the circumstances of the case and all legal elements of compensation whatsoever involved in this case, I have come to the conclusion to fix the value of this farm and the compensation with all damages whatsoever resulting from the expropriation, at the sum of \$12,390.

There was a tender made in this case, but no part thereof was paid to the farmer who was ousted from his farm and left to shift for himself—with his cattle and agricultural implements on his hands. The farm was taken and no money up to date was ever given to him. His whole business, his manner of living was recklessly dislocated. He had no money to purchase a new farm and was working on day labour or otherwise whenever he could get something to do. Under these circumstances there must, at least, be added 10 per cent to the amount of compensation, for the compulsory taking. Therefore the amount of compensation is hereby fixed at the sum of \$13,629.

Therefore, there will be judgments as follows:—

1.—The land expropriated herein is declared vested in the Crown, as of the 22nd October, 1929.

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2.—The compensation for the land so taken and for all damages whatsoever resulting from the expropriation is hereby fixed at the sum of \$13,629 with interest thereon from the 4th day of July, 1930—the date at which the defendant released possession of the farm—to the date hereof.

3.—The defendant, upon giving to the Crown a good and satisfactory title, free from all mortgages, charges and encumbrances whatsoever, is entitled to recover and be paid by the plaintiff the said sum of \$13,629 with interest thereon as above mentioned.

4.—The defendant is also entitled to the costs of the action.

*Judgment accordingly.*

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BETWEEN:  
CANADIAN GYPSUM COMPANY, } PLAINTIFF;  
LIMITED .....

AND

GYPSUM, LIME & ALABASTINE, } DEFENDANT.  
CANADA, LIMITED.....

*Patents—Subject matter—Ingenuity of invention—Novelty and usefulness.*

*Held* that utility is not an infallible test of originality, and that to support a patent there must be something more than a new and useful manufacture, the invention must have required for its evolution some amount of ingenuity to constitute subject matter, or invention.

- 2. That the design of the patent law is to reward those who make some substantial discovery or invention adding to our knowledge and making a step in advance in the useful arts.
- 3. That the inventive ingenuity necessary to support a valid patent may be found in the underlying idea, or in the practical application of that idea or in both. The idea or conception may be meritorious, but once suggested its application is very simple, or the idea may be obvious but ingenuity is required to put it into practice, or the idea itself may have merit and the method of carrying it into practice also may require inventive ingenuity.

ACTION by the plaintiff herein to have it declared that the defendant is infringing their patent for invention relating to improvements in “Insulation” and insulating materials.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*O. M. Biggar, K.C.*, for plaintiff.

*W. D. Herridge, K.C.*, for defendant.

The points of law raised and the facts are stated in the Reasons for Judgment.

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THE PRESIDENT, now (July 25, 1931) delivered the following judgment.

This in an action for infringement of a patent granted to the United States Gypsum Company, assignee of Bruno E. Bolduf, the alleged inventor of the patent, and was issued on the 9th day of July, 1929, the date of application being October 10, 1928. The patent was subsequently assigned to the plaintiff company, a subsidiary of the United States Gypsum Company. The invention is said to relate to improvements in "Insulation", and the insulating material said to be infringed is produced and sold by the plaintiff under the trade name of Thermofill.

The United States Gypsum Company, its subsidiaries in the United States and Canada, have long been engaged in the manufacture of gypsum products in various forms, chiefly for building requirements. About 1905 the United States Gypsum Company, and other similar concerns, began the manufacture of the well known gypsum board, or plaster board, as it is sometimes called. Gypsum board gradually came to be made by the trade in standard sizes, with covers of paper on its exterior surfaces, that is to say, the board consisted of a gypsum core about three-eighths of an inch thick, with paper varying in quality and thickness on each side, and in this form it was attached to walls. At an earlier stage layers of paper were also placed within the core of the gypsum board as well as on the outer surfaces of the board. Presently the plaintiff manufactures a gypsum board known as Rocklath to be used as a plaster base, and also another known as Sheet-rock for the finished wall. The process of manufacture of gypsum board may be briefly stated. There is spread upon a plate a sheet of paper of predetermined size, and upon this there is poured calcined gypsum slurry, or plaster of paris, which is in a plastic state, and spread over the top of that by mechanical means is another sheet of paper.

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These two layers of paper, with the calcined gypsum slurry between, are then pressed between rolls which determines its thickness and edge characteristics. It is then carried on belts or conveyers such a distance as will give the gypsum core sufficient time to set; it is then dried in a kiln or other drying medium. This practically completes the process of manufacture. In the course of the fabrication of gypsum board, a certain proportion proves defective and therefore unsaleable. The plaintiff company alleges that in its experience, and that of its associated companies, eight to ten per cent of the total output of this board proved to be defective for one reason or other. It is claimed that efforts were made to utilize the waste board by using it over again in the manufacture of other board, or as an accelerator to hasten the set of the gypsum, but it is said without satisfactory results. Defective board was thrown away in piles which gradually grew to substantial sizes, and in one instance, a plant of the United States Gypsum Company was obliged to convey the contents of a dump pile out to sea some twelve miles, and there discharge the same.

In May, 1925, Bolduf, the alleged inventor, entered the employ of the United States Gypsum Company as a service engineer. At that time the United States Gypsum Company was manufacturing another insulating material called Pyrocell, which was made of finely ground calcined gypsum, with certain chemicals added thereto in order to make it expand so that its weight per cubic foot might be reduced below the weight of ordinary solid gypsum; the material was then mixed with water, and being then in a plastic state was poured into the wall spaces. It was claimed that there were some unsatisfactory features about Pyrocell, but I understand, it is still being manufactured and sold by the plaintiff company. While Bolduf was doing some experimental work with Pyrocell at one of his employer's plants in the state of Illinois, his eyes fell upon a pile of waste gypsum board, and he suggested to a co-worker that this waste board might be used in ground form as an insulating material. That was, it is alleged the genesis of the insulating material now known as Thermo-fill. Bolduf thereupon ground some of this waste board in a small accelerator mill and he states that it came out in a fluffy condition, and that it would stand up like any

insulating material. Eventually, suitable machinery for grinding the waste gypsum board was found,—no invention is claimed for that—and in 1927 all the plants of the United States Gypsum Company in the United States were equipped for grinding this waste board into what is called a bulk fill insulator, the same being poured in a dry state into the walls and floor spaces of buildings. Thus, the plaintiff stressed in its evidence, was solved the problem of the dumps of waste gypsum board.

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Turning now to the specification of the patent. The invention is said to relate to a new, fluffy, dry, powdered insulating agent having fire resistive, sound absorbing, and other novel features not found in ordinary powdered insulating agent. The stated objects of the invention are:—

to provide a new insulating material which is easily handled as a dry filling agent; to utilize materials formerly regarded as waste products in producing a new commercial article; to provide an insulating material which is variable in weight depending upon the ingredients used, which is fluffy and light in appearance, but which will not be packed down or compressed by the weight of a column of such material; to provide an elastic material of this kind which will not slump down or sift away, but remains piled vertically; to utilize such ingredients that the material although light and fluffy in appearance can be spread out in a thin layer and sprinkled lightly with water or other liquid, thereby forming a light crust on top of the material to prevent it from being blown about; to provide a light, fluffy, elastic insulating material of this kind which can be made, used and applied as hereinafter set forth; and in general to provide a new material of this kind as hereinafter set forth.

The specification then proceeds:—

Gypsum in its various forms, hydrous, partially hydrous, or anhydrite, has long been known and used as a fire resistive insulating agent, especially as contrasted with the low insulating properties of Portland cement, ordinary masonry, or similar fire resisting masonry materials. In ordinary materials the insulating properties and sound absorbing qualities cannot be built up to a high standard without materially sacrificing the fire resistive properties, but on account of the high fire resistance of gypsum, it is possible materially to build up its insulating properties by incorporating with it some fibrous material which will retain its fibrous structure through extremely fine grinding with gypsum. Thus by making a mixture of coarse gypsum and this fibrous agent, and comminuting the mixture to extreme fineness with suitable machinery, the resulting powder becomes fibrous and fluffy, taking on the joint characteristics of the union. Hydrous gypsum may be extended into organic fibrous material by such grinding, with the result that up to 20 or 25% of fibrous organic material can be incorporated with the gypsum during this fine comminution and the resultant powder still will not support combustion.

This new insulating agent is a mixture of calcium sulphate, which is more or less hydrated, ground paper pulp, paper stock, or other fibres that can be ground and intimately mixed with gypsum during grinding to develop light weights per cubic foot. If properly made, this powdered

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insulating agent is of fine fibrous material, very elastic in structure so that it is not easily compressed by weight. Thus it will remain lightly packed when placed between walls or other structures which it is desired to insulate and does not pack down or together with age, or settle, thereby lowering its insulation efficiency. In addition, this fibrous, fluffy powder does not run, fall, or break off easily from a mass of the material, but remains piled vertically with scarcely any slumping or sifting, all due to its elastic and fibrous nature.

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The specification then states that the material when placed in layers between joists over the plaster on top of a plastered ceiling, for example, in a floorless attic, may be slightly sprinkled with water, when a thin crust will form on the surface of the material upon the water drying, which prevents the material being blown about if exposed to blasts of air.

Describing the method of manufacture the specification states:—

In one method of manufacture of this new insulating agent, calcined gypsum which has been rehydrated with water is used, in the form of gypsum block, tiles, gypsum boards, and the factory wastes resulting from these productions. If these products are not available, ground gypsum rock can be used with some addition of calcined gypsum, mixed together until hardened mass results. These products from whatever source prepared, are dried, then beaten up well in a hammer mill or a similar type of disintegrator. When this material is beaten up, the required amount of shredded paper stock may then be added so that the mixture can be further shredded, or the paper may be shredded separately and mixed in later. After the paper and gypsum have been shredded and mixed together this coarser granulated product is reground by special grinding mills like feed mills, which give it a fine cutting action as well as a fine powdering action during this final grinding operation. The resultant powder is quite homogeneous, very elastic, and a fine fibrous product in which the different constituents are perfectly blended. Because of this homogeneous structure and high content of gypsum, the product is very fire resistive and will not support combustion.

In a product intended as a very efficient insulator, weighing approximately twelve pounds per cubic foot when lightly packed in place, paper pulp or paper-like chip paper is employed as the fibrous agent in the ratio of one part of fibre to four parts of dried rehydrated calcined gypsum, and this gives a product composed of 80% gypsum and 20% fibrous material; for a product weighing twenty-four pounds per cubic foot when lightly packed in place, one part of fibrous material is used to seven parts of gypsum.

Plaster wallboard may be used alone or it may be combined with a small percentage of finely shredded paper. To increase the weight or content of gypsum, ground gypsum tile alone can be used. In this way any set mixture of fibrous agent and gypsum can be obtained, and are desirable because many types of insulation require different proportions of gypsum and fibres, but in the main it is desirable to limit the fibrous material to 25% or under because of the advantage of having high fire-resistance in the resulting product.



It will suffice here to refer to claims numbered 4, 5, 6, 8, and 9, and which are as follows:—

4. A composition of matter comprising comminuted wallboards having paper covers and hydrated gypsum cores, so that the composition is a light, fluffy mixture of partially hydrated gypsum and fibres.

5. The method of insulating a structure for thermal and sound protection which comprises comminuting dry, gypsum plaster boards to form a light, fluffy mixture of partially hydrated gypsum and paper fibres, pouring said mixture in a dry state into the structure, and applying water to the surface only of said mixture thus forming a crust on said surface by the rehydration of the gypsum so that said crust prevents the remaining dry mixture from being blown away.

6. The method of preparing a thermal insulating product which comprised comminuting a mixture of gypsum and paper, the proportion of ingredients being so proportioned that a light fluffy composition results in which the percentage of fibres from the paper is less than thirty per cent of the mass.

8. The method of recovering waste plaster board from the gypsum industry which comprises drying the waste boards and comminuting same to form a light, fluffy, insulating mixture having a gypsum to fibre content substantially equal to the gypsum to paper content in the original boards.

9. A dry, fluffy composition containing a mixture of powdered gypsum and not to exceed 25% per cent by weight of paper fibres, said composition being adapted to be poured in a dry state into structures to be insulated.

The specification, it seems to me, describes an insulating material composed preferably of calcined gypsum, and shredded paper stock or paper pulp, or any other fibrous organic material that can be ground; they are then mixed together in the proportions appropriate for the purpose for which the insulating material is required, and according to the weight required. These materials are then ground together until the different constituents are perfectly blended. Waste gypsum board may be used alone because ordinarily it is composed of calcined gypsum and paper. If the board happens to be deficient in either of these ingredients, for the purposes of an insulating material, the deficiency may be supplied during the process of mixing or grinding.

The insulating material made by the defendant, and known to the trade as Dry Insulex, is composed of ground calcined gypsum and ground wood fibre, but the defendant company has never used waste gypsum board, nor finding it profitable to do so, it is claimed. Thermofill and Dry Insulex are practically the same thing and are applied in buildings for insulating purposes, as a dry bulk fill.

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An insulator is any substance which delays the flow of heat. The defendant's witness, Thompson, stated that as a dam is required to prevent the flow of water from a high level to a low level, so insulation is a barrier to prevent the flow of heat from a high temperature to a low temperature. Essentially this is insulation. In fact, any material that prevents or impedes the flow of heat is acting as an insulator. The theory and principle of heat insulation has been long known and practised in some form or other. The value of porosity, cellular content, and lightness of weight, in insulating material, and the method of obtaining these characteristics has long been known. Materials such as shavings, cinders, sawdust, wood fibre, wood grain plaster, hollow blocks, mineral wool, infusorial earth, eel-grass, crushed cement, ground limestone, plaster, crushed or powdered gypsum, ashes, granulated cork, straw, asbestos fibre, rock wool, paper, diatomaceous earth, ground corn cobs and many other substances, usually waste products, have long been used as insulating materials. In the International Critical Tables will be found a long list, two score or more, of the thermal insulating materials with their several insulating values. Various materials have also been used in combination such as mineral wool and cork, asbestos and cement, shavings and lime, mud and shavings, straw and lime, and cork and paper. Then we have insulating material in the form of board, such as gypsum or plaster board, sold under various trade names. Gypsum board has always been advertised all over this continent, as possessing heat insulating properties; this board is also claimed to possess fire resisting and sound deadening properties. Another insulating material known as Insulex was introduced upon the Canadian market in 1925, by the Universal Gypsum Company, an American concern. This insulator was sold in bulk form, and was used between studding and over ceilings in buildings. Insulex is ground calcined gypsum to which is added chemicals to make it expand, to increase its cellular content and thus reduce its weight, just as in Pyrocell; in applying it water is added until it reaches a plastic state when it is poured into the wall spaces of a building. This product is generally called Wet Insulex, because it is in that state when applied. The Witness Gauvin, a building contractor in rather a large way, stated that he used Insulex in dry form, that is, he poured

it into the walls and over the ceilings in buildings, in dry form. The witness Govan stated that he used wet poured Insulex in 1923, 1924, and 1925, and that he frequently combined with it shredded paper or wood fibre.

The question for determination here is one of fact, and that is whether or not there is invention. It appears to me that the plaintiff's patent cannot be supported for want of subject matter. Thermofill has utility but, I think, only a comparative utility, a possible increase in utility over some other known insulating material. But utility is not an infallible test of originality. To support a valid patent there must be something more than a new and useful manufacture, it must have involved somehow the application of the inventive mind; the invention must have required for its evolution some amount of ingenuity to constitute subject matter, or in other words invention. Fortunately the law does not authorize the granting of a monopoly for everything that is new and useful. The design of the patent law is to reward those who make some substantial discovery or invention which adds to our knowledge and makes a step in advance in the useful arts. If there is no novelty there can of course be no inventive ingenuity, but if there is novelty in the sense required in the law of patents, it must be the product of original thought or inventive skill. As stated in the cases, the inventive ingenuity necessary to support a valid patent may be found in the underlying idea, or in the practical application of that idea, or in both. It may happen that the idea or conception is a meritorious one, but that once suggested, its application is very simple. Again, it may be that the idea is an obvious one, but that ingenuity is required to put it into practise. Or, again, the idea itself may have merit and the method of carrying it into practice also require inventive ingenuity. In all these respects, I think, the alleged invention in this case fails. I cannot see how there can be invention in the idea of combining ground calcined gypsum with shredded paper stock, and blending them together, and after all that is the essential feature of the alleged invention. The state of knowledge concerning the principle of heat, cold, or sound insulation, the wide range of known materials possessing heat insulating properties or fire resisting properties, their respective insulating values singly or in combination, and the many

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known methods of production and application of these insulating materials, was too extensive in my judgment to hold that what the plaintiff's patentee disclosed in his specification was invention. The insulating properties of the different elements entering into the Thermofill was known; it must have been known that the union of calcined gypsum with shredded paper stock or other fibrous material, however united or applied, would make an insulating material; the crushing, grinding and mixing did not involve a new method or means requiring the exercise of the inventive ingenuity. No serious difficulty was experienced by Bolduf in grinding gypsum board from the very start. Any skilled mechanic could have produced a machine that would grind the board whenever required to do so. The dry bulk fill insulation was known and practised. The introduction of shredded paper, or its equivalent, into ground calcined gypsum was known and had been practised, for instance, by Govan. It seems to me that all the patent discloses, lay in the track of old processes, methods, and means of insulation, and it is to be assumed that the patentee had access to everything that was commonly known. I do not think that the specification discloses sufficient invention to justify a monopoly.

The plaintiff therefore fails, and the costs will follow the event.

*Judgment accordingly.*

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CITY OF SAINT JOHN..... SUPPLIANT;

AND

HIS MAJESTY THE KING..... RESPONDENT.

*Contract—Interpretation—Acts of party as aid to interpretation—Covenant to repair.*

Suppliant by its action asks that the respondent be ordered to pay for the repair of a street on which a spur line of the Intercolonial Railway was located, by virtue of an agreement, reading in part as follows:

1. "The City hereby grants unto His Majesty the right to extend one spur track of the Intercolonial Railway from the said tracks of said railway on the Ballast Wharf, in the City of Saint John, along Charlotte street to Broad street, such tracks to be located in such portion of the street as may be approved by the Commissioner of Public Works and the Road Engineer of the said City."

2. "In consideration of the foregoing licence His Majesty HEREBY AGREES that HE will keep the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid, in proper repair at all times to the satisfaction of the Commissioner of Public Works of the said City. \* \* \* \* \* " The Respondent claims He is only obliged to repair the space occupied by its rails.

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*Held* that the word "aforesaid" in par. 2 above cited refers back to the "portion" in par. 1; and that "the portion of Charlotte street lying between the Ballast Wharf and Broad street aforesaid" relates, and was intended to relate only to "such portion of the street" whereon the tracks were to be located. That the words "lying between the Ballast Wharf and Broad street" in the second paragraph merely limit the length of the spur line, and that by the said contract the respondent is only obliged to keep repaired that portion of the street whereon the spur track was located.

2. The street in question was built 70 years ago on crib work, into the harbour, and then filled in. The western wall, built of timbers lying on top of one another and used as a wharf, being in a state of disrepair, the city have called on the respondent to pay for its repair, under the above cited contract, at a cost of over \$17,000.

*Held* further that, as a covenant to repair is not a covenant to make a new thing, and inasmuch as to do what the suppliant now requires of the respondent would practically amount to reconstruction of the whole of said wall, such work does not come within the meaning of "repairs" called for by the covenant in the contract.

PETITION of Right by suppliant herein for an Order that respondent pay to the suppliant the cost of repairing a certain street in the city of Saint John on which the tracks of the Government Railway had been laid.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Saint John.

*J. D. P. Lewin* and *A. N. Carter* for suppliant.

*I. C. Rand, K.C.*, for respondent.

The questions of law raised and the facts are stated in the Reasons for Judgment and in the headnote.

The PRESIDENT, now (August 6, 1931) delivered the following judgment.

This is a Petition of Right brought by the Corporation of the City of Saint John, N.B., in respect of a written agreement entered into between the Corporation and His Majesty the King, represented therein by the Minister of Railways and Canals for the Dominion of Canada. By the terms of the agreement the Corporation granted to the Intercolonial Railway the right, privilege, or licence, to extend one spur

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track along Charlotte street, within the corporation limits, from what is known as the Ballast Wharf, as far as Broad street.

The agreement was entered into in January, 1914, and after a recital of the date of execution of the agreement, and of the parties thereto, the remaining paragraphs of the agreement, which for convenience I shall number one, two and three, are as follows:

1. The city hereby grants unto His Majesty the right to extend one spur track of the Intercolonial Railway from the said tracks of said railway on the Ballast Wharf, in the city of Saint John, along Charlotte street to Broad street, such tracks to be located in such portion of the street as may be approved by the Commissioner of Public Works and the Road Engineer of the said city.

2. In consideration of the foregoing licence His Majesty HEREBY AGREES that HE will keep the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid, in proper repair at all times to the satisfaction of the Commissioner of Public Works of the said city, and at the expense of the Intercolonial Railway of Canada and also that His Majesty upon receiving sixty days' previous notice from the Common Council of the said city so to do, such notice to be given to the Minister of Railways and Canals aforesaid, shall and will take up the track hereby authorized to be laid and will remove the rails of the same from the said street.

3. His Majesty further agrees to pay to the said city yearly the sum of One Dollar as rental for the privilege hereinbefore granted.

It is the southern end of Charlotte street, which now ends at the Ballast Wharf, so called, in Saint John harbour, that is involved in the controversy; that end of this street was in the past known as Charlotte street extension. Originally, the area now comprised in the Extension formed a part of the harbour of Saint John, and was land covered with water. The Extension was originally a structure of crib work, about sixty feet in width, extending from what was then the end of Charlotte street, in the city of Saint John, to the Ballast Wharf; the crib work was gradually filled in and it is now a solid fill. The Extension was the result of a disagreement between the civic and military authorities respecting access to the Ballast Wharf, away back in 1858; the differences were composed by the construction of the Extension, towards the cost of which the Imperial authorities bore a portion. The west side of the Extension, for a great part at least, is bounded on the waters of Saint John harbour, and that side of the Extension was used as a wharf. This side wall of the Extension was faced by square timbers lying horizontally one above

the other, from below the bed of the harbour up to the surface of the Extension, forming a solid wall, and was built over seventy years ago. Several mooring posts were placed on that side of the Extension, and there for many years, vessels loaded and unloaded cargo. I should observe that this wall also serves as a retaining wall to hold back the earth filling in the Extension, and if it were not for this wall I doubt if the Extension or street could be permanently preserved.

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The western side wall of the Extension, for a distance of three hundred feet in length and some sixteen feet down the face of the wall, and also a portion of the surface of the Extension near the wall, is undoubtedly in a condition of disrepair, and it is claimed by the corporation, that it would cost about \$17,000 to repair the wall, which amount is claimed in damages herein by the corporation. The corporation contends that under the terms of the agreement, the respondent is obliged to maintain in repair the whole length and width of the Extension, between the Ballast Wharf and Broad street, including the western wall or wharf side of the Extension, while the respondent's contention is that it is obligated under the agreement to keep in repair only that portion of the Extension whereon is located the ties and rails of the spur track. The whole issue, as it developed at the trial, relates only to the question as to whether the respondent is liable for the repair of the western side wall of the Extension, under the agreement.

Mr. Carter, counsel for the corporation, contended that Charlotte Street Extension was a public street and nothing else, and was not to be treated as being partially, or in any sense, a wharf, while Mr. Rand, the respondent's counsel urged that the western wall was essentially a wharf, and could not properly be considered, in so far as this case was concerned, as a part of Charlotte Street Extension, or as a portion of that street. I have no doubt whatever that the Extension was popularly known as a street, and, the western wall, as a wharf. I think the use of both terms may be justified, but for convenience sake I shall hereafter refer to the Extension as a "street", that to be inclusive of the wall or wharf. The western wall in question was used by ships as a wharf for very many years; at the time the

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agreement was entered into and subsequent thereto, it was used as a wharf by the leave and licence of the corporation; the Annual Reports of the corporation appear to have treated it as a wharf; the corporation collected for the use of the same varying amounts annually as wharfage; and it made slight repairs to the wall or wharf, subsequent to the date of the agreement. Further, it would appear to me, that the corporation transferred, a few years ago, to the Saint John Harbour Commissioners the western side wall of the street, as part of the Saint John harbour shipping facilities, all of which I understand, were owned by the corporation, and it would also appear that the Saint John Harbour Commissioners have since been asserting jurisdiction over the wharf side of the street. In the books of the corporation, capital expenditure made in connection with the wharf side of the street, is designated as Charlotte Street Extension Wharf account. I think it is clear that the western wall was known and used as a wharf, but in my view of the case, I do not find it necessary to make any deductions therefrom in reaching a conclusion.

I have ventured to relate all these facts because much importance was attached to them by counsel at the trial, and possibly they may contribute something towards ascertaining what was in the minds of the parties, when the agreement was entered into, if the agreement itself does not clearly reveal the intention of the parties, or if it is ambiguously expressed. The agreement apparently did not originate with the parties thereto, but was the outcome of the interposition of others, shippers I assume; there was no correspondence, and apparently no serious oral negotiations, between the parties leading up to the agreement, and it is upon the precise terms of the written document itself that both parties rely. The facts of the case are rather unusual, and one can hardly look to decided cases for assistance.

Turning now to the agreement itself. It purports to grant to His Majesty, the right to extend one spur track of the Intercolonial Railway from the Ballast Wharf, *along Charlotte street*, as far as Broad street, *such tracks to be located in such portion of the street as may be approved*, by certain named officials of the corporation; the licence is terminable on sixty days' notice by the corporation,



whereupon the railway is to remove the rails. Then the agreement states that in consideration of the licence, or privilege, to lay the one spur track, which in fact was laid quite close to the western wall of the street, His Majesty will keep "*the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid* in proper repair, etc." In my opinion, "the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid", relates, and was intended to relate, only to "*such portion of the street*" (Charlotte street) whereon the tracks were to be located as directed by the corporation authorities. The words "lying between the Ballast Wharf and Broad street", in the second paragraph, merely limit the length of the spur line along Charlotte street, and were used only for that purpose; beyond that they have no significance, and in construing the agreement these words might well be eliminated, because they were unnecessary, the length of the track having been previously determined in paragraph one. Therefore, it seems to me, that in the second paragraph the important words should read: "the portion of said Charlotte street \* \* \* aforesaid", and if read with the words "such tracks to be located in such portion of the street" in the first paragraph, then, I think, that the proper interpretation to be placed upon the combined paragraphs is that the "portion" to be kept in repair, is "the portion of said Charlotte street" whereon the tracks were by the terms of the agreement to be located. "Portion" in the first paragraph undoubtedly means that portion of Charlotte street to be occupied by the spur track between the Ballast Wharf and Broad street, and the words "the portion of said Charlotte street" in the second paragraph has reference, I think, to the portion lengthwise of Charlotte street whereon the spur track was to be located. The use of the words "the portion of said Charlotte street" and "aforesaid" in the early lines of the second paragraph, makes it quite clear to me that the "portion" to be kept in repair is the same "portion" of Charlotte street whereon the spur track might be located, between the two mentioned points, and not the whole width of the street inclusive of the western wall. After the spur track was laid down, the corporation, in 1916, asphalted the surface

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of that portion of Charlotte street east of the spur track, constituting the major portion of the width of the street, and it was not then contended that the railway was liable for the cost of this improvement to the surface of the street between the Ballast Wharf and Broad street. The conduct of the corporation, for many years subsequent to the date of the agreement, would indicate that it interpreted the agreement in the same light as did the railway authorities. It would seem improbable that, for a licence or privilege, and not a demise, terminable on sixty days' notice, such an onerous obligation, as is claimed by the corporation, should be imposed upon or accepted by the railway authorities, without the same being clearly and unequivocally expressed in the agreement. I am of the opinion that it is only that portion of the surface of Charlotte street, between the Ballast Wharf and Broad street, whereon is located the spur track, that the respondent is required, by the terms of the agreement, to keep in repair.

Furthermore, as was contended by Mr. Rand, I doubt if the agreement can be construed to mean that the respondent was obligated to repair the side wall of the wharf or street, to the extent claimed by the corporation. Evidence was given to show that the operations of the railway on the spur track, and its user of the wall, seriously damaged the wall. I do not think this was established, but in any event, I doubt if it is important. It is doubtful if, under the terms of the agreement, the respondent had the right to use the wharf or wall except upon payment of the usual wharfage charges. The repair work, claimed as necessary to be done, means virtually the reconstruction of the whole wall down to the bed of the harbour, which is hardly, I think, a repair of the wall. Some years ago the most southern end of the same wall was wholly reconstructed by building a new wall outside the old wall, and filling in the space between the old and the new wall, causing a "jog" in the southern end of the west wall of the street. This is probably the form of reconstruction that should be followed in this case, and in fact, I think, this was recommended. The portion of the wall here in question was, I understand, constructed at the same time as the portion that was reconstructed, and that is now over seventy years ago. The three hundred feet of the wall in question was

bound, in the very nature of things, to require very substantial reconstruction now or in the early future. To do what the corporation now requires of the respondent would be to reconstruct the whole wall, with the exception of a few of the lowest tiers of timber that have been preserved, chiefly because they were always under the water, or the gravel and mud. It is not unfair to assume that should the wall in question be reconstructed to the extent claimed to be necessary by the corporation, that it would last another fifty or seventy years. A covenant to repair is not a covenant to make a new thing, or a thing different from that which the licensee or tenant took when he entered into the covenant. *Lister v. Lane* (1).

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The petition is therefore dismissed and costs will follow the event.

*Judgment accordingly.*

NEW BRUNSWICK ADMIRALTY DISTRICT

WALTER H. MARQUIS.....PLAINTIFF;

1930  
Dec. 17.  
Nov. 29.

vs.

THE SHIP ASTORIA.....DEFENDANT.

*Shipping—Claim for necessaries—Mortgagee—Priority of Mortgagee*

The vessel *Astoria* was an American vessel on which H. and E. Holding Company Inc., of New York held a mortgage. Messrs Baker, Carver & Morrell, Inc., of Connecticut had furnished certain necessaries to the vessel, for which the laws of the United States gave a maritime lien. The vessel was subsequently libelled and sold in New Brunswick, Canada, and the proceeds of the sale were deposited in Court for subsequent distribution. The mortgagee appeared and claimed that his mortgage should be preferred to the claim of materialmen.

*Held*, that, though by English law a maritime lien created by a foreign law, under circumstances which do not give rise to a maritime lien according to English law, is recognized; the priority which it will be given in the distribution of proceeds is treated as relating only to the remedy determined by the law of the form at which the vessel is libelled and sold, the mortgage should be preferred to the claims of the materialman.

APPLICATION of plaintiff for an order for payment out of Court of the proceeds of the sale the defendant ship, and for the purpose of establishing the order of priority in which claims against the ship should be paid.

(1) (1893) 2 Q.B.D. 212.

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The application was heard before the Honourable Sir Douglas Hazen, Local Judge in Admiralty for the New Brunswick Admiralty District, at Saint John.

*W. H. Harrison, K.C.*, for the Mortgagee (H. & E. Holding Company).

*J. H. A. L. Fairweather*, for the material men (Baker, Carver & Morrell, Inc.).

Harrison, K.C., argued that claimants for necessities in the ordinary way are postponed to the mortgagee. Mayers Admiralty, 87; *The Two Ellens* (1); *The Henrich Bjorn* (2).

All questions as to priority of claims are determined by the *lex fori*, nor is this affected by a foreign statute purporting to give a materialman a maritime lien. *The Union* (3); *The Colorado* (4); *The Tagus* (5).

The only remedy for a materialman is an action under the Act of 1840, or the act of 1861, which gives a lien dated from the institution of the action.

*The Strandhill v. Walter H. Hodder Co.* (6); Newcombe J. at p 809; *The Henrich Bjorn* (7). That *Baker, Carver & Morrell, Inc. v. The Astoria*, and *The Strandhill* made no decision on the priorities. Newcombe J. in *The Strandhill* at p. 808:

The case, as now presented, does not involve a question of priorities as between competing creditors to be determined by the *lex fori* as in cases like *The Tagus* (5); *Clark v. Bowring* (8); *The Colorado* (4).

Nor is it claimed by way of real privilege or lien that a chose in action, depending on the law for recovery of the latter, as in the much debated decision of Dr. Lushington in *The Milford* (9). The case is concerned only with the vindication of the right claimed against the ship.

and again at P. 809:

If it should appear at the trial that subsequent interests have intervened and that conflicting priorities are to be adjudged, other considerations may arise, which have not been debated, and as to which I am careful to say that it is not my purpose at present to express any opinion.

(1) L.R. 4 P.C. 161.

(2) 11 A.C. 270.

(3) 167 E.R. 60.

(4) (1923) P. 102, at 106 and 109.

(5) (1903) P. 44.

(6) (1926) 4 D.L.R. 801.

(7) 11 A.C. 270, at p. 278.

(8) (1908) Sess. Cas. 1168.

(9) (1858) Swab. Ad. R. 362; 166 E.R. 1167.

See also vol. 25 *Harvard Law Review*, 358, citing *The Constant v. Klompus* (1), for the proposition that though international comity requires that the creation of a lien by a foreign law be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libeled and sold. He cited *American Express Co. v. U.S.* (2). Also *Harvard Law Review*, Vol. 37, 1135; *The Oconee* (3); Horton, *Conflict of Laws*, 3rd Ed., vol. 324.

J. H. A. L. Fairweather, argued that under the Ship Mortgage Act, 1920, as enacted by Congress Statutes of the United States, vol. 41, part 1, any person furnishing necessaries shall have a maritime lien upon the vessel which may be enforced by suit in rem. In *Baker, Carver & Morrell, Inc. v. The Astoria* (4), it was decided that this court had jurisdiction to enforce the maritime lien granted by the said statute.

The question here is whether this maritime lien takes priority over the American Mortgage of H. & E. Holding Co. Inc. The mortgage was recorded four days after the last of the goods was supplied, and under American law the maritime lien for necessaries takes precedence of the mortgage. This maritime lien is something which adheres to the ship from the time the facts happened, and it must take precedence to the mortgage. He cited:

*The Strandhill v. Walter H. Hodder Co.* (5); *The Bold Buccleugh* (6); *The Two Ellens* (7); *The Ripon City* (8). Storey, *Conflict of Laws*, 4th Ed. 322; Roscoe's Admiralty Practice, 4th Ed. 67; Mayers Admiralty Law and Practice, 55; *Minna Craig Steamship Company v. Chartered Mercantile Bank of India* (9).

Accordingly maritime liens have precedence over statutory liens.

*The Colorado* (10); *City of Windsor* (11); *The Gordon Gauthier* (12); *The Mary Ann* (13); *The Feronia* (14); *The Hope* (15); *The Traders Bank and Lockwood* (16).

(1) 50 Scot. L. Rep. 27.

(2) 297 Fed. 189.

(3) 280 Fed. 927.

(4) (1927) 4 D.L.R. 1022.

(5) (1926) 4 D.L.R. 801.

(6) (1851) 7 Moo. P.C. 267.

(7) (1872) L.R. 4 P.C. 161.

(8) (1897) P.D. 226.

(9) (1897) 1 Q.B. 460.

(10) (1923) L.R. P. 102.

(11) (1895) 4 Ex. C.R. 400.

(12) (1895) 4 Ex. C.R. 354.

(13) L.R. 1 A. & E. 8.

(14) L.R. 2 A. & E. 65.

(15) (1873) 28 L.T. 287.

(16) 48 S.C.R. 593.

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*Astoria.*

The facts and questions of law raised are stated above and in the Reasons for Judgment.

Sir DOUGLAS HAZEN, L.J.A., now (December 13, 1930) delivered the following judgment.

In answer to a summons dated the 16th day of December, A.D. 1926, the parties concerned attended before me on November 29 last at my chambers, on the hearing of an application of the plaintiff for an order for the payment out of court of the proceeds of the ship *Astoria*. The application was for the purpose of establishing the order of priority in which claims against the ship should be paid.

The fund in court remaining of the proceeds of the sale of the ship amounts to less than \$5,000, and the claims against the ship amount to over \$19,000, and the main question involved is as to whether or not the maritime lien of Baker, Carver & Morrell takes priority over the American mortgage of H. & E. Holding Company, Incorporated. The mortgage was recorded in July, 1926. It was claimed by counsel on behalf of the mortgagee that the mortgage ranks ahead of necessities supplied anywhere, and Mr. Fairweather, of counsel for those supplying the necessities, admitted that mortgages come ahead of necessities under the English practice, but that a mortgage has no priority over a maritime lien for necessities, and it was claimed that there was no such a thing in this jurisdiction as a maritime lien for necessities. However the evidence is to the effect that the vessel left an American port with an American lien attaching to it, and came to Canada where the lien continued, and where the vessel was sold. It was claimed that the only authority in a British Admiralty Court to deal with a claim for necessities is to be found in the Acts of 1840 and 1861, and that the only remedy given a necessities man by British law is the remedy to be found in those Acts, viz., a right to sue in rem, or as it is called, a statutory lien dating from the institution of the action. In the case of *Baker, Carver & Morrell* (1), it was held that the Admiralty Court has jurisdiction under the Act of 1861, and the decision in that case was to the effect that the Exchequer Court of Canada had jurisdiction to enforce a maritime lien properly granted by a foreign statute.

(1) (1927) 4 D.L.R. 1022.

In Myers' Admiralty (1916), p. 87, I find it stated in regard to priority—

As no maritime lien is conferred by these sections the dates at which the rights of the material men are ascertained with regard to competing claims is the date of the institution of the suit. All liens, therefore, whether maritime or possessory, which have attached prior to that date and are still in force, are entitled to preference over the claims of the material man; and not only liens but all other valid charges on the ship existing at that date. Therefore a registered mortgagee takes precedence of claims for necessities for equipment, under these sections, in cases where the registration of the mortgage is prior to the institution of the suit in which the claim is made, although it may be subsequent to the supplying of the necessities. And in support of this a number of cases are cited.

It was open to the parties supplying the necessities and who have established claims in reference thereto, to have ascertained previous to doing so that a mortgage existed against the ship, and had they taken the necessary steps to so ascertain they could, by refusing to give credit, have saved themselves any loss which has been incurred, and it would seem an act of injustice if they should be given preference over the mortgagee who had lent his money on the strength of the security afforded by the ship.

In an article in No. 4, Vol. 26 of the Harvard Law Review, of February, 1913, at p. 358, under the heading of *What Governs Maritime Liens* I find the following—

It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered (*The Scotia*). Thus if an English vessel is supplied with necessities in an American or French port and libelled in the United States, the material man's lien is upheld. Conversely, it is submitted that for supplies furnished an English vessel in an English port no lien should be recognized even though the vessel were libelled in the United States. The creation of liens for service on the high seas, as for seamen's wages, is on the same theory, governed by the law of the ship's flag. But though international comity requires that the creation of a lien by a foreign flag be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libelled and sold. Thus in the recent case where a Russian ship mortgaged in England was libelled and sold in Scotland, the law of the forum was applied and the English mortgagee preferred to an intervening Danish material man. In support of this is cited the case of *Constant v. Klompus* (1).

From a note to the article at p. 358 I quote—

It might be contended that the essential right of a maritime lien is that it gives a vested right superior to all prior and non-maritime interests and that to postpone it to a mortgage is to refuse to recognize its existence. The foreign Sovereign, though he may pass a valid title to a ship

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even in assignment proceedings, as in *Castrique v. Imbrie* (1), has not jurisdiction to give a qualified interest which will forbid the sale of a ship in another forum later acquiring jurisdiction, or specify how the proceeds arising in that forum shall be distributed. Elsewhere the lien need only be regarded as giving such rights as the creating Sovereign had jurisdiction to grant, viz., a claim against the vessel for which the Sovereign of the forum may furnish such a remedy as he sees fit. It is submitted, however, that the only relief given a material man in the English Admiralty Act is grossly inadequate.

I concur in the conclusions come to by the author of the article in question, and can see no reason why the claim of the mortgagee should be postponed to that of the necessaries man, in view of the practice that has hitherto prevailed. It is laid down that the question of priority of liens is treated as relating only to the remedy determined by the law of the forum. See Wharton's *Conflict of Laws*, 3rd Ed., p. 324.

So far as the main question in the present application is involved, I am of opinion that the mortgagee takes preference over those who have claims for necessaries, and the order of preference will therefore be as follows:

1. Registrar and marshal's fees and expenses.
2. Costs of Walter H. Marquis of arrest and bringing fund into court.
3. Costs of Alexander McLennahan for the first arrest.
4. Wages of seamen.
5. Wages of Captain.
6. Mortgage as to 60/64 H. & E. Holding Company, Incorporated.
7. Necessaries.

I understand that the costs of Marquis and McLennahan, the seamen's wages and the wages of the mate and Captain have already been paid, so that the balance of the funds remaining will have to be applied to the payment of the mortgage claim, after payment of the Registrar and marshal's fees.

*Judgment accordingly.*

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(1) 4th H.L. Cases, 414.



JOHN P. HEARN.....CLAIMANT;  
 AND  
 HIS MAJESTY THE KING.....RESPONDENT.

1931  
 June 8.  
 July 18.

*Revenue—Crown—Reference—Seizure—Customs Act, Section 244*

A certain unregistered motor boat of less than 10 tons tonnage, was seized under section 244 of the Customs Act for departing from a port in Canada without a clearance. She had been moored at one pier in the Customs port of Sydney and left this pier to go to another point in the same port.

*Held*, that, inasmuch as the motor boat in question was not required to be registered, and was not eligible for clearance by Customs on a coasting voyage, she was not required to obtain a clearance under the provisions of the Customs Act before leaving her port or place of mooring and that, in consequence, she was not liable for penalty imposed by section 244 of the said Act, which Act does not apply to the facts of this case.

2. *Held* that, moreover, the boat in question did not depart from the port of Sydney within the meaning of said section and that the provisions of the Statute do not apply to a small boat which is unregistered and which is proceeding from one point in any port to another point in the same port without goods on board, and that she was not required to clear.

REFERENCE by the Minister of National Revenue to have the Court decide upon the claim made by the claimant herein.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Sydney.

*J. W. Maddin, K.C.*, for claimant.

*A. D. Gunn, K.C.*, for respondent.

The facts and questions of law raised are stated in the Reasons for Judgment.

THE PRESIDENT, now (July 18, 1931), delivered the following judgment.

This is a Reference made by the Minister of National Revenue under sec. 176 of the Customs Act, and involves the seizure and forfeiture of a small motor boat owned by the claimant, the alleged offence being that the boat had departed on the 1st, 2nd and 4th of September, 1928, from the port of Sydney, N.S., without clearing at Customs contrary to the requirements of sec. 244 of the Customs Act,

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Macleay J.

which enacts that if any vessel departs from any port or place in Canada without a clearance, the master shall incur a penalty of \$400. For the alleged offence a penalty of \$400 was imposed upon the owner of the boat, and the boat was detained until the penalty, expenses of seizure and subsequent keep, should be paid. The penalty was not paid and the boat is still under detention.

At the conclusion of the hearing I decided that the seizure was improperly made, and that the motor boat should be released to the owner, the claimant herein. I reserved however the matter of costs. As the grounds upon which the motor boat in question was seized and detained involves quite an important and difficult point, I have thought it desirable to state the reasons for the conclusion which I reached at greater length than I did at the hearing of this matter.

There is no definite evidence as to the tonnage of the boat. The seizing officer estimated the boat to be about ten tons, while the owner, the claimant, estimated that the tonnage of the boat was less than ten tons; the person from whom the claimant purchased the boat, stated that the tonnage of the boat was about three or four tons gross, or perhaps a little more, and this person is a master mariner, and has also served in the capacity of engineer on steamers. The length of the boat he stated was about thirty-five feet over all, with a beam of about nine feet, and a depth of about four feet; the boat has a covered cabin. I think that these measurements would probably indicate more than four tons but less than ten tons; at any rate we may, I think, safely assume that the boat is below ten tons. Such a boat is exempt, by sec. 5 of the Canada Shipping Act, from the provisions of that Act relating to measurement and registration of ships.

As I have already stated, the infraction of the Customs Act charged against the master of the motor boat is that she departed from the port of Sydney, September 2, 3 and 4, 1928, without clearing at Customs as required by sec. 242 of the Customs Act, but it is only in respect of the offence alleged to be committed on September 4 with which we are really concerned. The incidents leading to the seizure may be briefly stated.

The motor boat in question was taken from a certain wharf at Sydney, N.S., around 9 or 10 o'clock on the evening of September 4, by the owner Hearn, who stated in evidence that he afterwards proceeded to what is locally known as Whitney Pier, or International Pier, a shipping pier belonging to the Dominion Coal Company. Whitney Pier is within the limits of the city of Sydney, and within the Customs Port of Sydney, some two miles or less distant by water from the wharf from which the motor boat departed. The owner of the boat alleges that he purchased at Whitney Pier, from the "ships stores" of a steamer engaged in the river St. Lawrence coal trade, a quantity of wine and beer. It seems to be agreed that this wine and beer originated from the stores or stock of the Quebec Liquor Commission. It is not contended that these goods were unlawfully within Canada or were not duty paid, though they may have entered Nova Scotia contrary to the laws of that province. On his arrival back at Sydney, a few hours later, the motor boat was seized on the ground already stated; the wine and beer was seized and forfeited by the provincial authorities for violation of the Nova Scotia Temperance Act. There was some evidence suggesting that the boat proceeded far beyond Whitney Pier, and it was even suggested that she went beyond the limits of Sydney Harbour and out to sea, in the region known as Rum Row where vessels engaged in illicit liquor trade congregate, and that she there took on board the goods found in the boat when seized. There is not sufficient evidence to support these suggestions and they may be dismissed. The story of the owner of the boat is the more probable one, that is to say, that he procured the wines and beer at Whitney Pier from some steamer. The provincial authorities must have thought so, and in fact I must accept that evidence, because any evidence to the contrary is conjectural, and I cannot therefore entertain it. Such are the incidents leading to the seizure. The issue therefore is limited to the question as to whether or not this unregistered motor boat of less than ten tons, not employed as a common carrier containing no cargo or goods of any kind, destined for a place within the Customs Port of Sydney from which she sailed, was obliged under the law to clear at Customs.

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Mr. Campbell, Collector of Customs at the Port of Sydney testified that Whitney Pier was within the boundaries of the Customs Port of Sydney, and as I have already stated is within the limits of the city of Sydney. At Whitney Pier chiefly for the convenience of the clearance of coal carriers, a Customs clearing office of some kind is maintained by and directed from the Sydney Customs Office; it is not a separate Customs Office, nor a Sub-Customs Office, as I understand it. Mr. Campbell also testified that in practise all registered boats are required to clear, and also unregistered boats if bound for North Sydney, another Customs Port in Sydney Harbour, or if bound out of the harbour, but that boats unregistered, under ten tons, going around the harbour, do not in practise clear at Customs. The claimant stated in evidence that he did not know he was obliged to clear at Customs at the time in question here, and while I cannot find that evidence in the record, still I am sure this was stated by the claimant.

I do not think that sec. 244 of the Customs Act is applicable to the facts of this case. The section states that, "if any vessel *departs* from any port or place in Canada without a clearance," the master shall incur a penalty. In this case I find that the boat did not depart from the Port of Sydney. I do not think that this provision of the statute applies to a small boat, which is unregistered, and which proceeds from one point in any port or place to another point in the same port or place, without any goods on board, or that she is required to clear. Sec. 91 refers to vessels bound outwards from one port in Canada to a port or place out of Canada, or bound outwards from any port in Canada to any place within the limits of Canada, and the master is required to report outwards, and sec. 93 provides for the granting of a clearance. It is also to be pointed out that sec. 91 refers to a registered boat. Sec. 244 is really the penalty clause for violation of sections 91 to 93 inclusive, and also other provisions of the Act. It would appear somewhat strange if a person owning a sail boat or motor boat, under ten tons and unregistered, should proceed in such boat the distance of say one hundred yards or less, from one point to another point in any given port, to purchase non-dutiable goods for himself, that he must before so doing clear at Customs. That case would in no

respect be different from the case under discussion. I do not think that sec. 91 and sec. 244 provides that clearances should in such cases be made, and it was not suggested at the hearing that there was any regulation to that effect. If that is the law, then one can safely say that it is not generally enforced and the public are in ignorance of it. And the Collector of Customs at Sydney confirms this. The seizure, I think, was improperly made and cannot be sustained.

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Assuming however that the motor boat was about to depart on a coasting voyage to Whitney Pier, and it could not have been anything else than a coasting voyage. Then other difficulties are to be encountered. None but British registered vessels can engage in Canadian coasting trade; this is subject to any treaty rights which the subjects of foreign countries may enjoy. The seized motor boat not being registered, could not lawfully engage in Canadian coasting trade, and therefore could not be lawfully cleared at Customs at Sydney to depart for Whitney Pier coastwise. If the master of the boat in question committed any offence, then it was in engaging in the coasting trade with an unregistered boat. That however, is not the offence charged against the boat and for which she was seized.

It is my opinion that the seizure cannot be sustained. After carefully considering the matter I have concluded that the claimant is entitled to his costs of the Reference.

Judgment accordingly.

ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT

THE SHIP *CAVELIER*, HER CARGO }
AND FREIGHT (DEFENDANT) } APPELLANT;

1931
Sept. 22.
Oct. 17.

AND

LIVERPOOL SHIPPING COMPANY }
(PLAINTIFF) } RESPONDENT.

Shipping—Collision—Altering course—Articles 19, 22, 23, 27 and 29 of the Rules of the Road—Travelling red to red.

The collision herein occurred in Halifax harbour, the bow of the *C.* striking the *K.* on her starboard quarter. The *C.* was heading for the Inner Automatic Buoy and the *K.* was northward and westward of the buoy,

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each showing her red light to the other, until the *K.*, almost immediately after passing the buoy, altered her course suddenly, showing her green light on the port bow of the *C.* which would be about half to three-quarters of a mile S.S.E. of the buoy, and in attempting to cross the bow of the *C.* was struck as aforesaid. The *K.* gave no signal of her intention to change her course.

Held, [varying the judgment appealed from] that as the vessels were travelling red to red, the *K.* by altering her course without justification, and especially without signalling the *C.* her intention to do so, and in attempting to cross the *C.*'s bow, thus creating a danger of collision, violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road, and was guilty of mismanagement and bad seamanship, and was solely to blame for the collision which occurred.

This was an appeal from the judgment of the Honourable Mr. Justice Mellish, Local Judge in Admiralty, for the Nova Scotia Admiralty District, finding both vessels to blame for the collision, and condemning the plaintiff to two-thirds of the damages and the defendant to one-third.

The following are the reasons for the judgment of the Local Judge.

MELLISH, L.J.A. (April 21, 1931), delivered the following judgment.

This is an action for damages sustained by the plaintiff's ship the *Mary E. Kenny* with the defendant ship off Halifax harbour on the 17th November last. The *Mary E. Kenny* is a motor boat, 68 feet long 16 feet beam and 7 feet depth; gross tonnage 49, nett 40. The *Cavelier* is a steam freighter.

The *Kenny's* crew on duty just before the collision were the master, Ernst, who was steering the ship, and a seaman, Crouse, who is said by Ernst to have been on duty as look-out, but who was unfortunately drowned just after the collision. The collision occurred between 3 and 4 o'clock in the night, which was dark but with good visibility. The only witness on behalf of the plaintiff is the master, who says that he was bound from Halifax to Newfoundland, that he sailed from Halifax after passing George's Island on a course due south to the Inner Automatic buoy; that he rounded this buoy close—50 feet; and that he then proceeded on a course S.E. $\frac{1}{2}$ S. to pick up the Outer Automatic Buoy and incidentally to test his compass; that he first saw the *Cavelier* when the *Kenny* was about half a mile north of the Inner Automatic buoy and about two miles away, about two points on his *port* bow,

showing her green light. After rounding this buoy and changing his course $3\frac{1}{2}$ points to the eastward he says that he again saw the *Cavelier's* green light about $1\frac{1}{2}$ or $1\frac{1}{4}$ miles away, about half a point on his *starboard* bow; that when his attention was next called to the *Cavelier* by a single blast of the latter's whistle she was about three points on his *starboard* bow shewing both side lights about $\frac{1}{4}$ mile away; that in about 20 or 30 seconds the collision occurred and that during this interval to avoid the collision he starboarded his helm; that the collision followed, the *Cavelier* striking the *Kenny* on the starboard quarter at an angle of about 60' from the bow of the *Kenny* cutting into her about seven feet.

The master of the *Cavelier* swears that the *Cavelier* was awaiting a pilot on a course N. 50 W. from the vicinity of the Outer Automatic buoy; that the pilot came aboard, and that the ship's course was then directed to the Inner Automatic N.N.W. when he saw the red light of the *Kenny* two to two and a half miles away, half a point on his port bow; this was after the pilot came aboard and the ship was proceeding full away for the buoy at 3.07—a moderate northerly breeze; that the look-out reported the red light at the same time. He first saw the *Kenny's* light at 3.10 which broadened to two points on his port bow; that the *Kenny* then changed her course shewing her green side light only, about two points on the *Cavelier's* port bow when about half a mile away; that then the following steps were taken by the *Cavelier*—stop, hard a port, full speed astern, with appropriate signals; that the *Kenny* continued on her course shewing her green light; and that the *Cavelier* struck the *Kenny* on her starboard side, about two minutes after the green light was first seen, about $\frac{3}{4}$ mile S.E. of the Inner Automatic buoy. According to the *Cavelier's* log the collision took place at 3.17 or seven minutes, taking the captain's testimony, after the *Kenny* was first seen. On cross examination he puts the *Kenny* two cables westward of the buoy when first seen.

The *Cavelier's* look-out, Arcand, says he came on duty at 3 a.m., that at 3.10 he saw a light, "first one the white, and I looked afterwards, and the red one: and I gave two bells"; that he saw the red light one point on the port bow, and afterwards the red and green, and then the green.

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This witness appeared to be at some disadvantage in speaking English, but appeared to be an intelligent witness and had a mate's certificate. He says nothing about seeing either the green or red lights of the *Kenny* two points on the port bow, but he is I think the only witness on the defendant ship who says he saw all the *Kenny's* lights at once, although he does not say how they bore when he saw them.

The second officer of the *Cavelier*, Roach, corroborates the captain as to the *Kenny's* green light being two points on the port bow of the *Cavelier* and the distance from the Inner Automatic when the collision occurred. The following extract is from his evidence:

Q. Which way were they moving?—A. Towards us very rapidly.

Q. Straight towards you or to your left or right?—A. About an angle of 90 degrees he appeared to be coming across our bow.

Q. You did hit the ship?—A. Yes.

By the Court:

Q. How much did you shift your head before the collision?—A. I should say something about six points; the helm was hard aport we were swinging very rapidly; I think she was heading about N.E.

As to the position of the *Kenny* when first seen he says:

A. He appeared to be slightly to the westward of the buoy, possibly a little N. of W. of the buoy.

Q. Fairly close to it?—A. Yes, not too far.

A. He must have been very handy to the buoy when we saw him first.

The *Cavelier's* helmsman, Rose, who also held a mate's coasting certificate, says the first lights he saw were the *Kenny's* white and green lights two points on the port bow. He heard no report from the look-out. After seeing the green light the *Cavelier* he says "Gave him one blast, hard a port, and stop—pretty nearly the same time—and then maybe a minute or so after that, the engines went full astern; I heard the captain jingling the telegraph."

Reyno, the pilot in charge of the *Cavelier*, according to his evidence, boarded the ship about two miles S.S.E. of the Inner Automatic buoy at 3.07 a.m. Then "went full ahead, ported our helm on the buoy" the ship heading N.N.W. After about three minutes he saw the red and white lights of the *Kenny* a couple of miles off, half a point on the port bow; then broadening to two points. After this the *Kenny* "changed to green, altered to the eastward."

The evidence then proceeds as follows:

Q. You could not see the ship?—A. No.

Q. What do you mean altered to eastward?—A. He starboarded his helm and pulled around the buoy.

By the Court:

Q. Did you think that was what he was doing?—A. When he showed his green, yes.

At the time of the collision he says the *Cavelier* was making $1\frac{1}{2}$ knots heading about N.E. That when he first saw the *Kenny* she would be about W. or N.W. of the buoy in his judgment and that the collision was about head on.

The plaintiff's preliminary act says:

That the collision took place $\frac{1}{2}$ mile S.E. $\frac{1}{2}$ S. from the Inner Automatic Buoy.

That the other ship was seen first about four miles away S. 5' E.

Defendant's preliminary act which was filed too late, and after there had been a marine enquiry by the government, says:

That the collision took place S.E. of that buoy and about a mile distant therefrom.

That the defendant ship was heading N.N.W. when the other was first seen.

It is difficult to find any fact in relation to this collision, but the evidence justifies I think the following findings which I make:

1. The collision took place at a point lying about S.E. $\frac{1}{2}$ S. of the Inner Automatic buoy.

2. That at the time of the collision the *Cavelier* was heading about N.E.

3. That the *Cavelier* changed her course just before the collision from N.N.W. to N.E.

4. That at the time of the collision the ships met on courses about at right angles.

5. That the *Kenny* rounded the Inner Automatic buoy and then took a course about S.E. $\frac{1}{2}$ S.

The first four of these findings are practically undisputed, at least by the defendant, but if they are to be accepted, the defendant's explanation of the accident cannot be accepted. Defendant claims that the *Kenny* was two points on the *Cavelier's* port bow when the *Kenny's* green light was first seen. If the *Cavelier* was then heading

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N.N.W. which is not disputed, it is impossible that the *Kenny* could have been heading S.E. $\frac{1}{2}$ S. or even S.E. Under such circumstances the *Kenny's* green light would be invisible by itself (i.e., apart from her red light) at any distance. And if the *Kenny's* course was more to the eastward so as to make her green light visible two points on the *Cavelier's* port bow, the ships could not have collided, S.E. or S.E. $\frac{1}{2}$ S. of the buoy at *right angles* with the *Cavelier* heading N.E. but must necessarily have collided at an obtuse angle to starboard of both ships, which no one contends for; and there is no evidence that the *Kenny* changed her course to starboard after her green light was first seen by the *Cavelier*. And in this connection, it is significant that neither the *Cavelier's* look-out or pilot say that the *Kenny's* green light was seen two points on the *Cavelier's* port bow. The *Kenny* appeared to this pilot to be rounding the buoy when her green light was displayed, which is corroborative to some extent at least of Ernst's evidence that he rounded the buoy close—although I think he probably did not round it as close as he claims. If the latter's intention were to round the buoy close on his course S.E. $\frac{1}{2}$ S. it is natural that on his previous course about S. he would be heading somewhat to the westward of the buoy and before changing his course would for some time be exposing his port or red light off the port bow of the *Cavelier* and would really have to cross the latter's bow twice before coming again on the starboard bow of the *Cavelier* where he was when a half mile north of the buoy. Having crossed the *Cavelier's* bow from starboard to port when on a course about S. the *Kenny* was attempting to pass from the *Cavelier's* port to her starboard. Ernst saw the *Cavelier*, he says, when he was a half mile north of the buoy and I think did not see her again until after he had changed his course without notice and I am not satisfied that he saw the *Cavelier's* green light on his starboard bow until after the *Cavelier* had changed her course to avoid him, i.e., immediately before the collision. The great weight of the evidence is against the contention that the *Cavelier* took the extraordinary course of porting to the green light after it had passed to her starboard bow.

I find that the *Kenny* was rounding the buoy as the pilot of the *Cavelier* thought she was doing when she shewed

her green light, but I find that the green light was not then as much as two points on the *Cavelier's* port bow, and that it should have been seen earlier by the *Cavelier* when she was more than half a mile from the *Kenny*. As the *Cavelier* would after seeing the light be swinging to starboard the green light of the *Kenny* would for some time widen on her port bow until the speed of the *Cavelier* would be so diminished that the green light of the *Kenny* seemed to cross her bow at right angles.

The collision is said in plaintiff's preliminary Act to have taken place about half a mile from the buoy and in defendant's preliminary Act about a mile from it. The latter's preliminary Act was delivered after the evidence was taken so late as to be of no use for the purpose for which it is primarily intended. The only evidence on the point, that of the master of the *Cavelier*, puts the distance at about three-fourths of a mile. I am accordingly of opinion that the green light of the *Kenny* was visible westward of the buoy at more than half a mile and should have been seen on the *Cavelier's* bridge before it was, and that it was less than two points on the port bow of the *Cavelier* when it was so seen. Whether at that time the green light was so fine on the *Cavelier's* port bow as to justify her keeping her course and speed or in using a starboard rather than a port helm is difficult to determine.

When the *Kenny* shewed her red light off the *Cavelier's* port bow (red to red) it was to be expected that the *Kenny* would not imperil this safe position which may perhaps account for, though not justify, the *Kenny's* green light not being sooner seen. A green light off the port bow would appear to be a more important one to report than a red one, but it does not appear that any side light except the red one was reported by the look-out.

From the defendant's Preliminary Act and from the defendant's conduct of the trial, there is an indication that the *Cavelier's* officials may have thought that the rules as to meeting ships were applicable to these steamships. This however is clearly not so, as there is no evidence that both side lights of either ship were seen ahead of the other.

In the result I find:

1. That the *Kenny* was at fault in not keeping a good look-out, and in not stopping or reversing when she heard

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or should have heard the *Cavelier's* course signal, and that she should not have attempted to cross from the port to the starboard bow of the *Cavelier* under the circumstances at least without giving a signal. (4 P.D. 226.)

2. That the *Cavelier* was at fault in not earlier seeing the *Kenny's* starboard light.

By consent of the parties, Captain W. F. Mitchell, local Examiner of Masters and Mates, has given me the great benefit of his services as assessor herein.

In the result I adjudge that the plaintiff should bear two-thirds of the damage caused by the collision and the defendant one-third.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa.

Lucien Beauguard, K.C., J. E. Rutledge for the appellant.

The Hon. W. L. Hall, K.C., for respondent.

The facts are stated in the reasons for judgment of the Honourable Mr. Justice Audette, printed below, and of the Honourable Mr. Justice Mellish.

AUDETTE J., now (October 17, 1931), delivered the following judgment:

This is an appeal from the judgment of the Local Judge of the Nova Scotia Admiralty District, pronounced on the 21st May, 1931, decreeing that the respondent should bear two-thirds of the damage caused by the collision in question in this case and that the appellant should bear one-third of such damage. And furthermore that the respondent recover from the appellant one-third of the damage suffered by the respondent. No costs to either party.

The present appeal, however, is limited to such part of the said judgment "whereby the ship *Cavelier* was adjudged at fault at not earlier seeing the starboard light of the ship or motor boat *Mary E. Kenny* and as a result thereof was ordered to bear one-third of the damage caused by the collision between the ship *Cavelier* and the ship *Mary E. Kenny*. The appellant hereby asking that the *Mary E. Kenny* be held wholly to blame for the said collision, the whole with costs.

The facts of the case being stated at length in Reasons for Judgment of the Local Judge, it becomes unnecessary to repeat them here.

The SS. *Cavelier* is a steamer of 3,396 tons gross and 2,213 net tonnage, speed 12 knots. The *Mary E. Kenny* is a motor vessel of 49 gross tons, speed 7½ knots.

The *Cavelier* being a large vessel having two mast head lights, at regulation height, would be visible to the *Kenny* before the lights of the latter vessel were visible to the *Cavelier* and any change in the course of the *Cavelier*, with her two mast lights, could be readily detected by the *Kenny*, irrespective of the side lights; while in the case of the *Kenny*, with a single mast head light and showing either a port or a starboard light, the change in her course could only be ascertained with certainty by the approaching vessel by carefully watching the compass bearing of the light on the *Kenny*.

To qualify this statement, it is generally admitted that the master of the *Kenny* first observed the two mast head lights and the green light of the *Cavelier* on her port bow, while the *Kenny* was still approximately half a mile of the Inner Automatic Buoy—at a distance from one another of about 2½ miles. Presumably at that time the *Cavelier* was still on her north 50° west course picking up the pilot and before that vessel was headed for the Inner Automatic Buoy on her N.N.W. course.

According to the evidence submitted on behalf of the *Cavelier*, the *Kenny's* lights were first observed when the *Cavelier* was at point B on exhibit E-H, which is approximately one and three-quarter miles S.S.E. of the Inner Automatic Buoy, when the single mast head light and red light of the *Kenny* were reported by the lookout half a point on the bow of the *Cavelier*.

These statements would appear to be correct in each case after checking from the chart the respective angles of approach, assuming that each vessel was on the course as stated when the respective lights were first observed.

Therefore, when the *Cavelier* was first on her N.N.W. course heading for the Inner Automatic Buoy, the *Kenny* was still to the northward and westward of that buoy, and such being the case, each vessel must have been showing her red light—with possibly the *Cavelier* showing both

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side lights, until such time as the *Kenny* altered her course, almost immediately after passing the buoy, suddenly showing her green light on the port bow of the *Cavelier* when she would be approximately half to three-quarters of a mile S.S.E. of the Inner Automatic Buoy.

By so changing her course, in face of an approaching vessel showing either her red, or her red and green and the two white head mast lights, the *Kenny*, without justification and in obvious transgression of the well known rules of the road, interfered with the safety of the *Cavelier* and thereby jeopardized her position in attempting to cross her bow from port to starboard at an unsafe distance and without signalling her intention of so doing.

It was only after the *Kenny* thus altered her course for the Outer Automatic Buoy that her green light became visible to the *Cavelier*, when the master, realizing the risk of collision resulting from such lubberly manoeuvre, immediately did all in his power to avoid the collision, gave one short blast, which remained unanswered, ordered the helm hard a port, stopped his engines, followed by a full astern order and a three blast signal. I find without hesitation that the *Cavelier* was properly equipped and all through behaved with good seamanship and did all that was possible and all that is provided by the rules of the road in such an emergency—that is to say in the agony of collision—through the obviously wrong manoeuvring of the *Kenny*. When the *Kenny* heard the one blast of the *Cavelier*, intimating she was directing and keeping her course to starboard, she still had time to stop and reverse to avoid the collision. She still had time to resume her former course and pass red to red. However, she stubbornly persisted and proceeded full speed on her altered course and was still going full speed ahead at the time of collision while the *Cavelier* at that time, if not stopped, might be going ahead on her *momentum* at the speed of one or one mile and a half an hour.

Previous to the time the *Kenny* altered her course, both vessels were travelling in opposite directions, each showing her red lights. While in that position, the master of the *Kenny*, without signalling, changed his course to port, against the strict inhibition of such course provided by the rules of the road and aggravated his manoeuvre by

admitting in his evidence that he did not look at the *Cavelier* immediately before altering his course.

I have come to the conclusion that the master of the *Kenny* has violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road. There was no justification for altering his course under the circumstances, and much more so without any signal to the other vessel of such intention, and that he is guilty of mismanagement and bad seamanship. This manoeuvre was erratic and devoid of any seamanship. He created the danger of collision, placed the *Cavelier* in the agony of collision while the latter has shown all through good seamanship and has done all in her power to avoid this collision.

The *Kenny* is solely to blame for the collision; she should not have attempted to cross the bow of the *Cavelier* under the circumstances. The appeal is allowed with costs both before this court and before the trial judge.

I have had the advantage in this case of being assisted by Captain L. G. Dixon, Marine Superintendent of the Department of Marine of Canada, a Captain in the Merchant Service and a retired Lieutenant R.N.R., who has been of great service to me and I am pleased to say that he entirely shares the view I have arrived at upon the facts.

Judgment accordingly.

JOHN B. HOLDEN, ES QUALITE.....APPELLANT;

AND

THE MINISTER OF NATIONAL }
REVENUE } RESPONDENT.

Revenue—Trust fund—Taxation—Income—Non-residents—Interpretation of Statute—Beneficiaries ascertained

One McM. died in 1914, and by a clause (E) of his will, after certain charges have been paid, it was provided that the balance should be divided in three parts to pay the support, maintenance and education of three children, and, moreover, that the amount necessary for such maintenance, etc., was left to the discretion of the Trustee and the balance thereof to be invested in the name of each of the respective children to whom such residue is by the will given and bequeathed. Such balance so re-invested, so given and bequeathed is what is now sought to be taxed. The beneficiaries under the will, at all times

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material, resided out of Canada, except one who took up residence in Montreal in 1926. The surviving Trustee (appellant) resides in Canada.

Held that the fund sought to be taxed herein is absolutely vested in well-known beneficiaries without any contingent interest and that such beneficiaries being admitted not to be residents in Canada, they are not liable to be taxed, excepting as to the one beneficiary who took up residence in Canada and then only from the date at which he took up such residence.

2. If in one section of a statute imposing taxation there are express words which in their plain or literal meaning disclose an exemption from taxation of the income of non-residents in Canada, and there are also words of ambiguous import in another section of the same statute which might be construed as displacing the exemption—these latter words are not sufficient to rebut the intention to exempt non-residents as expressed in the former section.

APPEAL by the appellant herein from the assessment made by the Crown for the years 1917 to 1928 inclusive.

The appeal was heard before the Honourable Mr. Justice Audette at Ottawa.

N. W. Rowell, K.C., and *P. C. Finlay* for the appellant.

C. Fraser Elliott, K.C., and *W. S. Fisher* for the respondent.

The facts are stated in the Reasons for Judgment.

AUDETTE J., now (October 20, 1931), delivered the following judgment.

This is an appeal, under the provisions of The Income War Tax Act, 1917, and Amendments thereto, from the assessment of the appellant, for the years 1917 to 1928, both inclusive, on the income, received by the Trustee of the above mentioned estate, undistributed and not used in the maintenance of the children under Clause (e) in paragraph (9) of the Admission of Facts filed herein.

At the opening of the hearing of this appeal both parties, by their respective counsel, filed the following Admission of Facts which reads as follows, viz:—

STATEMENT OF FACTS AGREED UPON BY THE APPELLANT
 AND RESPONDENT FOR THE PURPOSES OF THE TRIAL
 OF THIS ACTION

1. The appellant is the sole surviving Executor and Trustee of the Last Will and Testament of Duncan McMartin bearing date the 24th day of April, 1914.

2. That the said Duncan McMartin died on the 2nd day of May, 1914, at the City of Toronto, in the Province of Ontario, but was domiciled in the City of Montreal, Province of Quebec.

3. After sundry bequests which are not involved in this appeal, the said deceased gave directions by his said Last Will and Testament for the sale and conversion of his residuary estate, the investment of the balance of the proceeds of such sale and conversion and as to the disposition to be made of the income derived from such investments, or the income or profits from the unrealized portions of the said Estate, which directions are to be found in Paragraph 9 of the said last Will and Testament which is as follows:

9. I give, devise and bequeath all the rest, residue and remainder of my estate both real and personal to my executors and trustees hereinafter named upon the following trusts, namely:—

(a) To sell and convert the same into money (except my shares in Canadian Mining & Finance Company Limited) as soon after my death as they in their absolute discretion deem it advisable.

(b) To pay out of the proceeds of such sale and conversion the legacies given by this my Will including the said legacy to my wife of one hundred and fifty thousand dollars (\$150,000) should same become payable.

(c) To invest and keep invested the balance of the proceeds of such sale and conversion in such investments as trustees are by the Laws of the Province of Ontario permitted to invest trust funds.

(d) To pay out of the income derived from such investments or the income or profits from the unrealized portions of my estate, the said annuity of twenty-five thousand dollars (\$25,000) a year to my wife.

(e) To divide the balance of the income from such investments or the income or profits derived from the unrealized portions of my estate, into three equal parts and to pay or apply one of such parts, or so much thereof as my executors and trustees in their discretion deem advisable, in or towards the support, maintenance and education of each of my children until they respectively attain the age of twenty-five years, or until the period fixed for the distribution of the capital of my estate which ever event shall last happen, provided that any portion of any child's share not required for his or her support, maintenance and education shall be re-invested by my said Executors and Trustees and form part of the residue of my estate given and bequeathed to such child.

(f) After the death or re-marriage of my wife, whichever event shall first happen, to divide the residue of my estate equally between such of my three children as shall attain the age of twenty-five years, as and when they respectively attain that age, provided that if any of said children shall have died before the period of distribution arrives, leaving a child or children, such children shall take the share in my estate which his or her parent would have taken had he or she survived the period of distribution, if more than one in equal shares.

4. On the 1st day of January, 1917, there were then living, Iva McMartin, widow of the said Duncan McMartin, deceased, and Allen A. McMartin, Melba McMartin and Duncan McMartin, children of the said deceased, all of whom resided in the City of New York and had so re-

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sided for some time prior to the 1st day of January, 1917. The said deceased left no other child, or any child or children of any deceased child, him surviving.

5. That Iva McMartin, widow of the said Duncan McMartin, deceased, re-married on or about the 4th day of March, 1925, and received on or about that date the sum to which she became entitled on such re-marriage and thereafter ceased to have any further interest in the residuary estate or in the income or profits therefrom.

6. The said Allen McMartin continued to reside in the City of New York or elsewhere in the United States of America until January, 1926, at which date he took up his residence in the City of Montreal, Province of Quebec and has since resided there. The said Melba McMartin and Duncan McMartin have continued to reside in the City of New York or elsewhere in the United States of America and are still residing there.

7. That the said Allen A. McMartin attained the age of twenty-five years on the 4th day of November, 1928, and the said Melba McMartin (now Melba McMartin Orr) attained the age of twenty-five years on the 3rd day of March, 1930, and the said Duncan McMartin attained the age of twenty-one years on the 17th day of February, 1930.

8. That the said Allen A. McMartin was married on or about the 29th day of August, 1923, and there is no issue of such marriage; the said Melba McMartin was married to Leander Lee on the 20th day of September, 1922, and Melba Lee born May 23, 1923, is the only issue of such marriage; the said Melba McMartin and Leander Lee were divorced and the said Melba McMartin was again married to T. W. Orr on the 28th day of October, 1929, and there is no issue of such marriage; the said Duncan McMartin was married on or about the 1st day of July, 1931, and there is no issue of such marriage.

9. By Notice of Assessment dated the 1st day of March, 1930, the Appellant was assessed for Income Tax upon the undistributed income not used in the maintenance of the children under clause (e) in paragraph 9 of the Will, from the said residuary estate as follows:—

Year	Taxable Income	Tax
1917	\$ 6,508.94	\$ 40.18
1918	45,378.57	3,469.16
1919	57,766.57	8,152.87
1920	90,167.28	20,394.78
1921	166,896.28	62,508.50
1922	205,433.09	85,438.34
1923	173,036.85	66,119.16
1924	222,788.25	96,372.10
1925	271,469.55	97,321.29
1926	352,884.04	121,063.95
1927	436,480.86	139,366.65
1928	392,875.10	122,649.04

10. The Notices of Assessment referred to in the preceding paragraph were the first and only notices served upon the Appellant in respect of the income from the undistributed portion of the residuary estate, although the returns required to be made by executors and trustees had been regularly filed from year to year in accordance with the provisions of the Income Tax Act. Notices of Appeal dated the 28th day of March, 1930, against the assessment for each of the said years were duly served

upon the Minister, which Assessments were affirmed by the Minister by Notice dated the 11th day of November, 1930. Notice of Dissatisfaction dated the 31st day of December, 1930, was given by the Appellant and the Reply of the Minister dated the 7th day of January, 1931, was given denying the facts alleged and confirming the said Assessment. All of the said Notices and/or proceedings being in accordance with the Provision of the Income War Tax, 1917, Chapter 28, Section 1.

11. That attached hereto is a true copy of the Letters Probate of the Last Will and Testament of the said Duncan McMartin deceased.

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The respondent, by his statement in defence, avers and claims, among other things, (a) that the Trustee Holden is a person and resides in Canada; (b) that the trustee, under the provisions of the Act, is liable in respect of the incomes in question; and (c) that the trustee is liable for Income Tax in respect of the income thereof "accumulating in trust for the benefit of unascertained person or persons with contingent interests . . . as if such income were the income of an unmarried person" in accordance with section 4, chapter 49, 10-11 Geo. V, and section 16, subsection 1 thereof. This section is now section 11, chapter 97, R.S.C., 1927.

As I had already occasion to say in the case of *The Royal Trust Company v. The Minister of National Revenue* (1), reversed on appeal to the Supreme Court of Canada (2), the respondent, in his contention, seems to overlook the provision of section 4 which enacts, as a condition precedent to any taxation being levied, that the person so taxed must be a resident of Canada (See now sections 9 and 11, R.S.C., 1927, which came into force on the 1st February, 1928).

The definition of the word "person" in the Act of 1917 (see now subsection (H) of section 2, R.S.C., 1927, ch. 97) reads as follows:

"Person" means any individual or person and any syndicate, trust, association or other body and any body corporate

While, in the view I take of the case, the interpretation of the word "Trust" has no practical bearing, although raised by Counsel, I wish to say that this word "Trust" used as it is in that section does not mean a trust such as that constituted by the will in question.

The word "Trust" defined in that section must be read under the rule of interpretation, generally known as *ejus-*

(1) (1930) Ex. C.R. 172.

(2) (1931) 3 D.L.R. 474.

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dem generis rule, or the rule *noscitur a sociis*. That is, when several words are followed, as here, by a general expression (such as "or other body and any corporate body") that expression is not limited to the last particular unit of the group; but applies to them all. *Great Western Railway Co. v. Swindon* (1); Craies, on Statute Law, 3rd Ed. 162.

This rule of construction was thus enumerated by Lord Campbell in *R. v. Edmundson* (2): "I accede to the principle laid down in all the cases which have been cited, that, when there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

The word "Trust" used in section 2 should be interpreted to mean a corporate or other body, a trust association or merger, combination of companies or interest created for the purpose of carrying on Trust business.

In a trust created by a will, the trustee is bound to hold the property for the benefit of another, the *cestui que* trust.

Now, the respondent further contends that the tax in question in this case is leviable under subsection 6 of section 3 of The Income War Tax Act, 1917, as amended by section 4 of 10-11 Geo. V, chapter 49, which reads as follows (see now section 11, R.S.C., 1927):

11. The income, for any taxation period, of a *beneficiary* of any estate or trust of whatsoever nature shall be deemed to include all income accruing to the credit of the taxpayer whether received by him or not during such taxation period.

2. Income accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests shall be taxable in the hands of the trustee or other like person acting in a fiduciary capacity, as if such income were the income of an unmarried person.

What is sought to be subjected to taxation in this case is not the actual property of the trustee; but it is the income of the beneficiary of a trust. While, if such income were liable to taxation, it would be payable in the hands of the trustee, yet, on the other hand, the trustee cannot be made liable therefor if the beneficiary, for any reason, is not taxable under the Act.

In the present case—with the exception of one beneficiary who resides in Canada since 1926—it may be said

(1) (1884) 9 A.C. 787.

(2) (1859) 28 L.J.M.C. 213.

that they are not resident in Canada, a condition which, as I read the Act, is made a condition precedent to any taxation thereunder.

Section 4 of the Act, as amended, provides that the taxation shall be levied only upon persons residing in Canada. Section 9, chapter 97, R.S.C., 1927, re-enacts the same provision in a more comprehensive manner and may be referred to for the present purpose. This legislation would seem to have been inspired by the well known doctrine that movable property, under the Civil Law, is governed by the laws of the domicile of the owner. *Mobilia sequuntur personam* and that Parliament has no extraterritorial power of Taxation. See also *London & South American Investment Trust v. British Tobacco Company (Australia) Ltd.* (1).

The corpus of the trust in this case, as well as the income derived therefrom, are not the property of a resident in Canada. A foreigner who is a shareholder of a Canadian company receives his dividend, but is not subject to taxation of the same if he does not reside in Canada. It is admitted by par. 4 of the above recited admission that all the beneficiaries reside in the City of New York, U.S., excepting Allen McMartin who resides in Montreal since 1926 and who would be subject to the taxation from that date.

Under section 11, the trustee, who acts in a fiduciary capacity, is merely the channel through which the income of a beneficiary residing in Canada is duly taxed. This section does not purport to establish a taxation against any new person. The subject matter mentioned in sections 9 and 11 does not come into operation unless a person residing in Canada has first been found. There cannot be taxation unless this imperative provision of residence in Canada is first ascertained.

Before a condemnation to pay a tax is made, a clear and unambiguous enactment must first be found. The *onus* is upon the Crown to show that the defendant comes clearly within the taxing provision, and that the Court should not go beyond the literal meaning of the words used in their plain and ordinary sense. *Can. Ency. Digest*, Vol. 10, pp. 267-268.

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There are in this Taxing Act (sec. 9) words amounting to negative words prohibiting the taxation of the income of persons who do not reside in Canada. This enactment therefore makes it inconsistent with any contention that a non-resident's income may be taxed under sec. 11. This section 9 determines and defines where the incident of taxation rests or falls.

If in one section of a statute imposing taxation there are express words which in their plain or literal meaning disclose an exemption from taxation of the income of non-residents in Canada, and there are also words of ambiguous import in another section of the same statute which might be construed as displacing the exemption—these latter words are not sufficient to rebut the intention to exempt non-residents as expressed in the former section.

If a charge is imposed upon a person, it must be so imposed in clear and express terms and not left to implication.

In the present case the general clause of the Act (section 9) makes it a condition precedent to taxation to be a resident in Canada. There cannot be taxation unless this imperative provision of residence in Canada is first ascertained. The test of liability is residence in Canada, that prevails all through the Act.

The case of *Williams v. Singer* (1) is not apposite in that there is special legislation in England covering a case like the present one which does not exist in Canada. That case is decided upon a statute which reads as follows: "For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, etc. . . ."

This legislation is possible in England because the tax is there payable at the source. Failing the Parliament of Canada passing such legislation, such tax is not payable by a non-resident of Canada.

In the case of *Kent v. The King* (2), it was held that:

Section 155 of the Taxation Act, R.S.B.C. (1911) c. 222, as re-enacted by sec. 25 of c. 89 (1918) has not the effect of making taxable an income of non-residents, as well as the income of residents derived from the work-

(1) 7 Report of Tax Cases, 399. (2) (1924) S.C.R. 388.

ing of mines. The words therein as provided in Part I have reference not only to the manner and machinery of taxation of income, but also as to the persons to be taxed; and by Part I, the non-residents are expressly not assessable to income tax.

Now, coming to the consideration of the case under section 11 of the Taxing Act, it will be necessary to ascertain the actual position, under the will, of the parties sought to be taxed.

The income, under clause (e), after being used for the payment of a certain amount, is divided into three equal parts, such part being assigned and earmarked to each individual, A, B and C individually. Then out of such respective amount—after having set apart and used what was thought adequate for the support, maintenance and education of each child respectively—the portion or balance (which is the amount sought to be taxed in the present case) of such income so divided in three parts respectively and which are not required for the support, maintenance and education, is re-invested by the Trustee and in the language of the will, is given and bequeathed to such child, an individual gift and bequeath to each individual child, in whom such amount becomes vested.

Therefore, such fund or revenue cannot be called, under section 11, an income accumulating for the benefit of unascertained person or persons with contingent interest; because each participant is named, the fund is earmarked and is given and bequeathed to such individual by the deceased testator.

There remains no uncertainty as to the ownership of such income. It is the absolute property of each individual named in the will and thereby left to him. It is not the case of an unascertained beneficiary.

The intention of the testator is quite manifest and unambiguous.

Now clause (f) of the will deals with the division of the capital which is now sought to be here taxed. That clause (f) only deals with the distribution to be approached, as a matter of law, under clause (e) whereby the income in question has been vested in the children. For proper interpretation of the will, the whole of it must be considered and looked at, before passing upon any segregated clause.

Where the income is by the will given for the maintenance, etc., the presumption is obviously in favour of vest-

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ing. There is in this respect no gift over of such income in case the children died. And the postponement of the distribution, by clause (f), is for the benefit of the estate and in the present case it is obviously done for the benefit of the wife until her death or remarriage. And that again is a presumption in favour of vesting, since it was to let in the wife's interest. The postponement until the children attain the age of 25 is simply a postponement of the time of payment and does not interfere with the question of vesting.

Furthermore there is the provision that the child or children of a deceased child should take the parent's share and that again supports the contention for vesting, since it becomes a divesting of that share in favour of the issue.

Moreover, one must not overlook the fact that this maintenance is not out of the general fund or residue, it is not a general maintenance; but an individual one out of an amount set aside and bequeathed to each child. After a certain amount is paid from the general revenues, the children get their three partite share, use a certain amount for maintenance and the balance thereof is invested and given and bequeathed to each child respectively.

The facts of this case are different from that of the *McLeod case* (1) and also different from those in *The Royal Trust Case* (2).

The following authorities may be referred to in support of the question of "vesting" as above mentioned.

Williams, On Executors, 12th Ed., pp. 795 to 797, 800. *Halsbury*, 28 pp. 797 *et seq.* At page 798 it is said: "in cases of doubt, the presumption is in favour of the early vesting of the gift at the testator's death . . . and it is presumed that the testator intended the gift to be vested, *subject to being divested, rather than remain in suspense.*"

Then there is a very apposite case to the one in question, *Phipps v. Ackers* (3), a case wherein the House of Lords requested the opinion of the common Law Judges, wherein it was held that an equitable estate in fee in lands *vested immediately on the testator's death, liable to be divested in*

(1) (1925) Ex. C.R. 105; (1926) (2) (1930) Ex. C.R. 172; (1931) 3 S.C.R. 457. D.L.R. 474.

(3) (1835) 9 Clark & Finnelly 583.

the event of the heir dying under 21 without leaving issue of his body.

In re Bartholomew (1), it was held that the words “to whom I give and bequeath” constituted a direct gift.

See also *Williams v. Williams* (2); *Re Gossling* (3); *Hart’s Trusts* (4); *In re Ussher* (5); *Fox v. Fox* (6); *Booth v. Booth* (7); *In re Wrey* (8); *Jarman, On Wills*, 7th Ed., Vol. 2, 1402 at 1403; *Davies v. Fisher* (9).

A just appreciation of the circumstances and facts of the case fails to bring the appellant within the scope of the statute for imposing a tax upon them. There is no equitable construction of a taxing statute in favour of the Crown, the exact meaning of the words used in the Act must be adhered to. *Partington v. Attorney-General* (10).

The word “income” must not be regarded loosely, the words as used in the taxing Act must be read in conjunction with the meaning of the words used in the context. See per Halsbury, L.C. in *Ystradyfodwg & Pontypridd Main Sewerage Board v. Bensted* (11).

There will be judgment allowing the appeal and with general costs—declaring and adjudging that the fund sought to be taxed herein is absolutely vested in well known beneficiaries without any contingent interest and that such beneficiaries being admitted not to be residents in Canada are not liable to be taxed; with however this qualification that as Allen McMartin resided in New York until January, 1926, when from that date he took up his residence in the City of Montreal, Canada, he will from such date be liable to the present taxation, the amount of which can be adjusted between the parties; failing, however, such adjustment, leave is hereby reserved to either party, upon notice, to apply to the court for the settlement of the same. The question of costs as between this issue of the respondent and Allen McMartin from January, 1926, is hereby reserved.

Judgment accordingly.

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| (1) (1849) 1 MacN. & G. 354. | (7) (1799) 4 Vesey jr. 399. |
| (2) (1907) 1 Ch. Div. 180 at 183. | (8) (1885) 30 Ch. Div. 507. |
| (3) (1903) 1 Ch. Div. 448. | (9) (1842) 5 Beavan, 201. |
| (4) (1858) 3 DeG. & J. 195. | (10) (1869) L.R. 4 H.L. 100 at 122
(E. & I. App.). |
| (5) (1922) 2 Ch. Div. 321. | (11) (1907) A.C. 264. |
| (6) (1875) L.R. 19 Eq. 286. | |

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Sept. 18.
Oct. 30.

HIS MAJESTY THE KING..... PLAINTIFF;

VS.

PETE ROUBLE DEFENDANT.

*Revenue—Excise Act, Section 95, ss. 2—Seizure—Forfeiture—Discretion
of Court*

On July 26, 1928, an unidentified person rented a certain garage, and on the same day the truck in question herein was driven into the garage by R., a hired truckman, and the owner thereof, who locked it therein. The truck, to the knowledge of R., had on it a "still" used or to be used in violation of the Excise Act in the production of spirits, and which truck was used for removing the still from one place to another. On August 1, 1928, the truck was seized by an Excise Officer, under section 95, ss. 2 of the Act, as forfeited. R. pleaded guilty before the Criminal Courts of illegally having a still in his possession. He was condemned and paid the fine. He contended that a discretion was vested in this Court to direct the restoration to him of the truck, as being an innocent wrongdoer and already sufficiently penalized.

Held that, in the circumstances, the truck was legally seized and forfeited and that the Court had no discretion vested in it to remit the penalty, and that, in any event, even if the court had any discretion in the matter, it should only be exercised upon substantial grounds of law or facts which are entirely absent in this case.

INFORMATION exhibited by the Attorney-General of Canada, to have it ordered and declared that the seizure and forfeiture of a certain motor truck used contrary to the provisions of the Excise Act was legal and valid.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Winnipeg.

A. C. Campbell, K.C., for plaintiff.

W. J. Lindal for defendant.

The facts and questions of law raised at the trial are stated in the Reasons for Judgment.

THE PRESIDENT, now (October 30, 1931), delivered the following judgment.

This is an Information filed by the Attorney-General of Canada on the 16th day of June, 1930, in which it is claimed that a certain motor truck seized by an Excise Officer in the city of Winnipeg, Manitoba, on the 1st day

of August, 1928, should be declared forfeited to His Majesty, and was heard upon certain written admissions made by counsel for the parties hereto. The admissions are as follows:

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That on the 26th day of July, 1928, an unidentified person rented from Mrs. Ilene Taylor a garage at the rear of her premises at 470 Spense street in the city of Winnipeg, in Manitoba, and that under the said renting on the afternoon of the same day a truck, being the truck in question driven and owned by the defendant Rouble, being a hired truckman, and having thereon to the knowledge of the defendant a still used or to be used in violation of the Excise Act in the production of an article, namely spirits, was driven into the said garage by the defendant and the same was locked therein by the defendant and remained therein until the 1st day of August, 1928, when the same was seized by W. H. Stubbs, an Excise Officer, and that the defendant within one month from said 1st day of August, 1928, gave notice in writing to said seizing officer that he claimed the said truck and the said truck was thereafter provisionally released to the defendant under authority of section 121 of the Excise Act upon the defendant depositing \$200 representing the appraised value of the said truck and that the proper proceedings were taken under section 77 of the Excise Act as it then stood, and a notice, hereto annexed, was then mailed in a registered package to the last known post office address of the said Peter Rouble and that in respect of the still on the said truck the said Peter Rouble was on the 15th day of August, 1928, convicted on a plea of guilty for THAT Peter Rouble of 381 Alfred avenue at the city of Winnipeg in the province of Manitoba, on the first day of August in the Year of Our Lord one thousand nine hundred and twenty-eight did unlawfully at the garage in rear of 470 Spense street, Winnipeg, have without having a licence under the Excise Act then in force and without having given notice thereof as required by the said Act in his possession a still suitable for the manufacture of spirits, the said still not being a duly registered chemical still of capacity not exceeding three gallons, being an offence contrary to section 176 paragraph E of the Excise Act and amendments thereto, being Chapter 60 of the Revised Statutes of Canada, 1927, contrary to the provisions of the statute in such cases made and provided, and was thereupon fined \$200 and costs which have been paid.

The admissions reveal the important facts, quite clearly I think. The defendant Rouble pleaded guilty, in a court of competent jurisdiction, to a charge of having in his possession unlawfully, a still, contrary to the provisions of sec. 176 (E) of the Excise Act, and he was thereupon fined \$200 and costs for such offence. A motor truck owned and driven by the defendant, and specifically described in the Information, was used in removing the same still from one place to another, and the still had in fact been laden for about five days upon the motor truck in a garage, when seized; the motor truck was seized as forfeited, by an ex-

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cise officer, for violation of sec. 95, ss. 2 of the Excise Act. The admissions state that the defendant Rouble was aware that he was transporting a still on his motor truck, and that the still was used or to be used in violation of the Excise Act in the production of "spirits." The question for decision is whether any discretion is vested in the court to remit the penalty imposed against the motor truck, and if so, whether within the admissions are to be found grounds for so doing.

The Information asks for a declaration that the seized truck be forfeited. This I assume became necessary, because, either under sec. 124 or sec. 125 of the Excise Act, or possibly under both, Rouble became a claimant of the seized motor truck, and it became necessary in order to determine the issue thus raised that proceedings be taken in some court by either the Crown or the claimant of the truck. No point was raised before me as to the procedure adopted in the initiation and prosecution of this Information.

This is a proceeding in the nature of an action in rem in which it is sought to condemn as forfeited the thing itself, and the bond or money stipulated for the property is a mere substitution for the thing itself; still the real and active defendant is the claimant of the property. Here the truck was seized for the illegal use made of it by Rouble. The forfeiture results from the nature of the use made of the truck and this method of enforcing revenue laws is common, and is enacted to enable governmental authorities to put an end to such use by the apprehension of the thing used, and to minimize the temptation to disregard such laws. The motor truck was seized as forfeited, it was said by counsel for the Crown, under sec. 95, ss. 2, which is as follows:

2. All horses, vehicles, vessels and other appliances which have been or are being used for the purpose of removing any spirits, malt, beer, tobacco, cigars, materials or apparatus used or to be used in the production of any article subject to excise, in violation of this Act, shall likewise be liable to be seized by any such officer and to be forfeited to the Crown, and may be dealt with in like manner.

The claimant's counsel did not contend that the seizure was without statutory authority. The only point urged on behalf of the claimant Rouble was that a discretion was

vested in the court to direct a remission of the penalty and a restoration of the truck to Rouble, and that this discretion should be exercised in his favour, because he was an innocent wrong-doer and had already been sufficiently penalized. The only penalty apparently prescribed by the statute for the offence for which the truck was seized is forfeiture of the thing itself. After the seizing officer, in the exercise of his discretion, seized as forfeited the motor truck, I do not think any discretion is anywhere in the Act vested in the court to remit the penalty, especially, if in fact, the alleged offence was committed by and with the knowledge of the owner of the thing seized. It appears to me that I have no discretion in the matter. In any event, upon the facts disclosed in the admissions, I am not satisfied that there are before me any grounds upon which I could possibly refuse a decree for the forfeiture and condemnation of the truck, and direct a remission of the penalty and a restoration of the truck to the claimant. If the court has any discretion in the matter it should only be exercised upon substantial grounds of law or fact which seem to be entirely absent here. There is no matter before me in my opinion, which would warrant a remission of the penalty, even if I was possessed of such a discretion and were inclined to exercise it in favour of Rouble. The motor truck was used by Rouble for a purpose prohibited by statute, and there is nothing in the admissions to the effect that the user was an innocent one, rather, such a statement of fact seems to have been avoided. If the penalties directly and indirectly imposed against the claimant of the truck were too onerous, or unjust, in the circumstances of the case, then I think the appeal for mitigation should have been made to the authorities administering the Excise Act. The claim of the Attorney-General for forfeiture or condemnation of the motor truck cannot I think, on the grounds before me be refused. The case of *Lord Advocate v. Crookshanks* (1), may be found of interest in this connection.

Costs will follow the event.

Judgment accordingly.

(1) (1888) 15 Sc. Sess. Cas. 995 (4th Ser.)

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 Oct. 22.

PETER LAVISSIERECLAIMANT;

vs.

HIS MAJESTY THE KING.....RESPONDENT.

Practice—Application for new trial—Court of Appeal—Exchequer Court Act, Sec. 81—Rule 174

Held that when in any action or proceeding before this Court final judgment has been pronounced, an application for new trial cannot be made to a Judge of the Court but should be made to the Court to which an appeal lies from the judgment of this Court.

2. That a final judgment of this Court becomes effective at and from the day on which such judgment is pronounced.

MOTION by the claimant herein for new trial and permission to adduce new evidence.

The motion was heard before the Honourable Mr. Justice Maclean, President of the Court, in Chambers, at Ottawa.

E. G. Gowling for claimant.

J. F. MacNeill for respondent.

After hearing parties, the following judgment was rendered.

THE PRESIDENT, now (October 22, 1931), delivered the following judgment.

This application, as I read the notice of motion, seeks nothing less than an order for a new trial.

I delivered final judgment in this case on the 11th day of July last. If it were conceded that I am not *functus officio*, and have jurisdiction to grant an order of this kind under the law and practice of the Court, I would not be disposed to do so upon the facts set out in the affidavits heard upon the motion. So that even if I had jurisdiction to allow the motion I should dismiss it on the merits.

On the hearing of the motion I entertained no doubt about the failure of the application on the merits. But I was pressed by counsel for both parties to give them the benefit of my opinion as to the jurisdiction of a trial judge in this Court to grant a new trial after final judgment pronounced by him.

A number of early cases decided in this Court were cited to me, but after examining them I find that they were decided at a time when, under the Rules of Court, it was open to a trial judge sitting in this Court to grant such a motion upon a proper case being made therefor. This observation applies to the cases of *Humphrey v. The Queen* (1) and *DeKuyper v. Dulken* (2), as noted in the second edition of Audette's Practice at pages 480-1, which were strongly relied on by Mr. Gowling.

On referring to the case of *The General Engineering Company v. The Dominion Cotton Mills* (3), I find that the late Mr. Justice Burbidge in the last-mentioned case distinguished the two earlier cases from the case then before him, for the reason that in the *Humphrey* case no final judgment had been pronounced, and the effect of his order there was to reopen the trial before judgment; while in the *DeKuyper* case the motion was to allow a Commission to take further evidence in respect of a matter which was left open to both parties for the production of further evidence. In the *General Engineering Company's* case Mr. Justice Burbidge refused the application to reopen the case after the trial and argument but before judgment. So that none of these cases support the present application.

Then, again, as I have pointed out, the rule of practice that was in force at the time that these cases were decided has been rescinded, and there is no provision in the present practice for the judge at trial in this Court to order a new trial. It is true that under the provisions of Rule 2 of the Practice now in force, where such rules do not expressly provide for a particular matter, the practice and procedure at the time in force in similar suits in His Majesty's Supreme Court of Judicature in England is invoked. On turning to the last edition of *The Annual Practice* in the English Court, I find in Order XXXIX the following provision:

1. Except as hereinafter provided every application for a new trial or to set aside a verdict, finding, or judgment where there has been a trial with or without a jury shall be made to the Court of Appeal.

So far as this Court is concerned there is nothing in any subsequent portion of Order XXXIX which would enable

(1) Decided—January 9, 1891.

(2) Decided June 26, 1893.

(3) (1889) 6 Ex. C.R. 306.

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a Judge of this Court to make an order for a new trial in a case in which he has pronounced final judgment. That such should be the law of the Court seems to me to be eminently proper. It realizes the wisdom of the rule, *Interest reipublicae ut sit finis litium*, as expounded in the leading case of *Marriott v. Hampton* (1).

There were certain English cases cited by counsel for the Claimant to show that if the old rule enabling the trial judge in this Court to order a new trial was still in force the motion could have been entertained because my judgment, though pronounced, had not been entered by the Registrar. That is an entirely technical point which rests upon a difference in the procedure in the English Courts and this Court with regard to the moment when the judgment becomes operative. I am inclined to think that under the provisions of section 81 of the Exchequer Court Act, R.S., 1927, c. 34 and of Rule 174 of the present practice, a final judgment in this Court becomes effective at and from the day on which such judgment is pronounced.

Judgment accordingly.

1924
 Jan. 24.
 Feb. 14.

IN THE MATTER OF THE INCOME WAR TAX ACT,
 1917, AND AMENDMENTS

IN RE SALARY OF LIEUTENANT-GOVERNORS

*Revenue—Salaries—Deductions—Income War Tax Act, 1917, as amended
 by 13-14 Geo. V, c. 52—Voluntary expenses*

The appellant declared his income as Lieutenant-Governor to be \$..... and claimed a deduction therefrom of \$..... expended for social entertainments, claiming that the latter amount was properly deductible as having been necessarily laid out for the purpose of earning the income.

Held that the expenses claimed as a deduction herein were not "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" within the meaning of Sec. 8, ss. "a" of the Income War Tax Act, 1917, as amended by 13-14 Geo. V, c. 52.

2. That the disbursements that must be made to earn profits are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and will of the taxpayer.

3. That the true meaning of the section in question is, that in a "trade or commercial or financial or other business or calling," before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted. But it is otherwise in the case where a person is in receipt of an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income.
4. That there is no legal obligation upon a Lieutenant-Governor, flowing from his appointment as such, to entertain socially; and no implied contract exists between him and the Crown, by reason of his appointment and the taking of the oath of office, from which flows any obligation with respect to expenditures for social entertainments. Such expenditures are voluntary, and the failure to so entertain could not be a cause for removal or dismissal.

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This was an appeal from the taxation by the Crown of the salary of a Lieutenant-Governor.

The appeal was heard before the Honourable Mr. Justice Audette on the 24th day of January, 1924, at Ottawa, the appelland and the Crown being represented by counsel.

The facts are stated above and in the Reasons for Judgment.

AUDETTE J., on February 14, 1924, delivered the following judgment.

This is an appeal,—under the provisions of secs. 15 et seq. of *The Income War Tax, 1917*, as more specifically amended by sec. 7 of 13-14 Geo. V, ch. 52,—from the assessment, for the year ending 31st December, 1920, of that part of the Appellant's income dealing with his salary as Lieutenant-Governor * * *

By section 58 of *The British North America Act, 1867*, it is provided that for each province there shall be an officer, styled the Lieutenant-Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada, and by section 59 thereof it is enacted that the Lieutenant-Governor holds office during pleasure of the Governor General. By sec. 3 of Ch. 4, R.S.C., 1906, the salary of such officer, as appointed for the province of * * *, is fixed at the annual sum of * * * .

In making the return of his income for the year, * * * the appelland declared his salary at * * * and claimed a deduction therefrom of the sum of * * * expended for social entertainments, the particulars of such expendi-

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ture appearing in his letter to the Minister * * *. He claims he should not be assessed on the gross salary but on the net after having deducted the above amount which he alleges was necessarily laid out for the purpose of earning the income, outside of his living expenses.

It was further contended at bar that when the oath of office is taken, the officer administering the same hands to the incumbent in office a copy of the Instructions filed as Exhibit No. 1, and that a contractual obligation results from this oath of office and these instructions taken together for the discharge and performance of the several duties attached to the position.

It may also be casually mentioned that beside his salary, which is paid by the Dominion Government, the Lieutenant-Governor under the provisions of the provincial statute, is given, without charge of rent, by the provincial government, residence, with all the grounds, outbuildings and premises known as Government House property. He is further provided with the furnishing of the house, repairs, the salaries of a private secretary, head gardener, caretaker, etc., etc.

Dealing with the first contention, it becomes primarily necessary to ascertain what constitutes "Income" under Sec. 3 of the Assessment Act.

The word "income" "means the annual *net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling, etc.*"

Therefore the income or annual net profit of a taxable citizen may be classified under two heads,—the ascertained and the unascertained incomes. Within the former would fall wages, salary and other fixed amounts, as in the present case; and in the latter would come all of those incomes that have to be ascertained under various calculation, such as fees or emoluments, and the profits derived from a trade or commercial business, after deducting the expenses of carrying on the same.

Subsec. 8 of sec. 3, as amended by 13-14 Geo. V, ch. 52 reads as follows:

(8) In computing the amount of the profits or gains to be assessed, a deduction shall not be allowed in respect of—

(a) disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income,

Much stress was laid by the appellant upon this section, contending that under its provisions expenditures for social entertainment should be deducted from his salary, before he could be said to receive any net profit therefrom.

It is quite obvious that this section does not apply to a case of this kind. The disbursements that must be made to earn profit are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and the will of the taxpayer,—and after all are not these disbursements measured by the hospitable disposition of each Lieutenant-Governor, and are they not freely and voluntarily incurred and so not enforceable by law.

What that section means is that in “a trade or commercial or financial or other business or calling,” before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted. But it is otherwise in the case where a person received an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income. One cannot apply to the office of the Lieutenant-Governor the ordinary business principles whereby the expenditure to earn profits must be deducted from the taxable amount.

The question or policy of spending for social purposes is of a personal character and in no way affected by any legal obligation. No action can lie to enforce the same.

The generous hospitality with which the present appellant entertains is of itself a commendable thing and reflects much lustre upon the office he holds; but I fail to find either within the spirit or the language of the Act any ground for holding that it comes under the expression “disbursements or expenses *wholly, exclusively and necessarily* laid out or expended for the purpose of earning the income.” (Section 3 of the Act of 1923.) The Tax is entirely a creature of the Statute. If the person sought to be taxed

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comes within the letter of the law, he must be taxed however great the hardship may appear to be to the judicial mind. When accepting office the appellant knew what duties were cast upon him; having taken office he can no more claim these deductions than he could, outside of the Act, take any action against his employer to recoup himself of his expenses for such social entertainments. All offices carry with them certain detriments as well as remuneration. There is no law to force such expenses and none to justify these deductions. They are not enforceable by law either way.

Much as these expenditures for carrying on levees, social entertainments and dispensing a dignified and liberal hospitality which absorb so large a portion of the salary may be considered as incidental to the office of Lieutenant-Governor, assisted by the ladies of his household, just as valid an argument could be made for the relief of cabinet ministers, indeed of all persons to whom social distinction and rank is accorded. Todd's Parliamentary Government in the Colonies, 2nd ed., p. 32.

The provisions of sec. 3 of the Act of 1923, like the English Act, do not affirmatively state what disbursements and expenses may be deducted. They furnish mere negative information and in the result it can be said that such disbursements and expenses can be deducted only when connected with and incidental to the trade or commercial business itself.

Dealing with the second contention of the appellant which is based on an implied contract between the Crown and the Lieutenant-Governor as flowing from his oath of office, and the instructions supplied to him, as to his duties to be performed which are part social, I must find that such a proposition does not rest on sound legal principles. There was no concensus between the parties in respect of the matters in question herein from which could flow any obligations with respect to this expenditure for social entertainment attached to the office by custom and tradition.

The failure of the Lieutenant-Governor to entertain could not be a cause for removal or dismissal.

A public officer entitled to salary takes office *cum onere* and the legislature may attach additional duties to an

office, without increasing the salary. The principle, and its derivative, being that salary of an officer is not resting on a contract,—it does not grow out of a contract between the officer and the State. The salary belongs to the officer, as an incident to his office and he is entitled to it, not by force of any contract, but because the law attaches it to the office. The incumbent may die or resign and his place is filled, and the salary earned by another person. The right to compensation grows out of the rendition of the services (1), and not out of any contract between the government and the officer, Throop, *Public Officers*, pp. 19, 430.

It appears in exhibit No. 1 from a despatch dated 7th November, 1872, with reference to the question asked by Sir Hastings Boyle, and submitted by Lord Lisgar to Lord Kimberlay, namely: "Whether the Lieutenant-Governors are supposed to be acting on behalf of the Queen," that "While the Lieutenant-Governors from the nature of their appointment represent on ordinary occasions the Dominion Government, there are nevertheless occasions (such as the opening or closing of a session of the provincial legislature, the celebration of Her Majesty's birthday, the holding of a levee, etc.) on which they should be deemed to be acting directly on behalf of His Majesty, etc."

It is true this is not a claim for exemption but only one for deduction, but from a perusal of the Act, it appears by sec. 5 thereof, that the total "income" of the Governor General is exempt from taxation. It may well be that the Lieutenant-Governors of our provinces who hold office and discharge duties similar in character, though lesser in degree than those performed by the Governor General, are equally entitled to have their salaries—not their income—exempted from the liability imposed by the Income Tax Act, and all the more so as the salary has been the same since confederation notwithstanding the notorious increased cost of

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(1) *Strong v. Woodfield*, (1906) A.C. 448, at p. 452; 5 T.C. 215, at p. 219; *Clerical, Medical & General Life Ass. Soc. v. Carter*, 2 T.C. 437, at p. 442; *Cook v. Knott*, (1887) 2 T.C. 246; *Revell v. Directors of Elworthy Bros. Co. Ltd.*, 3 T.C. 12; *Bowers v. Harding*, (1891) 3 T.C. 22.

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living, and has been really reduced by the Taxing Act. This, however, is a matter for Parliament to consider, and beyond the province of a court of justice, and I leave it with the cursory observations I have made: See Lord Carnarvon's Despatch, 8th April, 1875—Exhibit No. 1.

Therefore, for the reasons above mentioned, I have come to the conclusion to dismiss the appeal.

Judgment accordingly.

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Sept. 26.
Nov. 4.

ALICE G. ROACH.....SUPPLIANT;
AND
HIS MAJESTY THE KING.....RESPONDENT.

Insurance—Returned Soldiers' Insurance Act—Application—False or misleading answers—Fraud—Cancellation of policy.

R. applied for insurance under the Returned Soldiers' Insurance Act, and printed on the form provided for the application for insurance were certain instructions, one reading: "Give full statement of illness or injury of a serious nature, etc." In his written application, in answer to the question "Are you in good health" he answered "Yes," and the question "If not, what is the nature of your illness or injury" he left unanswered. The policy issued on this application. R. at the time of applying was and had been for some time, to his knowledge, afflicted with a chronic valvular disease of the heart, from which he later died. His widow now sues to recover the amount of the policy.

Held that as the very basis of the contract of insurance was the information conveyed in the application therefor, R's concealment of the truth regarding his condition constituted in law a fraudulent misrepresentation which voided the policy.

2. That the fact that R's heart condition was revealed in an application for pension, or in the report of a vocational officer, did not constitute a communication as to his condition of health to the officers of the same Department of Government charged with the administration of the Act here in question, and could not here be introduced as constituting an answer to the questions above mentioned.

PETITION OF RIGHT by the suppliant, seeking to recover the sum of \$2,000, the amount of a policy of insurance on the life of her late husband, issued under the Returned Soldiers' Insurance Act.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Edmonton, Alberta.

G. H. Steer, K.C., for suppliant.

R. D. Tighe, K.C., for respondent.

The facts necessary for the understanding of the case, and the questions of law raised at the trial are stated in the Reasons for Judgment.

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THE PRESIDENT, now (November 4, 1931), delivered the following judgment.

This is a Petition of Right wherein the suppliant claims payment of the sum of \$2,000 by virtue of a policy of insurance issued by the respondent, in April, 1929, under the provisions of The Returned Soldiers' Insurance Act. Chap. 54 Statutes of Canada, 1920, and amendments thereto, upon the life of the suppliant's husband James Broderick Roach, who died in April, 1930; the benefits under the said policy were payable to the widow of the insured, the suppliant herein. The defence is that the respondent was induced to enter into the contract of insurance by the fraud of the insured.

Sec. 13 of The Returned Soldiers' Insurance Act provides that:

The Minister may refuse to enter into any insurance contract in any case where there are in his opinion sufficient grounds for his refusing.

Sec. 15 provides as follows:

No medical examination or other evidence of insurability shall be required in respect of any contract issued under this Act: Provided, however, that the Minister may, for the purpose of determining whether he shall refuse to enter into a contract of insurance in any case under the provisions of section thirteen of this Act, require such medical examination or other evidence of insurability of the insured as he may deem necessary.

Sec. 2 of Chap. 42, Statutes of Canada, 1922, amending the principal Act, enacted as follows:—

In the exercise of the powers conferred upon the Minister by sections thirteen and fifteen of the said Act, the Minister shall be governed by the provisions of the Schedule to this Act.

The balance of this section is not relevant to the case.

The schedule referred to in the section of the amending Statute of 1922 just mentioned, refers to four Classes of applicants for insurance, and the first three, as amended, might be fully recited.

CLASS 1—APPLICANTS WHO ARE NOT SERIOUSLY ILL

(a) An applicant with dependents, ill with a pensionable disability. Application to be accepted.

(b) An applicant without dependents, who is ill with a pensionable disability.

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Application to be accepted.
 (c) An applicant with dependents, ill with a disability that is not pensionable.
 Application is to be accepted.
 (d) An applicant without dependents, ill with a disability that is not pensionable.

Application is to be accepted.

CLASS II—APPLICANTS WHO ARE SERIOUSLY ILL

(a) An applicant with dependents, seriously ill with a pensionable disability.

Application to be accepted.

(b) An applicant with dependents, dangerously ill with a disability that is not pensionable.

Application is to be refused.

(c) An applicant without dependents, seriously ill with a pensionable disability.

Application is to be refused.

(d) An applicant without dependents seriously ill with a disability that is not pensionable.

Application is to be refused.

CLASS III—APPLICATIONS FROM PERSONS IN SO SERIOUS A CONDITION OF HEALTH THAT THEY HAVE NO REASONABLE EXPECTATION OF LIFE

Applications are to be refused.

The application for insurance was made upon a form printed for the purpose. The first page contains printed Instructions For Completing Application Form, and one of the instructions, no. 10, reads: "Give full statement of illness or injury of a serious nature since enlistment." To question no. 10 in the application form, "Are you now in good health?" the applicant in his own handwriting answered "Yes." Question no. 13, "If not, what is the nature of your illness or injury?" was left unanswered. It is quite clear from the evidence, and it need not be enlarged upon, that the insured at the time of his application for insurance was, and had been for a number of years, afflicted with a chronic valvular disease of the heart and of which condition he had knowledge; and of this infirmity he died. The deceased was however usually employed at some light work. Condition 19 of the policy states that the policy shall be incontestable after one year from the date it takes effect, "except for fraud, etc."

The petitioner's counsel conceded that the policy was voidable for fraud but contended that it was upon the respondent to show that if all the evidence as to the physical infirmity of the insured, at the date of his application for

insurance, had been before the officers administering the Act that the policy would not have been issued; and that, putting the same thing in a slightly altered form, if all the evidence disclosed at the trial as to the heart condition of the insured had been disclosed to the Minister he could and should cause the policy to issue by virtue of the schedule to the amending Act of 1922, and that the burden was upon the respondent to show that the policy would not have issued. He also argued that there was no evidence to show that the applicant's answer to question 10 of the application was material, because the Department of Soldiers' Civil Re-establishment had knowledge of the applicant's heart condition (from other Departmental documents, but unrelated to insurance), and he pressed the point that the inference was fairly deducible from the schedule, that if the applicant was not dangerously ill, and had dependents, that then the application was required to be accepted, and, it was claimed, that the insured, according to the evidence, was not at the time of his application dangerously ill and was usually employed in some occupation or other. Generally that was, I think, the argument of Mr. Steer, counsel for the suppliant.

It may be true, as suggested, that had the applicant upon his application, frankly disclosed the actual facts regarding his heart condition, that the policy would or should have issued, but nevertheless it seems to me that by reason of the failure to truthfully answer question 10 in the application form, the suppliant must fail. The Minister had the right to refuse to enter into an insurance contract with Roach, if he thought there was sufficient grounds for so refusing, and he was invested with the discretion as to whether or not he would require medical examination or other evidence of insurability of the applicant. On reference to the schedule it will be seen that in Class I, in the case of "Applicants who are not seriously ill," the application was in all cases to be accepted; in Class II, which refers to "Applicants who are seriously ill," some applications were to be accepted while others were to be refused; and in Class III which applied to "Applications from persons in so serious a condition of health that they had no reasonable expectation of life," the applications were in all cases to be refused. It was imperative, it seems to me, that

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the applicant disclose in his application for insurance all material facts concerning his health, in order that those administering the Act might determine whether or not medical examination, or other evidence of insurability, might or might not be required, and also that it might be determined whether the applicant was not seriously ill, or was seriously ill, or was in so serious a condition of health that he had no reasonable expectation of life. Applications could not be dealt with according to the intent of the schedule unless there was full and truthful disclosure of the facts concerning the applicant's health, so that it might be determined under what Class of the schedule the application would fall, and whether it should be accepted or rejected. In Class III, for instance, at the date of Roach's application, all applications were to be refused.

The very basis of the contract is the information conveyed in the application of the insured. It is indisputably clear that Roach was aware that he had a more or less serious condition of the heart, whatever its probable effect upon his expectation of life. Foolishly, he concealed this fact in his answers to questions in the application form, and this in my opinion constitutes in law a fraudulent misrepresentation which voids the contract. I do not think there is substance in the very ingenious contention made on behalf of the suppliant, that the burden is upon the respondent to show that, at the date of application for insurance the state of the health of the insured was such that his application would not have been rejected even had the true facts been disclosed. He was not then medically examined, and it is not now possible to know what was then his actual heart condition, or what action those administering the Act might have taken upon the application had the true facts been disclosed. The fact that Roach's heart condition was revealed in an application for pension, or in the report of a vocational officer, as shown in evidence, does not constitute a communication as to his condition of health to the officers of the same Department of Government charged with the administration of the Act here in question, and cannot here be introduced as constituting an answer to question 10 of the application.

I therefore think the suppliant must fail, and costs will follow the event.

Judgment accordingly.

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CONTRACTS — *Interpretation* — *Acts of party as aid to interpretation*—*Covenant to repair.*] Suppliant by its action asks that the respondent be ordered to pay for the repair of a street on which a spur line of the Intercolonial Railway was located, by virtue of an agreement, reading in part as follows: 1. "The City hereby grants unto His Majesty the right to extend one spur track of the Intercolonial Railway from the said tracks of said railway on the Ballast Wharf, in the City of Saint

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John, along Charlotte street to Broad street, such tracks to be located in such portion of the street as may be approved by the Commissioner of Public Works and the Road Engineer of the said City." 2. "In consideration of the foregoing licence His Majesty HEREBY AGREES that HE will keep the portion of said Charlotte street lying between the Ballast Wharf and Broad street aforesaid, in proper repair at all times to the satisfaction of the Commissioner of Public Works of the said City. * * * *"

The Respondent claims He is only obliged to repair the space occupied by its rails.—*Held* that the word "aforesaid" in par. 2 above cited refers back to the "portion" in par. 1; and that "the portion of Charlotte street lying between the Ballast Wharf and Broad street aforesaid" relates, and was intended to relate only to "such portion of the street" whereon the tracks were to be located. That the words "lying between the Ballast Wharf and Broad street" in the second paragraph merely limit the length of the spur line, and that by the said contract the respondent is only obliged to keep repaired that portion of the street whereon the spur track was located.—2. The street in question was built 70 years ago on crib work, into the harbour, and then filled in. The western wall, built of timbers lying on top of one another and used as a wharf, being in a state of disrepair, the city have called on the respondent to pay for its repairs, under the above cited contract, at a cost of over \$17,000.—*Held* further that, as a covenant to repair is not a covenant to make a new thing, and inasmuch as to do what the suppliant now requires of the respondent would practically amount to reconstruction of the whole of said wall, such work does not come within the meaning of "repairs" called for by the covenant in the contract. CITY OF SAINT JOHN v. THE KING... 188

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right of action is given by Statute.—2. That in order to succeed in an action against the Crown, for damages resulting from the death of a son, on a public work, the onus is upon the Suppliant to prove that the accident occurred on a public work, and that there was an officer or servant of the Crown whose duties or employment involved the doing or omitting of doing something which was the *causa causans* of the accident.—3. That the act of the Crown in paying the expenses of and incidental to the funeral and burial, is referable to the grace and bounty of the Crown and did not constitute an acknowledgment by it of a right of action.—*Quære*: Would not a person who came to his death by drowning, in choosing to walk on and along the coping of the retaining wall of a wharf some 2 to 4 feet wide, on a dark night, with the knowledge of indentations therein where mooring posts were placed, and when he had ample room to walk on the inside of such coping be the victim of his own imprudence? **JOUBERT v. THE KING**..... 113

2 — *Responsibility — Petition of Right.*] About 11.30 a.m. on February 10, 1928, suppliant, while entering the Ottawa Post Office to purchase stamps, was struck on the head by an icicle falling from the coping of that building, causing her injury. An employee of the Public Works Department who had full charge and care of the roofs of Government buildings, especially that of the Post Office, and whose duty it was to remove snow and icicles therefrom, passed the building twice on the morning of the accident, first between 8 and 8.30 and again between 9.30 and 10 o'clock, but claims no snow or ice needed to be removed.—*Held* that the omission of the officer, whose duty it was to keep roofs free of snow and ice, to notice the presence of icicles and to remove them, when he had ample time to do so before the accident, constituted negligence, making the Crown liable for the damage resulting from such careless omission. **JOHNSON v. THE KING**..... 163

3 — *Responsibility — Negligence.*] At about 9 p.m. on the 15th November, 1921, one C. drove onto a wharf, Montreal Harbour, with his two children to visit some friends who were employed in transferring freight from a shed on the wharf, rented to private companies, to a warehouse in the city. C. had not been sent by his employer, had no business there and went solely to amuse himself. C. had been drinking and was under the influence of liquor. He was making a nuisance of himself and when told to go, got into his car and drove straight into

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the canal, and all were drowned.—*Held* that as C. had no business on the wharf on the evening of the accident and was there by tolerance, the Crown under such circumstances was under no obligation or duty to him.—2. *Held* further that the accident was the result of deceased's inebriated condition and that he was the victim of his own condition and conduct. **LEGAULT v. THE KING**..... 167

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EXPROPRIATION—1. *Market value—Title — Value to the owner—Servitudes*
The defendant derived its title to the lands expropriated under a grant from the Crown subject to two conditions: (1) that the building now being or lately erected by defendant on said lands be such as would be suitable for exhibition purposes and available at all times for the same, and (2) that certain water pipes on the lands should be diverted and relaid outside the area of said building.—*Held* that as property may under certain circumstances have a specially high value to the owner over and above its market value, and as it is the value to the owner which the party expropriated is entitled to receive and as the above mentioned conditions or servitudes would be less onerous to the owner than to anyone else in the community, the market value of the property in question was not the proper criterion of the amount to be allowed him for the same. [*Pastoral Finance Association Ltd. v. The Minister (1914) A.C. 1083 referred to.*]—2. That the Crown having in its grant aforesaid described the property in question as bounded for a part by a street, as also in the Statutes of 1891 and 1911, in the description deposited in the Registry Office under the Expropriation Act, and in the Information herein, such statement was practically an "aveu judiciaire" that such a street existed, creating a servitude in favour of the land so sold. That it is a sufficient specification in writing of the nature, the extent and the situation of the servitude to meet the requirements of Art. 551 of the Civil Code of the Province of Quebec. [*Roberge v. Daigneau (1926) S.C.R. 191 referred to.*] **THE KING (NATIONAL BATTLEFIELDS COMMISSION) v. THE QUEBEC SKATING CLUB**..... 103

2 — *Compensation — Conflicting evidence — Balance of probabilities — Evidence of price of neighbouring properties.*
—*Held* that where, in expropriation cases, the Court is faced with conflicting evidence of the optimists on the one hand and the pessimists on the other, it must be guided, in arriving at the true market value of the property, by the reasons supporting each witness' views bearing in mind the soundness of the same, and the balance of probabilities.—2. That whilst the evidence of the price paid for properties in the neighbourhood is cogent evidence of value, such evidence must be approached with care and be regulated with reasonable judgment by the Court, and cannot be based on common rumour or from hearsay. That class of evidence is only helpful when all the circumstances of such sales are clearly and exhaustively disclosed. Otherwise, it introduces a multitude of collateral

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issues, as no two pieces of land or property are ever exactly the same. **THE KING v. FROST**..... 176

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See TRADE-MARKS NOS. 1 & 2.

FALSE REPRESENTATION

Re Contract of Insurance. See INSURANCE.

FEDERAL APPEAL BOARD

Jurisdiction of. See PENSIONS.

FORFEITURE

Re Customs Act. See REVENUE NOS. 8 & 13.

FORCED LANDING

Re Customs. See REVENUE No. 10.

FRAUD

See INSURANCE.

FUNERAL EXPENSES

In Accident Case. See CROWN No. 1.

GRACE AND BOUNTY

See CROWN No. 1.

IMPEACHMENT

See PATENTS FOR INVENTION NOS. 1 & 3.

INCOME TAX

See REVENUE NOS. 1, 6, 12 & 14.

INCOME WAR TAX ACT

See REVENUE NOS. 1 & 14.

INFORMATION

By Attorney General, re Impeachment. See PATENTS FOR INVENTION.

INFRINGEMENT

See PATENTS FOR INVENTION.

INGENUITY OF INVENTION

See PATENTS FOR INVENTION No. 4.

INJURY TO PERSON

See CROWN NOS. 1 & 2.

INSURANCE—*Returned Soldiers' Insurance Act — Application — False or misleading answers — Fraud — Cancellation of policy.*] R. applied for insurance under the Returned Soldiers' Insurance Act, and printed on the form provided for the application for insurance were certain instructions, one reading: "Give full statement of illness or injury of a serious nature, etc." In his written application, in answer to the question "Are you in good health" he answered "Yes," and the question, "If not, what is the nature of your illness or injury" he left unanswered. The policy issued on this application. R. at the time of applying was and had been for some time, to his knowledge, afflicted with a chronic valvular disease of the heart, from which he later died. His widow now sues to recover the amount of the policy.—*Held*

INSURANCE—Concluded

that as the very basis of the contract of insurance was the information conveyed in the application therefor, R's concealment of the truth regarding his condition constituted in law a fraudulent misrepresentation which voided the policy.—2. That the fact that R's heart condition was revealed in an application for pension, or in the report of a vocational officer, did not constitute a communication as to his condition of health to the officers of the same Department of Government charged with the administration of the Act here in question, and could not here be introduced as constituting an answer to the questions above mentioned. *ROACH v. THE KING* 238

INTENTION TO ABANDON

See TRADE-MARKS No. 1.

INTEREST

On Bonds. See REVENUE No. 5.

INTERPRETATION OF STATUTES

See REVENUE Nos. 2, 4 & 8.

INTERPRETATION OF CONTRACTS

See CONTRACTS.

INTERPRETATION ACT

See PENSIONS.

INVENTION

See PATENTS FOR INVENTION.

JUDICIAL OBSERVATION

See REVENUE No. 8.

JURISDICTION

of Federal Appeal Board. See PENSIONS, of Court. See SUPERANNUATION.

See REVENUE No. 5.

LICENCE FEE

See REVENUE No. 4.

MARINE SUPERINTENDANT

Re Maritime Lien for Services. See SHIPPING AND SEAMEN No. 1.

MARITIME LIEN

See SHIPPING AND SEAMEN No. 1.

MARK

Re Trade-Marks. See TRADE-MARKS No. 3.

MARKET VALUE

See EXPROPRIATION No. 1.

MORTGAGE

See SHIPPING AND SEAMEN No. 4.

NARROW CHANNELS

See SHIPPING AND SEAMEN No. 3.

NECESSARIES

Claim for. See SHIPPING AND SEAMEN No. 4.

NEGLIGENCE

See CROWN Nos. 1, 2, 3.

NEW TRIAL

See PRACTICE No. 2.

NOVELTY

See PATENTS FOR INVENTION.

NULLITY OF PATENTS

See PATENTS FOR INVENTION.

ORDERS IN COUNCIL

Regulations. See REVENUE No. 4.

PATENT ACT

See PATENTS FOR INVENTION No. 3.

PATENTS FOR INVENTION — *Invention — Utility — Novelty — Impeachment — Costs.*] The patent for invention in this suit is for a "new and useful improvement in separable fasteners."—*Held* that the fact that a patented device, consisting of an improvement on similar devices to be found in the prior art, has been generally adopted by the public, is strong evidence of its novelty and usefulness and of its being an advance in the art.—2. That the increased security in a fastener, when applied successfully to remedy an old defect, with the discovery of the cause for such defect, would seem to amount to invention, and the novelty of an invention is not impeached by the fact that the same results may be achieved in a different way.—3. That a Court should not be too astute to find reasons for impeaching a document under the Great Seal, and that where any doubt exists it should be resolved in favour of the patentee.—4. Plaintiffs having at trial, abandoned their action against one of three of the defendants, the Court ordered that one-third of the costs to be taxed against the defendants be deducted upon taxation. *THE G. E. PRENTICE MANUFACTURING COY. v. KENNY ET AL* 22

2 — *Infringement — Nullity — Specifications—Vague and ambiguous—Subject matter — Anticipation — Combination.*] The patents for invention in question herein are two in number. The first relates to "means for recording and reproducing sound," and in the specification filed with his application for patent in 1923, the patentee describes a "small arc lamp" as the source of light to be used for recording sound on a film photographically. In 1925, in a divided application, he claimed as the light source "an enclosed luminous gas discharge device." At the trial the patentee testified that neither the light from an arch discharge lamp, nor a positive glow lamp, were suitable for his purposes, and claimed that a negative glow lamp alone was suitable. It was contended on behalf of the plaintiff that the light source described in the speci-

PATENTS FOR INVENTION

—Continued

fication as "a small arc lamp" was a negative glow lamp. The second patent relates to an arrangement for combining sound and picture projecting machines, putting the elements forming the sound head into a separate attachment, or unit, so that it could be easily applied to a standard picture projecting machine. The plaintiff also claimed invention in the sound film gate which guides and presses the film close to the slit as it passes from the film magazine, preventing lateral movement which would be fatal.—*Held* that where the specification uses language which, when fairly read, is avoidably obscure or ambiguous, the patent is void, whether the defect be due to design, or to carelessness, or to want of skill; nothing can excuse the use of ambiguous language when simple language may easily be employed, due allowance, of course, being made where the invention is difficult to explain.—2. Where the terms of a specification are so ambiguous that its proper construction must always remain a matter of doubt, it is the duty of the Court to declare the patent void.—3. Specifications must be read in their ordinary and natural sense though it may sometimes happen that in construing the same the Court may be justified in understanding the language not according to its ordinary meaning but in the way in which it would be understood by skilled workmen. Such specifications, moreover, must be intelligent to ordinary workmen possessing that degree of skill, intelligence and knowledge fairly to be expected of them in respect of that branch of the useful arts to which the invention relates, and they are not required to possess that great skill scientific knowledge or power of invention, which would enable them by themselves to supplement a defective description or correct an erroneous description.—4. Where a specification contains various statements calculated to mislead persons to whom it is addressed, or renders it difficult for them without trial or experiment to comprehend in what manner the invention is to be performed, the specification is bad.—5. Moreover, where a specification describes two things, one practicable and the other impracticable or where it directs two alternative ways of constructing or using an invention and one is impracticable or useless, the patent is bad.—6. The patentee must make it perfectly clear what it is he claims as his monopoly; the public are entitled to know at once what it is, by reason of the patent, they are excluded from doing. If he describes something not new, it must distinguish that which is old from that which is new and claim the latter

PATENTS FOR INVENTION

—Continued

only; if claim is made to anything which is old, the specification will be bad and the patent void on the ground that the patentee has claimed something lacking the essential feature of novelty.—7. That the patentee in his present specification having chosen to designate as his light source an arc lamp, there being such a lamp, now not claimed as his invention, and failing to mention by its well known name the useful negative glow lamp, now claimed as his invention, and having failed to describe the latter even in general terms so that those to whom the specification was addressed might readily recognize the invention as a negative glow lamp and nothing else, his specification fails in this to comply with the requirements of the law, is too vague, indefinite and misleading and the patent is in consequence null and void.—8. That uncertainties and deficiencies in the specification cannot be amended or explained away years afterwards when the same is questioned in an action, and the patented lamp being capable of being used either as a glow lamp, or as an arc discharge lamp, according to the pressure of gas and other conditions, and the patentee not having directed the exclusive use of the lamp as a glow lamp and not having explained that an arc discharge light was unsuitable and how it could be avoided, the specification is for this reason also bad, and the patent void.—9. Persons to whom the specification is addressed are not expected to possess that skill and knowledge, or to perform that amount of experimental work which would enable them to ascertain the one source of light which would be suitable for the purpose of recording sound on a film, or to ascertain that the other light was unsuitable for the purpose.—10. That as regards the second patent there was no ingenuity of invention in making a separate unit of the sound head to be easily applied to the picture head.—11. At trial, it was claimed that there was invention in the sound film-gate, one of the elements of the sound head combination.—*Held*, that in a combination patent particularly if invention is claimed for any integer in the combination it must be described and claimed as new, and clearly claimed, otherwise the invention can only be in the combination, if at all. That, moreover, the film-gate being known, there was no invention in selecting one way of a score of slightly different ways which would easily suggest themselves to anyone skilled in the art. *DE FOREST PHONOFILM OF CANADA, LIMITED, v. FAMOUS PLAYERS CANADIAN CORPORATION, LIMITED*..... 27

PATENTS FOR INVENTION

—*Concluded*

3—*Action to impeach—Scire facias—Information—Exchequer Court Act—Commissioner of Patents—Patent Act, Section 48.*—*Held*, that the present action to impeach and annul certain patents of invention instituted in this Court by Information in the name of the Attorney-General of Canada was properly instituted under Rule 16 notwithstanding the provisions of section 37 of the Patent Act providing for procedure by *Scire Facias*.—2. That the Exchequer Court Act authorizes the Crown to institute proceedings upon the Information of the Attorney-General of Canada to impeach a patent of invention, without showing that it is otherwise a party interested.—3. That, upon the evidence in this case, the two patents in question herein should be annulled upon the ground that both alleged inventions lacked utility, and should be revoked.—4. That, the Commissioner of Patents has no authority to assess the compensation to be paid by the Government of Canada, for use by it of any patented invention, under section 48 of the Patent Act, unless the said Government admits its use and is a consenting party to such enquiry by the Commissioner. **THE KING v. MYERS CANADIAN AIRCRAFT CO. LIMITED ET AL. 146**

4 — *Subject matter — Ingenuity of invention—Novelty and usefulness.*—*Held* that utility is not an infallible test of originality, and that to support a patent there must be something more than a new and useful manufacture, the invention must have required for its evolution some amount of ingenuity to constitute subject matter, or invention.—2. That the design of the patent law is to reward those who make some substantial discovery or invention adding to our knowledge and making a step in advance in the useful arts.—3. That the inventive ingenuity necessary to support a valid patent may be found in the underlying idea, or in the practical application of that idea or in both. The idea or conception may be meritorious, but once suggested its application is very simple, or the idea may be obvious but ingenuity is required to put it into practice, or the idea itself may have merit and the method of carrying it into practice also may require inventive ingenuity. **CANADIAN GYPSUM COMPANY, LTD. v. GYPSUM, LIME & ALABASTINE, CANADA, LIMITED. . . . 180**

PENAL ACTION

Discovery in. See REVENUE No. 9.

PENSIONS—*Reference by Minister under Pension Act—Application by Minister to withdraw reference—Vested rights—Effect of repeal—Interpretation Act.* In May

PENSIONS—*Continued*

1929, the Minister of Pensions and National Health, under sec. 30, ss. 8 of 18-19 Geo. V, c. 38, being an Act amending the Pensions Act (R.S.C., 1927, c. 157, s. 51), referred to this court, a dispute as to the jurisdiction of the Appeal Board to render a certain judgment. The Reference was duly filed in court on June 14, 1929, and on October 23, 1930, the widow of the soldier in whose favour the judgment was given filed her statement of claim. The Minister now applies for an order permitting him to withdraw the Reference, on the ground that the Act under which it had been made had been repealed, and that the court had now no jurisdiction to proceed with the same.—*Held*. That the jurisdiction of a court of record, when it has once obtained, cannot be ousted by any forced interpretation, and that the jurisdiction of this court to proceed with the present Reference was not taken away by the statute of 1930 (20-21 Geo. V, c. 35).—2. That judgment having been rendered by the Federal Appeal Board, in this matter, it was not one which came under the provisions of section 15 of 20-21 Geo. V, c. 35, which provides a means of dealing with appeals remaining undisposed of at the date of the coming into force of the Act. *In re SKITCH. 12*

2—*Pensions Act—Federal Appeal Board—Jurisdiction—Board of Pension Commissioners—13-14 Geo. V, c. 62—14-15 Geo. V, c. 60—18-19 Geo. V, c. 38.* In January, 1923, the Board of Pension Commissioners refused pension in the matter of one Skitch on the ground that his death was not attributable to military service. An appeal was taken to the Federal Appeal Board under 13-14 Geo. V, c. 62, sec. 10, and the latter found the death was due to military service. By 14-15 Geo. V, c. 60, sec. 10, the Appeal Board was required to give certain information in its judgment. The Commissioners, claiming the Appeal Board had not complied with the statute, refused to pay the pension. After some correspondence between the Boards in which the Appeal Board claimed to have complied with the statute, a dispute having arisen as to the jurisdiction of the latter Board, the Minister, under 18-19 Geo. V, c. 38, sec. 30, ss. 8, referred the matter to this Court for determination.—*Held* that the only matter referred to this Court for its determination was as to whether the Appeal Board had jurisdiction to hear the appeal in question. That the appeal having been heard and decided in 1926, the question of its jurisdiction must be determined under the law in force at that time, and that under 13-14 Geo. V, c. 62, sec. 10, the Appeal Board had jurisdiction to hear and determine appeals

PENSIONS—Concluded

from the refusal of pension by the Board of Pension Commissioners.—2. That the provisions of sec. 29, c. 38 of the Statute of 1928 requiring a certain course of action to be taken by the Appeal Board when the medical classification in respect of which the Board of Pension Commissioners had refused a pension is considered by the Appeal Board to be in error, being passed subsequent to the hearing or decision by the Appeal Board, did not apply to said appeal.—3. That whether or not the Appeal Board in giving its decision complied with the statute did not go to the question of jurisdiction. *SKITCH v. MINISTER OF PENSIONS AND NATIONAL HEALTH & WADE*..... 97

PENSIONS ACT

See PENSIONS Nos. 1-2.

PETITION TO REGISTER

See TRADE-MARK No. 2.

PETITION OF RIGHT

See CROWN Nos. 1, 2, 3.

POLICY OF INSURANCE

Cancellation of. See INSURANCE.

POWERS DELEGATED BY STATUTES

See REVENUE No. 4.

POWERS OF MINISTER TO WITHDRAW REFERENCE

See PENSIONS No. 1.

PRACTICE — *Appeal—Stay of execution—Discretion of judge as to amount of security.*] Judgment was given against the defendants in the three cases for over \$700,000, and appeals have been taken therefrom to the Supreme Court of Canada. On motion of defendants for stay of execution, it was contended that the judge could in his discretion, in ordering security to be furnished, fix a smaller amount than that for which judgment was given.—*Held*, that Rule 208 of the General Rules and Orders of this Court did not apply to the subject-matter of this application.—2. That under Section 71, ss. "a" of the Supreme Court Act, the discretion conferred upon a judge granting a stay of execution refers only to the form or manner in which the security is to be given and does not extend to the amount of said security. *THE KING v CONSOLIDATED DISTILLERIES LIMITED ET AL*..... 125

2—*Application for new trial—Court of Appeal—Exchequer Court Act, Sec. 81—Rule 174.*]—*Held* that when in any action or proceeding before this Court final judgment has been pronounced, an application for new trial cannot be made to a Judge of the Court but should be made to the Court to which an appeal lies from

PRACTICE—Concluded

the judgment of this Court.—2. That a final judgment of this Court becomes effective at and from the day on which such judgment is pronounced. *LAVISIÈRE v. THE KING*..... 230

See also—

Re Costs on Action Discontinued in Part.

See PATENTS FOR INVENTION.

Re with Scire Facias—to Impeach a Patent.

See PATENTS FOR INVENTION.

Re Discovery in Penal Actions. See

REVENUE No. 9.

PRIORITY

Claim for Necessaries. See SHIPPING AND SEAMEN No. 4.

PROHIBITION

See REVENUE No. 4.

REFERENCE

By Minister. See PENSIONS.

Withdrawal of. See PENSIONS.

See also REVENUE No. 11.

REGULATIONS

Limitation of by Statute. See REVENUE No. 4.

Ultra Vires. See REVENUE No. 4.

REPAIRS

See CONTRACTS.

REPORTING TO CUSTOMS

Re Forced Landing of Plane. See REVENUE No. 10.

RESPONSIBILITY

See CROWN Nos. 2, 3.

RETURNED SOLDIERS INSURANCE ACT

See INSURANCE No. 1.

REVENUE—Income—Sec. 6 Income War Tax Act—British Columbia Taxation Act, 1922—Exemptions.—(1) *Held*, that the amount of Income Tax paid by a taxpayer to the Province of British Columbia, under the British Columbia Taxation Act, 1922 (R.S., B.C., Ch. 254) is not a disbursement or expense "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income," and such amount cannot be legally deducted from the total income of the taxpayer in arriving at the income which is taxable by the Dominion Government under the Income War Tax Act (1917) and that the appeal herein should be dismissed.—(2) That exemption from taxation is a case of exception which must be strictly construed. *ROENISCH v. MINISTER OF NATIONAL REVENUE*..... 1

2—*Sales Tax—Sections 86 (a) and 87 (d) of Special War Revenue Act, R.S.C. (1927) c. 179—Samples—Meaning of "Used by"—Free distribution—Interpretation of statutes.*] The defendant put up in special

REVENUE—Continued

small packages, samples of its products, which were distributed amongst the physicians and druggists for the purpose of acquainting them with the character and quality of these products. These samples were distributed free, as a part of a well defined policy, and in the ordinary course of business. The cost of production of the same was paid by the company as a necessary expense of business and was treated in their books as a necessary cost of production of articles manufactured and sold, in respect of which last mentioned articles the company had paid the sales tax.—*Held*, on the facts and circumstances of this case, that the samples in question herein were not produced for use of the defendant in the sense contemplated by the Special War Revenue Act (R.S.C. (1927) c. 179, sec. 87), and that the defendant was not liable for the consumption or sales tax on or in respect of the same.—2. That words of a statute, when there is a doubt as to their meaning, are to be understood in the sense in which they best harmonize with the subject of the enactment, and the object which the legislature had in view, but the language of the statute must not be strained to make it apply to cases which were not in view at the time the enactment was drawn. *THE KING v. HENRY K. WAMPOLE & COMPANY, LTD.*

3 — *Sales Tax — Manufacturers using its goods in its business—Special War Revenue Act (R.S.C., 1927, c. 179—Sec. 87 ss. (d).)* The defendant at all times material herein was engaged, *inter alia*, in the production and manufacture of lumber, and of its sale to the trade, and was the holder of a sales tax licence, duly issued. During the said period it was also engaged, in the course of the development of its business, in the construction and building of pulp mills and the repair thereof; and in the building and repair of houses, etc., for its employees, and for said purposes used and consumed some of the lumber manufactured by it for sale. Such lumber was taken from stock in the yards and in no instance had said lumber been manufactured especially for the purpose for which the same was used. The plaintiff now claims to be entitled to recover sales tax on the value of the lumber so used, under Sec. 87 ss. (d) of the Special War Revenue Act.—*Held*, that the goods intended to be taxed under section 87 ss. (d) of the Special War Revenue Act, are only goods expressly manufactured for the use of the manufacturer and wholly used for the purpose for which they were made.—This provision of the statute was not intended to relate to goods produced for sale but partially diverted to the producer's use

REVENUE—Continued

for purposes not contemplated when the same were produced. *THE KING v. FRASER COMPANIES LTD.*..... 16

4 — *Crown — Statutes — Regulations — Interpretation — Delegated Powers — Scope—Order in Council — Taxation — Licence fee — Prohibition — Discrimination.*] Section 69A of The Fisheries Act, as amended by 19-20 Geo. V, ch. 42, provided, among other things:—That, under licence from the Minister a vessel registered as a British ship in Canada and owned by "a Canadian or a Canadian Company with its principal place of business in Canada," is allowed to use an "otter" or other similar trawl.—Moreover under this Statute, Rules and Regulations might be made by Order in Council, and the same were made providing that such licence could be granted only to "Canadian built" vessels and that after April, 1932, none but such would be eligible for licence, and further providing that after April 1, 1930, a licence fee of one cent a pound on the fish caught should be payable. This fee in the case of defendant would amount to between \$130,000 to \$150,000 a year.—*Held* that as the Regulations ignore the statutory limitation to British ships registered in Canada or owned by a Canadian, etc., and fix as the condition upon which the licence would issue that such ships be Canadian built, and such condition being obviously beyond the scope of the Act, and the delegated powers, such Regulations are ultra vires, unenforceable, null and void.—2. That Parliament had full and plenary powers to legislate both in respect of the provisions contained in the Act and in the Regulations, even if the result were prohibitive, oppressive or discriminative, and the only remedy is an appeal to those by whom the legislators are elected, but that statutory regulations made by the delegated power differ from the Statutes in that it may be open to the judiciary to question their validity, to examine if they have complied with the condition precedent and if they are reasonable.—3. That such Regulations cannot of their own inherent power control or originate matters of taxation.—4. That delegated authority of this kind must be exercised strictly in accordance with the power creating it, and in the spirit of the enabling Statute.—The distinction between a licence charge and a business tax discussed. *THE KING v. NATIONAL FISH COY. LTD.*..... 75

5 — *Excise and Customs Acts — Bond — Interest—Jurisdiction.*] This action is for the recovery of the sum of \$34,094 on a bond, such as has been described and discussed in the cases of *The King v. Vancouver Breweries Ltd.* (1929, Ex. C.R. 14); *The King v. Fidelity Insurance Co. of*

REVENUE—Continued

Canada (1929, Ex. C.R. 1); *The King v. Canadian Surety Co.* (1929, Ex. C.R. 216). The defence denied liability on the bond and alleged that, in any event, the crown could not recover interest, and that the Court had no jurisdiction in the matter. That the matter was one of contract and not one arising out of the administration of the laws of Canada, and that the provincial courts only had jurisdiction.]—*Held* that as the bonds sued upon herein were required by a law enacted by the Parliament of Canada in respect of a matter over which it had undoubted jurisdiction, namely Excise, this Court had jurisdiction to hear and determine the present action, and the Court condemned the defendants in the amount of their bond, but with interest only from the date of judgment.—(2) That the condition of the bonds in question being for the performance of an act, recovery thereon is limited to the amount of the penalty, and interest only runs from the date of judgment. *THE KING v. CONSOLIDATED DISTILLERIES LIMITED, ET AL* 85

6 — *Income Tax — Dividends — Victory Bonds—Exemptions.*] *W. Ltd.*, having accumulated profits, declared a dividend, and by consent of the shareholders, paid the same in Victory Bonds. *W.*, a shareholder, in his income return for that year, claimed he should not pay income tax on this dividend because it was paid in Victory Bonds which were exempt from income tax.—*Held* that the payment of the distributed dividend in question in this case, in bonds, does not bring the transaction within the “obligation” of the bond in question which introduces the exemption in taxes. That such payment is not the payment of the capital of the bond at maturity nor is it the payment of interest upon presentation and surrender of coupons which is what is exempt from taxation. That the amount so received as dividend represented by said bonds was liable to income tax as profits and gains. *WATERBOUS v. THE MINISTER OF NATIONAL REVENUE*..... 108

7—*Inspection of Distillery—Proof of Shortage—Excise Act—Collection.*]—*Held*, That where an inspection of the stock of spirits in a distillery, made according to the directions of the statute, shows that on a given date a substantive quantity of spirits had in some way been removed from the distillery, and that the distillery stock books, required to be kept under the Act, did not show said deficiency to have been lawfully removed, such evidence, unless rebutted by proper and legal evidence, will be proof that said shortage was unlawfully removed.—2. That it results from the proper reading of sections 53, 149, 151 and 152 of the

REVENUE—Continued

Excise Act, that, upon it being shown that any distilled spirits have been unlawfully removed from a distillery, the excise duties thereon become payable forthwith.—3. That it is no defence in the present action to show that the spirits had been unlawfully removed by its Sales Manager, who was also a Director, without the knowledge of the other Directors. That the Company is bound by the acts of such Sales Manager and that it cannot escape from the results of the illegal acts of its officers and servants. *Quære*: That from sections 149 and 151 of the Excise Act read together, does not “collection” therein mean a collection to be made when there has been a sale or removal of spirits from a distillery, and that being so where it is shown that a certain shortage occurred through a leakage in a tank in the distillery, no excise duties are payable on such shortage. *THE KING v. THE ATLANTIC DISTILLING COMPANY, LIMITED*..... 119

8 — *Customs Act — Section 181 — “Whether owner thereof or not”—Forfeiture — “Removed” — Interpretation of Statutes — Judicial observation.*]—*Held*, that, inasmuch as by the first part of section 181 of the Customs Act, which deals with the penalty for having liquor in one’s possession illegally, it is provided that the offence exists “whether (the party is) the owner thereof or not,” and in the second part, where provision is made for the forfeiture of the liquor or vehicle in which it is being transported, the words “whether the owner thereof or not” are omitted, if it is proved that the vehicle used is the property of an innocent party who claims it, the Crown has no power to forfeit the same.—2. That the word “removed” used in said section means, in the case of a manufacture, the removal from the distillery or factory, and in the case of importation, from the vessel or train.—3. That in statutes imposing penalties and forfeiture, the language must be clear to charge the alleged offender with liability, and if there is a reasonable interpretation which would avoid the penalty or forfeiture in any particular case, that construction must be adopted.—*Judicial observation*. In view of the dissimilarity of the American and our Constitution, cases there determined would have no bearing, because by the first Article of the American Constitution, it is forbidden to pass any law impairing the obligation of contracts. *THE KING v. KRAKOWEC ET AL*..... 137

9 — *Customs Act — Discovery — Penal action.*] The present action was one to recover a penalty to the amount of the duty paid value of goods harboured by *D.* unlawfully imported, and incurred under

REVENUE—Continued

the provisions of the Customs Act. Plaintiff proved the finding of the goods in the premises of D. and the duty paid value thereof. D. offered no evidence at all.—*Held* that, by section 217 of the Customs Act, the burden of proving that the goods harboured were lawfully imported is upon the person in whose possession the goods are found, and section 262 provides that in case of any question relating to identity, *origin*, importation or payment of duty, the burden is on the owner or possessor of the goods, and that D. having failed to discharge the burden put upon him by law, plaintiff was entitled to judgment for the duty paid value of the goods so found on his premises.—2. The question of the right of the plaintiff in a penal action to examine the defendant on discovery, discussed. **THE KING v. DOULL..... 159**

10 — *Crown — Customs — Aeroplane — Forced landing — Reporting to Customs.*] The aeroplane in question was seized by the Customs authorities on the ground that it had landed at a place other than an airport and for not reporting to a Customs Officer.—*Held*, that where the evidence establishes that an aeroplane was forced to land on account of engine trouble and to avoid a crash, she is justified in so doing at any place that such landing can be safely made and for the same reasons that a vessel in distress may enter a port for shelter. **PENTZ v THE KING..... 172**

11 — *Crown — Reference — Seizure — Customs Act, Section 244.*] A certain unregistered motor boat of less than 10 tons tonnage, was seized under section 244 of the Customs Act for departing from a port in Canada without a clearance. She had been moored at one pier in the Customs port of Sydney and left this pier to go to another point in the same port.—*Held*, that, inasmuch as the motor boat in question was not required to be registered, and was not eligible for clearance by Customs on a coasting voyage, she was not required to obtain a clearance under the provisions of the Customs Act before leaving her port or place of mooring and that, in consequence, she was not liable for penalty imposed by section 244 of the said Act, which Act does not apply to the facts of this case.—2. *Held* that, moreover, the boat in question did not depart from the port of Sydney within the meaning of said section and that the provisions of the Statute do not apply to a small boat which is unregistered and which is proceeding from one point in any port to another point in the same port without goods on board, and that she was not required to clear. **HEARN v. THE KING..... 201**

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12 — *Trust fund — Taxation — Income — Non-residents — Interpretation of Statute — Beneficiaries ascertained.*] One McM. died in 1914, and by a clause (E) of his will after certain charges have been paid, it was provided that the balance should be divided in three parts to pay the support, maintenance and education of three children, and, moreover, that the amount necessary for such maintenance, etc., was left to the discretion of the Trustee and the balance thereof to be invested in the name of each of the respective children to whom such residue is by the will given and bequeathed. Such balance so re-invested, so given and bequeathed is what is now sought to be taxed. The beneficiaries under the will, at all times material, resided out of Canada, except one who took up residence in Montreal in 1926. The surviving Trustee (appellant) resides in Canada.—*Held* that the fund sought to be taxed herein is absolutely vested in well-known beneficiaries without any contingent interest and that such beneficiaries being admitted not to be residents in Canada, they are not liable to be taxed, excepting as to the one beneficiary who took up residence in Canada and then only from the date at which he took up such residence.—2. If in one section of a statute imposing taxation there are express words which in their plain or literal meaning disclose an exemption from taxation of the income of non-residents in Canada, and there are also words of ambiguous import in another section of the same statute which might be construed as displacing the exemption—these latter words are not sufficient to rebut the intention to exempt non-residents as expressed in the former section. **HOLDEN v. MINISTER OF NATIONAL REVENUE..... 215**

13—*Excise Act, Section 95, ss. 2—Seizure — Forfeiture — Discretion of Court.*] On July 26, 1928, an unidentified person rented a certain garage, and on the same day the truck in question herein was driven into the garage by R., a hired truckman, and the owner thereof, who locked it therein. The truck to the knowledge of R., had on it a "still" used or to be used in violation of the Excise Act in the production of spirits, and which truck was used for removing the still from one place to another. On August 1, 1928, the truck was seized by an Excise Officer, under section 95, ss. 2 of the Act, as forfeited. R. pleaded guilty before the Criminal Courts of illegally having a still in his possession. He was condemned and paid the fine. He contended that a discretion was vested in this Court to direct the restoration to him of the truck, as being an innocent

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wrongdoer and already sufficiently penalized.—*Held* that, in the circumstances, the truck was legally seized and forfeited and that the Court had no discretion vested in it to remit the penalty, and that, in any event, even if the court had any discretion in the matter, it should only be exercised upon substantial grounds of law or facts which are entirely absent in this case. *THE KING v. ROUBLE*.. 226

14 — *Salaries — Deductions — Income War Tax Act, 1917, as amended by 13-14 Geo. V., c. 52—Voluntary expenses.*] The appellant declared his income as Lieutenant-Governor to be \$..... and claimed a deduction therefrom of \$..... expended for social entertainments, claiming that the latter amount was properly deductible as having been necessarily laid out for the purpose of earning the income.—*Held* that the expenses claimed as a deduction herein were not “wholly, exclusively and necessarily laid out or expended for the purpose of earning the income” within the meaning of Sec. 8, ss. “a” of the Income War Tax Act, 1917, as amended by 13-14 Geo. V, c. 52.—2. That the disbursements that must be made to earn profits are those in connection with unascertained incomes, unlike a case of salary, where disbursements are made at the discretion and will of the taxpayer.—3. That the true meaning of the section in question is, that in a “trade or commercial or financial or other business or calling,” before the amount upon which the tax is to be levied is ascertained, the amounts expended to earn the same must be deducted. But it is otherwise in the case where a person is in receipt of an annual salary from any office or employment—an amount which is duly ascertained and capable of computation, and which constitutes of itself a net income.—4. That there is no legal obligation upon a Lieutenant-Governor, flowing from his appointment as such, to entertain socially; and no implied contract exists between him and the Crown, by reason of his appointment and the taking of the oath of office, from which flows any obligation with respect to expenditures for social entertainments. Such expenditures are voluntary, and the failure to so entertain could not be a cause for removal or dismissal. *In re INCOME WAR TAX ACT AND In re SALARIES OF LIEUTENANT GOVERNORS*..... 232

RIGHT OF WAY

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See EXPROPRIATION No. 1.

SECURITY

On Staying Execution. See PRACTICE.

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See REVENUE No. 13.

SHIPPING AND SEAMEN 1 — [*Marine Superintendent — Maritime Lien.*]—*Held*, that services performed by a man engaged to superintend the installation of machinery in a ship, to have charge of all the operations of fitting out, purchasing supplies, and finding occupation for the ship, etc., do not create in his favour, a Maritime Lien.—His subsequent assumption of the duties of Master involving the navigation of the vessel would, if properly proven, create a Maritime Lien for his services during the period when he was engaged in carrying out his duties as Master. *NICHOLSON ET AL v. THE SHIP Joyland*..... 70

2 — *Collision — Conflicting evidence — Weighing of evidence — Duty of Appeal Court to vary on facts.*] Action by plaintiff to recover damages suffered by it by reason of defendant’s ship coming into collision with one of its booms of logs in Burrard Inlet, North Vancouver, while the said ship was backing out of Empire Wharf.—*Held* (reversing the Judgment appealed from) that in cases of collision where the evidence is conflicting and nicely balanced, the Court should be guided by the possibilities of the respective cases which are set up, in weighing the evidence.—2. That it is next to impossible for one on a moving vessel, unless he is in a position to see her from stem to stern and at the same time maintain a complete and commanding view of the shore, to follow the course, speed or evolutions in the manoeuvres of a vessel; and that the plaintiff’s witnesses being some on the boom and some on land overlooking the locus of the accident were in a better position to follow the course of the vessel than were those on board the same.—3. That though a Court always loathes to reverse the findings of another Court on questions of fact, this does not mean or imply that it should abdicate its right and duty to examine all the evidence, and, when there appears manifest error, to

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rectify the mistake. *VANCOUVER ORIENT EXPORT CO. LTD. v. THE SHIP Anglo-Peruvian AND OWNERS*. 127

3 — *Collision — Right of way — Narrow channels—Rules 25 and 37 of the Rules of the Road for the Great Lakes.*—*Held* (affirming the judgment appealed from) that when a danger of collision occurs, a vessel is not justified in arbitrarily and obstinately insisting on her right of way conferred under Rule 25. If in obstinately following out the letter of the Rules regulating the course, a collision thereby occurs, she becomes at fault under Rule 37.—2. That where the *E.*, coming down stream in a narrow channel of Lake St. Louis, and upon giving the two-blast signal, indicating she elected to meet green to green, received in answer a one-blast signal, amounting to cross signals, the *E.*, instead of persisting in her course and sounding a second two-blast signal, should under the rule have given a danger signal. *THE STEAMSHIP Elfstone v. CHICAGO TRIBUNE TRANSPORTATION COY. LTD. AND CRETE SHIPPING COMPANY, LTD. vs THE SS. Chicago Tribune*. 132

4 — *Shipping — Claim for necessaries — Mortgage — Priority of mortgagee.*] The vessel *Astoria* was an American vessel on which H. and E. Holding Company Inc., of New York held a mortgage. Messrs. Baker, Carver & Morrell, Inc., of Connecticut had furnished certain necessaries to the vessel, for which the laws of the United States gave a maritime lien. The vessel was subsequently libelled and sold in New Brunswick, Canada, and the proceeds of the sale were deposited in Court for subsequent distribution. The mortgagee appeared and claimed that his mortgage should be preferred to the claim of materialmen.—*Held*, that, though by English law a maritime lien created by a foreign law, under circumstances which do not give rise to a maritime lien according to English law, is recognized: the priority which it will be given in the distribution of proceeds is treated as relating only to the remedy determined by the law of the form at which the vessel is libelled and sold, the mortgage should be preferred to the claims of the materialman. *MARQUIS v. THE SHIP Astoria*. 195

5 — *Collision — Altering course — Articles 19, 22, 23, 27 and 29 of the Rules of the Road—Travelling red to red.*] The collision herein occurred in Halifax harbour, the bow of the *C.* striking the *K.* on her starboard quarter. The *C.* was heading for the Inner Automatic Buoy and the *K.* was northward and westward of the buoy, each showing her red light to the other, until the *K.*, almost immediately after passing the buoy, altered her

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course suddenly, showing her green light on the port bow of the *C.* which would be about half to three-quarters of a mile S.S.E. of the buoy, and in attempting to cross the bow of the *C.* was struck as aforesaid. The *K.* gave no signal of her intention to change her course.—*Held*, that as the vessels were travelling red to red, the *K.* by altering her course without justification, and especially without signalling the *C.* her intention to do so, and in attempting to cross the *C.*'s bow, thus creating a danger of collision, violated Articles 19, 22, 23, 27 and 29 of the International Rules of the Road, and was guilty of mismanagement and bad seamanship, and was solely to blame for the collision which occurred. *THE SHIP Cavalier, HER CARGO AND FREIGHT v. LIVERPOOL SHIPPING COY.*. 205

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STAY OF EXECUTION

Amount of Security. See PRACTICE.

SUBJECT MATTER

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SUPERANNUATION — Civil Service — Crown — Contract — Discretion — Jurisdiction of court.—*Held*, that a civil servant, retired or removed from office, has no right of action to recover any allowance under the Superannuation Act, such allowance being entirely in the discretion of the executive authority. That no contractual relationship arises between the Crown and its servants with respect to such allowances. To create such contractual relationship would require express statutory enactment. *MILLER v. THE KING*. 22

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TAXATION ACT OF BRITISH COLUMBIA

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TITLE

See EXPROPRIATION No. 1.

TORT

See CROWN No. 1.

TRADE-MARKS — Expunging — Calculated to deceive — Abandonment—Intention.] By its action, Petitioner, owner of the trade-marks "Big Ben," "Baby Ben," "Pocket Ben," "Glo-Ben" and "Ben Hur," seeks to have the trade-mark "Bentima," owned and registered by the defendant, expunged, on the ground that the same was liable to confuse and deceive the public.—*Held*, that as the trade-marks in question consisted of distinctive names and were printed in such a conspicuous place and manner, there could not be any confusion as to which was which, and the public, even the unwary and incautious purchaser, could not be made or led to purchase the goods of the defendant for that of the plaintiff; that the defendant's trade-mark was not liable or calculated to confuse or deceive the public, and was properly registered and should not be expunged.—2. That the fact of non-user of a trade-mark alone does not establish the abandonment thereof; to succeed in such contention, it must be established that the original owner of the mark, not only discontinued its use, but also intended to abandon the same. **WESTERN CLOCK COMPANY v. ORIS WATCH COMPANY, LIMITED . . . 64**

2 — *Petition to register — "Zipper"—Descriptiveness.*—*Held* that the word "Zipper" having become descriptive of slide fasteners generally and the public having come to associate this word with that type of fasteners, it is not a proper word to be registered as a trade-mark. **LIGHTNING FASTENER COMPANY LIMITED v. CANADIAN GOODRICH Co., LTD . . . 90**

3 — *Expunging—Meaning of "mark"—Trade-Mark and Design Act, Ch. 201, R.S., 1927, Sec. 5.*] The trade-mark in question is a specific trade-mark to be applied to the sale of wire ropes, and consists of a yellow coloured strand running through the length of such ropes. The present action is to have said trade-

TRADE-MARKS—Concluded

mark expunged as not being a proper trade-mark within the meaning of section 5 of the Trade-Mark and Design Act.—*Held*, that a coloured strand woven into a wire fabric is a "mark" which may be used by any person carrying on a manufacture of wire rope for the purpose of distinguishing the article manufactured or produced or offered for sale by him from that of any other manufacture; and that the same is a "mark" within the meaning of section 5 of the Trade-Mark and Design Act. **WRIGHT'S ROPES LIMITED v. BRODERICK & BASCOM ROPE Co. . . 143**

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"Used by." (*Sections 86a and 87d Special War Revenue Act*). **THE KING v. HENRY K. WAMPOLE & COY. LTD. 7**

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"Whether Owner Thereof or Not." "Removed". (*Sec. 181, Customs Act*). **THE KING v. KRAKOWEC. 137**

"Mark" (*Trade-Mark*). **WRIGHT'S ROPES LTD. v. BRODERICK & BASCOM ROPE Co. 143**