

1939

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CANADA  
LAW REPORTS

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Exchequer Court of Canada

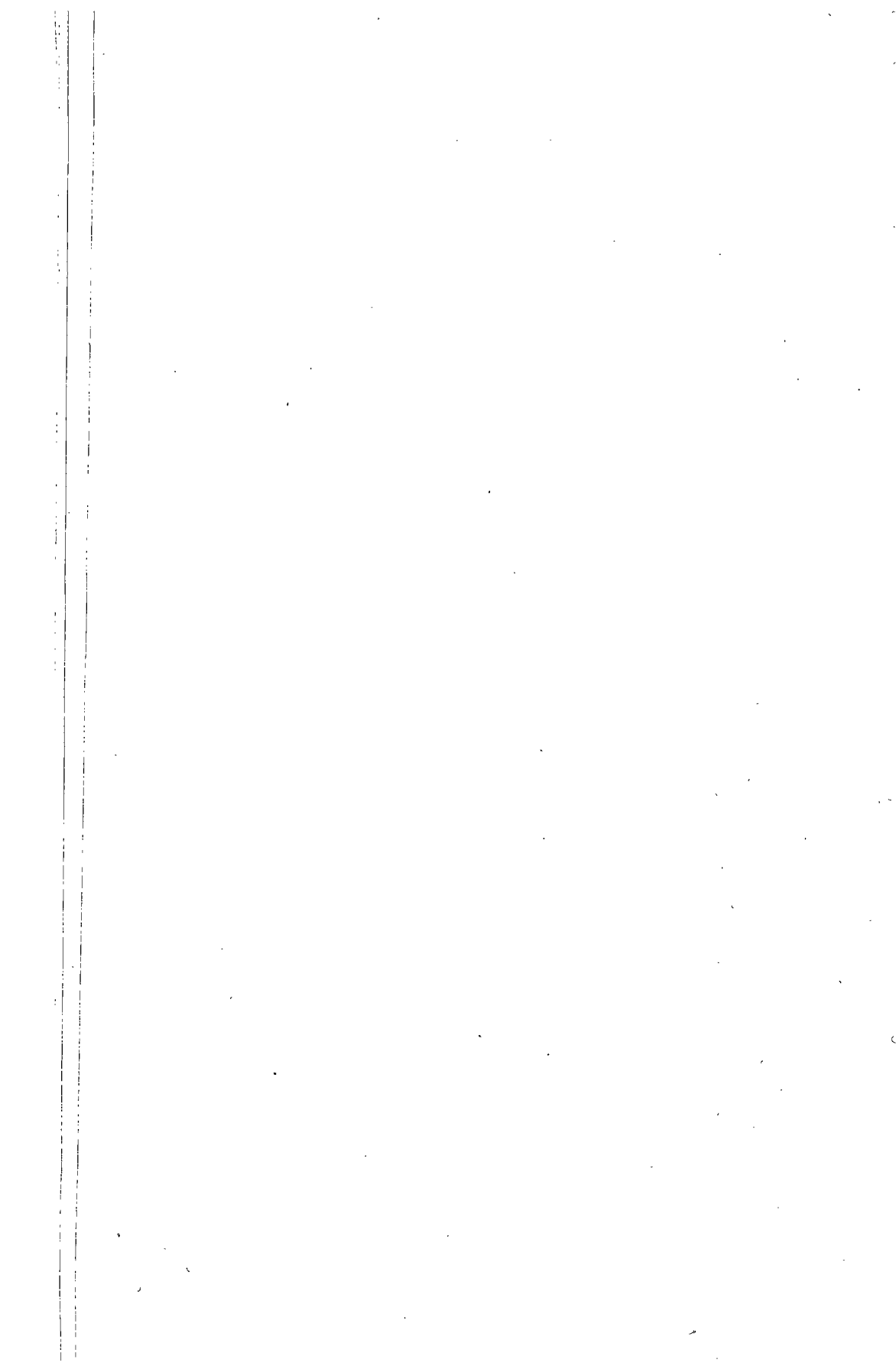
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RALPH M. SPANKIE  
OFFICIAL LAW REPORTER

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OTTAWA  
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PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1939



**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 EUGENE REAL ANGERS  
*(Appointed 1st February, 1932)*

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DISTRICT 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.

His Honour DONALD MCKINNON, Prince Edward Island Admiralty District—appointed  
20th July, 1935.

do LEONARD PERCIVAL DEWOLFE TILLEY, New Brunswick Admiralty District—  
appointed 14th August, 1935.

The Honourable WILLIAM F. CARROLL, Nova Scotia Admiralty District—appointed 23rd  
April, 1937.

do LUCIEN CANNON, Quebec Admiralty District—appointed 18th October,  
1938.

His Honour FRED. H. BARLOW, Ontario Admiralty District—appointed 18th October,  
1938.

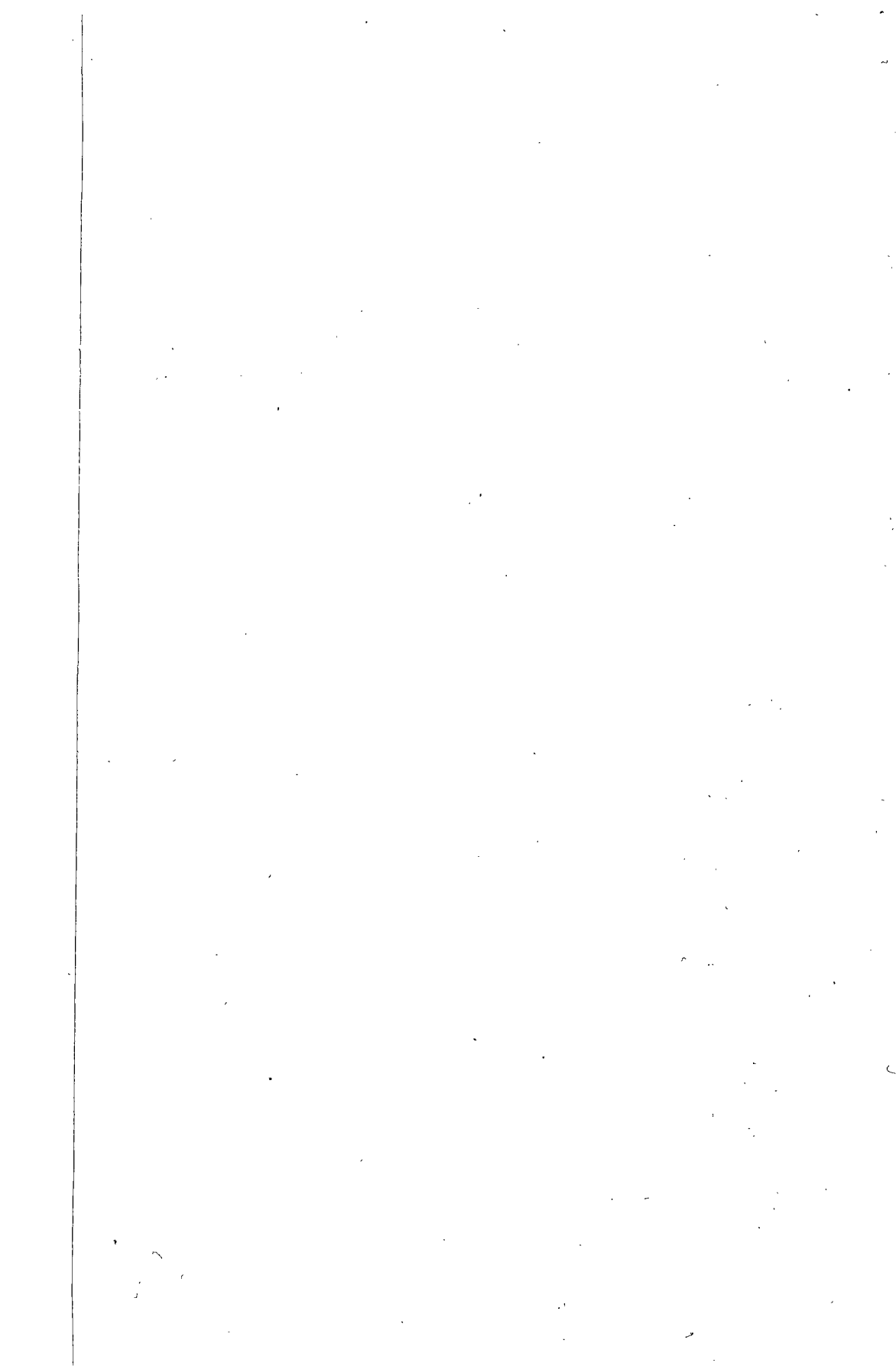
DEPUTY LOCAL JUDGE:

The Honourable Sir JOSEPH A. CHISHOLM—Nova Scotia Admiralty District.

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ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Right Honourable ERNEST LAPOINTE, K.C.



3

*CORRIGENDUM*

P. 2.—The names of counsel should read:

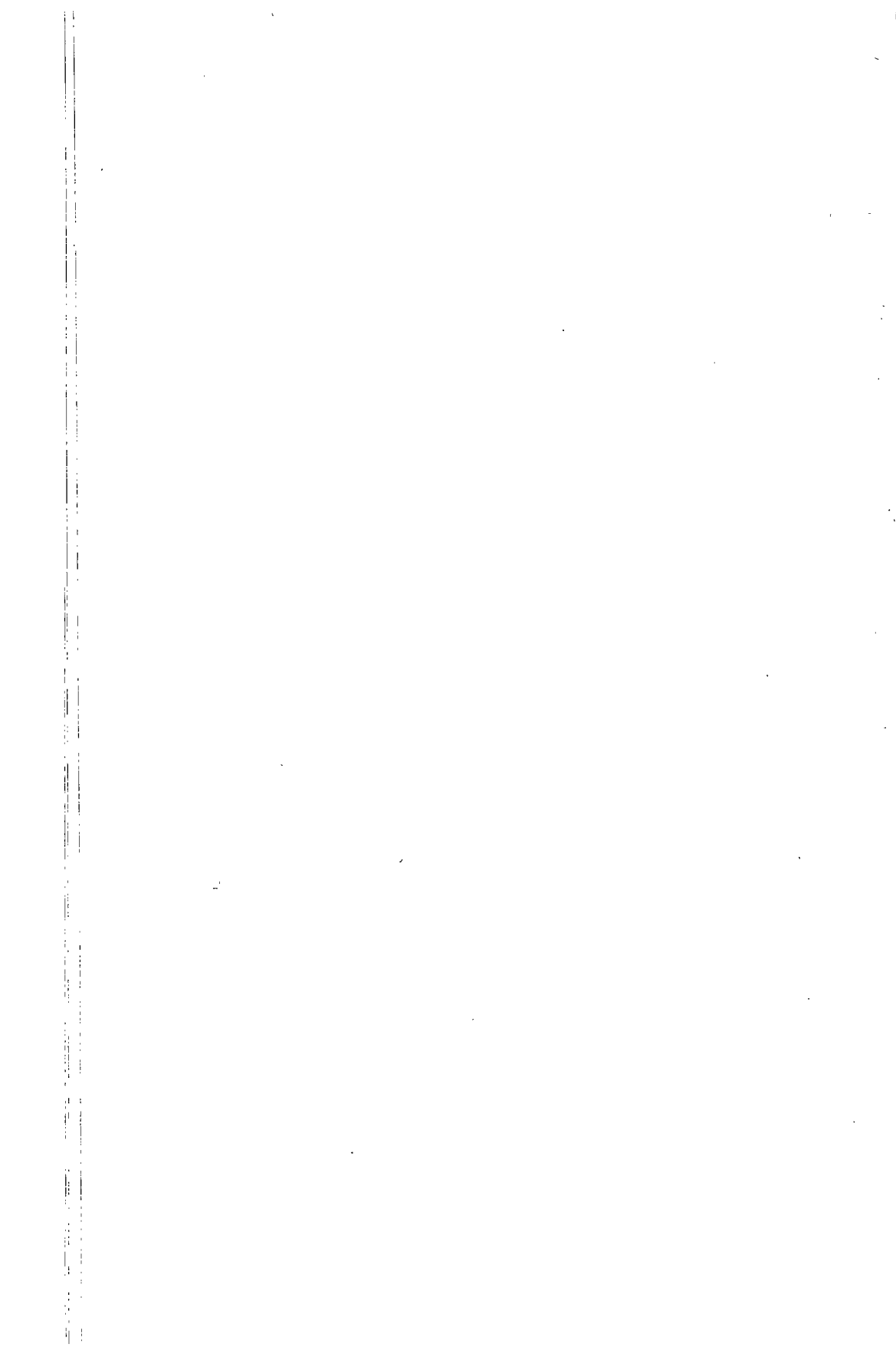
*C. J. Ford, K.C.* and *J. R. Tolmie* for plaintiff.

*H. S. Patterson, K.C.* and *A. W. Hobbs* for defendants.

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A. To the Judicial Committee of the Privy Council:

1. *Birtwistle Trust, Peter v. Minister of National Revenue.* (1938) Ex. C.R. 95. Appeal to the Supreme Court of Canada allowed. Leave to appeal to the Privy Council granted. Appeal allowed.
2. *King, The v. Canada Rice Mills Ltd.* (1938) Ex. C.R. 257. Appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council granted. Appeal dismissed.
3. *Pioneer Laundry & Dry Cleaners Ltd. v. Minister of National Revenue.* (1938) Ex. C.R. 18. Appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council granted. Appeal allowed.

B. To the Supreme Court of Canada:

1. *Air Reduction Co. Inc. v. Commissioner of Patents.* (1939) Ex. C.R. 65. Appeal dismissed.
2. *Applegate, William E. v. Minister of National Revenue.* (1938) Ex. C.R. 235. Appeal allowed.
3. *Canadian Shredded Wheat Co. Ltd. v. Kellogg Co. of Canada Ltd.* (1939) Ex. C.R. 58. Appeal dismissed.
4. *Coca-Cola Co. of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd.* (1938) Ex. C.R. 263. Appeal allowed.
5. *Discount & Loan Corpn. of Canada v. Superintendent of Insurance for Canada.* (1938) Ex. C.R. 194. Appeal dismissed.
6. *Dominion Bridge Co. Ltd. v. The King.* (1939) Ex. C.R. 235. Appeal pending.
7. *Dominion Tankers Ltd. v. Shell Petroleum Co. of Canada Ltd.* (1939) Ex. C.R. 192. Appeal pending.
8. *Dr. Brinkley II v. Shanahian et al.* (1939) Ex. C.R. 181. Appeal pending.
9. *Eastern Canada Steel & Iron Works Ltd. v. The King.* (1939) Ex. C.R. 244. Appeal pending.
10. *James B. Eads v. Joseph P. Burke.* (1939) Ex. C.R. 289. Appeal pending.
11. *King, The v. Imperial Tobacco Co. of Canada Ltd.* (1938) Ex. C.R. 177. Appeal dismissed; cross-appeal allowed.
12. *Lafayette et al. v. Maple Leaf Milling Co. et al.* (1939) Ex. C.R. 368. Appeal pending.
13. *Lafayette et al. v. Port Colborne & St. Lawrence Navigation Co. Ltd.* (1939) Ex. C.R. 355. Appeal pending.

14. *Magazine Repeating Razor Co. of Canada Ltd. et al. v. Schick Shaver Ltd.* (1939) Ex. C.R. 108. Appeal pending.
15. *Massey's Executors, Walter E. H. v. Minister of National Revenue.* (1939) Ex. C.R. 41. Appeal dismissed.
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18. *Niagara Wire Weaving Co. Ltd. v. Johnson Wire Works Ltd.* (1939) Ex. C.R. 259. Appeal pending.
19. *Quebec Central Ry. Co. v. The King.* (1938) Ex. C.R. 82. Appeal dismissed.
20. *Riedle Brewery Ltd. v. Minister of National Revenue.* (1939) Ex. C.R. 314. Appeal allowed.
21. *Salmo Investments Ltd. v. The King.* (1939) Ex. C.R. 228. Appeal allowed.
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23. *Shaw, Bessie L. v. Minister of National Revenue.* (1939) Ex. C.R. 35. Appeal allowed.
24. *Smit & Sons Inc., J. K. v. McClintock, Richard S.* (1939) Ex. C.R. 121. Appeal allowed.
25. *Snyder, Clarence E. v. Minister of National Revenue.* (1938) Ex. C.R. 235. Appeal allowed.
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**CASES**  
 DETERMINED BY THE  
**EXCHEQUER COURT OF CANADA**  
 AT FIRST INSTANCE  
 AND  
 IN THE EXERCISE OF ITS APPELLATE  
 JURISDICTION

---

BETWEEN:

HIS MAJESTY THE KING, on the  
 Information of the Attorney-General  
 of Canada ..... } PLAINTIFF;

1937  
 ~~~~~  
 Sept. 21.  
 ~~~~~  
 1938  
 ~~~~~  
 Aug. 15.

AND

LEON L. PLOTKINS, carrying on  
 business under the firm name and  
 style of LION REFINING COM-  
 PANY and said LION REFINING  
 COMPANY and LION OILS LIM-  
 ITED ..... } DEFENDANTS.

*Revenue—Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179,  
 s. 85 (a), s. 86, ss. 1 (a & b)—“Manufacturer”—Independent trad-  
 ing units—Partnership and limited company—Liability for tax.*

Defendant Plotkins is the sole owner of Lion Refining Company, a part-  
 nership engaged in the business of manufacturing petroleum products.  
 Lion Oils Limited is engaged in the marketing and distribution of  
 petroleum products and other articles. Approximately sixty per cent  
 of the business of Lion Oils Limited consists of selling petroleum  
 products manufactured by and purchased from Lion Refining Com-  
 pany. Its business is carried on on premises owned by Lion Refining  
 Company. The accounting and clerical work of both concerns are  
 carried on by the staff of Lion Oils Limited in whose name a banking  
 account is maintained into which are deposited the receipts of both  
 concerns from all sources. The business transactions of each are kept  
 distinct and in separate books. The salaries and wages of officers and  
 employees of both concerns and all bills payable by Lion Refining  
 Company are paid through the common banking account. Lion  
 Refining Company sells to Lion Oils Limited and also to others.  
 The goods are invoiced in the name of Lion Oils Limited. The two  
 concerns share profit and loss in the proportion of \$5,700, the paid  
 up capital of Lion Oils Limited, to \$20,000, the amount of Plotkins'  
 original investment in Lion Refining Company.

The action is one to recover sales tax assessed upon the selling price of  
 Lion Oils Limited. The Crown alleges that both concerns are to  
 be treated as one business, or, in the alternative, that Lion Refining  
 Company was the agent of Lion Oils Limited and that the sales to  
 it by Lion Refining Company were fictitious and illusory and made  
 with the intent of avoiding payment of the sales tax properly pay-  
 able.

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*Held:* That the Lion Refining Company and Lion Oils Limited are independent trading units, and Lion Refining Company is the manufacturer of the petroleum products disposed of and is liable for the sales tax.

INFORMATION exhibited by the Attorney-General of Canada to recover from defendants sales tax alleged due the Crown under the provisions of the Special War Revenue Act, R.S.C., 1927, c. 179, and amendments thereto.

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

*H. S. Patterson, K.C.* and *A. W. Hobbs* for appellant.

*C. J. Ford, K.C.* and *J. R. Tolmie* for respondent.

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

THE PRESIDENT, now (August 15, 1938) delivered the following judgment:

This is an Information to recover from Leon L. Plotkins, who carries on the business of manufacturing gasoline, kerosene, tractor fuels, and other petroleum products, under the firm name and style of Lion Refining Company (hereafter to be referred to as "the Refinery"), the sum of \$3,873.33, as sales tax, under the Special War Revenue Act, or, in the alternative, to recover from the defendant, Lion Oils Ld. (hereafter to be referred to as "Oils Ld."), the business of which is to a considerable extent concerned with the sale of oil products manufactured by the Refinery, the sum of \$3,284.83, and from the Refinery the sum of \$588.50, as sales tax.

There are two taxation periods covered by the plaintiff's claim; first, that from September 1, 1932, to August 31, 1933. With this period the Refinery is alone concerned for Oils Ld. had not commenced business operations until February, 1934, and the amount claimed for this period is \$588.50. The second period runs from August 31, 1933, to December 31, 1935. In this period the assessment was made against the Refinery on the basis of the sale prices of Oils Ld., for goods sold to it by the Refinery, and not on the sale prices of the Refinery. It is the contention of the plaintiff, in respect of the second taxation period, that both concerns are to be treated as one business and that the sales made by Oils Ld. were sales of the Refinery and



that the latter is liable for the sales tax in respect of the said sales, or, in the alternative, that the Refinery was but the instrument or agent of Oils Ld.; that the operations of the former were in fact the operations of the latter, and that the alleged sales made by the Refinery to Oils Ld. were fictitious and illusory and made with intent to evade payment of the amount of the sales tax properly payable, and that the sales of Oils Ld. to the trade and to consumers are assessable for the sales tax. In the further alternative it is pleaded that if the defendants were not associated or related as principal and agent, they were, nevertheless, interrelated or associated in their said business as is contemplated by a certain regulation governing the computation of sales tax, made and issued under the provisions of the Special War Revenue Act, and under which regulation it is prescribed that in such cases the price at which the goods are regularly sold to *bona fide* independent wholesalers by either of them, in the ordinary course of business, shall be the value upon which the tax is payable.

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The provisions of the Special War Revenue Act of particular interest here are s. 85 (a), s. 86, subs. 1 (a) and subs. 1 (b). Sec. 85 (a) defines "sale price" as follows:

85 (a) "sale price" for the purpose of calculating the amount of the consumption or sales tax, shall mean the price before any amount payable in respect of the consumption or sales tax is added thereto, and shall include the amount of other excise duties when the goods are sold in bond; and in the case of goods subject to the taxes imposed by Parts X and XII of this Act, shall include the amount of such taxes; in the case of imported goods the sale price shall be deemed to be the duty paid value thereof.

By s. 86, subs. 1 (a) the sales tax is imposed "on the sale price of all goods, produced or manufactured in Canada, payable by the producer or manufacturer at the time of the delivery of such goods to the purchaser thereof." Subs. 1 (b) also imposes the sales tax "on the sale price of all goods, imported into Canada, payable by the importer or transferee who takes the goods out of bond for consumption at the time when the goods are imported or taken out of warehouse for consumption." The above provision of the Act is of importance here because it appears that several importations of goods were made by the Refinery either on its own account, or on behalf of Oils Ld., and upon the duty paid value of such importations the sales tax was paid by the Refinery. The plaintiff also invokes

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a regulation which states: "In cases where vendor and purchaser are interrelated, associated, or affiliated concerns, or where one is subsidiary to the other, the price at which the goods are regularly sold to *bona fide* independent wholesalers by either of them, in the ordinary course of business, shall be the value upon which the tax is payable." The validity of this regulation is, I think, subject to grave doubt, but it will not be necessary, upon the facts disclosed here, to consider it in determining the issues in dispute.

The facts concerning the business relations of Plotkins and Oils Ld. are of importance in respect of the second taxation period and it is desirable that they be stated rather fully. Plotkins, in 1932, commenced the business of manufacturing petroleum products under the registered firm name of Lion Refining Company, at or near Calgary, Alberta, and he has since been the sole owner of that business. In 1933 Oils Ld. was incorporated, with a capital of \$20,000, the shares being of the par value of \$50 each, and shares aggregating the value of \$5,700 have been sold and issued, the shareholders numbering eighteen. Plotkins is the holder of but one share in Oils Ld., a qualifying share issued to him at the time of the incorporation of Oils Ld. It is estimated that about sixty per cent of the business of Oils Ld. had its origin in selling to the trade and consumers, petroleum products manufactured by and purchased from the Refinery, and about forty per cent from the sale of such articles as standard gasoline, ethyl gasoline, kerosene distillates, greases, tires and automobile accessories, purchased from other refiners and distributors, and which articles the Refinery did not produce. Oils Ld. owns and operates five or six filling stations in Calgary and Edmonton, Alberta, and is the owner of motor trucks, tanks, pumps and distributing equipment, that is, outside of any office equipment. The Refinery owns certain equipment and oil lands in the State of Montana, U.S.A., besides its refining plant, storage tanks, buildings, etc., in Calgary, the total invested capital now being about \$75,000.

Plotkins stated that Oils Ld. was formed originally at his instance for the purpose of marketing the products of the Refinery. Later, he subscribed and paid for seventy shares in that company, in addition, I think, to his qualify-

ing share. At some stage, Plotkins entered into negotiations with one, Beauchemin, and associates, whereby the latter were to undertake to purchase one-half of the authorized capital shares of Oils Ld. and Plotkins was to subscribe for and purchase the remaining half of such shares. However, in the end, Beauchemin and his associates were able only to purchase shares amounting in par value to \$5,700, which is the paid up capital of Oils Ld. to-day, distributed among eighteen different shareholders. The original proposal was that Beauchemin and his associates were to invest \$10,000 in Oils Ld. and Plotkins an equal amount; and Beauchemin and his associates were also to invest \$10,000 in the Refinery. The idea was that each would have the same amount of capital in the Refinery and in Oils Ld., but this scheme failed to materialize. Then, there came a time when Plotkins disposed of his share holdings in Oils Ld. because, it was stated, Beauchemin and his associates did not wish the control of Oils Ld. to be in the hands of Plotkins; the retention of Plotkins' qualifying share in the corporation was owing, it was said, to an oversight in not selling the same, or in not transferring back the same to Oils Ld., I do not know which. Plotkins was, however, appointed manager of Oils Ld. some time after it commenced business, exactly when is not clear.

The business of Oils Ld. is carried on upon the premises of the Refinery, for which, it was said, an allowance by way of rent is made in calculating the administrative expenses of Oils Ld. The accounting and clerical work of both concerns is carried on by the staff of Oils Ld., but whether or not an allowance is made Oils Ld. for such services was not, so far as I recall, explained. The only banking account is in the name of Oils Ld., and into this account the receipts of both concerns from all sources are deposited, but the business transactions of each concern are kept entirely distinct and in separate books. The salaries and wages of officers and employees of both concerns, including the salaries of Plotkins as manager of both Oils Ld. and the Refinery, and all bills payable by the Refinery, upon the proper voucher and order of the Refinery, are paid through this banking account—the Refinery being credited or debited with receipts and payments in

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the books of Oils Ltd., as the case may be. The Refinery employs some fifteen or twenty people exclusively for its own operations. All goods sold and delivered by the Refinery to Oils Ltd. are duly invoiced to the latter, and it would appear that a settlement is made on annual balances of all debit and credit transactions as between the two concerns, although that is not quite clear from the evidence. Where goods are sold by the Refinery to customers other than Oils Ltd., the same are invoiced in the name of Oils Ltd., and at prices identical with prices charged Oils Ltd. by the Refinery. At times, the Refinery imported or purchased from producers in the domestic market, for the account of Oils Ltd., certain goods which it could not supply, and which importations or purchases were delivered over to Oils Ltd. at cost, together with the cost of freight and handling. The Refinery and Oils Ltd. have a profit and loss sharing arrangement in the proportion of \$5,700, the paid up capital of Oils Ltd., to \$20,000, the amount of Plotkins' original capital investment in the Refinery, as I understand it; the division of profits and losses on this basis is made at the end of each year. It was upon the book entries of sales made to the trade and consumers by Oils Ltd., and not upon the selling prices from the Refinery to Oils Ltd., that the assessments for the sales tax here in dispute were made.

In February, 1934, the Refinery (as "the Company") and Oils Ltd. (as "the Purchasers") entered into an agreement to run for the period of five years, with an option to Oils Ltd. to renew the same upon the same terms for a further period of five years, and some of the terms of that agreement perhaps should be mentioned; paragraphs 1, 2, 3, 4, 5, 8, 9 and 11 of the agreement are as follows:

1. The Company shall sell and deliver to the Purchasers and the Purchasers shall purchase and receive of and from the Company the whole of the output of the Company, including gasoline, kerosene, distillate, Gas Oil, Fuel Oils and all other products of any nature.

2. Notwithstanding anything hereinafter mentioned the Purchaser shall purchase exclusively from the Company all products that the Company are ready, willing, and able to supply at price calculated in accordance with Paragraph 8 hereof and are required by the purchaser.

3. All products supplied by the Company to the purchaser under this agreement shall be made according to specifications mutually agreed upon.

4. The purchaser covenants and agrees that the minimum quantity of products to be accepted by it under the terms of this agreement shall not be less than forty thousand (40,000) gallons during each of the months

of November, December, January and February in every year during the currency of this agreement and eighty-five thousand (85,000) gallons in every month of the year not heretofore mentioned.

5. The purchaser covenants and agrees that the minimum quantity set out in clause four (4) hereof shall be increased in every month of each successive year by an amount equivalent to twenty-five (25) per centum of the monthly gallonage agreed to be accepted in each preceding year.

8. The prices of various products supplied to the purchasers under this agreement shall be based on the actual cost to the company plus one cent (1c.) per gallon. The terms of payment shall be cash on receipt of invoice from the Company.

9. The purchasers shall be the sole representatives of the company in regard to the products supplied under this agreement and shall use every endeavour to advertise and push the sale and solicit business for products so supplied by the Company.

11. Notwithstanding anything hereinbefore set out the Company shall, if the purchaser does not accept the minimum quantity agreed to be accepted in any one month, extend for 60 days the time for acceptance of such quantity, and have the right to dispose of the difference between the quantity actually accepted and the quantity agreed to be accepted to any other purchaser. Any number of gallons in excess of the minimum quantity as hereinbefore set out, actually accepted in any one month shall be construed as accepted in any succeeding month during which the minimum quantity has not been accepted.

The terms of the agreement as to the quantities of goods to be sold and purchased were not fully carried out during the period in question, owing in some cases to the inability of the Refinery to supply the precise goods required by Oils Ltd., and in other cases to the non-acceptance by Oils Ltd. of the stipulated quantities, and which the Refinery was able to furnish. The provision as to price, cost plus one cent per gallon, was found to be impractical and was not adhered to. With those exceptions the spirit of the agreement was observed by both parties; whether the agreement is presently an enforceable one is perhaps debatable, but in any event I do not think that is of vital importance. We are here concerned with the actual transactions that took place between the two defendants, the true character of the sales in question; and which of the two defendants is taxable upon such sales and the proper basis of assessment.

I may at once dispose of the issues in respect of the first period, and which concern the Refinery alone. There are just two points for decision in respect of that period. The Refinery imported from the United States, or purchased from domestic producers or wholesalers, a considerable quantity of what is known as "gas oil," which it

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sold under the name of "tractor fuel," and sometimes as "gas oil," without further processing or manufacture, and without any change in the structure of such product. Upon such sales the Refinery was assessed as a manufacturer or producer, upon its selling price, or the selling price of Oils Ld., and not on the import or purchase price, which assessments, in my opinion, cannot be sustained, and this I think was conceded. This would be applicable also to the second period, in so far as the same state of facts pertain thereto. There was one other point in issue, the sale price of fuel oil, but that is concluded by the plaintiff agreeing that the price should be reduced from 5 cents to 3 cents per gallon. The only point therefore to be determined in this period is the volume of taxable sales, and unless counsel can agree upon this there will be a reference to determine the amount of the taxation payable and due, because I see no way of doing that myself.

Another point might also be disposed of at this stage. A dispute arose between the Refinery and the Department of National Revenue as to whether the mixing of raw naphtha and gas oil, or raw naphtha and kerosene, constituted a "manufacture," and the Department ruled that it did, and in this I concur. If Oils Ld. engaged in the same practice—my impression is that it did not—it also would be a "manufacturer" and liable for the tax. It is not absolutely clear to me that the ruling of the Department was accepted by the Refinery and that the sales tax was paid on such manufactured goods, but if not then I find that the Refinery is liable for the tax upon the same, in the proper amount.

The principal question for decision is whether it is against the selling prices of the Refinery, or those of Oils Ld., that the tax should be levied, or whether the Refinery should be assessed upon the selling prices of Oils Ld., and in fact it was the latter that was done. Cases of this type always contain perplexing features, and they are difficult to resolve with confidence. The statute imposes the tax upon the producer or manufacturer. The tax must be levied against the sales of the producer or manufacturer unless it be that he is but the agent of another for any of such purposes, and possibly there may be other exceptions. Imposing the tax upon other persons or companies,

outwardly independent of but working in close co-operation with the manufacturer or producer, particularly in selling the goods of the latter, is bound to present difficulties,—first, because the former is not in fact the producer or manufacturer, and secondly, because the selling prices of the former will usually include some of the profit customarily exacted by wholesalers and retailers. In such cases very clear evidence should be required to shift the imposition of the tax from the producer or manufacturer to another. Sec. 98 provides that where goods are sold, in the judgment of the Minister, at less than the fair price, and this means the selling price of the producer or manufacturer, the Minister may determine the fair price. That seems a very suitable and just provision, particularly if the taxpayer has the right of appeal therefrom. This provision of the statute would seem to contain all the machinery necessary for settling all disputes of the nature in question here, which usually is but the contention that the producer or manufacturer has sold his goods at an unfair price, which he seeks to conceal by some subterfuge or another; that is always the question at stake in such cases—largely a question of fact.

I was referred to the *Palmolive* case (1), but I do not think the facts there are similar to the facts of this case. There, it was held that the manufacturing company was merely the agent of the selling company and subject in all things to the direction and control of the latter, and that the operations of the former were the operations of the latter, and there was some evidence to support that finding. I do not think it is possible to say that in the case under consideration the Refinery was the manufacturing agent of Oils Ltd., but it might be argued that Oils Ltd. was merely the selling agent of the Refinery, and in fact that is one of the contentions here made by the plaintiff. It seems to me that the Refinery and Oils Ltd. must be held to be independent trading units, and the agreement and the facts concerning their several activities, I think, support that conclusion. Their business relations were of course intimate and probably so designed for their mutual advantage, but that does not of itself constitute them a single business enterprise for the purposes of the tax, or otherwise. That

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(1) (1933) S.C.R. 131.

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requires a state of facts that indubitably points to a business arrangement made to evade the tax, or, that one so dominated and controlled the business of the other that one is obliged to say that the existence of that other was apparent only and not real; I do not think that can be said here. The division of profits and losses on the basis of capital employed by each is a suspicious and unusual circumstance, but that circumstance after all does not go to the question as to which concern was in fact the manufacturer or producer, or to the question of the proper sales price. The Refinery, it is perfectly clear, was the manufacturing concern, and it sold its goods to Oils Ld. which was to sell the same to the trade and consumers, generally at an advanced price which would not be improper. Neither can I see how it can be said that the Refinery was but the agent of Oils Ld., in manufacturing the goods in question. I think, however unusual the practice of the defendants dividing their respective profits and losses, each was an independent trading unit, and each acted on its own behalf. The facts disclosed concerning their several business activities, I think, support such a conclusion. I therefore am of the opinion that, upon all the facts disclosed, it cannot be said that the Refinery was not the manufacturer or producer of the goods in question, or that it was the mere agent of Oils Ld., or that Oils Ld. is not an independent trading unit.

I turn now to the question of the sale prices of the goods in question, by the Refinery, because that is still a matter of importance. There was put in evidence by the Refinery a tabulated statement showing a list of the various named products which it sold to Oils Ld. and the prices charged therefore respectively, and the prices at which such sales were assessed for the tax, which, I understand, in all cases were the selling prices of Oils Ld. to the public. There were also put in evidence invoices showing importations, or purchases from domestic producers, by the Refinery, mostly in 1935, for its own account or that of Oils Ld., of such articles as motor fuel, kerosene distillates, tractor fuel, naphtha and washed naphtha, which the Refinery could not at the time supply Oils Ld. I do not propose to mention all the details of these invoices, or review any of the explanations made concerning them by Plotkins. It



will suffice to say that these invoices show duty paid importations, or purchases from domestic producers, of oil products, which, expressed in imperial gallons, cost the Refinery respectively 9·4, 11·8, 9·8,  $7\frac{3}{4}$ , 8·9, 8·4,  $10\frac{1}{4}$ ,  $10\frac{1}{4}$ , 8·5, 8·9, 10, 11·2, 8·4, and 10·3 cents per gallon, and upon these importations and domestic purchases the assessments for the sales tax, stated in the same order, were based upon a selling price of 13,  $13\frac{1}{2}$ ,  $12\frac{1}{2}$ ,  $13\frac{1}{2}$ ,  $12\frac{1}{2}$ , 13,  $12\frac{1}{2}$ ,  $10\frac{1}{2}$ , 12·7, 12·7,  $12\frac{1}{2}$ , 18,  $13\frac{1}{2}$ , and  $14\frac{1}{2}$  cents per gallon respectively. It would appear that in one case the tax was paid when the goods were properly free of the tax; and in one other case the tax paid, inadvertently on the part of both parties it was said, was much higher than was payable. I am not required to make any adjustments in respect of those matters. Upon all these importations and domestic purchases the Refinery made returns on account of sales tax on the basis of the purchase prices, and so far as I can gather the tax thereon was in all cases paid. I have no reason to doubt that the purchases which I have just mentioned might have been made by any one else in wholesale quantities, and upon the same terms as to price. The tax upon these purchases having once been paid I do not understand how it can be said that the tax may be imposed on resales of such purchases; and I was not referred to any provision of the statute authorizing the tax on such resales. In such cases it matters not what were the business relations between the Refinery and Oils Ld. Plotkins stated that he showed, but ineffectually, the investigating officer of the Revenue Department certain of these invoices which would exemplify the principle of assessment for which he was contending, namely, that the tax should not be assessed against the Refinery's importations of goods, or goods purchased from domestic refineries, because the tax had already been paid thereon, or that he was willing to pay the same upon the proper assessment, and that the price of certain goods should not be varied because they were sold under a name different from that under which they were manufactured, imported or purchased. The prices at which the Refinery sold to Oils Ld. were determined largely by the prices at which the Refinery could import similar goods from a certain refinery in the State of Montana, or from domestic manufacturers.

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The importations and domestic purchases illustrated by the invoices referred to seem to have been made in the usual course of business, and there is nothing to indicate that the prices therein mentioned were not the *bona fide* prices current at the time, and at which prices others might have made purchases, from the same vendors, of the corresponding goods.

And there is something further to add. There seems to have been a disagreement between the Refinery and the Revenue Auditor regarding the standard or grade of certain oil products which the Refinery imported or purchased under one name, and sold under another name, for example, a product imported as "gas oil" was sold as "tractor oil," and apparently a distinction was made between them for taxation purposes. Plotkins claimed they were the same thing and upon the evidence before me I feel obliged to hold that in this he was correct. Again the Refinery purchased from the Royalite Oil Co. Ltd. of Turner Valley, Alberta, the manufacturer or producer, a product called "absorption plant gasoline," which the Refinery did not produce, and which it sold as "motor fuel"; any one could have bought the same article for 7½ cents per gallon as did the Refinery; but for this reason the assessment for the sales tax seems to have been fixed at the rate of 13½ cents per gallon, as if it were in fact another article that was sold; this seems to me to be untenable. Again the Refinery did not produce gasoline of the highest standard; the only evidence on the point goes to show that the gasoline produced by the Refinery was of a third grade or standard, and the Refinery claims that this should always have been taken into consideration in ascertaining the current price, and in making the assessment, of its sales of gasoline. I cannot but think that this contention is a correct one in estimating the fair market price of gasoline produced and sold by the Refinery; the Refinery was, I think, obliged to consider this factor as an element in its price-fixing. It seems to me that the revenue officers did not properly approach the matter of the sales tax assessments in question, and this of course was inevitable if they had concluded that the proper basis of assessment against the Refinery was the selling price of Oils Ltd. to the trade and the public. Further, it is to be remembered that the

Refinery was not bound to sell its products at precisely the same prices charged by other importers, manufacturers or producers, in Canada; that was never contemplated by the Act, as there might be many very obvious reasons why the prices of the one should be lower or higher than those of the other.

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Upon the evidence before me it is my opinion that the Refinery is the party liable for the tax, and that generally it has made returns for the tax in connection with the sale transactions in question here, upon the proper basis, and at the proper prices. However, the evidence perhaps is not complete in respect of every transaction and in some respects it is somewhat confusing, and I hesitate to say that the Information should, at once, be dismissed. If under the terms of this judgment the plaintiff is advised that the prices of some of the sales transactions of the Refinery have not been fully established by the evidence, or that they should be more definitely determined, or, if there is any reasonable ground for a difference of opinion as to the net amount payable by the Refinery under this judgment, then I grant leave to the plaintiff to move within thirty days from the date of this judgment, to show cause why an order should be made directing the appointment of a Referee to take evidence in respect of any of such matters, and to report thereon. However I hope this will not be necessary. Failing such a motion on the part of the plaintiff, within the period mentioned, this action will stand dismissed with costs, but otherwise the matter of costs will be reserved.

*Judgment accordingly.*

BETWEEN:

C. P. FULLERTON ..... APPELLANT;  
 AND  
 THE MINISTER OF NATIONAL }  
 REVENUE ..... } RESPONDENT.

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 Nov. 2.

*Revenue—Income tax—Income War Tax Act, R.S.C., 1927, c. 97, s. 3—  
 Evidence—"Income"—Payment made on cessation of office—"Gratuity"—No liability for tax.*

Appellant, in December, 1933, was appointed Chairman of the Trustees of the Canadian National Railways for a term of five years at a salary of \$30,000 per annum. By 1 Edward VIII, Chapter 25 the

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appellant's office was abolished, and his employment as Chairman of the Trustees terminated on October 1, 1936. Appellant was advised by the Minister of Railways that he would be granted a gratuity of \$30,000 and later, on the recommendation of the Minister of Railways, an Order in Council was passed approving of the payment of such sum by the Canadian National Railways to appellant "in relation to his services as Chairman, to be paid to and accepted by him as a remunerative payment subject to income tax." The Board of Directors of the Canadian National Railways passed a resolution in substantially the same terms as the Order in Council and a cheque for \$30,000 was delivered to appellant accompanied by a voucher, embodying the language of the resolution, for his signature, the latter portion of which stated that the money was being paid to and accepted by the appellant "as a remunerative payment subject to income tax." The voucher was signed by the appellant concurrently with the receipt of the cheque. Immediately after receipt of the cheque the appellant wrote to the President of the Canadian National Railways and also to the Minister of Railways in protest against the form of the voucher and the manner in which the payment was therein described.

Appellant was assessed for income tax purposes on this sum of \$30,000. The assessment was affirmed by the Minister of National Revenue from whose decision the appellant appealed.

*Held:* That the payment was personal to appellant, made because of the cessation of his office, and not for past services rendered in office and therefore not subject to income tax.

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

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

*G. Monette, K.C.* for appellant.

*F. P. Varcoe, K.C.* and *W. S. Fisher* for respondent.

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

THE PRESIDENT, now (November 2, 1938) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment for income tax levied under the Income War Tax Act, for the 1936 taxation period, against the appellant, formerly Chairman of the Trustees in whom was vested the direction and control of the Canadian National Railways. The assessment here in dispute had its origin in a payment of \$30,000 made to the appellant, by the Canadian National Railways, in October, 1936, in the circumstances which I shall relate

presently. The result of the inclusion of the said sum in the income of the appellant for the taxation period in question was the levy of an additional tax against the appellant, in the sum of \$9,711.92. The appellant contends that the said payment does not constitute "income" within the meaning of the Income War Tax Act. Before stating the facts immediately material to the issue it will be desirable first to refer to certain legislation respecting the Canadian National Railways, its management and direction.

The Canadian National Railways Act, Chap. 172, R.S.C., 1927, provided for the nomination, by the Governor in Council, of a Board of Directors, and their incorporation as a company under the name of "Canadian National Railway Company," to whom was to be entrusted the management and operation of the several lines of railway, and other works and properties, owned or controlled by the Government of Canada, and now collectively designated and known as the Canadian National Railways, hereafter to be referred to as "the Company." All the capital stock of the Company, amounting now, I understand, to 180 million dollars, is vested in the Minister of Finance on behalf of the Crown. In pursuance of this statutory authorization a Board of Directors was named and appointed by the Governor in Council and in due course the said Directors entered upon their duties.

In 1933 there was enacted The Canadian National-Canadian Pacific Act, 1933, Chap. 33 of the Statutes of Canada, 1932-33, which empowered the Governor in Council to vacate all nominations made to the Board of Directors of the Company, pursuant to the Canadian National Railways Act, and to appoint in their place and stead three Trustees, one of whom was to be Chairman of the Trustees, and who was required to devote his whole time to the performance of the duties of his office. The other Trustees were to devote to the performance of the duties of their office their whole or part time as might be determined from time to time by the Governor in Council. The tenure of office of the Chairman was to be for the term of five years from the date of his appointment, and his salary, and that of the other Trustees as well, was to be fixed by the Governor in Council. The Chairman

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of the Trustees apparently was prohibited from becoming a director of any company, other than a company comprised in the Canadian National Railways. In December, 1933, three Trustees were appointed by the Governor in Council in succession to the Board of Directors, the appellant being appointed as Chairman for the period of five years from the date of his appointment, at an annual salary of \$30,000. The salary of one of the other Trustees was fixed at \$6,000 per annum, the third Trustee agreeing to serve without salary. The Act provided that no Trustee should be entitled upon any ground to any "recompense or emolument," that is, in addition to his salary.

In June, 1936, there was enacted The Canadian National-Canadian Pacific Act, 1936, which repealed that part of the Act of 1933 which provided for the appointment of three Trustees in succession to the Board of Directors and empowered the Governor in Council to appoint a Board of Directors in the place and stead of the Trustees. This power was in due course exercised by the Governor in Council with the consequence that the Trustees were succeeded by a Board of Directors, on October 1, 1936. The Chairman was therefore deprived of serving the full tenure of his office by more than two years. It was later agreed by the Company that the Chairman of the Trustees, the appellant, should be paid, and he was paid, the sum of \$30,000, in the circumstances I am about to relate.

It will be necessary now to review at some length certain of the evidence given at the trial practically all of which was directed to showing the character or quality of the payment made to the appellant; that is, whether the payment was received by the appellant as an annual net profit or gain or gratuity from his office or employment as Chairman of the Trustees, or whether it was paid to and received by the appellant by way of compensation for the cessation of his office. My review of the evidence will embrace a great deal that was received subject to objection but I propose to refer to the same, leaving to a later stage a discussion of the admissibility of that evidence received subject to objection. I think this may be done without prejudice to either party, and at the same time it will clearly reveal the issue as to the admissibility of that evidence. When the Act of 1936, authorizing the

termination of the services of the Trustees and replacing them by a Board of Directors was being enacted by Parliament, questions were asked certain Ministers of the Crown as to whether some allowance would be made to the Chairman of the Trustees. What was there stated in answer to such questions was in substance restated by such Ministers at the trial, but as the substance of that oral evidence is to be found in certain documentary evidence, to which I am about to refer, I need not pause to discuss it.

The Minister of Railways, on June 16, 1936, wrote a letter to one of his colleagues, the Honourable Mr. Dandurand, which letter was, through another, transmitted to the appellant. The letter is as follows:

With reference to our conversation about a retiring allowance for Judge Fullerton, I feel disposed to recommend that he be given one year's salary in compensation for the repeal of the Act under which he is employed. This can be paid to him in cash on his retirement, over a period of one year, over a period of two and a half years, which is the balance of his term as Chairman, or at the rate of \$6,000 per annum for five years. In this connection I may point out that upon the date of his retirement he becomes eligible for his retiring allowance as judge, which amounts to \$6,000 per annum.

Any moneys that become payable to him will be payable by the Canadian National Railways and he must be satisfied with my letter to the effect that I will ask the new Board of Directors of the Canadian National Railways to grant him the allowance along the lines for which he may express preference.

On June 20 following Mr. Fullerton wrote the Minister of Railways as follows:

In view of your letter of June 16th addressed to Senator Dandurand and the coming into effect of the Canadian National-Canadian Pacific Act, 1936, you will doubtless wish to have an expression of my desires as to how the compensation of \$30,000 agreed to be paid me should be made.

It would be a great convenience to me if this were paid in cash, and, as I am contemplating taking a trip abroad around the 7th of October, I shall be obliged if you will kindly facilitate the payment by the Canadian National Railways as soon as possible after the directors take office.

The receipt of this letter was acknowledged by the Minister of Railways on September 14, the relevant portion being as follows:

I have your letter of September 12th, and note that you prefer to receive your retiring allowance in one lump sum. I shall endeavour to arrange accordingly.

On September 21, the Minister of Railways wrote Mr. Fullerton in the terms following:

Referring to the question of a gratuity of \$30,000, this is to assure you that upon the Directors assuming office I shall duly bring the matter to their attention.

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The next letter of importance is one from the Minister of Railways, dated September 28, written to the appellant, and it is as follows:

Referring to our conversation at your office last week, our legal officers state that it is very necessary that the wording of the resolution shall be definite in its description of the purpose for which any money is paid to you.

Our Legal Department also states that there can be no doubt that any money paid to you is in fact a gratuity, as no contractual relation exists beyond October 1st, when amendments to the Canadian National-Canadian Pacific Act become effective.

I therefore see no alternative but to follow the advice of my Legal Department and ask the new Board of Directors to pass a resolution in the following form:

"Moved by

Seconded by

That a gratuity of Thirty Thousand Dollars (\$30,000) be paid to the Honourable C. P. Fullerton, formerly Chairman of the Trustees of the Canadian National Railway Company."

In view of the above, you may wish to vary the manner in which payments shall be effected. If so, please advise me.

The form of the resolution, suggested in the above letter, it seems required further consideration and the appellant was so advised by the Minister of Railways, on October 3. The next step taken in the matter was the passage of an Order in Council on October 7, the important terms of which are as follows:

The Committee of the Privy Council have had before them a report, dated October 5th, 1936, from the Minister of Railways and Canals, recommending approval of a sum of \$30,000 being paid by the Canadian National Railway Company to the Honourable C. P. Fullerton, formerly Chairman of the Trustees of the said Company, in relation to his services as Chairman, to be paid to and accepted by him as a remunerative payment subject to income tax.

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

It will be observed that the Order in Council is an approval of the recommendation of the Minister of Railways that the sum of \$30,000 be paid Mr. Fullerton by the Canadian National Railways. On the following day, October 8, the new Board of Directors passed a resolution in substantially the same terms as the Order in Council, and on October 14, a cheque for \$30,000 was forwarded to the appellant accompanied by a voucher for his signature. The voucher, as signed by the appellant, contained the following matter:

In payment of an amount authorized to be paid by the Board of Directors at meeting held October 8th, 1936, in the following terms:

"That a sum of \$30,000 be paid to the Honourable C. P. Fullerton, formerly Chairman of the Trustees of the Canadian National Railway



Company, in relation to his services as Chairman, to be paid to and accepted by him as a remunerative payment subject to income tax." and as per Order in Council P.C. 2589, copy of which is attached hereto.

Received THIRTY THOUSAND DOLLARS (\$30,000) under the above terms which I hereby accept.

C. P. Fullerton.

On receipt of the cheque Mr. Fullerton immediately wrote Mr. Hungerford of the Canadian National Railways as follows:

With reference to the cheque for \$30,000 which was handed to me this morning by Mr. Hobbs, I feel that I should point out that, while I have signed the voucher in the form in which it was presented, it does not set out in clear terms the arrangement which was made by the Minister of Railways regarding this payment. I recognize that your Directors are not likely to alter the wording of the voucher without the approval of the Minister and I am, therefore, taking the matter up with him.

Mr. Fullerton on the same day wrote the Minister of Railways and though this letter is quite lengthy it should perhaps be fully quoted. After a reference to the receipt of the cheque for \$30,000, and the terms of the voucher, the letter proceeds to say:

As I am satisfied the Railway Board of Directors would not vary the terms of the voucher without prior approval from you, and as you will not be back in Ottawa until after I have left Montreal, I have signed the voucher, rather than have my refusal to do so cause delay and perhaps subject my attitude to misunderstanding while I am no longer present in Canada. I have, however, to point out that the wording of the voucher while correct as to amount, and because of that enabling me to accept the cheque, does not clearly state the arrangement made with me when the matter of compensation was under consideration by both of us. This arrangement, in my view, is solely one of fact and should present no difficulty in stating.

There seems, however, to be some concern lest the payment made to me should be free from income tax, but personally I do not share this concern. I have always paid income tax to the full extent of my obligations, and I hope to continue to do so. I am not interested in any device to avoid tax where it is due, and if the circumstances of this payment to me are such that the payment is subject to tax, the tax will be promptly and cheerfully paid. It seems to me completely unnecessary to invoke the machinery of the Privy Council to declare this, or any other payment by Canadian National Railways to be subject to tax. Settlement of liability to taxation by this method would very quickly render our courts of law unnecessary and leave the construction of our taxing statutes entirely a matter for the Governor General in Council.

I think, therefore, that questions of law should be omitted from the resolution, the voucher, and the Order in Council, and that if it is considered necessary to detail the circumstances giving rise to the payment this should be done simply and in clear language setting out the facts. If no agreement can be reached as to these—and I am unable to understand why—then nothing should be said, my view being that no information is better than indefinite information which might easily give rise to misunderstanding.

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What then are the facts? I think it will be conceded that but for the passing of the Canadian National-Canadian Pacific Act of this year, no payment of this nature would have been made. If this is so, then the payment is made because of the effect this Act has had on me and my livelihood. The payment obviously is not made by virtue of the old Act which expressly prohibits interference with the terms on which Trustees were appointed, and so it cannot be considered as a bonus made in the ordinary course of the Company's business. Further, it is difficult to see its relationship to my services as Chairman when the fixed emoluments had already been paid to me for such services, and at the time of this payment I was no longer in the service of the Railway Company. The best definition of the reason for making the payment is to be found in a letter by yourself to Senator Dandurand and afterwards relayed to me. In this letter you say that it is "in compensation for the repeal of the Act under which he is employed." That this was no inadvertent remark is clear from the letter and also Senator Dandurand's letter transmitting your intention and letter to Senator Meighen in which he uses the words "touching the compensation which the Minister of Railways expressed himself as disposed to allow Judge Fullerton." Senator Meighen understood the payment to be a compensatory one for in a letter to me dated June 17, he refers to "the compensation to be allowed by reason of the passage of a measure abolishing the Board of Trustees." I submit very respectfully that where you yourself, Senator Dandurand, Senator Meighen and myself find ourselves in such complete unanimity as to the reason for paying me \$30,000, there should be no hesitancy in disclosing it and certainly no resort should be had to words whose apparent meaning indicates something different.

As you were in the West at the time the Order in Council was passed, I am strongly of the view that your instructions have not been strictly complied with, but I have formally to request that the Order in Council be amended to show clearly the compensatory nature of the payment because of the passage of the Canadian National-Canadian Pacific Act, 1936, or, if for any reason you do not wish to do this, then, that the payment be described simply as a gratuity to me as ex-Chairman of the Board of Directors.

It is presently unnecessary to comment on the foregoing documentary evidence, which is fairly plain, but I might point out that the proposed payment is therein variously described. It was designated as "compensation for the repeal of the Act under which he is employed," as "an allowance," as "compensation," as "a retiring allowance," as a "gratuity," and finally, at the time of payment, as "a remunerative payment subject to income tax."

It was contended on behalf of the respondent that it is the terms of the resolution passed by the Board of Directors and embodied in the voucher signed by Mr. Fullerton, on the day of payment, that alone may be looked at in order to ascertain the nature of the payment, because, it was said, it expressed the understanding of the payer and the recipient at the time of payment; and objection was taken

to the reception of any other evidence, particularly that portion of the documentary evidence to which I have just referred and which is anterior in point of date to the voucher and the payment. At the trial I received this evidence subject to objection, reserving the right to rule later as to its admissibility. Now, in my opinion, this is hardly a case where it is sought to vary the terms of a contract expressed in writing. It was agreed by counsel that there was not at any stage a contract to make the payment in question, but a payment was made, and now the only issue is as to the true nature of the payment, in order to determine whether or not the same was received as "income" under the Income War Tax Act. The issue is whether the payment was a personal one, or whether it came to the recipient by virtue of his office or employment. The evidence received subject to objection was introduced on the ground that the true nature of the payment was not clearly or accurately expressed in the resolution of the Board of Directors and so it was sought, on behalf of the appellant, to show the reason for making the payment at all, the circumstances leading up to the decision to make the payment, and what quality or nature the parties concerned were attributing to the proposed payment, up to the time of the actual payment. It seems to me that in all the circumstances of the situation here such evidence is admissible. In reported cases of the very kind now under consideration I find that it is usual to have before the court evidence of all the circumstances attending such payments for the purpose of ascertaining their true character, in order to determine whether the same was received as "income," or otherwise. I do not think therefore that the evidence in question should be excluded.

It has been frequently remarked by the courts that cases of this kind are in their nature difficult because they all turn upon nice questions of fact, because it is difficult to draw a line between questions of fact and questions of law, and because it is frequently difficult to fix upon any clearly defined line of division between payments which fall within the scope of the taxing statute, and those which do not. The leading authorities upon the point in debate here are to be found mentioned at one stage or another in the case

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of *The Commissioners v. Foster, Foster and Dewhurst* (1).

Sec. 3 of the Income War Tax Act defines "income" as meaning "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, . . . directly or indirectly received by a person from any office or employment, or, . . ." The English authorities to which I was referred seem to decide that if the sum in question is received by the taxpayer in virtue of his office, even if the payment is made voluntarily, the same is taxable, but if it is a gift, a gratuity, a payment personal to the taxpayer and not his office, a payment in respect of the cessation of his office, a payment in the nature of capital and non-recurring, it is not taxable as a profit or gain of the office, because it is not "income" received from the office. On reflection, the reason for such a distinction will, I think, appear quite obvious. The test as to whether payments of the nature in question here are taxable is frequently put in this way: Was the payment made to the subject in virtue of his office? If it were it is taxable, but otherwise it is not taxable as "income." I do not think there is any substantial distinction between the English Income Tax Act, and the corresponding Canadian Act, in respect of the point falling for determination here.

In such a case as this, it will be agreed, I think, that it is to the substance and not the form of matters pertaining to the payment that we must look, in order to ascertain the true facts of the case, or the real character of the payment, before applying the law. It is also, I think, immaterial how the payment was designated or described by any or all of the parties concerned therewith; it is the true nature of the payment that is to be ascertained; and that is but to inquire in this case whether the payment was made in respect of services rendered by the Chairman of the Trustees while in office, or whether in fact it was made because of the cessation of his office. In the case of *The Commissioners v. Dewhurst* (2), Lord Dunedin said that the mention of the words "in consideration of loss of office" could not be allowed to make a change in the true nature of the payment which was there in question, and

(1) (1932) 16 Tax Cas. 605.

(2) (1932) 16 Tax Cas. 640.

in the same case Lord Macmillan said that the circumstance that a payment was described as "compensation for the loss of office" was immaterial, and did not relieve the taxpayer, if the payment were in truth made as part of the bargain for remuneration on which the services in the office had been rendered. In the case of *Cooper v. Blakiston* (1), the payments in question were described as "personal non-official free will gift," and in his discussion of that case Buckley L.J. said: "I suppose that the object of those words was to suggest that the gift was not to the vicar as vicar, but to him personally; but I do not think that those words represent the scheme which was presented to those who were asked to contribute." In the end, in cases of this kind, it is always the real nature of the payment that is to be ascertained. Furthermore, the character which the payer attributes to the payment is not to be accepted, and the viewpoint of the recipient ignored. It was stated by Collins M.R., in *Herbert v. McQuade* (2) that the test was whether, from the standpoint of the person who received the payment, the payment accrued to him in virtue of his office, and Buckley L.J., in *Cooper v. Blakiston, supra*, stated that the question is not what was the motive of the payment but what was the character in which the recipient received it? Was it received by him by reason of his office? I should think that in principle it is safe to say that, in cases of this kind, the viewpoint of him who makes the payment is not conclusive, and he cannot determine the true character of the payment merely by his understanding of the reason or ground for making the payment.

This case would occasion no serious difficulty were it not that the payment proposed to be made to Mr. Fullerton was described in the resolution of the Board of Directors of the Company as "a remunerative payment subject to income tax," and to be paid "in relation to his services," as the former Chairman of the Trustees; even that perhaps would raise no serious difficulty were it not for the fact that Mr. Fullerton signed a voucher, concurrently with the receipt of the payment, which in effect states that he accepted the payment under the terms of that resolution.

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(1) (1907) 2 K.B. 688.

(2) (1902) 4 Tax Cas. 489 at 500.

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The Minister of Railways in his letter of September 28, to Mr. Fullerton, places emphasis on the fact that the proposed payment must be treated as a gratuity, because no contractual relation would exist between the Company and Mr. Fullerton after October 1, and in that letter is contained a form of resolution which the Minister proposed asking the Directors of the Company, the successors to the Trustees, to pass, and therein the proposed payment to Mr. Fullerton is described as a "gratuity." Then the Minister of Railways in his letter of October 21, to Mr. Fullerton, after the payment was made, explaining why a change had been made in the proposed resolution, states that some objection had been raised to the "form" of that draft of the resolution, and one might fairly infer therefrom that the Minister considered that the departure from the resolution originally proposed was one of "form," and not one of substance. I am disposed to think that the view of the Minister of Railways always was that the payment was being made to Mr. Fullerton because of the cessation of his office. But the resolution is so drafted as to make it appear that the payment was to be made on account of the former services of Mr. Fullerton as Chairman of the Trustees. It seems to say: "We are paying you \$30,000 but this payment is to be accepted by you as having been made on account of your former services as Chairman of the Trustees." I think it is probable that the words "subject to income tax" were used from an abundance of caution in order to amplify or clarify the words "a remunerative payment," that is to say, the words "subject to income tax" were used with the intention of making it indisputably clear that the payment was to be made as remuneration for services rendered while in office. In fact, the words "remunerative payment," by themselves, would carry no particular meaning. The resolution must mean that the payment was being made for services rendered while in office, and if this were in fact true the payment would, I apprehend, be treated as "income" under the taxing statute. It is difficult to believe that the Directors of the Company, in the use of the words "subject to income tax," would be deliberately concerning themselves about the imposition of the income tax. Whatever construction be placed upon the resolution the question for decision is whether the payment received

by Mr. Fullerton was "income" within the meaning of the Income War Tax Act. The taxing authorities are bound by the provisions of that Act in determining what is assessable income.

The office of Chairman of the Trustees was abolished by statute and it became illegal for the Company to continue Mr. Fullerton in that office, or to pay him any salary, and it became impossible for Mr. Fullerton to exercise his office, or to demand any compensation for the loss of his office. Consequently, on September 30, 1936, he was no longer entitled to be paid a salary or remuneration, on account of his former office. And s. 5 (2) of the Act of 1933 setting up the Board of Trustees provided that no Trustee was entitled, upon any ground, "to any recompense or emolument," in addition to his salary. If a sum of money is paid to an incumbent of an office, substantially in respect of his services as incumbent, it is received by him by reason of his office, and that probably would be also true if the payment were made after he ceased to occupy his office but in pursuance of a contract or bargain made while he was still in office, in respect of remuneration for services to be performed. Now, it cannot be said, in my opinion, that in point of fact the payment was made to Mr. Fullerton for services rendered in his office, because for such services he had been paid already the salary attaching to his office, up to the time when the office ceased to exist. And there is nothing to suggest that the payment was made in pursuance of any contract or bargain made while he was in office. Neither do I think it can be said that the payment was made in respect of the office, because, just as was said by Lord Dunedin in *Duncan v. Farmer* (1), the only possible ground or justification for the payment made to Mr. Fullerton was that he was no longer in office, and because his office had ceased to exist. What then is the true nature of the payment? To that question I have given anxious thought and I find myself utterly unable to see how it can be said that the payment was anything but a gratuity, personal to Mr. Fullerton, paid him because he was no longer in office, and because of the cessation of his office more than two years before the end of the period for which he was appointed. The fact that the office was

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(1) (1909) S.C. 1212; 46 Sc. C.L.R. 857; 5 Tax. Cas. 417.

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one of importance and responsibility, that the payment was made on the termination of the office, and that the amount of the payment to the former Chairman of the Trustees was very substantial, are strong indications that the payment was personal to Mr. Fullerton and not on account of past services rendered by him while in office; another indication of this might be mentioned and that is the fact that s. 7 of the Act of 1933 provided that "no Trustee shall be removed from office, nor suffer any reduction in salary, during the term for which he is appointed, unless for assigned cause and on address of the Senate and House of Commons of Canada." Notwithstanding the terms of the resolution and voucher, it is not, in my opinion, in accord with the facts to say that the payment was made to Mr. Fullerton on account of past services rendered by him in his office.

I do not think that the taxing authorities can construe as "income" that which is erroneously described as such, even by the parties concerned, if in fact it is not "income" under the terms of the taxing Act. The words "subject to income tax" cannot be construed as giving a quality to a payment or receipt of money, which in point of fact cannot be attributed to it. The appropriate statute defines what is "income," for income tax purposes, and one cannot give to "income" a meaning contrary to that given by the statute. It is to the real nature of the payment that the taxing authorities, and the courts, in cases of this kind, must look. I have earlier referred to highly regarded authority for the proposition that it is always the true nature of the payment to which the courts must look in determining whether or not a receipt of money is "income" derived from "any office or employment." The resolution of the Directors of the Company, and the voucher, not being truly descriptive of the nature of the payment, they fall and have no meaning or place in the controversy between the revenue authorities and Mr. Fullerton, and they do not afford any basis for the claim that the receipt of the payment was "income" in the sense of the statute. If the voucher is to be construed as an agreement to pay the income tax on the amount received, whether or not it was exigible under the Income War Tax Act, then, it seems to me that any claim to the amount of the tax is one to be enforced like any other contractual obligation.



My conclusion is that the payment in question was personal to Mr. Fullerton, and was made because of the cessation of his office, and is not therefore taxable income. The appellant must therefore succeed and costs will follow the event.

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*Judgment accordingly.*

BETWEEN:

W. J. McCART & COMPANY }  
LIMITED .....

SUPLIANT;

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Nov. 12.

AND

HIS MAJESTY THE KING.....RESPONDENT.

*Revenue—Customs Act, R.S.C., 1927, c. 42, as amended by 21 Geo. V, c. 2, s. 4—Value of goods imported into Canada as fixed by the Governor in Council is not to be determined in terms of currency of the country of export.*

*Held:* That s. 43 of the Customs Act, R.S.C., 1927, c. 42, as enacted by 21 Geo. V, c. 2, s. 4, granting the Governor in Council the right to fix the value for duty purposes of certain goods imported into Canada does not authorize the fixing of such value in the terms of the currency of the country of export.

PETITION OF RIGHT by the suppliant claiming a declaration that certain duties collected by the Minister of National Revenue were collected without authority and that the same be returned to suppliant.

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

*G. G. Plaxton, K.C.* and *J. S. Wright* for suppliant.

*R. S. Robertson, K.C.* and *C. W. Livingston, K.C.* for respondent.

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

THE PRESIDENT, now (November 12, 1938) delivered the following judgment:

The suppliant here is a wholesale deal in fruits and vegetables, carrying on business at Toronto, Ontario, and was an importer of such products from the United States at the time material here. It seeks by this petition of right to recover from the Crown certain sums of money which it paid as customs duties upon certain importations of such classes of goods from the United States, and which payments it alleges were in excess of any properly authorized duties.

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In 1930, s. 43 of the Customs Act was so amended as to read as follows:

(1) If at any time it appears to the satisfaction of the Governor in Council on a report from the Minister that goods of any kind not entitled to entry under the British Preferential tariff or any lower tariff are being imported into Canada either on sale or on consignment, under such conditions as prejudicially or injuriously to affect the interests of Canadian producers or manufacturers, the Governor in Council may authorize the Minister to fix the value for duty of any class or kind of such goods, and notwithstanding any other provision of this Act, the value so fixed shall be deemed to be the fair market value of such goods.

(2) Every order of the Governor in Council authorizing the Minister to fix the value for duty of any class or kind of such goods, and the value thereof so fixed by the Minister by virtue of such authority, shall be published in the next following issue of the *Canada Gazette*.

In September of 1930, and in February and April of 1931, the Governor in Council, by three different Orders in Council, made under the authority of the said section 43 of the Customs Act, authorized the Minister of National Revenue to fix the value for duty of certain mentioned goods, fruits and vegetables. The three Orders in Council were similar in form and one, which I quote for the purpose of illustration, was as follows:

Whereas the Minister of National Revenue reports that carrots are being imported into Canada under such conditions as prejudicially or injuriously to affect the interests of Canadian producers thereof;

Therefore His Excellency the Administrator in Council, on the recommendation of the Minister of National Revenue, and under the authority of section 43 of the Customs Act, chap. 42, R.S.C., 1927, and amendments thereof, is hereby pleased to authorize the Minister of National Revenue to fix the value for duty of the above mentioned product, notwithstanding any other provisions of the Customs Act; the value so fixed to be deemed to be the fair market value thereof.

In pursuance of the authority conferred upon the Minister of National Revenue by such Orders in Council, the Minister proceeded from time to time to fix, in writing, the value for duty of certain named goods, in the case of fruits and vegetables at so many cents per pound, and this would be communicated to customs and excise officers throughout Canada, by what are called "Appraisers' Bulletins" signed by the Commissioner of Customs, or the Assistant Commissioner of Customs. From time to time the Minister would order, in writing, that a value fixed for duty by him on certain named goods would be cancelled on a future date named; this would be done without any authorization of the Governor in Council. Later, and without any renewed authorization of the Governor in Council, the Minister would again fix the value for duty of the

same goods, presuming to act under the authority of one or other of the Orders in Council which I have mentioned.

On November 3, 1931, there was issued to customs and excise officers, at the instance of the Commissioner of Customs, an Appraisers' Bulletin, advising them "that in computing the value for duty of articles upon which the value has been fixed by the Minister, under section 43 of the Customs Act, such values are to be considered as fixed in terms of the currency of the country of export, to be advanced by the amount of the premium at the rate of exchange current at the date of shipment. If the selling price to the purchaser in Canada in the currency of the country of export, or its equivalent in Canadian currency at the rate of exchange current at the date of shipment, is less than the value for duty as computed above, special or dumping duty, is applicable." This Bulletin was not expressed to be issued under the authority of any Order in Council passed under s. 43 of the Customs Act, and it does not appear that the same was authorized by the Minister, at least there is no evidence of any such authorization. The obvious effect of this ruling, when American funds were at a premium, was to add to the duty value of importations from the United States, as fixed by the Minister under s. 43 of the Customs Act. This is illustrated in the Bulletin where it is pointed out that if the fair market value and the selling price in the country of export were \$100, and the value fixed by the Minister were \$150, and the premium on American funds were 10 per cent, the value for duty would be \$150 plus \$10 per cent., \$165. In the calculation of what is known as the "dumping duty" the matter of the rate of exchange between the importing and the exporting country would be of importance to importers but I do not think any useful purpose would be served by any reference to that phase of the case.

It was the submission of the suppliant that the values for duty fixed by the Minister in his several orders were values fixed in pursuance of s. 43 of the Customs Act, and that the Departmental ruling to the effect that such values were to be considered as fixed in terms of the currency of the country of export, and that the values fixed by the Minister were "to be advanced by the amount of the

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premium at the rate of exchange current at the date of shipment," was in effect the imposition of an additional tax upon importations, unauthorized by the Customs Act or any other Act, or by the Minister of National Revenue, and was an unauthorized ruling of the Commissioner of Customs. The suppliant, being obliged to receive prompt possession of its importations of fruits and vegetables from the United States paid the additional duties exacted by reason of the issue of the Departmental Bulletin in question, now claims that it paid duties in excess of those properly exigible and by its petition seeks to recover back such excess payments on the ground that such Bulletin issued without lawful authority. It was agreed by counsel that if I decided that the addition of the premium in the exchange rate referable here, to the value for duty fixed by the Minister, were unauthorized, then the suppliant would be entitled to recover the sum of \$1,449.49, which amount is to be found in an exhibit put in evidence.

More than one point was raised by Mr. Plaxton in his attack against the validity of the imposition of the additional or excess duties paid by his client by virtue of the ruling of the Department of National Revenue that the value for duty fixed by the Minister was to be treated as fixed in the terms of the currency of the country of export, and that the values for duty fixed by the Minister in respect of the suppliant's importations were to be advanced by the amount of the premium on United States funds current at the date of shipment. A very formidable point of attack made at the outset of the case was that, in some instances, the values for duty fixed by the Minister, and cancellations of the same, were not published in the *Canada Gazette*. However, this point was not in the end pressed, because, I assume, Mr. Plaxton was of the view that his legal position was otherwise so strong that he thought it unnecessary to rely upon that ground. I need not therefore pause to discuss that point.

Another point raised by Mr. Plaxton was that once the Minister fixed the value for duty upon the articles or goods specifically mentioned in each Order in Council he was without authority to fix again, at a subsequent date, the duty value of the same articles or goods, after a cancellation of the values fixed by him in the first instance, that

is to say, that if the Minister once fixed the value for duty of specific articles or goods, under the authority of an Order of the Governor in Council, and later cancelled the same—which was frequently done—it would require the authority of another Order in Council to clothe the Minister with the authority to fix again the value for duty of the same goods. There is much force in such a contention. It is conceivable that at the date when the Minister assumed to fix, for the second or third time, the value for duty of specific goods, the Governor in Council might entertain a different view about the subject-matter from what he did when an Order in Council was passed in respect of the same goods. This ground of attack was met by Mr. Robertson by saying that the Minister once having been given the authority to fix the value for duty of certain named goods that authority stood until the same was appropriately repealed, and that the Minister was free to cancel from time to time any values fixed by him, and to restore the same either modified or unmodified. It will be remembered that the authorization of the Governor in Council to the Minister was not expressed as being applicable to “a class or kind of goods,” but to specifically named goods of “a class or kind,” that is, certain named vegetables or fruits, not all fruits or vegetables. I am inclined to think that from the practical viewpoint much is to be said for Mr. Robertson’s contention, and perhaps it would have been unanswerable if the Orders in Council had been expressed in more general terms. When power is granted to the Governor in Council to authorize a Minister of the Crown to fix the value of imported goods for duty purposes, which in the result is in the nature of a tax, it is imperative that such authorization be very strictly construed. There can be no taxation by the Government of Canada except under the authority of an Act of the Parliament of Canada, but if the Parliament of Canada vests in the Governor in Council the power to authorize a Minister of the Crown to impose a tax in the form of a duty, upon an importer, that authority must be exercised strictly within the limits of the power granted. While I am rather inclined to accept the view advanced by Mr. Plaxton, that the Minister having once exercised his authority to fix the value of specific articles for duty purposes it

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would require fresh authorization from the Governor in Council to fix another value at another period, if the value earlier fixed had been cancelled, yet, I do not propose to express any definite opinion upon the point. I find it difficult to believe that it was ever intended by the legislature to grant to the Governor in Council the power to confer authority upon the Minister to fix the value for duty, to cancel the same, and later to fix another value, without fresh authorization. The point is an extremely difficult one, and it is because it is my view that the case may be disposed of upon another ground that I refrain from expressing any definite opinion upon it.

I turn therefore to what is the most important aspect of the case, that is, whether s. 43 of the Customs Act, or the Orders in Council, clothed the Minister with power to make any order or direction to the effect that the values for duty fixed by him were to be considered as fixed in terms of the currency of the country of export. Sec. 43 of the Customs Act, and the Orders in Council, are silent altogether upon the question of the appreciation of the currency of the country of export, or, of the event that the rate of exchange between the exporting country and Canada, was adverse to the latter. The Customs Act, and I think the Customs Tariff Act, had already provided for the case where the currency of the country of export was substantially depreciated, and one can readily understand the reason for such a provision. At the time of the enactment of s. 43 the American dollar and the Canadian dollar were substantially on a parity, and it was only after England went off the gold standard that the American dollar became appreciated in terms of the Canadian dollar, the premium, if I remember correctly, sometimes reaching over 20 per cent, which of itself would substantially add to the cost of any dutiable goods purchased in the United States for export to Canada. That situation or state of facts could hardly "prejudicially or injuriously" affect the interests of Canadian producers, in the sense contemplated by s. 43 of the Customs Act. Sec. 43 being silent about the question of appreciated currency in the country of export, the Orders in Council being equally silent, the Customs Act having provided for the event of depreciated currency in the country of export, I have no difficulty in

reaching the conclusion that it was never intended by s. 43 to empower the Governor in Council to authorize the Minister to direct that in fixing the duty value of certain imported goods, such values were to be treated as being fixed in terms of the currency of the country of export.

It is plain, I think, that s. 43 was designed to meet the contingency of unfavourable marketing conditions in Canada for certain domestic products, a situation that was calculated "prejudicially or injuriously to affect the interest of Canadian producers or manufacturers," and that section was intended to give to the Minister, if and when authorized by the Governor in Council, the arbitrary power of fixing the value for duty of imported goods of the same class, if the contingency feared, occurred or was likely to occur. If he exercised that authority by fixing a value or values that would be the end of his authorization, and to that he could not add. The values fixed by the Minister, were, I think, expressed in terms of Canadian currency, and nothing else, in my opinion, was ever contemplated. It is utterly untenable, I think, to say that the values fixed by the Minister were to be considered as fixed in terms of the currency of the country of export. I see no ground for thinking that the legislature ever intended to give power to the Governor in Council, or to the Minister, or to any one, to expand the authority expressed in s. 43, contemplated by the legislature. There does not seem to be any authority for saying that the value fixed for duty, by the Minister, was to be treated as fixed in the terms of the currency of the country of export, when the rate of exchange was adverse to Canada. It is very significant that there is no mention whatever of the appreciation or depreciation of any currency, in any of the Orders in Council, and one may assume that this was not accidental, but rather due to a strict observance of the language of s. 43 of the Customs Act.

There is nothing in the record of this case to indicate, so far as I can find, that the Minister ever directed or approved of any Appraisers' Bulletin instructing customs and excise officers that the value of any goods fixed by the Minister under s. 43 was "to be advanced by the amount of the premium at the rate of exchange current at the date of shipment." I am bound to assume upon the

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evidence before me that the Minister never made such a direction, or ever approved of the Appraisers' Bulletin issued in this connection, to customs and excise officers. That the Commissioner of Customs could not impose taxation, or advance the value of goods fixed by the Minister under s. 43, or deal in any way with the subject of appreciated currency in exporting countries, without legislative authority, is too elementary for serious discussion. And my attention has not been called to any authority bestowing such a power upon the Commissioner of Customs.

The remaining question for decision is whether or not the suppliant complied with the requirements of s. 125 of the Customs Act. That section provides that "although any duty of customs has been overpaid, or although, after any duty of customs has been charged and paid, it appears or is judicially established that the same was charged under an erroneous construction of the law, no such overcharge shall be returned after the expiration of three years from the date of such payment, unless application for payment has been previously made." The suppliant, I think, through its authorized customs broker, made claims, orally and in writing, for a refund of the alleged excess of duties paid upon the goods in question. And in fact some refunds were made to the suppliant, and to others, I understand. There came a time, however, when the National Revenue Department definitely decided to make no further refunds in respect of such cases as this, and accordingly the customs authorities at Toronto declined even to receive any formal application for a refund. The suppliant's customs broker, I am quite satisfied, promptly made oral claims in respect of every importation in which the alleged excess duty was paid, and he attempted to lodge with the customs authorities at Toronto a written claim in respect of each importation and payment, in the form usual in such cases, but their reception was declined, which one can quite understand the customs authorities at Toronto doing, in view of the decision of the Department of National Revenue not to entertain any further claims of such a character. The written and formal claims to refunds, were, physically offered to the customs authorities at Toronto, perhaps not wholly complete, but they would at the moment have been made complete, if it had not been



intimated that they would not in any event be received or entertained. I do not think there is any substance in the contention of the Crown to the contrary upon this point.

There will therefore be judgment for the suppliant in the sum of \$1,449.49, and costs will follow the event.

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*Judgment accordingly.*

BETWEEN:

BESSIE L. SHAW ..... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE.. RESPONDENT.

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*Revenue—Income tax—Income War Tax Act, s. 3 (b), s. 5 (k)—“Income from but not the proceeds of life insurance policies”—“Income”—Liability for tax.*

The Sun Life Assurance Company of Canada issued a policy of insurance upon the life of appellant's husband, appellant being named the owner and beneficiary therein. The policy was described as “Guaranteed Income Life—Monthly Instalments—Annual Dividend Plan” and provided that on the death of the assured the company would pay to the beneficiary mentioned therein “the sum of Seven Hundred Dollars and a like monthly instalment on the same day in each succeeding month until one hundred and twenty monthly instalments in all shall have been paid . . . The company further agrees that if the beneficiary . . . shall still survive after the payment in full of the one hundred and twenty monthly instalments . . . the company shall continue to pay to the said beneficiary the sum of Seven Hundred Dollars monthly on the same day in each month . . . so long as she may survive thereafter; . . . It is further agreed that when the first instalment under this policy becomes due, as above, the person or persons legally entitled to receive said first instalment shall have the option of commuting all instalments into a single cash payment of Seventy-One Thousand Four Hundred Dollars and the payment of this amount shall completely discharge the company from all liability in connection with this contract.”

Appellant, upon the death of the assured, did not elect to accept the cash payment of \$71,400, and the monthly instalments stipulated in the contract have been paid to and received by her since that time. In the year 1934 she received the sum of \$8,400 which was assessed for income tax. The assessment was affirmed by the Minister of National Revenue from whose decision appellant appealed.

*Held:* That such monthly payments constitute “income” and appellant is liable for tax thereon.

2. That the contract herein is not like the annuity contracts mentioned in s. 5 (k) of the Act and the appellant is not entitled to any exemption or deduction.

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

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

*I. F. Hellmuth, K.C.* and *H. C. F. Mackridge* for appellant.

*F. P. Varcoe, K.C.* and *J. R. Tolmie* for respondent.

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

THE PRESIDENT, now (November 23, 1938) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment for income tax levied against the appellant under the Income War Tax Act, for the 1934 taxation period. The pleadings and a Statement of Admitted Facts disclose that the appellant is the widow of the late Mr. G. B. Shaw, of Toronto, who died on or about November 23, 1933; and that before the decease of Mr. Shaw a policy of insurance was taken out on his life, with the Sun Life Assurance Company of Canada, upon the application of his wife, the appellant, who paid the annual premiums thereon, amounting to \$6,265, except that all dividends earned by the policy during the lifetime of the husband were from time to time, on the election of the appellant, applied in reduction of the annual premium. The contract of insurance provided that the appellant should be paid, on the death of her husband, the sum of \$700 per month for a guaranteed term of one hundred and twenty consecutive months, and should she survive that term she was to be paid the same monthly instalment so long as she lived, but she had the option of commuting all such monthly instalments into a single cash payment of \$71,400.

The principal provisions of the contract are brief and had better be recited. They are as follows:

Sun Life Assurance Company of Canada hereby agrees that on receipt and approval at its Head Office in Montreal of the proofs of the fact and cause of the death of GEORGE BALDWIN SHAW of Toronto, Ontario (herein called the assured) and of the title of the claimant, it will pay to BESSIE LOUISE SHAW (herein called the owner) (herein called the beneficiary) the sum of SEVEN HUNDRED DOLLARS and a like monthly instalment on the same day in each succeeding month until

one hundred and twenty monthly instalments in all shall have been paid.

Each instalment payable by the Company under this policy shall be paid to the said BESSIE LOUISE SHAW.

The Company further agrees that if the beneficiary above described by name shall still survive after the payment in full of the one hundred and twenty monthly instalments mentioned above, the Company shall continue to pay to the said beneficiary the sum of SEVEN HUNDRED DOLLARS monthly on the same day in each month as that on which the preceding instalments became due, so long as she may survive thereafter; provided always that satisfactory proof in writing be furnished to the Company that the said beneficiary be still living at the time each such subsequent payment becomes due, and in default of such proof, no further payment (fractional or otherwise) shall be made.

It is further agreed that when the first instalment under this policy becomes due, as above, the person or persons legally entitled to receive said first instalment shall have the option of commuting all instalments into a single cash payment of SEVENTY-ONE THOUSAND FOUR HUNDRED DOLLARS and the payment of this amount shall completely discharge the Company from all liability in connection with this contract; provided always that this option cannot be exercised by the beneficiary or payee unless the owner shall have filed with the Company a written request to that effect, or shall have so expressed his desire by will.

The insurance policy is described at the foot of the first page, and in the endorsement on the back, as "Guaranteed Income Life—Monthly Instalments—Annual Dividend Plan." The policy was to participate in profits at the expiration of each year from the date on which the first premium fell due, and such profits were to be allotted to the policy in one of four forms, one of which was "as a reduction of the premium for the ensuing year." Dividends accrued under the policy in the aggregate sum of \$6,815.15 and were applied in reduction of the annual premiums from time to time, from the date of the contract until the death of Shaw, some six or seven years thereafter. The appellant did not, upon the death of her husband, elect to exercise the option of commuting the monthly instalments into a single cash payment of \$71,400, and consequently the monthly instalments stipulated in the contract have been paid to and received by the appellant since the death of her husband. In the year 1934 she received the sum of \$8,400, which was assessed for the income tax, and the appeal herein is in respect of such assessment.

There are two points for decision in the case. First, is the sum of \$8,400, the annual amount of the monthly instalments, subject to the income tax, in addition to the

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other income of the appellant from other sources, and secondly, if this amount is to be treated as taxable income is it subject to a deduction of \$5,000, or \$1,200, or any sum?

The relevant section of the Income War Tax Act in this dispute is s. 3 and ss. (b). Together they read as follows:

For the purposes of this Act income means the annual net profit or gain or gratuity . . . , and also the annual profit or gain from any other source including (b) the income from but not the proceeds of life insurance policies paid upon the death of the person insured, or payments made or credited to the insured on life insurance endowment or annuity contracts upon the maturity of the term mentioned in the contract or upon the surrender of the contract.

It is evident that s. 3 (b) contemplates the taxation of "income" derived from life insurance policies or annuity contracts. In this case we are concerned with a life insurance policy or contract, the main provision of which provided that if the appellant survived her husband she would be entitled to a monthly payment of \$700, for one hundred and twenty consecutive months, and similarly so long thereafter as she continued to live. The payment of one hundred and twenty instalments was guaranteed and in respect of those instalments the appellant is described in the policy as the "owner," and therefore she could dispose of the same as she might any other property which she owned. The policy itself, as I have already pointed out, is described by the company issuing the same as "Guaranteed Income Life," payable in monthly instalments, and the policy was entitled to participate in profits after the end of the first policy year and during the lifetime of the assured, all of which means that if the appellant survived her husband she was to be paid, as owner, a monthly sum of \$700, for one hundred and twenty months, and if she survived that period the insuring company agreed to pay her the same monthly instalment so long as she lived.

The taxable "income" referred to in s. 3 (b) whatever it may comprise, provides for no exemption or deduction, but the section, for the purposes of clarity and greater certainty states that certain payments or receipts, flowing from life insurance policies or annuity contracts, are not to be included as "income" within the meaning of s. 3 (b). In the first place the proceeds of a life insurance policy paid upon the death of the person insured are not to be construed as income; such proceeds are to be regarded as capital and not income, in the hands of the recipient. In

the next place payments made or credited to the insured on "life insurance endowment or annuity contracts" upon the maturity of a term or terms mentioned in the contract are not to be treated as "income." This may be illustrated by reference to a life insurance endowment contract where, for example, the face of the policy was \$5,000, but at the end of a stated term the payments to be made or credited to the insured under the policy, or to a beneficiary, might, by reason of the accumulation of profits, reach the sum of say \$7,000; in that case the payment or credit of the accumulation of profits, \$2,000, is not to be treated as "income," at least that is my view in such a case. That illustration would be applicable to life insurance annuity contracts if similar payments or credits were made, or earned, and the words of the section read "life insurance endowment or annuity contracts." That is the kind of payment or credit to which, I think, the section refers. Payments made or credited to the insured here mean, I think, a distribution of profits at the end of a term or terms, or a payment made on the surrender of a policy, neither of which would be income within the meaning of s. 3 (b).

Now, was the \$8,400 received by the appellant in the 1934 taxation period "income" from the insurance policy in question here? It was not, I think, the proceeds, or a part of the proceeds, of the policy. The appellant might have commuted the monthly instalments or income, surrendered the contract, and received a single cash payment of \$71,400, which, I think, would be the "proceeds" of the life insurance policy. But the appellant did not exercise her option to do this and therefore the insuring company at once commenced to pay to her, on the death of her husband, the monthly sum of \$700, as it was obligated to do. Some \$43,000 had been paid in the way of premiums to ensure the payment of this monthly income to the appellant, upon the death of her husband. It matters not whether the obligation of the insuring company be called a life insurance annuity contract or a plain annuity contract. We are here concerned only with the true nature of the insurance contract in question and particularly the nature of the payments made thereunder to the appellant; the contract required the insuring company to pay to the

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appellant a fixed monthly sum if she survived her husband, virtually for the balance of her life, and the question is whether or not that is "income" from a life insurance annuity contract. We need not really be concerned about the words "payments made or credited to the insured," because in point of fact no payments were ever made or credited to the insured, and therefore no difficulty arises on that account. In this case any dividends or profits paid or credited on the maturity of any term, went in reduction of the annual premium payable by the appellant.

The words "payments made or credited to the insured" do not therefore, in my opinion, occasion any real difficulty here, and do not seriously enter into the debate. Further, this is not a case of the surrender of a life insurance contract. It seems to me that this insurance contract was entered into expressly for the purpose of giving the appellant a monthly income during her life, in the event of her surviving her husband, and really that is what the contract states. That is the sense and real purpose of the contract. The appellant did not elect to take the proceeds of the policy, the capital worth of the policy, she preferred to take the income. I think therefore that such monthly receipts constitute "income," and that the appellant is subject to the income tax upon the monthly instalments received by her in 1934.

There remains the further question as to whether the appellant is entitled to any exemption or deduction under the provisions of ss. (k) of s. 5 of the Act, or any corresponding section earlier enacted and repealed. An annuity contract with the Dominion Government cannot be issued on the life of any one other than the actual annuitant, and therefore such a contract is not "like" the policy or contract of life insurance under which an annuity, or income, is now being paid to and received by the appellant, and therefore I do not think that the appellant is entitled to any exemption or deduction. The reason for the distinction between a Dominion Government Annuity Contract and the contract in question here, in respect of exemptions and deductions, is not for the court to explain.

This is a case of first impression, and one in which I think I would be fully justified in refraining from making any order as to costs.

*Judgment accordingly.*

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March 28  
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Dec. 6.  
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BETWEEN:

WALTER E. H. MASSEY'S EXECU- } APPELLANTS;  
TORS .....

AND

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

*Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, s. 17—  
“Corporation having undistributed income on hand”—Redemption  
of company's shares at a premium—Premium paid out of and charged  
against surplus account of company—Liability for tax.*

S. 17 of the Income War Tax Act, R.S.C., 1927, c. 97, at the material time herein, read as follows:—

“Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder.”

Massey-Harris Co. Ltd. in 1929 redeemed its outstanding 7 per cent cumulative preference shares at 110 per cent of their par value.

The premium of 10 per cent was paid out of and charged against the Surplus Account of the company as shown in its Annual Report for the year 1929.

Appellants received the sum of \$91,220 as a premium on the redemption of shares owned by the estate of W. E. H. Massey. This sum was assessed for income tax, which assessment was affirmed by the Minister of National Revenue.

*Held:* That the premium was paid out of “undistributed income on hand,” and therefore taxable.

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

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

C. H. A. Armstrong, K.C. for appellants.

F. P. Varcoe, K.C. and A. A. McGrory for respondent.

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

THE PRESIDENT, now (December 6, 1938) delivered the following judgment:—

This is an appeal taken by the Executors of the Will of the late W. E. H. Massey, of Toronto, from the decision of the Minister of National Revenue affirming an assessment for income tax, for the taxation period of 1929. The

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point in issue here is precisely the same as that decided in the case of *National Trust Company Ltd., Executor of the will of Sir Lyman Jones v. The Minister of National Revenue* (1), from which decision there was no appeal. In that case no oral evidence was adduced by either party upon the issue of fact there involved, that is, whether or not a premium paid on the redemption of an issue of 7 per cent. preference shares of Massey-Harris Company Ltd., manufacturers of agricultural implements, was paid from "undistributed income on hand"; in the case now before me there was tendered evidence on behalf of the appellant and respondent, directed to that issue of fact, and it was the submission of Mr. Armstrong for the appellant, that the facts here disclosed materially distinguished the two cases, and that this appeal was put before the court on a different footing from that in the case of the Estate of Sir Lyman Jones.

I might at once refer to the provision of the Income War Tax Act relevant to the assessment for income tax here appealed from. It was sec. 17 of Chap. 97, R.S.C., 1927, and it read as follows:—

Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder. This section was superseded by a new section 17 which reads:—

Where a corporation redeems its shares at a premium, the premium shall be deemed to be a dividend and to be income received by the shareholder.

The distinction between the former and the present section is that in the latter case all reference to "undistributed income on hand" is omitted, and the source of the funds from which a premium is paid on redeemed corporate shares is immaterial. Now, whatever the source, the premium paid on the par value of corporate shares redeemed shall be deemed to be a dividend and to be income received by the shareholder.

The late Mr. Massey was the owner of 9,122 shares of the 7 per cent. cumulative preference stock issued by Massey-Harris Company Ltd., hereafter referred to as "the Company," which shares were redeemable by the Company, after due notice, at one hundred and ten (110%)

(1) (1935) Ex. C.R. 167.



per cent. of their par value. In the month of May, 1929, the Company did give notice of redemption and did redeem all its outstanding 7 per cent. cumulative preference shares at one hundred and ten per cent. of their par value, and the Executors of the will of Massey received the sum of \$91,220 as a "premium" on the redemption of the said 9,122 shares, and that amount of premium is now claimed by the Minister of National Revenue to be assessable income.

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By Supplementary Letters Patent, dated March 19, 1929, the Company was authorized to vary its capital stock structure by creating 150,000 five per cent. cumulative convertible preference shares, of the par value of \$100 each, and to increase its authorized common shares from 500,000 shares to 1,000,000 shares, without nominal or par value. Later, during the Company's fiscal year of 1929, the Company redeemed all of its outstanding 7 per cent. cumulative preference shares at the price of \$110 per share, with accrued dividend up to the date of redemption, and in substitution a new issue of 5 per cent. cumulative convertible preference shares was made, for the same amount, namely, \$12,089,900, thus reducing the annual charge for dividends on preference shares by \$241,798. And 241,798 new common shares were taken up by the shareholders, or the public, at \$60 per share, which yielded something over 14 million dollars. As already stated, the appellants surrendered the certificates for the 9,122 shares of the 7 per cent. cumulative preference shares, and on May 15, 1929, the redemption date, they were paid \$110 per share together with accumulated dividends to the date of surrender, the premium itself amounting to \$91,220.

It is the contention of the appellants that the said premium was not paid out of "undistributed income on hand"; that the Company at the date of the payment of such premium had not any "undistributed income on hand"; that if the premium were paid out of "undistributed income on hand" it was out of accumulated profits on hand prior to January 1 1917, which, it is claimed, would not be taxable; that the obligation to pay the premium was a capital one, and that the premium was paid out of the new capital received from the sale of the new common shares; and that therefore the premium

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received by the appellants was not subject to the income tax. I understood it to be argued that the words "on hand" have, for income tax purposes, a definite meaning and contemplate a realized fund on hand from which the premium might be paid. In point of fact the payment of the premium was charged against the "Surplus Account" of the Company, as will appear from the Surplus Account of the Company appearing in its Annual Report for the year 1929. The issue therefore narrows down to this: Does the Surplus Account reflect undistributed income on hand? This requires a brief examination of the Company's Surplus Account, and the state of that Account at the time material here.

We may first turn to the Company's Income Account for the year 1929. The Surplus Account of any Company is built up from annual net profits or income and in practice the net profit or income, less any sums distributed, is transferred to the Surplus Account. The Company's Income Account for 1929, as appearing in its Annual Report for that year, is as follows:—

#### INCOME ACCOUNT

|                                                                                              |                |                       |
|----------------------------------------------------------------------------------------------|----------------|-----------------------|
| The Income from the year's operations before deducting interest and appropriations was ..... | \$4,740,915 58 |                       |
| Add Profit from sale of Assets.....                                                          | 127,990 75     | \$4,868,906 33        |
| <hr/>                                                                                        |                |                       |
| From this there has been deducted for:                                                       |                |                       |
| Interest on borrowings .....                                                                 | \$ 448,542 39  |                       |
| Bond Interest and Expense .....                                                              | 609,835 00     |                       |
| Appropriation for depreciation .....                                                         | 745,035 92     |                       |
| " for taxes .....                                                                            | 210,000 00     |                       |
| " for Pension Fund .....                                                                     | 54,679 67      | 2,068,092 98          |
| <hr/>                                                                                        |                |                       |
| Leaving a net profit of .....                                                                |                | <u>\$2,800,813 35</u> |

The Company would be assessed for the corporation tax on \$2,800,813.35, subject perhaps to some adjustments. The net profit above stated for 1929 was transferred to the Surplus Account, and that Account is to be found in the same Annual Report and is as follows:—

| SURPLUS ACCOUNT                                                 |                                 | 1938                             |
|-----------------------------------------------------------------|---------------------------------|----------------------------------|
| The Surplus at 30th November, 1928, was .....                   | \$6,982,098 02                  | W. E. H. MASSEY'S EXECUTORS      |
| Less Bond Discount and Expense .....                            | \$ 900,970 20                   | v. MINISTER OF NATIONAL REVENUE. |
| Less Premium on 7% Preference Shares redeemed.....              | \$1,100,770 00     2,001,740 20 | Maclean J.                       |
|                                                                 | <hr/>                           |                                  |
| Adding Net Profit for 1929....                                  |                                 | \$4,980,357 82                   |
|                                                                 |                                 | 2,800,813 35                     |
|                                                                 |                                 | <hr/>                            |
|                                                                 |                                 | \$7,781,171 17                   |
| Deducting dividends paid in 1929:—                              |                                 |                                  |
| On 7% Preferred Shares—15th February and April..                | \$ 423,146 50                   |                                  |
| On 5% Preferred Shares—15th July and October ....               | 302,247 50                      |                                  |
| On No Par Common Shares—75c, 15th April, July and October ..... | 1,269,439 50                    |                                  |
|                                                                 | <hr/>                           | 1,994,833 50                     |
| The Surplus at 30th November, 1929, was .....                   |                                 | <hr/> <hr/> \$5,786,337 67       |

From this Account it will be seen that the surplus, on November 30, 1929, was \$5,786,337.67. Against the Surplus Account, in 1929, was charged the premium paid on the redeemed 7% preference shares, and certain dividends on the old and new preference shares, and on the common shares.

It will be convenient now to turn to the Consolidated Balance Sheet, also appearing in the Company's Annual Report for 1929, and there we find what the Current Assets (not the Capital Assets) consisted of. That is as follows:—

| CURRENT ASSETS                                                                                                         |                 |
|------------------------------------------------------------------------------------------------------------------------|-----------------|
| Inventories—Raw materials, goods in process and finished goods (valued at cost, not exceeding replacement value) ..... | \$31,814,545 10 |
| Prepaid freight and expenditures on account of next year's operations .....                                            | 304,393 88      |
| Bills and accounts receivable (accrued interest of approximately \$925,000 not taken into account) .....               | 22,810,950 39   |
| Cash .....                                                                                                             | 76,648 74       |
|                                                                                                                        | <hr/>           |
|                                                                                                                        | \$55,006,538 11 |

It will be observed that the Current Assets amounted to \$55,006,538.11, a very substantial amount.

I now turn to the state of the Company's cash position on the last day of April, 1929, and down to May 15 of

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the same year, the redemption date of the 7 per cent. preference shares, and to this the appellant seems to attach some importance. I do not think it necessary to go into this at any great length. It will suffice to say that on April 30th, the Company's current bank account was overdrawn and altogether it was indebted to its bankers in a sum exceeding 6 million dollars. From May 1 to May 15, it received \$3,737,000 from the new common stock subscriptions, 11 million dollars from the sale of the new preference shares, and \$398,693 from its business operations. In the same period it paid off its indebtedness to the bank, it disbursed on account of ordinary business operations nearly 1 million dollars (the Company's expenditures on ordinary business operations usually exceeded receipts at that time of the year), and it transferred from time to time from its current bank account to what was called the Preference Dividend Account such sums as were necessary to meet any cheques drawn against that account in redemption of the old preference shares. The Preference Dividend Account was utilized for the redemption of the 7 per cent. preference shares. It was from the Preference Dividend Account that the Executors of the Massey will were, on May 15, 1929, by cheque, paid the amount necessary to redeem the preference shares owned by the late Mr. Massey. What transpired after that date, down to the end of the Company's financial year, would not seem to me to be of any assistance in determining the issue here. It required \$1,100,000 to pay the premium on all the preference shares redeemed, and this was later charged against the Surplus Account.

It may at once be conceded that the Company, on April 30, 1929, had no cash on hand, and that its position in that respect thereafter improved by revenue derived from the sale of the new preference and common shares. Now, the question for decision is whether the Surplus Account constituted "undistributed income on hand," and whether the premium in question was, in fact, paid from that Account. The amount of the Surplus Account was doubtless represented largely, if not altogether, by the Current Assets on hand. Mr. Edwards, a chartered accountant, called by the appellants, stated that there was a time when profits or surplus were regarded "as money in a

bank" but that in modern business practice this is no longer so, and that profits are now ascertained by appraising assets and liabilities, and that "the best way to handle a surplus is to re-employ it as working capital in the business." Accountants would seem to be in agreement that when a man is in business his profits for the year are the excess of his receipts from his business during the year over his outlay for his business; the difference between the value of his stock and plant at the end and at the beginning of the year being taken as part of his receipts or as part of his outlay, according as there has been an increase or decrease of value. It is the practice to transfer undistributed annual net profits to Surplus Account, to be employed as capital if necessary. Sec. 13 of the Income War Tax Act recognizes this practice and it provides that if undistributed profits are, in the opinion of the Minister, in excess of what is reasonably required for the purposes of the business, then the amount of the undistributed profits which the Minister regards as excessive, shall be deemed to have been received by the shareholders as a dividend, and taxable. The undistributed profits there referred to would be shown in the Surplus Account. The business operations of the Massey-Harris Company in 1929, and for several years prior thereto, realized net profits and such as were not distributed were yearly transferred to Surplus Account.

The amount standing to the credit of the Surplus Account was always dealt with by the Company as undistributed profits or income on hand and I do not see how the same could be otherwise classified. Out of such Surplus Account the Company paid the premium in question. It was not an illusory account but one capable, within limits, of responding to actual demands made upon it. If the Surplus Account here were made up of realized profits, and dealt with in that way by the Company, then I think the surplus must be treated as "undistributed income on hand." In paying the premium out of Surplus Account the Company affirmed that to that extent there was undistributed income on hand. The courts and accountants seem, generally, to agree that if accumulated profits shown in the Surplus Account have really been earned and used in the business, the replenishment of the cash position of

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the Surplus Account through borrowing for the purpose of paying a dividend is not objectionable, and that principle would be equally applicable in the case of the payment of a premium on corporate shares redeemed. The Company here may have temporarily used funds in its current banking account, which were derived from capital sources, to pay the premium in question, but that is merely a matter of form and not of substance. The Company's receipts from capital and trading sources, and from borrowings, would be commingled in the Company's current banking account and the source or sources of such receipts could not be ascertained from that banking account. It is the accounting, the books of account, which allocate or distribute all receipts and expenditures, debits and credits, profits and losses, arising in the affairs of a business concern, to their proper destination, and that is determined by established business and accounting practices.

This is a case where the amount of the Surplus Account was actually realized as income, and was not distributed. It was treated by the Company, and the shareholders' auditors, as undistributed profits, and that was the view of Mr. Vardon, a chartered accountant and Assistant to the Financial Comptroller of the Company. I am unable to see how it can be said that the amount standing to the credit of that Account was not "undistributed income on hand," available for any purpose to which the Company might apply the same. I do not see how else it could be described or treated. The fact is that the Company paid the premium in question out of Surplus Account, that is to say, it was charged against that Account. The premium payable on the preference shares if redeemed does not seem to have been charged as a contingent capital liability in the Balance Sheet, and possibly some accountants would suggest that this should have been done, but it would seem to have been the policy of the Company to pay the same from surplus, if and when it should be decided to redeem such shares. The premium in question was not treated, and apparently was never intended to be treated, as a capital liability. I have carefully considered the grounds advanced in support of the appeal so ably presented by Mr. Armstrong, but I have reached the conclusion that the premium in question was paid out of the Company's

undistributed profits, which means, in my opinion, "undistributed income on hand," and therefore taxable.

It appears that a portion of the Surplus Account, about \$1,800,000, was earned prior to the coming into force of the Income War Tax Act, 1917, when the Company's surplus was about 10 million dollars, and it was contended that if the premium had to be paid out of surplus it should be out of that portion of undistributed surplus earned prior to 1917. Subsection five of section three of Chapter 55 of the Statutes of Canada, 1919, provided that dividends or bonuses, paid to shareholders exclusively out of a surplus or accumulated profits on hand prior to the first day of January, 1917, would not be taxable as income; that provision remained in force until the first day of January, 1921, when section 3 of Chapter 49 of the Statutes of Canada, 1920, came into effect. After January 1, 1921, any distribution made out of accumulated surplus by way of dividend, regardless of when such surplus was accumulated, became taxable as income. Therefore, in 1929, the taxation period in question here, it was not open to the appellants to say that the premium should be paid out of any balance of undistributed profits on hand and accumulated prior to January 1, 1917; now, any undistributed surplus accumulated prior to that date, if distributed as a dividend after January 1, 1921, is subject to the tax, just as would any surplus accumulated subsequent to that date, if distributed as a dividend. And the premium in question here is deemed to be a dividend.

I am of the opinion that the appeal must be dismissed and with costs.

*Judgment accordingly.*

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NOVA SCOTIA ADMIRALTY DISTRICT

1938  
Feb. 28.  
March 1.  
—  
July 13.

BETWEEN:

CALEB W. HIRTLE, Owner, NORMAN }  
HIRTLE and WALTER BUSH, Mem- } PLAINTIFFS;  
bers of the Crew of the *FISHING BOAT* }  
*NUMBER 54* .....

AND

*THE SHIP SHANALIAN*, her cargo and } DEFENDANTS.  
freight .....

*Shipping—Collision—Duty of steamship in fog.*

*Held:* That it is the duty of a steamship at anchor in a dense fog to remain at anchor and not attempt to make port, especially by a route known to the master of the ship to be frequented by many small fishing boats.

ACTION by the owner and members of the crew of the *Fishing Boat Number 54* to recover damages occasioned by collision between it and the defendant ship.

The action was tried before the Honourable Mr. Justice Carroll D.J.A., Nova Scotia Admiralty District, at Halifax, N.S.

*W. P. Potter, K.C.* for plaintiffs.

*G. McL. Daley, K.C.* for defendants.

The facts are stated in the reasons for judgment.

CARROLL D.J.A., now (July 13, 1938) delivered the following judgment:

On the morning of August 9th, 1937, about 5.30 o'clock, a small fishing boat *Number 54* was run down and sunk by the Steamship *Shanalian*. This action is brought against the defendant ship for damages by the owner of the sunken boat—the boat and tackle being a total loss—and by two members of the boat's crew for loss of personal effects, nets and gear.

It is rather difficult for me in my position, without the assistance of experts, to say exactly where this collision took place. One thing I am convinced of and find as a fact, namely, that the defendant ship was well off from the "fairway" leading up and into the La Have river. Had she been there she would have been on her proper course. I think that the accident occurred at a point about one



and one-quarter miles south southeast of the Western Head of Mosher's Island and about the same distance north north-west of the La Have automatic light and whistle buoy. These distances are purely approximate. The automatic light and whistle buoy is located south by east from Mosher's Head light and this light works the western side of the mouth of the La Have river. It was to and up this river the *Shanalian* was proceeding.

The *Number 54* was at the time of the accident not equipped with a fog horn or other sound making device as provided for by Article 9 (*h*) of the International Rules of the Road, but being, I think, under twenty tons gross tonnage, there was no obligation for such equipment. I am not prepared to say that there was any other efficient sound signal being made by those aboard "at intervals of not more than one minute" for the purposes of complying with the rule, but there were sound signals made at such intervals, first by the engine and then by other "poundings" which, I think, were as sufficiently "efficient" as the circumstances required. I am, however, of the opinion that the absolute absence of such sound signals under the circumstances was not such negligence as would in any way have contributed to the collision. In other words, if the boat were equipped as required of larger boats and giving the required signals, I do not think the collision would have been avoided.

The *Shanalian* was proceeding at about three nautical miles per hour, which was about half speed. The siren was kept in action I think at the required intervals. She had been lying by the La Have automatic buoy above mentioned from eleven o'clock Sunday night until nearly five o'clock Monday morning, August 9th, light laden, bound for Bridgewater up the La Have river. The weather at the hour of departure was very thick and foggy with visibility on board of only fifty or sixty feet and so continued up until the accident.

I have already mentioned that the *Shanalian* at the time of the collision was not in the "fairway" where of course she should have been. She was as a matter of fact a considerable distance off her course which could have been averted by good seamanship and ordinary care. The Master of the *Shanalian* knew that off the fairway, espe-

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cially to the west thereof, was a fishing ground, frequented by many small fishing boats. Those boats, of which the plaintiff's was one, were entitled to be there and "it is the duty of other ships to take greater precautions when passing over such a fishing ground, so as to keep clear of fishing boats." Marsden on Collisions, 9th ed., p. 449. The plaintiff's boat was not in the fairway and had the defendant ship been in her proper place in the fairway, the collision would not have happened. I do not intend discussing the reasons for her being off her course other than to say that it was probably caused by the master not taking into account the tides running that morning.

As already indicated there was a very dense fog that morning when the defendant ship left her moorings and the fog continued so thick that I am of opinion that she should have remained at anchor and not have attempted to make port especially by a route known to the Master to be alive with small fishing craft. *The Lancashire* (1); *The Otter* (2).

In the first mentioned case it was said (pp. 201, 202):

The question arises in this case, whether it was proper and right in this ferry-boat to go deliberately across the river in a fog of such a dense nature as here described, and with the knowledge of these vessels lying in her track . . . . I have no doubt that it is very much for the convenience of the public that the ferry-boat should go in all weathers and at all times, but at the same time, I cannot myself think it right to set the convenience of the public in competition with the possibility, or rather the probability, of injuring human life and greatly damaging property . . . . But one thing appears to me quite clear—that if this ferry steamer thinks herself justified in going across the river in such a dense fog as this, she takes upon herself all the responsibility incident to such a course. She has the advantage if she goes over safely, and she must have the disadvantage if she injures life or property in the course of the passage.

I will express no opinion as to whether the *Shanalian* was properly manoeuvred after sighting the small boat as I am of opinion that for the two reasons mentioned—being out of her course and running in such a dense fog—the *Shanalian* was wholly and entirely to blame for the collision and that it was her negligence alone which caused the damage to the *Number 54*, and I assess the damages as follows:—

(1) (1874) L.R. 4 Ad. & Ecc. 198.      (2) (1874) L.R. 4 Ad. & Ecc. 203.

|                                     |          |          |
|-------------------------------------|----------|----------|
| To the plaintiff Caleb Hirtle:      |          |          |
| Boat .....                          | \$120 00 |          |
| Engine .....                        | 115 00   |          |
| Three nets .....                    | 60 00    |          |
|                                     | <hr/>    | \$295 00 |
| To the plaintiff Norman Hirtle:     |          |          |
| Coat, hat and lines .....           |          | 6 65     |
| To the plaintiff Walter Bush:       |          |          |
| Net with moorings and grapple ..... |          | 20 00    |

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The plaintiffs are entitled to only one bill of costs.

*Judgment accordingly.*

NOVA SCOTIA ADMIRALTY DISTRICT

BETWEEN:

WESTERN NOVA SCOTIA BAIT }  
 FREEZERS LIMITED ..... } PLAINTIFF;

AND

THE SHIP SHAMROCK ..... DEFENDANT.

1937  
 Nov. 9.  
 1938  
 Jan. 28.

*Shipping — Foreign vessel — Necessaries — Charter-party — Authority of master—Liability of owner—Vessel sailed under the “quarter lay” or sharing system.*

The action was brought by the plaintiff against a foreign vessel for necessaries supplied on her account at a Canadian port. The vessel was engaged in the fishing business and at the time the necessaries were supplied she was operated on what is known as the “quarter lay.” The owners appointed the Master who hired the crew and after certain deductions from the gross proceeds of a voyage the balance was distributed between the owners, the master and the crew. The plaintiff supplied bait and ice to the ship on the order of the master and the credit of the ship and owners.

*Held:* That considering the nature of the business defendant ship was engaged in, the bait and ice were necessaries.

2. That upon the true inference to be drawn from the facts as proved, there was no demise or bailment of the ship to the master; that he managed and sailed the ship for the joint benefit of himself and the owners whose servant or agent he was, and that the ship was liable for the amount claimed.

ACTION *in rem* by plaintiff to recover from defendant ship the value of necessaries supplied to it at a Canadian port.

The action was tried before the Honourable Mr. Justice Carroll D.J.A., Nova Scotia Admiralty District, at Halifax.

*W. C. MacDonald, K.C.* and *D. J. Fraser* for plaintiff.

*F. D. Smith, K.C.* and *C. R. Coughlan* for defendant.

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

CARROLL D.J.A., now (January 28, 1938) delivered the following judgment:—

This is an action against the American ship *Shamrock* for the price of ice and bait supplied on board said ship at the request of the Captain while ship and captain were in a Nova Scotia port. The supplies were delivered about the 1st of May, 1936. The ship was seized to respond to this claim. Evidence was taken at Boston by virtue of a commission granted.

The *Shamrock* is a vessel of American registry and was engaged in the fishing business. She was operated on what is known as the "quarter lay." The owners appointed the captain, who, I think, hires his own crew. The proceeds of a voyage were distributed between the owners, master and crew. There is deducted after a voyage, from the gross proceeds, wharfage and scaleage at the pier, oil, \$10 for engineer, \$3 per night for watchman, something extra for the cook, and one-half of one per cent for the Boston Fish Exchange. As to the cost of ice there is some contradiction in the evidence but I think it is not deducted from the gross proceeds. One-quarter of the balance was taken by the owners. The remaining three-quarters went to the captain, out of which he paid most of the expenses of the voyage except fuel, which is supplied by the owners. The vessel is completely outfitted, so far as fishing gear is concerned, by the owners. The crew are paid on "shares" from this three-quarters. The owners are responsible for repairing of sails and such like and have control of that, but for fishing tackle, such as trawls lost or broken, the captain and crew are responsible. In addition to this share of the three-quarters the captain or master receives five per cent of the gross.

There are two defences set up to the action, the first that the goods supplied were not "necessaries" within the meaning of that word as interpreted by Courts of Admiralty, and in any event there is no proof that the bait and ice were necessary at the time of delivery. This vessel was engaged in the fishing business and it is shown by the evidence that ice and bait are essential for the

prosecution of that industry as carried on by the *Shamrock*. I think, too, that without any evidence of the situation here one having knowledge of the business in which this vessel was engaged is bound to reach the conclusion that bait and ice were necessary for the proper prosecution of that business because "necessaries" has been judicially interpreted as "whatever is fit and proper for the service in which the vessel is engaged; whatever the owner of that vessel as a prudent man would order if present at the time": Abbott C.J., in *Webster v. Seekamp* (1).

Then, too, the evidence of Captain Wilson of the *Shamrock* indicates, in fact the only reasonable inference to be made from it, is that the ice was necessary at the time it was placed aboard, necessary for that voyage or "immediately necessary."

Speaking to the time the purchase was made he was asked the question: "They had to have bait, didn't they?" And he answered "Yes."

The most serious defence offered however is that the *Shamrock* was under charter, and such a charter as amounted to a demise of the ship; that the owner had parted with possession of her, and exercised or could exercise absolutely no control over the ship or captain. I am not just clear whether the contention is that she was chartered to the captain alone or to the captain and crew.

Many authorities were cited to me on the argument, and I have read many additional ones dealing with this question.

It was decided in *Frazer v. March* (2) that a registered owner divests himself by a charter-party of all *control* and possession of a vessel for the time being in favour of another who has *all the use and benefit of it* is not liable for stores furnished to the vessel by order of the captain while such charter-party is effective. In this case the owner could not appoint a captain, and did not appoint him and the relationship between the owner and captain was not that of servant or agent. Practically the same proposition was held sound by the House of Lords in *Baumwoll Manufactur von Carl Scheibler v. Furness* (3),

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(1) (1821) 4 B. & E. Ald. 352; 106 E.R. 966.

(2) (1811) 13 East 238; 104 E.R. 362.

(3) (1893) A.C. 8.

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which was an action for the price of goods by the shipper against the owner. The vessel was under charter and the charterers appointed the captain and crew, and the owners divested themselves of *all control* and possession of the vessel. It was held that the captain was not the agent of the owners and could not bind them by contract without express authority. The Court also held that the fact that the shippers had no notice of the charter-party made no difference. In our Courts we have the case of *The Barge David Wallace v. Bain* (1) which is authority for what it decides on the subject. Then there are the cases cited which dealt with compensation to members of the crew of ships injured or killed while engaged in their occupations aboard ship. The chief is *Boon v. Quance* (2) and also *Jones v. Owners of the Ship Alice & Eliza* in the same volume of Butterworth at page 495, which seem to extend the principle enunciated in the above two cases. I shall refer to such cases as I proceed. There of course may be cases where the vessel is under charter without actual demise of the ship—where the owner retains some measure of control over her—and the owners and ship are responsible for necessaries supplied (3). In this case Lushington J. said at p. 276:—

For *prima facie* the master is the agent of the owner . . . . I cannot think it is consistent with justice, or according to ordinary mercantile practice, that a shipper of goods on board a ship . . . . should lose his right to sue the owner for damage, on account of a charter of this description.

The same principle was adopted in *Sandeman v. Seurr* (4) and in *Manchester Trust v. Furness* (5). In the last mentioned case the Court after discussing and distinguishing the case of *Baumwoll Manufactur von Carl Scheibler v. Furness* (*supra*) and *Colvin v. Newberry* (6), indicated that if there is any reservation that the ship is not given up entirely, then the owners are liable.

There is further the authority of *Associated Portland Cement Manufacturers Ltd. v. Ashton* (7) where it was held that upon the true inference to be drawn from the facts as proved there was no demise of the ship to the

(1) (1903) 8 Ex. C.R. 205.

(2) (1909) 3 Butterworth's Comp. Cas. 106; 102 L.T.R. 443.

(3) *The St. Cloud* (1863) 167 E.R. 269.

(4) (1866) L.R. 2 Q.B. 86.

(5) (1895) 2 Q.B.D. 539.

(6) (1832) 1 Cl. & Fin. 283. (1832) 6 E.R. 923.

(7) (1915) 2 K.B.D. 1.

master. The barge was being worked on the system of "thirds" under which the master took two-thirds of the gross freights paying thereout the mate, crew, cost of provisions and expenses of the voyage and handing over one-third of the gross freights, less harbour and towage dues, to the owner. At page 18 the Court adopted the reasoning in *Steel v. Lester* (1) and quoted with approval the language of Lindley J. in that case:—

What is the true substance and result of that arrangement? We are asked to say that it amounted and was equivalent to a demise of the ship by the owner to the master, throwing the whole responsibility of the management on the master and taking it off the shoulders of the owner. I do not think such an arrangement amounted to a demise or anything of the kind. I look on it either as a mere mode of paying Lilee (the master) for his services—the owner paying him a share of profits instead of fixed wages and retaining control over the master, but leaving the master to choose his ports and men.

In the *Portland Cement* case (*supra*) some of the United States decisions and authorities cited to me were cited to that Court but in the reports that I have read of the case no notice was taken of them. It is in this case, too, that cases under the Workmen's Compensation Act were discussed. On this question Lord Cozens-Hardy M.R. said at p. 11:—

Moreover, the question under the Workmen's Compensation Act is whether the relationship of master and servant exists, and an answer to that question in the negative would be in no way decisive upon the question whether the owner of a vessel is answerable for the contracts made by the master. As was pointed out in *Steel v. Lester*, the question is whether the master was agent of the owner for the management of the vessel. Cases under the Workmen's Compensation Act are of little assistance.

*The Tolla* (2) was cited as an authority but I am not founding my opinion on the judgment in that case.

Here it seems to me to be a question of fact whether the owners had to a certain extent the direction of the master—whether they retained some measure of control—whether the master could use the vessel as and how he liked. See *The Great Eastern* (3). If there were some measure of control, there is no demise of the ship.

I take it to be a joint venture where the owners say: "You go as master of this vessel on a particular venture and hire your men and take a certain proportion of the catch as your pay." There is no doubt the master could

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(1) (1877) 3 C.P.D. 121.

(2) (1921) P. 22.

(3) (1868) 2 Adm. &amp; Ecc. 88.

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have been dismissed at any time—he was dismissed after four or five years' service. He was told he could sell the catch elsewhere if O'Hara's had a full supply.

The master said he did not hire the boat and while the evidence of the master is more or less contradictory on the matter there is no doubt in my mind he had some responsibility to the owners, shore captain or manager. The owners notified people in Nova Scotia to give the boat nothing—they paid a previous account of the claimants.

The claimants will therefore have judgment for the amount claimed with costs.

*Judgment accordingly.*

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BETWEEN:

CANADIAN SHREDDED WHEAT } PETITIONER;  
 CO. LTD. ....

AND

KELLOGG COMPANY OF CAN- } OBJECTING PARTY.  
 ADA LTD. ....

*Trade mark—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 29, s. 26 (1) and s. 14 (1)—Petition for registration of mark—Issues raised in petition res judicata—Petitioner not entitled to relief provided for in s. 29 of Act in case of mark already registered.*

Petitioner seeks a declaration of the Court, pursuant to s. 29 of the Unfair Competition Act, 22-23 Geo. V, c. 38, that the words "Shredded Wheat" may be registered as a trade mark, on the grounds, *inter alia*, that on March 20, 1928, the petitioner registered under the Trade Mark and Design Act, the words Shredded Wheat as a specific mark for use in association with the sale of biscuits and crackers, and also registered, on April 3, 1929, the said words for use in connection with the sale of cereal foods, and that on May 5, 1938, the petitioner filed an application for registration under the Unfair Competition Act, of the words Shredded Wheat for use as a trade mark in connection with cereal foods, which application was accompanied by a request for cancellation of the aforesaid registrations, to take effect upon the re-registration of the said words as a trade mark.

Notice of the filing of such petition was given in the *Canada Gazette* pursuant to Rule 35 of the Rules of the Exchequer Court. The Objecting Party filed a statement of objections, and, on order of the Court, certain points of law raised therein were set down for hearing.



In June, 1934, the petitioner herein commenced an action in the Supreme Court of Ontario against the objecting party herein and another, for an injunction to restrain infringement of the petitioner's registered trade mark "Shredded Wheat." That action was dismissed and an appeal therefrom to the Ontario Court of Appeals was dismissed. A further appeal to the Judicial Committee of the Privy Council was also dismissed. The Judicial Committee found against the validity of the mark, that it was descriptive of the goods sold, and that it had not acquired a secondary meaning in respect to petitioner's goods.

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*Held:* That the issues raised in the petition are *res judicata*, the judgment of the Judicial Committee being conclusive of the matter.

2. That the existence upon the Register of petitioner's mark is a bar to the petition.
3. That the declaration provided for in s. 29 of the Unfair Competition Act is not to be made in the case of a registered mark.
4. That the relief provided for by s. 29 of the Unfair Competition Act may be the subject of a petition to the Court

ARGUMENT on points of law raised by the objecting party in its statement of objections, in answer to a petition filed in the Exchequer Court of Canada by the above named petitioner for registration of the trade mark Shredded Wheat.

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

*A. H. Elder, K.C.* and *E. G. Gowling* for petitioner.

*O. M. Biggar, K.C.* and *R. S. Smart, K.C.* for objecting party.

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

THE PRESIDENT, now (December 10, 1938) delivered the following judgment:

The immediate matter before me arises by reason of an Order made, upon consent of counsel, that certain points of law raised by the Objecting Party, in paragraphs 7, 19, 20 and 21 of its Statement of Objections, in answer to a petition filed in this Court by the Canadian Shredded Wheat Company Ltd., should be set down for hearing and disposition. The principal points of law raised are (1) that by virtue of a decision of the Judicial Committee of the Privy Council, in a certain action hereafter to be mentioned, the issues raised in this petition are *res judicata*,

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and (2) that the existence upon the register of the registrations referred to in paragraph 6 of the petition form a bar to the petition.

The Petitioner's proceeding here was taken under s. 29 of the Unfair Competition Act, which reads as follows:

29. (1) Notwithstanding that a trade mark is not registrable under any other provision of this Act it may be registered if, in any action or proceeding in the Exchequer Court of Canada, the court by its judgment declares that it has been proved to its satisfaction that the mark has been so used by any person as to have become generally recognized by dealers in and/or users of the class of wares in association with which it has been used, as indicating that such person assumes responsibility for their character or quality, for the conditions under which or the class of person by whom they have been produced or for their place of origin.

(2) Any such declaration shall define the class of wares with respect to which proof has been adduced as aforesaid and shall specify whether, having regard to the evidence adduced, the registration should extend to the whole of Canada or should be limited to a defined territorial area in Canada.

(3) No declaration under this section shall authorize the registration pursuant thereto of any mark identical with or similar to a mark already registered for use in association with similar wares by any person who was not a party to the action or proceeding in which the declaration was made.

Under that provision of the Act the petitioner seeks a declaration that the words "Shredded Wheat" may be registered as a trade mark on the grounds that since it commenced business, namely, the manufacture and sale of cereal foods, in Canada, and particularly during the past ten years, it has expended large sums of money in advertising its products in association with the trade mark Shredded Wheat; that the words Shredded Wheat have become adapted to distinguish its goods from other goods falling within the same category and were and are used to indicate to dealers and users that such goods are manufactured and sold by the petitioner; that it registered, on March 20, 1928, under the Trade Mark and Design Act, the words Shredded Wheat as a specific trade mark for use in association with the sale of biscuits and crackers, and also registered, on April 3, 1929, the said words for use in connection with sale of cereal foods, cooked or prepared for consumption; and that on May 5, 1938, the petitioner filed an application for registration, under the Unfair Competition Act, which superseded the Trade Mark and Design Act, of the words Shredded Wheat for use as a trade mark in connection with cereal foods, which application was

accompanied by a request for cancellation of the aforesaid registrations, to take effect upon the re-registration of the said words as a trade mark. Notice of the filing of the petition herein was published, as required by Rule 35, in the *Canada Gazette*, and the Kellogg Company of Canada Ltd., herein designated as the Objecting Party, intervened.

In May, 1896, it appears, that one, Perky, obtained a grant of Canadian Letters Patent No. 52,428, covering a new product, a cereal food, which he had invented, and a process and a machine by means of which the new product was prepared or produced, which product could be used in its then condition or could be further cooked by being baked into particular shapes. In August, 1901, the said Perky obtained a grant of Canadian Letters Patent No. 72,695, for "Improvements In and Relating to Machines for Making Biscuits and other Articles," which patent covered the machine which was used and has since been used by the petitioner for the production of biscuit shapes composed of the new product, the subject of patent No. 52,428. This new product was called and was known by the name of "Shredded Wheat," presenting in itself the appearance of having been shredded, and the process in the said patent No. 72,695 was referred to as "shredding the grain."

The patent No. 52,428 expired in the year 1914, and down to that time no one had sold or could lawfully sell in Canada the product known as "Shredded Wheat," except the petitioner and its predecessors in title. The patent No. 72,695 expired in 1919. Upon the expiration of the aforesaid patents, the petitioner's legal monopoly thereunder ceased, and thereafter any manufacturer of the product in Canada could use the apparatus covered by the patents and would be entitled to sell in Canada the products so produced as "Shredded Wheat" or "Shredded Wheat Biscuits," providing he did not infringe any other person's trade mark or pass off his goods as being the manufacture of some other person.

In June, 1934, the petitioner brought action in the Supreme Court of Ontario against Kellogg Company of Canada Ltd., the Objecting Party, and another, for an injunction to restrain infringement of the petitioner's registered trade mark, "Shredded Wheat," and at the trial of such action evidence was heard from a large number of

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witnesses, representative of consumers, retail grocers and wholesale grocers, throughout Canada, for the purpose of establishing that a secondary meaning had been acquired for the words Shredded Wheat, to distinguish the goods of the petitioner.

The action in the Supreme Court of Ontario came on for trial before Mr. Justice McTague who dismissed the action, in a judgment delivered in March, 1936. Upon appeal being taken to the Court of Appeals for Ontario, that Appellate Court dismissed the appeal in a judgment delivered in November, 1936. A further appeal was then taken by the petitioner to the Judicial Committee of the Privy Council, and in February, 1938, judgment was delivered by the Judicial Committee dismissing the appeal, holding that the registered trade mark Shredded Wheat was invalid, was descriptive of the goods and of the material of which it was composed and was the name of the biscuit or product, and that no secondary meaning had been acquired by those words in respect of the petitioner's goods. That judgment refers to the petitioner's trade mark registrations in 1928 and 1929 as an attempt to prolong or retain the monopoly it had under the patent covering the product. The judgment of the Judicial Committee is reported at page 127 of Volume 55 of the Reports of Patent, Design and Trade Mark Cases. That judgment is a lengthy and exhaustive one and I do not propose discussing the reasons advanced for the conclusion there reached, and which are available to any one interested in the issues which arise here. I content myself with saying that their Lordships found in clear and unmistakable language against the validity of the mark Shredded Wheat, against the contention that the mark was not descriptive, and against the contention that it had acquired a secondary meaning in respect of the petitioner's goods. Recently, in November last, the Supreme Court of the United States reached the same conclusion, in respect of the same subject-matter, in the case of *Kellogg Company v. National Biscuit*.

In view of the judgment of the Judicial Committee in the infringement action taken by the petitioner, the Objecting Party here having been one of the defendants therein, I feel impelled to the conclusion that the issues

raised in the petition are *res judicata*. That judgment holds that the words "Shredded Wheat" always constituted the name of, and were descriptive of Perky's invented product, and had been used only in that sense, and that such words never acquired any secondary meaning as being distinctive of goods manufactured exclusively by the petitioner, or indicative of the origin of such goods; essentially this means that the petitioner, or its predecessors in title, had been using the mark Shredded Wheat for over twenty years as being the name of the goods. It was argued that while the mark in question might not have acquired a secondary meaning up to 1928, or 1929, the dates of the registration of the marks now on the Register, that it might have done so in the last nine or ten years. I must say I utterly fail to appreciate the relevancy of that contention, in the state of facts here. It would seem to me that to allow the petition to proceed further would be an abuse of the machinery of the courts, and would offend against the rule that there must be a finality in litigation. I do not think the efforts of the petitioner to register the mark in question on the ground of anything occurring since 1928 can be sound or meritorious. I think that the judgment of the Judicial Committee is conclusive of the matter.

There is, I think, another obstacle in the path of the petitioner. It is to be remembered that it has the mark Shredded Wheat already registered, and it requests its cancellation only when the application for re-registration of the same mark is granted by the declaration prayed for in its petition. Does s. 29 of the Unfair Competition Act permit a person to come before the court and ask for a declaration that a mark already registered has acquired the significance and character contemplated by s. 29? I think not. It seems to me that this section contemplates the case where a mark is in use but not registrable because it cannot meet the requirements of sec. 26 (1), or because it would offend the provisions of s. 14 (1), but in any event an unregistered mark. Sec. 29 gives jurisdiction to the Exchequer Court to entertain a proceeding asking for a declaration that notwithstanding a mark in use is not registrable under any other provision of the Act, that Court may declare, if upon the facts disclosed it seems fit to do so, that such mark has been so used as to indicate a class of goods which were the manufacture of the appli-

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cant or petitioner, and therefore may be registered. I am not using the exact words of the section. I cannot think that the proceeding before me is of that kind. The mark Shredded Wheat is still registered even though it has been held to be invalid, in an action brought by the petitioner for infringement of that registered mark. This proceeding seems to be but another attempt to prolong a monopoly the petitioner, or its predecessors in title, had under the patent covering the product known as Shredded Wheat. The fact of the petitioner's mark being registered is, it seems to me, a bar to the petition. I do not think that s. 29 was intended to meet a case of this kind and I am of the opinion that the point of law raised in the Statement of Objections, and there numbered 21, namely, that the existence upon the Register of the marks referred to forms a bar to the petition, must prevail. I should remark that the Courts of Ontario, and other Provincial Courts, while having jurisdiction in actions for infringement of trade marks, are without jurisdiction in such an action to direct that the trade mark in question be expunged, and therefore no relief to that effect was claimed or made in the litigation to which I have referred.

Another law point raised by the Objecting Party is that s. 29 is only applicable in an action or proceeding already pending in the Exchequer Court, and was not available to a party by filing a petition. It is possible, I think, that in an action for infringement pending in the Exchequer Court a party thereto might in the alternative ask for the declaration contemplated by s. 29, but unless there be reasons which I do not now perceive, or to which my attention has not been directed, I see no reason why any party seeking the relief provided for by s. 29 might not proceed by way of petition. If that is not so, then it seems to me the section had better be repealed altogether.

In view of what I have already said I do not think it necessary to discuss paragraph 20 of the Statement of Objections, one of the law points mentioned in the Order, but if counsel think it desirable that I should pronounce an opinion upon it I shall do so on the settlement of the minutes of judgment. Otherwise there will be judgment according to the conclusions which I have herein expressed, and the Objecting Party will have its costs of the hearing upon the points of law raised. *Judgment accordingly.*

BETWEEN:

AIR REDUCTION COMPANY, IN- } APPELLANT;  
 CORPORATED ..... }

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AND

THE COMMISSIONER OF PATENTS... RESPONDENT.

*Patents—Practice—Patent Act Rules—Notice to applicant of official action taken by Patent Office—Applicant required to proceed within six months after notification of official action by Patent Office.*

*Held:* That every official action taken in the Patent Office must be communicated to the applicant for a patent, and if the applicant takes no further action within six months after being notified of such official action his application shall be held to be abandoned.

2. That the judgment of the Exchequer Court deciding upon the claims in a conflict action is not to be construed as official action taken by the Patent Office.

APPEAL from the decision of the Commissioner of Patents.

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

*E. G. Gowling and Gordon F. Henderson* for appellant.  
*W. L. Scott, K.C.* for respondent.

THE PRESIDENT, now (December 14, 1938) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents holding that an application for a patent for an invention, made by one Joshua and others in January, 1932, later assigned to The Distillers Company Ltd., hereafter to be referred to as "Distillers Company," had been abandoned. The grounds for the appeal are that Distillers Company had not taken further time in the prosecution of the application assigned to it, than was permitted by the Patent Act, Chap. 32, Statutes of Canada, 1932, and the Rules, Regulations and Forms provided under the said Act. The point in issue is entirely one relating to Patent Office procedure.

In January, 1932, Joshua et al. filed an application for a patent of an invention alleged to have been made by them, which invention was given the title "Conversion of Olefines into Alcohols." This application, as already stated, was assigned to Distillers Company. In June, 1932, an application for letters patent of invention was filed by one

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Metzger, which alleged invention was given the title of "Manufacture of Alcohols," and which apparently had close relation to the subject-matter in the application of Joshua. The application of Metzger was later assigned to Air Reduction Co. Inc., hereafter to be referred to as "Air Reduction," the appellant in this matter.

The filing of affidavits of the record of the respective inventions claimed by those two applicants, as provided by the Patent Act, was required by the Commissioner, for the reason that the claims seemed to him to be in conflict. In August, 1934, the Commissioner informed the applicants, that upon a consideration of the facts appearing in the affidavits which were in due course filed, he would allow the claims in conflict to Metzger, unless within two months proceedings be commenced in the Exchequer Court as provided by the Patent Act, which proceedings, after several extensions of the period named, were duly instituted in the Exchequer Court, in February, 1935. In such conflict proceedings Distillers Company appeared upon the record as plaintiff, and Air Reduction as defendant.

On October 30, 1936, on motion for judgment made on behalf of Air Reduction, and upon the written consent of counsel for both parties, it was ordered that Air Reduction was entitled to the claims in conflict, the claims of Distillers Company then being five in number. The important clauses of the Order for Judgment are as follows:

This Court Doth Order and Adjudge that as between the parties hereto, the defendant is entitled to the issue of a patent on its application, serial number 390,541, containing claims directed to the subject-matter of the invention therein described.

This Court Doth Further Order and Adjudge that the plaintiff is not entitled to the issue of a patent on its application, serial number 385,527, containing claims directed to the subject-matter in conflict with the subject-matter claimed in defendant's application for patent serial number 390,541.

The last quoted paragraph of this Order for Judgment is inaptly expressed because it is open to the construction that in no circumstance was Distillers Company entitled to a patent, or even to file new claims, and I think the Patent Office so construed the Order. What the Order really does say is that Distillers Company was not entitled to a patent for invention based on the claims contained in its application, or as existing at the time of the conflict proceedings, and that Air Reduction was entitled to a patent



on its claims as then appearing. It does not mean that the application of Distillers Company was to be entirely dismissed or ignored because its claims were all disallowed.

In due course a copy of the Order for Judgment in this Court was transmitted to and filed in the Patent Office, and thereafter a patent issued to Air Reduction, but no further official action was taken by the Patent Office upon the application of Distillers Company, that is to say, no notice was given this applicant that all its claims had been disallowed by the Exchequer Court, and it was not officially informed that it should take further steps in the matter. It now appears that Distillers Company had assigned its invention to Air Reduction before, or about the time, the Order for Judgment was made in the Exchequer Court, but the Patent Office was not aware of this until July, 1938.

On July 13, 1938, Air Reduction forwarded the assignment made to it by Distillers Company to the Patent Office for registration, and concurrently it forwarded to the Patent Office certain new claims applicable to the application of Distillers Company, at the same time requesting that the outstanding claims, which had been awarded to Air Reduction in the conflict proceedings, be cancelled. Evidently, Air Reduction, now the assignee of any invention claimed in the application of Joshua, was of the opinion, whether rightly or wrongly we need not pause to consider, that the specification of that application contained disclosures for which valid claims to invention might be made, and which were not embodied in the claims which were disallowed in the conflict proceedings. The new claim was refused by the Commissioner on the ground that the original application by Joshua had been abandoned. The Commissioner in his letter of August 6, 1938, states:

The Judgment of the Exchequer Court . . . ordered and adjudged that the plaintiff, The Distillers Company Limited, was not entitled to the issue of a patent in its application Serial No. 385,527 . . . As all the claims were found in conflict there remained no claims of record in the present case, and the applicants in application Serial No. 385,527 did not present any amendment following the Judgment which was made of record in the case of the 25th of November, 1936.

In a later communication the Commissioner wrote the appellant's counsel:

The Judgment of the Court confirmed the award of the Office which was communicated to the then attorney of record on the 23rd of August,

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1934, and the judgment becomes, therefore, equivalent to an action by the Office. The Office holds that action may be taken in such case at any time within six months from the date of the Order of the Court and that application Serial No. 385,527 became abandoned at the end of six months from the 30th of October, 1936, that is on the 30th of April, 1937, and absolutely abandoned at the expiry of one year from that date. As the conflicting application matured to patent on the 16th of March, 1937, your clients had ample time after knowledge of the issued patent was open to the public to file an amendment in the above application.

The Commissioner evidently took the position that the Order for Judgment of the Exchequer Court was tantamount to official action by the Patent Office, and the application of Distillers Company was held to be abandoned because it did not file any amended claims, or take any step or action within six months following that judgment. The applicant, Joshua, or his assignee, had no official notice that the judgment had been made of record in his application. Air Reduction, the appellant, and the assignee of Distillers Company, now claims that after the judgment rendered in the conflict proceedings, its assignor should have been notified of the status of the application in question in the light of that judgment, and that until default after such notification the application must be considered as being still in good standing.

Under certain provisions of the Patent Act as in force in 1932, and presently, there seems to run the principle that whenever, by official action of the Patent Office, an application for a patent is refused, the applicant must have notice of the same, and he is given the right of appeal from any decision of the Commissioner at any time within six months after such notification. The Rules under the Patent Act provide that if an applicant fails to prosecute his application for a patent within six months "from a report of an examiner or other subsequent official action of which notice has been duly given to the applicant, such application shall be held to be abandoned." That means that every official action taken in the Patent Office must be communicated to the applicant, and if the applicant takes no further action within six months after being notified of such official action his application shall be held to be abandoned. Now, all that was decided in the conflict proceedings by the Court was that the claims of Distillers Company were refused and those of Air Reduction were allowed. The application of Distillers Company was not

disallowed or voided, and conceivably its specification might contain such disclosures as would warrant the grant of claims to invention which had not been hitherto claimed, and which might be distinguishable from the claims awarded to Metzger in the conflict proceedings. The conflict proceedings took the applications out of the Patent Office temporarily, for the Court to decide to whom belonged the claims said to be in conflict. They were then remitted back to the Patent Office for action in accordance with the Order of the Court. And the Commissioner was advised of the judgment rendered in the Exchequer Court. It appears to me that Distillers Company was entitled to notification of the effect of the judgment of the Court in the conflict proceedings, and until that notice was received the six months could not commence to run against that applicant. It may be that Distillers Company became aware of the result of the conflict proceedings, and it may be that the recent filing of new claims by Distillers Company was purely an afterthought, yet, I think, I must disregard these possibilities and adhere to a strict construction of the statute and the rules, and in so doing I have concluded that the appeal must be allowed. It would, I think, be desirable practice that the Patent Office notify applicants of the result of the judgment of the Court in conflict proceedings, in patent cases. In most instances I have no doubt this is done because it does not always happen that all the claims of one applicant are awarded to a rival applicant, or that the Order for Judgment in such cases is so unhappily expressed as it was here. I have no doubt the Patent Office was misled by the unfortunate language of the Order for Judgment referred to. I cannot think that the judgment of a Court can be construed as official action taken by the Patent Office.

I am, of course, deciding only the question of practice which has arisen here. Whether valid claims may yet be made by the assignee of the application made by Joshua, having in mind the patent issued to the assignee of the application of Metzger, is a matter for the decision of the Patent Office. The appeal is therefore allowed but there will be no order as to costs.

*Judgment accordingly.*

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WHITIN MACHINE WORKS ..... PLAINTIFF;

AND

FERNANDO CASABLANCAS ..... DEFENDANT.

*Patents — Impeachment action — Patent invalid — Lack of invention — Subject-matter.*

The action is one to impeach claims numbered 1 and 2 of Canadian Patent no. 255,629 granted to defendant on November 24, 1925. The patent relates to improvements in drawing apparatus for textile rovings. Plaintiff contends that claims 1 and 2 of the patent disclose no invention and therefore are invalid and void. Plaintiff also contends that any invention or inventions covered by claims 1 and 2 of the patent in suit had been already described and patented in and under United States Patents nos. 1,240,670 and 1,297,794 granted to defendant in September, 1917, and in March, 1919, respectively, and one British Patent, no. 9,692, granted to defendant in February, 1919. The Court found that the belts described in United States Patent no. 1,240,670, and in the patent in suit, are described by the patentee as performing the same function in the same manner; and that the drawing mechanism described in the patent in suit performs the same function as that referred to in the United States Patent no. 1,297,794.

*Held:* That there is no subject-matter in claims 1 and 2 of Canadian Patent no. 255,629.

2. That the introduction of "slack" or "loose" belts, as described in the patent in suit, does not add such a new and useful element to the known mechanism as to constitute a new combination possessing that degree of novelty and utility to justify ascribing to it the quality of invention.

ACTION to impeach claims 1 and 2 of Canadian Patent for Invention no. 255,629.

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

*R. S. Smart, K.C.* for plaintiff.

*H. Gerin-Lajoie, K.C.* for defendant.

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

THE PRESIDENT, now (January 17, 1939) delivered the following judgment:

This is an action wherein the plaintiff company, which carries on business at Whittinsville in the State of Massachusetts, U.S.A., claims a declaration that claims 1 and 2 of a patent of invention, no. 255,629, granted to the defendant in November, 1925, are invalid and void.

It is contended on behalf of the plaintiff that when this patent was applied for, on October 22, 1924, the invention or inventions covered by the said claims had already been patented more than two years before the date of the said application, under two United States patents, nos. 1,240,670 and 1,297,794, granted to the defendant Fernando Casablancas, in September, 1917, and March, 1919, respectively, and also under a British patent, no. 9,692, granted to the said Casablancas in February, 1916. The plaintiff was the exclusive licensee of the defendant in the United States, under the United States patents just mentioned, for mechanisms for drawing fibres with endless belts, and which the plaintiff there manufactured under such licence or licences; the said licence or licences terminated on the expiration of such United States patents, some few years ago. Certain textile mills in Canada were threatened with actions for infringement of the patent in suit if they continued to purchase from the plaintiff the drawing mechanisms manufactured by it, and thereupon this action was instituted. It is claimed by the plaintiff that the first time two claims of the patent in question here disclose no invention, and are therefore invalid and void.

The patented invention here is said to relate to a drawing apparatus for textile rovings by means of which a large draft of the roving can be obtained in a highly favourable condition. The similar mechanism is referred to in other patents as a "spinning frame." Cotton,—the textile material always spoken of at the trial—as received by a mill is a mass of tangled fibres in bale form, mixed with foreign matter, and the ultimate object is to convert the raw fibres into cotton yarn. After being cleaned the cotton reaches the stage when it is subjected to carding, and from the carding the cotton fibres come in the form of strands or ropes, known in the industry as "sliver" or "roving." As the patent in question always speaks of "roving" or "rovings," I shall adhere to that terminology. This roving has to go through what is called a drawing operation before it is a finished yarn. In a roving, the fibres, long and short, are held together loosely, and with just enough twist to prevent them falling apart of their own weight. "Drawing" means the drawing out of cotton fibres from

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a given sized roving into another one of greater length and correspondingly smaller section, the object being to spread out the fibres into a longer and thinner form, making a fair distribution of the short and long fibres, until in the end it approximates the size and form of any desired cotton thread or yarn. It is one of the last steps in the process of making cotton yarns.

The mechanism in question is made up of three pairs of rollers. First, there is a pair of feed rollers, between which the roving is fed. Then follows a pair of intermediate rollers, each carrying an endless belt or band, which run at a peripheral speed much higher than the feed rollers, and between them is held the roving which is carried by the belts up to a point near the last pair of rollers, called the drawing rollers. The drawing rollers run at a peripheral speed much higher than the intermediate rollers, so that between each set of rollers a drawing or lengthening of the roving is progressively effected, but particularly by the drawing rollers. We need not discuss what occurs after the roving has passed through the drawing rollers.

I had better refer to two paragraphs of the specification which will more accurately explain the alleged invention than I can do. These two paragraphs are as follows:

My invention relates to a drawing apparatus for textile rovings by means of which a large draft of the roving can be obtained in highly favourable conditions.

This apparatus is made up of three pairs of rollers moving at increasing peripheral velocities, of which, the intermediate pair of rollers are provided with two endless bands which by surrounding these rollers exert pressure one against the other and between them hold the roving and bring it up to a point quite near the last pair of rollers or drawing rollers. These endless bands are guided by a small frame-work resting on the intermediate rollers, and formed by two plates which laterally guide the bands preventing them from shifting towards one side or the other and by rods or other devices which join these plates together and which at the same time serve as a guide to the bands so as to make sure that these adopt the correct position. These endless bands follow the movement of the intermediate rollers, and they therefore seize the roving between them, hold it gently and lead it up to a point very near the drawing rollers.

The first pair of rollers or feeding rollers adopt the arrangement usual in already known drawing devices, the second pair of rollers, or intermediate rollers, which carry the endless bands, run at a peripheral speed higher than that of the feeding rollers, so that between the feeding rollers and the intermediate rollers a first draft of the roving is effected the object of which, principally, is to cause the twist of the roving to disappear and leave it in good condition to undergo the definite drawing. The third pair of rollers or drawing rollers run, on the other hand, at a peripheral

speed much higher than the intermediate rollers and higher, therefore, than the bands driven by the latter, so that, between the bands and the drawing rollers a very vigorous draft of the roving is effected. The bands have a special arrangement which causes them to hold the roving tightly at the point corresponding to the line of contact of the two rollers which drive the bands, but, on the other hand, in all the rest of that part in which the roving is imprisoned between the bands the pressure which these latter exert upon the roving is a very gentle pressure. This slight pressure makes it easy for the fibres held by the drawing rollers to slip from between the other fibres of the roving. On the other hand, this pressure is sufficiently firm to prevent these fibres dragged along by the drawing rollers from dragging in their movement the neighbouring fibres, which are thus obliged to follow the normal speed of the bands up to the moment in which they are caught between the drawing rollers. In order to bring this about, the two endless bands are slack and the same frame-work which guides them compels them to impinge one against the other with a gentle and elastic pressure.

Claims 1 and 2 are as follows:

1. A drawing apparatus for textile rovings having in combination three pairs of rollers positively driven with increasing peripheral speeds, a pair of loose endless bands which run round the rollers of the intermediate pair and are driven by them and a frame-work supported by the same rollers of the intermediate pair and which laterally guides these bands, the roving which is being drawn thus passing between the two rollers of the first pair and of the last pair and between the two bands of the intermediate pair, which accompany the roving up to quite close to the last pair of rollers or drawing rollers.

2. In a drawing apparatus for textile rovings, a pair of feeding rollers, a pair of intermediate rollers which revolve at a peripheral speed greater than the feeding rollers, a pair of drawing rollers which revolve at a peripheral speed greater than the intermediate rollers, a pair of loose endless bands which run round the intermediate rollers and are driven by them and a frame-work which guides the bands laterally and obliges them to adopt such a form that they seize the roving and lead it gently up to quite near the drawing rollers.

It will be seen that the belts or bands surrounding the intermediate rollers are described as being "slack," and in claims 1 and 2 they are referred to as "a pair of loose endless bands." The whole mechanism, broadly speaking, is undoubtedly old and the only suggestion of patentable novelty or utility is that the combination of "slack" or "loose" belts on the intermediate rollers, together with all the other elements of the mechanism, afford subject-matter for a valid combination patent. There is no defined measure of the degree of slackness or looseness of the belts requisite for the most effective functioning of the belts, in carrying the rovings to the drawing rollers. The issue therefore narrows down to the point as to whether or not the introduction of "slack" or "loose" belts constitute invention, or whether it adds such a new and useful ele-

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ment to the known mechanism as to constitute a new combination possessing that degree of novelty and utility as would justify ascribing to it the quality of invention. Therein rests the essence of the issue to be determined.

The claim to invention seems to rest in the fact that the belts, except at the point corresponding to the line of contact of the rollers which drive the belts, exert but a very gentle pressure on the roving, and this gentle pressure, it is said, makes it easy for the fibres held by the drawing rollers to slip from between other fibres of the roving. But, the specification states, the pressure exerted by the belts upon the roving is sufficiently firm to prevent fibres dragged along by the drawing rollers from dragging in their movement the neighbouring fibres, which are obliged to follow the normal speed of the belts until they are caught between the drawing rollers. To bring this about the specification states the two endless belts must be slack yet they must impinge one against the other with a gentle and elastic pressure. All this amounts to saying that the belts should be slack but not too slack, loose but not too loose, and that they should impinge upon one another with "a gentle and elastic pressure," but the pressure must not be too slight. That seems to be the sole ground for a claim to monopoly here, and that because the described belts give a new quality or character to the combined elements of the mechanism.

The plaintiff's particulars of objection refer to the two United States patents already mentioned, nos. 1,240,670 and 1,297,794, granted to the defendant Casablancas in 1917 and 1919 respectively, and also to British patent no. 9,692, granted to Casablancas in 1916, and it is claimed by the plaintiff that any invention or inventions covered by claims 1 and 2 of the patent in suit had been already described and patented in and under those three patents, and which issued much more than two years before Casablancas applied for the Canadian patent in question. The first mentioned United States patent does not in terms refer to slack or loose belts, but it does state that the belts come into contact one against the other, and that the belts convey the roving to the drawing rollers. The specification states that the roving passes between the belts to the drawing rollers and the belts "retain the fibres which have not



been caught by the drawing rollers so as to avoid such fibres being picked off and dragged along by the fibres which have already been drawn by the drawing rollers." The quoted words in the last sentence above express the same thing as is to be found towards the end of the last paragraph which I earlier quoted from the specification in question, that is to say, the pressure must not prevent fibres caught by the drawing rollers to slip away from other fibres in the roving, but there must be sufficient pressure to prevent fibres being dragged along by the drawing rollers from dragging neighbouring fibres of the roving along with them. Therefore the belts in this United States patent, and in the patent in question, are described by the patentee as performing the same function in the same manner, so therefore the belts in each case must be much the same order in respect of tension and pressure. The belt arrangement in this United States patent is somewhat different from that in the patent in suit, but I do not think that the belts in the former can be described as "tight" or "slack," or that they exerted undue pressure on the roving. The idea no doubt was that there had to be sufficient pressure to carry the roving to the drawing rollers in orderly fashion, but the pressure had to be of that degree which would permit of the release from the roving of any fibres caught by the drawing rollers without dragging neighbouring fibres from the roving. They were expected to perform the same function as the belts described in the patent in suit, which are to be "slack" but yet they must impinge one against the other with some pressure. The second mentioned United States patent refers to the endless belts receiving the roving, grasping it practically throughout its length and delivering it to the drawing rollers "in a well understood manner," and that is just what the drawing mechanism in question here does. It is not necessary to refer to the British patent to Casablancas.

One cannot learn from the patent in suit just what is the requisite degree of pressure to be applied when the belts impinge one against the other, or under what tension the belts should function. I have no doubt that in the early use of the Casablancas mechanism it was at times found that the belts were sometimes too tight and other times too slack, or that the pressure of the one against the other

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was too great or too little. The operator of the mechanism, or some one, would have to ascertain the suitable degree of tension and pressure by experiment, by trial and error, as I have no doubt was done, and probably has, in many cases, yet to be done. And probably that was the reason why Casablancas in his earlier patents did not in terms speak of a slack belt, or of any particular pressure between the belts; it was only after the expiry of his main patents that he does this, and then ineffectually, because he speaks of it only in general terms.

The fibres of the roving are delivered to the drawing rollers by the belts for the purpose of accomplishing the drawing. If the belts are too tight, or if the pressure between them is too great, it seems obvious that they could not deliver the roving to the drawing rollers in a satisfactory way. If the belts were too slack or too loose, or if the pressure of the one against the other were too light, that would also be unsatisfactory. It is obvious that the belts should not be too tight, or impinge one against the other with too much pressure, but on the other hand there must be some tension and some pressure. The proper degree of tension, or pressure, or both, can only be determined by trial and error, and the specification would not assist anyone in determining this. Anybody interested in Casablancas' drawing mechanism would know and expect this, as no doubt did Casablancas himself, but this would present, at the date of Casablancas' application for the patent in question, no real difficulty to people conversant with the subject-matter and admits of no sufficient ingenuity to support a patent. In earlier days women, by the touch of the finger determined how much pressure should be applied to the carded wool in feeding it to the spinning wheel, and it is the same thing here, except that the art has been mechanized. I do not think that any invention can possibly be attributed to the claims in Casablancas which are here attacked, and the combination therein described.

The plaintiff is therefore entitled to the declaration claimed, and to its costs of the proceeding.

*Judgment accordingly.*

BETWEEN:

WILLIAM JOHN SYKES.....SUPPLIANT; 1938 Mar. 29 & 30.

AND

HIS MAJESTY THE KING.....RESPONDENT. 1938 Dec. 30.

*Crown—Government Annuities Act, R.S.C., 1927, c. 7—Crown bound by doctrine of waiver—Mistake of fact—Unilateral mistake—Loss to be borne by party making the mistake—Specific performance decreed against the Crown—Exchequer Court Act, R.S.C., 1927, c. 34, s. 18 and s. 36—Rule 2, Exchequer Court Rules.*

Suppliant, on December 20, 1934, applied to the Government of Canada for the purchase of a deferred annuity of \$1,200 per annum, payable in quarterly instalments, the first payment to be made on December 20, 1936. The suppliant agreed to pay for this annuity at the monthly rate of \$260.20 or \$3,122.40 yearly. The application contained a clause reading “. . . reserving, however, the right to complete the contract by periodical payments and lump sums; or by paying lump sums of varying amounts and at regular intervals; or by a single payment; or by such other plan as may be authorized and approved by the Government; and with the understanding that such an annuity will in any event be granted to me as the total amount paid in by me improved at four per cent compounded yearly will purchase at the rates in effect at the date of this application, the same not to exceed \$1,200; and with the further understanding that in case the payments made by me are not sufficient to purchase an annuity of \$10 the payments I make will be returned to me or to my legal representatives with compound interest at four per cent.”

Pursuant to the Government Annuities Act, R.S.C., 1927, c. 7, a contract, duly signed by the proper officers of the Government, was issued to suppliant. It provided for payments by the suppliant at the rate of \$260.20 on the 20th day of each month, commencing on December 20, 1934, for a period of two years; for the payment to suppliant of \$1,200 per annum in quarterly instalments, the first instalment to be payable on December 20, 1936, if the suppliant be then living, and an instalment of \$300 every three months thereafter, the contract to end with the last payment prior to the annuitant's death. The contract contained a clause reading: “This contract witnesseth further that in consideration of payments made in any other manner than in the manner above indicated, such an annuity shall be paid at the date fixed for the commencement of the annuity as the total payments made (increased at 4 per cent compounded yearly), will purchase at the rate in effect at the date of this contract.”

Payments made by the suppliant were made irregularly and not in strict compliance with the terms of the application and the contract. He did pay the full amount called for by the contract, within the two years, the last payment of \$444.80 being made on October 2, 1936.

Prior to making the last payment, suppliant was advised by the Superintendent of Annuities that the yearly premium of \$3,122.40 quoted to him was due to “an error in computing the rate” and that the annual premium for such an annuity contract as that issued to suppliant was \$3,834.24. Suppliant was advised that after crediting the last payment made by him the balance necessary to be paid was \$1,783.18.

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Suppliant by his petition of right asks specific performance of the contract by His Majesty, or in the alternative, damages for non-fulfilment of the contract.

*Held:* That the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which the Crown is a party, and by accepting payment of instalments subsequent to the dates stipulated in the contract the officers of the Government waived any right arising on behalf of the Crown to rescind or vary the contract by reason of suppliant's defaults.

2. That the error in computing the proper rate for payment of the annuity in question was a mistake of fact.
3. That the mistake was a unilateral one, made by the officers of the Government, and of which the suppliant could not be cognizant, nor did he silently acquiesce in the making of the mistake.
4. That any loss ensuing from the error in question should be borne by the respondent.
5. That the Court has jurisdiction to decree specific performance of the contract by the Crown.

PETITION OF RIGHT by suppliant herein asking specific performance by His Majesty of a contract entered into between suppliant and the Government of Canada pursuant to the Government Annuities Act, R.S.C., 1927, c. 7, or in the alternative, damages for non-fulfilment of the contract.

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

*Charles Morse, K.C.* and *H. A. Ayles, K.C.* for suppliant.

*S. M. Clark, K.C.* and *Alastair MacDonald* for respondent.

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

THE PRESIDENT, now (December 30, 1938) delivered the following judgment:

By his petition of right herein the suppliant seeks a declaration of the Court directing performance by His Majesty of a contract entered into by the suppliant for the purchase of an annuity from the Government of Canada, under the Government Annuities Act, R.S.C., 1927, c. 7, or, in the alternative, that the suppliant may be declared entitled to damages in the sum mentioned in his petition.

The suppliant, on December 20, 1934, then Librarian at the Ottawa Public Library, and aged 69 years, made written application to the Government of Canada for the purchase

of a deferred annuity of \$1,200 per annum, payable in equal quarterly instalments, the first payment to be made two years from the date of the first payment of the purchase money, that is, on December 20, 1936. The annuity was one sold under what was called Plan B, for which the suppliant agreed to pay at the monthly rate of \$260.20, or \$3,122.40 yearly, making a total payment of \$6,244.80 in two years. The annuity was purchased through a Mr. Hall who is a special agent of the Department of Labour, in Ottawa, appointed by the Minister on a commission basis, and who has been with the Department for several years, in that capacity. The application contained this clause: . . . "reserving, however, the right to complete the contract by periodical payments and lump sums; or by paying lump sums of varying amounts and at regular intervals; or by a single payment; or by such other plan as may be authorized and approved by the Government; and with the understanding that such an annuity will in any event be granted to me as the total amount paid in by me improved at four per cent compounded yearly will purchase at the rates in effect at the date of this application, the same not to exceed \$1,200; and with the further understanding that in case the payments made by me are not sufficient to purchase an annuity of \$10 the payments I make will be returned to me or to my legal representatives with compound interest at four per cent."

On January 14, 1935, a contract entitled "Plan 'B'—Deferred Annuity Contract," signed by W. M. Dickson, Deputy Minister of Labour, and E. G. Blackadar, Superintendent of Annuities, was received by the suppliant together with a pass-book, in which to record the payments made. The contract provided for payments by the suppliant at the rate of \$260.20 on the 20th day of each month, commencing on December 20, 1934, until payments for two years shall have been made; for the payment to the suppliant of \$1,200 per annum in quarterly instalments, the first to become due and payable on December 20, 1936, if the annuitant be then living, and an instalment of \$300 every three months thereafter, the contract to end with the last payment prior to the annuitant's death. The following clauses are included in the contract:

If the annuitant should die before the date fixed for the first instalment of annuity to be paid, the purchaser or his or her legal representa-

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tives shall not be entitled to claim any part of the amount paid as purchase money.

This contract witnesseth further that in consideration of payments made in any other manner than in the manner above indicated, such an annuity shall be paid at the date fixed for the commencement of the annuity as the total payments made (increased at 4 per cent compound yearly), will purchase at the rate in effect at the date of this contract.

Those two clauses are, I think, self explanatory. Some contention was advanced on behalf of the Crown, based on the last of those two clauses, but I am not disposed to attach any importance to it.

The suppliant testified that at the time he applied for the annuity he explained to Hall that he would be obliged to sell securities which he owned to make the stipulated purchase payments, and that he would sell the same as and when the market appeared favourable, and that it was understood between Hall and himself that as long as the total purchase money was paid, with interest on any deferred payments, it would be satisfactory. The suppliant made his payments through Hall. When ready to do so he would make out a cheque payable to the Receiver-General, hand the cheque and pass-book to Hall, and later he would receive back by mail the pass-book with the entry of payment made therein. Payments by the suppliant were made irregularly and not in strict compliance with the terms of the application and the contract. He did, however, pay in full the purchase money called for, namely, \$6,244.80 within the two years, the last payment of \$444.80 being made on October 2, 1936.

Prior to making the last payment the suppliant was advised by letter dated September 3, 1936, written by Hall, that an additional sum of \$2,215.59 would be required to be paid on September 20, 1936, in order to complete the purchase of an annuity of \$1,200. The suppliant had at the date of this letter paid \$5,800 on account of the purchase price. A number of letters then passed between the suppliant and the Superintendent of Annuities. In one of these letters, dated October 2, 1936, written by Mr. Blackadar, the Superintendent, the suppliant was informed that the yearly premium of \$3,122.40 quoted him at the time he applied for the contract, was due to "an error in computing the rate," and that the annual premium for such an annuity contract as was issued to suppliant

was \$3,824.24. After crediting the payment of \$444.80, made on October 2, 1936, the balance necessary to be paid was stated to be \$1,783.18.

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A duplicate of the contract in question was later tendered the suppliant but with the endorsement thereon that the annuity to be paid the suppliant was to be in the sum of \$944.47, and payment of this amount has since been accepted by the suppliant, without prejudice, it is agreed, to his rights under the contract.

The issues joined between the parties, and the relevant points of law that here arise, may be discussed in the following order: (1) The validity of the contract in respect of form, parties, and mutuality, under the provisions of the Government Annuities Act, (2) the effect of the waiver, by officers of the Department of Labour, of the suppliant's obligation to make punctual payment of the purchase instalments as they matured on the dates mentioned in the contract, (3) the effect on the contract of a mistake on the part of officers of the Crown in fixing the rate applicable to the purchase price of an annuity such as applied for by the suppliant, and (4) the jurisdiction of the Court to make a declaratory order as to the suppliant's right to performance of the contract in question, by the Crown.

No serious doubt, I think, arises as to the validity of the contract in respect of form, parties and mutuality under the provisions of the Government Annuities Act. The contract both in substance and form, appears to be in accordance with the requirements of that Act. The suppliant was eligible to purchase an annuity at the date of the contract, and the contract itself declares that it was entered into in pursuance of the Government Annuities Act. The contract was signed by the Deputy Minister of Labour, and the Minister of Labour is charged with the administration of the Government Annuities Act. By sec. 31 (1) of the Interpretation Act, words directing or empowering a Minister of the Crown to do any act or thing, include his deputy lawfully appointed.

Turning now to the second point, and that is, whether the conduct of the officers of the Department of Labour in accepting from the suppliant payment of the instalments of the purchase price subsequent to the dates prescribed by the contract, constitutes a waiver in law of any right

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arising to the Crown to make the suppliant's delay in making such payments a ground for rescinding or reforming the contract. Waiver is implied when the person entitled to anything does or acquiesces in something inconsistent with that to which he was entitled, and I think it is clearly established by the authorities that the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which he is a party. Time was not here made "of the essence of the contract." Fry on Specific Performance, 6th Ed., page 520, states the principle of waiver, whether or not time was originally of the essence of the contract, as follows: "Objections grounded on the lapse of time are waived by a course of conduct inconsistent with the intention of insisting on such an objection; and in this respect it is immaterial whether time was originally of the essence or was subsequently engrafted on the contract." And at page 522 he further states: "The mere extension or giving of time, where time is of the essence of the contract, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essentiality of the time." This principle will be found enunciated in all the standard text books on contract, and is supported by such cases as *Davenport v. The Queen* (1); *A.-G. of Victoria v. Etterbank* (2); *Dominion Corporation v. The King* (3); and *Peterson v. The Queen* (4). I think it is well settled law that the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which he is a party, and I think that by accepting payment of instalments subsequent to the dates stipulated in the contract the officers of the Department of Labour waived any right arising on behalf of the Crown to rescind or vary the contract by reason of the suppliant's defaults.

I come now to the question of the effect upon the contract of the mistake on the part of the officers of the Crown in fixing the purchase price of annuities of the kind here in question. The Attorney-General pleads that the rate given the suppliant for the annuity in question was one determined erroneously by an official or officials of the

(1) (1877) 3 A.C. 115.

(2) (1875) L.R. 6 P.C. 354.

(3) (1933) A.C. 533.

(4) (1889) 2 Ex. C.R. 67.



Annuities Branch of the Department of Labour, and in a manner contrary to and unauthorized by the provisions of the Government Annuities Act, and particularly sec. 4 thereof, or by any regulations made thereunder. Sec. 4 of the Act authorizes the Minister to contract with any person for the sale of annuities, according to one of several plans. Sec. 13 empowers the Governor in Council to make regulations as to the rate of interest to be allowed in the computation of the values of annuities, and as to the preparation and use of tables for determining the value of annuities, and the revocation of such tables and the preparation and use of other tables, and certain regulations were accordingly made thereunder.

In connection with Canadian Government Annuities there was published, pursuant to s. 13 a manual containing the rates for determining the value of annuities at different ages, and upon plans therein indicated, and which rates are referred to by the Crown as "authorized" rates, because they were approved of by the Governor in Council. This approved manual of rates, it appears, makes no provision for the case of an applicant for a deferred annuity, according to plan B, whose age was the same as that of the suppliant, upon the date of his application. For such and some other cases a special table of rates was prepared by hand, on one sheet of paper, by actuarial assistants to the Superintendent of Annuities; and this table of rates had been in use, in effect, and available to authorized agents, in the Annuities Branch, I understand, for several years, and it was resorted to by any authorized person when quoting to applicants the cost of an annuity similar to that applied for by the suppliant. This table of rates, referred to as "office rates" by the Superintendent, it is claimed by the Crown, was "unauthorized" because the same was never approved by the Governor in Council. One of the regulations made under the provisions of s. 13 of the Act states that in the case of an application for a contract where the rate to be charged is not obtainable from the authorized tables, the said rate shall be the rate "which the Actuary of the Department or Branch holding office under the Act at the time being shall determine" in accordance with the provisions of s. 4 of the Act. I have no doubt that it was under this regulation that the Annuities Branch acted in compiling what is called the

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“unauthorized” rates, the source of the mistake here alleged. It was just before the suppliant made his last payment that the error in this table of values or rates was discovered and it was accordingly amended no doubt, by the actuarial officers of the Annuities Branch. It does not appear that the amended rate was approved by the Governor in Council, and the Annuities Branch no doubt acted under the regulation, in making the amended rate. The amended rate had the effect of increasing very considerably the cost of an annuity on the plan selected by the suppliant, and for one at his age, and for which nearly two years he believed was to give him \$1,200 per year; or, to state it in another way, the sum of money paid by the suppliant, according to the amended rate, would provide an annuity of \$944.47 instead of \$1,200, a serious reduction no doubt in the mind of the suppliant. The amended or new rate is now sought to be applied to the suppliant's contract which would, of course, vary the terms of the contract. However, the rate quoted the suppliant at the date of his application, was “the rate in effect at the date of this contract,” to use the words of the contract itself. It was a rate which had been in effect for several years.

The Crown, it will be seen, relies upon an error made by some actuarial officer or officers of the Annuities Branch of the Department of Labour in fixing the value or cost of an annuity contract of the type applied for by the suppliant, and applicable to his age at the date of his application, and which value or cost appeared in the table prepared by the actuaries of the Annuities Branch. The mistake relied on by the Crown to relieve him from his obligation under the contract is therefore a unilateral one, and not a bilateral one. This is not a case where both parties have been in error as to some fact lying at the root of the contract. Here, one party only, the Crown, complains that he entered into the contract under a mistake of fact; and it was a mistake, it is claimed on behalf of the suppliant, to which he was not a party, or of which he could be cognizant. It was a contract of sale and purchase, the price or cost of the thing sold being fixed by the seller, the Crown, who was authorized by the Government Annuities Act to sell the thing, and to fix the price or cost in the manner I have indicated.

Mistake in the law of contract is usually a difficult subject. The mistake alleged in this case is, I think, one of fact, and not of law, and therefore we need not enquire as to what constitutes a legal mistake, probably the most troublesome branch of the law of mistake, a satisfactory definition of which has not yet been found, according to some text-writers. The authorities seem to be in agreement in making a distinction between cases of mutual mistake, and those of unilateral mistake; the former usually falls into two main divisions, (1) cases in which both parties have contracted in the mistaken belief that some fact which lies at the root of the contract is true, and (2) cases where there has been no *consensus ad idem*, while in cases of unilateral mistake only one party was in error, or the victim of a mistake. That there should be a distinction would seem reasonable and logical. One cannot say that there appears to be any fixed rule of law applicable to mutual mistakes, or to unilateral mistakes, because of the numerous exceptions to be found in the case law. Very many persuasive criticisms have been made of the doctrine which permits of the rescission of a contract on account of a unilateral mistake, and yet relief of that nature has been granted. However, the courts, it would appear from the decided cases, are not so willing to grant relief where one party only has contracted under a mistake concerning the true facts as where both have erred. I was referred to a work on Mistake In The Law of Contract, by Champness, and in the author's chapter on Unilateral Mistake, he observes that it was obvious that the law of contract would become a farce if a party could, after agreement, shed his obligations by simply pleading that he had been mistaken over some matter concerned with the contract, and yet this author concedes that the courts will under certain circumstances, and in accordance with certain principles, evolved from time to time, relieve a party who has entered into a contract under a mistaken belief, even though the other contracting party was himself under no misapprehension as to the true facts. But generally, where a party seeking to enforce a contract which he has entered into in good faith, and unaware of a mistake of a fact made by the other party, such lack of knowledge will as a rule operate to make the contract enforceable, notwithstanding the unilateral mistake. And the question here is whether

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this case falls within this general rule, or whether it falls within some exceptions to that rule. It was said by James L.J. in *Tamplin v. James* (1): "If a man will not take reasonable care to ascertain what he is contracting about he must take the consequences," and in Halsbury, 2nd Ed., Vol. 23, page 14, I find this remark: "But the Court will not interfere in favour of a man . . . who commits a mistake without exercising the due diligence which the law would expect of a reasonable and careful person, nor will relief be granted when the ignorance was due to the negligence of the party's legal adviser." In the case of *Scriviner v. Pask* (2), where a builder took a contract for some work to be completed for a certain sum relying upon an erroneous statement of quantities taken out by an architect, the other party not knowing of it or being in any way responsible for the mistake, it was held the contractor must perform the contract. And much the same case is *Islington Union v. Brentnall and Cleland* (3), where the defendants, in answer to the plaintiffs' advertisements tendered for the supply of coal for one year, which tender was duly accepted by the plaintiffs. The defendants then sought to withdraw their tender on the ground that the price quoted was a mistake, and the plaintiffs thereupon bought elsewhere and sued the defendants for the difference in price. It was held that the defendants were not entitled to withdraw their tender once it had been accepted by the plaintiff, and that in the absence of any evidence of *mala fides*, the plaintiffs were held to be entitled to succeed in their action. The last two mentioned cases are in effect very similar to the one under discussion. Here the Crown was invited to make an offer for the sale of a certain type of annuity contract, and an offer being made it was accepted, and a contract entered into.

Now what are the facts in this case? The parties assented to the same thing, at the same time, and there was no reason on the part of either to suspect the possibility of any mistake, and particularly would this be true of the suppliant. The one was willing to sell an annuity contract of a type for a stated amount, at a rate which was in effect at the time, upon certain terms as to pay-

(1) (1880) 15 Ch. D. 215 at 221. (2) (1866) L.R. 1 C.P. 715.

(3) (1907) 71 J.P. 407.

ment, and the other party was willing to buy that annuity, upon such terms, and each being in agreement as to the vital elements in the transaction they entered into a contract, which accurately expressed their minds. In contemplation of carrying out his obligation, as to payments under the contract, covering a period of two years, the suppliant was obliged to sell and did sell, from time to time, certain assets which he possessed, from the proceeds of which he was to make the instalment payments required by the contract. And apparently he resigned his position in the Ottawa Public Library to become effective shortly before the first quarterly instalment would be paid him under the contract, and before the mistake in question was discovered. His position had therefore altered, and could not be restored. The error in question was accessible only to the Crown, and could not possibly be known or accessible to the suppliant. The suppliant did not silently acquiesce in a mistake of which he was cognizant. There was nothing which the suppliant knew about annuity rates which he could communicate to the officers or agents of the Crown, in order to assist them in discovering an error made several years earlier, in making up a table of rates. There was nothing that would suggest to the suppliant that the actuaries of the Annuities Branch had made a mistake many years back, or had acted carelessly or negligently. The Annuities Branch had for years been willing to sell the same annuity contract, at the same rate, to any other applicant, and it is possible that they did so. The rate quoted the suppliant was the rate in effect at the time, and no mistake was made in quoting that rate. I doubt if it can be said that any mistake was made by the Crown when the annuity was sold to the suppliant. The mistake made was referable to something else than the contract. The discovery that the purchase price of the annuity contract was unsound from an actuarial standpoint is not, in my opinion, a sufficient ground for seeking to avoid the obligations of the contract. If any loss ensues from the error in question it should be borne by those who sold the annuity.

Now as to the remaining point for discussion. I do not think there can be any serious doubt as to the jurisdiction of the Court to make a declaratory order as to the sup-

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pliant's right to performance by the Crown of the contract in question. Sec. 36 of the Exchequer Court Act provides that in cases not provided for by that Act, or by rules made thereunder, the practice and procedure of the High Court of Justice in England shall regulate the practice and procedure of the Exchequer Court. As the Exchequer Court Rules do not contain any provision in respect of a declaratory order, the English Rule is brought into force by the provisions of Rule 2 of the Exchequer Court Practice. Order 25, rule 5, of the English Rules of the Supreme Court of Judicature provides that: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not." In the case of *Dominion Building Corporation Ltd. v. The King*, a Canadian case (1), Lord Tomlin, discussing the competency of the Court to make a declaratory judgment or order, said:

It is no doubt true that an operative order for specific performance cannot be made against the Crown. In fact, no order can be made against the Crown in the sense in which it can be made against the subject, but under the Petition of Right Act, R.S. Can., 1906, c. 142, s. 8, there is jurisdiction in respect of claims of the subject against the Crown to consider and determine what is right to be done and, as their Lordships do not doubt, to make a declaration as to the right of the subject to specific performance if the circumstances justify it. It is, in their Lordships' opinion, too narrow a view to treat the applicability of the rule as limited by reason of the status of the Crown. In the present case their Lordships think that the circumstances are such as would have justified an order for specific performance by a court of equity, had the contest been one between two subjects.

In the same connection I might refer to *Qu'Appelle Long Lake Ry. Company v. The Queen* (2), and the well known case of *Dyson v. The Attorney-General* (3). Further, s. 18 of the Exchequer Court Act provides that the Court shall have "exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown," and "in all cases in which the lands, goods or money of the subject are in possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf of the Crown."

(1) (1933) A.C. 533 at 548.

(2) (1901) 7 Ex. C.R. 105.

(3) (1911) 1 K.B.D. 410.

I am of the opinion therefore that the suppliant is entitled to a declaration to the effect that the Crown should perform the terms of the contract, subject to a slight qualification. I should have pointed out earlier that the Crown does not seek here a rescission or reformation of the contract. As already stated the suppliant made his payments under the contract irregularly; and it is conceded that some amount would be due the Crown by way of interest, which the suppliant stated he offered to pay, and is still willing to pay. Mr. Blackadar, at my request, filed of record a memorandum to the effect that assuming the monthly premium payments of \$260.20, quoted to the suppliant and as set out in the annuity contract, to be the correct rate to purchase an annuity of \$1,200, the total annuity to which the suppliant would be entitled would be \$1,159.78, by reason of his having made his payments under the contract irregularly. I am assuming that this figure is correct, and the declaration will be accordingly, unless the parties agree otherwise in respect of any amount justly due the Crown in respect of interest, in which event the contract, of course, should be performed in its entirety. The suppliant will have the costs of his petition.

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*Judgment accordingly.*

ON APPEAL FROM THE ONTARIO ADMIRALTY  
 DISTRICT

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 March 21.

BETWEEN:

THE TUG CHAMPLAIN (DEFEND- }  
 ANT) ..... } APPELLANT;

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AND

CANADA STEAMSHIP LINES LIM- }  
 ITED (PLAINTIFF) ..... } RESPONDENT.

*Shipping—Tug and tow—Tow damaged by coming in contact with a hidden obstruction unknown to either party—No negligence on part of tug or its officers—Duty of tug—Canada Evidence Act, R.S.C., 1927, c. 59, s. 95 & s. 7—Canada Evidence Act determines number of expert witnesses that may be called in proceedings over which Parliament of Canada has legislative jurisdiction—Appeal allowed.*

Respondent's ss. *Hamonie* had laid in her winter moorings up a narrow and uncharted channel leading from the St. Clair river. Appellant tug was engaged by the captain of the *Hamonie* to tow her from

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her winter berth to another berth in the Port of Sarnia, Ontario. During the towing operations the *Hamonic* encountered a submerged and unknown obstruction and sustained damage to her rudder. Respondent brought action against the appellant. Judgment at trial was rendered in favour of respondent. On appeal the Court found that appellant tug was a "named" tug; that neither the appellant nor those in charge of her were negligent and that the accident was not due to any default of the tug.

*Held:* That the obligation to carry out a towage contract requires only that degree of caution and skill which prudent navigators usually employ in such services.

2. That it was the appellant that was hired and any complaint alleged against her must relate entirely to the question of the performance of her duty under the towage contract.
3. That the restriction of the number of expert witnesses that may be called in proceedings over which the Parliament of Canada has legislative jurisdiction is controlled by the Canada Evidence Act, R.S.C., 1927, c. 59, and s. 35 of that Act is applicable here.

APPEAL from the judgment of the District Judge in Admiralty for the Ontario Admiralty District allowing plaintiff's action.

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

*Francis King, K.C.* for appellant.

*F. Wilkinson, K.C.* for respondent.

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

THE PRESIDENT, now (January 14, 1939) delivered the following judgment:

This is an appeal from a decision of His Honour Judge Field, District Judge in Admiralty for the Ontario Admiralty District, in an action for damages for alleged negligence on the part of the tug *Champlain* in towing, on April 10, 1933, the steamship *Hamonic* from her winter berth to another berth in the Port of Sarnia, Ontario, during which towing an injury occurred to the *Hamonic*. The trial judge found for the owners of the *Hamonic*, Canada Steamship Lines Ltd., and the tug *Champlain* here appeals therefrom. The judgment of the learned trial judge is to be found in 1938 D.L.R., Vol. I, page 197. On the hearing of the appeal I was assisted by Capt. J. W. Kerr as nautical assessor.

The writ in this action did not issue until March, 1934, nearly one year after the cause of action arose. The state-



ment of claim was not delivered till January 29, 1937, nearly three years after the issuance of the writ. In the meantime Captain Bolton Reid, the master of the tug *Champlain*, had died, and other witnesses who might have testified on behalf of the *Champlain* had scattered and were not available to her owners. Mr. King urged, as he did at the trial, that because of the laches of the plaintiff in bringing the action to trial the court should give the appellant the benefit of every presumption which might be fairly in its favour, and he referred to the cases of *The Kong Magnus* (1), and *The Mellona* (2). I agree fully with the submission of Mr. King in respect of this point, although I do not quite understand why he did not move, long before the trial, for the dismissal of the action. However, in my view of the case the point is not one of great importance.

During the winter of 1922-23, the passenger ship *Hamonic* lay in her winter moorings up a narrow and uncharted channel leading from the St. Clair river, in the Port of Sarnia. She was moored on the northwesterly side of the dock belonging to the Dominion Salt Company, locally known as the Salt Dock. The *Hamonic* was heading in a northerly direction with her starboard side to the dock, and was made fast fore and aft to the dock and she also had her starboard anchor down. Tied upon her port side was the ss. *Huronic*, another passenger ship, also owned by the Canada Steamship Lines. The length of the *Hamonic* was 349 feet, her breadth 50 feet, and her depth 34 feet, her registered tonnage being 3,295 tons. The length of the *Huronic* was 321 feet, her breadth 43 feet, her depth 23 feet, her registered tonnage being 2,211 tons. The length of the tug *Champlain* was 120 feet, her breadth 30 feet, her depth 17 feet, and her registered tonnage 235 tons.

On or about April 8, 1933, the master of the *Hamonic*, Captain Johnston, acting on behalf of the Canada Steamship Lines, employed the tug *Champlain*, through its master, to shift the *Hamonic* from her winter berth to, I assume, the berth usually occupied by her in the shipping season in the Port of Sarnia. There appears to have been no contract, express or implied in regard to the liability of the tug for any damage that might be sustained to the *Hamonic* in towing her out from her winter berth. Abreast

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(1) (1891) P. 223 at 230.

(2) (1847) 3 W. Rob. 7 at 10.

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the Salt Dock, which appears to be at the end of the navigable channel, the channel is from 90 to 100 feet wide, and a very short distance down, where the accident here occurred the channel is about 75 feet wide, or something of that order, and there is a bend or jog in the channel, extending outwardly and westerly between the Salt Dock and the point where the accident occurred to the *Hamonic*. Both the master of the *Hamonic* and the master of the *Champlain* were familiar with the channel, and its hazards, the nature of which will later appear. It seems to be agreed that the western boundary of the channel, beyond which shoal water exists, is not clearly defined. A series of piles are visible above the water but it is not definitely established that these piles mark the top of the bank where shoal water exists, or the edge of the bank where deep water begins, or the edge of the channel shown on a plan made by the Department of Public Works of Canada in contemplation of dredging operations, and which appears as an exhibit in the proceedings. It was admitted that submerged piles were known to exist, or to have existed, on the western side of the channel but doubt existed as to how far these piles might be found off the bank of the western side of the channel. It seems to have been admitted that when ships, with drafts which would allow very little water under the keel in this channel, moved their engines, there was a possibility of stirring up sunken logs or piles which presumably would lay on the bottom in a water-logged condition.

At the time appointed the tug *Champlain* approached the dock where the *Huronic* and *Hamonic* were moored but on account of the confined waters of the channel, and the inability of the tug to turn, on account of her length, in the vicinity of that dock, this manoeuvre was performed at a distance off to allow the tug to back astern up to the *Huronic* on which a tow line was made fast. The *Huronic* was also to be towed out from her winter berth on the same occasion by the *Champlain*, and being on the outside of the *Hamonic* she was the first to be towed, and both stern first. No trouble was encountered in towing the *Huronic* out of the channel to her new berth. Lying, as she was, on the port side of the *Hamonic* the *Huronic* would from the start of the tow be in mid-channel or be

west of mid-channel, and her course from the start would be rather a straight one while proceeding down the channel, and the bend or jog in the channel would not ordinarily be embarrassing to the tow or tug. The fact that no difficulty or accident occurred in the towing of the *Huronic*, does not in my opinion raise any presumption of negligence against the tug in the towing of the *Hamonic*, when an accident did occur. The towing of the *Hamonic*, starting from the dock on the east side of mid-channel with the outward bend or jog in the channel just a short distance down the channel, and the existence of another factor yet to be mentioned, would present some possible difficulty.

The tug then returned to the Salt Dock for the *Hamonic*, when the tow line was made fast. The starboard anchor of the *Hamonic* which had been down all winter remained there, and the chain cable which had been flaked on the dock, was moved aboard until about 12 fathoms remained out. It was decided to use the anchor as a drag to assist in controlling the bow of the *Hamonic*, and in addition it was decided to keep a head line ashore to check the bow if necessary. It would appear from the evidence that no strain came on this bow line from the time the *Hamonic* left her berth until she struck some unknown object in the channel, which resulted in this litigation.

There appears to be no definite record of the draft of the *Hamonic* but it was agreed on both sides that it was about 16 feet aft. This is of some importance because on examining the depths of the channel as shown on the plan of the Department of Public Works—which draft should be reduced by .8 to 1.0 feet as indicated on the plan—it will be seen that a ship drawing 16 feet might touch bottom in certain parts of the channel. The fact that the *Huronic* made the passage without mishap might be partially explained by the fact that her draft was admitted to be less than the *Hamonic*, though the precise draft was not clearly established.

When, upon an agreed signal, the tow began, the *Hamonic* moved astern, but there appears to be a divergence of opinion whether she moved her engines astern, or whether she kept them going slow or dead slow ahead until her stern came close to the Sarnia Yacht Club Dock when it was seen that the stern would have to be pulled

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over to the westward to clear a pile driver moored a very short distance to the south. The tug then pulled the stern of the *Hamonic* to the westward which was the proper thing to do, but as the stern came down towards the pile driver it was seen that the swing to the westward was going too far. The tug thereupon endeavoured to haul the *Hamonic* towards the eastern side of the channel but on account of the length of the tug, 120 feet, and the confined waters in which she had to operate, the angle of pull, my assessor advises me, which she could exert to the eastward of a line drawn from the stem to the stern of the *Hamonic* would not have the same effect as if she had been able to get wide off on the quarter and pull at right angles to the *Hamonic's* keel. This view of my assessor seems reasonable and I endorse it without hesitation. This is a matter of considerable importance.

When the stern of the *Hamonic* was about abreast of the pile driver a submerged and unknown obstruction was encountered which brought her to a stop, and she thereby sustained rudder damage. It was suggested that the obstruction was on the bank of the western edge of the channel but the evidence would indicate, I think, that the obstruction was encountered somewhere between the mid-channel line and the western bank of the channel, at least it does not appear that the stern of the *Hamonic* touched the western boundary of the navigable channel and that was the view of the learned trial judge. Referring to the conduct of the master and crew of the *Hamonic*, he said:

But I find they were alert and did, by engine and rudder operations, endeavour to prevent the steamer contacting the westerly shore. In that endeavour their efforts were successful but a submerged pile was encountered with the disastrous results giving rise to this litigation.

The respondent's statement of claim alleges that the stern of the *Hamonic* was brought into contact with a submerged pile or object. After the accident the *Hamonic* moved over against some exposed upright piling and rested against them, which would indicate that at that particular point there was sufficient water to float the *Hamonic* on the extreme western edge of the channel, and that the hidden obstruction which the *Hamonic* struck was east of the edge of the western bank of the channel. It must therefore be accepted as a fact that the *Hamonic* did not strike the western edge of the channel, while under tow, and that

the injury to the *Hamonic* was caused by striking an unknown obstruction in the navigable channel. It is surmised that it was a submerged pile she struck, but it may have been the ground as the master of the *Hamonic* himself suggested as a possibility, or a rock, or something else. What it was she struck can never be definitely determined.

The obligation to carry out a towage contract requires nothing more than that degree of caution and skill which prudent navigators usually employ in such services. The occurrence of an accident raises no presumption against the tug, and the burden is on the complaining party to prove a lack of ordinary care. A tug is not an insurer, and this is particularly true of a "named" tug, and I think the *Champlain* was a "named" tug, and though the question is not, I think, of any great significance here, yet I might briefly refer to the point because it is one that was raised at the trial and on the appeal. Counsel for the *Hamonic*, in his written argument following the trial, admitted that there was only one tug available at Sarnia, and the evidence supports this statement. There can be no doubt that it was the services of the *Champlain* that were hired by the master of the *Hamonic*; it could have been no other tug, and I see no room for debate upon this point. If the contract is for the hire of a "named" tug, or a tug selected by the tow, there is no implied obligation as to the fitness of the tug to perform the services required. In point of fact the tug here was one well equipped for towing and that is not questioned, but it might be said that she was not the most suitable sort of tug for the particular services here to be performed, on account of her length. The *Champlain* was longer than the width of the channel, and as I have already pointed out she could not pull the *Hamonic* at right angles to her keel in coming down the channel, if any situation developed which made such an operation desirable. Some witness, I think, described the *Champlain* as having been seen at right angles to the *Hamonic* at one stage, but it is obvious that this was not possible. The approximate length of the tug was known no doubt to the master of the *Hamonic* when hired, and if the *Champlain* were in this respect unsuitable for the purposes for which she was hired, that cannot now be made a ground of complaint against her. The respondent,

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having selected the *Champlain* for the tow, it cannot now be heard to say that the accident was due to the length of the *Champlain* and her inability to give a pull at right angles to the *Hamonic's* keel, when her stern came close to the western side of the channel. Otherwise it matters little, so far as I now see, whether the *Champlain* was a "named" tug or not. It was the *Champlain* that was hired and any complaint now alleged against her must relate entirely to the question of the performance of her duty under the towage contract.

In the American case of *The Margaret* (1), the Supreme Court of the United States, in the course of its judgment, said:

The tug was not a common carrier, and the law of that relation has no application here. She was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in every thing relating to the work until it was accomplished.

The same view of the law was expressed by the Supreme Court of Canada, in the case of *Sewell v. British Columbia Towing and Transportation Company* (2). In that case Strong J., in reviewing the authorities, said:

In the face of the decisions in the cases of the *Julia*, 14 Moo. P.C. 210, and in that of *Spaight v. Tedcastle*, 6 A.C. 217, it is difficult to see how there can be any doubt as to the duties of a tug under circumstances like those in evidence here. In the former case Lord Kingsdown lays it down that:

"The law implies an engagement that each vessel would perform its duty in completing the contract, that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other, or increase any risk which would be incidental to the service undertaken."

In *Spaight v. Tedcastle*, Lord Blackburn refers to this case of the *Julia* with approval, saying that "it accurately and clearly states the law."

The judgment of the Supreme Court of the United States in the case of the steamer *Webb* states the law as applicable to American waters in the same terms; it says:

"The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

Now, did the tug exercise that degree of caution and skill reasonably to be expected of her? Neither the tug nor the tow had knowledge of the submerged pile, or whatever was the obstruction that caused the accident. Infor-

(1) (1877) 94 U.S. 494, at 496.

(2) (1883) 9 S.C.R. 527 at 543.

mation as to this hidden hazard was not accessible to the master of the tug, and he was under no obligation to ascertain before the tow began what water-logged piles, or obstructions, there were on the bottom of the channel; he was not an insurer against unknown hazards of that nature. The towage would have been carried out without any injury to the tow had it not been for this hidden obstruction. I do not think it can be said that a tug is responsible for an accident to a tow which strikes an unknown and submerged obstruction, not appearing on any chart, and where the depth of the water was known by its master, the hirer of the tug, to leave but a narrow margin of safety, and where it was known that water-logged piles might unexpectedly be encountered. I know of no principle which would sustain that proposition, and I find no authority for it. The master of the *Hamonic* gave as a reason for not putting his engines full speed ahead, when it appeared that the swing of her stern to the western edge of the channel was excessive, the possibility of stirring up submerged piles. He understood that this might happen at any time but neither he, nor the master of the tug, could inform himself as to whether any water-logged piles were located at any particular spot in the channel, or when or where they might be encountered. The master of a tug would probably render his tug liable for damages sustained by a tow on account of striking upon obstructions, or rocks, in a channel which ought to have been known to him, as one experienced in its navigation, but not for those which are unknown to him.

Further, here, the channel was only about 75 feet wide where the accident occurred and this would leave but little water on either the port or starboard side of the *Hamonic*, and I cannot think there was any obligation on the part of the tug to keep the tow at all times precisely in mid-channel to avoid the possibility of unknown obstructions on the western side of mid-channel. The bend in the channel, and the presence of the pile driver, made the operation a very difficult one. I know of no principle upon which the tug *Champlain* should be held liable because of the fact that the *Hamonic* struck some unknown obstruction while in the navigable channel down which she was being towed, and during which time she did not come in

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contact with the western limit of that channel. Nor do I think the master of the tug was in any way negligent, or failed to show that degree of caution or skill that should be expected of him. In all the circumstances here, I do not think that any negligence can be attached to the tug on account of the fact that at one stage the stern of the *Hamonic* got close to the western bank. The tug promptly proceeded to correct that situation and between her and the tow, the learned trial judge states, they succeeded. The *Hamonic* did rest against exposed piling on the western bank for a short time, but that was subsequent to the accident. The towage would have been performed without accident had it not been for the hidden obstruction of which the tug had no knowledge. I do not think that the tug, or those in charge of her, can be said to have been negligent, or that the accident was due to the default of the tug, and I do not think she should be held liable for the injury caused the *Hamonic*. Upon this ground I am of the opinion that the appeal should be allowed.

It was argued by Mr. King that if the tug were in fault in any way, there was contributory negligence on the part of the *Hamonic* in (1) having her starboard anchor down close to the dock at the starting of the tow, instead of having her port anchor down, and (2) in not putting her engines full speed ahead in order to bring her to a full stop, when it appeared that her stern was getting too close to the western side of the channel; and it was contended that this would be a bar to the respondent's success having regard to the law as it stood at the time of the accident, 1933, and in respect of the waters wherein it occurred. In view of the conclusion which I have already expressed regarding the liability of the *Champlain* it is not now necessary to discuss the two points just mentioned.

There is just one further point upon which I feel I should express briefly my opinion. At the trial, the appellant called a fourth expert witness when the objection was raised by counsel for the respondent that it was the law of Ontario which applied in determining the number of expert witnesses which might be called, and which law limited the number to three. This objection was sustained by the learned trial judge. Sec. 35 of the Canada Evi-



dence Act, R.S.C., 1927, c. 59, provides 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, and s. 7 of the Act limits the number of expert witnesses which may be called by either party to five. Neither the Exchequer Court Act, nor the Admiralty Act of 1934, make any provision in respect of the number of expert witnesses that may be called by either of the parties. The restriction of the number of expert witnesses that may be called in proceedings over which the Parliament of Canada has legislative jurisdiction is, I think, a matter controlled by s. 35 of the Canada Evidence Act, and it was applicable here. I think therefore that the appellant was entitled at the trial to call and examine five expert witnesses, without leave of the court. In my view of the case this point is not now of importance, and it becomes unnecessary to direct that the evidence of the one or two expert witnesses which the appellant proposed to call, should still be heard.

With great respect therefore I must disagree with the conclusion reached by the learned trial judge, and I allow the appeal with costs, both here and below.

*Appeal allowed.*

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BETWEEN:

MONTECATINI SOCIETA GENER- }  
 ALE PER L'INDUSTRIA MIN- } APPELLANT;  
 ERARIA ED AGRICOLA . . . . . }

1938  
 Nov. 15.  
 1939  
 Jan. 5.

AND

COMMISSIONER OF PATENTS . . . . .RESPONDENT.

*Patent—Appeal from Commissioner of Patents—Article 4 of the Union Convention of Paris for the Protection of Industrial Property—Patent Act, 25-26 Geo. V, c. 32, s. 27 (1), s. 31—Filing date of patent—Filing of assignment of patent—Appeal allowed.*

Article 4 of the Union Convention of Paris for the Protection of Industrial Property, ratified by the Dominion of Canada, provides: "(a) Any person who has duly deposited an application for a patent . . . . in one of the contracting countries . . . . shall enjoy, for the purposes of deposit in the other countries . . . . a right of priority during the periods hereinafter stated. (b) Consequently, a subsequent

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deposit in any of the other countries of the Union before the expiration of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by another deposit . . . . (c) The above-mentioned periods of priority shall be twelve months for Patents . . . . These periods start from the date of deposit of the first application in a country of the Union, the day of deposit is not included in the period."

The Patent Act, 25-26 Geo. V, c. 32, s. 27 (1) provides: "An application for a Patent for an invention filed in Canada by any person entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party who has . . . . previously regularly filed an application for a patent for the same invention in any other country which by treaty, convention or law affords similar privilege to citizens of Canada, shall have the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such other country, provided the application in this country is filed within twelve months from the earliest date on which any such application was filed in such other country" . . . .

*Held:* That where an application for a patent was filed in Italy on December 31, 1936, and another application for a patent for the same invention was filed in Canada by the same applicant on December 29, 1937, the applicant for such patent is entitled to a filing date in Canada of December 29, 1937, and to the benefit of the filing date in Italy of December 31, 1936.

2. That the filing with the Commissioner of Patents of an assignment of a patent within the delay prescribed by s. 31 of the Patent Act for completion of an application for a patent, is sufficient and valid.

APPEAL from the decision of the Commissioner of Patents rejecting appellant's application for Letters Patent and refusing appellant's request for the benefit of a certain filing date.

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

*R. S. Smart, K.C.* and *G. H. Riches* for appellant.

*W. P. J. O'Meara, K.C.* for respondent.

The facts are stated in the reasons for judgment.

ANGERS, J., now (January 5, 1939) delivered the following judgment:

Appeal from the decision of the Commissioner of Patents dated February 28, 1938, rejecting the application of Montecatini Societa Generale per l'Industria Mineraria ed Agricola, of Milan, Italy, for letters patent for an invention concerning "a process for the simultaneous manufacture of calcium nitrate and carbon dioxide," and from the de-

cision of said Commissioner dated January 14, 1938, refusing appellant's request for the benefit of a date of filing based on appellant's application for the same invention filed in Italy on December 31, 1936, the said appeal dismissed by judgment of August 24, 1938, and coming up for re-hearing following an order of October 14, 1938, rescinding the judgment of the 24th of August, 1938, and adjudging that the appeal be re-argued.

In an affidavit filed in support of the appellant's application for leave to re-open the appeal for argument, the affiant alleges (*inter alia*):

(2) That I am advised by the Commissioner of Patents, and do verily believe that since the coming into force of the Patent Act, 1935, Section 26 of that Act has been interpreted by him and by the persons practising before the Canadian Patent Office, as meaning that an applicant for patent may obtain a valid patent in Canada provided that his application is filed either before his first foreign patent issues, or alternatively, before one year from the date of the filing of his first foreign application has expired, with the consequence that a very large proportion, probably well over 50%, of the patents granted under the Patent Act, 1935, have been granted on applications which were filed in the Canadian Patent Office more than one year after the filing of the first foreign application, but prior to the issuance of the first foreign patent, or alternatively, which have been filed within the Convention year but after the first foreign patent has issued.

3. That the question determined by the judgment herein is accordingly one of very great public importance and I am informed, and do verily believe, that the point was not argued on the hearing of the appeal from the decision of the Commissioner, but believe that the only point which was argued was as to whether or not it was necessary that an assignment be filed before a filing date might be given by the Commissioner of Patents to an application for patent filed by an assignee of the inventor.

(4) That under the provisions of the International Convention for the Protection of Industrial Property, to which Canada is an adherent, and of section 27 of the Patent Act, 1935, an application for a Canadian patent which has previously regularly been filed in any other country of the Union has the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such other country, provided that the application in Canada is filed within twelve months from the earliest date on which any such application was filed in such other country . . . .

The petition made in the name of and signed by Montecatini Societa Generale per l'Industria Mineraria ed Agricola, through its attorneys, contains, among others, the following statements:

(1) That Gerlando Marullo, of Milan, Italy, made the invention entitled "A Process for the Simultaneous Manufacture of Calcium

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Nitrate and Carbon Dioxide" which is described and defined in the attached specification.

(3) Your petitioner requests that this application be treated as entitled to priority as follows, having regard to the following applications for patent heretofore made in other countries:

ITALY, Serial No. 347,231, filed on Dec. 31st, 1936.

The petition makes no mention of the assignment by the patentee, Gerlando Marullo, of his right, title and interest in and to the said invention.

This petition was sent to the Commissioner of Patents in Ottawa by the applicant's solicitors in a letter dated December 28, 1937, reading in part as follows:

We are now enclosing herewith the necessary papers for filing an application for Canadian Letters Patent in the name of "Montecatini" Societa Generale per l'Industria Mineraria ed Agricola, as assignee of the inventor, Gerlando Marullo, for the invention "A Process for the Simultaneous Manufacture of Calcium Nitrate and Carbon Dioxide."

It will be noted that the applicant is claiming the priority date of the corresponding Italian application Serial No. 347,231, filed Dec. 31st, 1936. A certified copy of the supporting document will be filed in due course.

We would advise you that the application has been assigned to applicant company and we have been advised that the assignment has been mailed to us. In view of the fact that the convention date expires December 31st, we are filing the application immediately in order to obtain the Convention date. The assignment will be forwarded as soon as it is received.

Accompanying the application is the prescribed Government Filing Fee of FIFTEEN DOLLARS (\$15.00) . . . .

As may be noted, the letter states that the application has been assigned to the applicant company.

On December 30, 1937, the Commissioner of Patents sent to the applicant's solicitors the following telegram:

Cannot enter Marullo application until assignment received as your power from assignee.

On December 31, 1937, the applicant's solicitors wired to the Commissioner as follows:

Re your telegram re Gerlando Marullo application assignment received today executed December 16 establishing our power of attorney (Stop) Application entitled to receive filing date under rule 12 (Stop) Advise immediately by wire if given today's filing date (Stop) Assignment in mail to you.

On the same day the applicant's solicitors wrote to the Commissioner the following letter:

Further to our telegram of December 31st, copy of which is enclosed herewith, we are enclosing herewith assignment in duplicate together with the prescribed Government Fee for registering the same.

We are also enclosing herewith the Oath of Inventorship which has been duly executed by the inventor and we would ask you to file these documents with the application.

On January 3, 1938, the Commissioner wired to applicant's solicitors as follows:

Assignment Marullo application received today filing date January third.

In a letter dated January 11, 1938, the Commissioner confirmed his telegram.

On January 14, 1938, the Commissioner wrote to applicant's solicitors; his letter reads in part as follows:

I beg to advise that the application was entered and given a filing date and serial number on the 3rd instant. The request for the benefit of a date of filing in Italy on the 31st of December, 1936, may not be granted.

On February 21, 1938, the applicant's solicitors wrote to the Commissioner the following letter:

At a personal interview which we had with the Commissioner relative to the above entitled application, we again requested that this application be given a filing date as of the 30th day of December, 1937, the day upon which this application was received in the Patent Office. The request was again refused.

The Italian Patent referred to in the application and which corresponds to the invention described and claimed in the application was granted on April 2nd, 1937 as No. 347,231. As explained to the Commissioner we are desirous of taking an appeal to the Exchequer Court to have this question decided, we request an early action by the Examiner.

At the interview, we pointed out to the Commissioner that the oath required by the Act had not been filed and that we could not file it in proper form until this question has been determined. The Commissioner stated that the requested action could be given without the oath being filed.

On February 28, 1938, the Commissioner rendered the following decision:

This application, bearing a filing date of January 3, 1938, corresponds to an Italian application filed December 31, 1936, which matured into patent April 2, 1937. This is contrary to Section 26 (2) of the Act. The case is consequently rejected under the provisions of this section.

On March 11, 1938, the Commissioner wrote to applicant's solicitors in part as follows:

In reply to the question contained in the last paragraph of your letter you are advised that your letter of the 28th of December with the accompanying papers reached the Office on the 29th of December, 1937, and your further letter of the 31st of December with the required assignment on the 3rd of January, 1938.

A copy of the Italian letters patent for invention and a translation thereof were sent to the Commissioner and form part of the file of the Patent Office; they show that

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the application for the letters patent in Italy, made in the name of the present appellant, was filed on December 31, 1936, and that the letters patent were issued on April 2, 1937.

The decision of the Commissioner is based on subsection (2) of section 26 which, in my opinion, has no application to the present case; in view of the Union Convention for the Protection of Industrial Property hereinafter referred to, the question at issue is governed by subsection (1) of section 27.

At the re-hearing counsel for appellant relied on subsection (1) of section 27 of the Patent Act and on clauses (a), (b) and (c) and paragraph 4 of clause (d) of Article 4 of the Union Convention of Paris of the 20th of March, 1883, for the Protection of Industrial Property, revised at Brussels on December 14, 1900, at Washington on June 2, 1911, and at The Hague on November 6, 1925, the ratification whereof by Canada was deposited at The Hague on May 1, 1928.

Clauses (a), (b) and (c) of said Article 4 (English translation) read as follows:

(a) Any person who has duly deposited an application for a patent, or for the registration of a utility model, industrial design or model, or trade mark in one of the contracting countries, or his legal representative or assignee, shall enjoy, for the purposes of deposit in the other countries, and reserving the rights of third parties, a right of priority during the periods hereinafter stated.

(b) Consequently, a subsequent deposit in any of the other countries of the Union before the expiration of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by another deposit, by publication or exploitation of the invention, by the putting on sale of copies of the design or model, or by use of the mark.

(c) The above-mentioned periods of priority shall be twelve months for patents and utility models, and six months for industrial designs and models and trade marks.

These periods start from the date of deposit of the first application in a country of the Union; the day of deposit is not included in the period.

If the last day of the period is a *dies non* in the country where protection is claimed, the period shall be extended until the first following working day.

The fourth paragraph of clause (d) of Article 4 has no materiality herein.

Subsection (1) of section 27 of the Patent Act reads thus:

27. (1) An application for a patent for an invention filed in Canada by any person entitled to protection under the terms of any treaty or

convention relating to patents to which Canada is a party who has, or whose agent or other legal representative has, previously regularly filed an application for a patent for the same invention in any other country which by treaty, convention or law affords similar privilege to citizens of Canada, shall have the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such other country, provided the application in this country is filed within twelve months from the earliest date on which any such application was filed in such other country or from the thirteenth day of June, 1923.

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The period of priority in the present instance commenced on the 1st of January, 1937, the day of deposit of the application in Italy not being included in the period; it extended to December 31, 1937, inclusive.

Counsel for appellant urged that his client was entitled to a filing date as of the 29th of December, 1937, which is the date on which the application was received by the Commissioner, together with the filing fee of \$15, and that the deposit of the assignment with the application was not necessary.

According to subsection (1) of section 26 of the Patent Act the application for a patent must set forth the facts, which I assume to mean all the essential facts. The right, title and interest in and to the invention is, in my opinion, an essential fact; if the same is derived from an assignment, I think that the assignment must be alleged in the petition. There is no provision to that effect in the Patent Act; there is none either in the rules. Rule 5, however, states that forms of proceedings will be found in the appendix to the rules; it adds that in proceedings for which no form is provided any form conformable to the letter and the spirit of the law will be accepted.

There is in the appendix a form of petition for a patent for invention, namely, form I. It contains the following allegation:

(2) That the right to obtain a patent on such invention has been assigned or transmitted to Your Petitioner as appears from the document submitted herewith.

A marginal note says:

Omit this paragraph if the application is made by the inventor.

I may point out incidentally that, under section 12 of the Act, the Governor in Council on the recommendation of the Minister may make, amend or repeal such rules and

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regulations and prescribe such forms as may be deemed expedient:

(a) For carrying into effect the objects of this Act, or for ensuring the due administration thereof by the Commissioner and other officers and employees of the Patent Office; and

(b) . . . . .

(c) In particular with respect to the following matters:

(i) the form and contents of applications for patents.

The petition, as previously noted, makes no mention of the assignment; the letter accompanying it, however, signed by the attorneys who signed the petition on behalf of the applicant, states that the "application" has been assigned to the applicant and that the assignment has been mailed to them. Notwithstanding the fact that the petition is not entirely in compliance with form I of the Appendix to the Rules and lacks a declaration concerning the assignment, I feel inclined to overlook this omission in view of the statement relating to the assignment contained in the letter and of the fact that the Commissioner raised no objection against the form of the petition. Indeed the Commissioner, on receipt of the petition, wired the applicant's attorneys as follows: "Cannot enter Marullo application until assignment received as your power from assignee." Had the Commissioner objected to enter the application because it did not mention the assignment from Marullo to the applicant, the latter could have amended the petition and added thereto an allegation referring to the assignment. In view of these particular circumstances, I do not think that the omission aforesaid, likely due to the haste in which the petition was drawn, should deprive the applicant of its right to a patent, assuming of course that he has fulfilled the requirements of the law.

If the petition, as a general rule, must mention the assignment, I do not think that the assignment need be filed with the petition.

Rule 12 of the Rules, Regulations and Forms under the Patent Act approved by Order in Council of the 26th of September, 1935, stipulates that:

Applications transmitted to the Office shall be regarded as incomplete unless they contain a petition, specifications in duplicate, triplicate copies of claims, drawings in duplicate and one set on bristol board if such are required by the specification, power of attorney if given and appointment of representative if required, all accompanied by the prescribed filing fee.



No mention is made in this rule of the assignment.

Section 31 of the Act enacts that each application for a patent shall be completed and prepared for examination within twelve months after the filing of the application; it adds that in default thereof or upon failure of the applicant to prosecute the same within six months after any action thereon of which notice shall have been given to the applicant, such application shall be deemed to have been abandoned. I believe that the filing of the assignment with the Commissioner within the delay prescribed in section 31 would be sufficient and valid.

The appellant's application was filed within the period prescribed by clause (c) of Article 4 of the Union Convention for the Protection of Industrial Property and subsection (1) of section 27 of the Patent Act, 1935, i.e., within twelve months from and exclusive of the 31st of December, 1936 (the date of deposit of the application in Italy), namely, on the 29th of December, 1937; the appellant's application is accordingly entitled to a filing date of the 29th of December, 1937; it is also entitled to the benefit of the filing date in Italy on the 31st of December, 1936.

The decisions of the Commissioner of Patents of the 14th of January and the 28th of February, 1938, are contrary to the terms of the Union Convention for the Protection of Industrial Property and subsection (1) of section 27 of the Patent Act and they are accordingly reversed and set aside.

There will be no order as to costs.

*Appeal allowed.*

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1938

BETWEEN:

Nov. 2,3,& 4.

MAGAZINE REPEATING RAZOR  
CO. OF CANADA LIMITED, AND  
MAGAZINE REPEATING RAZOR  
COMPANY .....

1939  
Feb. 7.

PLAINTIFFS;

AND

SCHICK SHAVER LTD. ....DEFENDANT.

*Trade mark—Infringement—Licence to use name as trade mark—Obligation on part of licensee to surrender any rights acquired under the licence upon termination thereof—Acquiescence in use of mark—Amendment of registered trade mark.*

The action is for infringement of a trade mark, consisting of the word "Schick," registered by the Magazine Repeating Razor Company, in August, 1927, to apply to safety razors of all kinds, razor blades . . . "shaving machines" . . . and other articles. The defendant by counter-claim, asks that the trade mark registration be modified so as to exclude therefrom any reference to "shaving machines."

Plaintiffs' razors are sold under the name of "Schick Injector Razor" and "Schick Repeating Razor"; the defendant uses the word "Schick" in connection with what it calls "shaving machines," an electrically operated dry shaving apparatus which is sold under the name of "Schick Shaver."

By certain agreements made in March, 1925, and in May, 1927, one, Jacob Schick, agreed to transfer to the plaintiff, Magazine Repeating Razor Company, or its predecessor, Sharp Manufacturing Company, a patent owned by him and several pending patent applications, and the exclusive right to manufacture and sell throughout the world the safety razors and blades covered by the patent and patent applications, and also certain inventions and discoveries he had made in connection with razors or blades, or machinery or processes for manufacturing the same. Schick agreed that the Corporation might use the word "Schick" in connection with the razors, blades and other articles and that such razors, blades or other articles might be marked or associated with the name of "Schick." He also agreed, by paragraph XI of the agreement of May, 1927, that if, during the life of that agreement, he should "make any invention or discovery relating to the art of shaving, other than inventions or discoveries relating to razors or blades or machinery or process for the manufacture thereof," he would disclose the same to the company and make application for letters patent thereon and assign the same to the company.

By an agreement entered into on January 1, 1929, the company released Schick from his obligations under paragraph XI of the 1927 agreement in so far as that paragraph applied to "shaving machines." By a licence agreement dated January 1, 1929, Schick, then the owner of letters patent relating to "shaving machines" which had been named "Schick Dry Shavers," licensed the company to manufacture and sell in the United States, and foreign countries, under the name "Schick," the shaving machines described and disclosed

in his patents or patent applications relative to the same. The licensee agreed that all shaving machines which it or its agents might manufacture, would be marked with the name "Schick," and would be advertised, offered for sale, and sold, under the name "Schick." The company later terminated the licensing agreement effective as of July 1, 1930, by an agreement entered into in May, 1930; certain mutual releases were agreed upon, and the company agreed that "all rights relative to Schick Dry Shavers and Shaving Machines . . . heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end." Schick then organized a company in the United States, known as Schick Dry Shavers Inc. to manufacture the shaving machine and sell it in the United States and other countries, which article became widely known and was widely advertised as "Schick Shaver." The Magazine Repeating Razor Company continued to sell and advertise its safety razor under the name of "Schick Injector Razor" and "Schick Repeating Razor." The Razor Company, in 1938, brought this action against defendant company.

*Held:* That by the agreement of May, 1927, the Magazine Repeating Razor Company was to have the right to use the name of Schick only in connection with the safety razors and blades covered by the Schick patents and patent applications referred to in that agreement.

2. That the compulsory use of the name "Schick" in connection with dry shavers, in the licensing agreement of January 1, 1929, was a condition imposed by Schick, and the acceptance of that condition was an admission that Schick had a right to use his own name, on his dry shaver, if he chose so to do.
3. That if the owner of a patent licenses another to make his invention, and requires as a term of the licence that the inventor's name be marked on the article invented, which condition the licensee accepts, and the licensee later terminates the licence and surrenders back to the licensor all rights acquired under the licence, then the licensor is free to make and sell his invention with his name marked thereon.
4. That the Magazine Repeating Razor Company had not the right to register or maintain on the register the trade mark "Schick" in connection with "shaving machinery."
5. That the plaintiffs acquiesced in the use of the word mark "Schick" by the defendant in connection with its dry shavers.
6. That any confusion resulting from the use of the name "Schick" is a consequence of the agreement and understanding of the parties and the plaintiffs must accept any inconvenience resulting from a situation which they helped to create.

ACTION by plaintiffs asking for an injunction restraining defendant from infringing plaintiffs' trade mark rights.

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

*R. S. Smart, K.C.* and *M. B. Gordon* for plaintiffs.

*J. D. Kearney, K.C.*, *E. G. Gowling* and *R. de W. MacKay* for defendant.

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

THE PRESIDENT, now (February 7, 1939) delivered the following judgment:

This action is one for infringement of a trade mark, consisting of the word "Schick," registered by the second-named plaintiff, in August, 1927, pursuant to the terms of the Trade Mark and Design Act which was then in force, as applied to the sale of razors of all kinds, safety razors of all kinds, razor blades and blade holders, and many other articles, including "shaving machines," the latter of which enters largely into the debate here. The plaintiffs' razors are sold under the name of Schick Injector Razor, and Schick Repeating Razor, and perhaps under another name. The defendant uses the word "Schick" in connection with what it calls "shaving machines," otherwise an electrically operated dry shaving apparatus, and which frequently will be referred to as a "dry shaver," and sometimes as "Schick Dry Shaver." It is sold under the name of "Schick Shaver," the first word being the name of its inventor, but, so far as I know, those words are not registered in Canada, as a trade mark.

The first named plaintiff is a Canadian corporation having its principal office at Niagara Falls, Ontario, the other plaintiff being a corporation incorporated in the United States, and which owns or controls the Canadian corporation. The defendant is a company incorporated under the Companies Act of the Bahamas Islands, its head office being in Nassau, Bahama Islands, and it is licensed to do business in the Province of Quebec, its principal place of business in such province being at St. Johns. One, Jacob Schick, was the founder of this company, and any of its Canadian predecessors, and of a United States company, Schick Dry Shaver Inc., the shares of the latter being now wholly owned by the defendant company here, and it is his name that figures so prominently in this case. Schick is now deceased, and his interest in such companies is now owned by his widow, with the exception of qualifying shares. The facts of this case are, in many respects, somewhat unusual, and I shall at once endeavour to state the most prominent of them.

About 1920 Schick directed his mind towards the invention of safety razors, and blades for use therein, for which he or his assignees later obtained letters patent. There came a time when a syndicate was organized for the purpose of exploiting such inventions as Schick had then made, and later, doubtless for the same purpose, there was incorporated in the United States a company under the name of Sharp Manufacturing Corporation, the name of which corporation was subsequently changed to Magazine Repeating Razor Company, the second named plaintiff in this proceeding, hereafter to be referred to as "the Razor Company." By 1925 Schick had become the owner of one United States patent, and had pending in the United States Patent Office several applications for other patents of invention, all relating to a certain safety razor and blades to be used therein, and that year saw the beginning of transactions between Schick and the Razor Company, the latter being still known as Sharp Manufacturing Corporation, which ultimately gave rise to this litigation, and to that I now turn.

In March, 1925, an agreement was entered into between Schick and Sharp Manufacturing Corporation wherein Schick agreed to transfer to Sharp Manufacturing Corporation the patent which he then owned, and his several pending patent applications, the consideration being the payment of stated sums of money and certain royalties. The Sharp Manufacturing Corporation was to have the exclusive right to manufacture and sell throughout the world the safety razors and blades covered by the said patent and patent applications. By this agreement Schick also granted to Sharp Manufacturing Corporation all "trade marks, trade names and all other privileges relating to said safety razors and blades." In point of fact, Schick does not appear to have had at this time any registered or unregistered trade marks, or trade names, and it is unlikely that he, or any one on his behalf, was manufacturing or selling any safety razor, but that in any event is not of importance. In the event of default by the Sharp Manufacturing Corporation in respect of the conditions of the agreement that corporation was to convey and deliver back to Schick any patents and patent applications, and any and all rights, which it had acquired in virtue of this agreement.

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In May, 1927, a second agreement, supplemental to that of 1925, was entered into between Schick and the Razor Company, formerly Sharp Manufacturing Corporation, wherein Schick agreed to transfer to the Razor Company further applications for patents of inventions which he had made since the date of the first agreement, and which related to safety razors and their blades, and also certain inventions and discoveries he had made in connection with razors or blades, or machinery or processes for manufacturing the same, and for which he had not yet filed applications for letters patent in the United States. One important term of that agreement was the following:

Schick agrees that the Corporation may use the name "Schick" in connection with the razors, blades and other articles, on the sale of which royalties are payable under the provisions of this paragraph IV, and that such razors, blades or other articles may be marked or associated with the name of "Schick."

The agreement also provided that in the event of any default in the payment of royalties or of any deficiency under paragraphs IV or V of the agreement, Schick had the right, upon giving a written notice of such default, and if the default continued for a stated period, to terminate the agreement, in which event the Razor Company obligated itself, *inter alia*, to assign and transfer back to Schick all letters patent and applications for letters patent, acquired from Schick under this agreement and the agreement of 1925, "and also the right to use the name 'Schick' in connection with the manufacture and sale of razors, blades and other articles."

Schick also agreed, in paragraph XI of the agreement, that if, during the life of the agreement, he should "make any invention or discovery relating to the art of shaving, other than inventions or discoveries relating to razors or blades or machinery or process for the manufacture thereof," he would disclose the same to the Razor Company, and make and file applications for letters patent thereon in the United States and such foreign countries as he deemed advisable, and would assign such applications for letters patent to the Razor Company, upon terms to be reached in the manner provided by the agreement. This provision probably was inserted in the agreement because Schick was then engaged in developing his shaving machine, reducing it to practice as they say in the United States, and which the plaintiffs claim is the offending

instrument in this cause. The next agreement to which I am about to refer rather affirms this.

On January 1, 1929, two agreements were entered into between Schick and the Razor Company, in one of which the Razor Company released Schick from his obligations under paragraph XI of the agreement of 1927, the paragraph to which I have just above referred, in so far as that paragraph applied to "shaving machines," which term for the first time appears in the agreements. Shaving machines, as there used, had reference to Schick's dry shaver, and both parties seemed to be in agreement that "shaving machines" properly described this invention of Schick, and that they were to be distinguished from the safety razors, the earlier of Schick's inventions. The other agreement of the same date is designated as a "licence agreement." At this time Schick was the owner of the letters patent relating to "shaving machines," and he had also applications for patents pending, covering the same subject-matter. This shaving machine had been given the name of "Schick Dry Shavers," and the licensing agreement states that the expression, "Schick Dry Shavers," was used to designate "shaving machines," and a brief description is given of such a shaving machine. Schick licensed the Razor Company to manufacture and sell, in the United States, and foreign countries, under the name of "Schick," the shaving machines disclosed in his patents or patent applications relative to the same. The licensee, the Razor Company, agreed that all shaving machines which it or its agents might manufacture, would be marked with the name of "Schick," and they were to be advertised, offered for sale, and sold, under the name of "Schick," and this is a very important point in the dispute here. It was an obligation imposed upon the licensee by Schick, the licensor. If the Razor Company defaulted in its covenants under the licensing agreement, Schick might terminate the licence, after notice of such default as prescribed by the licensing agreement, and the Razor Company on written notice might also terminate the licensing agreement at either of several dates therein specified. If the licensee terminated the licensing agreement, the Razor Company obligated itself to transfer and deliver back to Schick the entire business or businesses of manufacturing and selling shaving machines then con-

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ducted by it, or any of its agents, the good will thereof, and all "trade marks and trade names used exclusively in connection therewith, the exclusive right to use the name of 'Schick' upon or in connection with shaving machines . . . ."

The Razor Company embarked upon the manufacture of Schick's Dry Shavers, experimentally only, and for reasons which I need not pause to state, it terminated the licensing agreement effective as of July 1, 1930. In May, 1930, another agreement was entered into between the same parties, whereby certain mutual releases were agreed upon, and it is therein stated that the Razor Company agrees that any and "all rights relative to Schick Dry Shavers and shaving machines, . . . heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end."

A few words might conveniently here be said in reference to the trade mark here said to be infringed. In March, 1927, the Razor Company applied for the registration of the word "Schick," in Canada, under the Trade Mark and Design Act then in force, as a specific trade mark. The mark was to apply to safety razors of all kinds, razor blades, . . . "shaving machines" and a wide range of other articles such as shaving brushes, pharmaceutical products, toilet preparations and perfumery. At the time of this registration the Razor Company was not manufacturing or selling shaving machines, in Canada or elsewhere, and in fact none had ever yet been made by anybody so far as I know, but Schick was no doubt then developing and perfecting his shaving machine, or dry shaver, and probably this had been disclosed to the Razor Company. By the licensing agreement of 1929, to which I have already referred, it will be remembered that Schick licensed the Razor Company to manufacture and sell his shaving machine, but the licensee shortly afterwards terminated the licence and never in fact manufactured, unless experimentally, what was then known as a shaving machine, or as Schick Dry Shaver. By way of counter-claim the defendant asks that the trade mark registration of the Razor Company be modified so as to exclude therefrom any reference to "shaving machines." It does not appear whether Schick in his lifetime was informed of the Canadian registration of the mark in



question, but apparently the defendant company became aware of that registration only in 1938, the year in which this action was launched.

When the Razor Company terminated its licence to manufacture and sell the Schick dry shaver, or shaving machine, Schick proceeded to organize a company in the United States, known as Schick Dry Shavers Inc., to manufacture this article for sale in the United States and other countries, and the article in the course of time became widely known, and was widely advertised, as "Schick Shaver." In the meanwhile the Razor Company was selling and advertising its safety razor under the name of "Schick Injector Razor" and "Schick Repeating Razor." This all resulted in leaving the impression among a number of people in Canada and the United States that both the electric dry shaver and the safety razor were manufactured by the Razor Company. At one stage the Razor Company was in receipt of many inquiries addressed to it respecting Schick's dry shaver. These communications at one time were quite numerous and may have caused some inconvenience to the Razor Company, but as both concerns were then in friendly relations, the Razor Company would at once forward the same to Schick's own company. Schick and his company appear to have been willing and anxious to do everything possible to abate this inconvenience or confusion, which, I am satisfied, has gradually diminished and is of small proportions to-day. From time to time complaint would be made by the Razor Company over the form which certain advertising of Schick's Dry Shaver Inc. was taking,—possibly, at times with some cause—and which it was claimed was calculated to cause confusion in the public mind as to the origin of the respective articles. But it would seem that any differences arising from such or other causes would be composed quickly, and for a long time friendly relations between the two companies continued; in fact some persons were shareholders in both companies, and all concerned seemed anxious that any confusion arising from the use of the word "Schick" by both companies should be avoided or reduced to a minimum. It is fairly clear that when Schick's dry shaver came on the market neither party suspected that any confusion could or would arise by reason of the use of the word "Schick," each having in

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mind no doubt the dissimilarity between the two articles in question. It was not till June, 1937, that a definite breach occurred and then Schick Dry Shaver Inc. was advised that its use of the word "Schick" was a direct infringement of the Razor Company's trade mark, and that it would take such steps as were deemed necessary to protect its rights under such mark, culminating in this action in Canada, and, I understand, a corresponding action in the United States. These observations have reference largely to the situation as it developed in the United States, and that, for our purposes here, reflects the Canadian situation, and any particular facts distinguishing the one from the other I need not pause to relate.

Closely related to what I have just stated is some documentary evidence which might be referred to here even though this might more appropriately be done elsewhere. In a letter from the solicitor of the Razor Company to the solicitor of Schick, while the question of "confusion" was more or less active, it was stated that the use of the name Schick by the Razor Company was on the solicitation and with the approval of Schick. It was with his approval certainly, but whether it was on his solicitation is apparently in dispute. There is in evidence a letter from Schick to the solicitor of the Razor Company which might be quoted because it, in my opinion, affords an accurate explanation of what occurred, in connection with the dry shaver at least. This letter is dated February 5, 1932, and apparently was occasioned by some opposition on the part of the Razor Company to the registration in the United States of some mark which Schick had applied for, presumably in connection with his dry shaver, and in it Schick gives his view of the cause of any confusion that had arisen, and he explains why, in the licensing agreement, he required the use of the name Schick in connection with the licence to manufacture and sell his dry shaver. The letter reads as follows:

While you state that confusion in the trade has become very evident and is constantly increasing because of the use of the name Schick by the Magazine Repeating Razor Company and by Schick Dry Shaver, Inc., this is not very apparent to us, at least not to cause any practical difficulty. Whatever confusion there may be is due to the fact that the Magazine Company had the right to manufacture the dry shaver for a period of one year, during which time articles appeared in various publications that the company planned to market an electric shaver. As time goes on however, I believe it will become more evident

that the dry shaver will be associated only with Schick Dry Shaver, Inc. As a matter of fact, in our national advertising we are specifically calling attention that the shaver has no connection with the Magazine Company.

The use of the name Schick by the Razor Company was not of my solicitation, but rather on the earnest solicitation of the Company for a period of three or more months, and my aversion to its use was only finally overcome by representation that the name would lend a personal story for advertising purposes.

My intention from the outset, upon taking over the development and manufacture of the dry shaver, was to associate my name with the product, and we intend to continue such use of it. In contracting with the Magazine Company I was especially solicitous in being assured, as you may recall, that the use of the name Schick went with the right to sell and manufacture the dry shaver. This was done. While documentary evidence can therefore be presented to the patent office for the registration of the trade mark to Schick Dry Shaver, Inc., I nevertheless asked Mr. Summer to ask the Magazine Company to consent to this registration, in order to expedite matters and make it unnecessary to send an attorney to Washington. I sincerely hope that upon further consideration, you will advise the Magazine Company to grant such consent.

Earlier I made an extended reference to the several agreements because, in my opinion, they, in themselves, furnish a ground upon which this case may be disposed of, though there are other grounds to be considered. Now what emerges from these agreements? It is perfectly clear that throughout the parties concerned were in agreement that a distinction was to be drawn between the Schick "safety razor" and the Schick "shaving machine," between a safety razor and an electrically operated dry shaver, that the one did not comprise or mean the other, and consequently they were the subject of separate agreements. It was agreed that the expression "Schick's Dry Shaver" was used to designate shaving machines. The licensing agreement makes it clear that a "shaving machine," in the minds of both parties, had reference to Schick's dry shaver. Schick authorized the use of his name in connection with the safety razors and blades, and the 1927 agreement states that the name "may be marked or associated with the name of 'Schick'." It is not lightly to be assumed that Schick, in 1927, contemplated anything else than that the Razor Company might mark its safety razors and blades, and nothing else, with his name. It is hardly believable that he then intended to surrender the use of his name as a mark, for his dry shaver, when he had fully developed it, and if it came upon the market. It is impossible to read into the 1927

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agreement anything more than that the Razor Company was to have the right to use the name of Schick in connection with the safety razors and blades covered by the Schick patents and patent applications referred to in that agreement, and so long as the Razor Company made and sold the same under the terms of that agreement. However, the Razor Company later acquired outright Schick's patents and patent applications covering such safety razors and blades, and the right to use the name "Schick" thereon is no longer in question, and in fact that right is conceded by the defendant.

When it came to the licensing of Schick's patented dry shaver in 1929, Schick granted a licence to the Razor Company to manufacture and sell that invention on the condition that it be marked with his name, a proper precaution for a licensor to take in many instances. The compulsory use of the name "Schick" in connection with dry shavers was a condition imposed by Schick, and the acceptance of that condition was an admission, and virtually an agreement, that Schick had a right to use his own name, on his dry shaver, if he so chose to do. If the licence were terminated by the licensee, as it was, the Razor Company agreed to surrender back to Schick any rights it acquired under the licence, and this it did. Now if the owner of a patent licenses another to make his invention, and requires as a term of the licence that the inventor's name be marked on the article invented, and which condition the licensee accepts, and the licensee later terminates the licence and surrenders back to the licensor all rights acquired under the licence, surely the licensor is free to make and sell his invention, with his name marked thereon. How could it be said that the licensor, in that state of facts, would be infringing any mark of the licensee?

I think the agreements are to be construed as meaning that Schick gave the Razor Company the right to use his name only in connection with the safety razors and blades covered by the agreement of 1927, and that he licensed the Razor Company to manufacture and sell his dry shaver upon terms, one of which was that the dry shaver should carry the mark of his name, so long as the same was manufactured and sold by that licensee. But the licence was terminated by the Razor Company, and accordingly its obligation or right to use the name of

Schick in connection with shaving machines concurrently terminated, and the licensor's right to use his own name thereon was restored to him. The Razor Company had not, in my opinion, the right to register, or maintain on the register, the trade mark "Schick" in connection with "shaving machinery."

Further, it is the contention of the defendant that the plaintiffs, for several years, had knowledge of Schick's use of his name as a mark for his dry shaver, and that this affords a defence to this action because it constitutes acquiescence in the infringement, if any. From the date of the termination of the licensing agreement, July 1, 1930, and for a period of six or seven years thereafter, the plaintiffs were aware that the Schick dry shaver was being manufactured, sold and advertised, by some authorized company or companies, in Canada and the United States, under the name of Schick Dry Shaver or Schick Shaver, without seriously asserting infringement. This conduct is the more fatal because in all that time the word "Schick" was registered in Canada, as a trade mark in connection with "shaving machinery," and yet the plaintiffs stood by and permitted Schick, or the corporations which he controlled, to build up an extensive business in the manufacture and sale of the Schick dry shavers, which involved very substantial capital expenditures. In all the circumstances here I do not think the plaintiffs should be permitted to stand by and allow Schick to put his article on the market, under his own name, in a large way, at great expense, and to acquire a wide reputation for his dry shaver, and now come in and successfully assert infringement, and restrain the defendant from using the word mark "Schick" on its dry shavers, or as part of its corporate name. I doubt if the plaintiffs seriously considered, for several years at least, that Schick, or any one of his companies, was infringing their trade mark. The idea of infringement probably had its birth in other causes. This acquiescence in itself is, I think, a complete defence to this action, and this, together with the agreements, seem to me to make an unanswerable defence for the defendant company. I do not think it necessary in this case to refer to any authorities relating to the doctrine of estoppel.

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Moreover, I doubt if it has been established that the mark "Schick" is liable to cause confusion, in the legal sense, as between the goods of the defendant and those of the plaintiffs. There is no evidence of any one selling or buying the goods of one as that of the other, and there is no evidence of deception or unfair dealing in this connection, on the part of any person. It is difficult to understand how any person could be so deceived as to purchase or accept Schick's dry shaver if intending to purchase a Schick safety razor. Their appearance, cost and mode of operation, are so in contrast that I cannot think it possible that one of the parties here would lose sales at the expense of the other. There may have been caused inconvenience and annoyance, and conceivably momentary confusion, but this would be a consequence of the agreement and understanding of the parties that each might use the word "Schick," and they will have to put up with what ensues from the use of the word "Schick" by each of them. If any confusion is liable to occur it will have been brought about by the action of the parties themselves, and, in my opinion, the complainants here must accept whatever inconvenience or confusion emerges from a situation which they assisted in creating.

My conclusion is, therefore, that the action of the plaintiffs must be dismissed, and that the registered trade mark of the first named plaintiff should be amended by striking out from the registration any words having reference to "shaving machines," as claimed by the defendant. I am in doubt as to whether I have power to direct that the defendant's mark be modified, because it is not a registered mark. While I am of the opinion that there is no infringement here, yet I think that the defendant's mark as now used, should be altered in some way. As I am in doubt as to my power to make any direction in this connection I reserve any definite expression of opinion upon the matter until the settlement of the minutes of judgment, when I shall hear counsel upon the point. If, after hearing counsel, I conclude that I have power to make any direction in the matter I shall do so, and this will be notice to counsel of my intention so to act.

Subject to what I have just said the action is dismissed and with costs to the defendant.

*Judgment accordingly.*

BETWEEN:

J. K. SMIT &amp; SONS INC.....PLAINTIFF;

AND

RICHARD S. McCLINTOCK.....DEFENDANT.

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*Patent—Infringement—Subject-matter—Equivalency—Invention.*

Defendant's patent, no. 368,042, relates to a Method and Mold for setting diamond-cutters in core bits, tools and devices as in rotary drill-bits for earth boring.

Plaintiff is engaged in the business of selling diamonds for industrial purposes, and in connection therewith manufactures a machine for casting diamond core bits.

Plaintiff seeks a declaration that the machine, manufactured by it, and the sale and use thereof in Canada, do not constitute an infringement of defendant's patent. The validity of defendant's patent is not questioned.

The Court found that the structure of the plaintiff and that of the defendant perform the same functions and are governed by substantially the same structural law; that that of the plaintiff is a mere equivalent and did not require an inventive step.

*Held:* That the plaintiff has taken the substance of defendant's invention and any difference in the arrangement of parts, the material employed, or the order of the different steps in the manufacture, are diversities of form and not diversities of substance.

2. That the taking of two steps to accomplish what patentee does in one step does not void an invention, unless the former represents an entirely different conception of means and method for securing the same end.

ACTION by plaintiffs seeking a declaration that a machine manufactured and sold by it does not infringe defendant's Canadian Patent no. 368,042.

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

*R. S. Smart, K.C.* for plaintiff.

*E. G. Gowling and J. C. Osborne* for defendant.

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

THE PRESIDENT, now (February 25, 1939) delivered the following judgment:

The defendant is the owner of Letters Patent no. 368,042, granted in August, 1937, on the application of one Richard S. McClintock, and which relates to a Method and Mold for setting diamond-cutters in core bits, tools and devices, as for instance in rotary drill-bits for earth boring. A core bit is a hollow cylindrical boring bit for cutting out a core

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in earth boring or rock drilling. The plaintiff is engaged in the business of selling diamonds for industrial purposes, and in connection therewith manufactures a machine for casting diamond core bits. The plaintiff alleges that it has imported into Canada certain of its machines, and it wishes to import others for sale to diamond drill contractors who may wish to use the same for the purpose of setting diamonds in the core bits of diamond drills, and this action is brought for the purpose of securing a declaration that the plaintiff's machine, and its sale and use in Canada, does not constitute an infringement of the defendant's patent. The validity of the defendant's patent is not attacked.

The defendant pleads that the plaintiff's machine, and its use in the manner described in an exhibit accompanying the plaintiff's statement of claim, would constitute an infringement of claims 1 and 4 of his patent. Claims 1 and 4 are as follows:

(1) The method of setting diamonds in a molded casting which consists in seating the diamonds to be set in a pattern holder, supporting the diamond holder in the mold and applying suction of air to the diamonds while in their seats before and during the process of molding the casting.

(4) The method of setting diamonds in a tool which consists in seating the diamonds in a mold, applying air suction to the diamonds to hold them in situ, and pouring molten metal in the mold to envelop portions of the diamonds.

Three paragraphs of the specification of the defendant's patent will reveal in broad terms the invention that is there claimed and its object. They are the following:

My present invention relates to an improved METHOD AND MOLD FOR SETTING DIAMONDS which while applicable for use in a variety of industries, is especially designed for setting diamond-cutters in tools and devices, as for instance in rotary drill-bits for earth boring. Heretofore the common practice for setting diamonds, as cutters in industrial tools, has centred around the comparatively difficult, tedious, and therefore extremely expensive method of first drilling depressions in the face of the tool and then setting diamonds in the depressions and forming facets from the surrounding material by means of punches and mauls, to retain the diamonds. This old method of hand setting permits the selection of desired faces to be exposed, after the diamonds are set, but it is expensive and inefficient and necessitates the use of comparatively large and more expensive stones.

Various other methods have been employed for setting the diamonds in the tools, which use plastics for temporarily holding the diamonds in proper position in a mold, and then, through the application of heat and pressure upon a powdered metal confined within the limits of the mold, a cutting tool is produced. An obvious disadvantage of this method is that the diamonds are not firmly held in their seats, and therefore a high percentage in loss of diamonds occurs when the bit is used.



In carrying out my invention, I employ a pattern-holder for the diamonds in which they are initially seated, and after the pattern-holder has been located in the mold, I utilize a vacuum chamber in the mold and air-suction to retain the diamonds in their respective seats in the holder during the process of arranging the diamonds in the best chosen pattern and during the pouring of the molten metal for the formation of the tool. In this manner the diamonds are retained in their proper positions against dislodgment during arranging period and against "floating" and they are set with accuracy and firmly retained against loss during subsequent use.

McClintock's "Method and Mold" for setting diamond-cutters in a drilling tool I shall now attempt to describe briefly, but avoiding reference so far as possible to the combinations and arrangements of parts of the structure which he describes in his specification, and which are exemplified in the accompanying drawings. He starts with what he calls a pattern plate, a mica disk with a round central aperture, in which a predetermined number of small holes have been made, around the circumference and inwards towards the central aperture. Diamonds are manually placed in these holes, and they protrude slightly through the mica on the other side, and that side eventually becomes the cutting end of the core bit. The pattern plate is then set on top of a perforated die plate which is located in the bottom of the mold in which the core bit is to be cast, and below which is a vacuum chamber. Air-suction is then applied upon the diamonds in the pattern plate through the vacuum chamber and the perforated die plate, which air-suction holds the diamonds in their respective seats in the pattern plate, and avoids what is called "floating" during the operation of pouring the molten metal into the mold and around the diamonds, in casting the core bit or cutting tool. The molten metal is poured into the mold from a vertical chamber above the pattern plate, and by gravity it falls around and over the pattern plate, enveloping a portion of the diamonds which become embedded in the metal; the remaining portion of the diamonds which protrude therefrom forms the cutting end of the tool. When sufficient of the molten metal has reached the diamonds to hold them in place the air-suction is discontinued, and when the required amount of metal has flown down to form the desired length of the core bit the same is then completed, except for some machining operations which need not be explained. The mica disappears owing to the

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heat of the metal. The vacuum chamber and the application of air-suction, for the purpose of retaining the diamonds in place in the pattern plate until the molten metal effectively holds the diamonds in place, is the substance of the invention of McClintock. And he does this in the one combination or arrangement of parts which constitute his complete mechanism.

The plaintiff's machine, which I shall endeavour to describe, is primarily designed for the casting of diamond core bits, that is to say, core bits in which the cutting stones or commercial diamonds are embedded in a cast metal matrix. The plaintiff divides its operation of casting diamond core bits into two separate steps. In the first step it employs what is called a "suction cup," in principle the same as the vacuum chamber and air-suction means found in McClintock; they may be regarded as being one and the same thing, designed and intended for the same purpose, namely, the temporary retention of the diamonds by air-suction in the holes wherein they were placed. On the top of this suction cup is placed a die plate having, as in McClintock, many small perforations wherein are placed the diamonds. The diamonds being in place the air-suction means is called into play to hold the diamonds in place in the die plate. In the meanwhile a thin coating of some adhesive material, such as collodion, is sprayed over the die plate and diamonds to hold the latter in place, and after the adhesive has firmly set the air-suction is discontinued. We now have the diamonds fixed in the die plate, with the danger of "floating" probably eliminated, when the casting of the core bit takes place. The die plate is then removed and located in the outer end of a mold cavity in the casting apparatus or machine, and then the second step or operation, the casting of molten metal into the mold to form the core bit and envelop portions of the diamonds, is commenced. The molten metal is poured into a pouring tube, and, by a centrifugal force caused by the rotation of a turn-table on which the pouring tube is attached, is forced around and against the die plate holding the diamonds, and when that operation is fully completed we have in the rough a core bit with the diamonds partially embedded therein; some machine work must be done upon the core bit, but it is not necessary to describe that. The heat of the molten metal burns up the adhesive that tem-

porarily kept the diamonds in place, and passes off in the form of a gas.

It will thus be seen that the plaintiff places its diamonds in a die plate, and retains them in place by air-suction until the adhesive has set and the diamonds are fixed securely in the die plate, after which the air-suction is discontinued. The die plate is then removed and located in the outer end of a mold in the casting mechanism, and the casting of the core bit is begun. The plaintiff injects the molten metal into the mold, by a centrifugal force, whereas McClintock allows the metal to flow vertically by gravity into the mold. The fact that in the plaintiff's casting arrangements a centrifugal force is used, in moving the molten metal into the mold, does not in my opinion distinguish it, in the patent sense, from McClintock. That is a mere equivalent and did not require an inventive step. The use of centrifugal force was necessary in the case of the plaintiff's machine because its casting mechanism is planned on a horizontal basis and not on a vertical one. Being horizontal, a centrifugal force was imperative to drive the molten metal to the end of the mold, and a rotating turn-table was required to create the centrifugal force. If this structure were erected vertically that would have obviated the necessity of the turn-table and its accessories, and also the centrifugal force, and it would in principle and effect be a replica of defendant's structure down to the die plate.

It must, I think, be conceded that the plaintiff employs air-suction for the same purpose of McClintock, but, it was contended by Mr. Smart that this operation was carried out in one piece of mechanism, before the casting of the core bit in another piece of mechanism, and not while the casting was taking place as in McClintock, which, he said, so distinguished the method and means employed by each of the rival parties here, that there could be no infringement of McClintock. Dividing the manufacture of a diamond core bit into two steps does not, in my opinion, mean that there is a diversity of means and method employed by the plaintiff and the defendant. The taking of two steps to do that which a patentee does in one step should not be permitted to destroy an invention, unless the former represents an entirely different conception of means and method for securing the same end, which I do not think can be said of the plaintiff's means and method.

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Doing the same thing in a little different way, using two separate mechanisms to do what a patentee does in one combination of parts, or producing an article which may be a little better than that produced by a patentee, afford no defence to one charged with infringement by a patentee. When the underlying principle of McClintock was once known it would not be difficult for an experienced engineer to vary its structural details by the use of equivalents, or by a different arrangement of parts, or by a change in the order of the steps or processes taken, but that would not mean that the substance of McClintock's invention was not taken.

An individual machine may be considered as a mode of operation embodied in tangible materials, and its essential characteristics are those by which it is enabled to perform its functions according to the structural law imposed on it by its inventor. The first subject for examination is the function of each machine, and if diversity be here found the conclusion that the two machines are not the same becomes inevitable. If their functions prove to be identical two points remain to be considered: the nature of their essential parts, and the character of their respective structural laws. If the integral parts of each are interchangeable with those of the other without disturbance of its functions, these parts are mere equivalents, if each essential part of each machine performs its office in substantially the same order and direction and degree as its equivalent in the other, the structural law of each must be the same. Here, I think it may be said that the structure of the plaintiff and that of the defendant perform the same functions and are governed by substantially the same structural law. The essential and common characteristics of each are the integers in which the diamonds are first placed, the provision of a vacuum chamber or cup, and the employment of air-suction means for holding the diamonds in place temporarily, until in the case of the plaintiff, the adhesive has set, and in the case of the defendant until the molten metal so envelops portions of the diamonds at the end of the mold that they become firmly fixed therein. The integral parts of the one may be said to be interchangeable with the other, and are mere equivalents. The vital characteristic of each is the employment of air-suction to keep the diamonds in place

until they are fixed in their respective seats, prior to or during the casting. And substantially the plaintiff does this in the same way as the defendant. The plaintiff, I think, has taken the substance of the defendant's invention, and any difference in the arrangement of parts, in the material employed, or the order of the different steps in the manufacture, are here diversities of form and not diversities of substance.

I might conclude by referring to certain observations of my own in the case of *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd.* (1)—a case in several respects similar to that under discussion—which would seem to be quite applicable here. There, I said:

In each case the substance, or principle, of the invention and not the mere form is to be looked to. It has been stated in many cases that if an infringer takes the principle and alters the details, and yet it is obvious that he has taken the substance of the idea which is the subject-matter of the invention and has simply altered the details, the Court is justified in looking through the variation of details and see that the substance of the invention has been infringed and consequently can protect the inventor. And the question is not whether the substantial part of the machine or method has been taken from the specification, but the very different one, whether what is done by the alleged infringer takes from the patentee the substance of his invention.

My conclusion is that the plaintiff's machine or machines infringe, or would infringe if sold and used in Canada, claims 1 and 4 of McClintock, and that therefore the plaintiff is not entitled to the declaration claimed. The action is therefore dismissed and with costs.

*Judgment accordingly.*

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BETWEEN:

May 20 & 23.

CELOTEX CORPORATION

(RESPONDENT)

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Jan. 26.

AND

DOMINION SOUND EQUIPMENT

(INTERVENANT)

} APPELLANTS;

AND

DONNACONA PAPER COMPANY, }

LIMITED (PETITIONER) . . . . . }

} RESPONDENT.

*Patent—Appeal from Commissioner of Patents—Abuse of patent rights—Exclusive licence to manufacture and sell in Canada the inventions covered by certain patents—Patent Act, 25-26 Geo. V, c. 32, secs. 65, 66, 67, 68 & 69 (1)—Patents capable of being worked in Canada—Working of the patents on a commercial scale—Qualification of licence granted by the Commissioner of Patents.*

The Commissioner of Patents granted an application made by the respondent herein for an exclusive licence to manufacture and sell in Canada the inventions covered by two patents known as the Trader and Mazer patents, on the ground that there had been an abuse of the exclusive rights thereunder, in that they had never been worked in Canada, and fixed the royalty to be paid by the licensee. The Trader patent is owned by Celotex Corporation and that company is also the exclusive licensee, in Canada, under the Mazer patent. The invention disclosed by the Trader patent relates to sound-absorbing board or material, and that of the Mazer patent relates to an improved "sound-absorbing material for halls, auditoriums or other enclosures and adapted to be used, without change of structure, as a surface material for walls, ceilings, and the like, or, between walls, ceilings and floors and the like."

Celotex Corporation and Dominion Sound Equipment appealed from the decision of the Commissioner of Patents.

The Court found that there had been an abuse of the exclusive rights under the two patents mentioned, and that Donnacona had qualified itself as an applicant for a licence to work the said patents in Canada. The licence granted by the Commissioner of Patents was qualified to permit Celotex to import its acoustical board or material into Canada for sale, when manufactured only from begasse fibres, according to the disclosures of Trader and Mazer.

*Held:* That a patentee who has claimed a wholly new invention must manufacture it in Canada or subject himself to the provisions of s. 65 of the Patent Act.

- 2. That the importation into Canada of a patented article in sufficient quantities to meet the demand in Canada for that article is not a working of a patent in Canada as contemplated by the Patent Act.
- 3. That engineering work done in advance of any sale of acoustical board in order to determine the particular character and formation of the material most suitable to meet any particular sound problem, the appointment of selling agents, the licensing of individuals or acoustical engineers, is not a working of the patents on a commercial scale, as contemplated by the Patent Act.

APPEAL from the decision of the Commissioner of Patents granting to respondent an exclusive licence to manufacture and sell in Canada the inventions covered by two patents.

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

*W. F. Chipman, K.C.* for Dominion Sound Equipment.

*F. B. Chauvin* for Celotex Corporation.

*R. S. Smart, K.C.* and *M. B. Gordon* for Donnacona Paper Company Limited.

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

THE PRESIDENT, now (January 26, 1939) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents, in the matter of an application made by Donnacona Paper Company Ltd., under sections 65 and 66 of the *Patent Act*, 25-26 Geo. V, Chap. 32, for an exclusive licence to manufacture and sell in Canada the inventions covered by two patents, known as the Trader and Mazer patents, on the ground that there had been an abuse of the exclusive rights thereunder, in that they have never been worked in Canada. The Trader patent is now owned by Celotex Corporation, and it is the exclusive licensee in Canada under the Mazer patent. Donnacona Paper Company Ltd. is a Canadian corporation carrying on business in the City of Quebec. Celotex Corporation has its principal place of business in the City of Chicago, U.S.A. The Commissioner found that there had been an abuse of the exclusive rights under the said patents, and that an exclusive licence should be granted the applicant, and he fixed the royalty to be paid by the applicant to Celotex Corporation. It will be convenient hereafter to refer to the Donnacona Paper Company Ltd., as "Donnacona," and to Celotex Corporation as "Celotex." The application of Donnacona for a compulsory exclusive licence is an unusual one, and, I think, it was stated by Mr. Chauvin that it was the first to be made in Canada, under the provisions provided therefor in the *Patent Act*.

Before referring to the provisions of the *Patent Act* relevant to the issues here, which are sections 65 to 70

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inclusive, I might observe that prior to the enactment of such sections, the *Patent Act* provided that any person might apply to the Commissioner, at any time after three years from the date of a patent, for the revocation of such patent on the ground that the patented articles or process was manufactured or carried on exclusively or mainly outside Canada, to supply the Canadian market with the invention covered by the patent. The Commissioner, in the absence of satisfactory reasons as to why the article or process was not manufactured or carried on in Canada, was empowered to make an order revoking the patent forthwith, or after a reasonable interval. This provision was enacted with a view to establishing new industries in this country, but it was evidently found at times impractical, or oppressive, and it was superseded by the provisions of the *Patent Act* to which I am about to turn, which are almost identical with section 27 of the English *Patent Act*.

Sec. 65 (1) provides that any person interested may at any time after the expiration of three years from the date of the grant of a patent apply to the Commissioner alleging, in the case of that patent, that there has been an abuse of the exclusive rights thereunder, and asking for relief under the Act. There are six classes of cases in which monopoly rights are to be deemed to be abused. These classes are not mutually exclusive; but unless the circumstances relied upon fall within one or other of the classes, no relief can be granted under the section. The six classes of cases in which the exclusive rights under a patent may be deemed to be abused, are to be found in subsec. 2 of s. 65, and the first four may be recited. They are as follows:

(2) The exclusive rights, under a patent shall be deemed to have been abused in any of the following circumstances:

(a) If the patented invention (being one capable of being worked within Canada) is not being worked within Canada on a commercial scale, and no satisfactory reason can be given for such non-working;

Provided that, if an application is presented to the Commissioner on this ground, and the Commissioner is of opinion that the time which has elapsed since the grant of the patent has by reason of the nature of the invention or for any other cause been insufficient to enable the invention to be worked within Canada on a commercial scale, the Commissioner may make an order adjourning the application for such period as will in his opinion be sufficient for that purpose;

(b) If the working of the invention within Canada on a commercial scale is being prevented or hindered by the importation from abroad



of the patented article by the patentee or persons claiming under him, or by persons directly or indirectly purchasing from him, or by other persons against whom the patentee is not taking or has not taken any proceedings for infringement;

(c) If the demand for the patented article in Canada is not being met to an adequate extent and on reasonable terms;

(d) If, by reason of the refusal of the patentee to grant a licence or licences upon reasonable terms, the trade or industry of Canada or the trade of any person or class of persons trading in Canada, or the establishment of any new trade or industry in Canada, is prejudiced, and it is in the public interest that a licence or licences should be granted;

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Subsec. 3 of s. 65 is of importance and it reads as follows:

(3) It is declared with relation to every paragraph of the next foregoing subsection that, for the purpose of determining whether there has been any abuse of the exclusive rights under a patent, it shall be taken that patents for new inventions are granted not only to encourage invention but to secure that new inventions shall so far as possible be worked on a commercial scale in Canada without undue delay.

Then s. 66 provides that if the Commissioner is satisfied that a case of abuse of the exclusive rights under a patent has been established, he may order the grant to the applicant of a licence upon terms, or he may grant an exclusive licence upon terms, or he may order the patent to be revoked. S. 66 (iii) (b) is as follows:

(b) If the Commissioner is satisfied that the invention is not being worked on a commercial scale within Canada, and is such that it cannot be so worked without the expenditure of capital for the raising of which it will be necessary to rely on the exclusive rights under the patent, he may, unless the patentee or those claiming under him will undertake to find such capital, order the grant to the applicant, or any other person, or to the applicant and any other person or persons jointly, if able and willing to provide such capital, of an exclusive licence on such terms as the Commissioner may think just, but subject as hereafter in this Act provided;

Sec. 67 deals further with the subject of exclusive licence and may be recited. It is as follows:

67. (1) In settling the terms of any such exclusive licence as is provided in paragraph (b) of the last preceding section, due regard shall be had to the risks undertaken by the licensee in providing the capital and working the invention, but, subject thereto, the licence shall be so framed as

(a) to secure to the patentee the maximum royalty compatible with the licensee working the invention within Canada on a commercial scale and at a reasonable profit;

(b) to guarantee to the patentee a minimum yearly sum by way of royalty, if and as far as it is reasonable so to do, having regard to the capital requisite for the proper working of the invention and all the circumstances of the case;

and, in addition to any other powers expressed in the licence or order, the licence and the order granting the licence shall be made revocable

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at the discretion of the Commissioner if the licensee fails to expend the amount specified in the licence as being the amount which he is able and willing to provide for the purpose of working the invention on a commercial scale within Canada, or if he fails so to work the invention within the time specified in the order.

(2) In deciding to whom such an exclusive licence is to be granted the Commissioner shall, unless good reason is shown to the contrary, prefer an existing licensee to a person having no registered interest in the patent.

(3) The order granting an exclusive licence under the last foregoing section shall operate to take away from the patentee any right which he may have as patentee to work or use the invention and to revoke all existing licences, unless otherwise provided in the order, but on granting an exclusive licence the Commissioner may, if he thinks it fair and equitable, make it a condition that the licensee shall give proper compensation to be fixed by the Commissioner for any money or labour expended by the patentee or any existing licensee in developing or exploiting the invention.

It will be convenient next to refer to the two patents here involved. The first to be mentioned is that known as the Trader patent. This patent was granted in March, 1925, and will thus expire within five years. This invention, the patent states, relates to sound-absorbing board or material and has for its object to provide "an article of manufacture" that will be simple in construction and for the same absorbing capacity will be less costly to make than those heretofore proposed. As a preferred sound-absorbing board or material Trader suggests that made from begasse fibres which are derived from the stalks of sugar corn, and so compacted as to be capable of use as an artificial lumber, and board made from begasse fibres is mentioned in some of the claims. The invention here lies in the formation of perforations or openings in various forms, in a sound-absorbing board or material. Claims 7 and 8 will make clear what is the invention claimed and they are as follows:

7. In a sound-absorbing construction, the combination of a fibrous porous layer of sound-absorbing material provided with openings communicating with its interior; a wall; and means to space said layer from said wall.

8. In a sound-absorbing construction, the combination of a fibrous, porous layer of sound absorbing material provided with perforations extending entirely through said layer; a wall; and means to support said layer away from said wall and provide a space into which said perforations open.

I think the invention here clearly relates to "an article of manufacture," as the patentee himself stated.

The second patent in question is one granted to Mazer, in October, 1925, and which therefore has been in force

thirteen years. The invention is said to relate to an improved "sound-absorbing material for halls, auditoriums or other enclosures and adapted to be used, without change of structure, as a surface material for walls, ceilings and the like, or, between walls, ceilings and floors and the like." One paragraph of the specification reads:

My invention aims particularly to provide sound-absorbing material having predetermined and controllable sound modifying effect which may be selected and controlled, and which is produced by surface apertures which are in free communication with the room or other space where the acoustics are to be controlled. The surface apertures may be formed in the material in advance of its installation, or may be formed in the material after the material has been placed in position. This general aspect of my invention is capable of being put to use with a great variety of substances and with many different arrangements of apertures some of which are described below.

The character, the form, the size and number of sound-absorbing surface apertures formed in the board or material selected for treatment according to the teaching of this patent, need not be explained. The important feature of the invention is the formation of apertures or openings in one form or another, on the surface of a selected sound-absorbing material, which apertures or openings are formed usually before the material is put in place in any enclosure, but it is also claimed that this may be done on the surface of a wall or ceiling already erected, although that has never been done in Canada. Whether or not this is a practical suggestion I cannot say. There is a claim for the method of establishing predetermined acoustic conditions for an enclosure in which the invention is to be applied, which I confess I cannot well understand, and there does not seem to be any description of any such method in the specification. The patentee states that his invention relates to an improved sound-absorbing material, having predetermined and controllable sound-modifying effect produced by surface apertures, and I think it is that and nothing else.

Sec. 68 of the Act requires that every application made to the Commissioner under sections 65 or 66 of the Act shall set out fully the nature of the applicant's interest and the facts upon which he bases his case, and the relief which he seeks. This requirement was complied with and the same was accompanied by certain statutory declarations verifying the facts set out in the application. Similarly, Celotex delivered to the Commissioner a counter

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statement setting forth the grounds on which the application was to be opposed, as required by s. 69 (1). Donnacona, in its application, states that the inventions covered by the Trader and Mazer patents have never been worked in Canada on a commercial scale; that it presently operates a factory in Canada for the manufacture of fibre board in connection with which it spent the sum of \$1,250,000, and that it is prepared to carry on the manufacture of acoustical board in the manner described by the Trader and Mazer patents, which would require a further capital expenditure of the order of \$20,000, for special equipment; that at various times since 1930 it sought to enter into negotiations with Celotex for a licence to manufacture acoustical board in Canada under the said patents, but without success; that since 1930 Celotex has continued to import into Canada the inventions, an improved sound-absorbing material, covered by the Trader and Mazer patents; that the demand in Canada for acoustical board of the type covered by the patents in question could be increased if such a board were made in Canada; that the selling of acoustical board or material must be done by sale engineers who are able to advise a potential purchaser as to the character of the material required to meet a particular sound problem in a given installation, which must be done in advance of the sale and the expense of installation, and which adds to the cost of any installation; that the present market for acoustical board in Canada is limited and if the applicant installed the necessary equipment to manufacture acoustical board its capacity would be many times greater than the existing market in Canada and that it would not be profitable to install such equipment unless it could be assured of a reasonable expectation of an increase in the demand for acoustical board, and the exclusive right to the Canadian market during the period of development; that with an expenditure of \$20,000 the applicant could equip itself to manufacture 500,000 square feet of acoustical board per year though not over 100,000 square feet of such material has been sold in Canada during the past five years; that the applicant would, providing an exclusive licence were granted it under the patents in question, make the necessary capital expenditure to enable it to manufacture acoustical board and aggressively market the same in order

to develop the market therefor in Canada with resultant increased employment of Canadian labour not only in the manufacture of the said board but also in the sale, engineering and installation thereof; and the applicant states that a royalty of 3 per cent on the factory sales price of such acoustical board would be a reasonable royalty to allow Celotex for the working and use of the old patents of invention.

Celotex, in its counter statement, denies that there has been any abuse of the exclusive rights granted under the patents in question, and it sets forth that the invention covered by the Trader and Mazer patents involve methods of determining, by proper computations from an examination by experts of any given enclosure, the acoustical treatment that may be required, and the processes of making apertures in the surface material of an enclosure, whether such apertures are formed in the material before or after it has been placed in position; that since 1925 approximately 1,000,000 square feet of installations have been made in Canada in conformity with the teachings of the patents in question, and that all the labour and engineering work incident thereto has been Canadian, and two large and well known Canadian buildings are mentioned as having been acoustically treated,—and there were others—which, it is claimed, was a working of the patents in Canada; that in 1928 it appointed Alexander Murray & Company Ltd., of Montreal, as its exclusive representative in Canada to further there the working of the said patents, by contact with architects, owners, distributors, dealers and contractors, and that in 1937 it appointed Dominion Sound Equipments Ltd., the Intervenant here, its exclusive representative for Canada in an endeavour to increase the demand and develop the market in Canada for the inventions covered by Trader and Mazer; that in the exercise or working of the inventions of the patents in question it had determined that where there is required the installation of a fibre board, prepared in accordance with the disclosures of Trader and Mazer, a fibre board composed of strong begasse fibres derived from the stalks of sugar-cane was most in demand, and in the majority of cases was the most suitable, and that as sugar-cane was not a Canadian product and must be imported the cost to the Canadian consumer would be greater if the raw

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material were imported into Canada and there converted into board and processed in accordance with the disclosures of Trader and Mazer; that it has never refused a licence to carry on in Canada the methods and processes described in the said patents; that no part of the Canadian public is deprived of the use and benefit of the inventions disclosed in the said patents on the ground that they cannot be had in Canada upon reasonable terms, and that any importations of board have been purely incidental to the working of the invention in Canada; that an expenditure of the sum of \$20,000, as suggested by Donnacona, would not procure an efficient and economical equipment for the production of the apertures in any fibre board that might be used in the working of the said patents; and that a royalty of 3 per cent of the net factory selling price would be inadequate and it submitted that a royalty of 10 per cent of such selling price would be a reasonable royalty, or, in the alternative, a royalty of 4 cents per square foot of surface treated, and in any event a minimum annual royalty of \$10,000.

In addition to the statements of fact admitted by Donnacona and Celotex, and also one submitted by the Intervenant, each of which was accompanied by one or more statutory declarations, counsel on behalf of Donnacona and Celotex, and the Intervenant, were heard by the Commissioner.

I come now to the main facts of the appeal. There can be no doubt but that the patents in question are capable of being worked in Canada. The inventions therein claimed are to be construed as relating to the manufacture of a sound-absorbing board or material, because of the particular form in which it is manufactured and given acoustical qualities, that is, by the formation mechanically of perforations, apertures or openings, upon the surface of any selected board or material. It is essential to the working of the patents in Canada, in my opinion, that the formation of perforations, apertures, or surface openings, in the acoustical board should be carried out in Canada, because such is the essence of the inventions; it is an acoustical board so formed, having such physical characteristics, and that is the invention in the case of each patent. Engineering work done in advance of any sale of acoustical board in order to determine the particular

character and formation of the material most suitable to meet any particular sound problem, the appointment of selling agents, the licensing of individuals or acoustical engineers, is not, in my opinion, a working of the patents on a commercial scale, as contemplated by the *Patent Act*, and I think such contentions are altogether untenable. As practised by Celotex, the sound-absorbing apertures or perforations are made by a special drilling machine of which there are only three in existence, all located and operated in the State of Louisiana, U.S.A., so there could have been no working of the patents in Canada. It is clear therefore that neither Celotex, or the Intervenant, ever manufactured in Canada an acoustical board or material according to Trader or Mazer, during all the years both patents have been in existence, and any sales of such board made in Canada have been by way of importations. It is quite clear also, I think, that Celotex does not propose to work the patents in question in Canada, because, as was argued by its counsel, it is not practical to import begasse fibres into Canada for the purpose of manufacturing an acoustical board according to Trader or Mazer, and Celotex seems to have committed itself to the policy of making an acoustical board from begasse fibres only, although, of course, it might use many other materials. It is unlikely that Celotex would at this stage in the life of the patents in question contemplate the working of the patents in Canada. It may also be said with confidence that Celotex did not sympathetically or seriously consider Donnacona's approaches for some licensing arrangement by which it might manufacture in Canada an acoustical board made from wood fibres, according to Trader and Mazer, and I am rather of the opinion that it never intended doing so. Donnacona proposes to undertake the manufacture of an acoustical board from wood pulp tailings, under the patents in question, if its application for an exclusive licence is granted. It is presently the manufacturer of a wood fibre board, apparently in a large way, and the raw material is readily available to it, in large quantities, in Canada. I assume that Donnacona possesses the financial resources to warrant it embarking in this new industrial venture, so therefore it may fairly be said that Donnacona is an interested party, acting in good faith, and it seems to me, not unreasonable

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that Donnacona should seek the licence it does, if the patents are held to have been abused. Whether or not the Intervenant is a licensee of Celotex is not of importance here, because in any event it does not manufacture an acoustical board or material under the patents in question, or at all, and there is no suggestion that it proposes to do so during the lifetime of such patents.

In the same connection there is one further point to which I must refer, and that briefly. Claim 10 of the Mazer patent refers to a method of providing the surface of an enclosure, a room, with a material capable of being treated according to Trader and Mazer after the surface material is in position in the enclosure, and then forming the apertures, perforations or openings, by some special tool or apparatus. The suggestion in respect of this point is that this would constitute a working of the invention in Canada. Whether this is a practical proposal I cannot say, but in any event, any invention covered by this claim has never been practised or worked in Canada, by Celotex or the Intervenant, and therefore that contention falls.

It has, I think, been clearly established that there has been an abuse of the exclusive rights under the patents in question here, and that Donnacona has qualified itself as an applicant for a licence to work the said patents in Canada. I think therefore the Commissioner, upon the facts and circumstances disclosed, was justified in finding that there had been an abuse of the exclusive rights under such patents. Sec. 65, ss. (3) of the Act declares that in an application of this nature it shall be taken that patents for new inventions are granted not only to encourage inventions but to secure that new inventions shall, as far as possible, be worked on a commercial scale in Canada, without undue delay; that is, and always has been, the spirit of the several Patent Acts in force in this country, at least for a long time. The present *Patent Act* is more liberal to patentees than former Acts. If a patentee has claimed a wholly new invention, a machine, an acoustical board, he must manufacture it in this country or run the risk of coming within the provisions of s. 65 of the Act. Each case must, of course, be determined on its merits, and in each case it will have to be determined on a proper construction of the patentee's specification, what the invention really is, and what are its essential features. In



this case the essential feature of the inventions of Trader and Mazer, as I have already stated, is the manufacture of a suitable acoustical board or material according to the manner described in such patents. That is a new manufacture. The patentee must, in such cases make an effort to create a demand for the monopoly, and the establishment of an industry will in itself frequently help to create a demand for the article or process in question. And regard must be had to the possible export trade with countries in which the importer would not be liable to actions for infringement, as well as the demand for domestic consumption. It may be that the demand in Canada for the acoustical board produced by Celotex is limited, and that Celotex has adequately met Canadian demands for that board by importations of such board, but that is not a working of the patents as contemplated by the *Patent Act*. It seems to me that Donnacona has made out a case for an exclusive licence to work Trader and Mazer, and upon the terms proposed in the draft order of the Commissioner, subject, however, to one qualification to which I will refer at the end of this judgment.

I should have earlier referred to the following point. It was contended upon behalf of Celotex that the Commissioner should first have found whether or not there had been an abuse of the patents in question, and, if he decided in the affirmative, that there should have been an adjournment of the hearing, to be followed by a second hearing, in respect of the nature of the licence to be granted, and the terms of the order to be made. I have no doubt that the Commissioner had power to direct an adjournment and a further hearing, and to hear further evidence if he so desired, or to call witnesses of his own accord to assist him if he so felt, after having decided that there had been an abuse of the patents. And possibly this might be a desirable practice to adopt in some cases. But the relevant provisions of the Act do not seem to contemplate this, or require it. However, in this case, the facts found in the application of Donnacona, and in the counter statement of Celotex and that of the Intervenant, seem complete, and there were filed several statutory declarations verifying the facts therein stated. I cannot see that more could usefully be said or done. The Commissioner has yet to fix definitely the terms of the licence. In this case

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the Commissioner was evidently of the opinion that another hearing was unnecessary upon the point as to whether or not Donnacona was entitled to an exclusive licence, and I cannot say that he was in error in reaching that conclusion. All of the facts really relevant to the issues were presented to the Commissioner apparently with great care, and in the main they are really not seriously in dispute, except possibly as to the question of royalty. I do not think that the facts pertaining to the issues here could have been amplified or clarified by any further hearing.

The Commissioner filed with his decision a draft of the form of licence proposed to be made in this case, if his decision is sustained. Subject to one qualification, I approve of the terms of the proposed form of licence. Therein the Commissioner proposes to grant an exclusive licence to Donnacona to manufacture, sell and use in Canada the inventions covered by the Trader and Mazer patents. This would seem to involve a prohibition of the importation of the type of acoustical board made by Celotex, and would virtually mean the termination of its patent rights in Canada. In point of law that might well be justified, yet, in all the circumstances of the case that would appear to me to be an unnecessarily severe term to impose against Celotex, and one which I think might be modified. I have some measure of sympathy for the contention made on behalf of Celotex, namely, that it is not practical to import begasse fibres into Canada wherefrom to make acoustical board according to the disclosures of Trader and Mazer, and as I have elsewhere stated it is to the begasse fibre acoustical board that Celotex directs its activities, in Canada. Donnacona proposes to work the Trader and Mazer patents in the manufacture of an acoustical board made from a wood fibre material, and it is not suggested that it proposes to employ begasse fibres. It therefore appears to me that the interests of all here concerned might justly be served if the exclusive licence were so qualified as to permit Celotex to import into Canada for sale its acoustical board or material, but only when manufactured from begasse fibres, according to the disclosures of Trader and Mazer. It is conceivable that some persons in Canada might in the future regard an acoustical board made from begasse fibres as the one which would best meet their particular problems. Further, the

acoustical board of Celotex has become known in the Canadian market, and, I think, has been widely advertised, and probably considerable money has been expended in promoting sales in one way or another, so therefore to exclude Celotex from the Canadian market entirely so close to the expiration of its patent rights, would seem unduly severe. In the facts of this particular case, and I am not laying down any rule of general application, I think ample justice will be done all parties here concerned by qualifying the proposed licence in the manner I have suggested. Subject to that qualification, Donnacona will be the sole licensee in Canada during the balance of the life of Trader and Mazer, which should adequately meet all its requirements. Such a qualification would not, I think, offend against the intent and spirit of the *Patent Act*, and I therefore direct that the form of licence include such a term as I have just indicated. The inclusion of this term in the licence may in turn, in the judgment of the Commissioner, require some variations in or additions to his proposed form of licence, but that may be determined by him when the precise form of the licence is finally settled.

In the result the appeal herein is dismissed, and as Celotex resisted throughout the granting of any form of licence to Donnacona, the latter is entitled to its costs of the appeal.

*Appeal dismissed.*

BETWEEN:

THE IMPERIAL TOBACCO COMPANY OF CANADA, LIMITED.. }

APPELLANT;

AND

THE REGISTRAR OF TRADE MARKS .....

RESPONDENT.

*Trade mark—Appeal from Registrar of Trade Marks—Unfair Competition Act, 22-23, Geo. V, c. 38, s. 2 (d) & (m).*

Appellant applied for registration of a trade mark to be applied to tobacco in all its forms, and consisting of a flat sheet of cellophane to be used as an outer wrapper, and a narrow coloured band of the same material extending around the package, this outer wrapper being entirely distinct from the container or package containing the tobacco. The Registrar of Trade Marks refused registration of the mark on the grounds that the coloured band performed the function of indicating where the tear strip was located, thereby facilitating the opening of

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the wrapper, and that such wrapper being in use by manufacturers other than the applicant the same would not identify the wares so wrapped as those of the applicant. The applicant appealed to this Court.

- Held:* That any combination of elements which are primarily designed to perform a function, as here, a transparent wrapper which is moisture proof, and a band to open the wrapper, is not subject-matter for a trade mark.
2. That the proposed mark is not a "distinguishing guise" within the meaning of the Unfair Competition Act, 22-23 Geo. V, c. 38, s. 2 (d); It is not a "mode of shaping, moulding, wrapping or packing wares."
  3. That the proposed mark is not one which has become adapted to distinguish the wares of the appellant within the meaning of s. 2 (m) of the Unfair Competition Act.

APPEAL from the refusal of the Registrar of Trade Marks to register a trade mark applied for by appellant.

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

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

*J. T. Richard* for Rock City Tobacco Co. Ltd.

*J. T. Hackett, K.C.* for W. C. MacDonald Inc.

*W. P. J. O'Meara, K.C.* for the Commissioner of Patents.

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

THE PRESIDENT, now (February 22, 1939) delivered the following judgment:

This is an appeal from the refusal of the Registrar of Trade Marks to register a certain trade mark on the application of Imperial Tobacco Company of Canada Ltd., the appellant. Notice of the hearing of the appeal was served upon L. O. Grothe Ltd. and W. C. Macdonald Inc. of Montreal, and Rock City Tobacco Company Ltd. of the City of Quebec, and counsel appeared on behalf of the last two named companies in opposition to the appeal.

In January, 1936, Imperial Tobacco Company of Canada Ltd. applied for the registration of a design mark, which was said to be "in the form of a distinguishing guise," and its principal features were described in the application as "a transparent outer wrapper and a coloured tearing strip in the form of a ribbon extending around the package beneath the transparent wrapper." Later the application was amended and the principal features of the mark are now described as "a transparent outer wrapper

with a coloured band extending around the package," no reference is made to the mark being "in the form of a distinguishing guise," and the words "a coloured band" are used instead of "a coloured tearing strip." Representations of the mark accompanying the application disclose a flat sheet of cellophane to be used as an outer wrapper, and a narrow red band of the same material extending around the package, but the applicant does not confine itself to a band of any particular colour. When employed as an outer wrapper the red band would be on the inner side of the wrapper, but with one of its terminals on the outer side so that it may be grasped by the fingers, and when pulled will tear away the overlying part of the outer wrapper, so that the container or package may be opened, and the cigarettes or tobacco in the container rendered accessible. It is to be kept in mind that the outer wrapper is something distinct from the container or package containing the cigarettes or tobacco, as the case may be. The mark for which registration is sought is to be applied to tobacco in all its forms. The appellant states that it has used the mark since November 9, 1934, in connection with cigarettes for the purpose of indicating that such goods were sold by it.

The Registrar refused registration of the mark on the grounds that the coloured band performed the function of indicating where the tear strip was located and thus facilitate the opening of the outer wrapper, and that a transparent outer wrapper with a coloured strip or band being in use by manufacturers other than the applicant the same would fail to identify the wares so wrapped, as those of the applicant.

Prior to the application for registration of the mark in question being made, the appellant, with another, brought an action against Rock City Tobacco Company Ltd. for infringement of two patents. That case came before me for trial and my decision dismissing the action, and finding both patents invalid for want of subject-matter, will be found in the Exchequer Court Reports (1). On appeal to the Supreme Court of Canada that decision was affirmed. One of the patents sued upon, and which was owned by the appellant herein, was applied for on August 14, 1934.

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The object of the invention is to be found in the first paragraph of the specification which runs thus:

The object of this invention is to facilitate the removal of the transparent moisture proof outer wrappers used on cigarette and other packages. To this end the invention comprises a tearing strip extending around the package inside the wrapper so that one of its terminals may be conveniently grasped and pulled to tear away the overlying part of the wrapper. The tearing strip is preferably located to divide the wrapper into two half sections which are easily slipped off the package to permit the latter to be opened in the usual manner.

The other patent sued upon, one owned by Wm. Wrigley Jr. Company, was applied for in August, 1933, and the invention there claimed related to the same subject-matter. I might quote one paragraph from the specification.

The opening member S as previously explained is preferably a narrow ribbon-like strip of the same material as the outer wrapper of, say  $\frac{1}{16}$  or  $\frac{3}{32}$  of an inch in width, and of a colour that is readily visible in contrast with that of the package and the outer wrapper. Thus, for example, if a colorless clear material is used for the wrappers, the strips may be red or some other colour.

One cannot read the specification of those two patents without concluding that they describe precisely the principal features of the trade mark for which the appellant now seeks registration. The alleged inventions disclosed in those patents were intended to perform certain functions, both the wrapper and the tearing strip, and one of the patents states that it was desirable to have the tearing strip of a colour different to that of the wrapper, so that the former would be readily visible by reason of its contrast with the outer wrapper. The appellant does not, in its amended application, ascribe any function to the wrapper or band other than to distinguish its own goods. However, it is not denied that the cellophane wrapper is used because it is moisture proof, and it is not denied that the coloured band is designed to perform the function of tearing open the outer wrapper. In affidavit evidence submitted by the appellant it is stated, by the secretary of the appellant company, that the coloured band not only gives a distinctive appearance to the goods sold by the appellant, but also has "an added convenience in opening the package by arranging that the coloured band should serve to assist in opening the package." One may safely say that the band was primarily designed and adopted for the purpose of opening the outer wrapper, and it is

unlikely that if the outer wrapper were not moisture proof and the band did not function as a tearing strip, they, in combination would ever be suggested as a trade mark. It seems to me that the trade mark applied for was intended to replace the patents referred to, if they should be found to be invalid, as they were. In my opinion any combination of elements which are primarily designed to perform a function, here, a transparent wrapper which is moisture proof and a band to open the wrapper, is not fit subject-matter for a trade mark, and if permitted would lead to grave abuses. The introduction of a coloured strip or strand might be a good mark in some cases, particularly where it is practically impossible otherwise to mark the goods.

There was put in evidence a tin box of cigarettes, made and sold by the appellant, which had an outer transparent wrapper made of cellophane, and a narrow blue band or tearing strip around the package, but those cigarettes are sold under the name of "Gold Flake," which is conspicuously stamped on the box. That is the mark or name under which those cigarettes are sold, and the mark is visible owing to the transparency of the cellophane wrapper. The appellant also sells cigarettes under the name of "Sweet Caporal," and the container is wrapped in the manner described in the application we are here considering. The words "Sweet Caporal" are printed on the container and the same is plainly visible through the outer wrapper. I have no doubt the appellant produces and sells other cigarettes, under other names or marks. There is ample evidence in the record to show that purchasers of cigarettes, for example, invariably ask for a specific brand and never make any reference to the outer wrapping of the package or the method of opening it. There is the affidavit of George Bruneau, who there states that he visited three tobacco stores in Toronto, and he asked for cigarettes wrapped in "cellophane" and provided with a coloured ribbon, and in each case he was informed by a clerk that there were many makes of cigarettes using a cellophane wrapper with a coloured ribbon, and he was asked by the clerk to indicate the brand or name the cigarettes which he desired. It is safe to say that all cigarettes and tobacco manufactured and sold by the appellant, and others in the same trade, are

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sold, under some trade name or mark, and if the container is covered by a transparent wrapper the trade name or mark is plainly visible through the wrapper, and that is one of the advantages of a cellophane outer wrapper. Otherwise, I do not see how it would be possible for the public to identify the various brands of cigarettes or tobacco, produced and sold by the appellant and others.

There are in the record three or four affidavits, made by dealers in cigarettes and tobacco, in which it is stated that an outer wrapper, in conjunction with a coloured band or tear strip, could not in any way become a distinguishing guise for the cigarettes or tobacco of any one manufacturer, as purchasers, the affiants state, invariably ask for a specific brand by name, and never by reference to the outer wrapper or the method of opening it. And that evidence I unreservedly accept, and I cannot believe it could possibly be controverted. I doubt very much if "distinguishing guise," as used in s. 2 (*d*) of the Unfair Competition Act, is applicable to the subject-matter here under discussion. I do not think we have here "a mode of shaping, moulding, wrapping or packing wares." The wares with which we are here concerned are packed in a box or container of some well known sort. It is the box or container, that is wrapped with cellophane, and that is why it is called an outer wrapper. I hardly think the Act ever contemplated that an outer wrapper, such as we have here, covering a container, might be a "distinguishing guise." Upon the evidence I would hold that it is not in fact a distinguishing guise. Nor do I think that the proposed registration is a mark which has become adapted to distinguish the wares of the appellant within the meaning of s. 2 (*m*) of the Act.

I should perhaps point out that other Canadian concerns make and sell cigarettes in containers which are wrapped with cellophane, and have a coloured band to be used as a tearing strip. W. C. Macdonald Inc. of Montreal sell "British Consols" cigarettes, the Rock City Tobacco Ld. of Quebec sell "Spud" cigarettes, with an outer cellophane wrapper and a tearing strip, and that practice by those concerns, so far as I can make out, commenced before the appellant applied for the registration in question. The Macdonald Company was the first concern in Canada to use a cellophane wrapper over cigar-



ette containers, but, I understand, without the band or tear strip. The evidence is not very clear as to who was the first to use an outer cellophane wrapper, with a coloured tearing strip, but the practice seems to have been adopted by several of the trade about the same time, but not, I think, as a trade mark. While the appellant commenced wrapping cigarette containers with cellophane, and having the coloured tearing strip, for some time before its applicaton here in question was made, yet I am far from being convinced that this wrapping of the container, and the use of the coloured band or tearing strip was used as a trade mark, or that the public ever regarded the same as a trade mark denoting the wares of the appellant.

I think the Registrar was right in refusing the application for registration of the mark in question. I dismiss the appeal with costs to the parties opposing the same.

*Appeal dismissed.*

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BETWEEN:

THERMIONICS LIMITED ..... PLAINTIFF;  
AND  
PHILCO PRODUCTS LIMITED, }  
ET AL. .... } DEFENDANTS.

1939  
Jan. 5.  
Jan. 11.

*Patent—Practice—Particulars—Order 53A, Rule 21A, of the Rules of the Supreme Court in England—Form of order.*

MOTION by plaintiff for directions. The action is one for a declaration that plaintiff's patent is valid and is infringed by the defendants.

The motion was argued before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

O. M. Biggar, K.C. for the motion, contended that the order could be made under English Order 53A and Rule 21A of the Rules of the Supreme Court of England. He referred to The Yearly Practice, 1936, p. 1024, and cited the following authorities: *Fraser v. Simpsons* (1937) 54 R.P.C. 199; *Ultra Electric v. Barnes* (1937) 54 R.P.C. 269; *Eyres v. Grundy* (1938) 55 R.P.C. 149; *British Thomson-Houston v. Tungstalite* (1938) 55 R.P.C. 280; *Whatmough v. Morris* (1938) 4 All E. 584.

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*E. G. Gowling, contra*, contended that there was no equivalent to the English order in the Exchequer Court practice; that there is no authority under the Exchequer Court practice for making the directions asked for and that the English rule does not apply to this Court since the Exchequer Court Rules have certain provisions regarding particulars.

*Reporter's Note:* The form of order made in this case is reported as affecting the practice, and because it is the first made on these lines, but such will not necessarily be made in every patent case.

The President held that under the Exchequer Court Rules the Court could order the particulars, or the directions in the nature of further pleadings or particulars, and the inspection asked for in the draft order presented by the plaintiff. His Lordship remarked that in view of the highly technical character of this case and the difficulties it presented, this was an action in which an order as made was justified and proper, but that similar orders would not necessarily be made in all patent actions.

The following is part of the order as made:

Upon the application of counsel for plaintiff in presence of counsel for defendants, upon hearing read the notice of motion herein dated the 16th day of December, 1938, the affidavits of Melville B. Gordon, William Watson Richardson and Edward S. Peyton filed, and upon hearing what was alleged by counsel aforesaid,

\* \* \* \* \*

AND IT IS FURTHER ORDERED that the plaintiffs shall within three weeks from the date of this order deliver to the defendants a statement signed by counsel referring to each of the claims alleged to be infringed in each of the patents in question and

- (a) specifying the integers alleged to be comprised in such claim;
- (b) stating in the case of each integer whether the words in the claim denoting the same include every construction which, and only such constructions as, fall within the said words in their ordinary meaning when read apart from the body of the specification, or whether some, and if so what, limitation or extension is to be implied therein, and in such case stating the reasons for such implications;

(c) identifying the parts of each of the types of tubes referred to in the particulars of breaches with the corresponding integers specified in the claims.

2. The defendants shall within one month from the statement referred to in the last preceding clause deliver to the plaintiffs a statement signed by counsel specifying

(a) The extent to which the defendants accept the contentions set forth in the plaintiffs' said statement, and in so far as the same are not accepted, stating the defendants' contentions in respect of each of the said matters;

(b) in respect of each of the documents alleged in the particulars of objection to have been published prior to the date of each of the several inventions in the statement of claim mentioned, and relied upon by the defendants, the relevant integers alleged to be disclosed by each of the same, and in the case of each the part or parts thereof upon which the defendants rely;

(c) the respects in which it is alleged that each of the several patents sued upon does not disclose any invention or that the construction disclosed was obvious and involved no inventive step;

(d) the respects in which it is alleged that each of the several inventions described in the patent sued upon is not useful;

(e) the respects in which it is alleged that the disclosure in each of the patents sued upon does not sufficiently or fairly describe the nature of the invention or the manner in which the same is to be performed, and the respects in which the directions contained in the said disclosure respectively are insufficient to show how an operable device may be constructed;

(f) the respects in which it is alleged that each of the claims of each of the patents sued upon is incomplete, extends to more than was invented by the applicants for the said patents respectively or fails to state clearly and distinctly the scope of the monopoly asserted;

(g) whether or not the defendants admit that the plaintiff was at the date of the filing of the statement of claim the legal owner of each of the several patents.

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3. The plaintiffs may within one month from the delivery of the defendants' statement in the last preceding clause referred to and at least fourteen days before the date fixed for the trial of this action deliver to the defendants a statement signed by counsel specifying the contentions upon which the plaintiffs intend to rely in rebuttal of the contentions made in the defendants' statement.

4. No amendment of any of the aforesaid statements shall be made except upon application to a judge and upon such terms as to costs and otherwise as may seem just.

5. Except by special leave of the judge at the trial
- (a) no models shall be put in evidence at the trial or evidence given of any experiment unless the party seeking to rely thereon shall have given notice thereof to the other party within four weeks from the date hereof and shall have offered to that party and his legal and technical advisers an opportunity of inspecting the said models and seeing the experiments or a repetition thereof performed;
  - (b) no evidence shall be given at the trial relating to any model or experiment made in answer to any models or experiments of the other party unless the party seeking to rely thereon shall have given notice thereof to the other party within seven weeks from the date hereof and shall have offered to that party and his legal and technical advisers an opportunity of inspecting any such models and seeing any such experiments or a repetition thereof performed;
  - (c) no evidence shall be adduced in support of any contention which is inconsistent with the statements directed to be made by the parties as aforesaid.

AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause.

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BETWEEN:

NOVOCOL CHEMICAL MANUFACTURING COMPANY OF CANADA LIMITED .....

PLAINTIFF;

1938 April 25 & 26. 1939 Jan. 31.

AND

W. R. MACFARLANE, ET AL.....DEFENDANTS.

Patent—Chemical patent—Patent for anesthetic composition and process of making the same—Chemical equivalent—Infringement.

The action is for infringement of plaintiff's Canadian Patent No. 355,246. The invention relates to an anesthetic composition and the process of making the same. It is claimed that if a buffer salt is added to the main ingredients of an anesthetic solution, namely, procaine, a vaso-constrictor, a salt and an anti-oxidant, the solution will retain its neutral condition.

Defendants manufacture and distribute an anesthetic solution which they contend does not contain a buffer salt but which is a buffered solution by virtue of the manner in which it is compounded, since procaine is used as a base and converted into a salt by bubbling carbon dioxide through the solution, thereby making an alkaline salt of procaine.

Defendants did not question the validity of plaintiff's patent.

Held: That the solution manufactured and sold by the defendants is the chemical equivalent of the invention claimed by the plaintiff and is not so distinguishable from that of the plaintiff's as to be in fact a different solution, or one made by a process entirely different from that of the plaintiff, and there is infringement of plaintiff's patent.

ACTION by plaintiff to have it declared that Canadian Patent for Invention No. 355,246 is valid and is infringed by defendants.

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

R. S. Smart, K.C. and Christopher Robinson for plaintiff.

F. B. Fetherstonhaugh, K.C. and E. H. Charleson for defendants.

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

THE PRESIDENT, now (January 31, 1939) delivered the following judgment:

This is an action for infringement of a patent, no. 355,246, granted to the plaintiff in January, 1936, being a re-issue of a patent granted in 1934, on the application of Samuel D. Goldberg, of Brooklyn, U.S.A., the inventor, and by him assigned to the plaintiff company. The in-

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vention relates to an anesthetic composition and the process of making the same. The anesthetic composition is of the kind which dentists use in giving a local anesthetic, a liquid in form, and which is injected hypodermically. The invention of Goldberg is manufactured and distributed in Canada by the plaintiff company, under the name of Novol, I understand.

Maclean J.

During the course of the trial no evidence was led on behalf of the defendants in attack upon the plaintiff's patent to show want of invention, or that there was anticipation of Goldberg. The defendants, who all carry on business at Toronto, Ontario, either manufacture or distribute an anesthetic solution called Alkalinic which, it is claimed, infringes the plaintiff's patent. The controversy between the parties is a narrow one. The dispute turns wholly upon whether or not the defendants' solution, Alkalinic, contains a buffer, or a buffer salt, the plaintiff claiming that it does, and the defendants denying it, or, at least contending that their solution is not buffered in accordance with the disclosure made in the plaintiff's patent.

The specification of Goldberg is quite lengthy and it is difficult to make selections therefrom which would afford a connected description of the invention, and the processes therein mentioned for the making of it, without quoting from the specification at an undesirable length. I propose therefore, at whatever risk, to attempt an explanation of the invention and the object which it purports to achieve. I may at once say that the principal object of the invention is to provide a composition for local anesthesia, which would do away with or substantially lessen the pain, swelling and other objectionable symptoms, often resulting from hypodermic injections, at or around the place where the injection was made, while accelerating to some extent the anesthetic effect desired.

It has long been known that there are many natural substances, such as cocaine, which produce anesthesia, or insensitiveness to pain. These natural substances are quite intricate organic compounds usually referred to as alkaloids, and it was discovered that equivalent compounds could be made synthetically. One of the best known of these synthetic compounds was marketed under the name

of Novocaine, which originated in Germany, and later was manufactured in the United States under the name of Procaine. When Procaine was injected as a local anesthetic it had added to it another element, called a vaso-constricting material, designed to restrict the application or extent of the effect of the anesthesia, so that it would be local. The vaso-constricting material most commonly used is epinephrin, popularly known under the name of adrenalin. There was added a third element, sodium chloride, a salt to make the solution compatible with the blood, and the word "isotonic" is used as a general term for a solution which is compatible with the blood. It was explained that an isotonic solution must be one which gives approximately, within reasonable limits, the same osmotic pressure as is given by the blood, in order to avoid too much pressure through the membranes. A fourth element was also added sometimes, an anti-oxidant such as bisulphite, to prevent oxidation of the vaso-constrictor, which was apt to decompose and make the solution brown; the anti-oxidant was usually spoken of as a preservative for the epinephrin. This anti-oxidant is added to the solution in order to preserve the anesthetic in proper condition during what is called by the trade its "shelf life," that is, the length of time the anesthetic normally remains on the shelf of the dealer or dentist, after leaving the manufacturer—usually a period of from six to nine months. So that prior to the invention here in question the anesthetic solution was composed of four ingredients, the procaine, the vaso-constrictor, the salt, and the anti-oxidant.

Procaine is a synthetic alkaloid of a rather complex structure. It is a compound of carbon and hydrogen and nitrogen, which for local anesthesia has largely replaced the use of natural alkaloids, such as cocaine, for example. It is prepared as a procaine base and that base is then later processed into a salt, simply because the base itself has only a relatively minimal solubility in water. A base in the case of an organic compound, means a nitrogen compound having a  $\text{NH}_2$  group, or more simply stated, it is a derivative of ammonia, ammonia being  $\text{NH}_3$ , one of the hydrogens being replaced by an organic radical. That is an organic base in general and that is also a procaine base. All alkaloids are of that general structure. The  $\text{NH}_2$  group forms the nitrogen base in procaine. The solu-

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bility of procaine base in water is approximately three-tenths of one per cent, which is a rather minimal solubility. Any base will form a salt with any water-soluble acid. To produce the desired solubility of the procaine base in the vehicle, which in this case is water, it is converted to a salt by its reaction with any water-soluble acid. It would form a water-soluble salt with the common mineral acids, such as hydrochloric, sulphuric and carbonic acids. It would form a water-soluble salt with the common organic acids, such as acetic, tartaric, lactic, and so forth. Carbonic acid is the acid which results when carbon dioxide is dissolved in water.

The use of this anesthetic solution had two main disadvantages. The first was that there was considerable after-pain suffered by the patient, and also there was some delay in its action. This was found to be due to the fact that the solution was an acid solution, and being more acid than the blood it destroyed the tissues and blood cells. This acidity could be avoided if an alkaline substance were added to the solution thereby rendering it neutral and the solution were used immediately. But if the solution were allowed to stand a short time it would again be acid and would again cause after-pain. The invention claimed here is that if instead of an alkali there is added to the main ingredients of an anesthetic solution what is termed a buffer salt, the solution will retain its neutral condition. Buffers are substances which have the quality of keeping a solution either acid or alkaline, according to the nature of the buffer. If, to a solution having a buffer, something is added which would ordinarily make the solution more acid, the action of the buffer prevents the solution from becoming in fact more acid. The original condition of the solution is not affected except so far as the buffer itself may be either alkaline or acid. Here an alkaline buffer is used and the addition of acid has not the effect of making the solution more acid. The buffer first brings the solution to a practically neutral point and then maintains it at that. It is claimed, and it is not denied, that Goldberg discovered that if the anesthetic solution were buffered the solution became nearly neutral and that such condition could be maintained, and that the usual tendency to increased acidity would be counteracted by the buffer agent.



Acidity in this connection is measured in very small degrees. Goldberg, in his specification, refers to the measure of acidity and alkalinity by the term pH, one well known to, and much used by, chemists. The plaintiff's expert witness, Dr. Snell, explained it by saying that acidity in dilute solutions such as there is commonly expressed by the pH scale, a convenient chemical shorthand which is used almost universally. Pure water has what is called neutrality, that is, it has the same degree of acidity as alkalinity. When chemists speak of pH 7, they mean that water has a pH of 7. This pH may be measured in fractional units. We may have a pH 7, or pH 6, or pH 8, and so on. Those fruits which have just a little acid have a low pH, that is a higher acidity about 4 to 4.5; vinegar has a pH of about 3 to 3.5; sodium bicarbonate in aqueous solution is about pH 3.5. The acidity of pH 6 is ten times that of pH 7, and so on. The normal pH of the blood is 7.4. The critical acid value of the blood is about 5.7. If any material is injected into the blood which produces an acidity lower than that, there is a decomposition of red blood corpuscles, actual destruction of the essential materials of the blood, and similarly there is actual destruction of the tissue. If any material is to be injected into the blood or tissues it is desirable that it be in the range between the critical acid value of the blood, about 5.7, up to the normal pH value of the blood, approximately neutral, that is 7.4. It was explained how chemists determine whether a solution is acid or alkaline. Hydrogen ions are the things which determine whether a solution is acid. If it contains a preponderance of hydrogen ions it is acid; if there is a preponderance of hydroxyl ions over hydrogen ions it is alkaline.

The specification states that the term "buffer," as employed in the claims, refers to a salt like di-sodium phosphate, preferred by Goldberg, which upon being put into water solution dissociates and produces a small amount of weak acid and alkali, and it refers to a definition of buffer salts given by Horace G. Deming, in a named publication. In the specification, in a preferred formula, is to be found an example of the use of phosphate buffer in an anesthetic solution. But the specification also plainly states that instead of the phosphates mentioned in this

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formula as a buffer, acetates, tartrates, carbonates and citrates may be employed, and one of these, it is claimed, is the buffering agent employed in the preparation of Alkalinic.

The following of the claims of Goldberg, which are typical, might be mentioned:

1. An anesthetic solution for hypodermic injection containing a solvent, an acid containing anesthetic material for local anesthesia, a vaso-constricting material and a buffer including a weak acid to dissolve and maintain said vaso-constricting material in solution and to modify the pH of the solution, said solution being substantially stable and having a pH value in a range from approximately 5.7 up to approximately neutral.

4. An anesthetic solution ranging from slightly acid to nearly neutral containing an anesthetic acid salt for local anesthesia, a buffer, a vaso-constricting material, a weak acid to dissolve the vaso-constricting material and an anti-oxidant.

9. A base composition for making a substantially stable anesthetic solution for hypodermic injection, including acid-containing anesthetic material for local anesthesia and a buffer material containing a salt for altering the pH of the base when in solution, a vaso-constricting material and an anti-oxidant material, said base when placed in water being adapted to produce an anesthetic solution having a pH value within a range from approximately that of the critical acid value of blood up to that of the blood itself.

The defendants assert that they do not employ a buffer salt in making Alkalinic, but it is conceded that Alkalinic includes the epinephrin, the vaso-constricting material, the anti-oxidant, and the salts designed to make the solution isotonic with the blood. They contend that the buffering agent is inherent in the manner in which they compound the ingredients of Alkalinic, and that they do not designedly buffer it in the sense of Goldberg. Mr. Norris, chemical expert for the defendant Unity Chemical Company, denied that any buffer was used in the manufacture of Alkalinic. He stated, however, that procaine was used as a base and to get it into solution it had to be converted into a salt, by adding a weak acid, carbon dioxide, in the form of a gas. The gas, carbon dioxide, was bubbled through the solution, the last step in the preparation of Alkalinic, which had the effect of making an alkaline salt of procaine. Professor Rogers, an expert witness called by the defendants, admitted that the solution of the defendants which he tested was buffered, but no buffer salt was added, nor any of the buffer agents named or suggested in the specification of Goldberg; that is to say, that the ingredients of the defendants' Alkalinic did not contain a buffer

agent within the description of such as found in the specification of Goldberg. He stated that the procaine base was put into solution with carbon dioxide, the latter being bubbled through the solution until the procaine base was dissolved and while the solution was buffered nothing was contributed to it in the nature of a buffer. Procaine, he said, was a weak alkaline base, and if a carbonate were formed there it was a weak acid, carbonates being weak acids; and he stated that a procaine carbonate was a weak base with a weak acid, which was a material that could buffer an acid solution. It was obvious that it did so, he said, because the result of the two was an alkaline solution, and he said the procaine solution was the buffer. He stated also, that when one uses procaine hydrochloride the solution is acid, but Alkalinic employs a procaine solution which is alkaline, which needs no buffer. Professor Bain, testifying also on behalf of the defendants, stated that he had prepared an Alkalinic solution but no buffer salt was added to it. He stated however, agreeing with Professor Rogers, that if procaine is dissolved by passing through the solution carbon dioxide, the carbon dioxide unites with the procaine, forming either a procaine carbonate or a procaine bicarbonate, and that substance is capable of buffering the solution, because a weak acid was formed.

While the invention of Goldberg is not attacked upon any ground it is perhaps desirable to refer briefly to its early history, and its reception by that section of the public who would be concerned with an anesthetic composition. That has some legal significance. Mr. Nevin, president of the Canadian plaintiff company, and I think the United States parent company, and a dentist, stated that he was the first in America to use Novocaine, the German product. After the United States entered the war the Government of the United States took over certain German patents including that relating to Novocaine. Nevin, under some authority, began the manufacture of Novocaine under the name of Procaine. On account of the numerous complaints of after-pain incident to the use of Procaine, he employed Goldberg, a chemist, to seek a solution of the problem of after-pain, who in the end discovered and produced the plaintiff's anesthetic solution, for which discovery Goldberg applied for a patent, which was subsequently granted to his assignee, the plaintiff.

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Nevin, or a company of which he was the head, commenced marketing this anesthetic solution in 1930 with the result, he stated, that complaints about after-pain are a rarity to-day. He said that in clinical experiments he would inject one of the anesthetics then generally in use on one side of the patient's mouth, and on the other side Goldberg's buffered solution, and after twenty-four or forty-eight hours he would observe that the side of the mouth where the former solution was injected was considerably inflamed, whereas on the other side normal healing had proceeded. There was also he found, an improvement in the rapidity of induction of the anesthesia, and the toxic effect was eliminated to a considerable extent. He stated that generally dentists now use a buffered solution in preference to an unbuffered one. It is not denied that the buffered anesthetic solution has met with favour from the dental profession. In Canada the sales have progressively increased. In 1931, when manufacture was begun in Canada, the plaintiff company sold 300,000 tubes of Novol, and that had increased to 1,500,000 in some one year before the trial, at least that is my inference from the evidence, but probably that includes sales throughout the British Empire. The plaintiff's anesthetic solution is sold and distributed in many other countries, and in fact it is being produced in Brazil and Argentina.

I come now to the question as to whether or not infringement has been established, which is a difficult one for me because of the chemistry involved in that issue. It is clearly established, and in fact admitted, that Alkalinic is a buffered solution. Professor Bain, one of the defendants' expert witnesses, stated that it was the procaine carbonate or bicarbonate in the Alkalinic solution, a weak acid, formed in the manner already pointed out, that had the buffering action, that was the buffering agent, and which was capable of buffering the solution. And Professor Rogers agreed that it was obvious that a procaine carbonate, an alkaline material, which is a weak base with a weak acid, was a material which could buffer an acid solution, and give an alkaline solution. Professor Bain and Professor Rogers were referring to an Alkalinic solution which was prepared by them, or under their supervision, in 1938. It therefore would appear to be beyond controversy that the carbonate or bicarbonate in

the Alkalinic solution is a buffer agent, and that the solution is buffered. Whether this should be called a buffered solution, or a buffer solution, does not impress me as a distinction of importance. The Alkalinic solution is a buffered solution. It contains material which has the properties of a buffer. I think there is no real distinction between a buffer solution, and a buffered solution, at least for our purposes here.

In 1937 an Alkalinic solution was produced on discovery by the defendants and this was examined by Dr. Snell, the plaintiff's expert witness. He testified that he found that this solution contained sodium bicarbonate which is a buffer, and a weak acid in the form of carbonic acid, which would fall apparently within claim 4 of the plaintiff's patent, and he stated that the buffer was present as a bicarbonate-carbonic acid mixture, and was therefore a solution of a strong base and a weak acid, being a mixture of sodium bicarbonate and carbonic acid. He was of the opinion that the result could be produced by the action of carbon dioxide, and this seems to explain the reason for the defendants' buffered solution, and in fact that seems to be their contention. Without the carbonate or bicarbonate element the solution would be acid. This 1937 solution was not examined by the defendants' expert witness and therefore Dr. Snell's evidence cannot well be repelled as to this production on discovery, and he was of the opinion that the solution which he analysed in 1937 was not the same as that analysed by Professors Bain and Rogers. If I correctly comprehend the facts I do not think there is much conflict between the plaintiff's expert witness and those of the defendants. Alkalinic is a buffered solution, or it is a solution which has been buffered. And I take it that the defendants, when they advertise as they do, that there is "no after soreness" attributable to Alkalinic injections, they have in mind that this is due to the fact that their solution has been buffered, otherwise there would be no reason for referring to "after soreness" at all. In 1934 the defendants, or some of them, produced an anesthetic solution which the plaintiff apparently complained of as infringing Goldberg. This solution, I understand, was abandoned, presumably because it appeared that it might be held to be an infringement of Goldberg. I cannot avoid the conviction that

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the defendants designedly buffer their anesthetic solution, but in a way which it was hoped might afford a defence in an infringement action. It appears to me as if the manufacturers of Alkalinic have taken an important leaf out of the book of Goldberg, and are attempting to re-write a few words of it, without changing the substance of it. My opinion therefore is that infringement has been established, unless there is some legal impediment in the way of the plaintiff, or, that the Alkalinic solution is something entirely different from that of the plaintiff.

I do not think that Alkalinic is an anesthetic solution so distinguishable from that of the plaintiff's as to justify one in holding that it is a different solution, or that it is made by a process entirely different from that of the plaintiff. The only real distinction between them, or the compounds or materials entering into them, relate to the agency which produces the effect of buffering. Goldberg was a trained chemist, and when he was requested to find out some means of avoiding after-pain from the effects of procaine injections he discovered, it seems to me, the cause, and he claims to have found a solution. As a chemist he would have some knowledge of chemical equivalents and alternatives. I wish to avoid any lengthy recital from the specification and its claims, and therefore I merely point out that, while expressing a preference for a phosphate buffer, Goldberg states, that instead of such a buffer, acetates, tartrates, carbonates and citrates might be employed. It is to the carbonates that the defendants attribute the buffering in the Alkalinic solution. In the claims of Goldberg there is reference to a "buffer including a weak acid," "a buffer containing an alkaline buffer," "a buffer," "a buffer including a buffer salt." This impresses me with the fact that Goldberg having once discovered the reason for after-pain incident to the use of procaine,—an excess of acidity—and then having discovered that if the solution were buffered it would become nearly neutral, and that the usual tendency to increased acidity, through the operation of the anti-oxidant or otherwise, would be counteracted by a buffer agent, he did not tie himself down to one formula, or one buffering agent, because he would at once know that chemistry could supply equivalents or alternatives to his preferred formula, and he numbers several of them. Into

one or more of them the defendants' solution and process fall, in my opinion.

As I have already stated, the defendants do not attack the validity of Goldberg and they therefore must be taken to admit that no one had before disclosed what Goldberg disclosed in his specification. The plaintiff asserts that Goldberg made an invention of more than usual importance; in fact it is claimed he made a very important discovery, and I am bound to concede this upon the facts as revealed, and this the defendants did not attempt to dispute. And apparently Goldberg's invention has had a very considerable commercial success, which means that his invention found favour with members of the dental profession at least, whom, I assume, are the principal users of Goldberg's anesthetic solution. If Goldberg made a great step in advance in the art, which seems to be admitted, then it would not be fair to look upon him as one who had made merely a slight improvement in any known anesthetic preparation used by dentists, and which would avoid after-pain. Alkalinic is, I think, the equivalent of Goldberg's solution. The specification of Goldberg, as I have already stated, defines the term "buffer," as used in his claims, as any salt which on being put into water solution produces a small amount of weak acid and alkali. I think the defendants' buffering agent falls within this definition. It is usually fairly safe to define an equivalent as a thing which performs a function in substantially the same manner as the thing of which it is alleged to be an equivalent. If an important step in advance has been made by an inventor, the law, I think, affords a patentee a range of equivalents commensurable with his invention, and that, I think, should be accorded Goldberg if needs be. However, in my opinion, it is not necessary to invoke that principle because Goldberg in his specification points out that buffering might be accomplished not merely by his preferred buffering agent, but also by that of the defendants, that is, by the use of carbonates. And that I think he claims. I think it is clear that there has been infringement.

In the result, the plaintiff succeeds with the usual consequence as to costs.

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*Judgment accordingly.*

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BETWEEN:

ARPAD SPITZ ..... CLAIMANT;

AND

THE SECRETARY OF STATE OF  
 CANADA, as Custodian of Alien  
 Enemy Property ..... } RESPONDENT.

*Crown—Consolidated Orders respecting trading with the Enemy, P.C. 1023, 1916—Treaty of Peace—Treaty of Peace (Germany) Order, 1920—Interpretation of War Measures—Purchaser of shares from an enemy national before termination of Great War is not entitled to registration of same—Registered enemy shareholder not entitled to notice of application for order vesting such shares owned by him in Custodian of Alien Enemy Property—Nationality of transferee immaterial.*

P.C. 1023, dated May 2, 1916, and entitled "Consolidated Orders Respecting Trading with the Enemy" provided *inter alia*:

6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection) by or on behalf of an enemy of any securities shall confer on the transferred any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such transfer.

(2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer or any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State.

By leave of the Court and by consent of the parties to this proceeding five questions were set down for hearing. The issues involved in these questions are, whether or not the claimant, who acquired for a consideration from a German national, before the termination of the Great War, certain shares of the common stock of the Canadian Pacific Railway Company, and the certificates representing such shares, can now claim ownership of such shares, and require registration of the certificate of such shares in his own name, in the share register of the Canadian Pacific Railway Company.

In April, 1919, on application of the Custodian, of which the Canadian Pacific Railway Company had notice, an order was made by a Judge of the Superior Court of the Province of Quebec under Order 28 of the Consolidated Orders, vesting in the Custodian a considerable number of C.P.R. Company shares, including those here in question, which were registered on the New York register of the C.P.R. Company. The C.P.R. Company acted upon the vesting order and has refused to act upon any transfer, made by an enemy national, of the shares in question.



*Held:* That in interpreting war measures such as the Consolidated Orders above referred to, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind.

2. That Order 6 (1) effectively prevented the claimant from acquiring a legal or equitable title, or any rights or remedies, to or in the shares under the transfer to him by the German national.
3. That Order 6 (1) does not require that the transferee must be a Canadian, or that the transfer must be made in Canada, or that the registration of the securities must be in Canada, or that the locus of the certificates must be in Canada.
4. That the registered enemy owner of the shares in question was not entitled to notice of the Custodian's application for an order vesting ownership of the shares in the Custodian.
5. That the sole right or claim of an enemy national, whose property has been retained and liquidated by Canada, is one for compensation against his own State.
6. That the Treaty of Peace and The Treaty of Peace (Germany) Order, 1920, effectually validated and confirmed the vesting order, and also operated as a vesting order to vest in the Custodian the legal and equitable title to the shares in question.
7. That the nationality of the transferee, under any Treaty, is immaterial.

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ARGUMENT on questions submitted to the Court by leave of the Court and the consent of the parties concerning the right of the claimant to registration in his name of certain shares of stock purchased by him from a German national before the termination of the Great War.

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

*R. V. Sinclair, K.C.* for the claimant.

*Aimé Geoffrion, K.C.* and *H. A. Ayles, K.C.* for the respondent.

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

THE PRESIDENT, now (February 20, 1939) delivered the following judgment:

The claimant appears presently to be a banker carrying on business in the City of Zurich, Switzerland. He was born in the district of Slovakia, Hungary, and was therefore by birth an Austro-Hungarian national. When this proceeding was instituted, and when the claimant acquired from a German national certain certificates of shares of stock of the Canadian Pacific Railway Company which are in question here, Slovakia comprised a portion of the

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Republic of Czechoslovakia which was carved out of Hungary, and the claimant was, I understand, a subject of Czechoslovakia. Czechoslovakia, it seems, was recognized as an independent republic in October, 1918, by the Allied Powers. The Custodian disclaims any interest in the nationality of the claimant in so far as this case is concerned.

In February, 1919, the claimant purchased in the City of Amsterdam, through the Hollandache Trust Company, a company owned and controlled by the claimant, from a Berlin bank, 400 shares of the common stock of the Canadian Pacific Railway Company (hereafter to be referred to as "Canadian Pacific"), 110 shares of which he sold to Continental brokers, and as to the balance, 290 shares, the claimant here claims, *inter alia*, a declaration of the Court that the Secretary of State of Canada, as Custodian of Alien Enemy Property (hereafter to be referred to as "the Custodian"), who claims possession or title to the said shares by reason of various war measures, has no interest or right therein, and that the claimant is the owner of such shares; and the claimant seeks an order inhibiting the Custodian from interfering with the claimant's right to have the certificates of said shares registered in his name, in the share register of the Canadian Pacific. The certificates for the said shares are in the possession of the claimant.

By leave of the Court and by consent of the parties five questions were set down for hearing and it is only with such questions we are presently concerned. Broadly stated, the issues involved in such questions, are, whether or not the claimant, who acquired from a German national, in February, 1919, for a consideration, certain Canadian Pacific shares and the certificates representing such shares, can now claim ownership of such shares, and require registration of the certificates of such shares in his name, in the share register of Canadian Pacific, in view of certain of the terms of the Treaty of Peace, and certain Canadian war measures.

It might be desirable at once to determine when the Great War ended, that being a matter of some importance here. The Treaty of Peace between the Allied and Associated Powers and Germany provides that "from the coming into force of the present Treaty the state of war will

terminate." The Treaty was signed on June 28, 1919, and was ratified by His Majesty on January 10, 1920, so therefore the purchase of the shares in question by the claimant from the German national occurred before the termination of the war, and legally a state of war continued for some time after the said purchase. Treaties only become definitely binding on being ratified. A suspension of hostilities does not bring about a termination of a state of war. That, I think, is hardly open to debate.

A certain war measure enacted by Canada in 1916, "Consolidated Orders Respecting Trading with the Enemy," hereafter to be referred to as "Consolidated Orders," figures largely in the dispute here, and must be considered. Before referring to any of the provisions of Consolidated Orders, or any of the questions raised here for decision, it would be desirable first to inquire briefly into the reason and purpose prompting the enactment of Consolidated Orders. This should be of some assistance in construing such Orders. Mr. Geoffrion argued that Consolidated Orders was designed to prevent the flow of supplies, financial and otherwise, to the enemy. In the case of *Secretary of State of Canada v. The Alien Property Custodian for the United States* (1), I stated that Consolidated Orders was designed primarily to prevent the use of, or control by, enemy nationals, of their property within Canada, and thus to weaken the financial resources of the enemy, and I stated that to ensure the effectual execution of this public policy, it was necessary to grant wide and arbitrary powers to some officer or officers of Government. In Great Britain, the underlying idea of the corresponding Orders was stated by Lord President Strathclyde of the Scotch Court of Session, in *Van Uden v. Burrill* (2), in the following words: "The principle which lies at the root of this legislation—I refer to the Trading with The Enemy Acts and also to the Royal Proclamation thereanent—is public policy, which forbids the doing of acts that will be, or may be, to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state . . ." There can be little room for doubt but that the purpose of the

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[1] (1930) Ex. C.R. 76 at 87.

(2) (1916) S.C. 391.

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Trading with the Enemy Acts, enacted throughout the British Empire, and the United States, was to interdict all intercourses, commercial and non-commercial, with all enemy nationals, and to prohibit the doing of acts tending to the financial benefit of such nationals, and judicial decisions during the war show that the guiding principle was the destruction of the credit and trade of the enemy, to prevent his power of resistance being increased, and to ensure that the property of the enemy, tangible and intangible, through governmental agencies, could not be used as the basis of credit in foreign countries by the enemy owner, or by his Government. I quite agree with Mr. Geoffrion that when you come to interpret Consolidated Orders, or any other war measure, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. One must consider not only the wording of the war measures but also their purposes, the motives which led to their enactment, and the conditions prevailing at the time. In time of war particularly the substance of things must prevail over form, and usually all technicalities must be swept aside.

The sequestration of enemy property authorized by Canadian war measures was not, of course, intended to operate as confiscation; the ultimate disposition of the sequestered property of the enemy was a matter to be determined upon the termination of the war, by the Treaty of Peace, and by any legislation enacted within the terms of the Treaty of Peace, by any of the victorious Powers.

The questions may now be mentioned and they are as follows:

1. Did the Consolidated Orders respecting Trading with the Enemy, P.C. 1023, effectively prevent a person, firm or Corporation, not being a Canadian Citizen, firm or Corporation from purchasing the shares mentioned in the Statement of Claim (assuming that the said shares were registered in the names of alien "Enemies" as defined by the said Order in Council) and acquiring the legal and equitable title thereto, assuming that such purchase was effected by paying for and by obtaining possession of the certificates representing such shares, and that such certificates being endorsed in blank, were physically located outside of Canada and registered and transferable only upon the Registry of the Company, kept in the City of New York?

2. Did the Vesting Order of the Quebec Superior Court dated 23rd April, 1919, alleged to be made pursuant to subparagraph (1) of paragraph 28 of Consolidated Orders respecting Trading with the Enemy (P.C. 1023),

without notice to any of the persons, firms or corporations whose names appear upon the Schedule attached thereto, and served April 25, 1919, on the Canadian Pacific Railway only, effectively vest in the Custodian, the legal and equitable title to Shares of the Canadian Pacific Railway Company, specified in the statement of Claim, assuming that the Certificates (1) came into the possession, *bona fide* and for value of a person, firm or corporation other than the person, firm or corporation appearing upon the face of such certificate as the owner thereof, on or about the 19th day of February, A.D. 1919; (2) were endorsed in blank; (3) were physically located outside of Canada; (4) were registered in and transferable only on the register of the Company, in the City of New York; (5) were never in the possession of the Custodian, and (6) were registered in the names of "Enemies" as defined in the said Order in Council?

3. Assuming the Vesting Order described in Question Number Two to be ineffective for the purpose described in question number two, does the Treaty of Peace (Germany) Order, 1920, and Amendments effectually validate and confirm the said Vesting Order?

4. Does the Treaty of Peace, Germany, Order in Council, 1920, operate as a Vesting Order and vest in the Custodian, the legal and equitable title to shares, as described in question Two, the Certificates of which were physically located outside Canada on 10th January, 1920, and were registered on the New York Registry of the Company?

5. Whether or not, on the assumption that the certificate of Nationality filed by the Claimant herein establishes that on 10th January, 1920, the Claimant was a National of the Republic of Czechoslovakia which was recognized as an Independent Republic on 20th October, 1918, do the securities of the Claimant come within the provisions of The Treaty of Versailles, and/or the Treaty of St. Germain and/or the Treaty of Trianon?

The first question is the important one, and in fact if answered in the affirmative would dispose of all the other questions, but, as other actions similar to this are pending, it will, I think, be desirable to answer the remaining questions. The Custodian contends that the purchase of Canadian Pacific shares by the claimant, and concurrent delivery to him of the certificates representing such shares, did not confer on him any rights in respect thereof, because of the provisions of Consolidated Orders in force at the time of the purchase of such shares, and later confirmed by the Treaty of Peace and the Treaty of Peace (Germany) Order, 1920, which will be referred to in answering some of the other questions. Mr. Geoffrion was willing to assume that Spitz was a citizen of Czechoslovakia, or a citizen of an allied country, when he acquired the share certificates in question, so therefore the question of the nationality of the claimant need not be considered. The important provision of Consolidated Orders referable

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6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection) by or on behalf of an enemy of any securities shall confer on the transferred any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as hereinafter appears, take any cognizance of or otherwise act upon any notice of such transfer.

(2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer of any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State.

Order 6 (1) was designed to render ineffective any transfer of securities made by or on behalf of an enemy, unless a licence so to do were granted. It purports to make any such transfer ineffective in the hands of the transferee, and it distinctly states that no such transfer "shall confer on the transferred any rights or remedies in respect thereof," and it directs that no company or other body by whom such securities were issued or are managed shall "take any cognizance of or otherwise act upon any notice of such a transfer." And Order 6 (2) directs that during the war, no entry shall be made in any register or branch register or other book kept within Canada of any transfer of any securities therein registered, and standing in the name of an enemy, except by leave of a court or the Custodian. Some doubt might be raised as to what the words "in Canada" in Order 6 (2) may mean, though Mr. Sinclair, at the hearing, made no point concerning it. I think those words must refer to a foreign company with a Canadian register, such as Order 26 (3) contemplates. In any event those words do not, in my opinion, relieve any Canadian company from acting to the fullest extent under Order 6 (1), even if that company have a share register outside of Canada, because the issuing company is not to act on any such transfer as we are here considering.

Order 6 (1) would not be expected to prevent the transfer by delivery of any certificate, scrip, or other document of title relating to securities, by enemy nationals, to neutral or allied nationals, but it does prevent such a transfer conferring on the transferred any rights or remedies in respect thereof, and no cognizance of such transfer can

be taken, if the securities were held by an enemy national at the time of the passing of Consolidated Orders. The shares in question, in February, 1919, were held by an enemy national. Mr. Geoffrion argued therefore that the transfer to Spitz conferred on him no rights or remedies, because no licence was granted exempting this particular transaction from the terms of Order 6 (1), because the transfer was subsequent to the passing of Consolidated Orders and was therefore subject to them, and also because the transfer was made prior to the termination of the war. The Consolidated Orders was designed to ensure that enemy property in this country should not remain in the hands of the owner or his agent, and the generally accepted view is that the rights of shareholders are substantial rights of property. I do not see how the effective transfer of the property of the claimant in the securities here in question could be effectively prevented except by the means provided by Order 6. And for that purpose all British countries, and the United States, adopted the same means, and their designated officers acted in such cases as did the Custodian here. It was very important indeed to prevent so far as was possible the effective sale of foreign securities held by German nationals, in any neutral country, in order to limit the facilities of the German Government in procuring exchange for the purchase of war supplies in neutral countries, and this was no doubt one of the purposes of Order 6. Foreign securities held by German nationals would, if necessary, be commandeered by the German Government for this purpose, if they were effectively saleable abroad, and in return the German nationals would be given German Government securities. I think the British Government at one stage felt obliged to do this, in respect of United States securities held by its nationals. There can be no doubt about the purpose for which Order 6 (1) was enacted, and I can conceive of no more effective way of accomplishing the desired end. Otherwise Order 6 would be rendered almost useless. This Order should therefore be so construed as to make it operative in the sense, and to the extent, its authors intended. At the moment the submission of Mr. Geoffrion, that the transfer conferred no right or remedy upon the claimant, appears to me to be very substantial indeed. But with this Mr. Sinclair does not agree, and we must

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examine his grounds of attack against Mr. Geoffrion's construction of Order 6 (1).

Mr. Sinclair urged that four distinct limitations must be read into Order 6 (1), which, if done, Mr. Geoffrion contended, would largely defeat the purpose of that Order. Mr. Sinclair argued that the transferee must be a Canadian, that the transfer must be made in Canada, that the registration of the securities must be in Canada, and that the locus of the certificates must be in Canada. I shall deal with these points in that order.

If the first limitation is to be implied in Order 6 (1) then a German, by selling his securities to anyone but a Canadian, could defeat the very purpose for which that Order was enacted. There is no express limitation in Order 6 (1), of the nature suggested by Mr. Sinclair, and I see no reason why it should be implied. Reason and sense impel one to the conclusion that no such limitation as that the transferee must be a Canadian can be read into the Order 6 (1), and, I think, the contention is utterly untenable and without any basis whatever. The Order was intended to apply to our own nationals, the nationals of allied countries, and the nationals of any other country. Why should any distinction be made? It is immaterial what be the nationality of the transferee. I agree that if this contention of the claimant were of substance, Order 6 (1) and other Orders would be rendered practically useless.

Nor can I perceive of any ground for introducing into Order 6 (1) the limitation that the transfer must be one made in Canada. There is no suggestion of that in Order 6 (1), and it cannot be implied. It matters not where the transfer was made, or to whom made. Order 6 (1) means that a Canadian company which has issued securities cannot, after the coming into force of Consolidated Orders, take cognizance of or act upon any transfer of that security, made by an enemy national. The Order, I have no doubt, when drafted had clearly in mind the case where the transfer would be made outside of Canada, and probably that was in mind more than anything else, as it would be the thing most likely to occur in the circumstances of the time. Order 32 (1) requires a company to register a transfer of shares made by the Custodian if so empowered by a vesting order, even if the Custodian is



not in possession of the documents of title. I have no doubt it was always expected that most transfers falling under Order 6 (1) would be those made out of Canada, but of course that Order would also relate to transfers made in Canada.

The next two points made by Mr. Sinclair, that the registration of the securities must be in Canada, and that the locus of the certificates must be in Canada, may be considered together. Again, Order 6 (1) does not require that registration of the security must be in Canada, or that the certificate of the security must be located in Canada. It says that the company issuing the securities must disregard transfers of the character in question, and it cannot act upon such transfers, if presented for registration. "Transfer" and "registration" are entirely different matters. The first mentioned point is no doubt suggested by the fact that the shares in question were registered on the share register of the Canadian Pacific in New York. The Canadian Pacific maintains a share register in Montreal, its home office, and by its charter it is permitted to maintain share registers in New York and London, which it does. It has a transfer office in the City of New York, for the transfer of shares on the New York share register, and there is there a registrar of transfers, and a transfer agent. One reason for a share register and transfer facilities in New York was the accommodation of New York Stock Exchange members, on which exchange Canadian Pacific shares are listed, and it is well known that in normal times such shares were heavily traded in on the New York Stock Exchange. The Canadian Pacific has full power and control over the share register, and the registrar and the transfer agent. It is its own share register, and the registrar of transfers and the transfer agent are its servants or agents. The Canadian Pacific being a Canadian company, the terms of Order 6 (1) would extend to its New York share register, and it would be bound to observe the terms of the Order there as well as in Canada, so far as was reasonably possible. And this it did. The charter of a company is the same abroad as it is at home. Where authorized to do business in other jurisdictions, it is still subject to the law of the home of its creation, though it must comply with the local laws of such other jurisdictions. I cannot

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conceive of any ground for reading into Order 6 (1) the limitation or condition that the locus of the certificate must be made in Canada. It is a matter of indifference in this case where the certificate is, or where registered. I do not think there is substance in either of the two points which I have just mentioned as being advanced by Mr. Sinclair.

In this connection there is one authority to which I might refer, and that is the case of *United Cigarette Machine Co. v. Canadian Pacific Railway Co.* (1). The case has some application here though the ground of action was one entirely different from that under discussion. The plaintiff there, in November, 1916, purchased 1,300 shares of Canadian Pacific from German corporations, the certificate of such shares being endorsed and delivered to the plaintiff. The defendant refused to transfer the shares on its share register in New York, though ultimately they were there transferred. The shares were vested in the Canadian Custodian, pursuant to an order made by a judge of the Superior Court of the Province of Quebec, long subsequent to the date of purchase. The transferee was not a Canadian, the certificate was in the United States, the registration was in the share register of the Canadian Pacific in New York, and the transfer was not made in Canada. There we have the four points mentioned by Mr. Sinclair, yet the United States Circuit Court of Appeals, Second Circuit, held that the plaintiff did not acquire any rights in the shares, neither a chose in action nor the shares themselves, by the purchase of the shares from the German corporations and the receipt of the certificates therefor, by reason of the provisions of Consolidated Orders and the vesting order. And the Circuit Court of Appeals held that rights regarding transfer of stock of a corporation must be determined by the law of the place of incorporation of the company issuing the stocks. Subsequently the plaintiff did acquire the right to transfer the shares with the consent of the Canadian Custodian, but the reason for this is one of no interest here.

It is my opinion that Order 6 (1) did effectively prevent the claimant from acquiring a legal or equitable title, or any rights or remedies, to or in the shares under the

(1) (1926) 12 Fed. R. (2nd) 634.

transfer made to him by the German national, and the first question must be answered in the affirmative.

I come now to the second question, wherein reference is made to a vesting order. As I have already explained, Canadian Pacific was authorized by the laws of Canada to maintain a share register in the City of New York. In conformity with the requirements of Consolidated Orders, Canadian Pacific, by its chief transfer agent in New York, reported to the Custodian a list of Canadian Pacific shares there registered by their owners, and believed to belong to enemy nationals, and comprised in that list were the shares in question. In April, 1919, on the application of the Custodian, of which application the Canadian Pacific had notice, an order was made by a judge of the Superior Court of Quebec under Order 28 of Consolidated Orders, vesting in the Custodian a considerable number of Canadian Pacific shares, including those here in question. While the shares vested in the Custodian were on the New York register, the property represented by such shares was subject to the laws of the Dominion of Canada. The matter of the transfer of shares on the New York register was one to be determined by the laws of Canada, where the Canadian Pacific was incorporated, and the Canadian court, I think, had jurisdiction to make a vesting order in respect of such shares, even though on the New York share register. I see no reason for thinking that a judge of the Superior Court of Quebec would not have power to vest in the Custodian any shares of Canadian Pacific owned by, and registered in the name of, an enemy national on the New York register. The Canadian Pacific here acted upon the vesting order, and has refused since to act upon any transfer made by an enemy national of the shares in question.

It was because Canadian Pacific refused to act upon the request of the claimant to register in New York the shares he acquired from the enemy national that this proceeding was brought. The Custodian contends that if there were any defect in the vesting order that was cured later by the terms of The Treaty of Peace, and The Treaty of Peace (Germany) Order, 1920, but that is a matter for discussion later. It is suggested that the vesting order is void because the registered owner of the shares in question was not notified of the application of the Cus-

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todian for the vesting order. The Canadian Pacific was notified, and, as I have stated, has since acted upon the vesting order. It would appear to me unnecessary that the registered enemy shareholder, resident in Germany, should be notified of the Custodian's application. Order 28 does not direct that this should be done, and paragraph 2 of that Order gives the judge making the order a discretion as to the matter of notice. During the active war period the giving of such a notice would be an impractical thing, and I have no doubt it was not intended that an enemy shareholder living without Canada should have notice before any vesting order was applied for. Much that I said in discussing the first question is applicable here, and apparently the vital point for decision in connection with the second question is whether the enemy shareholder should have had notice of the Custodian's application for a vesting order, and I hold that this was not required or necessary. My answer to the second question is in the affirmative.

Questions three and four may be considered together. They involve the question as to whether or not the securities in question were vested in the Custodian by the Treaty of Peace, and the Treaty of Peace (Germany) Order, 1920. These questions require a consideration of certain provisions of the Treaty of Peace between the Allied Powers and Germany, and The Treaty of Peace (Germany) Order, 1920, the latter of which may hereafter be referred to as "the Treaty of Peace Order."

I might preface my discussion of those two questions by stating in a general way that the Treaty of Peace provided for the readjustment of rights of private property on land. The general principles underlying its complicated arrangements were that the validity of all completed war measures were reciprocally confirmed; the property of subjects of the victorious Powers on the territories of the Allied Powers might be retained and liquidated, and the owner was to look for compensation to his own State. The proceeds of the realization of such property were not to be handed over to him, or to his State, but were to be credited to his State as a payment on account of the sums payable by it under the Treaty. Between some States, Great Britain and Germany for example, and which example Canada followed, Clearing Offices were established for

the collection and payment of pre-war debts, and mixed Arbitral Tribunals were constituted for the purpose of deciding questions relating to debts, contracts, property, rights, and interests, and certain other matters arising under the Treaty of Peace. That is provided for by Section III, Article 296, of the Treaty, and this Section was adopted by Canada.

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Section IV, Article 297, of the Treaty deals with "Property, Rights and Interests," and paragraphs (b) and (d) state:

(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

And paragraph (i) states:

As regards Powers adopting Section III and the Annex thereto, the said proceeds and cash assets shall be credited to the Power of which the owner is a national, through the Clearing Office established thereunder; any credit balance in favour of Germany resulting therefrom shall be dealt with as provided in Article 243.

Annex 1 to Article 297 confirms the validity of vesting orders, and of any other orders, directions, decisions or instructions of any court or any department of the Government of any of the High Contracting Parties made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights and interests. Annex 3 defines "exceptional war measures" as including measures of all kinds, legislative, administrative, judicial or others, "that have been taken or will be taken hereafter with regard to enemy property," and which have had or will have the effect of removing from the proprietors the power of disposition over their property, such, for example, as measures of sequestration. Acts in the execution of these measures include all orders or decrees of courts or Government departments applying

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those measures to enemy property. Annex 4 reads as follows:

All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gustave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

Section III, Article 296, of the Treaty relates generally to Debts, payable before the war, or which became payable during the war, by a national of one of the Contracting Powers to a national of an Opposing Power, and were to be settled in accordance with certain principles laid down in the Annexes thereto, through Clearing Offices, the functions of which I need not explain. The proceeds of liquidation of enemy property, rights and interests, mentioned in Article 297, to which I have already referred, were to be accounted for through such Clearing Offices, by any Power adopting Section III. While Canada adopted Section III, Article 296, for such purposes, that is of no practical interest in this case.

The Canadian Treaties of Peace Act, 1919, provided that the Governor in Council might make such Orders in Council and do such things as might appear to him necessary for carrying out the Treaty of Peace, and for giving effect to any of the provisions of that Treaty. Under that authority there was enacted, in April, 1920, the Order cited as The Treaty of Peace (Germany) Order, 1920, which I earlier mentioned, and which superseded Consolidated Orders. Part II of the 1920 Peace Order relates to "Property, Rights and Interests." Paragraph 33 of that Order is as follows:

33. All property, rights and interests in Canada belonging on the 10th day of January, 1920, to enemies, or heretofore belonging to enemies, and in the possession or control of the Custodian at the date of this Order, are hereby vested in and subject to the control of the Custodian.

(2) Notwithstanding anything in any order heretofore made vesting in the Custodian any property, right or interest formerly belonging to an enemy such property, right or interest shall be vested in and subject to the control of the Custodian, who shall hold the same on the same terms and with the same powers and duties in respect thereof as the property, rights and interests vested in him by this Order.

This paragraph of the 1920 Peace Order was made in exercise of the option reserved in Article 297 (b) of the Peace Treaty. Paragraph 34 reads as follows:

All vesting orders and all orders for the winding up of business or companies, and all other orders, directions, decisions and instructions of any Court in Canada or any Department of the Government of Canada made or given or purporting to be made or given in pursuance of the Consolidated Orders respecting Trading with the Enemy, 1916, or in pursuance of any other Canadian war legislation with regard to the property, rights and interests of enemies, and all actions taken with regard to any property, business or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision or winding up, the sale or management of property, rights or interests, the collection or discharge of debts, the payment of costs, charges or expenses, or any other matter whatsoever in pursuance of any such order, direction, decision or instruction, and in general all exceptional war measures or measures of transfer or acts done or to be done in the execution of any such measures are hereby validated and confirmed and shall be considered as final and binding upon all persons, subject to the provisions of Sections 33 and 41.

(2) The interests of all persons shall be regarded as having been effectively dealt with by any such order, direction, decision or instruction dealing with property, rights or interests in which they may be interested, whether or not their interests are specifically mentioned therein.

(3) No question shall be raised as to the regularity of a transfer of any property, rights or interests dealt with in pursuance of any such order, direction, decision or instruction.

(4) The provisions of this section shall not be held to prejudice any title to property heretofore acquired in good faith and for value and in accordance with the Canadian law by a British subject or by a national of any of the Powers allied or associated during the war with His Majesty.

Paragraphs 39 and 40 might be mentioned and they are as follows:

39. No transfer, whether for valuable consideration or not, made after the sixth day of May, 1916, without the leave of some competent authority in Canada, by or on behalf of an enemy as defined in paragraphs (a) and (b) of Section 32 of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipality or other body by whom the securities were issued or are managed shall take any cognizance of or otherwise act upon any notice of such transfer.

40. Where any property, right or interest vested in the Custodian or the title to or any record of such property, right or interest is registered, recorded or entered in any public book or in any book kept for that purpose by any public or private corporation, the Custodian may

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deliver to the person in charge of such public book or to the proper officer of such corporation a certificate that such property, right or interest is vested in the Custodian, and the certificate shall be entered in the book, and thereafter no entry concerning such property, right or interest shall be made in such book except by permission or direction of the Custodian, and such entries shall be made therein as may be directed by the Custodian in all respects as though the Custodian were registered, recorded or entered as the owner of such property, right or interest, notwithstanding any law, by-law, regulation or article, and notwithstanding that the Custodian is not in possession of any certificate, scrip, pass book or other document of title relating to such property, right or interest.

Before discussing the effect of the Treaty of Peace and the Treaty of Peace Order, upon the matters in issue here, and answering questions numbered three and four, there are two or three points raised by Mr. Sinclair which I might conveniently dispose of at this stage. It is claimed that under Article 297, Annex 4, of the Treaty of Peace there must be an express charge upon enemy property retained and liquidated, under Article 297 (b), and the Treaty of Peace Order. I do not think that the word "charge" has any significance beyond the fact that it means that the proceeds of liquidated enemy property may be charged with certain classes of claims. The word "charge," is used, I think, in the ordinary accounting sense, as in paragraph 43 (2) of the Peace Order, and there does not seem to be any formal procedure to be followed. It means that Canada might charge against any proceeds resulting from the liquidation of enemy property, the classes of claims mentioned in Article 297, Annex 4, but this does not give the claimant any equity of redemption therein; if the proceeds of liquidated enemy property were not fully exhausted by payment of the claims mentioned in Annex 4, or elsewhere, then the surplus would be dealt with under Article 243. I fail to appreciate how this contention can be of any practical importance to the claimant. The sole right or claim of the enemy national, whose property has been retained and liquidated by Canada, is one for compensation against his own State, which undertook to compensate her nationals in respect of the sale or retention of their property by any of the Allied Powers. The Custodian must deal with the German State in these matters and on the hypothesis that a credit balance would sometime appear in favour of Germany at the Clearing Office, that would be reckoned as a



credit to the German State and not to any German national, and dealt with under Article 243 of the Treaty.

Again, it was argued by Mr. Sinclair that a fresh vesting order should have been made after Consolidated Orders ceased to exist. The 1920 Peace Order operated as an absolute vesting order, and it is no longer necessary to apply to the courts for such an order. I find nothing in the Treaty, or in the Treaty of Peace Order, on which can be founded the contention that another vesting order was necessary and this point, in my opinion, cannot be sustained. Further, the claimant, in some way, which I am not sure that I fully understand, seeks support for his contentions here in an agreement made between Canada and Germany in 1930. I do not propose to state the terms of that agreement and I content myself with saying that the agreement does not purport to give any rights or remedies to German nationals or their assignees. It is merely an agreement between the two States, Germany and Canada, in respect of certain property, which does not so far as I can see comprise the Canadian Pacific shares here in question, but in any event enemy nationals can derive no advantage from the agreement. I therefore think that this point is not one of substance.

Now what are the consequences flowing from the provisions of the Treaty of Peace, and the Treaty of Peace Order, 1920. Hostilities had ceased, and, barring untoward events, the war would terminate upon the signing of the Treaty and its Proclamation. The Treaty when proclaimed, would bring all war measures, including Consolidated Orders, to an end. The Treaty confirmed all exceptional war measures and all acts done under them by the Allied Powers. This confirmed Consolidated Orders and all acts done under them, which would include Order 6, and the vesting order. Any taint of invalidity in any step taken or act done under the terms of Consolidated Orders was removed, and any excess of authority exercised was validated. The Treaty gave the Allied Powers the right to retain and liquidate all property, rights and interests belonging to German nationals, at the date of the coming into force of the Treaty, in any territory of the Allied Powers, and the German national was to be indemnified by his own State for any of his property so retained under the Treaty and the Treaty of Peace Order. In pursuance

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of this right under the Treaty, the Treaty of Peace Order, 1920, vested all German property in Canada in the Custodian, and it ratified all things that had been done under Consolidated Orders, including the vesting order. At that time the shares in question had been vested in the Custodian. Altogether, it would not seem to permit of any possible doubt but that the securities in question came into the possession and control of the Custodian and no enemy national has any right or claim thereto, or in their proceeds, now or hereafter.

My answer to questions three and four is that the Treaty of Peace and the Treaty of Peace Order effectually validated and confirmed the vesting order, and also operated as a vesting order to vest in the Custodian the legal and equitable title to the shares in question.

Now as to question five. Mr. Geoffrion's submission upon this question was, as has been stated already, that the nationality of the transferee was immaterial. For the reasons already stated no national could receive an effective transfer from an enemy national. I agree that the matter of the nationality of the transferee is irrelevant. My answer to question five is that the nationality of the transferee, under any Treaty, is immaterial, and affords no support to the several contentions herein advanced on behalf of the claimant.

I do not think there is anything further I can usefully add to the foregoing answers to the questions stated.

There will be no order as to costs.

*Judgment accordingly.*

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ON APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT  
 BETWEEN:

1938

June 7 & 8.

THE MOTOR YACHT *DR. BRINKLEY II* (DEFENDANT) .....

APPELLANT;

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AND

THE OWNER, MASTER AND MEMBERS OF THE MOTOR VESSEL *SHANALIAN* (PLAINTIFFS) .....

RESPONDENTS.

*Shipping—Appeal from District Judge in Admiralty—Limitation of right of master to bind owner of vessel—Services rendered pursuant to contract—Services not in nature of salvage—Time for appealing from judgment rendered in Admiralty Court—Admiralty Rule 172—Appeal allowed.*

Appellant yacht, United States Registry, while on a cruise from Galveston, Texas, to Nova Scotia, stranded on the coast of Nova Scotia. The owner of appellant yacht refused an offer made by the master of the respondent vessel to haul the yacht off the shore. He also instructed the master of the *Dr. Brinkley II* that he was not to employ any tow boat that day. Later, on the same day, the managing owner of respondent vessel offered to tow the yacht off, and look to the hull underwriters for his compensation, and not to the yacht itself, or her owner. The master of the *Dr. Brinkley II* accepted this offer. Unknown to either the owner or the master of the *Dr. Brinkley II* the policy of insurance did not cover her while in Canadian Atlantic waters.

The yacht was floated easily at high tide and was towed to Yarmouth, N.S., by respondent vessel. No demand for payment was made on the owner or the master of the *Dr. Brinkley II* while at Yarmouth, nor prior to her departure from Yarmouth two days later.

The trial judge found that the *Dr. Brinkley II* was in distress and danger, that the services rendered by the respondent vessel were voluntary and in the nature of salvage, and he awarded compensation to respondents.

On appeal the Court found that appellant yacht was not, at the time the services were rendered, in any imminent danger or distress.

*Held:* That the owner of appellant yacht was justified in preferring his own means of releasing the yacht and any services rendered by respondent vessel were not in the nature of salvage.

2. That the master of a ship cannot bind her owner in any transaction concerning the ship, when the owner is on the ship or easily accessible.
3. That the agreement entered into between the master of appellant and the master of respondent vessel was for the assistance of respondent vessel in releasing the appellant on certain definite terms, and cannot be interpreted as conceding the right of salvage against appellant or her owner, with the insurance company acting as arbitrator in fixing the amount of salvage.
4. That the time for appealing in any matter being an action, from a judgment or order in Admiralty, runs from the date the judgment or order is perfected and not from the time when it is decided or pronounced.

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APPEAL from the decision of the District Judge in Admiralty for the Nova Scotia Admiralty District, allowing respondents' action for compensation for salvage services.

The appeal was heard before the Honourable Mr. Justice Maclean, President of the Court, at Halifax, N.S.

*W. H. Jost* for appellant.

*D. J. Fraser* for respondents.

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

THE PRESIDENT, now (March 21, 1939) delivered the following judgment:

This is an appeal from the judgment of Mr. Justice Carroll, District Judge in Admiralty for the Nova Scotia Admiralty District, in an action for salvage, brought by the owner and master and crew of the motor vessel *Shanalian* against the American registered motor yacht *Dr. Brinkley II*, a vessel of 211 tons, and about 120 feet in length, and hereafter to be referred to as the *Brinkley*. The *Brinkley* was owned entirely by one Dr. John R. Brinkley, an American citizen, who was on board his yacht, on a cruise starting from Galveston, Texas, to Nova Scotia. Her last American port of departure was Portsmouth, New Hampshire, bound for Halifax, N.S. On Sunday, the last day of June, 1935, at 9.15 in the morning, on approaching the coast of Nova Scotia during a dense fog the *Brinkley* ran ashore, at Chebougue Point, some five or six miles from the Town of Yarmouth, N.S.; she was released therefrom about twelve hours thereafter in the circumstances soon to be related.

The evidence on behalf of the appellant was heard by the late Mr. Justice Mellish, then the District Judge in Admiralty for the District of Nova Scotia. The evidence on behalf of the respondents was heard some three or four months later by Carroll D.J.A., and this appeal is from his judgment rendered in the action.

The *Brinkley* went ashore in a hospitable spot, on an otherwise rocky shore line, a spot that was the scene of the stranding of a steamer, some twenty years earlier, whose release required the blasting and removal of rocks which thus made the locus favourable for the stranding

of the *Brinkley*. The *Brinkley* went ashore very lightly on a receding tide, and just at the moment of stranding she was going full speed astern on both her engines. After grounding, the *Brinkley* put out two bow anchors, one on each side, and had them carried pretty well to the stern, and fastened behind the largest rocks that could be found there, the anchor chains being attached to a windlass on board; this would tend to lighten the yacht forward, prevent her going further up on the shore at high tide, and it was expected that the disposition of the anchors would assist in floating her under an astern propellor movement, when the time came to do so. On the full recession of the tide—the fall and rise of tide being usually great in those parts—the *Brinkley* was soon high and dry, with a pronounced starboard list. It was not till about 9.15 p.m. on the evening of the same day that the *Brinkley* was floated, on a rising tide, with the assistance of the motor vessel *Shanalian*, such assistance occupying but a few minutes, probably less than five minutes. The *Shanalian* was not in any danger in rendering the assistance, and it is agreed that the release of the *Brinkley* was readily and easily accomplished. It was even suggested by the appellant that the *Shanalian* did not exert any pull at all in floating the *Brinkley* off the strand, and that she came off under her own power. While there may be some doubt as to the degree of assistance rendered by the *Shanalian* yet she had a tow line on the *Brinkley* and, I think, it will have to be assumed that she did render some assistance.

A Mr. Purney, a Lloyd's Agent, resident at Yarmouth, appeared on the scene around noon, a few hours after the stranding; and also Brannan, the master of the *Shanalian*, the latter having been sent there by his managing owner, for the purpose of putting his boat at the disposal of the stranded yacht, if required. Purney soon engaged in conversation with Dr. Brinkley, and this resulted in Purney asking Brannan what he would charge to "jerk" the yacht off at high tide, and Brannan replied that he would charge \$1,000. This was communicated to Dr. Brinkley and he there and then declined to pay such an amount, for such a service. Some unidentified person at this time informed Dr. Brinkley that the high tide in the evening would be greater by three feet than it was when

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the *Brinkley* grounded, and this may have influenced Dr. Brinkley in concluding that his yacht would readily float off at the evening high tide, under her own power. In the afternoon Dr. Brinkley, who in the meanwhile had motored to Yarmouth and back, informed the master of his yacht that he was not to employ any tow boat that day, and, if the yacht failed to float off with the next high tide, he hoped to get the services of some Canadian Government boat, through a Mr. Kinney at Yarmouth, whom he had in the meanwhile met; in fact some such boat did tow his yacht out of her dock at Yarmouth on her departure for Halifax, on the following Tuesday. Later in the afternoon Dr. Brinkley motored to Yarmouth where he remained, as I understand the evidence, until the next morning. He apparently was strongly of the opinion that there would be no difficulty in floating his yacht, by her own exertions, at the high tide on Sunday evening, and if this did not prove successful he would then have to consider the matter of procuring or hiring the services of some tug, for the next high tide. He seems to have definitely concluded that he would not consider a payment of \$1,000, and there is no doubt, I think, but that his instructions to his master were clear and explicit upon this point, and the master himself appears to have been indignant that in the circumstances of the case any such sum as \$1,000 should be demanded for what he deemed to be a very slight service.

Nothing of importance thereafter transpired until shortly after or around 8 p.m. on Sunday evening, just before dark, when the *Shanalian* appeared on the scene, just as the tide was beginning to rise, but not at the request of the master or owner of the *Brinkley*. The master of the *Brinkley* observing this vessel, and thinking she might be a United States coastguard boat whose aid the yacht had requested by wireless just at the time of the stranding, or a Canadian Government owned boat, sent a launch with two of his crew to this then unknown vessel, which turned out to be the *Shanalian*. The managing owner of the *Shanalian*, a Mr. Sweeney, came ashore in the launch to the side of the stranded yacht, but the master, Brannan, I think, remained on his boat. Then some conversation ensued between the master of the *Brinkley* and Sweeney regarding the towing off of the *Brinkley*. Sweeney stated

that he would tow the *Brinkley* off for \$1,000, which proposal the master of the *Brinkley* refused to entertain. Then Sweeney stated that he would tow the yacht off and would look to the hull underwriters for his compensation, and not to the yacht itself, or her owner. To make sure about his understanding of this proposal the master of the *Brinkley* then called around him most everybody on board the yacht, and requested Sweeney to repeat his proposal, that is, to tow the yacht off the shore, and to look only to the insurers for payment of his services, and this was done. There is no conflict of evidence upon this point, and it is beyond controversy, in my opinion, that the managing owner of the *Shanalian* agreed to perform the services without any liability for compensation on the part of the yacht, or her owner. Both Sweeney and Brannan stated in their evidence that this was the arrangement, and with this the learned trial judge agreed, as I do. The proffered service being put on this basis the master of the *Brinkley* decided to accept the same, though contrary to the instructions of Dr. Brinkley. The master of the *Brinkley* does not appear to have given any reasons for this decision, and we need not speculate as to it. The master of the *Brinkley*, when all was in readiness for the start of the tow, told his crew to start heaving on the anchors, and he started his port engine at full speed astern, and in three or four minutes, in less than half her length, the *Brinkley* was afloat. It was the opinion of the pilot, McKinnon, who was retained on Sunday to accompany the *Brinkley* on the balance of her Nova Scotia cruise, that she would float off about a half hour before high tide. The evidence of McKinnon impresses me, and he was a person with a knowledge of the local situation and one who had an extensive experience in salvage matters. I think it is probable that the *Brinkley* would have floated when McKinnon said she would, and this may well have been entertained as a probability by the managing owner of the *Shanalian*, and it may have been the reason which induced him in the end to venture into the gamble of looking to the insurers, if the services of his boat were accepted. There seems to have been no difficulty in floating the yacht; and the *Shanalian* towed her to Yarmouth, reaching there at 11.30 p.m. Why she was towed to Yarmouth was not clearly explained. No bill was ever rendered the owner or the master of the

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*Brinkley* while at Yarmouth, nor was any demand of any kind made by the managing owner of the *Shanalian* prior to the departure of the *Brinkley* from Yarmouth on Tuesday, at about 11.50 a.m. Dr. Brinkley was in Yarmouth when his yacht floated, on all of Monday, and on Tuesday until the hour of his departure therefrom.

I should explain that while the *Brinkley* was insured in quite a large amount yet it transpired that the policy did not cover her while in Canadian Atlantic waters, but neither the owner nor master of the *Brinkley* was aware of this, and the master I have no doubt was in good faith if he led the managing owner of the *Shanalian* into believing that the policy of insurance covered his ship while in Canadian waters. That likely would be assumed and probably no words passed between them upon the point.

The case is an unusual one and not free from difficulties, and in some respects it is one of no little interest. Carroll D.J.A., found the *Brinkley* was in distress and danger, that the services rendered were voluntary and in the nature of salvage, and he awarded compensation in the sum of \$600. If the *Shanalian* is entitled to salvage I should not feel justified in disturbing the award of the learned trial judge, and the amount of the award was not, so far as I recall, stressed as a ground of appeal. The appellant contended before me that the *Brinkley* was not a ship in danger or distress, in the practical sense at the material time, and that any services rendered were not in the nature of salvage. The important ground of appeal raised before me was that the master of the *Brinkley* could not bind the *Brinkley* or her owner for salvage services, or anything else, on the ground that a master cannot bind his ship or her owner when the latter is on board, or readily available to anyone desirous of any dealings relating to the ship. A principle of importance is therefore raised. It was also urged, in the alternative, that if any contract were made between the master of the *Brinkley* and the managing owner of the *Shanalian*, and such contract were binding upon the *Brinkley* or her owner, it was an express term of the contract that the *Shanalian* would not hold the *Brinkley* or her owner liable for any services rendered, but would take the risk of recovering compensation from the insurers of the *Brinkley*, and this being the essence of the contract it was



immaterial whether in fact the *Brinkley* were covered, while in Canadian waters, by her insurance policy.

The question as to whether or not the *Brinkley* was in danger or distress, at the time the services were rendered by the *Shanalian*, is one to which I have given anxious consideration. The conclusion, which I have reached, is that the *Brinkley*, at the time the services in question were rendered, was not in any imminent danger or distress, and, I think, all the circumstances of the case support this conclusion. I have in mind, of course, a time limitation, and the locality, the season of the year, and the actual and probable weather conditions. I do not think the *Brinkley*, in the practical sense, was in danger, or that her situation was so critical as to make it unreasonable for her owner, or master, to decide upon an attempt to float the ship by her own means at high tide, before seeking or accepting the assistance of a tug. It does not necessarily follow that because a ship is stranded that she is in danger, particularly a ship without a cargo. Doubtless, a stranded ship would be safer afloat, but that does not determine that the towing of her off the strand would be in the nature of a salvage operation. It was quite within the right of the owner, I think, at the time in question here, to prefer his own means of releasing the *Brinkley*, and in rejecting the services of the *Shanalian*, if her aid in his judgment were not urgent, and if in all the circumstances he did not regard his ship in immediate danger. I cannot reach the conclusion that in all the facts of the case the *Brinkley* was in danger when the services in question were rendered, or even the next day, and beyond that there is no evidence. There was no sea or wind at the time material that was alarming, and there is no evidence that any storm of any kind was imminent or predicted. In fact, whatever evidence there is goes to show that on Monday the weather conditions were not unfavourable. To say that a disturbance in sea or wind might occur at any time is not relevant. I think the owner of the *Brinkley* was justified in taking the risk he did, if risk it were, and that any services rendered by the *Shanalian* were not in the nature of salvage. The facts in the case of *The Pretoria* (1), offer a somewhat comparable situation.

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(1) (1920) 5 Lloyds List L.R. 112.

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I was referred to the case of *The Auguste Legembre* (1). The question for decision there was under what circumstances a tug employed by a salving tug, against the will of the master of the salved vessel, can claim a salvage reward. That was the principal point in issue, but, I think, it has no application here. In that case there were grounds for holding that the third tug was necessary because she was called into service by a second tug already engaged in a salving operation, and the case was decided upon practical considerations. I do not think that the case of *The Auguste Legembre* establishes any such principle that because a ship is stranded the master must accept any salvage services offered her, and that he has no right to refuse the same. Gorrell Barnes J., in that case, said that the case he was dealing with involved the nautical question, whether having regard to the circumstances of the case, and what might have been anticipated at that time of year, and in that locality, it was reasonably prudent and necessary to have a third tug, and the Elder Brethern thought it was, and Gorrell Barnes J. thought it was a reasonable thing to do, and accordingly a salvage award was allowed the third tug.

I come now to the question of law raised by the appellant. Clear of authority altogether, the principle that a master of a ship cannot bind her owner in any transaction concerning the ship, when the owner is on the ship or readily accessible, would seem to be a sound and safe one, and one founded on reason. The contrary principle would appear to be an unreasonable and dangerous one, and in practice, it is the managing owner who makes all decisions affecting a ship when in her home port, and not the master, though I can conceive of possible exceptions, in very urgent circumstances, when agency might even then be implied. Generally, there is no room for the application of the doctrine of agency when a ship is in her home port, or when the owner accompanies his ship, and is readily available. Dr. Brinkley may be treated as always being on board his yacht. He was at least, at the time material here, available to anybody. Here we have the sole owner of a stranded yacht making the decision that an attempt should be made to float her by her own

means, at the evening high tide of Sunday, June 30th, and that the hiring of any tug should in the meanwhile be postponed, and he so instructed his master. The decision of the owner to attempt to float his ship by her own exertions was within his right. The managing owner of the *Shanalian* was no doubt aware that Dr. Brinkley had refused on Sunday forenoon to accept the services of his tug, upon the terms already stated, and the same offer was refused on Sunday evening by the master of the *Brinkley*. The managing owner and master of the *Shanalian* were aware that Dr. Brinkley was accessible to them at the scene of the stranding, or at his hotel in the Town of Yarmouth. In fact, both had called to see him at his hotel in Yarmouth sometime before proceeding to the stranding on Sunday evening. He happened not to be in at the time, and they made no further effort to locate him. I cannot conceive of it being a difficult thing to locate him if they had seriously attempted to do so. Dr. Brinkley was dealing with his own property and in all the circumstances of the case, I do not think the plaintiffs can be heard to say what was his duty in respect of his own property.

Turning now to the authorities. The general rule is that the master of a ship by law has the power to bind the owner in conducting the navigation of the ship to a favourable termination, and he has, as incident to that employment, a right to bind his owner for all that is necessary, but, as was said by Parke B. in *Beldon v. Campbell* (1), "these instances do not apply where the owner of the vessel is living so near the spot as to be conveniently communicated with. In that case before the master has any right to make the owner a debtor to a third person, he must consult him, and see whether he is willing to be made a debtor or whether he will refuse to pay the money." The case of *Gunn v. Roberts* (2) affirmed the same principle. This rule seems to have been favoured by Dr. Lushington in the case of *The Elise* (3), wherein he said that a master might make a binding agreement on land as at sea as agent for the crew to bind them by agreement in respect of salvage compensation, but not, he

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(1) (1851) 6 Ex. R. 886 at 890. (2) (1874) 9 L.R.C.P. 331.

(3) (1859) 166 Eng. R. at 1206.

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thought, where the owner was at hand and had given him no authority. The point is discussed in Halsbury (1), in the following language: "The owner of the salved ship is generally bound by a salvage agreement entered into by the master, the latter having an implied authority to bind his owner for all that is reasonably necessary for the successful navigation of the ship. But the shipowner is not bound by it where he was easily accessible and gave no authority to the master to enter into it, or where in the circumstances the agreement was not reasonably necessary, or where the terms of the agreement show that it is not for the benefit of the shipowner . . . ."

I come now to the alternative ground upon which the appeal was put to me. If an agreement were made between the master of the *Brinkley* and the managing owner of the *Shanalian* it was an express term of that agreement that neither the *Brinkley* nor her owner was to be liable for any services proposed to be rendered, the managing owner of the *Shanalian* having elected to take the risk of recovering any compensation from the insurers of the *Brinkley*. It was upon that express term that the *Shanalian* was permitted to put a line on board the *Brinkley*. That fact is, I think clearly established. It was not, I think, the agreement that a right to salvage compensation was conceded as against the *Brinkley* or her owner, and that the insurance company was to act as an arbitrator in fixing the amount of salvage, as was suggested. The master of the *Brinkley* carefully and deliberately made sure that the suggestion of the managing owner of the *Shanalian* was that neither the *Brinkley* nor her owner was to be liable for compensation, and his reason for this exactness probably was that he had been instructed by the owner not to engage the services of a tug at all, at least on the day in question. I do not think there is any room for doubt but that was the agreement or arrangement reached, and it was the suggestion of the managing owner of the *Shanalian*. I do not think it avails the respondents in a salvage action that it transpired that the insurance on the hull of the *Brinkley* did not cover her while in Canadian waters. If I should be in error in the opinions already expressed in the case, I think this point is of itself fatal to the case of the respondents.

The towage from the scene of the stranding to Yarmouth, after the release of the *Brinkley*, seems to have been treated at the trial as part of the salvage services, and the action was disposed of on that footing. I think it is now too late to dispose of that portion of the services as one of towage—concerning which there is no evidence,—and the balance as salvage services, which I understood to be suggested to me on the appeal by counsel for the respondents; however I may be in error as to this. The towage to Yarmouth apparently was included within the service to be rendered by the *Shamalian*, on the terms which I have already stated. In any event the action was one for salvage and I do not see how I can now convert any portion of the services rendered into one for towage, even if the agreement did not stand in the way.

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There remains for discussion one further point. There was raised on behalf of the respondents the preliminary objection that notice of this appeal was not served in time. The decision of the learned trial judge in this action was filed with the District Registrar, on February 18th, 1938, but no entry of the same was made at the time in any book of record. On March 22nd, following, a decree was taken out before the learned trial judge and this was thereupon filed in the Office of the District Registrar, and entered in the appropriate record book. The respondents contend that the time for filing notice of appeal runs from the date of the decision, while the appellant contends that the time for filing notice runs from the date of the decree. The notice of appeal filed herein was within the required time, if calculated from the date of the decree, but not within the period of calculation from the date of the filing of the decision.

Admiralty Rule 172 is the one applicable here. It is as follows:

No appeal to the Exchequer Court from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Exchequer Court, be brought after the expiration of thirty days, and no other appeal shall, except by such leave, be brought after the expiration of sixty days. The said respective periods shall be calculated, in the case of an appeal from an order in Chambers, from the time when such order was pronounced, or when the appellant first had notice thereof, and in all other cases, from the time at which the judgment or order is signed, entered, or otherwise perfected, or, in the case of the refusal of an application from the date of such refusal.

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The Rule might be more clearly expressed, but I think its meaning is fairly clear. The case under discussion, "being an action," would seem to fall within that portion of the Rule which prescribes a period of sixty days within which an appeal may be brought, and the Rule provides that such time shall be calculated "from the time at which the judgment or order is signed, entered or otherwise perfected." I am, therefore, of the opinion that the time for appealing runs from the date when the judgment or order is perfected and not from the time when it is decided or pronounced, but that would not apply in the case of an Order in Chambers, "in any matter not being an action."

For the foregoing reasons, my conclusion therefore is, with great respect, that the appeal must be allowed, and with costs.

*Appeal allowed.*

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ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN:

DOMINION TANKERS LIMITED } APPELLANT;  
 (DEFENDANT) .....

AND

SHELL PETROLEUM COMPANY } RESPONDENT.  
 OF CANADA LIMITED (PLAIN-  
 TIFF) .....

*Shipping—Appeal from District Judge in Admiralty—Contract for carriage of goods by water—Loss of cargo—Onus of proof—Water Carriage of Goods Act, R.S.C., 1927, c. 207—Appeal allowed.*

Respondent entered into a contract with appellant for the carriage of a cargo of gasoline from Montreal, P.Q., to Sydney, N.S. During the course of the voyage appellant's ship, with the gasoline on board, stranded on the south shore of the St. Lawrence river. The ship suffered serious damage and a large part of the cargo of gasoline was lost. The respondent contended that most of the lost cargo was pumped overboard in order to lighten the ship. The appellant contended that the loss of cargo was due entirely to the stranding of the ship which seriously damaged her hull, causing the oil to leak from the tanks.

*Held:* That the appellant's explanation of the loss of cargo was a reasonable one and consistent with the occurrence of the stranding and the severe damage done to the ship.

2. That the onus on a person relying on an exception relieving him from liability does not go so far as to make him prove all the circumstances which could explain an obscure situation.

Judgment of Demers D.J.A., for the Quebec Admiralty District [(1938) Ex. C.R. 338] reversed.

APPEAL from the decision of the District Judge in Admiralty for the Quebec Admiralty District, allowing plaintiff's action for damages for loss of cargo.

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

*R. C. Holden, K.C.* and *F. Wilkinson, K.C.* for appellant.

*C. Russell McKenzie, K.C.* for respondent.

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

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THE PRESIDENT, now (March 9, 1939) delivered the following judgment:

This is an appeal from a judgment of Mr. Justice Demers, District Judge in Admiralty for the Quebec Admiralty District.

The preliminary facts to be stated are the following. On August 3, 1935, about 550,000 imperial gallons of gasoline were shipped at Montreal on board the oil tank steamer *John A. McDougald* (hereafter to be referred to as *the McDougald*), owned by the defendant, for carriage to the Port of Sydney, N.S. The *McDougald* was between 250 and 260 feet in length; her breadth and tonnage does not seem to have been anywhere stated. She had ten oil tanks, five on the port side, and the same number on the starboard side, numbered 1 to 5 on each side, commencing from the bow. Each tank if filled would hold between 70,000 and 80,000 gallons. The contract for carriage was subject to all the terms and provisions of, and all the exemptions from liability contained in, the Water-Carriage of Goods Act, Revised Statutes of Canada, 1927, Chap. 207. After departing from the Port of Montreal on August 3, 1935, and during the course of her voyage to Sydney, and on the same day, the *McDougald*, at about 11.19 p.m., while going at full speed, stranded on the south shore of the River St. Lawrence, near St. Antoine, in the Province of Quebec, sustaining serious bottom damage, and other damage as well, which, it is conceded, caused some loss of cargo. The plaintiff contends that a portion of the total cargo loss was not attributable to any damage caused the ship by the stranding. On the night of August 4th, at 10.35 p.m., at high tide, the *McDougald* came afloat, there having been two low tides while she was stranded. She then proceeded back to Montreal where her cargo, such as

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remained, was discharged and delivered to the plaintiff. The plaintiff alleges that only 188,000 gallons of the original cargo were delivered back to it, leaving a balance of 359,000 gallons unaccounted for.

The learned trial judge decided that the ship was in all respects seaworthy, properly manned, equipped, and supplied, and that the stranding of the ship was due to faults or errors in the navigation of the ship by a pilot, and that under the contract of carriage, and by law, the defendant was exempt from liability for any loss of cargo shown to be attributable to the stranding. He found that the loss of cargo from tanks Nos. 1, 2 and 3 on the port side of the ship was in consequence of the stranding, and that under the contract of carriage the defendant was not responsible for any loss of cargo from those three tanks. He also found that the stranding might account for the loss of 300 gallons from each of the other seven tanks, 2,100 gallons altogether, and that altogether the loss of 174,543 gallons had been accounted for by the defendant. As to the balance of the cargo, less that delivered back to the plaintiff at Montreal, he found that the defendant had not satisfied him that the loss was without fault on its part, and he found the defendant liable in the sum of \$21,191.36 for such loss, and it is that finding that is the subject-matter of this appeal.

The defendant counterclaimed against the plaintiff for the proper proportion of losses, charges and expenses incurred and paid by it, as a result of the stranding, in general average, in the sum of \$1,827.65; this claim was allowed by the trial judge and there was no appeal therefrom. The appeal here therefore relates to the remaining portion of the original cargo after deducting 174,543 gallons, and also the quantity delivered back to the plaintiff at Montreal, the loss of which, it was held by the trial judge, the defendant had not satisfactorily accounted for.

It might be desirable to state the quantities of gasoline, loaded in each tank at Montreal, the quantity there discharged from each tank on the return of the *McDougald* to Montreal, and the quantities estimated to be in each tank while the ship was still stranded at St. Antoine. The latter is estimated by taking what is called the "ullage," that is, the measurement in feet and inches between the top of the tank and the surface of the oil cargo in any



given tank. The ullage taken at St. Antoine, which I am about to state, was later converted into gallons. There was put in evidence a document showing the loading of gasoline, in gallons, at Montreal, by port and starboard tanks, and in the same way the quantities discharged therefrom on the return of the ship to Montreal, and the results of the ullage taken at St. Antoine at 4.30 p.m. on August 4th. That is as follows:

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	Montreal (loading)	St. Antoine (ullage)	Montreal (discharge)
Port Tank No. 1 .. .. .	32,591	12,404	
2 .. .. .	70,786	13,196	
3 .. .. .	70,858	14,816	
4 .. .. .	70,897	30,927	30,565
5 .. .. .	30,138	31,451	23,912
	<hr/>	<hr/>	<hr/>
	275,270	102,794	54,480
Starboard			
Tank No. 1 .. .. .	32,393	31,760	5,947
2 .. .. .	70,786	27,702	31,413
3 .. .. .	70,996	29,642	31,007
4 .. .. .	70,877	33,641	44,750
5 .. .. .	30,975	33,129	68,053
	<hr/>	<hr/>	<hr/>
	276,027	155,874	181,179
	551,297	268,668	235,659

The same document shows the water found in seven tanks, on the *McDougald's* return to Montreal, which is regarded by the defendant as an element of importance in its case, and which water the other side suggest got there owing to the negligence of the servants of the defendant. The particulars are as follows:

Port No. 1 .. .. .	Starboard No. 1.. .. .	4,081
2 .. .. .	2.. .. .	9,174
3 .. .. .	3.. .. .	7,789
4 .. .. .	4.. .. .	8,603
5 .. .. .	5.. .. .	8,658
	<hr/>	<hr/>
	4,660	43,065

On her return to Montreal the *McDougald* was surveyed by a Mr. Tait, Acting Surveyor to Lloyd's Register of Shipping, in the Vicker's Dry Dock, and later he supervised the repairs made to the ship on behalf of the owners. He stated that thirteen plates on the port side of the bottom were renewed, five were removed and then faired and replaced, and two were faired in place. "Faired" means that the plates are rolled and straightened out to their original shape. The damage on the starboard side

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of the bottom, Tait stated, extended practically the full length of the ship, and consequently throughout all the five tanks on the starboard side. Sixteen plates were renewed, four were removed and then faired and replaced, and five were faired in place. Altogether forty-five plates on the bottom of the ship were damaged. Nineteen frames and bulkheads on the port side, and thirty-nine on the starboard side, had to be dealt with, and approximately 3,000 rivets were started, excluding, as I understand it, the rivets in the plates that had to be removed. The ship's machinery also suffered some damage, the whole engine being thrown out of line. He stated that many seams and butts of plates which were not holed were distinctly opened up. He stated also that seams and butts would open more when the ship lay on the rocks, and under strain, then when she was in dry dock and lying evenly on her keel. The cost of repairs to the ship was around \$54,000. There was put in evidence a copy of a report made by Tait, as Acting Surveyor to Lloyd's Register, wherein are found the details of the damage disclosed by his survey of the *McDougald*, and what repairs he recommended should be done.

The question at issue being one largely of fact I must review, as briefly as possible, such portions of the evidence as would seem to bear upon the principal finding of the learned trial judge, and which constitutes the real issue here for decision. That issue might be stated by saying that it is contended on behalf of the plaintiff that the officers or crew of the *McDougald* must have pumped the lost cargo (outside the three port tanks) overboard, in order to lighten her and thus facilitate her floating at high tide, and that the water got into the tanks because the valves had been opened at low tide and not closed, and that the water came in through the pipes on a rising tide. The defendant denies this, and its submission is that the loss of cargo was owing entirely to the stranding of the ship, which seriously damaged her hull, on both the port and starboard sides, so as to cause the cargo to leak from the tanks to the degree and extent which represents that part of the cargo not delivered back to the plaintiff.

First, I might say that when the ship stranded she was going at full speed. The shore where the stranding occurred was more or less a rocky one, and I was led to

believe that where stranded the ship lay on a nest of rocks or boulders, at least to a considerable extent of her length. This, it was said, would, particularly during the two low tides following the stranding, cause a strain upon the bottom plates, the frames and bulkheads, the rivets, and other portions of the ship, because at low tide the ship would be pretty well out of water.

The master of the ship stated there was never any voluntary discharge of cargo, and that the pumps or valves were never used for that purpose, but he said that cargo was transferred on the night of August 4th, between 9.05 p.m. and 10.35 p.m., from No. 1 starboard tank to No. 5 starboard tank, and from No. 5 port to No. 4 starboard. The transfer from No. 5 port to No. 4 starboard was to offset a port list, and the transfer from No. 1 starboard to No. 5 starboard was to lighten the ship forward. He stated also that on the evening of the day the cargo was discharged at Montreal the ship was on an even keel with water ballast, but the next morning it was found she had a starboard list, indicating leaking on the starboard side. The master under cross-examination used the words "slight leak" once or twice and the trial judge comments upon this, but the sense of the evidence of the master as a whole is quite obvious; he makes it quite plain that in his opinion the cargo shortage leaked from the ship owing to the damage caused the hull by the stranding, and he could not otherwise account for the loss of cargo, that is, from the seven tanks.

The transfer of gasoline from No. 1 starboard to No. 5 starboard, and from No. 5 port to No. 4, starboard, appears to have been decided upon at a conference which took place on the *McDougald* in the late afternoon of the 4th between the master of the ship, Mr. Roberts of the defendant company, Mr. Drake, the surveyor of the cargo underwriters, and Mr. Solery, the defendant's marine superintendent. The master states that Mr. Drake was on the *McDougald* when the pumping began and that he was aboard when the ship floated and there is no evidence to the contrary, but if the master were in error as to this it matters not. That this transfer of cargo should be made was decided upon at the conference, no doubt hoping that it might assist greatly in floating the ship at the next high tide, when in fact she did float off the strand.

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The chief engineer of the *McDougald*, Wells, was in charge of the cargo pumps, which are operated only under his direction, and he stated that just before the ship came off, the cargo had been transferred from two tanks to two other tanks, as has already been explained. The valves, he said, were never opened to allow cargo to go overboard, to lighten the ship. Dick, the first mate, stated that he and the master took the ullage of the tanks in the afternoon of the day following the stranding and they found port tanks Nos. 1, 2 and 3 away down and the gasoline almost gone, and in the remaining tanks the cargo was going down a little in some cases, and considerably in others. Dick transferred the cargo from No. 1 starboard to No. 5 starboard, and from No. 5 port to No. 4 starboard before the ship floated, and other than this, he stated, there was no pumping or dealing with the cargo from the time the ship stranded until she floated. He confirmed the evidence of the master that after the discharge of cargo at Montreal the tanks were dry, other than port tanks Nos. 1, 2 and 3, and the ship was on an even keel, but the following morning she had a starboard list and that, he said, would be due to water getting in on the starboard side during the night; I entertain no doubt but that there was such a list, and it is difficult to see what other explanation there could be of it than that given by Dick.

Fontaine, Canadian Government Steamship Inspector for the District of Montreal, attended the official survey of the *McDougald* at the Vicker's Dry Dock on August 9th. He made a careful examination of the ship and stated that the damage to the ship was very severe, and as set forth in the joint report of the surveyors. From the damage he saw on the ship it was possible, he said, that leakage could have occurred from all the tanks, that is, those other than Nos. 1, 2 and 3 on the port side. He saw evidence of started seams and rivets in the ship's bottom and said that the ship was leaking on the starboard side as well as on the port side. If a ship were stranded on rocks, and unevenly supported, she would strain, he said, and this would start the seams and butts.

Captain Solery, the operating manager of the vessels of the defendant company, went to the place of stranding and was on the *McDougald* during the afternoon of the

4th, and he stated that he gave no orders that any of the cargo should be pumped overboard. In the afternoon of that day, after a discussion on board the *McDougald* between the master, Mr. Drake representing the London Salvage Association, and Mr. Roberts and himself of the defendant company, it was decided to transfer cargo from No. 1 starboard tank and No. 4 port tank, as already explained. Late in the afternoon he went on board the tug *Lord Strathcona*, which was standing by the *McDougald*, but he returned about 9.30 p.m. to the *McDougald*. He confirmed other evidence as to the damage to the ship, which he said extended throughout the whole length of the ship on the starboard side. He said that if a ship containing a liquid cargo were grounded on rocks, there would be a dislocation and breaking of plates because the ship would be under strain, and the cargo to some extent would leak out. If the ship were floated, or put on an even keel in, say, a dry dock, the plates would have a tendency to go back to their original position, though not completely, and leakages would close up to a certain extent. He said that after seeing the plates and rivets at the time of inspection in the dry dock at Montreal it was easy to see that there were leaks, and which had been worse at some time. There were, he said, thousands of rivets on the starboard side that were damaged. He said he saw scores of rivets unfastened and by tapping them he could see they were bad, and there would, he said, be a leak wherever there was a loose rivet.

In rebuttal the plaintiff called two witnesses, one being a Mr. Allan, but his evidence does not appear to afford any real assistance to the issue here to be determined. The other witness was Mr. Hayes, a marine surveyor, practising in Montreal. This witness was permitted to put in evidence a report of his survey of the *McDougald*, made on behalf of the cargo underwriters, on the ship's return to Montreal. The reception of this report was objected to by counsel for the defendant. I do not propose referring to anything in this report because its reception, in my opinion, cannot possibly be supported upon any conceivable ground. This report is easily distinguishable from the report of Tait, earlier referred to. Hayes testified that he was at the plaintiff's dock when the *McDougald* arrived, representing the cargo underwriters.

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After the cargo was discharged, and while the ship was still at the plaintiff's dock, he saw no indication of any leakage of the tanks, that is the seven tanks, by looking through the tank lids on the deck. His opinion was that the leakage would be practically nothing. In answer to a question put by counsel for the plaintiff, this witness stated that the only explanation for the ship floating when she did, and not at the second high tide, was that "some of the cargo must have been taken out of the ship." The minor leaks he saw would account only for two or three hundred gallons for which the trial judge made an allowance of 300 gallons for each of the seven tanks. Hayes' theory as to how water got into the tanks was that when the ship suddenly floated, the "valves along the starboard side must have been opened, or in some way the gasoline on the starboard side must have been allowed to run to the damaged port number 2 and 3 tanks." If these valves, he said, were left open at low water the gasoline would naturally run to the lowest point of the damaged tanks on the port side, then, with a rising tide, if the valves were not shut immediately, water would back through the pipes and enter all the tanks. The suggestion sought to be conveyed was that the ship's officers permitted gasoline to escape out of the tanks at low tide and forgot to close the valves before high tide came along, and that is how Hayes accounts for the 43,000 gallons of water found in the tanks, and why the ship floated when she did. If this theory of Hayes is correct then the master, the first mate and the chief engineer, deliberately perjured themselves, though the trial judge makes no such suggestion, and I do not think he meant to say that he did not believe their evidence as to specific occurrences and facts.

The evidence clearly establishes that the damage to the hull of the ship was very substantial, and that the injury extended to the bottom of the ship on both sides, the full length of the ship. The extent of the repairs, considered necessary by competent persons, reveals the extent of the damage and the likelihood of the ship leaking throughout her whole length. It would be expected, I should think, that a ship of that size lying to a considerable extent on rocks, during two low tides, would be under such strain as would open butts and seams and start rivets, and in fact it is plain that this occurred in varying degrees no

doubt. The master and the first mate took the ullage on the afternoon of August 4, while the ship was still stranded, and they found the gasoline in all the seven tanks was leaking out, and there is no reason for doubting this evidence; and the subsequent survey of the ship at Montreal shows that this was not only possible but probable, and other facts lend support to the contention that the ship was leaking more or less on the starboard side. The master, the first mate, and the chief engineer swear that no cargo was pumped overboard, or in any way jettisoned, at any time between the stranding and the floating of the ship, and I cannot perceive of any reason why their evidence should be doubted. I, of course, did not have the opportunity of hearing those witnesses give their testimony, but I have read the evidence of each several times, and carefully, and I must say I am impressed with the same. The seemingly contradictory features of the master's evidence, and that of the first mate, which were emphasized by the plaintiff's counsel, and which were commented upon by the trial judge, are of a character that rather confirms me in my impression as to the reliability of those witnesses. The master says the cargo deficiency, outside of the three port tanks, was attributable to the damage to the ship. That is the true meaning of his testimony. Moreover, the trial judge does not even remotely suggest that the evidence of the master, the first mate, or the chief engineer, should be disbelieved. What motive could there be for those officers of the ship perjuring themselves? If the master sacrificed as much of the cargo as he thought would release and save his ship, why should he hesitate to report this, or why should he conceal it? Such sacrifice of cargo would be considered a general average loss. The suggestion of Hayes that cargo was pumped overboard for this purpose cannot be supported without doing violence to all the evidence and circumstances of the case. And, I think, it is utterly improbable.

An important circumstance, I think, is the conference or discussion which took place on the *McDougald*, on the afternoon of the 4th, between the master of the ship, Mr. Roberts, Mr. Drake and Mr. Solery, when it was agreed that the ship should before the next high tide be lightened forward, and that some cargo should be transferred from No. 1 starboard tank to No. 5 starboard tank, and from

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No. 5 port tank to No. 4 starboard tank. This would lighten the ship forward and correct any port list, and probably would give her a starboard list, which, in the circumstances, might not be an undesirable thing. And the operation was successful, without, so far as I can make out, any aid from the salvage tug which was standing by. That this transfer of cargo was made cannot be seriously doubted, and it worked out as expected. Now, is it likely that these persons, all having some interest in the situation, and who, presumably, had investigated the cargo situation, would have decided upon this course, if it did not hold a promise of success, or if they thought that cargo had been or would be sacrificed during the last low tide, to aid the floating of the ship? And none of these persons apparently made any suggestion that a sacrifice of cargo should be made. A sacrifice of cargo might, wisely, have been made, but upon the evidence there is no reason for suspecting that it was made. To say that this was done is purely an unsupported theory, and in my opinion one utterly untenable upon the evidence.

I have already explained that Hayes testified that the cargo deficiency could be explained only on the ground that some cargo must have been pumped out, and then he put forward a "theory" as to how the water got into the tanks, particularly on the starboard side, which theory I need not repeat. Hayes was giving expert or opinion evidence upon this point. He did not see the ship while she was stranded. He was the representative of the cargo underwriters. In the circumstances, Hayes should not, I think, have been called as an expert witness. And I agree with defendant's counsel, after a careful study of the evidence of Hayes, that he appears to have been a witness giving evidence on behalf of the cargo underwriters rather than a witness called to assist the court, and, being called as an expert witness, he was presumed to be a witness to assist the court, and not either of the parties. To say that the officers of the *McDougald* pumped some cargo overboard at low tide, and then were so careless as to leave the valves open and allow water to enter the tanks through the pipes on the rising tide, to fill up some of the cargo space allegedly vacated for the purpose of lightening the ship, is so much of theory, and so speculative, that I decline to accept it, in the face of all the other evidence.



Then it is suggested that other members of the ship's officers or crew might have been called, and who might have been able to explain the cargo deficiency. The key witnesses were called and I do not think it was imperative that others should have been called. I do not think it is proper, on this ground, to suspect the veracity of the witnesses called, and whose testimony seems to have been given in, I think, a quite satisfactory manner, and which evidence would seem to be supported by the facts and circumstances of the case.

Upon whom lies the burden of proof in a case of this kind is always more or less difficult. Are there facts in evidence here which, if unanswered, would justify men of ordinary reason and fairness in affirming the contention of the defendant? I think so. All the circumstances of the case, had there been no evidence at all, would lead, I think, to the conclusion that the loss of cargo was due to the damage caused by the stranding, which was not the fault of the owners of the ship. And there is practically no evidence against this. I do not think it is necessary for the carrier, in order to claim protection, to show the exact cause of the loss of cargo, provided he proves it was not due to his negligence. It was said by Roche J.—who had an extensive experience in cases of this kind—in the case of *City of Baroda v. Hall Line Ld.* (1), that the onus on a person relying on an exception relieving him from liability did not go so far as to make him prove all the circumstances which could explain an obscure situation. The defendant has given a reasonable explanation of the loss of cargo, and I see no grounds for rejecting it. This explanation is consistent with the happening of the stranding, and the severe damage done the ship. If I reject the theory of Hayes, which I do, then I must accept the explanation of the loss of cargo given by the defendant's witnesses. I cannot conceive of any other explanation of the loss of cargo. The loss of cargo is not alleged to be attributable to negligence, and in fact the plaintiff did not make negligence a part of its case, although the evidence of Hayes does suggest some negligence as to the presence of water found in the tanks, but not otherwise. My conclusion is that the defendant has satisfactorily established that the loss of cargo was due to the damage caused

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the ship, by the stranding. With great respect, I feel compelled to differ from the conclusion reached by the learned trial judge, and I am of the opinion that the appeal should be allowed with costs here and below.

It just occurs to me that I have designated the parties in this appeal as plaintiff and defendant respectively, as in the court below, and not as appellant and respondent, but with this explanation that need not occasion any confusion.

*Appeal allowed.*

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BETWEEN:

DOMINION MANUFACTURERS } PLAINTIFF;  
LIMITED .....

AND

ELECTROLIER MANUFACTUR- } DEFENDANT.  
ING COMPANY LIMITED .....

*Patent—Infringement—Inquiry as to damages—Referee’s report finding amount—Sales by infringer—Loss of profit on actual sales—Royalty—Evidence that customers would not have purchased plaintiff’s patented article—Contention of defendant that plaintiff entitled to nominal damages only—Appeal from report of Referee dismissed.*

In an action for infringement of a patent relating to coffin handles it was held that plaintiff’s patent was valid and infringed by the defendant. See (1933) Ex. C.R. 141 and (1934) S.C.R. 436.

An inquiry as to the damages suffered by the plaintiff was ordered, the Registrar of this Court being appointed Referee. By his report the Referee found that the plaintiff would have made a total profit of \$17,078.41 had it made the sales which the defendant made of the patented article; that the damages should be estimated on a royalty basis for the unauthorized sale of every one of the infringing articles sold, and that each sale was to be considered as an invasion of the right of the patentee; that 10 per cent of the total profit which the plaintiff would have made would be a fair compensation for the use of the plaintiff’s invention by the defendant.

The defendant appealed and contended that the plaintiff was entitled to nominal damages only; that the plaintiff had only a portion of the total trade in coffin handles in Canada, and that if the defendant’s customers had not bought their requirements of coffin handles from the defendant they would not have bought from the plaintiff.

*Held:* That the Referee had assessed the damages on a right principle and in a manner consistent with the evidence before him, and the allowance made in respect to each one of the infringing articles, was not excessive. (*Meters Ld. v. Metropolitan Gas Meters Ld.* (1911) 28 R.P.C. 157, followed).

APPEAL from the Report of the Referee appointed to ascertain the damages recoverable by the plaintiff from

the defendant under a judgment obtained by the plaintiff against the defendant in an action for infringement of a patent relating to coffin handles.

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

*W. L. Scott, K.C.* for plaintiff.

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

The facts and questions of law raised are stated in the reasons for judgment of the learned President and in the Report of the Referee.

THE PRESIDENT, now (March 1, 1939) delivered the following judgment:

This is an appeal asserted by the defendant from the Report of the Registrar acting as Referee in the matter of the assessment of damages for infringement of a patent owned by the plaintiff, which, in an infringement action, was found to have been valid and to have been infringed by the defendant. The patent related to coffin handles.

At the opening of the reference proceedings before the Registrar the plaintiff claimed damages in the sum of \$29,757.44 on the ground of loss of profits on sales made by the defendant, which, it was claimed, would have been made by the plaintiff, had the defendant not made the infringing sales, and damages in the sum of \$46,330.82 for loss sustained by the plaintiff by being forced to reduce its prices to its customers, in order to meet the prices at which the defendant was selling the infringing article, but the latter item of damage was subsequently abandoned, and we are therefore concerned only with the first mentioned item of damage. The Registrar in his Report reviewed the evidence, the basis of the claim for damages, the contentions advanced by counsel for the respective parties, and he has stated them, and the reasons for the conclusion which he reached, with such great care and lucidity, that I am relieved of the necessity of any lengthy discussion of the facts, and other features of the case.

The Registrar found, and it is not in dispute, that the defendant sold 1,665 dozens of the infringing article, and 28,389 sets of the same. The distinction between a "dozen" and a "set" I need not pause to explain. He found that the average profit per dozen made by the plaintiff was

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\$1.42 $\frac{1}{2}$ , and that the average profit per set was .518 cents, giving a total profit of \$17,078.41 that would have been made by the plaintiff had it made the sales which the defendant made, of the patented article. I have no reason for doubting the substantial accuracy of these figures.

The Registrar was of the opinion that the evidence, on the whole, was of such a character that he would not be justified in estimating damages upon the loss of profits to the plaintiff owing to the infringing sales made by the defendant, and that this was not a case for estimating damages upon the basis of the plaintiff's loss of profits by reason of loss of sales. His view was that this was a case where the damages should be estimated on a royalty basis, for the unauthorized sale of every one of the infringing articles sold, and that each sale was to be considered as an invasion of the right of the patentee, and he found that 10 per cent of the total profit which the plaintiff would have made, as earlier mentioned, namely, \$1,707.84, would be a fair compensation for the use of the plaintiff's invention by the defendant.

The grounds advanced by Mr. Biggar in support of the appeal were that the plaintiff was entitled to nominal damages only; that anything beyond nominal damages must be clearly established by the evidence; that the plaintiff had only a portion of the total trade in coffin handles in Canada; and that if the defendant's customers had not bought their requirements of coffin handles from the defendant they would not have bought them from the plaintiff. Substantially, those were the reasons put forward by Mr. Biggar in asking for a reduction in the amount of damages found by the Registrar. The same grounds were advanced by the appellants in the case of *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1), a case to which I propose referring at some length.

The patent involved in that case was a "penny-in-the-slot," or prepayment, gas meter. The number of meters sold by the defendant infringer was 19,000, of which 14,000 were the subject of evidence addressed to show that the persons who bought those from the defendant would not, if they had not found what they wanted there, have gone to the plaintiff for them. Eve J., on appeal from the

Master, ruled out the 14,000 altogether. In respect of the balance, 5,000 meters, it was contended by counsel, that the plaintiff had failed to show that the said 5,000 purchases of gas meters would have come to the plaintiff, and therefore there was no evidence of damage. Eve J. found that the Master had rightly held that the profit on the whole meter was the proper factor to take in calculating the profit on the meters, but having regard to all the circumstances of the case, including the defendant's position in the market, he held that the 5,000 meters ought to be reduced to 3,500, an arbitrary reduction of three-tenths. The case then went to the Court of Appeal. The Court consisted of Cozens-Hardy M.R. and Lord Justices Fletcher Moulten and Buckley, and that Court refused to allow the appeal. The judgement of the Court of Appeal in this case no doubt influenced the Registrar in reaching the conclusion set forth in his report. The members of the Court apparently were of the view that the Court below was more favourable to the defendant, the infringer, than they would have been had either of them heard the matters at issue in the first instance. They all seem to have been doubtful as to whether the learned Judge in the Court below was right in excluding from his consideration the 14,000 meters, as to which it was said that particular purchases from the defendant would not have gone to the plaintiff, but probably would have gone to somebody else. I wish to refer particularly to the reasons for judgment of Fletcher Moulten L.J.—one who had a large experience in patent cases—because, I think, he deals with the matter of damage in patent cases in a very practical and convincing manner. I feel justified in quoting from that judgment at some length because it contains a very full discussion of the principal points in controversy here. He said:

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The defendants seek to diminish the damages by a variety of affidavits intended to show that the particular purchasers for whom they manufactured these infringements were customers who would not have purchased from the plaintiffs if they had not purchased from them. I am not for a moment going to say that evidence of that kind may not be relevant, but the argument based upon it was, that where a plaintiff proves the sale of infringing instruments by the defendants he does not establish any right to damages unless he shows how many of those particular instruments would have been purchased from him if the defendant had not sold them; and the counsel for the defendants were bold enough to say that in this case of infringement on a large scale there ought to be only nominal damages . . . .

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The defendants have set up here—the burden of proof is on them—that there is this secondary rule of law, that where a defendant has sold infringing articles the plaintiff can only recover damages in respect of those which he can show would have been bought from him, if the defendant had not infringed. In my opinion there is no such secondary rule. I am quite aware that a good practical method of arriving at a fair estimate of the wrong done may, in some cases, be by forming a conception of how many sales of a particular article would have been made by the plaintiff, and then giving him the full manufacturing profit for that proportion, but there is no rule of law which requires the Court to do that in all circumstances, and there are innumerable cases in which such a rule of law would be quite inapplicable. I put some of those cases in argument to the learned counsel for the appellants. Take this case,—An invention for improvements in engines comes out. According to the proposition of law contended for by the defendants every man who is manufacturing engines could with impunity, so far as damages are concerned, apply this invention to all the engines he had on order, because as they were on order *ex concessis* those orders could not have gone to the plaintiffs. Another case I suggested was this—the case of a person who has a patent for the totality of an instrument. All of us remember when the telephone came out. There was a fundamental patent for the telephone which left telephones in the hands of one company for the whole period of that patent. Supposing a person invented an improvement upon that patent and that the telephone company applied it to all its instruments. Could it then turn round and say: “We make these instruments ourselves; therefore you would not have had the making of them and could not have put your invention on the market in rivalry to ours, for you could not have made it without our licence”; or “We buy these instruments from so and so, and under no circumstances should we have bought them from you, and therefore we can take your invention and not be liable for damages.” There are still more obvious cases. Persons may deliberately combine to manufacture surreptitiously and to sell to other persons, the whole object being not to go to the plaintiff, and not to become purchasers from him. Not one of those manufactured articles would have been purchased from, or manufactured by, the plaintiff, because the very object of the wrongful acts was to avoid that. Could it be suggested that this might be done with impunity? There may be cases, again, where a man manufactures and sells at a price so low that the patentee would unquestionably not have sold at the price, and does damage to the patentee all the greater because the price is so unreasonably low. According to the contention, that there is a fixed rule of law that you can only recover in respect of those articles which you can prove would have come from you, all those things could be done with impunity. . . . In the assessment of damages every instrument that is manufactured or sold, which infringes the rights of the patentee, is a wrong to him, and I do not think that there is any case, nor do I think that there is any rule of law which says that the patentee is not entitled to recover in respect of each one of those wrongs. The mode of assessing damages, which I admit is sometimes very convenient, whereby you calculate how many of the orders the plaintiff probably would have got, and then take the full manufacturing profit on each article, and multiply the two together, does not contradict what I have said. You may estimate the damage by taking the whole of the infringing articles, and making an allowance in respect of each one, or you may consider how many he would have sold, and

make a full allowance in regard to those. They are both, in proper cases, reasonable methods of ascertaining what he has lost. The latter is certainly only a rough practical method which in some cases may be efficient. It rests on no theoretical basis, because in the eye of the law each article is a wrong.

He then proceeds to discuss the assessment of damages in the case of sales of infringing articles where the patentee has granted a licence to use the invention at a certain figure, and he expresses the view that in the case where a patentee has not granted a licence, and there does not exist a quoted figure for a licence, damages might be estimated in a way analogous to that where a licence was granted. He said:

There is one case in which I think the manner of assessing damages in the case of sales of infringing articles has almost become a rule of law, and that is where the patentee grants permission to make the infringing article at a fixed price—in other words, where he grants licences at a certain figure. Every one of the infringing articles might then have been rendered a non-infringing article by applying for and getting that permission. The Court then takes the number of infringing articles, and multiplies that by the sum that would have had to be paid in order to make the manufacture of that article lawful, and that is the measure of the damage that has been done by the infringement. The existence of such a rule shows that the Courts consider that every single one of the infringements was a wrong, and that it is fair—where the facts of the case allow the Court to get at the damages in that way—to allow pecuniary damages in respect of every one of them. I am inclined to think that the Court might in some cases, where there did not exist a quoted figure for a licence, estimate the damages in a way closely analogous to this. It is the duty of the defendant to respect the monopoly rights of the plaintiff. The reward to a patentee for his invention is that he shall have the exclusive right to use the invention, and if you want to use it your duty is to obtain his permission. I am inclined to think that it would be right for the Court to consider what would have been the price which—although no price was actually quoted—could have reasonably been charged for that permission, and estimate the damage in that way. Indeed, I think that in many cases that would be the safest and best way to arrive at a sound conclusion as to the proper figure. But I am not going to say a word which will tie down future judges and prevent them from exercising their judgment, as best they can in all the circumstances of the case, so as to arrive at that which the plaintiff has lost by reason of the defendant doing certain acts wrongfully instead of either abstaining from doing them, or getting permission to do them rightfully. All I say is that there is no such rule of law as that which has been contended for by the defendants here. In the present case, therefore, I think that the learned Judge went too far in wholly refusing to consider the 14,000 infringing instruments, which were sold to regular customers of the defendants. If such a principle existed then you could infringe with impunity if you only sold to relations or settled customers.

In the case of *Watson, Laidlow & Co. Ltd. v. Pott et al.* (1), Lord Shaw said that it was probably a mistake

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in language to treat the methods usually adopted in ascertaining the measure of damages in patent cases as principles. They are, he said, the practical working rules which have seemed helpful to judges in arriving at a true estimate of the compensation which ought to be awarded against an infringer to a patentee. And, in the same case, Lord Shaw expressed himself as being in entire accord with the principle laid down by Lord Moulton in the *Meters* case, and he said that each infringement was an actionable wrong, and although committed in a range of business or territory which the patentee may not have reached, he was entitled to hire or royalty for each unauthorized use, and he was of the opinion that a royalty was an excellent key to unlock the difficulty in such cases.

The finding of the Registrar, I think, is well within one of the working rules laid down by Fletcher Moulton L.J. and Lord Shaw that might be applied in a case of this kind. He estimated the damage by taking the whole of the infringing articles, and making an allowance in respect of each one, and that allowance I cannot say is excessive. I think the Registrar adopted the safest and best way of estimating the damage in this case.

The plaintiff entered a cross-appeal against the limitation of the costs of the plaintiff on the reference to \$300, on the ground that the damages claimed by the plaintiff on the reference were excessive, and, I think, they were absurdly excessive. I am not at all sure but that I would have refused the plaintiff any costs whatever had I been in the place of the Registrar, but I do not now propose to disturb the Registrar's conclusion upon the point. Perhaps the penalty fixed by the Registrar was ample.

My conclusion is that both appeals must be dismissed, but, as the defendant's appeal was the major question argued before me, I think the plaintiff is entitled to costs and that I fix at \$125.

*Judgment accordingly.*

Following is the Report of Arnold W. Duclos, K.C., Registrar of the Exchequer Court of Canada, the Referee herein:—

Counsel for the plaintiff on opening his argument restated his claim as follows:

Damages for loss of profits on sales made by the defendant, to wit: 28,389 sets and 1,665½ dozens.



It was argued by counsel for plaintiff that the evidence established that the plaintiff would have made at least 60% of the sales made by defendant; that it was entitled to judgment against defendant for the profits shown it would have realized on the defendant's sales which the plaintiff would have made. It was at first contended that, as plaintiff and defendant were the only corporations dealing in the patented handles in Canada, if defendant had not been in the market, it (plaintiff) would have made all the sales made by defendant, in addition to the sales made by it. This I understood to be later modified, and that it now claimed the profits lost on at most, 60% of defendant's sales.

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It was further argued, in the alternative, that should I find that less than 60% would have been made by the plaintiff then I should allow a certain sum, by way of royalty on the difference between 60% and the number found by me, as well as on the 40%. I was then asked to allow as "royalty" a figure representing one-half of the profit.

Counsel for defendant contended that the plaintiff was not entitled to any damages, or, at most, only nominal damages; that, as the sales made by the defendant could not be said to have been made by reason of the handles sold by it incorporating the invention covered by plaintiff's patent, there were no damages by reason of the infringement. This reasoning also applied to the matter of "royalty."

On the law to be applied, I would refer to the decision of the Supreme Court of Canada in the case of *Lightning Fastener Co. Ltd. v. Colonial Fastener Co. Ltd. et al* (1), recently given, and to the remarks made by this Court and by myself in my report in the same case. I do not intend to repeat here what was said in that case. As stated by Terrell, 8th edition, pages 437 and 438, the plaintiff "should be restored by monetary compensation to the position which he would have occupied but for the wrongful acts of the defendant provided always that such loss as he proves is the natural and direct consequence of the defendant's acts." The onus is upon the plaintiff of proving his damage, but, as stated in Terrell, "the burden is greatly lightened by the readiness of the Court to infer that the wrongful invasion of the patentee's monopoly

(1) (1936) Ex. C.R. 1; (1937) S.C.R. 36.

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will in the ordinary course of events cause damage to him." I do not think it will be questioned that one way of assessing the damages suffered by plaintiff is to allow it an amount equal to the profit it would have made on the defendant's sales, if proved it would have made them, and granting a royalty as damages on such sales as plaintiff would not have made.

The rules as to allowing plaintiff full profits it would have made on sales of the defendant which it, plaintiff, would have made, and that of giving a royalty by way of damages in other cases, are in effect simply means suggested by which a Court can arrive at the amount which will be, on all the evidence, a fair and reasonable compensation to plaintiff for loss sustained by it by reason of the defendant's infringement. Courts however are not bound or in any way obliged to follow either of these rules. See Fletcher Moulton, L.J. in *Meters Ltd. v. Metropolitan Gas Meters Ltd.* (1). The giving of a royalty as damages is resorted to in the cases where the patentee fails to prove he would have made the sales made by the defendant (infringer) and where the owner of the patent, instead of manufacturing himself, grants licences to others to use the invention covered by the patent. Instead of taking his full profits he thus shares it with others.

In order to fix "royalty" the Court must take into consideration the market, the cost of manufacturing and selling, and allow to the licensee a reasonable profit, and then give to the owner of the patent a proportion of such profits as royalty based upon the value of the use of the invention by and to the defendant.

As to the defendant's contention that this was a case where at most only nominal damages should be given, I cannot agree. The plaintiff is the owner of a patent found by the courts to be a valid patent, which has been infringed by the defendant, and which action of the defendant makes it liable in damages. However, the value of the invention to create a public demand is material and is to be considered in fixing the amount of damages.

As said in some of the cases each sale of the infringing article is a tort. To permit a defendant after about four

(1) (1911) 28 R.P.C. 163, line 41 & p. 164.

years of infringing to go free, merely upon its saying or even proving that it could have easily avoided infringement, or that the incorporating of the invention in its handles had no sales appeal, would practically render illusory the monopoly granted.

The plaintiff has suffered some damage, the manner of measuring the said damage is, I think, clear, and it then becomes a matter of proof, a question of fact to be found on the evidence.

It is admittedly impossible in these cases to arrive at the amount of the damages with mathematical exactitude, no two cases are exactly similar, and each case presents new difficulties. As said by Lord Shaw in *Watson, Laidlaw & Co. Ltd. v. Pott, Cassels & Williamson* (1), "restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe." The absence of proper proof or the difficulty of making an exact calculation is no reason for a court to refuse judgment. I may be compelled to act as a jury and as such to allow such damages as I consider, on the evidence, a fair and reasonable compensation for any loss suffered by the plaintiff from the illegal acts of the defendant.

Would any of the sales made by the defendant have been made by the plaintiff? Many questions arise here, such as, for instance, the length of time defendant had been in business, were the sales actually made of coffin handles so made by reason of the handles being manufactured in accordance with the patent, or would the defendant have made the sales notwithstanding; what induced the purchasers to buy, was it style and price alone, was it friendship towards defendant.

(Having referred to the evidence adduced the learned Referee continued.)

From an analysis of exhibit 14 one finds that the companies represented by the last seven witnesses were purchasers from the defendant to the extent of about 45% of the total sales made by the defendant during the 1929 to 1933 period, which is a fair representation of the purchasing public, and their evidence is not contradicted. The plaintiff offered no rebuttal whatever.

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(1) (1914) 31 R.P.C. 104 at 118.

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It is never an easy matter, in patent cases, to say with absolute certainty what proportion of the defendant's sales would have been made by the plaintiff. The argument that the plaintiff would have sold the patented handle if the defendant had not done so because they were the only ones selling the patented handle is unfounded in fact, and is not substantiated by the evidence. There was a substantial importation from the United States at competitive prices, as well as serious competition by Canadian firms other than the defendant. I think it is beyond any doubt that the patented assembling device or invention, if it had utility at all, such utility is only to the manufacturer, as an easier and quicker method of assembling, but that it has no sales value, if indeed, on the evidence it was not a decided objection. Other companies did very well with different handles and when the defendant changed over to the rivet assemblage the latter was received on the market as well, if not better, than the patented handles. There was no loss of sales and practically no difference in the cost of manufacture. There is no doubt, from exhibits 14 and 15, that the plaintiff, as well as the defendant, sold to the same persons, in some instances. The total volume of business of the plaintiff company was practically constant all through the depression, and in 1933, the year in which the infringement ceased in April, the plaintiff's sales of handles dropped by over \$20,000 from the previous year; seven of the witnesses heard, customers of the defendant, who represented about 45% in value of the total sales of defendant in question herein, swore that the assembly covered by the patent in suit was never considered, was not an inducement to buy, and that the only factor was style, appearance and price. The fact that the plaintiff and defendant alone sold the patented handle is not enough to presume that the plaintiff would have made all the sales in question, and not cogent enough evidence to justify a judgment for damages.

Besides this, it must not be overlooked that the defendant had been in the market since 1913, and that it did not suddenly come into being for the purpose of doing business in this line and making use of another man's monopoly. I am satisfied that when the defendant adopted the style of handle it did, about 1929, it was not aware that the same was protected, and so no punitive damages

should be allowed. Moreover, the witnesses heard for the plaintiff were all officers or employees of the plaintiff, whereas, on behalf of the defendant, besides its officers and employees, there were eight absolutely independent men in no way connected with the defendant company and whose evidence, I believe, was freely and truthfully given and without bias or partiality, and was in the main a simple statement of facts known to them personally. Mr. McDowell's evidence goes no further than the facts to be gathered from exhibits 14, 15 and 21, and the question of sales can be decided by a study of exhibits 14 and 15 and the evidence of Kert, and the eight outside witnesses, Girard's evidence was principally useful on that part of the claim which has been abandoned. If anything it supports the conclusion that price was the only factor.

I am therefore of opinion, on the evidence as a whole, that the plaintiff has failed to prove its case on this point and that the plaintiff has not lost any sales by reason of the defendant's selling coffin handles which infringed the plaintiff's patent or were sold by reason of incorporating the invention protected by such patent, and I am satisfied that this is not a case for basing damages upon the plaintiff's loss of profits by reason of loss of sales. A claim for loss of profits can only be allowed when clearly proved, but as no one can take another's property without compensating the owner, I think this is a case for royalty. Having arrived at this conclusion it becomes unnecessary to go into the matter of what would have been the plaintiff's profit on such sales, but may I say I found the evidence on this point also unsatisfactory and inconclusive. Profits are "adopted," what they "expected to make," they are in effect estimates. In calculating the profits the plaintiff neglected to take into account the efforts of the defendant in making the sales in question and nothing is deducted for selling costs or for bad debts.

I have therefore decided that justice will be done between the parties by allowing the plaintiff a fair royalty on all sales made by the defendant of the patented handle, as compensation to it for any damages suffered by reason of the infringement.

The evidence as to what royalty should be allowed is far from satisfactory, if indeed it can be said that there is any, and I was on the point of asking for evidence on this point

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but the hearing lasted so long that I decided not to increase the costs, and to do the best I could on the evidence before me.

I have already stated how I think the amount of royalty is to be fixed, and in this case I am of opinion, on the evidence, that the means of fastening the arms to the plate, which is the invention, is no factor in the selling of the coffin handles, and this fact must be considered in fixing the amount.

Exhibit 21 gives the profit the plaintiff claims it would have made on each unit (dozen or sets) and also the number of units, from which I can get the profit per unit. I am not forgetting that this document gives more units than the number as to which infringement is claimed, and that the plaintiff has neglected to consider the selling cost, but as I am using the information on this document solely to arrive at an average profit per unit, it will suit my purpose. The total number of dozens sold (Ex. 21) is  $2,002\frac{5}{12}$  and the total number of sets is 27,016. The total profit from the sale of dozens is \$2,854.68 and the total profit from the sale of sets is \$19,199.72. Dividing the total dozens into the total profit on the same will give me an average profit per dozen, namely, \$1.42 $\frac{1}{2}$  and doing the same for the sets gives me an average profit per set of .518 cent. The number of dozens sold by the defendant for which a claim is made is 1,665.2 and multiplying this by the average profit per dozen, namely, \$1.42 $\frac{1}{2}$ , gives a total profit on these sales of \$2,372.91. The number of sets sold by the defendant for which a claim is made is 28,389 and again multiplying this by the average profit per set, namely .518 cent, gives me a total profit on the sale of sets of \$14,705.50 or a total profit for both of \$17,078.41.

The question now is, what royalty is fair to allow to the plaintiff on sales representing such a profit, or what proportion of this profit would be fair to allow to the plaintiff as royalty on the said sales.

I do not consider myself bound by the above exact figures, but these calculations have been a great help to me in arriving at what I believe to be a proper royalty. This royalty I would fix at 10% of the above mentioned profit, namely, \$1,707.84, as a fair royalty under the circumstances in this case, and, acting as a jury, I find that

the said sum of \$1,707.84 is a fair compensation for the use by the defendant of the invention covered by the patent in suit.

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BETWEEN:

NEHI INCORPORATED ..... APPELLANT;  
 AND  
 THE REGISTRAR OF TRADE MARKS ..... } RESPONDENT.

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 April 13.

*Trade mark—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 14 and s. 28 (1) (g)—“Royal Crown”—Word mark not prohibited by Unfair Competition Act—Appeal from Registrar of Trade Marks allowed.*

*Held:* That the use of the words “Royal Crown” as a word mark is not proscribed by the Unfair Competition Act, 22-23 Geo. V, c. 38.

APPEAL from the refusal of the Registrar of Trade Marks to register the words “Royal Crown” as a trade mark.

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

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

*W. P. J. O’Meara, K.C.* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 13, 1939) delivered the following judgment:

This is an appeal from the refusal of the Registrar of Trade Marks to register as a word mark the words “Royal Crown,” to be applied on wares ordinarily and commercially described as non-alcoholic beverages or soft drinks, bottles therefor, the caps and crowns of such bottles, and other articles pertaining to the manufacture and sale of such beverages. The appellant, a corporation duly organized under the laws of the State of Georgia, U.S.A., and its predecessors in title, have used the word mark “Royal Crown” in the United States since 1906.

The refusal of the Registrar was made on the ground that as a representation of the Royal Crown, or a crown nearly resembling the Royal Crown, was not registrable

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under s. 14 of the Unfair Competition Act, and, as held in *Simms v. The Commissioner of Patents* (1), no person should be permitted to register as a trade mark a designation in words of the Royal Crown.

Section 14 of the Unfair Competition Act in part states that no person shall be entitled to adopt for use in connection with his business as a trade mark or otherwise, any symbol consisting of, or so nearly resembling as to be likely to be mistaken for,

- (a) the Royal Arms, Crest or Standard;
- (b) the arms or crest of any member of the Royal Family;
- (c) the national flag in any of its forms;
- (d) the standard, arms or crest of His Excellency the Governor General.

It is well settled law that where one trader has registered a device, a design mark, another trader cannot register a description in words of that device, in connection with similar wares. In fact, this principle is to be found in the Unfair Competition Act itself, and one is not required to rely on decided cases for this proposition. Sec. 26 (1) (g) states:

Subject as otherwise provided in this Act, a word mark shall be registrable if it . . . .

- (g) is not such as to suggest the name in French or English of some feature of a design mark already registered for use in connection with similar wares which is so characteristic of the design mark that its name would not be unlikely to be used to define or describe the wares in connection with which the design mark is used.

But that is not this case. Here there is no registered design of the Royal Crown as a mark, and such a registration cannot be entertained. Consequently, the word mark applied for here, the subject-matter of this appeal, does not define or describe a registered design mark. Sec. 14 strikes not only against the registration of the symbols mentioned therein but also against their adoption and use as trade marks, or otherwise. If a representation of the Royal Crown were used on a commercial van that would, I apprehend, fall within the prohibition.

I am going to assume—though there is no evidence upon it—that the Royal Crown constitutes a part of the Royal Arms, Crest or Standard. The question then for decision



is whether a designation of the Royal Crown in words, by the use of the words "Royal Crown" as a trade mark, comes within any of the prohibitions of s. 14. I cannot see how it can be said that those words so nearly resemble "as to be likely to be mistaken for the Royal Arms, Crest or Standard," because in fact there is no resemblance at all. There is no attempt here to register any representation of the Royal Crown. The prohibition is directed against the use of any symbol which is likely to be mistaken for any of the arms, crests, flags or emblems, enumerated in s. 14. If a statute prohibits the adoption and use of a representation of certain things as trade marks we must look carefully to the precise language of the statute containing the prohibition. In such a case as this we must keep in mind the fact that the statute here is dealing with the subject-matter of trade marks, and one of the objects of the statute is to avoid confusion or deception resulting from the use of marks which resemble one another. If the adoption and use of representations of certain things is prohibited, it is fair to enquire if a word mark, which is sought to be registered, resembles a representation of the thing which is prohibited, not only from registration but from adoption or use at all as a trade mark, or otherwise. Now, as I have already stated, and as s. 14 states, the prohibition here relates to the adoption and use of a symbol, as a trade mark, "consisting of or so nearly resembling as to be likely to be mistaken for the Royal Arms, Crest or Standard," and so on. That is to say, if the Registrar is correct, one must hold that the words "Royal Crown" resemble the Royal Arms, Crest or Standard, or, the standard, arms or crest of His Excellency the Governor General. If one cannot so hold then, I think, the registration must be allowed.

In the sense of the statute, can it be said that the words "Royal Crown," if used as a mark, nearly resemble the Royal Arms or Crest, or that they would suggest that Royal patronage or authorization was extended to the applicant here, if the words were registered? The use of the words "Royal" and "Crown," separately, as trade names or unregistered trade marks, is not uncommon in Canada, and one need only refer to city directories to observe the extent of this practice, and possibly both such

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words may be found registered as trade marks. In such cases I doubt if the public ever associate either of those words, when so used, with the Royal Arms, Crest or Standard. I doubt if the Registrar would be justified in refusing registration of the word "Royal" or the word "Crown," as a trade mark, if free from any accompanying device or symbol resembling the Royal Arms, Crest or Standard, and there being no other objection. Under the English Trade Mark Rules the use of the word "Royal" is prohibited but only when calculated to lead persons to think that the applicant has Royal patronage or authorization.

Now, do the words "Royal" and "Crown" when combined as "Royal Crown," alter the situation? Can it be said that those words fall within the prohibitions of s. 14, and that they might be construed as a representation resembling the Royal Arms or Crest? The statute does not prohibit the use of those words as a trade mark, singly or in combination. The statute, then, not proscribing the use of the words "Royal" or "Crown" I do not see, after a careful consideration, how the application for registration can be refused. I do not reach that conclusion without some anxiety but yet I do not see what other conclusion I can reach. I doubt very much if the words "Royal Crown," when used for the purpose here intended, and unaccompanied by any design or symbol resembling the Royal Crown, and which could never be lawfully used by the applicant in Canada, would be regarded by the public as designating the Royal Arms, Crest or Standard, or suggestive of Royal patronage or authorization. But the major difficulty I see in sustaining the decision of the Registrar is that the mark here applied for is not of the character prohibited by s. 14, and s. 14 does not seem to have been directed against such a mark. It was directed against marks of a different type. I do not think it possible that the word mark in question could be mistaken for a representation of the Royal Crown, and it is such a mistake, I think, that s. 14 seeks to prevent. I quite realize that there is much to be said in support of the refusal of the Registrar, and possibly the statute should ban the use of such words as registrable marks, but presently it does not.

The appeal is therefore allowed. There will be no order as to costs.

*Appeal allowed.*

BETWEEN:

ERNST KELLER..... PLAINTIFF;

AND

THE HONOURABLE THE SECRETARY OF STATE OF CANADA,  
AS CUSTODIAN OF ENEMY PROPERTY.. DEFENDANT.

1938  
Oct. 4.  
1939  
April 5.

*Crown—Alien enemy—Nationality—German-born subject—Loss of German nationality by residence abroad—Treaty of Peace (Germany) Order 1920, Par. 41—Exchequer Court Act, R.S.C., 1927, c. 34, s. 30 (c)—Motion to strike out statement of claim because of lack of jurisdiction of the Court to entertain the action allowed.*

Plaintiff, a German-born subject, emigrated to the United States of America in 1898, where he resided until 1902. He applied for and obtained First Letters of Citizenship in the United States, but did not acquire full citizenship in that country. From 1902 to 1909 he resided in Montreal, Quebec. In 1909 he returned to the United States where he resided until 1914 when he returned to Germany, where he has since resided.

Plaintiff, while a resident of Montreal, purchased through a brokerage firm certain securities of a United States corporation. These securities were deposited for his account in the Agency of the Bank of Montreal in New York City. In April, 1921, the defendant as Custodian of Enemy Property, demanded that the brokerage firm which had purchased the securities, deliver them to him. This was done and they were sold by the Custodian. The plaintiff now claims the sum realized from such sale, together with any interest derived therefrom.

Plaintiff alleges that he had lost his German nationality through absence from that country and was treated by the German Authorities as having no nationality. He had never acquired any other nationality. The Custodian declined to treat plaintiff as being stateless and declared him an enemy national. The Custodian further refused to proceed in the Exchequer Court for a declaration as to ownership of the money and also refused to consent to the plaintiff proceeding in this Court.

The present action is for a mandamus commanding the defendant, as Custodian, to refer the plaintiff's claim to this Court, for trial, under paragraph 41 of the Treaty of Peace (Germany) Order, 1920. The plaintiff bases his action on s. 30 (c) of The Exchequer Court Act, R.S.C., 1927, c. 34, which provides that the Exchequer Court shall have concurrent original jurisdiction in Canada "in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done, in the performance of his duty as such officer."

The defendant now moves for an order striking out the statement of claim upon the ground that this Court is without jurisdiction to deal with the claim.

*Held:* That the claim of the plaintiff did not constitute a "dispute" within the meaning of Paragraph 41 of The Treaty of Peace (Germany) Order, 1920.

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2. That no occasion arose for the Custodian to exercise the power given to him to proceed in the Exchequer Court, or to consent to the plaintiff so proceeding, after the Custodian had determined that the plaintiff was an enemy national.

MOTION by defendant to strike out the statement of claim herein, on the ground that the Court was without jurisdiction to entertain the action.

The motion was argued before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*H. Aldous Ayles, K.C.* for the motion.

*R. V. Sinclair, K.C. contra.*

THE PRESIDENT, now (April 5, 1939) delivered the following judgment:

The plaintiff herein lays claim to certain moneys in the hands of the defendant, as Custodian of Enemy Property, which claim the Custodian does not concede. The Custodian refused to proceed in the Exchequer Court of Canada for a declaration as to the ownership of the said moneys, and he refused to give his consent to the plaintiff so proceeding in such Court, contrary, it is claimed, to the provisions of paragraph 41 of The Treaty of Peace (Germany) Order, 1920, hereafter to be referred to as "the 1920 Peace Order." This action is for a mandamus commanding the defendant, as Custodian, to refer the plaintiff's claim to this Court, for trial, under the said paragraph 41 of The Treaty of Peace (Germany) Order, 1920.

The plaintiff's action is based upon s. 30 (c) of the Exchequer Court Act, R.S.C., 1927, c. 34, which provides that the Exchequer Court shall have concurrent original jurisdiction in Canada:

(c) in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done, in the performance of his duty as such officer.

The Custodian now moves for an Order striking out the statement of claim upon the ground that this Court was without jurisdiction in the premises, and that is the matter before me for decision. The only material before me on the motion was the plaintiff's statement of claim, a letter from the Deputy Custodian to the plaintiff, and a letter from the solicitor of the Custodian to the solicitor of the plaintiff.

Now as to the preliminary facts which I extract from the plaintiff's statement of claim. The plaintiff resides near the City of Munich, in Germany, in which country he was born in September, 1867. In 1898 he emigrated to the United States where he resided until 1902 and during which time he there applied for and obtained what is called First Letters of Citizenship, but no further step was ever taken by him towards acquiring United States citizenship. Between the years 1902 and 1909 the plaintiff resided in Montreal, Canada, and, while there he purchased through a brokerage firm five Southern Pacific Railway Company's four per cent convertible bonds, the obligations of a United States Corporation, and he directed the brokerage firm to deposit the said bonds in the Agency of the Bank of Montreal in the City of New York, for his account, which was done. In 1909 the plaintiff returned to the United States where he resided until 1914 when he returned to his native country, Germany, where he has since resided. In April, 1921, upon the demand of the defendant as Custodian of Enemy Property, the brokerage firm through whom the plaintiff purchased the bonds in question, withdrew the same from the New York Agency of the Bank of Montreal and delivered them over to the Custodian. After the bonds came into the possession of the Custodian, they were by him sold, realizing the sum of \$4,891.25, and it is that sum, together with any interest since derived therefrom, that is now claimed by the plaintiff.

In due course the plaintiff appears to have made a formal demand upon the Custodian for the relinquishment to him of the proceeds of the bonds in question. There then arose the question of the nationality of the plaintiff. The statement of claim states that in Germany the plaintiff was treated by the German Authorities as possessing no nationality, having lost his German citizenship through absence from Germany, and through his failure to take the necessary steps during that time to retain it. It is not suggested that he ever acquired any other nationality. The claim to "statelessness" was evidently advanced to the Custodian by the plaintiff and the former took the matter into consideration and ultimately he decided that the plaintiff was an enemy national, that is, that his nationality was that of his country of origin, and upon

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that ground he declined to relinquish to the plaintiff the proceeds of the bonds. In May, 1929, the Deputy Custodian advised the plaintiff, by letter, of his decision, and that letter in part reads as follows:

Sir,—

I have the honour to refer to my letter to you of the 24th October last, in which I advised you that the reply of the London Representative of the German Clearing Office to my enquiry of him would enable me to decide definitely on your contention of "statelessness." I am now in a position to advise that on the 27th February last the German representative submitted a certain document to my London Representative, who in turn submitted it to the Nationality Section of the British Clearing Office. The latter advised that such document would not be considered by them as sufficient to support a claim to "statelessness." In these circumstances, I have no alternative, of course, but to regard you definitely as an enemy national.

Having made that decision the Custodian concluded that it was not a case where there was a "dispute" regarding any property, right or interest, in the proceeds of the bonds, that should be referred to this Court, or a case where he should give his consent to the plaintiff taking proceedings in this Court under the terms of paragraph 41 of the 1920 Peace Order. The contention advanced on behalf of the plaintiff is that if he were "stateless" he was no longer an enemy national, and was therefore competent to assert a right of property in the proceeds of the bonds, just as would any national of an Allied or Associated Power.

The same contention apparently arose in certain cases in England and I would refer to *Rex v. Vine Street Police Station Superintendent* (1), *Ex parte Weber* (2), and *Hahn v. Public Trustee* (3). These cases arose in circumstances different from the one before me, and so far as I can see there is no provision in the English Treaty of Peace Order, 1919, corresponding to paragraph 41 of our own 1920 Peace Order.

Thereupon the plaintiff instituted this proceeding, by way of a statement of claim, claiming (1) a declaration that the Custodian, under The Treaty of Peace (Germany) Order, 1920, was an officer of the Crown within the meaning of sec. 30, ss. (c) of the Exchequer Court Act, Chap. 34, R.S.C., 1927, and that his refusal to refer the plaintiff's claim to the Exchequer Court of Canada for trial, was

(1) (1916) 1 K.B. 268 at 280. (2) (1916) 1 A.C. 421.  
 (3) (1925) Ch. Div. 715.

something omitted to be done by him in the performance of his duty as such officer, and ordering him to refer the plaintiff's claim to the said Court for trial, and (2) for a mandamus commanding the Custodian to refer the plaintiff's claim to this Court for trial, and (3) for a declaration that in paragraph 41 (2) of the Treaty of Peace (Germany) Order, 1920, the word "may" is imperative, and that, thereby, the Custodian is obliged to refer the plaintiff's claim to this Court for trial.

Paragraph 41, sub-paragraphs (2) and (3) of the 1920 Peace Order, are as follows:

(2) In case of dispute or question whether any property, right or interest belonged on the tenth day of January, 1920, or theretofore, to an enemy, the Custodian or, with the consent of the Custodian, the claimant may proceed in the Exchequer Court of Canada for a declaration as to the ownership thereof, notwithstanding that the property, right or interest has been vested in the Custodian by an order heretofore made, or that the Custodian has disposed or agreed to dispose thereof. The consent of the Custodian to proceedings by a claimant shall be in writing and may be subject to such terms and conditions as the Custodian thinks proper.

(3) If the Exchequer Court declares that the property, right or interest did not belong to an enemy as in the last preceding subsection mentioned, the Custodian shall relinquish the same, or, if the Custodian has before such declaration disposed or agreed to dispose of the property, right or interest, he shall relinquish the proceeds of such disposition.

The construction of sub-paragraphs 2 and 3 of paragraph 41 is, I think, plain. Sub-paragraph (2) was not, I think, designed to provide an opportunity for an enemy national to assert a claim against the Custodian for property retained or liquidated by an Allied or Associated Power, which property on or before the tenth day of January, 1920, belonged to an enemy national, but which had become vested in the Custodian by exceptional war measures. For the retention or liquidation of such enemy property in Allied or Associated States, the enemy national was to be compensated by his own country, Germany, in this case. There is no second party here disputing the title of the plaintiff to the property in question before the tenth day of January, 1920, when the Treaty of Versailles was ratified. This provision was intended to meet the case of a national of an Allied or Associated Power, or probably any national other than an enemy national, who claimed that on the tenth day of January, 1920, or theretofore, property in the hands of the Custodian as enemy national property, did not belong to the enemy national,

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but belonged to him, the claimant, notwithstanding that the property had been vested in the Custodian as enemy property. In that case the Custodian might take proceedings in the Exchequer Court, or he might allow the claimant to do so by giving his consent in writing. That is the case which paragraph 41 of the 1920 Peace Order provides for. But the claimant could not be an enemy national whose property was retained under the provisions of the Treaty of Versailles and the Treaty of Peace (Germany) Order, 1920. There could be no reason for entertaining such a claim by an enemy national. His property had been taken from him and he was to look to his own country for compensation. Sub-paragraph (3) makes plain what is the question to be determined by the Court, in such cases; it is whether the property did not belong to some one else other than the enemy national on the tenth day of January, 1920, and if that were found to be the case then the Custodian was to relinquish the same, or its proceeds, to the owner. It was to be expected that it might occur that some one would come forward and claim that property in the hands of the Custodian as enemy national property, belonged in fact and in law to some one not an enemy national, and that, I think, was the purpose of this paragraph of the 1920 Peace Order.

That was the construction the Deputy Custodian evidently placed on paragraph 41 of the 1920 Peace Order because when he reached the considered opinion that the plaintiff was an enemy national he concluded the plaintiff's claim could not be further entertained, and he declined to proceed in the Exchequer Court, or to consent to the plaintiff himself so proceeding. I do not say that the Custodian could not take proceedings in the Court if he were reasonably in doubt as to the enemy nationality of a claimant. He exercised his discretion here in deciding after due consideration, that the plaintiff still retained his nationality of origin, it not being suggested that he had acquired any other nationality; the plaintiff being therefore held by the Custodian to be an enemy national I think the Custodian was right in refusing to take proceedings in the Exchequer Court. This action was begun nine years after the plaintiff was advised by the Custodian that his claim to "statelessness" could not be recognized, and that he must be regarded definitely as an enemy national, and there is nothing before me suggesting that in the



interval of nine years the plaintiff moved in any way to establish the validity of his contention as to "statelessness." That, however, is perhaps of no importance on this motion. Assuming that the Custodian was required to exercise a discretionary power under paragraph 41 of the 1920 Peace Order, as contended for on behalf of the plaintiff, then, I think, it may be said that he did exercise that discretionary power when he decided that the plaintiff's claim did not constitute a "dispute" within the meaning of paragraph 41 of the 1920 Peace Order as to the ownership of property, which might be referred to the Exchequer Court for determination, because of the enemy nationality of the plaintiff. The occasion for proceeding in the Exchequer Court did not arise because of the enemy nationality of the plaintiff. As is stated in Maxwell on the Interpretation of Statutes, 7th Edition, at page 215, there is a distinction between a discretion to exercise a power and a discretion to determine only whether the occasion for it has arisen, and illustrations of such a distinction are there given. In cases of this kind it was imperative that a very wide discretion should be bestowed on the Custodian, and I think a very wide discretion was given him. Exceptional war measures must, I think, be given a liberal construction. The Custodian might, under paragraph 46 of the 1920 Peace Order, relinquish at his discretion the property of an enemy national and in fact a certain payment was made as a matter of grace to the plaintiff out of the proceeds of the bonds in question, but the Custodian could not, I think, be compelled to do this.

Upon the facts here, and the provisions of The Treaty of Versailles and the 1920 Peace Order, I do not think that the plaintiff is entitled to proceed as he has done. No occasion arose for the Custodian exercising the power given to him to proceed in the Exchequer Court himself, or to consenting to the plaintiff doing so, after having determined that the plaintiff was an enemy national, and I do not think the Custodian can be compelled so to proceed. The motion of the defendant must therefore succeed.

As a practical question here it matters not, I assume, whether an order as to costs is made or not, and I make none. This is the first proceeding of its kind so far as I know, under paragraph 41 of the 1920 Peace Order, and that is perhaps a ground for making no order as to costs on this occasion.

*Order accordingly.*

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BETWEEN :

SALMO INVESTMENTS LIMITED . . . . SUPPLIANT ;

AND

HIS MAJESTY THE KING . . . . . RESPONDENT.

*Crown*—“Public work”—*Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c)*—*The Relief Act, 1933, 23-24 Geo. V, c. 18*—Projects proposed and carried out pursuant to agreement entered into between the Governments of Dominion and Province for financial assistance in carrying out relief measures are not “public works” within the terms of the *Exchequer Court Act*.

Under the authority of *The Relief Act, 1933, 23-24 Geo. V, c. 18*, an agreement was entered into between the Government of the Dominion of Canada and that of the Province of British Columbia, which provided for the carrying out of certain relief projects by the Government of the Dominion, pursuant to certain conditions.

The Province proposed that the Dominion should initiate work upon a certain highway known as the Spokane-Nelson highway. The nature and extent of the project were determined by the authorities of the province which owned the highway; the actual work was carried out by the men on the strength of the project recruited or selected by a Department of the Government of the Dominion.

In the carrying out of the project burning operations were necessary, and a fire started on the project spread to timber lands owned by the suppliant, causing damage.

The suppliant alleges that the loss of the timber was due to the negligence of the officers and servants of the respondent.

The matter comes before the court on an order upon consent of the parties that the points of law raised in the pleadings should be heard in advance of the trial.

*Held*: That the project was not a “public work” within the terms of the *Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c)* as in force in 1934.

2. That the project was in reality a provincial work; the fact that it took the form of highway improvement carried out by and under the direction of the Dominion, does not alter the substance of the arrangement entered into and its real purpose, which was to render financial assistance to the province in carrying out necessary relief measures.

ARGUMENT on questions of law raised in the pleadings.

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

*E. F. Newcombe, K.C.* for suppliant.

*Edward Miall, K.C.* for respondent.

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

THE PRESIDENT, now (March 30, 1939) delivered the following judgment:

The suppliant in this petition of right proceeding is the owner of certain lands and timber limits in the Kootenay District, in the Province of British Columbia, which were burned over in July, 1934, owing, it is alleged, to the negligence of the officers and servants of the respondent, causing a loss of standing timber of the value of more than \$24,000, it is claimed. By consent of the parties it was ordered that the points of law raised by the pleadings should be heard in advance of the trial. The relevant facts appear in a written Statement of Facts, signed by counsel for the parties. The action is grounded on s. 19 (c) of the Exchequer Court Act, R.S.C., 1927, c. 34, as in force in 1934, and which gave the Exchequer Court exclusive original jurisdiction to hear and determine, *inter alia*, the following matter:

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.

The facts of the case are quite unusual.

By Chap. 18 of the Statutes of Canada, 1932-1933, 23-24 Geo. V, there was enacted "The Relief Act, 1933." The reasons for the enactment are set forth in the preamble to the Act, but so far as we are here concerned its purpose was to enable the Governor in Council to "support and supplement the relief measures of the Provinces and grant them financial assistance in such manner and to such extent as the Governor in Council may deem expedient," should the Provinces "require assistance in carrying out necessary relief measures and to meet financial conditions as the same may arise." By sec. 2 of the Act the Governor in Council was empowered, notwithstanding the provisions of any statute or law, to "enter into agreements with any of the provinces respecting relief measures therein," upon such terms and conditions as might be agreed upon. Additional powers were granted the Governor in Council but I need not enumerate them.

In August, 1933, under the authority mentioned, an agreement was entered into between the Government of the Dominion of Canada and the Government of the Province of British Columbia, therein referred to as the

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“Dominion” and “Province” respectively. Paragraph 2 of the Agreement is as follows:

The Dominion will assume responsibility for the care of all “physically fit homeless men,” and will for that purpose organize and execute relief projects consisting of works for the general advantage of Canada which otherwise would not have been undertaken at this time. The conditions under which these relief projects will be carried out are the following:

- (1) Shelter, clothing and food will be provided in kind and an allowance not exceeding twenty cents per diem for each day worked will be issued in cash.
- (2) Eight hours per day will be worked; Sundays and Statutory Holidays will be observed, and Saturday afternoons may be used for recreation.
- (3) Persons leaving voluntarily except for the purpose of accepting other employment offered or for the reason that they no longer require relief and those discharged for cause will thereafter be ineligible for reinstatement.
- (4) Free transportation will be given from place of engagement and return thereto on discharge except for misconduct.
- (5) No military discipline or training will be instituted; the status of the personnel will remain civilian in all respects.

The relief projects contemplated by this paragraph were to be for the general advantage of Canada and apparently would have no application to the particular relief project with which we are here concerned, from which ensued the damage to property alleged and claimed by the suppliant, and which I shall presently explain.

Paragraph 4 of the agreement is follows:

The Dominion may initiate such works for the general advantage of Canada as may be decided upon by the Dominion, and the Province may propose other works of a similar character for the purpose of providing occupation for physically fit homeless men.

It was, I assume, under this provision of the agreement that the Province proposed that certain work be carried out upon a highway owned by the Province, and soon to be mentioned, but there was no declaration by the competent authority, Parliament, that this proposed work was for the general advantage of Canada. Paragraph 5 of the agreement is as follows:

The Province will provide all rights of way or other property whether now owned by the Province or private individuals which may be required for the proper execution of the aforesaid projects.

Paragraphs 6, 7 and 8 of the agreement, as summarized in the Statement of Facts, provided for the Province making available for the use of the Dominion without charge during the period of the agreement all relief camps established by the Province, camp equipment, tools, stores and

supplies thereat or held in reserve therefore, such machinery as might be necessary and available for the proper execution of the projects and the apparatus for such machinery, and the assistance of such members of the permanent engineering staff of the Province as could be made available from time to time as required.

It is agreed that the Province, upon the recommendation of the Chief Engineer of the Department of Public Works of the Province, requested and agreed that the Dominion should initiate work upon a certain highway, called the Nelson-Spokane highway, extending from a certain point in the Province to the Canada-United States boundary line, and which highway was owned by the Province. In consequence of such request and agreement the Dominion instituted a project, known as Project No. 65, the project referred to in the suppliant's petition, and which I shall refer to hereafter as "the Project."

It is also agreed that the Project involved, by arrangement with the Province, the carrying out of certain improvements, such as the grading, widening and straightening, of the Nelson-Spokane highway, and the arrangements provided that the authorities of the Province would indicate the nature of the work to be done such as the line which any re-routing of the highway would take, the extent to which the same should be widened, but the actual work would be carried out by the men on the strength of the Project.

As I understand paragraph 4 of the Statement of Facts, all personnel connected with the Project were so connected either as labourers, or in an administrative or supervisory capacity, under the terms and conditions set out in various Orders of the Governor-in-Council. The requisite labour was to be recruited from those in receipt of relief from federal, provincial or municipal sources, under the terms and conditions earlier mentioned, or as from time to time determined by the Minister of National Defence. The administrative and supervisory personnel was to be selected by the Minister of National Defence, through the officers of his Department, pursuant to such conditions as he should prescribe. It would appear therefore that while the nature and extent of the Project were determined by the authorities of the Province, the actual work was carried out by the men on the strength of the Project, who were

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recruited or selected by the officers of the Department of National Defence, the Department of Government designated by the Governor in Council to administer any relief works initiated under the authority of The Relief Act.

In the carrying out of the Project it appears that burning operations were necessary, and a fire started on the Project apparently spread to the timber lands of the suppliant, causing the alleged loss thereto. The portion of the Statement of Facts relevant to this feature of the case is expressed as follows:

For the purpose of this argument and such purpose alone it is to be assumed that the damage claimed was sustained from a fire which originated from slash burning operations carried on by project No. 65, the slash burning being done under provincial fire permit issued to the member of the project personnel then in charge of the work and the fire escaping through the negligence of such personnel in failing effectively to observe the directions as to patrol laid down by the permit.

This may well be the last case to be heard in this Court involving s. 19 (c) of the Exchequer Court Act, as it stood prior to June, 1938. In the new s. 19 (c) of the Act the words "upon any public work" have disappeared. The principal point for decision here is whether the Project in question was a "public work," within the meaning of s. 19 (c). I was referred by counsel to many of the well known cases, decisions of the Supreme Court of Canada, which involved the construction of section 19 of the Exchequer Court Act, and particularly the meaning to be ascribed to the phrase "public work." I do not propose reviewing those authorities. This was done in a very comprehensive way, and with great clarity and force by Duff C.J. in the case of the *King v. Dubois* (1).

In the *Dubois* case the learned Chief Justice, in his treatment of the course of legislation upon the subject-matter which concerns us here, pointed out that the jurisdiction created by s. 16 (c) of Chap. 16 of the Statutes of 1887 was a jurisdiction transferred from the Official Arbitrators to the Exchequer Court, and it was by that statute that the Exchequer Court of Canada, in its present constitution, came into being, and was given jurisdiction to entertain actions against the Crown involving injury to person or property on any public work resulting from the negligence of officers or servants of the Crown. The jurisdiction of the Official Arbitrators had originally been

(1) (1935) S.C.R. 378.

constituted by section 1 of chapter 23 of the Statutes of 1870, which provided that where there was a supposed claim upon the Government of Canada "arising out of any death, or any injury to person or property on any railway, canal, or public work under the control and management of the Government of Canada" the claim might be referred by the head of the Department concerned to Official Arbitrators who had power to hear and make an award upon such claim. The learned Chief Justice also pointed out that in the Revised Statutes of 1886, the Act relating to Official Arbitrators reproduced this provision in slightly altered form, the words there being "claim . . . arising out of any death, or injury to person or property on any public work," and "public work" is defined by section 1 thereof, and that definition the learned Chief Justice quoted fully, and it is to be found at pages 383 and 384 of the report of the *Dubois* case, and I need not repeat it. I think the language there used is precisely the same as that used in the present Expropriation Act, R.S.C., 1927, c. 64, in defining a "public work."

The learned Chief Justice was of the opinion that when the jurisdiction conferred by s. 6 of the Official Arbitrators Act was transferred to the Exchequer Court by the Act of 1887, the phrase "public work" as employed in s. 16 (c) of the latter statute, must be read and construed by reference to the definition given in the Official Arbitrators Act, and in the contemporary Expropriation Act. In 1917 there was enacted s. 19 (c), the section applicable in this case, and though the phrase "on any public work" was placed in another position in the section, and the preposition "upon" substituted for the preposition "on," that, the Chief Justice points out, did not expand the meaning of the term "public work," it remained unchanged; it was an amendment within the framework of s. 16 (c) of the Act of 1887, which framework was not altered by the amendment, and with that I agree.

The definition of "public work" as found in the Official Arbitrators Act and the contemporaneous Expropriation Act did not, as stated by Duff C.J. in the *Dubois* case, embrace any subject not falling within that definition. Those statutes contemplated property or works owned or controlled by the Government of Canada, something acquired, constructed, maintained or improved, by money

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voted and appropriated by the Parliament of Canada, for a specific public purpose. The present Expropriation Act does not appear to deviate from that, and s. 19 (c) speaks only of a "public work." The decided authorities seem to have proceeded upon that principle. It was a limited jurisdiction that was conferred upon the Exchequer Court. The liability of the Crown for injury to the person or property is limited to that occurring "upon any public work," when resulting from the negligence of any officer or servant of the Crown. A liability on the part of the Crown generally for every tort committed by its servants or employees was of course not contemplated.

I have explained the nature of the Project, and the circumstances under which it was initiated and carried out. I do not think it was a "public work" within the meaning of s. 19 (c). The highway was owned by the Province, the Project was proposed by the Province and was carried out by the Dominion at the request, and with the agreement, of the Province. In essence it was financial assistance rendered the Province in carrying out necessary relief measures. That it took the form of highway improvement, and was carried out by and under the direction of the Dominion, does not alter the substance of the arrangement, and its real purpose. It may have been in the national interest that the Dominion should support and supplement the relief measures of the Province but that would not, I think, make the Project a "public work" in the sense of the statute. It was really a Provincial work. I have given anxious consideration to the matter but I find myself unable to reach the conclusion that the Project was a "public work" within the meaning of the statute, though much, I have no doubt, may be said for the contrary view. The Relief Act, which authorized the expenditure in question, does not, I think, purport to extend, and did not intend to extend, the meaning of the phrase "public work," or to enlarge the liability of the Crown for any injury to the person or property caused by the negligence of its servants. I do not think I can add anything useful by any extended discussion of the matter. My opinion therefore is that the Project was not a "public work" within the terms of the relevant statute.

With that conclusion it becomes unnecessary to discuss the question as to whether or not the persons employed



on the Project were officers or servants of the Crown. The terms of employment, applicable to some at least, were unusual, but that was because it was essentially a relief measure. If I were of the opinion that the Project was technically a "public work" I would feel obliged to hold that those employed on the Project would have to be treated as officers and servants of the Crown, regardless of the terms of employment.

This is a matter in which I think I would be justified in refraining from making any order as to costs.

*Judgment accordingly.*

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DOMINION BRIDGE COMPANY }  
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*Revenue—Petition of right to recover money paid to the Crown for Sales Tax—Special War Revenue Act, R.S.C., 1927, c. 179, secs. 86, 87, 104 and 105—Goods sold and delivered—Tax levied "on the sale price . . . at the time of delivery."*

By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works in His Majesty's Government for the Province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in the Province of Quebec, in consideration of the sums set out in each contract. The contracts provided that the suppliant was to furnish all the materials, merchandise, tools, labour, implements, carriages and scaffoldings, the requisite number of mechanics and workmen, and all things needful and proper for the due and proper performance and completion of the work undertaken and all matters and things incident to the same.

Suppliant erected the three bridges and was paid according to the contracts. In respect of the materials incorporated in the bridges, suppliant was assessed for sales tax, alleged due under the terms of the Special War Revenue Act, R.S.C., 1927, c. 179, and amendments. It paid, under protest, a proportion of the amounts so assessed, to the Commissioner of Excise by cheque made to the order of the Collector of National Revenue at Montreal.

Suppliant now claims a return of the moneys so paid on the grounds that no tax was payable by it in respect of the materials supplied in virtue of the contracts or, alternatively, that, if the materials were taxable, suppliant was entitled to a refund by reason of the fact that the materials were sold, if sold at all, to His Majesty the King in the right of the Province of Quebec.

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Respondent denies that the materials in question were sold to His Majesty the King in the right of the Province of Quebec and that the provisions of the Civil Code apply. Respondent further alleges that the materials in respect of which the suppliant was assessed for sales tax were manufactured or produced by the suppliant for the performance of the contracts mentioned and that suppliant became liable to pay sales tax in respect of such materials and was rightly assessed.

*Held:* That the materials supplied by the suppliant and incorporated by it in the superstructure of the three bridges are goods sold and delivered to His Majesty the King in the right of the Province of Quebec within the terms of s. 86 (a) of The Special War Revenue Act and are liable to sales tax.

2. That the goods were not purchased by His Majesty the King in the right of the Province of Quebec for purposes of resale, and suppliant is therefore entitled to a refund of the money paid to respondent, pursuant to s. 105, ss. 1, of The Special War Revenue Act.

PETITION OF RIGHT by suppliant herein to recover from the Crown certain sums of money paid to it by suppliant for sales tax.

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

*L. A. Forsyth, K.C. and John deM. Marler* for suppliant.

*F. P. Varcoe, K.C. and R. Gibeault* for respondent.

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

ANGERS J., now (March 14, 1939) delivered the following judgment.

(Having stated the facts the learned Judge continued.)

There is no dispute about the amounts of the assessment; its validity alone is contested.

In opening, counsel for the suppliant declared that his client, for the purpose of raising the issue, had paid certain amounts on account and applied for a fiat for a petition of right to recover them so that the legal right to impose the tax might be decided.

Counsel for the suppliant submitted that the transactions in question are taxable under section 86 (a) of the Special War Revenue Act and that under section 105 thereof the taxpayer is entitled to a refund. Counsel for the respondent, on the other hand, urged that the said

transactions are subject to section 87 (d) and that section 105 does not apply.

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It will be convenient to cite the relevant provisions of sections 86, 87, 104 and 105:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of six 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 delivery of such goods to the purchaser thereof . . . .

87. (1) 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.

104. The taxes imposed by Parts X, XI, XII, and XIII of this Act shall apply to goods imported by

(a) His Majesty in the right of the Government of Canada;  
 (b) His Majesty in the right of the Government of any province of Canada, for the purpose of resale.

105. (1) A refund of the amount of taxes paid under Parts X, XI, XII and XIII of this Act may be granted to a manufacturer, producer, wholesaler, jobber or other dealer on goods sold to His Majesty in the right of the Government of any province of Canada, if the said goods are purchased by His Majesty, for any purpose other than purposes of resale. . . .

To bring the transactions which took place between His Majesty the King in the right of the Province of Quebec and the suppliant within the scope of section 86, one must conclude that the suppliant sold and delivered goods, produced or manufactured in Canada, to His Majesty the King. Counsel for the suppliant naturally contended that this is what had occurred. If that is the case, the refund clause contained in paragraph 1 of section 105 would apply: the superstructure of the three bridges in question erected by the suppliant with its materials on behalf of His Majesty the King in the right aforesaid was not acquired by the latter for purposes of resale.

Can it be said that the suppliant sold to His Majesty the King “goods,” or, to use the word included in the French version of section 86 to which my attention was drawn, “marchandises”? Or is it more appropriate and judicious to say, as suggested by counsel for the respondent, that what the suppliant sold to His Majesty the King was an immovable property, viz., the superstructure of three bridges?

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Three cases were cited to which I deem it convenient to refer: *Dominion Press, Limited and Minister of Customs and Excise* (1); *His Majesty the King and Fraser Companies, Limited* (2); *His Majesty the King v. Henry K. Wampole & Company, Limited* (3).

In the case of *Dominion Press, Limited and the Minister of Customs and Excise*, the latter had brought an action against the former in the Superior Court of the Province of Quebec claiming arrears of sales tax under the Special War Revenue Act, 1915, and amendments. The Superior Court held that the company was not liable for the tax. An appeal, taken direct to the Supreme Court, was allowed unanimously. The Judicial Committee of the Privy Council affirmed the decision of the Supreme Court.

As appears from the reports, Dominion Press, Limited carried on business as job printers. Its operations consisted in printing to the order of individual customers stationery of a business character, such as cards, labels, order forms, price lists and statements. No privity of contract was created between the supplier of the paper used and the customers. The company supplied at a fixed price the material and the labour and delivered to its customers the finished article.

The judgment of the Judicial Committee of the Privy Council was delivered by Lord Hailsham, L.C.; it seems to me expedient to quote an extract therefrom (p. 341):

The appellants contend that in these circumstances they do not come within the words of the taxing statute. The Act of 1922 imposes a tax of 2½ per cent "on sales and deliveries by Canadian manufacturers or producers and wholesalers or jobbers," and it contains two provisos. First of all, there is a proviso which enacts that "the tax shall not apply to sales or importations of job-printed matter produced and sold by printers or firms whose sales of job printing do not exceed 10,000 dollars per annum." Secondly, there is a proviso that the taxes "shall not be payable on goods exported or on sales of goods made to the order of each individual customer by a business which sells exclusively by retail under regulations by the Minister of Customs and Excise, who shall be sole judge as to the classification of the business."

The Act of 1923 imposes a tax of 6 per cent "on the sale price of all goods produced or manufactured in Canada"; and it does not reproduce the provisos.

The first question to be determined is obviously whether or not these transactions are sales and deliveries by Canadian manufacturers or producers within the enacting words of this section. In their Lordships' opinion they do come within that language.

(1) (1927) S.C.R., 583; (1928)  
 A.C. 340.

(2) (1931) S.C.R. 490.  
 (3) (1931) S.C.R., 494.

There has been a discussion before the Board as to whether or not the contract was a contract of sale and delivery within such cases as *Lee v. Griffin* (1861, 1 B. & S. 272), or a contract for work and labour done and materials supplied within the authority of *Clay v. Yates* (1856, 1 H. & N. 73).

In their Lordships' opinion the material matter to be considered is as to the meaning of the expression "sales and deliveries by Canadian manufacturers or producers" as used in this statute.

Having regard to the language of the first proviso and to the general scope of the enactment, their Lordships entertain no doubt that these contracts were contracts of sales and deliveries by Canadian manufacturers or producers, within the meaning of the taxing statute, and that the payments made under them constituted the sale price of goods produced or manufactured in Canada. That would be enough to dispose of the appeal with regard to the period after January, 1924.

The observations concerning the second proviso, which was not reproduced in the Act of 1923 (13-14 Geo. V, ch. 70) nor in the subsequent Acts, offer no interest in the present case.

The Honourable Mr. Justice Rinfret, who delivered the judgment of the Supreme Court, expressed himself as follows (p. 586):

On this evidence, the contract between the respondent and its customers is not one of lease and hire, but one of sale. It is a contract for the sale of a thing to be made ("chose à faire" or "chose une fois faite").

Such is the solution of the Roman law and of the old French law which the Commissioners have embodied in the Civil Code of Quebec. On this subject, a quotation from Pothier (Bugnet, 3rd edition, vol. 4, no. 394) is strictly in point:

Ce contrat (de louage d'ouvrage) a aussi beaucoup d'analogie avec le contrat de vente.

Justinien en ses Institutes, au tit-de Loc. cond., dit qu'on doute à l'égard de certains contrats, s'ils sont contrats de vente ou contrats de louage, et il donne cette règle pour les discerner; "lorsque c'est l'ouvrier qui fournit la matière, c'est un contrat de vente; au contraire, lorsque c'est moi qui fournis à l'ouvrier la matière de l'ouvrage que je lui fais faire, le contrat est un contrat de louage."

Par exemple, si j'ai fait marché avec un orfèvre pour qu'il me fasse une paire de flambeaux d'argent, et qu'il fournisse la matière, c'est un contrat de vente que cet orfèvre me fait de la paire de flambeaux qu'il se charge de faire; mais si je lui ai fourni un lingot d'argent pour qu'il m'en fit une paire de flambeaux, c'est un contrat de louage.

Observez que, pour qu'un contrat soit un contrat de louage, il suffit que je fournisse à l'ouvrier la principale matière qui doit entrer dans la composition de l'ouvrage; quoique l'ouvrier fournisse le surplus, le contrat n'en est pas moins un contrat de louage.

On peut apporter plusieurs exemples de ce principe.

Lorsque j'envoie chez mon tailleur de l'étoffe pour me faire un habit: quoique le tailleur, outre sa façon, fournisse les boutons, le fil, même les doublures et les galons, notre marché n'en sera pas moins un contrat de louage, parce que l'étoffe que je fournis est ce qu'il y a de principal dans un habit.

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Pareillement, le marché que j'ai fait avec un entrepreneur pour qu'il me construise une maison, ne laisse pas d'être un contrat de louage, quoique par notre marché il doive fournir les matériaux, parce que le terrain que je fournis pour y construire la maison, est ce qu'il y a de principal dans une maison, quum aedificium solo cedat.

The modern doctrine and jurisprudence in France should perhaps be accepted with caution, because article 1711 of the Code Napoléon contains the following definition:

Les devis, marchés, ou prix faits pour l'entreprise d'un ouvrage moyennant un prix déterminé sont aussi un louage lorsque la matière est fournie par celui pour qui l'ouvrage se fait; which is not to be found in the Civil Code of Quebec. But the preponderating opinion is that the above passage of Pothier well expresses the state of the old law (Fuzier-Herman, Répertoire, verbo Louage d'ouvrage, de services et l'industrie, no. 1105). Planiol (Droit Civil 6th ed. vol. 2, no. 1902) calls it the "solution traditionnelle". On the authority of *Clay v. Yates* (1 H. & N. 73; 156 E.R. 1123) the situation would be the same under the common law.

According to the evidence before us, the respondent does not undertake to print on material (such as tags, cards, or paper generally) supplied by the client. It contracts to sell and deliver printed business cards, labels, order forms, price lists, statements and general stationery. The transactions described in the evidence and in respect of which the Minister seeks to recover taxes are sales. In the words of Pothier, "elles participent du contrat de vente."

In that case the goods involved were movables and remained so; in the present instance the goods, originally movables, were incorporated in an immovable property and are now an integrant part thereof. It was urged on behalf of respondent that the members which the suppliant fabricated and incorporated in the superstructure of the bridges were not sold and delivered to His Majesty the King but that the object of the sale, if there were a sale, was the superstructure of the bridges fully completed and erected. I do not think that it makes a particle of difference that, instead of being sold separately and distinctly, the members of the superstructures in question, manufactured expressly for His Majesty the King, were incorporated in the constructions which the suppliant had undertaken to make for him. The transactions which took place between the suppliant and His Majesty the King, in so far as the supply of the materials required for the erection of the superstructure of the bridges is concerned, constitute a sale.

The next case cited is that of *His Majesty the King v. Fraser Companies, Limited*. The defendant respondent was a manufacturer of lumber for sale; it consumed a portion of the lumber so manufactured in the construc-

tion and repair of pulp and other mills and of houses for its employees. The lumber so consumed was taken from stock in the yards produced and manufactured, in the ordinary course of the company's business, for sale and not produced or manufactured for the purpose for which it was used.

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The majority of the Supreme Court (Newcombe, Rinfret, Lamont and Smith, J.J., Cannon, J., dissenting) held that the company was liable for sales tax on the lumber so consumed.

Smith, J., who delivered the judgment, after relating the facts and quoting sections 86 (a) and 87 (d), continued as follows (p. 492):

The learned President of the Exchequer Court, before whom the case was tried, dismissed the action (1931, Ex. C.R. 16), on the ground that the lumber so consumed was produced in the ordinary course of business for sale, and not specifically for use by the manufacturer, within the meaning of the above quoted s. 87 (d).

With great respect, I am unable to take this view of the meaning and effect of these provisions of the Act. To so construe them is to put a narrow and technical construction upon the precise words used in clause (d), without taking into consideration the meaning and intent of the statute as a whole. It seems to me clear that the real intention was to levy a consumption or sales tax of four per cent on the sale price of all goods produced or manufactured in Canada, whether the goods so produced should be sold by the manufacturer or consumed by himself for his own purposes.

The view taken in the court below would result in the introduction of an exception to the general rule that all goods produced or manufactured are to pay a tax, and would amount to a discrimination in favour of a particular consumer. As an example, it is not unusual for a manufacturer engaged in the production and manufacture of lumber for sale to engage at the same time in the business of a building contractor. He manufactures his lumber for sale, and, as a general rule, would not manufacture any specific lumber for use in connection with his building contracts, but would simply take lumber for these purposes from the general stock manufactured for sale, and might thus, under the view taken in the court below, escape taxation on all lumber thus diverted from the general stock manufactured for sale.

It is quite clear that the lumber in question, although manufactured for sale, was used by the manufacturer for its own purpose and benefit. I do not think that this decision has any application in the present case.

The third case to which reference was made is that of *His Majesty the King v. Henry K. Wampole & Company, Limited.*

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The company, in the course of its business as manufacturer of pharmaceutical products, put up in small packages and distributed free among physicians and druggists samples of its products for the purpose of acquainting them with their character and quality.

A special case was agreed upon for the opinion of the Court, clause 4 of which was drafted as follows:

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.

After quoting this clause, Anglin, C.J.C., delivering the judgment of the majority of the Court (Anglin, C.J.C., and Rinfret, Lamont and Cannon, JJ., Newcombe, J., dissenting) said (p. 497):

It is obvious to me that it cannot have been the intention of the Legislature to tax the same property twice in the hands of the manufacturer. Having regard to the admission of paragraph 4, above quoted, such double taxation would ensue were we to hold the samples here in question to be now subject to the consumption or sales tax, it being there admitted that the cost of producing such samples is included in the

cost of production of articles manufactured and sold, in respect of which . . . the company has paid sales tax.

If the cost or value of these goods used as samples has already been a subject of the sales tax in this way, it would seem to involve double taxation if they should now be held liable for sales tax on their distribution as free samples. But for the admission of paragraph 4, however, I should certainly have been prepared to hold that the "use" by the company of goods manufactured by it as free samples for advertising purposes is a "use" within clause (d) of section 87. of the Special War Revenue Act, R.S.C., 1927, ch. 179.

The dissent of Newcombe, J., related to the interpretation to be given to clause 4 of the special case aforesaid; the learned judge expressed the following opinion (p. 498):

I am in agreement with my lord and my learned brethren as to the interpretation of the charging section; but I am not persuaded that the facts admitted by clause 4 of the case constitute payment, or operate to relieve the respondent company of its liability for the tax. If the sale price of the goods were increased by the company's method of book-keeping, I do not doubt that the fact would have been stated.

I see nothing in the case to justify a finding of double taxation, or that the tax upon the samples, to which, in the view of the court, the Government was entitled, has been paid; . . .

Here again it is evident that the goods upon which His Majesty the King wanted to impose a sales tax were used



by the manufacturer thereof for its own benefit and advantage, and I do not think that the decision has any bearing on the question at issue.

The underlying principle of the Act, to my mind, is that all goods produced or manufactured in Canada shall be subject to a consumption or sales tax on the sale price or value thereof, according as they are sold by the producer or manufacturer or consumed by him for his own purposes.

It was contended on behalf of the respondent that the matter in controversy herein is governed by section 87 (*d*) and not by paragraph (*a*) of subsection 1 of section 86, because there was no sale of the goods but use thereof by the suppliant. I cannot agree with this contention; I do not think that the members incorporated in the superstructure of the bridges can be considered as goods made for the use of the suppliant and not for sale.

Although I believe that the material matter to be determined is the meaning of the expression "on the sale price . . . . at the time of the delivery," I may perhaps note that, under the law of the Province of Quebec, the contracts entered into between His Majesty the King in the right of the Province of Quebec and the suppliant are not contracts of lease and hire but are contracts of sale: Mignault, *Droit Civil*, vol. 7, p. 401, par. 11; Pothier (ed. Bugnet) vol. 4, No. 394; Guillouard, *Traité du Contrat de Louage*, vol. 2, no. 772; Fuzier-Herman, *Répertoire Général*, vol. 26, no. 1105; Lyon-Caen & Renault, *Traité de Droit Commercial*, 4th ed., vol. 5, no. 152; Planiol, *Traité Elémentaire de Droit Civil*, 9th ed., vol. 2, no. 1902; Planiol & Ripert, *Traité Pratique de Droit Civil Français*, ed. 1932, vol. 11, no. 912.

After a careful perusal of the evidence and of the argument of counsel and the authorities cited, I have reached the conclusion that the materials supplied by the suppliant company and incorporated by it in the superstructure of the three bridges aforesaid must be considered as goods sold and delivered to His Majesty the King in the right of the Province of Quebec within the meaning of section 86 (*a*) of the Special War Revenue Act and are consequently liable to a sales tax thereunder.

As these goods were not purchased by His Majesty the King in the right of the Province of Quebec for purposes

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of resale, I am of opinion that subsection 1 of section 105 applies and that the suppliant is entitled to a refund of the sum of \$1,503, without interest.

The suppliant will have its costs of the action.

*Judgment accordingly.*

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Case No. 17528, *Eastern Canada Steel & Iron Works Limited v. The King*, was also decided by the Honourable Mr. Justice Angers, on March 14, 1939. The material facts and issues involved were the same as in the case of *Dominion Bridge Company Limited v. The King*. Judgment was rendered in favour of the suppliant.

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BETWEEN:

SCARBOROUGH GUILD LIMITED... APPELLANT;

AND

THE COMMISSIONER OF PATENTS... RESPONDENT.

*Patent—Failure to file the statutory oath within time prescribed by the Patent Act—Application held to have been abandoned—Patent Act, 25-26 Geo. V, c. 32, s. 29 and s. 31—Appeal from Commissioner of Patents dismissed.*

Application for a Canadian patent was made on November 13, 1935, by one, Robson. The oath required by the Patent Act did not accompany the application. The applicant was notified by the Patent Office on November 20, 1935, that the oath must be filed within the time limit of three months from that date. The petition, specifications and drawings were filed within one year from the date of application. Nothing further was done until May, 1938, when application to amend the specification was made. Four days later the Patent Office advised that the application must be held to have been abandoned because the oath required to complete the application had not been filed within the time limit fixed, and also that the application had not been completed within one year from the date of it being filed.

*Held:* That the oath is part of the application for a patent, and must be filed within the time prescribed by s. 31 of the Patent Act.

2. That the Commissioner of Patents was right in holding that the application had been abandoned.

APPEAL from the ruling of the Commissioner of Patents holding that appellant's application for a patent had been abandoned.

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

*G. E. Maybee* for appellant.

*H. A. Ayles, K.C.* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 14, 1939) delivered the following judgment:

This is an appeal from the decision of the Commissioner of Patents who decided that the appellant's application for a patent of invention had been abandoned.

It appears from the Patent Office file that on November 13, 1935, one, Robson, of Toronto, Ont., personally filed an application for a patent for new and useful improvements in Machines for Weaving, but the statutory oath did not accompany his application. Robson, in response to his application, was advised, on November 20, 1935, by the Patent Office, that a limit of time of three months from that date was set within which it was required that the oath should be filed. On October 26, 1936, Robson named Mr. J. A. H. Dennison as his attorney to prosecute his application. Sometime later the appellant, Scarborough Guild Ltd., acquired the invention of Robson, precisely when is not clear, but that is not of any importance. The power of attorney to Mr. Dennison was subsequently revoked by Scarborough Guild Ltd. and on October 30, 1936, Messrs. Ridout & Maybee of Toronto were appointed its attorneys to prosecute the application. The petition, the specifications and drawings, were completed and filed within one year from the date of application, and there does not seem to be any dispute as to that.

From December, 1936, until May, 1938, there was complete silence so far as the record shows, but, on May 26, 1938, Messrs. Ridout and Maybee made an application to amend the specification. Four days afterward, May 30, 1938, they were advised by the Patent Office that it was found that the application for a patent must be held to have been abandoned because the oath required to complete the application had not been filed within the time fixed, three months from November 30, 1935, and further because that one year had elapsed from the date of appli-

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cation without the same having been completed, and that therefore on both grounds the application must be held to have been abandoned.

Messrs. Ridout & Maybee, then, in June, 1938, explained to the Patent Office that they were unaware that the oath had not been filed and that they had no notification that this requirement had not been complied with, they no doubt thinking that either Robson or his attorney had earlier supplied this requirement; and they requested reconsideration of the case and asked that the Commissioner extend the time for filing the oath. To this the Commissioner replied (1) that the oath to complete the application was not presented within one year from the date of filing, (2) that the applicant had been advised of the lack of the oath, (3) that no petition was presented to reinstate the application within twelve months after the date on which the application was deemed by the terms of the statute to have been abandoned, and (4) that he, the Commissioner, was without power to extend the time fixed by the statute. He held the patent to have become abandoned on November 13, 1936. Such are the facts of the case.

Sec. 29 (1) of the Patent Act enacts that "the inventor shall, at or before the time of filing his application or within such reasonable extension of time as the Commissioner may allow, make oath: . . . that he verily believes that he is the inventor of the invention for which the patent is asked and that the several allegations in the application contained are respectively true and correct." As I have already pointed out the Commissioner on November 20, 1935, advised the applicant, Robson, that a limit of time of three months from that date was set within which it was required that the oath should be filed. No extension of that time was ever requested by Robson or his attorney, or by the appellant or its attorney. I might be pardoned if I said that I find it difficult to understand why the oath should not be required to accompany the application, and I do not think that any good reason can be advanced against such a requirement. Moreover, I have never been able to see that the oath is of any practical value in patent applications; and I find it difficult to conceive of any sound or practical reasons why it should be required at all. I understand that in

most countries the oath is not required. But the Act requires it and there it is. Mr. Maybee argued that the application, that is, the petition, the specification and drawings, were one thing, and that the oath was another thing, and that the application here was completed within twelve months from the date of application. That view is not, I think, tenable and the oath must, I think, be regarded as part of the application and the Patent Office might refuse, and perhaps do refuse, to consider or examine an application until the oath is filed. That, I think, would be justifiable practice inasmuch as the oath is required by the Act as part of the application.

The important section of the Patent Act in this controversy is section 31, and it reads as follows:

Each application for a patent shall be completed and prepared for examination within twelve months after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within six months after any action thereon of which notice shall have been given to the applicant, such application shall be deemed to have been abandoned, but it may be reinstated on petition presented to the Commissioner within twelve months after the date on which it was deemed to have been abandoned, and on payment of the prescribed fee, if the petitioner satisfies the Commissioner that the failure to prosecute the application within the time specified was not reasonably avoidable. An application so reinstated shall retain its original filing date.

As a matter of public policy it is essential, or at least it is desirable, that a time limit be set within which an application for a patent be completed, and s. 31 requires that it be completed within twelve months after the filing of the application. I think the true construction of s. 31 is that the oath, which is undoubtedly a part of the application, must be filed within that time. A completed application is one in which every document required by the Patent Act is filed, and this would include the oath. And the applicant has another twelve months within which he may petition for the reinstatement of the application, which the applicant here did not do. I think that is what was intended by the legislature—a very fair and practical provision—and, I think, that is what the statute says. That is my construction of the section in so far as we are here concerned with its provisions. While I have no doubt that Messrs. Ridout & Maybee assumed that the oath had been filed by the inventor, or his attorney, and my inclination would be to save their client's application, if possible, still the statute seems to offer an impenetrable

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barrier to any such inclination. The Patent Office cannot be expected to notify applicants of their failure to file the oath within the period fixed, or within the prescribed twelve months from the date of application, the Patent Office having to deal with thousands of applications annually. If the oath were required to accompany the application, as I think should be the case, there would be no difficulty as has arisen here.

My conclusion is therefore that the appeal must fail. I think the Commissioner was right in holding that the application had been abandoned. There will be no order as to costs.

*Appeal dismissed.*

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BETWEEN:

RITA LEMAY ..... APPELLANT;

AND

MINISTER OF NATIONAL REV- }  
 ENUE ..... } RESPONDENT.

*Practice—Exchequer Court Act, R.S.C., 1927, c. 34, s. 64—Exchequer Court Rule 169—Examination of parties by commission or letters of request.*

*Held:* That the Exchequer Court Act, R.S.C., 1927, c. 34, s. 64, does not provide for the examination of a party giving evidence in his own behalf, by commission or letters of request.

MOTION by appellant for an order that a commission or letters of request issue for the examination of the appellant at Paris, France.

The motion was heard before the Honourable Mr. Justice Angers, in chambers.

*E. A. Anglin* for the motion.

*Roger Owimet* and *A. A. McGrory*, *contra*.

ANGERS J., now (April 26, 1939) delivered the following judgment:

This is a motion on behalf of the appellant for an order that a commission or letters of request issue, as may be appropriate under the laws of France, for the examination

under oath by interrogatories or otherwise at the City of Paris, France, of the appellant.

The subject of the present suit is an appeal from an assessment by the Commissioner of Income Tax affirmed by the Minister of National Revenue.

The motion is supported by the affidavit of Mr. Louis S. Saint-Laurent, K.C., counsel for appellant. The affidavit states (*inter alia*) that the appellant resides in Paris, France; that there are facts which, unless admitted, can only be established by the appellant's testimony; that counsel endeavoured to arrange with respondent's solicitor for a joint admission of these facts so as to avoid the necessity of obtaining the appellant's testimony in connection therewith and that he was advised recently that the proposed joint admission cannot be made; that counsel endeavoured to ascertain if there were any probability that the appellant might have to come to Canada at an early date and that he has been informed that there is no such probability; that the cost and inconvenience to the appellant of having to make a trip from France to Canada to give evidence would be much greater than the cost or inconvenience of having to take her evidence on a commission or through letters of request in France; that Mr. André Veniot, advocate, residing at 127 boulevard Malesherbes, Paris, would be a proper person to whom such commission or letters of request might be addressed.

The examination of witnesses upon oath by commission or by means of letters of request is governed by section 64 of the Exchequer Court Act (R.S.C., 1927, chap. 34), which reads in part as follows:

If any party to any proceeding had or to be had in the Exchequer Court is desirous of having therein the evidence of any person, whether a party or not, or whether resident within or out of Canada, and, if in the opinion of the Court or a judge thereof, it is, owing to the absence, age or infirmity, or the distance of the residence of such person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient so to do, the Court or a judge may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise, before the Registrar of the Court, or any commissioner for taking affidavits in the Court, or any other person or persons to be named in such order, or may order the issue of a commission under the seal of the Court for such examination.

The first paragraph of rule 169 of the General Rules and Orders of the Court, dealing with commissions, says:

The Court or a Judge may, in a cause where it shall appear necessary for the purposes of justice, make any order for the examination upon oath

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before any officer of the Court, or any other person or persons duly authorized to take or administer oaths in the said Court, and at any place, of any witness or person, and may order any deposition so taken to be filed in the Court, and may empower any party to any such cause or matter to give such deposition in evidence therein on such terms, if any, as the Court or a Judge may direct.

Rule 169 adds nothing to section 64; in fact it is less definite.

Counsel for the respondent opposed the motion on the ground that a party is not entitled to give his testimony otherwise than *viva voce* in open court. Reliance was placed by counsel on the following decisions: *L'Abbé Warré v. Bertrand et Labelle* (1) and *Worthington v. Dame Walker* (2). In the former case the Court of Appeal and in the latter Mr. Justice Joseph Archambault held that a party cannot obtain the issue of a rogatory commission to receive his own evidence. These decisions are based on Article 380 of the Code of Civil Procedure of the Province of Quebec, which, at the time of their delivery, contained only the following clause:

When any of the witnesses or of the parties reside outside of the Province, or even within the Province at a distance of more than one hundred miles from the place where the court is held, the party who requires to examine them may obtain a commission appointing one or more persons to receive the answers of such witnesses or parties.

By 17 Geo. V, chap. 71, assented to on the first of April, 1927, article 380 of the Code of Civil Procedure was amended by adding thereto the following paragraph:

When one of the parties resides outside of the Province he may also obtain a commission to receive his evidence.

Possibly this amendment was prompted by the reporter's note in the case of *Worthington v. Dame Walker* at the foot of page 82, which it may not be unseasonable to quote:

Cette question a été tranchée dans ce sens par la Cour d'appel: *Warré v. Bertrand*. Dans cette cause le débiteur habitait Tours, France, et a cru devoir traverser l'océan pour rendre témoignage en sa faveur. Cette jurisprudence semble étrange depuis qu'une partie peut dans tous les cas rendre témoignage en sa faveur (C.P. 316). Elle peut donner lieu à de graves injustices. Pour la justifier en équité, on peut dire que sur une commission rogatoire fermée, sauf consentement des parties le contre-interrogatoire d'un témoin est presque impossible, et *fortiori* dans le cas de la partie elle-même. Le remède semblerait être de nous permettre de faire ce que nous laissons faire ici par les étrangers en vertu des articles 1445 *et seq.* C.P. et Statuts Refondus.

(1) (1926) R.J.Q., 40 K.B. 509. (2) (1927) 30 Q.P.R., 82.



I may note in passing that articles 1445 to 1450 inclusive, being chapter LXXIV entitled "Depositions in Proceedings in Courts out of the Province," were added to the Code of Civil Procedure by 7 Ed. VII, chap. 57, assented to March 14, 1907.

Article 380 of the Code of Civil Procedure has no application in the present case. If it applied, it would obviously not, as it reads to-day, sustain the respondent's contention.

Article 380 before the amendment did not provide, in my opinion, for the examination of a party as witness in his own behalf by means of a rogatory commission; the party who wished to testify for himself had to give his evidence in open court. The judgments in *L'Abbé Warré v. Bertrand et Labelle* and *Worthington v. Dame Walker* appear to me well founded. Needless to say the cross-examination of a witness, particularly of the adverse party, on a "closed" commission under article 385 was generally not very satisfying; the cross-examination on an "open" commission in virtue of article 385A, where the cross-interrogatories are no more limited than they would be in open court, is obviously more satisfactory. I may add incidentally that the examination of a witness by means of letters of request is equivalent in effect to his examination under an "open" commission and allows his cross-examination as thoroughly as if he were testifying in open court.

The text of section 64 of the Exchequer Court Act, if perhaps not so clear on that point as article 380 of the Code of Civil Procedure, seems to me to provide merely for the examination of the adverse party by commission or letters of request, as the case may be, and not of the party giving evidence in his own behalf. Leaving aside the words that are not pertinent in the present case, the material part of section 64 is worded as follows: "If any party to any proceeding . . . in the Exchequer Court is desirous of having therein the evidence of any person, whether a party or not, . . . and, if in the opinion of the Court or a judge thereof, it is . . . convenient so to do, the Court or a judge may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise . . ." I fail to see how the words "of any person, whether a party or

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not" can be said to apply to the party making the application. It seems to me that if the legislators had wished to include among the persons liable to be examined on a commission or letters of request the party seeking the issue of the commission or letters of request, they would have said it in plain words. The manner in which the phrase dealing with the subject is drafted induces me to believe that the legislators did not contemplate the examination of a party testifying on his own behalf by means of commission or letters of request.

The balance of convenience, which has to be considered when the evidence of a witness may equally be taken in open court or out of court by commission or otherwise, would undoubtedly be favourable to the issue of letters of request; but in the present case, it is not the question of convenience which I have to consider, but the question as to whether or not the issue of a commission or of letters of request on behalf of the appellant to receive her own evidence is permissible under section 64 of the Exchequer Court Act; as I have already said, in view of the wording of the section, I do not think that it is. The costs of having the appellant come from France to give her evidence in court instead of taking it by means of letters of request will be considerably higher; it will be the unhappy lot of the losing party to pay them.

The motion is accordingly dismissed; costs reserved.

*Order accordingly.*

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Nov. 15 & 16  
1939  
May 26.

BETWEEN:  
MURRAY BROWN ..... SUPPLIANT;  
AND  
HIS MAJESTY THE KING ..... RESPONDENT.

*Crown—Contract for architect's services—Termination of contract by the Crown before fulfilment—Damages for breach of contract.*

Suppliant was engaged by respondent to prepare plans and specifications and to supervise the construction of a proposed Postal Station in the City of Toronto "on the attached terms and conditions on which outside architects are being engaged by this Department." One of these terms was that the total fee for all services rendered should

be five per cent of the actual cost of the building, as should be determined by the Department of Public Works. The contract price for the erection of the building was \$149,229. The actual cost was \$145,529.05. Upon completion of the plans and specifications suppliant was paid two and one-half per cent of the contract price, in accordance with the practice of the Department. Later suppliant was advised that his services to supervise the work would not be required, and that he would be paid 2½ per cent for the preparation of the plans and specifications, and ¼ per cent for the preparation of the necessary detail drawings, both payments to be based on the amount of the lowest tender, namely, \$149,229. Suppliant now claims remuneration based on the Schedule of Professional Charges of the Ontario Association of Architects, less the payment received by him.

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*Held:* That the contract entered into between suppliant and respondent was not divisible; it required the suppliant to prepare the plans and specifications and to supervise the construction of the building, and also to perform other duties.

2. That suppliant was not a public servant, or one in the service of the Crown; the relations between suppliant and respondent were contractual.
3. That suppliant did not acquiesce in the termination of the contract.
4. That suppliant is entitled to recover an amount equal to 5 per cent of the actual cost of the building less a certain amount he would have had to pay an inspector, agreed to be employed at his own expense, and less a further sum in respect of certain responsibilities and contingent liabilities which he would have had to bear had the contract been fulfilled.

PETITION OF RIGHT by the suppliant herein claiming damages for alleged breach of contract.

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

*P. E. F. Smily, K.C.* for suppliant.  
*John Jennings, K.C.* for respondent.

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

THE PRESIDENT, now (May 26, 1939) delivered the following judgment:

In 1935, under the provisions of the Public Works Construction Act, 1934, and The Supplementary Public Works Construction Act, 1935, the Governor in Council determined upon the construction of a post office building in the City of Toronto, known as Postal Station K. The Minister of Public Works was charged with the execution of this work, and parliament made the necessary appropriation therefor.

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In July, 1935, the suppliant, Mr. Murray Brown, an architect practising in the City of Toronto, a member of the Ontario Association of Architects, was asked by the Chief Architect of the Department of Public Works, by letter, if he would prepare the plans and specifications and supervise the construction of the proposed Postal Station K, "on the attached terms and conditions on which outside architects are being engaged by this Department." One of such terms and conditions was that the total fee for all services rendered should be five per cent of the actual cost of the building, as should be determined by the Department of Public Works, and this fee was to include various mentioned services to be performed, such as the preparation of the plans and specifications, the detail drawings, and the testing and inspection of all material entering into the construction of the building.

The suppliant, by letter, agreed to prepare the plans and specifications, and supervise the construction of the proposed building, "in accordance with the terms and conditions on which outside architects are being engaged by your Department." On the recommendation of the Chief Architect, and the Deputy Minister of Public Works, the services of Mr. Brown were engaged, and this recommendation was approved by an Order of the Governor in Council.

The suppliant in due course proceeded with the preparation of the plans and specifications of the proposed building, the cost of which he estimated at \$180,000. In September, 1935, on completion of the plans and specifications, he rendered an account to the Department of Public Works for one-half of his fee, \$4,500, that is 2½ per cent of \$180,000, which amount the account stated was then due, and later he was paid \$2,000 on account. In the meanwhile tenders had been solicited for the construction of the proposed building, the lowest of which was \$149,229, and this tender was accepted. In February, 1936, the Department paid Mr. Brown an additional sum of \$1,730.73, making \$3,730.73 paid him altogether, the same being 2½ per cent of the contract price of \$149,229. Apparently it was the practice of the Department to pay to outside architects engaged by it one-half of the stipulated fee upon completion of the plans and specifications

of any proposed building, and this would seem to be the practice among architects.

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In May, 1936, the Chief Architect advised the suppliant, by letter, that the Department had decided to appoint a Clerk of Works to supervise the construction of the Postal Station, and that his services to supervise the work would not be required. And he was advised, at the same time, that he would be paid 2½ per cent for the preparation of the plans and specifications, and ¼ per cent for the preparation of the necessary detail drawings, both payments to be based on the amount of the lowest tender, namely, \$149,229, less payments previously made to him. The suppliant acknowledged receipt of this letter and enquired on what basis the ¼ per cent was arrived at, "as the Quebec Schedule of fees calls for this to be 20 per cent of the fee which would be 1 per cent." The Chief Architect replied that it was the practice of the Department to pay outside architects 2½ per cent for the "preparation of plans and specifications ready for tenders," under the Public Works Construction Act, and ¼ per cent for the preparation of detail drawings. No further communications passed between Mr. Brown and the Department in respect of the termination of his services. The suppliant was later paid \$373.08 for the preparation of the detail drawings, made at the request of the Department, that amount being ¼ per cent of the contract price, which payment Mr. Brown accepted, though questioning its sufficiency. The Department took the position that this was the fee paid for such work to other architects in private practice.

In March, 1937, the suppliant rendered an account to the Department of Public Works in which he claimed a fee of \$7,162.99 for the sketch plans, working drawings and specifications, and some other items, based on the Schedule of Professional Charges of the Ontario Association of Architects, aggregating in all \$7,550.99, less the payment of \$3,730.73 already received by him, and this account the Department declined to pay. The suppliant's claim then passed into the hands of his solicitor, and later this petition followed. Before passing on I might say that the contract price for the construction of the Postal Station was reduced by \$4,500 by reason of the substitution of reinforced concrete construction for steel construction.

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Apparently the suppliant visited the building almost daily during construction, and advised the contractor in the interpretation of the plans and working drawings, during the construction of the building, but he did not advise the Department that he was doing this, though possibly the Department's supervising architect resident in Toronto had knowledge of it. However, the suppliant was very frank in stating that he rendered such assistance to the contractor voluntarily and because of his sentimental interest in a building he had designed, and the plans and specifications of which he had prepared, and he is not now putting that forward as a claim against the Department, and consequently this does not call for any further discussion.

The suppliant contends that a contract was entered into, on terms, between the Crown represented by the Department of Public Works and himself, to prepare the plans and specifications and to supervise the construction of the building, which contract the suppliant was willing at all times to carry out, and that the Department of Public Works had not the right to alter the terms of the contract, or to terminate it; and by reason of the breach of the contract the suppliant by his petition now claims damages in the sum of \$3,357.64, or, in the alternative, a fair and reasonable compensation for the work actually done and services rendered by him, in accordance with the Schedule of professional charges of the Ontario Association of Architects. The alternative claim I do not propose to entertain and shall not again refer to it. On behalf of the Crown, it was conceded by Mr. Jennings that a contract was entered into between the parties for the performance of the services and duties mentioned, but, it is claimed, that the professional services of the suppliant were retained as any other public servant or employee of the Crown is retained, and which services might be terminated by the Department at any time; that the suppliant acquiesced in the termination of the contract; and that the contract was a divisible one, which, I assume, is intended to mean that the preparation of the plans and specifications was one thing, and the supervision of the construction of the building another thing.

It is hardly open to debate, I think, but that here a contract was entered into between the Department of

Public Works and the suppliant, and which contract was authorized by the Governor in Council. Neither is there room for debate for the proposition that the Crown is liable in damages for a breach of contract, just as is the subject, and I need not pause to make reference to the authorities supporting that proposition. And I cannot think it arguable that the contract here was a divisible one. The terms and conditions of the contract required the suppliant to prepare the plans and specifications and to supervise the construction of the building, and to perform other duties as well. It probably was the understanding, though it is not specifically mentioned in the terms and conditions which accompanied the offer of the Department, that the suppliant was to be paid one-half of his stated remuneration upon the completion of the plans and specifications, which appears to be the practice in such cases, and which would seem to be a very just and reasonable practice; the parties to the contract seem to have expected that such a payment would then be made, but that is in respect of remuneration, and does not make the contract a divisible one. I do not think there is substance in this contention. Neither do I think that the suppliant stood in the relation of a public servant or employee to the Crown, and therefore a line of cases referred to by Jennings are not here applicable. Their relations were contractual. The suppliant contracted to perform certain services but that does not make him a public servant, or one in the service of the Crown, in the popular or legal sense. I see no distinction between the position of the architect of a building, the suppliant here, and the contractor who constructs it, and I can hardly conceive of the latter being designated as a public servant, and whose contract might be terminated, with or without cause, on the ground that being a public servant his contract might be terminated at any time.

At the conclusion of the trial I was rather strongly inclined to the view that the suppliant must fail on the ground that he had acquiesced in the termination of the contract, but upon a further consideration of the matter I feel compelled to depart from that view. I have since considered the important portions of the evidence, particularly that of the suppliant, and I find nothing therein

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that on any fair construction can be described as acquiescence on the part of the suppliant in the termination of the contract, or as a waiver of his legal rights thereunder. It is true that he made no formal protest to any officer of the Department of Public Works when advised that his services would not be required for supervising the construction of the building. It is also true that thereafter he prepared the detail drawings, or shop drawings, at the request of the Department, and for which he was paid, but I do not think it can be said that this constitutes acquiescence in the termination of the contract. It might as fairly be said that this constituted a resumption of the contractual relations between the Department of Public Works and the suppliant, and a cancellation of the notice to terminate the contract. It was a part of the work he was to perform under the contract. The fact that the suppliant rendered an account for work actually done and services rendered, not according to the terms of the contract, but according to the schedule of fees laid down by the Ontario Association of Architects, does not constitute acquiescence in the breach of the contract, though it is a recognition of the fact that the contract had been ended. It was because the contract was ended that this account was rendered, and on a basis of remuneration different from the terms provided by the contract, which, I think, cannot be supported, but that does not destroy the legal rights of the suppliant. Upon a careful consideration of the evidence I do not think it can be said that the suppliant acquiesced in the termination of the contract, or that he waived his rights thereunder. It would be rather unusual that he would so lightly assent to this. Contract rests on the agreement of the parties; as it is their agreement which binds them, so by their agreement they may be loosed. I do not think the suppliant ever agreed to discharge the contract. I think therefore the suppliant must succeed.

Now, as to the amount of damages to which the suppliant is entitled, and the basis for the assessment of the same. The suppliant was to be paid a fee of 5 per cent upon the actual cost of the building, which amount was to be determined by the Department, and which amount was finally determined to be \$145,529.05. The rule of the common law is, that where a party sustains a loss by



reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The suppliant agreed he would employ, at his own expense, an inspector who should be on the work continuously during all working hours, and during the construction of the building, and that he should test and inspect all material entering into the building. This would have necessitated, so far as the evidence informs me, an expenditure of \$1,325 and a deduction from the stipulated remuneration must be allowed in that amount. I make the total fee that would have been earned by the suppliant if the contract had been fully performed to be \$7,276.45, from which there must be deducted the amount already paid, \$4,103.81, and the sum of \$1,325 just mentioned, leaving a balance of \$1,847.64, which would have been paid to and received by the suppliant had the contract been fully performed. Further, by reason of the termination of the contract the suppliant was relieved of certain responsibilities and contingent liabilities, for which, I think, some deduction should be made, but that, in all the circumstances of this case, should not be any large amount, and this I fix at \$200. I therefore find that the suppliant is entitled to damages in the sum of \$1,847.64. If it should transpire that my calculations upon the foregoing basis are in any way in error the same may be adjusted on the settlement of the minutes of judgment. The suppliant will have his costs of the petition.

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*Judgment accordingly.*

BETWEEN:

NIAGARA WIRE WEAVING COM- } PLAINTIFF;  
 PANY LIMITED..... }

AND

JOHNSON WIRE WORKS LIMITED... DEFENDANT.

1938  
 Oct. 18-21,  
 24-27.  
 1939  
 May 17.

*Patents — Infringement action — Subject-matter — Invention — Patent Act, R.S.C., 1927, c. 150, s. 50.*

The action is one for infringement of three patents owned by the plaintiff. The inventions claimed in two of the patents relate to methods of joining the ends of a woven wire belt to form an end-

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less belt particularly for use in Fourdrinier paper machines. The invention claimed in the third patent relates to woven wire fabric that is used in the manufacture of belts for Fourdrinier paper machines.

The Court found that with respect to the first two patents the art of joining the two ends of a woven wire cloth by wire stitching as described in the patents was quite old and that the patents lacked subject-matter.

With respect to the third patent the Court found that there is no invention disclosed in the patent and also that the defendant had been making the wire belt claimed to have been infringed since a date more than two years before the application for the patent in question.

*Held:* That small variations from, or slight modifications of, the current standards of construction, in an old art, rarely are indicative of invention.

2. That under the Patent Act, R.S.C., 1927, c. 150, s. 50, the defendant is entitled to continue the manufacture and sale of its wire belt, having commenced the manufacture and sale of the same more than two years prior to the issue of plaintiff's patent.

**ACTION** for a declaration that, as between the parties to the action, three patents of invention owned by the plaintiff be declared valid, and to have been infringed by the defendant.

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

*O. M. Biggar, K.C.* and *R. S. Smart, K.C.* for plaintiff.  
*W. F. Chipman, K.C.* and *G. F. Osler* for defendant.

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

THE PRESIDENT, now (May 17, 1939) delivered the following judgment:

In this action the plaintiff asks, *inter alia*, for a declaration that, as between the parties here, three patents of invention issued or assigned to it, pursuant to the Patent Act be declared valid and to have been infringed by the defendant.

The senior patent, No. 234,657, issued in October, 1923, on the application of Hamilton Lindsay, and by him assigned to the plaintiff. This invention relates to a method of joining the ends of a wire fabric to form an endless belt which is particularly useful in Fourdrinier paper machines. The next patent in point of date, No.

259,465, issued in March, 1926, on the application of Hamilton Lindsay, which was by him assigned to the plaintiff. The invention described in this patent relates to the same subject-matter as the one first mentioned. The last and junior patent, No. 332,216, issued in May, 1933, on the application of Hamilton Lindsay and Edward J. Buell, and which patent by assignment is now owned by the plaintiff. This invention relates to woven wire fabric that is used in the manufacture of belts for Fourdrinier paper machines.

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I propose first to consider the junior patent, that is the patent applied for by Lindsay and Buell, and which relates to an alleged improvement in a belt for Fourdrinier paper machines. A Fourdrinier machine is a well known paper making machine. Belts of the kind in question, and as in use to-day, are composed of woven wire cloth of the order of fifty feet and upwards in length, with a width of from seven to twenty-five feet, and are woven as a single piece of cloth of the desired length and width from fine brass or bronze wires of a diameter of the order of ten one-thousandths of an inch, said by one witness to be about three times the diameter of a human hair, but that diameter may vary upwards and downwards. In any event there would be a very considerable number of warp and weft wires per square inch of the woven wire cloth. After the ends are joined together, and placed upon a Fourdrinier machine, the face or upper surface of the wire cloth or belt is used as a conveyor of paper pulp or stock which is fed upon it from a tank during the circuit of the belt, and this paper stock normally contains a considerable proportion of water. At a certain stage the paper stock is transferred upon the wire belt to felts, and then on through various stages of manufacture until the paper is completed. The paper stock before passing to the wire belt consists of very small wood fibres suspended in water and therefore the wire mesh must be very small otherwise the fibres would go through it, and yet the mesh must be large enough to permit of the escape of water. The drainage of water through the belt is accelerated by suction boxes over which the belt travels, the purpose being to draw the water out of the paper stock, through the belt, as it passes over the suction boxes. It is desirable that the paper web be

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formed as evenly as possible and therefore it is important that the surface of the belt should be as even as possible, so that the paper produced shall be constant in its characteristics from side to side and end to end. It is also desirable that the belt be strong because it is subject to great strain and wear while being driven around rollers in its circuit. I might also add that prior to 1920 Fourdrinier wire belts were run at a speed of the order of six hundred feet per minute, but the modern machine is run at a speed of the order of twelve hundred to fifteen hundred feet per minute. The life of a wire belt is comparatively short.

There are two principal weaves of wire cloth. In the first, the plain weave, the warp wire passes over a weft wire and then under a weft wire, and so on, that is, the warp wire passes alternately over and under a weft wire, and this is generally referred to as a one-one, or 1-1, weave. Then there is what is called the twill weave of which there are many varieties. In what is called a one-two, 1-2, twill weave, the warp wire would pass over one weft wire and then under two weft wires, and so on; in a one-three, or 1-3, twill weave the warp wire would pass over one weft wire and then under three weft wires, and so on. It might, of course, be a two-two, 2-2, weave, or something else. Both the plain and twill wire weaves have long been known and practised. It is the one-two twill weave that both the plaintiff and the defendant employ in the weaving of their Fourdrinier belts. This will afford a general description of the construction and purpose of woven wire belts used in the paper making industry.

The improvement claimed to have been invented by the plaintiff's patentees is substantially that of raising the weft wires in a woven wire cloth or belt to approximately the same plane as that of the warp knuckles, by the proper selection of weaves and wire sizes. This, it is claimed, gives a smoother and more even surface to the belt on which the paper stock is to be carried, and a more even surface to the paper itself; this also, it is said, avoids wire markings on the paper, which are liable to occur when the warp knuckle is on a substantially higher plane than the weft knuckle.

It will be useful now to turn to the specification from which we may obtain a more complete description of the invention claimed. The specification states:

This invention relates to woven wire fabric that is used in the manufacture of belts for Fourdrinier machines. The increased width of paper machines and the increased speed at which Fourdrinier belts are operated has necessitated greater tensile strength in the belts. Such development has been gradual, and as a result the meshes of Fourdrinier wires have become more and more rectangular with a greater difference between the warp and weft count per inch, as heavier sizes of wires are incorporated into the web.

This development has continued over a long period of years until at the present time sixty mesh fabric is now commonly made of sixty warp wires to the inch and forty weft wires to the inch. Furthermore, the warp wires having a diameter of .009 inch, while the weft wires have a diameter of .010 inch. This resulted in a mesh opening of .015 inch long and .008 inch wide. Another arrangement which gives equivalent drainage with greater strength and durability utilizes fifty-five warp wires to the inch and thirty-six weft wires to the inch, using a warp wire of .010 inch in diameter and a weft wire of .011 inch in diameter, and providing a mesh opening of .017 inch by .008 inch. A further consideration in paper making belts is that the pulp is supported by the tops of the warp knuckles without adequate support from the weft-wires, except by forming deep depressions in the web of paper. These depressions do not exist on the top side of the sheet so that there is a pronounced difference between the two sides of the sheet. Efforts have been made to eliminate this objectionable feature by rolling the belt or grinding off the knuckles of the fabric, but these processes cannot be accomplished without seriously interfering with the flexibility and durability of the belt.

It will be observed that the patentees refer to the tops of the warp knuckles causing depressions in the web of paper and that this was sought to be eliminated by rolling the belt, or grinding off the knuckles, but this they say could not be done without seriously affecting the flexibility and durability of the belt. The specification proceeds:

We propose to eliminate the objections inherent in the projecting warp knuckles by raising a crimp on the weft knuckles, so as to bring the top of the weft knuckles substantially in a plane with the top of the warp knuckles, and we propose to accomplish this during the weaving operation by the proper selection of weaves and wire sizes. This effectively reduces the depth of the wire marks and enables the smaller depressions to be more easily smoothed out on the presses of the paper machine. This method is well adapted for the use of a twill weave wherein the short knuckles are disposed on the top of the cloth and the long knuckles are disposed on the bottom of the cloth. Furthermore, this method enables me to reverse the tendency toward more rectangular meshes, and to make the mesh opening more nearly square, and still use the multiple or twill weave.

The high rate of speed at which Fourdrinier machines are operated at the present time also increases the difficulty of the belt to hold the

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pulp, for the belt has a tendency to creep with reference to the pulp. It is an object of our invention therefore to so weave the fabric that the warp wires are spaced farther apart, thus allowing more room for the weft knuckles and permitting the weft knuckles to be raised above their previous position. This, in effect, provides a series of steps which extend across the belt and thereby serve to keep the pulp more securely in contact with the belt while the sheet is being formed. We have found that this operation can be satisfactorily accomplished if the top of the weft knuckles lie substantially in the plane of the top of the warp knuckles.

\* \* \*

We have found that satisfactory results can be obtained if a fabric embodying our invention is made by using a warp wire of .010 inch in diameter and a weft wire of .009 inch in diameter, with 55 warp wires and 50 weft wires to the inch. This arrangement is satisfactory in twill weaves to replace a sixty by forty mesh fabric having a plane weave.

Apart from the advantages of greater durability and less wire marks, which are obtained with this arrangement, we have found that the twill weave can now be used for the manufacture of fine grades of paper, whereas heretofore they have been limited to the manufacture of relatively coarse paper. This result follows by reason of the fact that the weaving provides a relatively square mesh, which will not lose so much fine stock during the formation of the web. Furthermore, a twill weave provides a longer life for a belt when used in the manufacture of fine papers.

Then the specification further states:

. . . . the size of wires should be chosen to make the top of the weft knuckles lie in substantially the same plane as the top of the warp knuckles.

While we have used the phrase "the tops of the weft knuckles and the tops of the warp knuckles lie substantially in the same plane" it is to be understood that if desired, the plane of the tops of the weft knuckles may be disposed somewhat higher or lower than the plane of the tops of the warp knuckles and still be within the spirit of our invention. We believe however, that in order to minimize the two sidedness of a sheet, the plane of the tops of the weft knuckles should not be disposed out of the plane of the tops of the warp knuckles, in the finished cloth a distance that exceeds half the normal diameter of the warp wire.

Claims 1 to 7 of this patent which are said to be infringed would appear to cover any twill weave wherein the weft knuckles are raised, in the weaving, substantially to the plane of the warp knuckles. Claim 3 is typical and is as follows:

3. A Fourdrinier paper making wire fabric having warp wires and weft wires woven into a twill weave, wherein the warp wires have long knuckles and short knuckles, and the warp and weft wires being so positioned with reference to each other during the weaving operation that the tops of the weft knuckles and warp knuckles lie substantially in a common plane.

It will be seen from the specification that the plaintiff's manufacture of a wire belt for a Fourdrinier machine is

of the one-two twill weave, wherein the short knuckles are disposed on the top of the cloth and the long knuckles are disposed on the bottom of the cloth, and that the warp and weft wires are so positioned with reference to each other during the weaving operation that the tops of the weft knuckles and warp knuckles lie substantially in a common plane. This it is stated serves to keep the pulp more securely in contact with the belt while the paper web is being formed, to reduce the depth of the wire marks, and to enable the smaller depressions to be more easily smoothed out on the presses of the paper machine.

The defendant's case is (1) that the plaintiff's patent is void for want of subject-matter and that in view of the state of the art it was not invention to do what the patent discloses; (2) that any invention therein had been disclosed in prior publications; (3) that the plaintiff itself made public any invention disclosed in the patent by the manufacture and sale of woven wire belts substantially as described in the patent in suit, more than two years before the date of the application for the said patent; (4) that the defendant had manufactured and sold, more than two years prior to the date of the application for the plaintiff's patent, precisely the same manufacture of woven wire belts as that which is here said to infringe the plaintiff's wire belt; and (5) that under s. 50 of the 1927 Patent Act, even if there were infringement, the defendant is entitled to continue to manufacture and sell its wire belt, having commenced the manufacture and sale of the same before the issue of the plaintiff's patent.

The wire belts first manufactured by the plaintiff were of a plain weave. In 1921, it experimented with a variety of twill weaves and ultimately made a selection of a one-two twill weave, and it commenced producing such a twill woven wire belt, to which it gave the name "long crimp." It found that this weave of wire belt gave a relatively uniform surface and was much stronger than that of the plain weave. Mr. Buell, then in the service of the plaintiff company, and a joint inventor with Lindsay of the patent under discussion, thought this twill weave an important forward step and he and his associates then believed that they were the first to develop and use it. In due course Lindsay or Buell, or both, applied for a patent in the United States for the long crimp wire belt,

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but the application was refused by reason of a patent granted to Kufferath, a German, in 1899. The applicant or applicants submitted to the ruling of the United States Patent Office, but it would appear that the plaintiff continued to manufacture its long crimp wire belt. It will be desirable now to examine the Kufferath patent, because it is admitted that this patent disclosed and described the plaintiff's long crimp wire belt.

The United States patent to Kufferath, No. 617,581, states that the invention related to a woven fabric adapted especially to the wire fabrics used in the paper-making art to carry the films of stock or pulp. The specification states:

The fabric is constructed with the warp-threads *a* woven with the weft-threads *b* in such a way that (referring to the top of the fabric, as in Fig. 1) the warp-threads *a* pass under two of the weft-threads *b*, then up over one of the weft-threads, and then down under two of the weft-threads, and so on throughout the fabric. This causes the weft-threads to be passed under one of the warp-threads, then over two, then under one, and so on throughout the fabric. The bottom of the fabric has a reversed appearance, as may be seen in fig. 2. Here the warp-threads are passed under one of the weft-threads, then over two, then under one, and so on, and the weft-threads are passed under two of the warp-threads, over one, under two, and so on. The result of this construction is that the bottom of the fabric (see fig. 2) presents to the rolls and drums on which the fabric runs more of the warp-threads than of the weft-threads and also greater lengths of the warp-threads without the usual number of sharp bends in the warp. This renders the fabric more durable in that the action of the rolls on the fabric does not wear away the warp-threads so quickly. The top surface of the fabric presents a uniform and regular surface to the paper-stock, and thus avoids marking the final products of the paper-making machine.

If desired, the durability of the fabric may be further increased by using warp-threads of greater thickness than those of the weft. This is so because the warp-threads are principally exposed to the rolls of the paper-making machine, and, being of increased thickness, will of course tend to prolong the life of the fabric.

The two claims might as well be mentioned and they are as follows:

1. A fabric having warp and weft-threads, the warp-threads of which are passed, with respect to the top of the fabric, over one weft-thread and under two of the contiguous weft-threads, and so on uniformly throughout the fabric.

2. A fabric having warp and weft threads, the threads of one of said sets of threads being passed over one thread of the other set and under two of the contiguous threads of said other set, and so on uniformly throughout the fabric.

Kufferath therefore shows such a twill weave that "the top surface of the fabric presents a uniform surface to



the paper stock, and thus avoids marking the final product of the paper-making machine," which must mean that the tops of the warp and weft knuckles were to be substantially on a plane, and though that is not in terms mentioned, it is obvious that this was one of the objects of Kufferath's weave, because the uniform surface of the belt would tend to give a uniform surface to the paper. The specification also points out that in this twill weave the bottom of the fabric presents to the rolls and drums on which the fabric runs more of the warp-threads than of the weft-threads and also greater lengths of the warp-threads without the usual number of sharp bends in the warp, and that this makes the fabric more durable in that the action of the rolls on the fabric does not wear away the warp threads so quickly. It is conceded that Kufferath was a complete anticipation of the plaintiff's long crimp wire belt, and one of the points arising for decision is whether there is any inventive step in Lindsay's and Buell's "modified long crimp" wire belt, the subject-matter of the patent in suit, over the plaintiff's own long crimp wire, which it produced and sold more than two years before the application of Lindsay and Buell for the patent under discussion.

Sometime in 1929, after the economic depression had set in, the consumption of newsprint markedly decreased, and, it was stated, that purchasers of newsprint began to complain severely about wire markings on that class of paper. For example, it was stated, that the Hearst Press instructed the paper mills from whom they purchased newsprint that they should no longer use long crimp wire belts, if their patronage were longer desired. I was told that protests of this character were regarded as serious because in the newsprint business the market had become a buyer's market, whereas for some years prior to 1929 it was a producer's market and newsprint purchasers were obliged to accept the quality of newsprint which the mills offered for sale. This situation was calculated to affect the position of the manufacturers of wire belts which were sold to paper mills. To meet the complaints of newspaper publishers Mr. Buell testified that the plaintiff tried several expedients to overcome such complaints but without success. Then suddenly, he stated, the realization came to Lindsay and himself that, as the wire markings on the

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sheet of paper were due to the difference in elevation between the warp knuckles and the forming surface of the belt, the forming surface being the basis of support upon which the paper sheet was formed and which if irregular or uneven would cause wire markings to appear on the paper, the problem would be solved if this difference in elevation were corrected and the weft knuckle elevated to or near the plane of the warp knuckle. Elevating the weft knuckles, in the process of manufacturing a wire belt, it was conceded by Mr. Buell, involved no difficulty once it was decided to so manufacture a wire belt.

Now, that is what is claimed as invention by the plaintiff. It is that type of twill weave wire which is described in the patent under discussion and which the plaintiff manufactures, and to which it gave the name "modified long crimp," and which it is alleged the defendant is infringing. Soon, it is claimed, the modified long crimp wire belt became the standard Fourdrinier belt for paper mills, that would be between 1931 and 1934. Mr. Buell admitted that from the standpoint of wear, rigidity and ruggedness, there was no material distinction between the plaintiff's "long crimp" belt and the "modified long crimp" belt, in fact he stated that so far as resistance to damage was concerned the old long crimp wire was superior to the modified long crimp wire, and that was why it was still being used in kraft paper mills. In the modified long crimp wire belt, lighter weft wires are used, that is, the diameter is less than the warp wires, which obviously would tend to assist in the elevation of the weft knuckles, but the primary difference between the modified and the unmodified long crimp wire, Mr. Buell stated, was the high weft knuckles, which as the patent states reduces the depth of the wire marks and enables the smaller depressions to be more easily smoothed out on the presses of the paper machines. To raise the weft knuckles the patentees select certain wire sizes and certain weft counts, the warp wires are all spaced farther apart thus allowing more room for the weft knuckles and permitting the weft knuckles to be raised above their previous position. Whatever be the distinction between the plaintiff's long crimp wire and its modified long crimp wire the plaintiff claims it to be an invention, that it has been widely adopted, and that it affords subject-matter for a patent. Before proceed-

ing to pronounce any opinion upon the question of subject-matter in respect of the patent in question it will be convenient, I think, to look at the grounds put forward by the defendant in answer to the charge of infringement, and which will at the same time reveal the grounds of attack against the validity of the plaintiff's patent.

An important defence advanced against the charge of infringement is that the defendant's wire belt, the belt alleged to infringe, has been manufactured by it since more than two years prior to the date of the application of the plaintiff's patent, and that the same weave of wire belt was manufactured by another in Manchester, England, many years before that. Charles Johnson, the president of the defendant company, before coming to Canada in 1901, became associated in 1889, in some capacity, with his father's business, now C. H. Johnson & Sons Ltd., of Manchester, England, which company, and its predecessors, have been manufacturing woven wire cloth since 1790, and had in 1804, as I understand the evidence, begun manufacturing plain weave wire cloth for use in Fourdrinier paper machines. This company's business had been conducted earlier in the form of partnerships, one of which was that of Johnson & Rowcliffe, the Johnson of the said partnership being the father of Charles Johnson. During all the time that Charles Johnson was associated with his father's business it had been weaving twill wire cloth, though not solely, and in that weave it was the practice to use a soft weft wire for the purpose of having the weft wire rise to the surface of the finished cloth. In weaving, the warp wire normally exerts an upward pressure on the weft wire, and in the process of weaving there is what is called "beating," which exerts a force calculated to elevate the weft wire, and this practice the Manchester concern followed. The object in having the weft wire rise to the surface of the finished cloth, Charles Johnson stated, was to have the wet paper sheet bear evenly on, and be supported by, both the warp and weft knuckles right across the Fourdrinier wire, which would avoid depressions in the sheet, and marks from the knuckles, thus giving a smooth top surface to the paper formed on the belt. The weft wire used by the Manchester concern was always softer than the warp wire so that the weft wire might the more easily rise to the plane

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of the warp wire, but the warp and weft wires were usually of the same diameter. During the weaving of this twill wire cloth it was being constantly examined by a magnifying glass to see if the weft wire were being raised to the desired plane, and this examination, Charles Johnson stated, usually revealed that the weft wire did rise to, or nearly to, the face of the wire cloth. In the plaintiff's specification it is stated that the weft knuckles may be disposed somewhat higher or lower than the plane of the tops of the warp knuckles and still be within the spirit of the invention there claimed. The evidence of Mr. Johnson was confirmed by that of Mr. Fish who has been in the employ of the Manchester company since 1891, as a wire weaver.

When Charles Johnson entered his father's business in 1889, twill weave wire cloth had been woven for many years prior to that, and this particular weave was known as "Patent Twill," which was attributable to the fact that it was made according to the disclosure of a British patent issued to one Rowcliffe in 1869, Rowcliffe being one of the members of the partnership of Johnson & Rowcliffe, which I have earlier mentioned. I must refer to that patent briefly because, I think, it supports the evidence of Charles Johnson as to the manufacture of twill woven cloth in his time, in Manchester. The patentee points out as one part of his invention that the weft wire is to be much softer than the warp, "in order that the weft may more easily rise to the face of the wire cloth," and he explains his mechanism and its operation for producing such a woven wire product, and what he claimed as his invention was "improvements in the manufacture of wire cloth for paper making machines, the various improved modes of weaving the same so as to produce twilled, fancy, or basket patterns in the manner *and for the purposes described.*" Now one of the objects of Rowcliffe was to raise the weft wire to the face of the cloth, and it was for that reason that a soft weft wire was used, the purpose no doubt being to give a more uniform surface to the paper being formed. I think it may be accepted that at the time of the invention of Rowcliffe it was known by wire weavers that the warp knuckle normally protruded above the face of the cloth. We do know from the evidence of Charles Johnson and Fish that the method

of weave disclosed by Rowcliffe was followed in the time of each in the mill at Manchester; they both testified that the twill woven wire was then manufactured so as to raise the weft wire to practically the same plane as the warp wire, so that the paper would bear evenly on the warp and weft knuckles of the wires, which, they stated, was then known to avoid wire markings on the paper. I think it is clear upon the evidence that the Manchester concern was aware for many years of the fact that an even surface on the woven wire cloth was desirable, and that this was calculated to give an even surface to the paper. At any rate the Manchester concern for many years manufactured twilled wire cloth for Fourdrinier paper machines, according to Rowcliffe, and in that manufacture the weft wire was raised and was known to raise to the face of the wire cloth. And that practice was followed by the defendant company in Canada.

In 1901 Charles Johnson came to Canada to engage in the manufacture of woven wire cloth, bringing with him looms and workmen, and he soon commenced manufacturing wire cloth, of a plain weave, in Montreal. In February, 1922, he concluded to manufacture a twill weave Fourdrinier wire, just as had been made in Manchester by his father's concern, and he had the Manchester company ship him the necessary equipment off one of its looms, to equip one of his own looms for the weaving of twill woven wire cloth. The equipment arrived in due course but was not set up until 1928. The first twill woven wire the defendant sold in Canada was in 1929, to the Dryden Paper Company, but this was manufactured by the Manchester concern. In March, 1929, the defendant sold a twill woven wire belt made on its own loom, with the Manchester equipment, and it has been manufacturing twill woven wire cloth since that date, and the defendant has used no other weaving equipment than that received from Manchester. It uses as soft a weft wire as is possible to use, and for the purpose of raising the weft wire to or near the plane of the warp wire so as to give an even surface to the wire cloth.

I am satisfied that the twill woven wire belts manufactured and sold by the defendant are produced on a loom fitted with the Manchester equipment, which is adapted to produce a twill woven wire belt substantially

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according to the Rowcliffe patent, and as manufactured by the Johnson concern at Manchester for many years prior to Lindsay and Buell. And the defendant company, I am satisfied, now manufactures twill woven wire belts in the same way. There is no reason for doubting the evidence of Charles Johnson, or his son, or Fish of Manchester, upon this point, and I unreservedly accept their evidence.

Now, is there invention in Lindsay and Buell? I think not. It must have been always obvious to all engaged in the manufacture of wire belts for Fourdrinier paper machines that it was desirable that the upper surface of the wire belt should be as uniform as possible, particularly when used in the production of newsprint or fine paper. The conception of weaving a twill wire cloth so that the top of the weft knuckles should lie substantially in the plane of the top of the warp knuckles was not an original one with Hamilton and Buell, and could hardly constitute invention in 1931, the date of their application. Rowcliffe had that in mind as one of the objects of his invention back in 1869, and for that purpose and none other he suggested the use of a weft wire that was softer than the warp wire, and the Johnson concern of Manchester apparently followed that form of twill weave with a soft weft wire, for half a century. That was what Kufferath impliedly disclosed in 1899, and Mr. Buell in terms admitted that Kufferath and the plaintiff's long crimp wire were one and the same thing, so that the plaintiff's long crimp wire must have given a relatively uniform top surface, by having the warp and weft wires lying substantially in a common plane. Mr. Buell stated that the fundamental difference between the plaintiff's long crimp wire and its modified long crimp wire was in the "high weft knuckles," and, I assume, by that it was meant that in the latter the weft knuckles were higher than in the plain weave, or higher than in the plaintiff's long crimp wire; it would not be correct to say that in Lindsay and Buell the weft knuckles were higher than the warp knuckles, because the patent itself states that the knuckles of the warp and weft wires are to be on the same plane, and it also states that the knuckles of the weft wires may be on a lower plane than the knuckles of the warp wire, and still be within the spirit

of the invention. The conception of Lindsay and Buell was that the weft wire should be high enough to give such adequate support to the pulp that would avoid depressions in the web of paper, and also avoid wire markings, but that was not an original conception. Strength, durability and flexibility, adequate drainage, and an even surface, are no doubt desirable characteristics in a Four-driner wire belt, but surely that is open to anybody to attain and to practise, if desired. To vary the size, count or spacing of wires, the precise height of the weft knuckles in relation to the warp knuckles, or the formation of the mesh, cannot, I think, constitute invention, when once it is known how to weave a twill wire belt that generally meets the requirements for which it was made. Small variations from, or slight modifications of, the current standards of construction, in an old art, rarely are indicative of invention; they are usually obvious improvements resulting from experience, and the changing requirements of users. If the complaints of newspaper publishers, after 1929, in respect of wire markings are to be accepted—and probably they were very much exaggerated—the solution of that problem was already known, that is, by weaving the top knuckles of the warp and weft wires substantially in a common plane, just as the defendant had been doing, and whose wire belt is now said to infringe Lindsay & Buell. Even if in Lindsay and Buell's modified long crimp wire the warp and weft knuckles were nearer on a common plane than they were in the plaintiff's long crimp wire that surely cannot constitute invention, when it was known that the nearer the warp and weft knuckles were on the same plane the more even would be the surface of the wire, and the paper, and it is admitted that it was well known how to weave such a wire, if one determined upon doing so. If Lindsay and Buell discloses some modification of the plaintiff's long crimp wire, or the Manchester wire, it is but a slight modification and not invention. It should be open to all those who manufacture wire cloth or belts to make such minor improvements and modifications in their product as experience suggests from time to time, and as their customers' requirements demand.

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I think therefore the plaintiff's action in respect of this patent must fail (1) because there is no invention in anything disclosed in the patent, (2) because it discloses no inventive step over the plaintiff's long crimp wire, and (3) because the defendant was making the wire belt which it is now said to infringe since 1929, more than two years before the application was made for the patent in question. In any event the defendant is protected by s. 50 of the Patent Act of 1927. There can be no infringement on the part of the defendant in making the same weave of wire belt which it began to make in 1929, and which form of weave had been followed by the Johnson Company of Manchester for a long number of years.

I now turn to the other two patents, numbered 234,657 and 259,463 respectively, both of which relate to methods of joining the ends of a woven wire belt, having a special weave, to form an endless belt, particularly for use in Fourdrinier paper machines. Those two patents are referred to as seam patents, the seam being formed where the two ends of the wire belt are joined, and which operation is performed manually.

The essential features of a seam are that it be strong, that the wire threads employed in seaming, called stitching and closing threads, be so laced into the wire belt so as not to pull out the last weft thread which under tension is readily displaced, that it does not cause any unevenness in the belt surface or wire markings on the paper, and that the holes through which the stitching and closing wires are passed, are so chosen as not to interfere unduly with the water drainage from the wet pulp as it is carried over the belt.

Patent No. 234,657 suggests first the use of stitching wires between every third warp wire and over the fourth weft wire from each end, with one closing wire through loops formed by the stitching wires, as shown in figs. 1 to 4 inclusive, and secondly, the same stitching wire as shown in figs. 1 to 4 with two closing wires, one through the loops and one through and over the second weft wire. One of the objects of the stitching wires is to fashion or anchor the last weft wires in the ends of the belts, the stitching wires being in loop form, through which the closing wire is passed, and which finally unite the ends of the belt.



Claims 1, 2 and 3 of this patent are said to be infringed by the defendant and claim 3 might be mentioned:

A seam for an endless belt wherein the weave comprises warp wires and lay wires, the warp wires having long knuckles on one side of the belt and short knuckles on the other side thereof, having a seam wire extending over a lay wire and intermediate two warp wires, one of the warp wires having a short knuckle over said lay wire and the other of said warp wires having a short knuckle over the adjacent lay wire.

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Patent No. 259,463 is a reissue of patent No. 234,658, the drawings being the same as those in the original patent, but one new paragraph is added in the specification, and claims 13, 14, 15 and 16 have been added, which are the claims alleged to be infringed by the defendant. In this patent, as shown by figs. 1 to 4, there are two stitching wires, one between every group of three warp wires and over the third weft wire, and around the end weft wire, the other between another group of three warp wires, over the second weft wire and around the end weft wire; then, as shown by figs. 5 and 6, there is a closing wire going through every loop made by the stitching wires, just as I have already explained. The claims sued on however, do refer to one single wire for closing with means for holding the end weft wires in position.

These two patents may be discussed together. It is obvious that the ends of a woven wire belt, in order to form an endless belt, have to be joined together in some way, and that the seam should so far as possible possess the requirements which I have already mentioned. It was obvious that the seaming would not be effective if the stitching and closing wires were merely tied to the end weft wires of the belt because, under any tension, they would be pulled out of the weave. Therefore the stitching threads would have to be positioned at some other points farther back in the weave than the last weft wires, but near to the ends of the belt, and in this way anchor the last weft wires into the weave, and this was for a long time the general practice. The seaming, by stitching and closing wires, was always more or less troublesome and now that practice has been abandoned and the ends of the warp wires are now welded together. The principle disclosed in the plaintiff's seam patents for joining the ends of a woven wire cloth was long in practice, with variations

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from time to time, as experience, and trial and error, would suggest or dictate. Wire belt manufacturers were constantly seeking improved methods in seaming, and in practically the same way. Mr. Buell, of the plaintiff company, stated that it was by numerous experiments, and by trial and error, old methods were gradually improved, and he told of how his company went from the stitching seam to the partly stitched or soldered seam, in which the last weft wire was soldered to the warp wire to get rid of some of the stitching wires at the warp ends. Mr. Buell stated that the holes chosen for the seaming would differ with the kind of weave in the wire cloth. Now, the method of stitching together the ends of a wire belt employed by the Johnson Company of Manchester, for many years prior to Lindsay, was in principle the same as that described in the plaintiff's patents. I do not mean to say they used precisely the same holes in the wire cloth, for stitching purposes, as those patents suggest, but, in my opinion, there is no patentable distinction between them.

The art of joining the two ends of a woven wire cloth by wire stitching was quite old. I think it is hardly arguable that there is subject-matter in the plaintiff's seam patents. No step is disclosed there which could be described as invention. There is not, in my opinion, that distinction between what was known before, and that disclosed by Lindsay, that called for that degree of ingenuity requisite to support a patent. If those patents could be supported it would seriously impede all improvements in the practical application of common knowledge. I therefore find that the plaintiff's seaming patents lack subject-matter, and consequently there can be no infringement. Having found that the two seam patents lack subject-matter, and that there is no infringement, it is unnecessary to discuss the matter of the validity of the reissued patent.

The plaintiff's action is therefore dismissed and with costs.

*Judgment accordingly.*

BETWEEN :

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June 12.  
—  
June 23.  
—

SAMSON-UNITED OF CANADA, }  
LIMITED, AND SAMSON-UNITED } PLAINTIFFS;  
CORPORATION ..... }

AND

CANADIAN TIRE CORPORA- }  
TION, LIMITED ..... } DEFENDANT.

*Patent—Infringement action—Invention—Subject-matter—Prior art—  
Equivalency—Substitution of one material for another may be inven-  
tion.*

The action is one for infringement of a patent owned by Samson-United Corporation. The invention claimed relates to improvements in a fan. Claim 3 is typical of the claims in suit and reads:

“3. A fan comprising a hub with radially projecting blades, formed of material sufficiently flexible to bend readily without permanent distortion, the inner end portions of said blades being maintained sufficiently rigid by said hub and of a configuration to increase the resistance of said blades to axial thrusts without materially increasing their resistance to deformation upon encountering an object in their path of rotation.”

The Court found that the whole idea of means and method in defendant's fan is the same as plaintiffs' and small variations in structure adopted by the defendant are plainly the equivalent of that found in the plaintiffs' fan.

*Held:* That there is invention disclosed in plaintiffs' patent and the same has been infringed by the defendant.

2. That the use of one material in lieu of another, in the formation of a manufacture, may be the subject of a patent, if such substitution involves a new mode of construction, or develops new uses and properties of the article formed, or there is some new and useful result.

ACTION to have it declared that, as between the parties, patent for invention No. 370,548 is valid and has been infringed by defendant.

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

*Maurice Crabtree, K.C.* and *E. G. Gowling* for plaintiffs.  
*W. L. Scott, K.C.* and *Cuthbert Scott* for defendant.

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

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THE PRESIDENT, now (June 23, 1939) delivered the following judgment:

This is an action for infringement of letters patent, No. 370,548, granted to the second named plaintiff, the assignee of one, Samuels, the applicant, on December 14, 1937, the filing of the application having been made in September, 1936. By agreement the first named plaintiff is the exclusive licensee under the said letters patent. The invention claimed relates to improvements in a "Fan."

The objects of the invention are set forth in the following paragraphs of the specification:—

In electric and other fans as ordinarily employed in localities such as the house and the office, the blades provided are formed of unyieldingly rigid material or other rigid material which will not yield if any object is intruded into the path of such blade, but will cut or destroy such object. The fingers of persons in the room are often seriously injured by such accidents and important papers are often destroyed when encountering the fan blade. The guard screen conventionally provided about the fan blades often proves inadequate to prevent such accidents. My invention provides a fan and a blade therefor wherein the blade yields when an object is intruded into the blade path, and such object is deviated from the blade path without injury. Such structure dispenses with the necessity for the guard screen.

This invention relates to fans for producing air currents and has for its principal object to provide such a fan with flexible fan blades of suitable material and shape to give the blades stability for an efficient operation of the fan combined with sufficient flexibility to cause any portion of the moving blades to yield when a stationary rigid or semi-rigid member is brought in contact with them, and to be self-restoring to normal position when the intruded member is withdrawn.

Another object of this invention is to so construct and mount the blades of the fan that a temporary deflection of a portion of the fan blades will not prevent the fan from operating to produce a movement of air.

A further object of this invention is to construct the fan with flexible material which may have suitable ballast incorporated therein to properly balance the fan blades and provide a steady operation of the fan.

A further object of this invention is to provide the fan blades with novel fastening means and a novel mode of mounting to provide for a quick and efficient attachment of the blades to the rotating member in a normally radial position thereto.

A still further object of my invention is to provide a fan which is almost entirely noiseless in operation.

Samuels, and its construction, is concisely described in the American case of *Samson-United Corporation v. Sears, Roebuck & Co.* (1), which description I shall substantially

follow. The peculiar characteristics of the patented fan are imparted to it by the use of flexible blades, preferably rubber blades, mounted on a rotating motor-housing or casing which serves as a hollow hub for the fan, so that the fan has the capacity of producing air currents when in motion, it is free from danger to objects intruded into the path of the fan blades when in motion, and it is almost entirely noiseless when in operation. These features are obtained by employing flexible blades which when cupped by insertion into arcuate or bow shaped grooves in the hub, are sufficiently rigid to withstand the axial thrust required for rotation against air to displace the air in such volume and with such speed as to give satisfactory service. The blades are resilient enough to return to normal shape when relieved from the effect of any distorting force, and at the same time are so pliable that they will yield to rigid objects, such as a hand or finger, which might accidentally come into contact with them in operation without any injurious results, thus eliminating the necessity of any guard to protect the fan. Another important feature in the construction of Samuels is a rib at the base of each blade which extends outwardly from the plane of the blade on each side to overlap the inner edges of the sides of the slots in the hollow hub into which the blades are inserted, so as to hold the blades immovable by centrifugal force when the fan is in motion.

The claims relied on by the plaintiffs are 1 to 8 inclusive and claims 15 and 18. The following of the claims relied upon may be recited:

1. A fan comprising a hub with radially projecting blades carried thereby, said blades being formed at their outer portions of material sufficiently flexible to bend readily without permanent distortion, and the inner end portions of said blades being of a construction and configuration such that said blades are sufficiently rigid to maintain a substantially radial position at all times.

2. A fan comprising a hub with radially projecting blades carried thereby, said blades being formed at their outer portions of material sufficiently flexible to bend readily without permanent distortion, and the inner end portions of said blades being of an obliquely curved configuration and a construction such that said blades are sufficiently rigid to maintain an effective pitch angle upon rotation.

8. In a fan, a hub having slots therein and a plurality of flexible blades having portions thereof fitted into said slots, said blades being sufficiently resilient to be self-restoring upon striking an object and of sufficient rigidity when assembled on said hub to substantially maintain their pitch angle.

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15. A fan comprising a hub with radially projecting blades carried thereby, said blades being formed of material sufficiently flexible to bend readily without permanent distortion, the inner end portions of said blades being of a construction and configuration such that said blades are sufficiently rigid to substantially maintain their pitch angle upon rotation, and said blades being relatively wide with respect to their radial dimension.

18. A fan comprising a hub with radially projecting blades carried thereby, said blades being formed of a material sufficiently flexible to bend readily upon striking an object without permanent distortion, the inner end portions of said blades being of a construction and configuration such that said blades are sufficiently rigid to maintain an effective pitch angle at all times.

In the offending fan the blades are made of rubber or some such flexible material, and may be visualized as being circular in shape with a small section cut out of them in arcuate form, that is, in the form of a bow. At the base of the blade, from where the arcuate section has been removed, a metal band or strip, also arcuate in shape so as to follow the contour of the hub, is inserted manually or during its moulding, which, when attached to the hub, has the effect of cupping the blade. There is no arcuate slot in the defendant's hollow hub, as in Samuels, into which the blade is inserted and held, but two holes are provided in the hub for each blade, and into these holes are inserted pins which are formed upon the metal ribs and near their ends, and which serve as a locking device for attaching the blades to the hub. This locking device is so positioned and employed as to maintain the arcuate form of the metal rib when attached to the hub the contour of which it follows, and this results in cupping the blades in the necessary degree. Looking at the defendant's hub and blades from the outside the fastening means have every appearance of being the same as that of the plaintiffs, that is, that the blades are held in arcuate slots in the hub. However, in the defendant's fan the desired curvature is given to the blades by the arcuate rib in the base of the blade when attached to the hub by the locking means described, that is, the pins in the metal rib and the holes in the hub. I am quite satisfied that if there is invention in Samuels the same is infringed by the defendant's construction. The whole idea of means and method is the same as Samuels, and infringement could not be avoided by the small variations in structure adopted by the defendant, which are plainly the equivalent of that to be found in Samuels.

Ordinarily, the use of one material instead of another in constructing a known machine is in most cases so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention unless some new and useful result—an increase of efficiency, or a decided saving in the operation—is clearly attained. The material of which the parts of an invention are composed are not often essential to its identity, except in compositions of matter. But it is possible that the use of one material in lieu of another, in the formation of a manufacture, may be the subject of a patent. If such substitution involves a new mode of construction, or develops new uses and properties of the article formed, it may amount to invention. Where there is some new and useful result, where a machine has acquired new functions and useful properties, it may be patentable as an invention, though the only substantial change made in the machine has been supplanting one of its materials by another. Robinson on Patents at page 302 states, I think, the true principle to be applied in such cases. He says: "In manufactures and machines, any material capable of receiving and retaining the forms of their essential parts is usually sufficient for the performance of their functions, and the expression of their idea of means. A change in such materials may effect the durability of the instrument, or the perfection with which it produces its results, but these attributes relate to the form of embodiment alone, not to the essence of the invention. Yet if diversity of the material employed requires a new mode of construction, or develops new capacities in the invention, as indicated either in the instrument itself or its effects, the change is one of substance and produces an improvement or a new invention."

The use of rubber or any other flexible material for fan blades inevitably required a mode of construction different from that where the blades were formed of a rigid metal, and the whole construction disclosed by Samuels is, I think, quite novel and ingenious. The flat flexible rubber blades had to be cupped or formed at the proper curvature to cause an efficient displacement of air, and that, I think, required a novel construction and fastening means not to be found in the conventional metal-bladed fan, or in the prior art. Then, the blades

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are capable of yielding to any object coming into their path, such as one's hand or finger, and thus the use of the conventional guard screen is eliminated. Samuels has come into substantial use, and it particularly has been widely adopted for defrosting the wind shields of automobiles, and in that field it has practically supplanted the old metal-bladed fans which had to be supplied with guards. Thus, Samuels required a new construction, and developed new capacities. Its functions are performed by means which possess novelty and utility. It is my opinion that the fan disclosed by Samuels is one of substance and is a new invention.

A great many citations of prior art were pleaded by the defendant, but none of them, I think, is here relevant or calls for any discussion. As has been many times stated the patented article must be as fully described in the prior art as it is described in the patent under attack, and that cannot be said of the prior art cited on behalf of the defendant.

My conclusion is that there is subject-matter in Samuels and that there has been infringement. The plaintiffs therefore succeed and with costs.

*Judgment accordingly*

BETWEEN:

1939  
June 13.  
June 22.

NATIONAL ELECTRIC PRODUCTS } PLAINTIFF;  
CORPORATION .....

AND

INDUSTRIAL ELECTRIC PROD- } DEFENDANT.  
UCTS LIMITED .....

*Patent—Infringement action—Combination patent—Lack of novelty—Subject-matter—Equivalency.*

The action is one for infringement of a patent. The invention relates to improvements in the construction of electric conductors having a flexible metallic outer sheath or jacket, commonly known as armored cables or conductors. The Court found that the patent sued upon lacked subject-matter.



*Held:* That, though the device used by the patentee may be simpler and more convenient than those previously known and used for the same purpose, it is only an equivalent of a well known device and it did not require invention to place it in the combination, and it performs the same function in the patentee's combination as in previous combinations.

2. That in combination patents the invention must be found in the combination and not in the parts unless claimed.

ACTION by plaintiff to have it declared that, as between the parties, patent for invention No. 288,480 is valid, and has been infringed by the defendant.

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

*O. M. Biggar, K.C. and M. B. Gordon for plaintiff.*  
*E. G. Gowling and G. F. Henderson for defendant.*

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

THE PRESIDENT, now (June 22, 1939) delivered the following judgment:

This is an action for infringement of patent No. 288,480, granted to the plaintiff, a corporation having its chief office in Pittsburg, Pennsylvania, U.S.A., in April, 1929, on the application of Otto A. Frederickson, the plaintiff's assignor, and the title given to the invention is "Improvements in Armored Electric Cables."

The invention relates to improvements in the construction of electric conductors having a flexible metallic outer sheath or jacket, commonly known as armored cables or conductors. Hitherto, it is said by Frederickson, cables of this general character ordinarily consisted of two or more insulated conductors enclosed in an interlocked covering of insulated material, such as braided or woven fabric, and about which a spirally wound metallic sheath was placed, but armored cables of such construction, it is said, were open to many objections.

In the installation of such armored cables as heretofore made the outer metallic sheath is cut off with a hack saw, or other tool, some distance from the end of the enclosed conductors, in order to make attachments of the conductors to electric fixtures, and in this operation, it is said, the workman was liable to injure the insulation on the

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conductor wires, and in any event the cut end portion of the metallic sheath would present burrs or sharp edges which would be liable to cut into the insulation, and thereby form short circuits. It is also claimed that metal slivers are sometimes formed upon the edges of the spirally wound strips of the armor and which are liable to work through the braided or woven fabric covering surrounding the conductors, and thus short circuit the conductors. Then, after cutting the metallic sheath in making electric connections, it is necessary to remove with a knife or other sharp instrument a short section of the braided or woven covering, between the exposed portion of the conductors and the end of the metallic sheath, and, it is said, this operation would be carried out at the risk of injuring the insulation upon the conductor wires, thus increasing the danger of short circuits. Such were the principal objections raised to this construction of electric cables.

Frederickson claims to have overcome these and other objections by his invention. In place of the braided or woven covering around the insulated conductors he proposes that there be wound spirally two fibrous strips of an insulating nature, such as strips of thin flexible paper that crumpled transversely into a soft round strand; the spiral coils of the strips are preferably laid closely together so that their edges overlap one another so as to form a smooth tight joint, which, it is claimed, makes it practically impossible for the metal slivers, of which I have spoken, entering the closed joints of this covering. Further, it is claimed, this covering fits snugly within the armored sheath, so as to prevent any sliding movement of the covered conductors within the armored sheath, thus preventing any chafing of the covering against the inner walls of the metal sheath. This spirally wound covering may be easily removed from the conductors by an unwinding action and this avoids any cutting operation, and thus any danger to the insulated conductors, as in the case of a braided or woven fabric covering. The unwinding of the cover may be extended down into the metallic sheath in order to provide sufficient clearance space to receive a bushing or sleeve which Frederickson interposes between the interior of the armored sheath and the insulated conductors. The bushing is thus easily inserted in the end of the armored sheath and provides a smooth sur-

face for the covered conductors, and protects the insulation upon the conductors from being injured by the burrs or sharp edges at the end of the armored sheath, the bushing having a flange at its outer end that abuts against the end of the armored sheath. The bushing is preferably formed of an insulating material so that should injury occur to the insulation of the conductors, the bushing will itself insulate the conductors from the metallic outer sheath. Another feature of the sleeve or bushing that is said to be of importance is that it is of a split tubular construction and may be readily inserted between the inner surface of the metallic sheath and the insulated conductors, in the space from which the paper covering has been removed, by contracting its diameter by pinching it, and this, it is said, could not be done, or if so not easily done, in the case where a braided or woven fabric was used as a covering.

In order to protect the insulated conductors against injury from the sharp edges occurring at the cut end of the metallic sheath it had been customary to place an exterior metal sleeve or ferrule about the end of the metallic sheath. It is claimed, however, that such exterior sleeve or ferrule was unsatisfactory because the metallic sheaths varied in size and spirality, and unless the sleeve or ferrule connected to the threaded or spiral portion of the outer sheath it was liable to be displaced, and defective electrical or mechanical connection resulted, and was the cause of trouble and annoyance. Further, it is said, that the exterior sleeve or ferrule increased the diameter of the armored cable or sheath and frequently prevented the enlarged end of the armored cable from entering the usual electrical fittings on the market, and special fittings with proper openings had to be provided. The purpose of the sleeve or ferrule and the bushing is the same, namely, the protection of the insulated conductors from injury at the cut end of the metallic sheath.

In Frederickson we have insulated conductors covered by two spirally wound strips of fibrous material, preferably thin flexible paper, all of which is enclosed in a flexible metallic sheath, and at the cut off end of the sheath there is inserted, between its interior and the insulated conductors, where the covering has been removed, a bushing or sleeve provided with a flange at its outer end

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and adapted to abut against the end of the armored sheath, and which will prevent the insulation of the conductors being cut or chafed by any sharp edges that might be formed at the cut off end of the sheath.

The plaintiff relies upon claims 2, 7, 8, 9 and 10. Claims 2 and 10 are typical and are as follows:

2. An armored electric conductor comprising, an insulated wire, a protecting covering of fibrous material surrounding the insulated wire, a metallic sheath or jacket enclosing the protecting covering and insulated wire, and a bushing of insulating material interposed between the insulated wire and the metallic sheath or jacket to protect the wire insulation from the edge formed at the end of the metallic sheath or packet.

10. An armored electric cable comprising, insulated electric conductors laid side by side, an armored outer sheath formed of a metal strip wound spirally about the conductors, a protecting covering surrounding and uniting the covered conductors and formed of insulating material laid in coils about the insulated conductors beneath the armored sheath so that one or more coils may be removed from the interior of the end portion of the armored sheath to form a bushing receiving clearance space, and a protecting bushing adapted to be inserted in said clearance space between the armored sheath and conductors and provided with a flange adapted to abut against the end of the armored sheath.

The defendant's flexible electric cable is comprised of insulated conductors around which there is spirally wound a covering of insulating material, composed of strips of flat waxed paper, and which is fitted within a spirally wound metallic sheath. The defendant contemplates the insertion of a bushing at the end of the cable which has been cut. The location of the bushing is unknown until the cable has been cut the desired length at the time of the installation, but each coil of cable sold by the defendant has attached to it a small bag containing a supply of bushings, substantially of the same construction and material as the plaintiff's bushings, and it is intended that these bushings be inserted by the purchaser in the cable between the interior of the metallic armor and the covering over the insulated conductors, at the end where the metallic sheath was cut during the operation of installation. Accompanying the bag of bushings is a printed notification that the bushings are to be used without removing the covering of paper, and, I think, there is no doubt but that the bushing may be inserted without removing the cover, but it would also appear that some workmen do not follow the instructions of the defendant in this regard and they remove the paper covering before inserting the

bushing in the cable. I think the defendant's electric cable is substantially the same as that of the plaintiff. If I were convinced that there was subject-matter in Frederickson I would be disposed to hold that there was infringement.

Frederickson has been the subject of litigation in the United States. In *National Electric Products Corporation v. Circle Flexible Conduit Co.* (1), the patent was held to be invalid for want of subject-matter. On appeal to the Circuit Court of Appeals, Second Circuit, the judgment of the District Judge was reversed and the validity of the patent was upheld, and infringement found, Chase J. dissenting. In the case of *National Electric Products Corporation v. Grossman* (2), the patent was upheld but no infringement was found, and on appeal the judgment was sustained. In both cases, the offending electric cables appear to me to be substantially the same as that of the defendant here.

The art of combining two or more parts, whether they be new or old, or partly new and partly old, so as to obtain a new result, or a known result in a better, cheaper, or more expeditious manner, is valid subject-matter if it is presumable that invention in the sense of thought, design, or skilful ingenuity was necessary to make the combination. The benefits of the patent laws are confined to inventions, and it is therefore necessary, in deciding whether a new machine or device or a modification of an old machine or device is good subject-matter for letters patent, to put to oneself the question: Does it involve invention? In combination patents that question is not always easily answered. The invention, if any, must be found in the combination and not in the parts unless claimed, and invention is not here claimed for any of the parts. If I put to myself the question whether patentable novelty, skill or ingenuity, is to be found in Frederickson's combination of parts I feel compelled to answer in the negative. Every element in the combination of Frederickson is to be found in previous combinations, that is, in electric cables, and their working is not essentially different, and I do not think any new result has been obtained. The insulating paper wound around the insulated conductors was much stressed before me but that

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was not an original use with Frederickson. That idea was earlier practised by Johnson of the American Metal Molding Company, and if there the paper were wound in a way different to that of Frederickson, or if any adhesive was used in the winding of the paper, that is of no consequence; and the question for decision still remains was there invention in combining the different parts found in Frederickson. The use of a flanged bushing or sleeve or some such equivalent device, for the purpose of protecting the insulated conductors from any sharp edges at the end of the cable which had been cut, was practised long before Frederickson, in various forms, but they were fitted on the outside of the metal sheath. Placing a bushing on the inside instead of the outside of the sheath, still leaves it a bushing, and there would be no difficulty in combining it with the other elements of Frederickson. Frederickson's bushing or sleeve may be simpler and more convenient than those previously known and used for the same purpose, but it is only an equivalent of a well known device and it did not require invention to place it in the combination, and it performs the same function in Frederickson's combination as in previous combinations. I do not think that there is invention in the combination of Frederickson over previous combinations or that it required invention to combine the elements there found into an electric cable, and on this ground I think the plaintiff's action must fail.

Mr. Gowling advanced the contention that Frederickson was not a true combination patent but was rather a mere aggregation of elements, each giving its own result, each performing its own function, and that they were not combined together so as to produce one result. While I recognize the force of this contention yet I refrain from making any definite pronouncement upon it; it is not necessary to do so in view of my finding that there is no subject-matter in the patent sued upon.

My conclusion therefore is that the plaintiff's action fails, and with the usual result as to costs.

*Judgment accordingly.*

ON APPEAL FROM THE ONTARIO ADMIRALTY DISTRICT  
 BETWEEN:

1939  
 May 8.  
 —  
 May 30.

STEAMSHIP *JAMES B. EADS* }  
 (DEFENDANT) ..... } APPELLANT;

AND

SARNIA STEAMSHIPS LIMITED }  
 (PLAINTIFF) ..... } RESPONDENT.

AND

NORRIS STEAMSHIPS LIMITED }  
 (PLAINTIFF) ..... } APPELLANT;

AND

STEAMSHIP *JOSEPH P. BURKE* }  
 (DEFENDANT) ..... } RESPONDENT;

*Shipping—Appeal from District Judge in Admiralty—Collision—Rules 25, 30 and 32 of the Rules of the Road for the Great Lakes—Negligent operation of vessel—Appeal dismissed.*

The SS. *Joseph P. Burke*, proceeding up Lake Ontario, and the SS. *James B. Eads*, on a voyage from Fort William to Toronto, collided immediately outside the entrance to the Welland Canal at Port Weller. The primary cause of the collision was the decision of the Master of the *James B. Eads* to cross from starboard to the port side of the channel when approaching the exit on Lake Ontario. The trial judge allowed an action brought by the *Joseph P. Burke* against the owners of the *James B. Eads* and dismissed an action brought by the *James B. Eads* against the owners of the *Joseph P. Burke*. On appeal the Court found that the collision was the result of the negligent operation of the *James B. Eads* and that there was no negligence on the part of the *Joseph P. Burke*.

*Held:* That the section of the Welland Canal where the collision occurred is not the type of narrow channel contemplated by Rule 25 of the Rules of the Road for the Great Lakes.

APPEAL from the decision of the District Judge in Admiralty for the Ontario Admiralty District allowing one action and dismissing the other, both actions having been consolidated for the purposes of trial.

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

*C. Russell McKenzie, K.C.* and *F. H. Keefer* for appellant.

*F. Wilkinson, K.C.* for respondent.

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*P. Burke.*

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

THE PRESIDENT, now (May 30, 1939) delivered the following judgment:

Maclean J. These two consolidated actions arose out of a collision between the ship *Joseph P. Burke*, hereinafter called "the *Burke*," and the ship *James B. Eads*, hereinafter called "the *Eads*," at 2.40 o'clock in the morning of November 30th, 1937, in Lake Ontario, just outside the entrance to the Welland Canal at Port Weller, and this is an appeal from the decision of Barlow D.J.A., for the Ontario Admiralty District, who found that the collision was due to the negligent operation of the *Eads*. The appeal was heard with the assistance of Captain J. W. Kerr, as nautical assessor.

The judgment appealed from contains an exhaustive statement of the relevant facts, and the reasons for the conclusion reached are so clearly stated, which conclusion I am satisfied is the correct one, that it will not be necessary to engage in any lengthy discussion of the matters in controversy here.

The *Burke* was proceeding up Lake Ontario on a voyage from Montreal to Port Colborne. The *Eads* was on a voyage from Fort William to Toronto. The *Burke* was running light and the *Eads* had a cargo of grain. The weather was clear with a strong forty mile an hour gale blowing west south west.

The primary cause of the collision between the *Burke* and the *Eads*, some 1,500 or 2,000 feet outside the Port Weller piers at the northern entrance to the Welland Canal—which piers may be visualized as extensions of the canal walls—was the decision of the master of the *Eads* to cross from the starboard to the port side of the channel when approaching the exit on Lake Ontario. The distance from the lowest lock to the end of the piers is approximately one mile and three-quarters. In justification of this manoeuvre the latter part of Rule 25 of the Rules of the Road for the Great Lakes was relied on. This rule deals with the situation when steamers are approaching each other head and head or nearly so, and the latter portion of the rule is as follows:

. . . Provided, however, that in all NARROW CHANNELS, where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit,



Niagara, and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.

The channel from the lowest or most northerly lock of the Welland Canal to the extremities of the Port Weller piers is undoubtedly narrow, but the current is negligible; there would be some flow of water from the canal into Lake Ontario, but that would have no appreciable effect on a ship departing from that lock and proceeding in the channel towards Lake Ontario, and it would not interfere with the control of the ship. Rule 25 appears to apply to channels and rivers where there is current sufficient to make it desirable to give the descending ship the right to choose on which side she will pass an upbound ship, after her intention is made known by whistle signal. The ascending steamer in such circumstances stems the current and is much better able to control her movements until the descending ship running with the current is clear. In my opinion the section of the Welland Canal with which we are concerned is not the type of narrow channel contemplated by Rule 25.

The initial fault of the *Eads* was in not keeping to the starboard side of the channel until well clear of the piers, and with this my assessor agrees, and the learned trial judge was of the same opinion. That seems to be the general practice of steamers emerging from the Welland Canal at Port Weller, and in fact the master of the *Eads* on some four or five previous voyages had always run for some five minutes straight out from between the piers before heading for Toronto, and my assessor advises me that this would be a precaution which ordinarily should be followed. To what distance a ship should proceed after passing the piers at Port Weller, and before her next course was set, would, of course, vary with circumstances. It is quite clear that had the *Eads* kept to the starboard side of the channel until well clear of the piers no accident would have occurred.

The *Burke* was apparently to the westward of a line bearing true north from the Port Weller piers when the *Eads* cleared the piers, admittedly on a course west of north in order to steer towards Toronto. In so doing her starboard light would be seen by the *Burke* which was steering west of south to keep to windward of the

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piers to allow for leeway or drift, as she was light and the wind was about west south west, and blowing with the velocity already mentioned.

The master of the *Eads* admitted in his evidence that he was aware that the *Burke* was a canal size ship and that it was proper for the *Burke* to go high, or to the westward of the piers, to allow for leeway or drift. The position of the ships just outside the piers is illustrated in the Fifth Situation as applied to Rule 30 for the Great Lakes, the left hand ship being the *Eads* and the other the *Burke*. As they approached each other at right angles or obliquely in such manner as to involve risk of collision, it was, in my opinion and that of my assessor, and as held by the trial judge, the duty of the *Eads* to keep out of the way. In the situation that developed, the *Burke* being on the starboard side of the *Eads*, the latter, after clearing the piers on a course towards Toronto and observing the *Burke* to starboard, should immediately have altered her course to starboard to pass astern of the *Burke*, or have stopped her engines, or reversed, in time to avoid collision. The *Eads* therefore offended against Rules 30 and 32, as found by the learned trial judge.

I concur fully in the conclusion of the learned trial judge, namely, that the collision was the result of the negligent operation of the *Eads*, and that there was no negligence on the part of the *Burke*, in all of which my assessor is in agreement with me.

The appeal is therefore dismissed and with costs.

*Appeal dismissed.*

#### REASONS FOR JUDGMENT OF BARLOW D.J.A.:

This action arises out of a collision between the ship *Joseph P. Burke* and the ship *James B. Eads* at 2.40 o'clock in the morning of the 30th day of November, 1937, in Lake Ontario just outside the entrance of the Welland Canal at Port Weller.

The *Burke* was proceeding up Lake Ontario on a voyage from Montreal to Port Colborne. The *Eads* was on a voyage from Fort William to Toronto. The *Burke* was running light and the *Eads* had a cargo of grain. The weather

was clear with a strong forty-mile-an-hour gale blowing west-south-west.

According to the evidence of Captain Norris, the captain of the *Burke*, the impact took place from 1,500 to 2,000 feet north-north-west of the west pier at Port Weller, the starboard bow of the *Eads* coming in contact with the port side of the *Burke* near the raised quarter deck between hatches numbers 5 and 6. The evidence of Captain Norris is that the mate, having sighted a ship known as

the *Diamond Alkali*, called him. At this time he could see the Port Weller lights and the *Diamond Alkali*, which was four points on the starboard side. He hauled southerly and paralleled the *Diamond Alkali* which was also proceeding to the entrance to the canal. He then saw the *Diamond Alkali* had slowed up and he hauled back 245°, which took the *Burke* up to the line of the blinker on the west pier at Port Weller. He then hauled to port and kept the light a point on the port bow. Shortly after he saw the *Eads* and altered his course on the west lights. At this time the *Eads* was well up in the harbour. He saw the two mast head lights of the *Eads* and later her red and green lights came into view. At that time the green light of the *Burke* was not visible to the *Eads*. He kept on coming in the same course until the *Eads* was just in the piers. He then pulled the *Burke* out two points on the port bow so as not to get her up too high, but the head of the boat never changed. At 1,500 to 2,000 feet he saw the *Eads*' red light shut out and the *Eads* altered her course to port. There was no signal by any boat up to this time. Sensing danger by reason of the course of the *Eads*, he ordered the wheel hard to starboard and blew five or more blasts. The *Eads* kept on coming out and blew two short blasts when it just cleared the piers. The *Eads* was heading somewhat west of north. The *Burke* then blew another alarm and the *Eads* blew an alarm and kept coming out. The *Burke* was swinging well around to the north-north-west and the captain saw that the *Eads* was coming into the *Burke*, and just before the impact he ordered the rudder of the *Burke* hard to port to swing the stern away.

The evidence of Captain Harpell, the captain of the *Eads*, is that he first saw the *Burke* when he was abreast of the main light

at Port Weller, which light is about 3,000 feet from the piers, and that he then blew two blasts to indicate that he wished to proceed out of the entrance on the port side. He states that the *Burke* was about 2,000 feet from the piers in a north-east direction when the first two-blast signal was given. When 500 feet inside the pier he gave a second two-blast signal. Both boats were making about the same speed; the *Eads* about eight miles an hour and the *Burke* about seven miles an hour. The captain states that he gave the second two-blast signal because the *Burke* had altered her course to starboard. He heard no signals from the *Burke* but saw the green light from the *Burke* for a minute or a minute and a half between the time of the first and the second signal, and he states he gave the second two-blast signal when the *Burke* closed out her green light. His evidence is that the *Burke* answered the second two-blast signal with a danger signal. He then ordered the wheel hard to starboard, ordered full speed astern and dropped the starboard anchor, and that when the contact took place the *Eads*, which is 400 feet long, was 50 feet clear of the west pier. He states that the *Eads* was practically stopped at the moment of contact.

John A. Clague, the first mate on the *Diamond Alkali*, was called as a witness. He first saw the *Burke* when she was about one and a half points on the port bow of the *Diamond Alkali* and about four miles from Port Weller. The *Diamond Alkali* was on her way from Toronto and was heading for the end of the west pier at Port Weller. He states that the *Diamond Alkali* was running half speed to permit the *Burke* to enter the canal first as she could proceed much faster through the canal than the *Diamond Alkali*. He saw the *Eads* coming out from the Port Weller harbour when she

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was about half way from the lock to the pier. He heard two blasts which he understood was from the *Eads*, when the *Eads* was just clear of the piers. The *Eads* was heading to the westward on her course out of the harbour. The *Burke* at this time was in line with the *Eads*.

The captain of the *Eads* stated that his usual course was to keep sharply to port on coming out between the piers and that this is what he proposed to do, he being on his way to Toronto. But his log book shows that on some four or five previous voyages he had always run for some five minutes straight out from between the piers before heading for Toronto. If he had followed this course this time, there would undoubtedly have been no collision. Just why the *Eads* should blow a two-blast signal when the *Burke* undoubtedly was too far out in the lake to hear her, cannot be understood. The captain of the *Eads* states that he blew a second two-blast signal when he was 500 feet inside the piers.

The first mate of the *Diamond Alkali* says that the two-blast signal he heard from the *Eads* was when the *Eads* was just outside the piers. The *Diamond Alkali* answered this signal believing it was for their ship. The first mate of the *Diamond Alkali* is an independent witness and I prefer his evidence to that of Captain Harpell. If the story of Captain Harpell is to be believed to the effect that after an alarm was blown by the *Burke*, that he put his wheel hard to starboard, reversed his engines and let go the starboard anchor, it would have the effect of swinging the stern to port and the bow to starboard, and if this was done inside the piers, as is sworn by Captain Harpell, it is hard to understand how the *Eads* came into contact with the *Burke* off the west pier, the *Burke* at the time going full speed away from him. I think it must be found that the

*Eads* continued her course and that if the anchor was dropped and the engines ordered full speed astern, that it must have been done very shortly before the contact because it is quite evident that the *Eads* had not stopped her way to any appreciable extent at the time of the contact. I cannot accept Captain Harpell's story as to this; nor that of his mate and wheelman, whose stories are in almost the same words. Counsel for the *Eads* contends that the *Burke* failed to give a one-blast signal. Captain Norris states that he was about to do this when he saw the possibility of danger and preferred to blow an alarm. In the light of what subsequently happened, I cannot see wherein the failure to blow a one-blast signal contributed in any way to the collision. In any event, the captain of the *Eads* had every opportunity to avoid the collision. If he had followed his usual custom of running straight out for five minutes, it would have been avoided. If he did what he claims to have done, namely, ordered the *Eads* hard to starboard, reversed his engines, and dropped his anchor no collision would have taken place.

Counsel for the *Eads* contends that a loaded down going vessel has the right of way in narrow channels and with the current, and contends that the *Eads* had the right to pass out through between the piers and that the *Burke* should have waited for her. The entrance is 400 feet wide. The *Burke* has a 43-foot beam and the *Eads* about a 40-foot beam. The only current would be that caused by the west-south-west wind which would carry the *Eads* the way which she should have gone. There is, therefore, in my opinion no reason why they would not have been able to meet safely between the piers. The fact is, however, that the *Eads* passed out through the piers and the line of crossing of the two vessels was some 1,500

or 2,000 feet out from the entrance in the open lake. According to the evidence which I prefer to accept, the two vessels met and the contact took place some 1,500 or some 2,000 feet out from the piers in the open lake. Captain Harpell and his mate both swore that the contact took place when the stern of the *Eads* was 50 feet from the west pier. The wheelman of the *Eads* placed this distance at 25 feet. I was not impressed with their evidence. It appeared too much as though it had been rehearsed. I prefer to believe the evidence of Captain Norris, his mate, and of Clague, the mate of the *Diamond Alkali*, an independent witness, which would place the point of contact between 1,500 and 2,000 feet from the piers.

Counsel for the *Eads* contends that Rule 25 of the Rules of the Road is applicable. This rule, however, deals with the situation when steamers are approaching each other head and head or nearly so, and further says: "In the night steamers will be considered as meeting head and head so long as both the coloured lights on each are in view of the other." That was not this situation. Here the steamers were meeting at right angles, and it is sworn that the green light of the *Burke* was never at any time visible to the *Eads*. The captain of the *Eads* states that he saw the green light of the *Burke* for a minute or a minute and a half. I am of the opinion that he must be mistaken. There is a green light on the east pier at Port Weller and it may be that he saw this light. I prefer to accept the evidence of Captain Norris as to the course of the *Burke* and that his green light was never visible. It therefore follows that Rule 25 is not applicable.

Rule 30 deals with the situation when two steamers are approaching each other at right angles or obliquely so as to involve risk of collision. This rule provides that

the steamer which has the other on her own starboard side, shall keep out of the way of the other by directing her course to starboard so as to cross the stern of the other steamer. Or if necessary to do so, slacken her speed or stop or reverse. This is the situation here. The *Burke* was on the starboard side of the *Eads*.

Rule 32 is also applicable and is as follows: "When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep on out of the way of the other."

The fifth situation following Rule 38 is also applicable: "The steamer which has the other on her own port side shall hold her course and speed and the other shall keep clear by crossing the stern of the steamer that is holding course and speed, or if necessary to do so shall slacken her speed or stop or reverse."

The *Burke* here quite properly held her course and speed, but the *Eads* did not do what was necessary and which in my opinion she had every opportunity to do to keep clear by crossing the stern of the *Burke*.

Counsel agree that the doctrine of the last chance is applicable, and this being so, it is quite evident to me that the *Eads* had the last chance to avoid the accident.

I had the assistance at the trial of Captain R. F. Wilson as assessor, a captain of wide experience.

After having carefully considered the evidence and having regard to the advice of my Assessor, I have come to the conclusion that the collision was the result of the negligent operation of the *Eads*. I cannot find that there was any negligence on the part of the *Burke* or those in charge of her.

Judgment will, therefore, go for the plaintiff in the first action with costs, with a reference to the Registrar to assess the damages. The second action will be dismissed with costs.

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UNDERWRITERS SURVEY BUREAU }  
LIMITED ET AL..... }

PLAINTIFFS;

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AND

AMERICAN HOME FIRE ASSUR- }  
ANCE COMPANY AND CENTRAL }  
FIRE OFFICE INCORPORATED... }

DEFENDANTS.

*Copyright—Action for infringement of copyright and conversion of infringing copies—Copyright in automobile insurance rate manuals—Ownership of copyright—The Copyright Act, R.S.C., 1927, c. 32, s. 20, ss. 3 (1) and ss. 5, s. 36 (2)—Defence of common sources—Presumptions as to copyright and ownership thereof—Infringement of copyright by copying from an unauthorized copy of a work in which copyright subsists.*

The action is one for infringement of copyright, and conversion of infringing copies, in certain unpublished literary works known as Canadian Underwriters Association 1935 Rate Manual for the Provinces of Ontario and Quebec. The plaintiffs are the Underwriters Survey Bureau Ltd., owner of the copyright by way of assignment from the original registered owner, and some 170 insurance companies most of them members of the Canadian Automobile Underwriters Association, an unincorporated association of insurance companies writing automobile insurance.

The manuals are booklets issued by the Canadian Automobile Underwriters Association to serve as instructions to agents in writing automobile insurance business. They were prepared by one, J. H. King, a salaried official of the Canadian Automobile Underwriters Association.

The alleged infringing manual was issued by the defendant, American Home Fire Insurance Company, and distributed by the other defendant, Central Fire Office Incorporated, as its agent. That manual was prepared by one, L'Esperance, who acted as automobile insurance underwriter for the American Home Fire Insurance Company. He used the plaintiffs' Quebec Manual and also manuals issued by the British Oak Insurance Company, the Toronto General Insurance Company and the Canadian General Insurance Company. These latter two companies have manuals which are almost photostatic copies of the plaintiffs' manual. The British Oak Manual is prepared from material supplied by King to the Western Canada Insurance Underwriters Association. It was not disputed that this alleged infringing manual was printed and distributed by the defendants.

*Held:* That there is subject-matter for copyright in the manuals of the plaintiffs, and there has been infringement and conversion by the defendants.

2. That it is not sufficient to show that common sources of information existed from which the defendants could have obtained material for their manual; it must be shown that they went to those sources and obtained from them the information contained in their manuals.
3. That pursuant to The Copyright Act, R.S.C., 1927, c. 32, s. 20, ss. 5, as enacted by 21-22 Geo. V, c. 8, s. 7, it is not necessary that all the plaintiffs should be members of the Canadian Underwriters Association.
4. That infringement cannot be avoided by copying from an unauthorized copy of a work in which copyright subsists.

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ACTION by plaintiffs alleging infringement of copyright and conversion of infringing copies by defendants in certain automobile insurance rate manuals.

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

*A. M. Boulton* and *H. G. Lafleur* for plaintiffs.

*W. B. Scott, K.C.* and *Cuthbert Scott* for defendants.

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

THE PRESIDENT, now (June 7, 1939) delivered the following judgment:

This action, begun by Underwriters Survey Bureau, Ltd., is one for infringement of copyright and conversion of infringing copies, in a certain unpublished literary work known as "Canadian Automobile Underwriters Association 1935 Rate Manual," for the Province of Ontario, and in the same work for the Province of Quebec. These works were registered at the Copyright Office in Ottawa in the name of Joseph H. King, and by him assigned to Underwriters Survey Bureau Ltd. The plaintiffs claim an injunction prohibiting defendants from further infringing the plaintiffs' copyright in such works, an order for the delivery up of all infringing copies and all plates and other material used or intended to be used for the reproduction thereof, and damages.

The statement of defence denied the existence of copyright in the said works and alleged that if copyright existed at all it was in the members of the Canadian Automobile Underwriters Association. To meet the latter plea the statement of claim was amended and to the original plaintiff, the Underwriters Survey Bureau Ltd.,

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there were added some 170 various companies, most of them members of the Canadian Automobile Underwriters Association, an unincorporated body.

The defendants are two in number, the American Home Fire Assurance Company, a United States corporation, which at the material time carried on the business of automobile insurance in Canada through the agency of the other defendant, the Central Fire Office Inc., which acted as agent of the American Home Fire Assurance Company. The Central Fire Office Inc. did not defend the action. There was filed as an exhibit an undertaking given by R. E. Schofield, President of the Central Fire Office Inc., to be bound by and to comply with any judgment rendered against that defendant.

The plaintiffs went to trial under the apprehension that the question of ownership of the copyright was not in issue but after the trial had proceeded the statement of defence was amended to more clearly deny the ownership of the copyright in the plaintiffs, and an adjournment was taken to allow the plaintiffs to plead to the amended statement of defence, and to make preparation to meet it.

The manuals in question are booklets issued by the Canadian Automobile Underwriters Association to serve as instructions to agents in writing automobile insurance business and might be properly called "Instructions to Agents." Each manual is issued to become effective on a particular date, and from that date no other instructions are to be followed by the agents. As rates for premiums vary in different parts of a province—they are determined by the cost of writing insurance in those particular parts and the loss sustained by companies therein—the various parts of a province are grouped into different territories and those territories are designated in the manuals by a letter such as A, B, C, and so forth. The different makes of automobiles are also associated together and divided into main classes such, for example, as private passenger automobiles and commercial automobiles. The various makes of cars are grouped together and these are called rating groups, so that an agent operating in any particular territory can tell from his manual the cost of insuring any particular make or kind of automobile in that territory against any and all hazards. There are



special sections of the manuals dealing with public automobiles such as buses, taxicabs and livery cars, funeral directors' automobiles, garages and automobile dealers, trucks and trailers, and so forth. The manuals also prescribe the terms of policies such as insurance for radios in automobiles, plate glass, winter storage or suspension of part of a policy, employers liability, passenger hazard coverage, excess limits of liability, minimum premiums and all special endorsements on policies.

By Chap. 222, s. 69 (a) of the Revised Statutes of Ontario, 1927, The Insurance Act, every licensed insurer carrying on in Ontario the business of automobile insurance was required to prepare and file with the Superintendent of Insurance, or with such statistical agency as he might designate, a record of its automobile insurance premiums, and of its loss and expense costs in Ontario, in such form and manner, and according to such system of classification as the Superintendent might approve. The Superintendent might require any designated statistical agency to compile the data so filed in such form as he might approve, and the expense of making such compilation was to be apportioned by the Superintendent among the insurers whose data were compiled by such statistical agency, and the amount found due from each insurer by the Superintendent was to be payable by the insurer to such statistical agency. The Canadian Automobile Underwriters Association, afterwards succeeded by Canadian Underwriters Association, was designated the statistical agency by the Superintendent of Insurance and all insurers in the Province of Ontario were required to file their data with that Association, whether they were members of the same or not. Similar legislation was passed in many other provinces, but not in the Province of Quebec. The Canadian Automobile Underwriters Association was designated as the statistical agency for the provinces of Manitoba, Saskatchewan and Alberta, and, I think, other provinces. The defendants, it appears, were not members of the Canadian Automobile Underwriters Association or later the Canadian Underwriters Association.

That the alleged infringing manual was printed and distributed by the defendants is not in dispute.

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The principal witness on behalf of the plaintiffs to prove the existence of copyright in their manuals was one, J. H. King, who from 1919 to 1935 was secretary of the Canadian Automobile Underwriters Association, an unincorporated association of insurance companies writing automobile insurance business. This organization ceased to exist after November 1, 1935, when there took place an amalgamation of three associations, the Canadian Fire Underwriters Association, the Canadian Casualty Underwriters Association, and the Canadian Automobile Underwriters Association. The new organization was named Canadian Underwriters Association and it now carries on the work of the amalgamated associations under three branches, the fire, casualty and automobile branches. Since 1935 King has been the chief official in charge of the automobile and casualty insurance affairs, in the Toronto office of this new organization. Not all of the plaintiffs now belong to the Canadian Underwriters Association, and though counsel for the defendants made some point about this I am of the opinion it matters not if a few of the plaintiffs are not now members of that Association. See ss. 5 of s. 20 of the Copyright Act.

King prepared the manuals issued by the Canadian Automobile Underwriters Association, gathering his material from various sources, some from corresponding United States organizations with which the Canadian organization co-operated. He was assisted by his staff and each year that a new manual was issued it would contain material from former manuals with new material incorporated therein. As the result of a judicial inquiry into the automobile insurance business in the Province of Ontario the legislation to which I have earlier referred was enacted, and under that legislation the Canadian Automobile Underwriters Association was appointed the statistical agency for the Government of Ontario to compile such data as were filed with it by insurers. This information or data came from both board and non-board companies and after it was compiled and classified by the statistical agency it was submitted to the Superintendent of Insurance who forwarded copies of the same to all insurers in Ontario. Thus the members of the Canadian Automobile Underwriters Association had no advantage over other insuring companies in this regard.

Now, though King had access to what may be called common sources for some of his material, yet it is claimed that certain phrases, certain arrangements, and certain figures and calculations in the plaintiffs' rate manuals are definitely the work of King, and this is not contradicted.

King did this work as a salaried official or employee of the Canadian Automobile Underwriters Association. Proposed alterations, new material and so on would be submitted by King to committees representative of the members of the Association and which when passed upon by them, with or without alterations, would be incorporated in the manual. The main foundation of the plaintiffs' rate manuals was laid in 1919 and then built up until that of 1935-36 issued, and which is the manual alleged to be infringed. King testified to certain parts of the manual being his original work and he pointed out wherein the defendants' manual was similar. A comparison of the manuals was best set forth by the evidence of Frank Bowden, an employee of the Montreal office of the Canadian Underwriters Association, and the sum total of his testimony is that 50 per cent of the plaintiffs' manual had been copied by the defendants, and that 50 per cent made up 85 per cent of the whole of the defendants' work, so that the defendants can only claim 15 per cent of their manual to be original. He produced, as Exhibit 24, a compilation prepared by him showing the pages in the plaintiffs' manuals which correspond to pages in the defendants' manual. This compilation is, I think, absolutely correct and may be relied upon.

The Canadian Underwriters Association works in harmony with the Western Canada Insurance Underwriters Association, hereafter referred to as "Western Canada Association," and furnishes that organization with any available material requested of it. The Canadian Underwriters Association is the statistical agency designated by the Superintendents of Insurance for the Provinces of Manitoba, Saskatchewan and Alberta. The rate manual for the use of the members of the Western Canada Association, in the Provinces of Manitoba, Saskatchewan and Alberta, was provided by that Association. R. J. Parker, secretary of the Western Canada Association, prepared this manual, from material gathered or furnished by himself, and he registered the copyright therein in the name of

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his Association. One of the members of the Western Canada Association was the British Oak Insurance Company, hereafter referred to as "British Oak," and that company received the authorized copies of the Western Canada Association manual; it withdrew from that Association in 1934, and is not a member of the Canadian Underwriters Association.

The submissions of the plaintiffs may be stated in the following way: The Underwriters Survey Bureau Ltd. is a plaintiff because it was registered as owner of the copyrights in question, by assignment from King, and immediately a presumption arose that it was the owner of the copyright and so it is a plaintiff solely because of that presumption; that the manuals alleged to have been infringed were prepared by King, a salaried employee of the Canadian Automobile Underwriters Association, and consequently any copyright he may have been entitled to belonged to this Association, which, being an unincorporated body its several members had to be brought in as plaintiffs; that while some of the material in the manuals of the plaintiffs was taken from other manuals, yet the particular phrasing, its arrangement and so on, was the original work of King, and that copyright subsists therein; that a comparison of the manuals of the plaintiffs and the defendants shows such marked similarity that one was bound to conclude that the defendants' manual was substantially a copy of the plaintiffs; that though there were common sources to which the defendants might have gone for some of its material they did not do so and instead took a short cut by copying the plaintiffs' works; that the foundation for the plaintiffs' works was laid in 1919 and that was built upon from year to year until 1935 when there was made an almost complete revision of the manuals, with several new features added, fifty per cent of which was carried over into the defendants' manual, and which fifty per cent constitutes eighty-five per cent of the manual of the defendants; and that upon the evidence there had been established infringement and conversion.

The chief evidence offered by the defendants was the testimony of J. H. L'Esperance given at the trial, and certain exhibits. L'Esperance had been in the insurance business since 1920 and in 1931 he joined the American

Home Fire Insurance Co. and the Central Fire Office Inc., the defendants. He acted as an automobile insurance underwriter for the latter company and in that capacity he fixed the rates for the both companies, since 1932. The American Home Fire Assurance Co. ceased writing automobile insurance in Canada on December 31, 1936. L'Esperance prepared, issued and distributed the alleged infringing manual, and he stated that in compiling this manual he took several pages from the British Oak manual of 1935, and certain material from the 1935 manual of the American Home Assurance Co., and that very little of the manual was original. While preparing this manual L'Esperance admitted having before him the plaintiffs' manuals, at least the plaintiffs' Quebec manual. This witness dealt with various parts of the defendants' manual to show that they corresponded with parts of various other manuals such as that of the British Oak, the 1935 manual of the American Home Assurance Co., and the Western Canada Association manual of 1934. He stated also, as I recall it, that in preparing his manual he had before him manuals issued by the Toronto General Insurance Company, and the Canadian General Insurance Company.

By the terms of the Copyright Act a literary work includes maps, charts, plans, tables and compilations. The Act makes no requirement as to the value of a literary work; it requires an original literary work and it is sufficient if there has been labour, skill, time, ingenuity, selection or mental effort expended in the production of the same. The Copyright Act is not concerned with the originality of ideas, but with the expression of thought in print or writing: See the *University of London Press Ltd. v. University Tutorial Press Ltd.* (1). And there are presumptions as to copyright and ownership as provided by s. 20, ss. 3 (1) and s. 36 (2) of the Act. The manuals of the plaintiffs bore the name of the Canadian Automobile Underwriters Association, and also the words "Copyright, Canada, by the Canadian Automobile Underwriters Association."

The manuals of the plaintiffs, in my opinion, afford fit subject-matter for copyright, and the plaintiffs had therefore the sole right to reproduce the same or any sub-

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stantial part thereof. The plaintiffs could not complain of the defendants' manual if satisfied it was the result of independent work and that the similarity of words and expressions was only coincident, but they contend that on a comparison of the works in question the similarity is such that it could not have been a mere coincidence. The names of towns, cities and districts, are of course not original, but what is claimed to be original is the particular grouping of these areas into designated territories, based upon the experience of insurers in the several territories, the information relative to such experience having been collected and classified for the plaintiffs by King. This work, I think, is something apart from any compilation of the data supplied by insurers to the Canadian Automobile Underwriters Association, as the statistical agency for the Superintendent of Insurance for the Province of Ontario. The classification of cars, territories and rates, into fifteen groups is so arranged and correlated that selection is shown, and this, I think, is subject-matter for copyright, and I might add that the defendants have adopted the same number of groups. The plaintiffs do not claim the sole right to make up an alphabetical list, for example, of private passenger automobiles, with their trade names, wheel bases, rating groups, cylinders, etc., but they do claim that when such a table is made up and expressed in certain language and form, that table is not to be adopted by any one else unless it is the result of independent work. Then, the plaintiffs claim particularly that original material is to be found in their manuals having reference to radios in automobiles, funeral directors' cars, combination hearse and invalid cars, and casket wagons, which are reproduced in the defendants' manual. It is my view that copyright subsists in the plaintiffs' manuals.

L'Esperance admits that he did not produce, independently, and by his own research and labour, the alleged infringing manual. It was almost wholly what one might call a scissors and paste production. The index, one or two foot notes, and the consolidation of two territories, were the only original contributions made by L'Esperance in the production of that manual. L'Esperance did not have the facilities at his command to assemble the material necessary for the production of such

a manual, and he admitted that the Canadian Underwriters Association was the only organization in Eastern Canada equipped to produce an Automobile Rate Manual. There is no pretense of saying that the defendants' manual was produced independently by reference and recourse to available common sources. There is even no allegation of this, and there is no evidence that L'Esperance went to any published common sources, and even if he had gone to those sources it is clear he would not have found the material appearing in his manual, with the exception of perhaps two pages to be found in the 1931 Automobile Statistical Plan which was apparently issued by the Superintendent of Insurance of Ontario, to insurers in that Province. The contention that the defendants went to common public sources for its material cannot, I think, be sustained.

In preparing his copy for the printer L'Esperance had before him the British Oak manual, but that company, it is admitted, had no independent information or facilities for producing a complete Automobile Rate Manual; it copied the Western Canada Association manual and any correspondence between the manual of the latter and that of the plaintiffs was furnished by King to Parker, the secretary of the Western Canada Association. L'Esperance admits that he had the plaintiffs' Quebec manual before him when preparing his copy for the printer, and eighty-five per cent of his manual is to be found in the plaintiffs' manual. I have no doubt his eyes were as much, and perhaps more, on the plaintiffs' manual than on the British Oak manual. There is no particular significance in the fact that L'Esperance cut many pages out of a British Oak manual in making up his copy for the printer; that does not mean it was not the manuals of the plaintiffs that he was intending to follow and reproduce, so far as was necessary for his purposes. It may have been convenient for many reasons to mutilate a copy of the British Oak which he had on hand instead of a copy of the plaintiffs' manual. If he were intending to copy the British Oak manual there would be no purpose in referring to the plaintiffs' Quebec manual at all. The British Oak manual was prepared primarily for use in Western Canada whereas the plaintiffs' manual was intended for use in the Provinces of Quebec and Ontario, and was based upon the general experience of insurers in

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those Provinces. I entertain no doubt but that having the plaintiffs' manual before him, he scanned it carefully to see that the printer's copy corresponded with it. It is as fair to say that he copied the manual of the plaintiffs as to say that he copied the British Oak manual, and I cannot avoid the conviction that it was the former which he chose to follow in the main. For his rates, L'Esperance relied upon the manual of the Canadian General Insurance Company and Bowden testified that this manual was almost a photostatic copy of the plaintiffs' manual. I do not think it matters whether the unauthorized copies were made directly from the plaintiffs' work or from other unauthorized copies of the same work. I do not think infringement can be avoided by copying from an unauthorized copy of a work in which copyright subsists.

Another point advanced by the defendant was that the British Oak, as a member of the Western Canada Association until 1934, was one of the owners of the manual issued by the latter, in 1933, and from which L'Esperance alleges that he copied, and that the proper party to bring this action would be the British Oak, or the Western Canada Association, or both. But this manual was prepared by Parker, the secretary of the Western Canada Association, and it was copyrighted by that Association in 1933. Parker, in preparing his manual, used more or less material supplied him by King of the Canadian Automobile Underwriters Association. That Association was also the statistical agency for the Superintendent of Insurance for the Provinces of Manitoba, Saskatchewan and Alberta, but, as I understand it, King supplied Parker with material other than that compiled by it as the statistical agency for those Provinces. Parker in preparing the Western Canada Association manual never claimed copyright in any material furnished him by King. He adapted it to his own requirements, and improved it, and the resulting manual was copyrighted by the Western Canada Association in 1934. One compiling a rate manual may gather his data from any available source but that does not destroy any copyright in the manual as a whole. The British Oak took any material contributed to Parker by King, as well as Parker's own work. So if the defendants copied the British Oak they infringed the manual of the Western Canada Association as well as that of the plaintiffs.



The defendants may go to common sources for material and make their own calculations, prepare their own tables and forms, and present their rates as they wish. But they must do this themselves. And it is not sufficient for the defendants to say or to show that common sources of information existed. They must go to those sources and obtain their information from them. See the remarks of Sir W. Page Wood V.C. in *Kelly v. Morris* (1), and which are referred to in Copinger on Copyright at page 118. As already stated the offending manual here could not have been prepared by the defendants without recourse to the work of the plaintiffs, or that of the Western Canada Association, both of which were copyrighted. As I have already stated there was no common source from which the defendants could have obtained but very little of the material found in their 1935 manual, and in any event they did not go to any common source. Whether the Automobile Statistical Plan issued by the Superintendent of Insurance for the Province of Ontario, effective January 1, 1937, would now be available to the defendants in preparing a manual, I need not decide. I therefore am of the opinion that infringement has been established.

The defendants also claim that it was a breach of trust for Canadian Automobile Underwriters Association to use in advance material collected by it as the statistical agency for the Superintendent of Insurance for the Province of Ontario, and which was not available to insuring companies in Ontario, until after this cause of action arose. Upon the evidence before me I cannot say that this occurred. It is unlikely that the material found in the manuals of the plaintiffs is the same, or is in the same form, as the data furnished it, as the statistical agency, by insurers in Ontario. In any event the Canadian Automobile Underwriters Association did not act as a statistical agency for the Government of Quebec, or for automobile insurers in the Province of Quebec. The defendants were not members of the Canadian Automobile Underwriters Association, and they, so far as the evidence shows, supplied no data to that Association as the statistical agency of the Government of Ontario, and I do not think they can be heard to say in this action that the Canadian Underwriters Association acted in breach of trust in preparing and compiling its manuals in the form it did.

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It is my view that both defendants are liable, the one as agent of the other, that is, the American Home Fire Insurance Company was the principal and Central Fire Office Inc. was the agent. The latter distributed the manuals as agent of the former, and so both are liable for infringement and for conversion.

I am therefore of the opinion that there is subject-matter for copyright in the manuals of the plaintiffs and that there has been infringement and conversion on the part of the defendants. The plaintiffs are therefore entitled to the relief claimed. The plaintiffs are entitled to an injunction without proof of actual damages. There will be a reference as to damages if the plaintiffs request the same on the settlement of the minutes of judgment.

The plaintiffs will have their costs of the action.

*Judgment accordingly.*

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ON APPEAL FROM THE ONTARIO ADMIRALTY DISTRICT

BETWEEN:

PATERSON STEAMSHIPS LIM- } APPELLANT;  
 ITED (PLAINTIFF) .....

AND

THE SHIP *FRANK B. BAIRD* } RESPONDENT;  
 (DEFENDANT) .....

AND

THE SHIP *SORELDOC* (DEFENDANT)... APPELLANT;

AND

UPPER LAKES & ST. LAWRENCE }  
 TRANSPORTATION COMPANY } RESPONDENT.  
 LIMITED (PLAINTIFF) .....

*Shipping—Collision between two upbound ships—Duty of overtaking ship—Rule 36 of the Rules of the Road—Appeals dismissed.*

The *Soreldoc* and the *Baird*, both laden and upbound from Quebec ports, were in collision off Weaver's Point gas buoy on July 15, 1937. About 11:00 p.m., July 14, 1937, the *Baird* anchored for the night in Pillars Bay, about three-quarters of a mile from Weaver's Point

gas buoy. The *Soreldoc* came around Steen Island and shortly after saw the anchor lights of the *Baird*. The *Soreldoc* saw the green light of the *Baird* and blew a two-blast signal which the *Baird* answered with a two-blast signal. The *Baird* weighed anchor and proceeded on her way to Weaver's Point. The *Soreldoc* gave a second two-blast signal which was also answered by the *Baird*.

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The two vessels collided at a point where the navigable channel is 1,000 feet wide. The trial judge found that the *Soreldoc* had plenty of room to the port of the *Baird* in which to navigate and keep out of the way of the *Baird* whilst the *Baird* could not safely have gone any closer to the buoy than she did. The trial judge also found that the *Baird* could have avoided the collision by slowing her speed and remaining in Pillars Bay. Both ships being equally at fault the trial judge ordered the damages assessed on the basis of 50 per cent to each. On appeal to this Court the judgment was affirmed.

*Held:* That it is the duty of a vessel overtaking another to keep out of the way of the overtaken vessel.

2. That the master or pilot of the *Baird* after answering the signal of the *Soreldoc* should have exercised more caution and facilitated in every reasonable way the passage of the *Soreldoc* towards the buoy.

APPEALS from the judgment of the District Judge in Admiralty for the Ontario Admiralty District dismissing two actions consolidated for purposes of trial.

The appeals were heard before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

*C. Russell McKenzie, K.C.* for appellants.

*G. P. Campbell, K.C.* and *F. H. Keefer* for respondents.

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

THE PRESIDENT, now (July 3, 1939) delivered the following judgment:

This is an appeal from the decision of the District Judge in Admiralty for the Ontario Admiralty District in the above two consolidated actions, which had their origin in a collision occurring between the ship *Soreldoc* and the ship *Frank B. Baird*, hereinafter referred to as "the *Baird*," off Weaver Point in the River St. Lawrence some distance below Morrisburg, Ontario, early in the morning on July 15, 1937. Both ships were laden, of about the same speed, and were bound up the River St. Lawrence. The learned trial judge found both ships equally to blame,

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and from that decision both parties have appealed. On the hearing of the appeals I was assisted by Captain J. W. Kerr as Nautical Assessor.

The important facts of the case are so concisely and clearly set forth in the reasons for judgment of the learned trial judge that it is unnecessary to repeat them.

The first two-blast signal of the *Soreldoc* indicated to the *Baird* that the former was directing her course to port and to which the *Baird* promptly responded with the same signal, knowing that the *Soreldoc* was proceeding up the river and that she would have to turn the buoy at Weaver Point, where a definite alteration in course to starboard would be necessary. At that stage the master of the *Soreldoc* apparently thought the *Baird* was a down-bound ship and therefore his signal could not have been intended to mean that he was overtaking the *Baird* and was desirous of passing her on her port side. But the *Baird* was then about departing from her anchorage to take a course up the river and she also would be obliged to turn the buoy at Weaver Point, both ships then being on courses slightly converging toward the buoy. I think it was the duty of the *Baird* from the start to make sure that she did not crowd upon the course of the *Soreldoc*. The *Baird*, however, worked her engines at full speed for several minutes in heading towards the buoy after clearing her anchorage, while in slack water, and after responding to the signal of the *Soreldoc* with a two-blast signal. The master or pilot of the *Baird* on answering the signal of the *Soreldoc* with two blasts should have exercised more caution and facilitated in every reasonable way the passage of the *Soreldoc* towards the buoy, by proceeding at moderate or slow speed. Had the *Baird's* speed from her anchorage towards the buoy been moderate or slow until the *Soreldoc* was well on towards rounding the buoy, which would have been the proper and prudent thing to do in the circumstances, the collision would have been avoided. Instead of that the *Baird* crowded upon the course of the *Soreldoc*. I think the *Baird* was therefore in part liable for the collision.

At some stage between the time of the first and the second two-blast signal of the *Soreldoc* it must have become obvious to her master that the *Baird* was bound up the river, and that she would have to turn the buoy at

Weaver Point. The *Baird* was then on a course which would take her around the buoy, and she was ahead of the *Soreldoc*. As they came into parallel positions, or almost so, the *Soreldoc* gave her second signal of two blasts. This signal was likely intended as one of an overtaking ship desirous of passing on the port side of a ship ahead. In any event Rule 36 requires that notwithstanding anything contained in the rules every vessel overtaking any other shall keep out of the way of the overtaken vessel, as would also the ordinary practice of seamen and the circumstances of the situation here require. There was, I think, a duty on the part of the *Soreldoc* to keep out of the way of the *Baird* notwithstanding the latter may have agreed that the *Soreldoc* might overtake and pass her on her port side. In point of fact the *Soreldoc* never overtook and passed the *Baird* up to the time of the collision, and I do not think they were even approximately bow to bow until about the moment of the collision. The *Soreldoc* did not keep sufficiently clear of the *Baird* to avoid the risk of collision and there was no reason for not doing so. I am advised by my assessor, as, I think, was the learned trial judge advised by his assessor, that in approaching Weaver Point the *Soreldoc* could have easily laid a course, preferably some distance from the buoy, to give the *Baird* a much wider berth, knowing that the *Baird* was also heading for the buoy, and with considerable speed, even though the *Baird* had responded to the second two-blast signal of the *Soreldoc* as meaning that the *Soreldoc* was an overtaking ship desirous of passing on the port side of the *Baird*. Further, I am advised, with the current against the *Soreldoc* she should have been able to stem the current without making any appreciable headway and still keep under command by reducing engine revolutions to equal or nearly equal the speed of the current and to manoeuvre a reasonable distance below Weaver Point buoy in such manner as to give it a wider berth than was given at the time of the collision. Had these precautions been taken the *Soreldoc* could have avoided the collision. The *Baird* could not with safety have passed closer to the buoy than forty feet which was her distance from the buoy when she was rounding it. I see no reason for thinking that the *Soreldoc* could not easily have manoeuvred sufficiently to port, even when

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the ships were getting quite close together, without subjecting herself to loss of command or steerage way because of the current. I am therefore of the opinion that the *Soreldoc* was also in part liable for the collision.

I am in agreement with the learned trial judge that both ships were equally at fault. Both appeals are therefore dismissed and each party will bear its own costs.

*Appeals dismissed.*

#### REASONS FOR JUDGMENT OF BARLOW D.J.A.:

These two actions were consolidated by order of the 8th day of March, 1939. The action is the result of a collision between the *Soreldoc* and the *Baird* off Weaver's Point gas buoy about 3:00 a.m. on the 15th day of July, 1937.

The *Soreldoc* is a canal type with a keel length of 253' and a beam of 43' 4". She was loaded with pulpwood on a voyage from Frankland, Quebec, to Thorold, Ontario.

The *Baird* is also a canal type with a keel length of 253' and a beam of 43' 1". She was laden with a cargo of corn on a voyage from Three Rivers to Toronto.

About 11:00 p.m. on the 14th day of July the *Baird* anchored for the night in Pillars Bay about three-quarters of a mile from Weaver's Point gas buoy. The *Soreldoc* came around Steen Island and shortly after saw the anchor lights of the ship anchored in Pillars Bay, which ship later turned out to be the *Baird*. When about half way from Steen Island to Weaver's Point, the *Soreldoc* saw the green light of the *Baird* at which time the *Soreldoc* blew a two-blast signal. The evidence of the witnesses for the *Baird* is that the first two blasts were blown by the *Soreldoc* when the *Soreldoc* was just east of the point known as the Poplars, which point is about half way between Steen Island and Weaver's Point. There is, therefore, no dispute as to the evidence this far.

The *Baird* answered with a two-blast signal. When the *Baird* came to weigh anchor in Pillars Bay, although she was an upbound ship her bow was heading almost due east, and although some of the witnesses of the *Baird* question whether or not the *Soreldoc* could see her green light, I am of the opinion that the *Soreldoc* did see the green light at the time she first blew her first two-blast signal. The *Baird* proceeded to back and fill in making the turn and in doing so her green light was shut out and her red light same into the view of the *Soreldoc*. It then became evident to the *Soreldoc* that the *Baird* was not a down bound ship and at this time it would appear to the *Soreldoc* that the *Baird* might be a crossing ship. When the *Baird* was turned sufficiently, she proceeded on her way to Weaver's Point. In the meanwhile the *Soreldoc*, which was to the port of the *Baird*, was proceeding on her way, but was out in the current whereas the *Baird* was more or less in dead water. When the *Baird* was some two or three boat lengths to the starboard of the *Soreldoc* and slightly ahead of her, the *Soreldoc* blew a second two-blast signal, which was answered with a two-blast signal by the *Baird*.

At this time the evidence is that the *Baird* was at half speed and the *Soreldoc* at full speed. If the *Baird* had checked her speed

somewhat more after having answered the second two-blast signal of the *Soreldoc*, the *Soreldoc* would probably have gone ahead of her and no collision would have occurred. I have asked my Assessor, Captain Felker, if the *Baird* should have waited for the *Soreldoc* to proceed ahead and he tells me that in view of the width of the river at Weaver's Point and that there was plenty of room for both ships to round the point, that there was no obligation upon the *Baird* to do so. In any event both ships proceeded.

For a time it would appear that both ships were almost parallel, and the *Baird* finding herself caught by the current, found it necessary to speed up to straighten herself away, after which she again checked to half speed. At this time the *Soreldoc* blew a check signal which was not answered, the explanation of the *Baird's* pilot being that the *Baird* was already checked to half speed. The evidence of the pilot of the *Soreldoc* is that he kept edging to port to keep away from the *Baird* as the two ships were coming abreast of Weaver's Point gas buoy when the *Baird* was about 40' off the buoy and the *Soreldoc* about 25' from the *Baird*. The evidence of the witnesses for the *Soreldoc* is that the *Baird* took a slight sheer to port and the two ships came into contact the buff of the starboard bow of the *Soreldoc* with the port bow of the *Baird*. The witnesses for the *Baird* say that just before the collision the *Soreldoc* hauled to starboard and that this caused the collision.

At the point of contact the navigable channel is at least 1,000 feet wide, yet the course of the *Soreldoc* was within at least 105 or 110 feet of the buoy. I have asked my Assessor, Captain Felker, if the collision could have been avoided and he tells me that with the width of the channel at this point the *Soreldoc* had some 900 feet to the port of the *Baird* in which she could safely navigate and keep out of the way of the *Baird*, and that the *Baird* could not safely have gone any closer to the buoy than she did.

I am, therefore, of the opinion that both ships were at fault. If the *Baird* had slowed her speed and remained in Pillars Bay no accident would have happened. On the other hand, in view of the width of the channel at Weaver's Point, she elected to proceed, and having done so the *Soreldoc* could have avoided the collision by keeping much more to the port of the *Baird*. Some evidence has been given as to the time which it took the *Baird* to proceed from her point of anchorage in Pillars Bay to Weaver's Point gas buoy, but when it is remembered that the *Baird* was travelling in almost dead water the better part of the way whereas the *Soreldoc* was travelling against the current, it can be easily understood how they reached the point of impact at the time they did.

As I have come to the conclusion that both ships are equally at fault, the damages will be assessed on a basis of fifty per cent to each with a reference to the Registrar to determine the same.

In view of the above finding each party should bear its own costs.

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BETWEEN:

RIEDLE BREWERY LIMITED.....APPELLANT;

AND

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

*Revenue—Income—Deductions—Money spent by brewer for treating purposes—Income War Tax Act, R.S.C., 1927, c. 97, s. 6 (a).*

*Held:* That money paid by appellant, a brewer, for the purpose of treating in the premises of beer licensees, does not constitute a disbursement or expense “wholly, exclusively and necessarily laid out or expended for the purpose of earning the income” of appellant.

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

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

*Arthur Sullivan, K.C.* and *B. B. Dubiensi* for appellant.

*W. C. Hamilton, K.C.* and *J. R. Tolmie* for respondent.

The facts are stated in the reasons for judgment.

THE PRESIDENT, now (April 12, 1938) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue disallowing as a deduction the sum of \$4,206.40 claimed by the appellant, in respect of its income tax assessment, for the fiscal year ended October 31, 1933. The appeal, I understand, is in the nature of a test case.

The appellant is an incorporated company, with its head office at Winnipeg, in the Province of Manitoba, and carries on the business of brewing and selling beer in that Province. During the taxation period in question practically all the shares of the appellant company were owned by Mr. A. W. Riedle, probably the founder of the business, but he is now deceased. Similarly, Riedle controlled eleven other corporations each of which was the



owner of a hotel in the Province of Manitoba, and which hotels were licensed, under the laws of Manitoba, to sell beer by retail. The relations between the appellant and the hotel corporations were quite intimate, and to some extent at least the operations of the latter were directed by the appellant. I was led to understand that other Manitoba brewers owned or controlled hotels licensed to sell beer.

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The purpose and intent of the Government Liquor Control Act of Manitoba was to prohibit all transactions in liquor which take place within that Province, except under government control as specifically provided for by the terms of that Act, through the instrumentality of a Commission, known as the Government Liquor Control Commission. The appellant was licensed to sell beer manufactured by it to the Commission, and so far as I can see, to no other person or body within the Province, but it might deliver beer lawfully sold, when and as authorized in writing by the Commission, to persons licensed to sell beer by retail, or to a permittee, that is, a person who has been granted a permit to buy liquor from the Commission.

In the period in question the appellant, by its officers, employees or agents, at various times and places, pursued the policy of purchasing its own manufactured beer on sale in licensed premises throughout Manitoba, including the hotels controlled by Riedle, for the purpose of treating frequenters of such premises. Occasionally, it was said, if a person being treated expressed a preference for a beer other than that produced by the appellant, he would be supplied with the beer designated by him, but this would rarely occur. The alleged object of this treating was to make known the appellant's beer, Riedle beer so-called, and to acquire the good will of the proprietors of licensed premises. It was urged that the Manitoba Liquor Control Act, and the Commission which administers that Act, imposed such restrictions upon the advertising of liquor, which includes beer, that the practice of treating by brewers became necessary as an advertising medium. The expenditures made by the appellant for treating, during the taxation period in question, were \$4,206.40, shown in its books as "treating expenses," or "treating at

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hotels," while its disbursements for advertising otherwise were \$331.29 for the same period, its total sales for the period being \$154,000. This system of treating is apparently engaged in by all brewers in Manitoba, some six or seven in number, and the expenditures of three of them, for treating, were given. Shea's Winnipeg Brewery Ltd. expended, in 1933, \$18,199.20 for treating and \$2,910.16 for advertising otherwise, its gross sales for that year being \$848,636.39. Pelissier's Brewery Ltd. expended, for the year ending January 31, 1934, \$12,619.69 for treating purposes, and \$1,997.75 for advertising, its gross sales for the same period being \$244,769.66. The Kiewel Brewing Company Ltd. expended, in the year 1933, \$15,508.45 for treating, and \$1,881.80 for advertising, its gross sales for that period being \$271,633.87.

Some features concerning the expenditures made by the appellant might be mentioned. In the eleven licensed hotels which Riedle controlled the appellant treated with its own draught beer almost exclusively, though these hotels carried some bottled beer produced by other brewers. Of the total expenditure of some \$4,200 which the appellant claims to have made on account of treating, almost \$1,600 was expended in the hotels controlled by Riedle; the value of the sales of the appellant's beer to the licensees of these eleven hotels, in the period in question, amounted to \$61,424.80, out of total sales amounting to \$154,254.55 for the whole of the Province of Manitoba. Again, the appellant's expenditures for treating were made in sixty-seven different licensed premises,—largely in Winnipeg—in nineteen of which the total expenditure was one dollar and under, and in some instances it was but twenty cents. In some few cases no paid sales of Riedle beer appear to have resulted from any expenditures made for treating purposes.

It is proper, I think, to refer briefly to a few of the provisions of the Government Liquor Control Act of Manitoba, because, it seems to me, they bear some relation to the question of the necessity of the disbursements here in dispute. There is a limitation in the number of beer licences to be issued in Manitoba at hotels, clubs, etc. In the City of Winnipeg beer licences must not exceed one licence "for each forty-three hundred population"; in other parts of Manitoba the number of beer licences

to be issued is limited, but that is determined on a basis of population different from that applicable to the City of Winnipeg. A licensed beer vendor is required to purchase his beer from the Commission, and as I have already pointed out licensed brewers may sell and deliver beer to the Commission. A brewer's licence is defined by sec. 2, ss. (3) of the Act as meaning "a licence granted under this Act authorizing a brewer who is duly licensed by the Government of Canada for the manufacture of beer, to sell beer manufactured by him to the Commission and to deliver the beer so sold to the Commission, or to any one on the authorization of the Commission; . . ." The prices which a beer licensee may charge for beer are fixed by the Act but this may be varied by regulations enacted by the Commission, and all sales must be for cash; the beer licensee is not permitted to advance money for the purchase of beer, nor can he take or receive any money by way of a deposit or pledge for the purpose of securing the price of any beer to be supplied by the licensee at any future time. Sec. 141 (1) of the Act is as follows:

Except as permitted by this Act or the regulations made thereunder, no person within the Province shall: (a) canvass for, receive, take or solicit orders for the purchase or sale of any liquor or act as agent or intermediary for the sale or purchase of any liquor, or hold himself out as such agent or intermediary; (b) exhibit or display or permit to be exhibited or displayed, any sign or poster containing the words "bar," "bar-room," "saloon," "tavern," "beer," "spirits," or "liquors" or words of like import; (c) exhibit or display or permit to be exhibited or displayed, any advertisement or notice about or concerning liquor.

The whole spirit of the Act would appear to indicate that it was the intention of the legislature that the sale and consumption of liquor should not be accelerated or encouraged, by advertising appeals of one kind or another, by brewers or beer licensees, except as permitted by the regulations of the Commission. All licensed brewers, and all beer licensees were in every respect to be on an equal footing. Competitive advertising as between brewers, or as between licensed retailers of beer, is something which the Act appears to discourage, or seeks to reduce to a minimum.

There was evidence, from persons interested in Manitoba breweries, to the effect that if treating were systematically practised by the brewers their beer sales to the

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Commission would increase, and if this were not done their sales would fall, a result which I find rather difficult to understand when looking at the trade as a whole. One licensed hotel proprietor stated in evidence that he would not buy the beer of a brewer who did not treat in his licensed premises, and the same witness stated he would "throw business" to the brewers who treated, and who continued to treat periodically. And I would gather from the evidence that some licensed beer retailers will not hesitate to inform a brewer that one of his rivals had just recently treated his patrons with free beer, which would be an invitation to that brewer to do the same thing. Another witness stated that a brewer would be "in disfavour" if he did not periodically treat in the premises of a licensed retailer. For obvious reasons the practice of treating is quite acceptable to the licensed retailer, and to the recipient of free beer; once the practice is established the licensed retailer will encourage the brewers to continue in their generous deeds, and the persons accustomed to being treated will never insist that the practice be discontinued. My conclusion from the evidence is that treating expenditures are made with the hope of putting the licensed retailer under an obligation to favour the brewer in his purchases of beer from the Commission. I do not think that the patrons of the beer licensees, who expect to be treated, could be seriously considered as an advertising or sales promotion medium, and one might safely say that no brewer's business could long survive on any patronage derived from those who look to be served with free beer. The licensed retailer conceivably might increase or lessen his purchases of any particular brewer's beer, if he were so inclined, but, it is difficult to understand why he should do this, because the cost and selling price of all beer is the same for all beer licensees, the conditions under which the trade of licensees is carried on are precisely the same, and there is therefore no competition of the character obtaining in most any other class of business; it would seem that the business interests of licensees would be best served by keeping in stock and selling the beer for which their patrons have a preference. I have no doubt but that the appellant made some expenditures on account of treating, but the

question I have to decide is whether such expenditures, were wholly, exclusively and necessarily, made for the purpose of earning the income.

The statutory provision with which we are concerned is sec. 6 (a) of the Income War Tax Act, which reads: "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." It will be obvious that narrow words were necessary in defining what deductions were permissible. It was not the intention of the legislature to lay down a general rule that whatever a subject liked to expend in his business, even if commercially advantageous, could be deducted as a business expense, but only such sums are to be allowed to which the character could be assigned that they had been "wholly, exclusively and necessarily" laid out for the purpose of earning the income. Expenditures may be wisely made, they may have been prudent, but it must also be shown that they were wholly necessary for the purpose of earning the income. The character of the deductions claimed in any case must therefore be carefully examined, particularly where they are of an unusual nature, as in this case.

Now, can it be said that the expenditure made by the appellant for treating, in the premises of beer licensees, and to a great extent in licensed premises which it doubtless controlled, was a necessary business expense in respect of income? I do not think so. I cannot avoid the conviction that such an expenditure was not a necessary business expense, and the fact that treating by brewers has apparently become a custom, in Manitoba, does not make such expenditures a necessary business expense. If it be true that the patronage of a beer licensee for a brewer's beer is only obtainable on the terms that the brewer must at times treat the patrons of the licensee, and if brewers are "in disfavour" with licensees if they do not treat, as was suggested by some witnesses, then such expenditures would seem to have come to be something in the nature of a levy made upon the brewer by the licensee, but however it may be classified, it does not, in my opinion, fall within the category of a business expense, wholly and necessarily incurred to earn the income. It is

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difficult to understand why it is considered necessary for brewers to make gifts of beer to the patrons of beer licensees, and one cannot but wonder why they do not agree among themselves to refrain from the practice. But, if a brewer wishes to indulge in the practice of treating, that is not a reason why he should be allowed a deduction for expenditures made in that connection, in computing his net income derived from his business as a brewer. If treating were not practised, all brewers and beer licensees would be on an equal footing, and the merits of their several beer products, the tastes of consumers, salesmanship, or something else, would be the determining factor in sales and consumption. I am inclined also to think that the expenditures made by the appellant cannot be considered a necessary business expense because of the provisions of the Government Liquor Control Act of Manitoba, if indeed they are not expressly or impliedly forbidden by that Act, the sale of beer is so controlled and regulated that expenditures for treating would seem altogether unnecessary because everybody concerned with the trade is exactly upon the same footing; everything in the nature of advertising is severely limited, and no doubt that was deliberately done as a matter of public policy, in connection with this particular trade. Then, I think, the expenditures with which we are here concerned must be treated as having been made for the general benefit of the appellant's business and not in respect of annual income, and were in the nature of capital expenditures for which no deduction is allowable. Further, I think the expenditure cannot be classified as a deductible business expense because there is no satisfactory or reliable way of accounting for the same, as is the case in all ordinary and necessary business expenses, and such expenditures if allowed as a business expense would be calculated to lead to intolerable abuses, at the expense of the public revenues. Many of the observations of Audette J., in the case of *O'Reilly & Belanger v. The Minister* (1) are applicable to the state of facts here. My conclusion therefore is that the expenditure in question here does not constitute a business expense necessarily incurred for the purpose of earning the income of

the appellant. However the expenditures may be classified, and whatever their effect or influence on the trade of the appellant, they are not, in my opinion, of the character for which the appellant is entitled to a deduction in computing the amount of its profits or gains.

In fairness to counsel I perhaps should make one further observation. By counsel on both sides I was referred to many English and American authorities. I can only say that I have consulted such authorities but I found myself unable to procure any assistance from them. In my view they are not applicable to the state of facts here and therefore I have not discussed them.

The appeal is therefore refused and with costs.

*Judgment accordingly.*

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BETWEEN:

J. ARTHUR GARIEPY .....SUPPLIANT;

AND

HIS MAJESTY THE KING .....RESPONDENT.

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 April 12 & 13  
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 April 17.

*Petition of right—Crown—Responsibility—Pilotage authority—Damages for wrongful suspension—Jurisdiction.*

*Held:* That by the Regulations for the Pilotage District of Montreal, made under the Merchant Shipping Act, the powers of the Superintendent of Pilots or his assistant are limited to the imposition of a fine, and do not confer on them the right to suspend a pilot and strike his name from the list, until payment of the fine. That the right to suspend is reserved to the Administrator of the Pilotage Authority.

2. The Crown is not bound by nor responsible for the errors, omissions, negligences, blunders or abuse of power of its officers or servants save as provided by law.
3. The jurisdiction of the Court is entirely statutory and the present action does not come within the ambit of section 19 and subsections thereof of the Exchequer Court Act.
4. By the acts of the Ministers of the Crown in providing security for costs of appeal in an action taken against the Superintendent of Pilots and in retaining counsel to argue the appeal in the Court of Appeal of the Province of Quebec, the Crown did not assume responsibility for the acts of the Superintendent of Pilots.
5. In the present case the Minister of Marine, in affirming the decision of the Superintendent of Pilots of Quebec, was not acting as a

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Minister of the Crown but was solely acting in his capacity of administrator of the pilotage authority, and as such is on the same footing as any officer or servant of the Crown, which act would not bind the Crown.

PETITION OF RIGHT to recover from the Crown the sum of \$18,749.79 for damages alleged to have been caused to the suppliant by reason of his illegal and wrongful suspension from the list of licensed pilots.

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

*J. E. Gregoire, K.C.; Jos. Marineau and M. L. Beau-lieu* for suppliant.

*Maurice Boisvert, K.C. and Paul Fontaine* for respondent.

The following is a statement of facts found by the Court.

G. is a licensed pilot for the district of Montreal.

On August 30, 1935, at about 4 a.m., G. was ordered by the superintendent of pilots at Montreal to take the *Canadian Cruiser* from Canadian Vickers dry dock, which work he finished about 10 a.m. At 3 p.m. he was asked to take charge of the *Belle-Isle*, to take it to the Imperial Oil wharf and from there to Quebec. He arrived in Quebec on the 31st of August at 6.50 a.m. G. then went to his home in Bienville, which he reached about 8 a.m.

At about 8 p.m. on the same day he received a telephone call from a clerk in the pilotage office in Quebec, to report for duty, to take a vessel to Montreal. G. told the clerk that owing to the great heat he had found it impossible to sleep all day, that he had had no sleep for about 40 hours and was in no condition to take on this work, but would report for duty at 5 a.m. next morning. A few minutes later, he was again called and finally at 9 or 9.15 p.m. the Assistant Superintendent called him and told him that if he did not report for duty he was liable to a fine of \$40 and suspension, to both of which calls he made the same reply. G. called up the pilotage office at 5 a.m., September 1st, to advise them he was available for work and was told that B., the Assistant Superintendent, had left orders that he (G.) was not to be given



a vessel. G. then went to the office and was notified that he had been fined \$40 and was suspended until payment of this fine.

A memorandum of this ruling of the Assistant Superintendent was sent to the Department at Ottawa, and from endorsement thereon ("Minister has seen this—E.H.") the Court found that at least tacit consent of the Minister was given and that the ruling imposing a fine and suspending G. until it was paid, had been ratified by the Minister.

G. then took an action before the Superior Court against B., Assistant Superintendent of Pilotage, to have the above-mentioned ruling annulled and on March 25, 1936, by judgment of Gelly J. the said ruling was declared illegal, null and *ultra vires* and was set aside.

Appeal having been taken from this judgment to the Court of Appeal the appeal, on May 29, 1936, was dismissed on the ground that there was no appeal from the judgment of the Superior Court (1).

On June 6, 1936, the Assistant Superintendent of Pilots wrote G. that he would be immediately reinstated and placed on the list of active pilots on the condition of his passing the eye test satisfactorily.

It was admitted that the Federal Minister of Marine had deposited the sum of \$200 as security in an appeal from a judgment on an exception to the form; and that the Federal Minister of Justice had deposited \$500 as security in connection with the above-mentioned appeal, and further that the latter had retained Mr. St. Laurent, K.C., as counsel with Mr. Aleyn Taschereau, K.C., on the said appeal.

The above are the facts material and pertinent to the issues decided.

By his present petition, the suppliant claims damages against the Crown resulting from his suspension from the list of pilots, alleging that the decision of the Superintendent as above mentioned was illegal, null and void and that the Crown was responsible for his acts and had assumed responsibility therefor.

(1) (1937) Q.O.R. 62 K.B. 459.

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The following damages are claimed:

J. ARTHUR GARIÉPY v. THE KING.	(A) Salary <i>re</i> : Shifts to the end of navigation in 1935, 14 weeks at \$10 per week.... \$	140 00
	(B) Loss of salary <i>re</i> : Shifts after opening of navigation in 1936, 6 weeks at \$10 per week .....	60 00
	(C) Loss of salary and revenue from Septem- ber 1, 1935, to end of navigation in 1935 .....	1,739 80
	(D) Loss of revenue and salary from opening of navigation in 1936 to June 6, 1936..	803 99
	(E) Paid for lawyers' fees and legal expenses..	795 00
	(F) Travelling expenses, made by suppliant in order to bring his case to a successful conclusion .....	211 00
	(G) Damages to reputation, mental suffering, trouble and bother due to and since illegal suspension and up to rendering of judgment .....	15,000 00
	Total .....	\$18,749 79

ANGERS J., now (April 17, 1939) delivered the following judgment.

The learned judge first refers to the pleadings and gives a summary of the facts substantially as above and then proceeds as follows:

La première question qui se pose est de savoir si l'assistant-surintendant Boulay était justifiable d'imposer une amende de \$40 à Gariépy et de le suspendre comme pilote jusqu'au paiement de cette amende.

Au soutien de l'affirmative le procureur de l'intimé invoque l'article 51 des Règlements pour le district de pilotage de Montréal, faits en vertu de la partie VI de la Loi de la Marine Marchande au Canada (S.R.C., 1906, ch. 113), encore en vigueur aux dates qui nous concernent.

L'article 51 se lit en partie comme suit:

(a) Le surintendant peut imposer des amendes de quarante dollars au maximum à tout pilote ou apprenti pilote qui aurait fait montre d'insubordination, de mauvaise conduite ou qui aurait fait le malade ou qui aurait négligé ses devoirs ou de quelque façon contrevenu à ce règlement.

(b) Aucune mesure disciplinaire de ce genre ne saurait être prise à moins que tel pilote ou apprenti n'ait eu l'occasion de se défendre verbalement ou par écrit.

Une copie des règlements a été produite comme pièce 6.

Les pouvoirs du surintendant ou de son assistant se bornent à imposer une amende qui ne doit pas excéder \$40; l'article ne lui confère pas le droit de suspendre le pilote et rayer son nom de la liste jusqu'au paiement de l'amende.

Le droit de suspension ou de destitution est réservé à ce que la loi appelle l'administration de pilotage. L'article 530 de la Loi de la Marine Marchande au Canada (S.R.C., 1927, chap. 186) stipule, entre autres, ce qui suit:

Tout pilote breveté qui, dans la circonscription pour laquelle il est breveté, ou en dehors de cette circonscription,

(g) refuse ou retarde, quand il n'en est pas empêché par la maladie ou par quelque autre cause raisonnable, de prendre la conduite d'un navire dans les limites de son brevet, sur le signal demandant un pilote fait par ce navire, ou étant requis de le faire par le capitaine, le propriétaire, l'agent ou le consignataire de ce navire, ou par tout officier de l'administration de pilotage de la circonscription pour laquelle il est breveté, ou par tout autre chef des douanes, sous réserve, dans le cas d'un pilote pour le havre de Québec et en aval, des lois concernant la corporation des pilotes de Québec;

est passible, pour chaque contravention, en sus de toute responsabilité pour dommages-intérêts, d'une amende d'au plus deux cents dollars et de suspension ou de destitution par l'administration de pilotage de la circonscription pour laquelle il est breveté.

L'article 391 définit l'expression "administration de pilotage" comme suit:

(a) "administration de pilotage" signifie toutes personnes autorisées à nommer ou à breveter les pilotes, ou à établir ou modifier les tarifs de droits de pilotage, ou à exercer une juridiction quelconque à l'égard du pilotage.

L'article 397, qui a trait à l'administration de pilotage de Montréal, décrète, entre autres, ce qui suit:

Le ministre constitue l'administration de pilotage de la circonscription de pilotage de Montréal....

Le paragraphe (d) de l'article 2 dit que "ministre" signifie le ministre de la Marine et des Pêcheries.

En vertu du chapitre 21 du statut 20-21 George V, intitulé Loi concernant le ministère des Pêcheries, sanctionnée le 30 mai 1930, il a été établi un ministère des Pêcheries et en vertu du chapitre 31 du même statut, in-

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titulé Loi concernant le ministère de la Marine, sanctionnée le même jour, il a été établi un ministère de la Marine. Le paragraphe (2) de l'article 5 de cette dernière loi décrète ce qui suit:

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Lorsque dans toute loi du Parlement du Canada ou dans tout règlement établi ou ordonnance rendue sous leur autorité, le ministère de la Marine et des pêcheries, le ministre de la Marine et des pêcheries ou le sous-ministre de la Marine et des pêcheries est nommé ou mentionné et que le ministère des Pêcheries, le ministre des Pêcheries, ou le sous-ministre des Pêcheries ne lui a pas été substitué par tout autre loi, ou sous son autorité, dans chaque pareil cas, il doit lui être substitué le ministère de la Marine, le ministre de la Marine et le sous-ministre de la Marine respectivement.

Il y a lieu de conclure que le ministre constituant l'administration de pilotage a été, depuis le 30 mai, 1930, jusqu'au 2 novembre, 1936, date de l'entrée en vigueur de la Loi du Ministère des Transports, 1936 (1 Ed. VIII, chap. 34), le ministre de la Marine.

Le 9 septembre 1935, le directeur du pilotage, G. E. L. Robertson, adressait à l'assistant-sous-ministre de la Marine un mémorandum qui contient, entre autres, les observations suivantes:

With reference to the article in the *Montreal Gazette* regarding suspension of J. A. Gariepy, a Montreal pilot, the *Gazette's* statement is correct, except that they have not gone into the details as to why the man was fined. You will see on file hereunder (page 203 marked) the Superintendent's report of the incident.

Mr. Boulay was, in my opinion, perfectly justified in ordering Pilot Gariepy to take a ship to Montreal as the man had at least twelve hours rest. His refusal meant that the ss. *J. J. Ramancher* would have had to anchor and the only reason that she did not have to do so was that a pilot who had brought a ship down river immediately offered to take a double turn.

Authority for the action taken by the Assistant Superintendent in Pilot Gariepy's case is given him under By-law 51 of the Montreal District, and for his additional suspension, in addition to the by-laws, is given under Section 530 of the Canada Shipping Act, particularly subsection (g).

Une copie dûment certifiée de ce mémorandum a été produite comme pièce H. Cette copie porte, en haut à gauche, la note "Minister has seen this—sgd. E. H.—10.9.35."

Je suis d'opinion qu'il y a lieu de conclure de ce mémorandum et de son approbation, au moins tacite, par le ministre, que celui-ci a ratifié la décision de l'assistant-

surintendant Boulay et maintenu l'amende imposée à Gariépy ainsi que sa suspension.

Le pétitionnaire a-t-il eu tort de refuser de prendre charge d'un navire le soir du 31 août, alors qu'il se sentait physiquement incapable de le faire. Je ne le crois pas.

Il y a deux points de vue à considérer en l'occurrence: (a) la discipline; (b) la sécurité du navire à piloter. Il est oiseux de dire que le choix du navire à piloter ou le choix du moment à faire du service ne doit pas être laissé à la fantaisie du pilote. Le pilotage est l'un des services publics où la discipline, je dirais même une discipline rigoureuse, est nécessaire. Il y a par contre un autre aspect de la question à considérer, qui est celui de la sécurité du navire confié à un pilote; celui-ci en effet a, entre ses mains, la vie des membres de l'équipage et, en certains cas, celle de passagers ainsi que la valeur du navire et de sa cargaison. Il aurait probablement été imprudent de la part de Gariépy de prendre charge d'un navire dans la condition physique où il se trouvait.

Gariépy aurait-il dû le 31 au soir, après n'avoir pu dormir durant la journée à cause de la chaleur, aller voir un médecin, lui exposer son cas et essayer d'obtenir de lui un certificat à l'effet qu'il n'était pas en état, à cause de sa grande fatigue, de piloter un navire de Québec à Montréal? Un médecin aurait-il pu lui donner pareil certificat? J'en doute beaucoup. Ce qui me paraît certain cependant c'est que, si Gariépy avait pu obtenir ce certificat et en donner connaissance à l'assistant-surintendant des pilotes, celui-ci aurait eu tort d'insister auprès de lui pour qu'il prit charge d'un navire ce soir-là. Gariépy pouvait-il se procurer ce certificat lors du premier appel téléphonique reçu du bureau de l'assistant-surintendant le soir du 31? Il n'y a rien dans la preuve dans un sens ou dans l'autre. Ce qui semble évident c'est que Gariépy n'a fait aucune démarche pour l'obtenir.

L'assistant-surintendant aurait-il dû accepter la déclaration, trois fois répétée, de Gariépy sans aucune preuve à l'appui? J'hésite à le croire; admettre ce principe équivaldrait à laisser au gré des pilotes le service du pilotage et la discipline serait réduite à son minimum. Je crois que Gariépy aurait dû, même s'il lui était impossible de se procurer un certificat du médecin, traverser à Québec, ex-

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pliquer son cas à Boulay et, au besoin, lui fournir une déclaration écrite, déclaration solennelle si requise, à l'effet qu'il était physiquement incapable, vu son extrême fatigue, de conduire un navire à Montréal ce soir-là. Si Gariépy eût agi de la sorte, Boulay, à mon avis, aurait été en mauvaise posture pour le contraindre à accepter du service immédiatement.

Selon la prétention de l'intimé, il y avait dans la soirée du 31 août rareté de pilotes à Québec; en fait plusieurs vaisseaux remontaient le fleuve. Le *J. J. Rammacher* que Boulay voulait confier à Gariépy a été mis à la charge du pilote Léonce Gendron qui arrivait de Montréal sur le *Sarnolite*; ceci appert des feuilles du registre des arrivées et départs produites comme pièce 10.

Tel que précédemment mentionné, Gariépy a affirmé qu'il y avait ce soir-là plusieurs pilotes disponibles. De son côté, Albert Hamel, qui le soir du 31 août était commis au bureau de pilotage à Québec et qui par la suite a remplacé Boulay comme assistant-surintendant, entendu comme témoin de la part du pétitionnaire, a déclaré que le 31 août il y avait à Québec et à Deschambault, qui, soit dit en passant, est à une quarantaine de milles en amont de Québec, six pilotes disponibles; plus loin dans son témoignage cependant, il a dit que le soir le bureau de pilotage était à court de pilotes, à cause de la maladie subite de Tancrede Perron. Hamel a ensuite ajouté que dans la soirée il y avait deux pilotes disponibles pour conduire un bateau de Québec à Montréal, savoir Adrien Paquette et Gariépy. Paquette est arrivé à Québec à minuit dans la nuit du 30 au 31 août, ainsi que le fait voir le pièce 10 (deux feuilles du registre des arrivées et départs), alors que Gariépy est arrivé le 31 à 6 h. 50, tel qu'indiqué par la même pièce 10. Le nom de Paquette se trouvait ainsi sur la liste des pilotes en disponibilité avant celui de Gariépy: voir la photographie de la page du 31 août du livre d'ordre du bureau de pilotage (pièce 9). Pourquoi n'a-t-il pas été appelé au lieu de Gariépy? La preuve sur ce point n'est guère satisfaisante. L'on a prétendu que Gariépy avait plus d'expérience que Paquette et que c'est là la raison pour laquelle Boulay aurait insisté pour l'avoir. Je ne crois pas que ce soit là une raison valable pour ne pas suivre le tour de rôle, comme c'était la pratique. Paquette, arrivé à Québec près de sept heures

avant Gariépy et à une heure plus convenable pour prendre du repos, devait se trouver en meilleure condition le soir du 31 août, à 9 heures, pour prendre charge d'un navire. La pièce 10 démontre que Paquette a pris charge du *Sarnolite* pour le monter à Montréal le matin du 1er septembre à 4 heures. Gariépy s'était déclaré prêt à partir à 5 heures ce matin-là; il est raisonnable de croire qu'il n'aurait pas refusé d'avancer son départ d'une heure si on lui avait demandé de piloter le *Sarnolite*.

Vu qu'il y avait sur la liste des pilotes disponibles le soir du 31 août un pilote breveté, savoir Adrien Paquette, capable de se charger du *Rammacher* que Boulay entendait confier aux soins de Gariépy, je crois qu'il y a lieu de conclure que Boulay a commis une erreur en intervertissant le tour de rôle et en insistant pour que Gariépy se chargeât de piloter le *Rammacher*, particulièrement quand celui-ci se déclarait physiquement inapte à le faire, vu ses quarante heures d'insomnie et sa grande fatigue. L'insistance de Boulay à avoir Gariépy ce soir-là de préférence à Paquette, qui avait droit d'être appelé, me paraît difficile à expliquer.

Il y a eu, ce me semble, erreur de jugement de la part de Gariépy de n'avoir pas essayé d'obtenir un certificat de médecin le soir du 31 août, qu'il serait allé porter à l'assistant-surintendant des pilotes et qui aurait justifié sa conduite, ou, à défaut de certificat, de n'être pas traversé à Québec pour exposer son cas à Boulay et tâcher de le convaincre de l'impossibilité dans laquelle il se trouvait de prendre du service. Il y a également eu erreur de jugement de la part de Boulay d'insister pour confier un navire à Gariépy, qui, à trois reprises successives, s'était déclaré excédé de fatigue, alors que Boulay avait à sa disposition un pilote compétent, dont le nom apparaissait sur le livre d'ordre avant celui de Gariépy, arrivé à Québec près de sept heures avant ce dernier et ayant eu par conséquent plus de loisir que lui pour se reposer; et je suis disposé à croire que cette erreur de jugement de Boulay équivaut à un abus de pouvoir.

Le procureur de Gariépy a prétendu que la sentence portée contre son client par l'assistant-surintendant des pilotes l'avait été sans que le pétitionnaire ait eu l'occasion de se défendre, contrairement aux dispositions du paragraphe (b) de l'article 51 des règlements et il en a conclu

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que la sentence était illégale. A l'encontre de cette pré-  
 tention le procureur de l'intimé a cité la décision dans la  
 cause de *Regina v. The Master Wardens &c. of the Trinity-  
 House* (1). Le "jugé" dans cette cause, qui résume de  
 façon succincte mais substantielle le jugement de Lord  
 Campbell, est ainsi conçu :

Where a complaint of being drunk when it was a pilot's turn for  
 duty, was made to the Trinity-house and the Trinity-house summoned  
 the pilot to answer, and heard his answer; and after so doing sent down  
 for further information ex parte, without giving the pilot an opportunity  
 of contesting this, and, when received, acted upon such information, and  
 revoked the pilot's licence;

It was held that the pilot had been heard sufficiently to enable the  
 Trinity-house to exercise their jurisdiction of revoking the licence under  
 17 & 18 Vict., c. 104, s. 375, assuming they were bound to hear him at all.

Je crois que Gariépy a eu l'occasion de faire valoir sa  
 défense. Il aurait pu traverser à Québec le soir du 31 août  
 et exposer ses raisons à Boulay; il n'a pas jugé à propos  
 de le faire. Le lendemain matin, vers 9 h. 30, il est allé au  
 bureau du pilotage à Québec, où il a vu Boulay et lui a  
 exposé son cas. Boulay n'a pas voulu entendre raison et  
 il a maintenu la sentence. Je suis porté à croire qu'il aurait  
 fait de même si Gariépy était allé le voir dans la soirée  
 du 31. Boulay était apparemment décidé à sévir, à tort  
 ou à raison.

A tout événement la question n'a guère d'importance  
 vu la conclusion à laquelle je suis arrivé que Boulay a  
 commis un abus de pouvoir.

Gariépy a pris une action devant la Cour Supérieure du  
 district de Québec contre l'assistant-surintendant des pilotes  
 Boulay dans laquelle il concluait à ce que la décision rendue  
 par ce dernier lui imposant une amende de \$40 et le suspen-  
 dant comme pilote jusqu'au paiement de cette amende fût  
 cassée et annulée.

Par jugement rendu le 25 mars 1936, l'honorable juge  
 Gelly a maintenu l'action, déclaré que la sentence pro-  
 noncée par le défendeur contre le demandeur était illégale,  
 nulle et *ultra vires* et l'a cassée et annulée avec dépens.

\* \* \* \* \*

Le défendeur a inscrit en appel du jugement de la Cour  
 Supérieure. Boulay étant mort dans l'intervalle, Albert  
 Hamel, son successeur comme assistant-surintendant des



pilotes à Québec, a fait une requête en reprise d'instance. Le jugement de la Cour du Banc du Roi, rendu le 29 mai 1936, rapporté sous le titre *Hamel v. Gariépy* (1) a, sur motion, rejeté l'appel par le motif que le jugement de la Cour Supérieure était définitif.

Ce jugement, il va sans dire, ne peut lier l'intimé qui n'était point partie dans la cause.

[The learned judge then cites an extract from the judgment of Mr. Justice Gelly and a statement of admissions put in evidence and continues as follows]:

Le procureur du pétitionnaire a soutenu que la responsabilité de la Couronne peut tout aussi bien procéder de la loi que résulter de délits, quasi-délits, contrats ou quasi-contrats. A son dire, l'intimé est soumis à la loi de la province de Québec relativement à une action dont la cause aurait pris naissance dans la province. Ceci est vrai dans une certaine mesure: les lois d'une province s'appliquent lorsqu'un statut fédéral ne régit pas la question en litige. Le procureur du pétitionnaire a cité à l'appui de sa prétention la décision du Conseil Privé dans la cause de *The Exchange Bank of Canada et al. v. The Queen* (2), dans laquelle il a été jugé (*inter alia*):

That the Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its other ordinary creditors.

Il s'agit en l'espèce de privilèges, déterminés à juste titre par la loi provinciale vu qu'il s'agit de propriété et droits civils, sur lesquels le parlement fédéral n'a pas juridiction.

La responsabilité de la Couronne pour dommages est régie par la Loi de la Cour de l'Échiquier (S.R.C., 1927, chap. 34), particulièrement l'article 19.

La réclamation pour dommages résultant de délits ou quasi-délits est déterminée par les clauses (c) et (f) du premier paragraphe de l'article 19, lesquelles se lisent comme suit:

(c) Toute réclamation contre la Couronne provenant de la mort de quelqu'un ou de blessures à la personne ou de dommages à la propriété, résultant de la négligence de tout employé ou serviteur de la Couronne pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi dans tout chantier public.

(f) Toute réclamation contre la Couronne provenant de la mort de quelqu'un, ou de blessures à la personne, ou de dommages à la propriété,

(1) (1937) R.J.Q. 62 B.R. 459.

(2) (1886) 11 A.C. 157.

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causés par la négligence de quelque employé ou serviteur de la Couronne, pendant qu'il agissait dans l'exercice de ses fonctions ou de son emploi, sur, dans ou près le terrain de construction, d'entretien ou de mise en service du chemin de fer Intercolonial ou du chemin de fer de l'Île-du-Prince-Edouard.

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Je ne crois pas que ces clauses s'appliquent au cas qui nous occupe.

Il ne peut être question en l'espèce de contrat ou de quasi-contrat; il serait, ce me semble, inutile d'insister sur ce point.

Reste l'obligation procédant de la loi; le pétitionnaire invoque la clause (d) du premier paragraphe de l'article 19, qui est ainsi conçue:

Toute réclamation contre la Couronne fondée sur quelque loi du Canada ou sur quelque règlement édicté par le gouverneur en son conseil.

Le pétitionnaire a appuyé sa prétention sur les arrêts suivants: *Massein v. The King* (1) et *The King et Armstrong* (2).

Le "jugé" dans la première cause se lit en partie comme suit:

Certain goods were seized by Canadian Customs officers, and by consent of counsel, an order was made by the Exchequer Court dissolving such seizure and directing that the property be restored to the suppliant. Some months later when he went for delivery of the goods, it was discovered there was a shortage, for the value of which this action was brought.

*Held:* That the Crown is liable for the value of goods unlawfully seized or detained if restoration cannot be made.

2. That the Court has jurisdiction to entertain a claim for goods of the subject in the possession of the Crown.

3. That a petition of right will lie against the Crown when specific chattels have found their way into the possession of the Crown, and if restitution cannot be made, for compensation in money.

Cette cause a consacré le principe qu'un sujet peut, au moyen d'une pétition de droit, recouvrer des effets lui appartenant qui se trouvent en possession de la Couronne ou, à leur défaut, leur valeur. Le jugement est basé sur l'article 18 et la clause (d) du premier paragraphe de l'article 19. Il me semble opportun de citer un extrait du jugement du Président de la Cour (p. 231):

Now, does a petition of right lie against the Crown for the recovery of the value of the goods which have not been restored? . . . . A petition of right was the only available step to which the suppliant could resort to reap the full fruits of his judgment recovered, under the pro-

(1) (1934) Ex. C.R. 223.

(2) (1908) 40 S.C.R. 229.

visions of the statute, against the Crown, and with its consent. A writ of execution could not issue against the Crown, and the remedy of mandamus was not available against the Crown. Unable to obtain a return of the goods in specie, then, I think, the relief contemplated by the statute extends to a claim for their value. In *Buckland v. The King* (1933, 1 K.B.D. pp. 329 and 767), a petition of right proceeding, the suppliant sought the return of certain films which had been seized by customs officials, or their value, and damages. While the suppliant failed upon statutory grounds, yet, apparently no objection was taken at the trial, or on appeal, that a petition of right did not lie against the Crown for goods wrongfully detained by the servants of the Crown, or their value, or that the action should have been taken against the customs officers seizing the films. The definition of the word "relief" in sec. 2 (c) of the Petition of Right Act is, I think, in its terms sufficiently wide to cover a claim for a declaration that the suppliant is entitled to the value of the goods. Further, sec. 18 (d) of the Exchequer Court Act enacts that the Exchequer Court of Canada shall have exclusive jurisdiction to hear and determine "any claim against the Crown arising under any law of Canada." The Supreme Court of Canada, in *The King v. Armstrong* (40 S.C.R. p. 229), held that where the Exchequer Court Act gave jurisdiction it imposed a liability upon the Crown. I think that this claim is one arising under the Customs Act, a statute of Canada.

But there is another section of the Exchequer Court Act which clearly seems to confer jurisdiction upon the court, and to create a liability against the Crown, in precisely a case of this kind, concurrently with any remedy to be found in the Customs Act. Sec. 18 of the Exchequer Court Act states that the Exchequer Court shall have jurisdiction in all cases where "the land, goods or money" of the subject are in the possession of the Crown; and this does not relate to "land, goods or money" taken for any public purpose, for, in that case jurisdiction is conferred by sec. 19 (a); sec. 18 also refers to contracts entered into by or on behalf of the Crown. Taken in their plain meaning these words clearly give jurisdiction to the court to entertain a claim for goods of the subject in the possession of the Crown; then if there is jurisdiction so conferred, under the decision of the Supreme Court of Canada in the case of *Armstrong v. The King* (*supra*), a liability is imposed upon the Crown.

La seconde cause, savoir celle de *The King* et *Armstrong*, concerne une réclamation en dommages résultant d'un accident et la décision, favorable à la pétitionnaire-intimée, repose sur la clause (c) du premier paragraphe de l'article 16 (maintenant 19). Cette cause, de nature différente de celle qui nous occupe, ne peut servir d'appui à la réclamation de Gariépy.

Le procureur de l'intimé, de son côté, a soutenu que le recours en dommages contre la Couronne ne peut résulter que d'un délit, d'un quasi-délit, d'un contrat ou d'un quasi-contrat. D'après lui, aucune action en dommages ne peut procéder de la loi seule; le prétendu recours en dommages qui résulterait de la loi, invoqué par le pétitionnaire,

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semblerait basé sur l'article 1065 du Code Civil. Cet article décrète ce qui suit:

Toute obligation rend le débiteur passible de dommages en cas de contravention de sa part; dans les cas qui le permettent, le créancier peut aussi demander l'exécution de l'obligation même, et l'autorisation de la faire exécuter aux dépens du débiteur, ou la résolution du contrat d'où naît l'obligation; sauf les exceptions contenues dans ce Code et sans préjudice à son recours pour les dommages-intérêts dans tous les cas.

Cet article est un corollaire de l'article 983, qui se lit ainsi:

Les obligations procèdent des contrats, des quasi-contrats, des délits, des quasi-délits, ou de la loi seule.

Les articles 983 et 1065 du Code Civil n'ont, à mon avis, aucune application en la présente cause.

Les recours en dommages contre la Couronne sont déterminés par la Loi de la Cour de l'Échiquier. S'il ne s'agit point de dommages délictuels ou contractuels, la réclamation du pétitionnaire ne peut avoir d'autre base que la clause (d) du premier paragraphe de l'article 19. La seule loi dont il puisse s'agir en l'espèce est la Loi de la Marine Marchande au Canada; ce serait de l'infraction de quelque-une de ses prescriptions que procéderait le recours du pétitionnaire, si recours il y a. La partie VI de cette Loi a trait au pilotage; c'est là que se trouvent les dispositions pouvant avoir quelque application à la présente cause.

J'ai déjà cité certaines dispositions de la loi, contenues dans les articles 391, 397 et 530; il me semble opportun de faire mention en outre de l'article 415 et d'en citer les clauses pertinentes:

Sous réserve des dispositions de la présente Partie ou de toute loi alors en vigueur dans sa circonscription, toute administration de pilotage doit, quand il y a lieu, par règlement approuvé par le Gouverneur en son conseil et dans les limites de sa circonscription,

f) réglementer la gouverne des pilotes, des capitaines et des seconds, s'il en est, porteurs de ses certificats, pour assurer leur bonne conduite, l'assiduité à remplir leurs devoirs et l'efficacité de leurs services à bord et à terre, ainsi que la gouverne des aspirants pilotes; et régler le nombre de ces derniers;

g) établir des règles portant que toute contravention à ces règlements peut être punie par la révocation ou la suspension du brevet ou du certificat de quiconque se rend coupable de cette contravention.

C'est en vertu des dispositions des paragraphes (f) et (g) de l'article 433 de la Loi de la Marine Marchande au

Canada (S.R.C. 1906, chap. 113), en substance les mêmes que les paragraphes (f) et (g) ci-dessus, que les règlements (pièce 6) ont été adoptés. Ces règlements ont été approuvés par un arrêté ministériel en date du 16 septembre 1927, publié dans la *Gazette du Canada* le 24 du même mois.

L'intimé peut-il être tenu responsable de la conduite de Boulay? Je n'aurais pas d'hésitation à répondre à cette question dans la négative, si le ministre n'avait ratifié la décision de son subalterne et maintenu l'amende et la suspension imposées à Gariépy.

La doctrine est bien établie que le Roi ne peut être tenu responsable des erreurs, bévues, omissions, négligences ou abus de pouvoir de ses officiers ou serviteurs, sauf les cas particuliers prévus par la loi; voir à ce sujet: *Chitty, Prerogatives of the Crown*, 379; *Bacon's Abridgment of the Law*, 95; *Robertson, Law and Practice of Civil Proceedings by and against the Crown*, 577; *Lord Sheffield v. Ratcliffe* (1); *Viscount Dunbarr's case* (2); *Attorney-General v. Chitty* (3); *Giles v. Grover* (4); *Regina v. Renton* (5); *Lord Advocate v. Miller's Trustees* (6); *The Queen v. Bank of Nova Scotia* (7); *Burroughs et al. v. The Queen* (8); *Boyd & Co. v. Smith* (9); *Black et al. v. The Queen* (10); *Gunn & Company Ltd. v. The King* (11); *Tobin v. The Queen* (12).

Vu que ces notes son déjà longues, je me contenterai de citer des extraits de quatre des décisions ci-dessus mentionnées.

Dans la cause de *Attorney-General v. Chitty*, Lord Parker a émis, entre autres, l'opinion suivante (Parker's Rev. Rep., 47):

Two of these instances are modern and *pendente lite*; and Sike's was after the making of the additional book of rates, and is accounted for by the promise of the commissioners of the customs to put him upon

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| (1) (1724) Hobart's Reports, 334, 347; 80 Eng. Rep. 475, 487.        | (6) (1884) 11 Court of Session Cases, 1046, 1053.      |
| (2) (1634) 4 Croke's Rep. 349.                                       | (7) (1885) 11 S.C.R. 1, 10.                            |
| (3) (1744) Parker's Revenue Reports, 37, 47; 145 Eng. Rep. 707, 710. | (8) (1891) 2 Ex. C.R. 293, 298; (1891) 20 S.C.R. 420.  |
| (4) (1832) 9 Bingham's Rep. 128, 156.                                | (9) (1894) 4 Ex. C.R. 116.                             |
| (5) (1848) 2 Ex. Rep. 216, 220; (1848) 17 L.J. 204, 205.             | (10) (1899) 6 Ex. C.R. 236; (1899) 29 S.C.R. 693, 699. |
|  | (11) (1906) 10 Ex. C.R. 343, 346.                      |
|  | (12) (1864) 143 Eng. Rep. 1148.                        |

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the same footing with Mr. Chitty, till the dispute between the Crown and Mr. Chitty should be determined; but the mistake, or the acquiescence of the commissioners, or the officers, could not bar or prejudice the right of the Crown. *Sheffield and Ratcliffe*, Hob. 347, and *Lord Viscount Dunbar's case*, Cro. Car. 349.

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Dans la cause de *Lord Advocate v. Miller's Trustees*, Lord Fraser s'exprime ainsi (p. 1053):

It is the privilege of the Crown not to be bound by the omissions, neglect, and blunders of their officers. It is needless to inquire what was the reason or origin of this privilege. It is perfectly established, and in reference to these legacy-duties it is matter of daily practice to open up accounts that had been apparently settled with the Inland Revenue—(See *The Lord Advocate v. Meiklam, &c.*, 13th July 1860, 22 D. 1427).

Dans la cause de *Boyd & Co. v. Smith*, où il s'agissait d'une réclamation par des manufacturiers de bois de construction contre un officier de la Couronne pour dommages résultant de saisies illégales, pratiquées pour le recouvrement de droits imposés sur la descente de billes de bois dans un glissoir érigé sur une rivière sous le contrôle du Gouvernement du Canada, l'honorable juge Burbidge, après avoir exprimé l'opinion qu'il n'était rien dû à la Couronne par les demandeurs, déclare ce qui suit (p. 126):

It is argued, however, that as the defendant acted under instructions from his superior officers he is not liable for his acts. In my opinion that will not avail him. I have no doubt that he was a ministerial officer having in respect of the collection of tolls and dues on slides and other river improvements a duty to perform, and that for the manner in which he performed that duty he must himself answer. Others may or may not have made themselves liable for his acts. We need not enquire as to that now. . . .

The case of *Buron v. Denman* (2 Ex. 167) in which the acts of the defendant in firing the barracoons of the plaintiff and carrying away his slaves and destroying his goods were ratified by the Crown and became acts of state, and that of *Irwin v. Grey* (L.R. 1 C.P. 171) in which the plaintiff sought to recover damages from the defendant for having, in breach of his duty as Secretary of State, neglected to submit to Her Majesty a petition of right presented by the plaintiff, are obviously distinguishable. The Crown is not liable for the wrongs committed by its officers except in cases in which such a liability has been expressly created by statute, and if the officer himself were in such a case not liable the subject would be without remedy. That fortunately is not the law. For acting without authority of law, or in excess of the authority conferred upon him, or in breach of the duty imposed upon him, by law, a public officer is personally responsible to any person who sustains damage thereby.

Dans la cause de *Black et al. v. The Queen*, le juge en chef, Sir Henry Strong, a exprimé l'opinion suivante (p. 699):

Next it is said that the laches of the Crown officers in not communicating the default of the postmaster to the sureties, by which they

were deprived of the benefit of a statute which provides that sureties for Crown officers may obtain their release by giving notice of their wish to be discharged to the Crown, and allowing a certain time to elapse, is a bar to the Crown. To this it is answered that notice was given to the appellant Henderson Black, for himself and on behalf of his brother John Black, of the principal defalcation which had been discovered before Macpherson's death. The evidence on this point is contradicted by Henderson Black, but the learned judge seems to treat the facts of notice as established. There is, however, a much more conclusive answer, namely, that the Crown is never bound by the laches or default of its officers. In one aspect of this doctrine it is applied in cases of tort where the rule respondent superior is held not to apply to the Crown. There is therefore nothing in this point.

Les causes de *McHugh v. The Queen* (1) et de *Harris v. The King* (2) citées par le procureur de l'intimé, concernant toutes deux des réclamations pour dommages à la suite d'accidents, ne me semblent pas pertinentes.

La ratification par le ministre, en sa qualité d'administrateur de pilotage, de la sentence imposée par l'assistant-surintendant des pilotes peut-elle lier la Couronne et la rendre responsable de l'erreur de jugement et de l'abus de pouvoir de ce dernier? Le dépôt par le ministère de la Marine de la somme de \$200 à titre de cautionnement sur l'appel à l'encontre du jugement rejetant une exception à la forme dans la cause Gariépy-Boulay susdite et le dépôt par le ministère de la Justice de la somme de \$500 à titre de cautionnement sur l'appel à l'encontre du jugement maintenant l'action entraînent-ils la responsabilité de la Couronne? Le fait que le ministre de la Justice a demandé à Me Louis St-Laurent d'agir comme conseil de Me Allyn Taschereau, procureur de l'assistant-surintendant des pilotes, devant la Cour d'Appel peut-il avoir pour effet d'obliger la Couronne?

Il a été décidé à maintes reprises qu'un ministre ne peut lier la Couronne à moins d'y être autorisé par statut ou arrêté ministériel: il suffra de citer les arrêts suivants: *The King v. Vancouver Lumber Co.* (3); *The King v. McCarthy* (4); *The Quebec Skating Club v. The Queen* (5); *Jacques-Cartier Bank v. The Queen* (6); *British American Fish Corporation, Ltd. v. The King* (7); *Livingston v. The King* (8); *Lefebvre v. The King* (9); *National Dock and Dredging Corporation Ltd. v. The King* (10).

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| (1) (1900) 6 Ex. C.R. 374.       | (6) (1895) 25 S.C.R. 84, 91.     |
| (2) (1904) 9 Ex. C.R. 206.       | (7) (1918) 18 Ex. C.R. 230, 235; |
| (3) (1914) 17 Ex. C.R. 329, 331; | (1919) 59 S.C.R. 651.            |
| (1920) 50 D.L.R. 6.              | (8) (1919) 19 Ex. C.R. 321, 327. |
| (4) (1919) 18 Ex. C.R. 410, 415. | (9) (1923) Ex. C.R. 115, 117.    |
| (5) (1893) 3 Ex. C.R. 387, 399.  | (10) (1929) Ex. C.R. 40, 42.     |

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Il s'agissait dans les causes précitées de contrats faits ou d'engagements assumés par un ministre au nom de la Couronne. Le cas qui nous occupe n'est pas identique. Il ne s'agit pas en l'espèce d'un contrat ou d'un engagement créant pour la Couronne une obligation. Il s'agit purement et simplement de l'exercice d'un devoir ou d'une charge incombant au ministre en sa qualité d'administrateur de pilotage en vertu de la loi. Ce dont on se plaint c'est qu'en exerçant ce devoir ou cette charge le ministre a maintenu l'amende et la suspension imposées au pétitionnaire par l'assistant-surintendant des pilotes de façon arbitraire et illégale, a empêché le pétitionnaire sans motif valable de pratiquer son métier et lui a ainsi causé des dommages considérables.

Ce n'est pas en sa qualité de ministre de la Couronne mais comme administrateur de pilotage que le ministre de la Marine a agi. Ce n'est que dans les circonscriptions de pilotage de Québec et de Montréal que le ministre constitue l'administration de pilotage en vertu de la loi en vigueur aux dates qui nous concernent; dans les autres circonscriptions l'administration de pilotage est composée de la commission des pilotes ou d'un comité de trois à cinq personnes nommé par le gouverneur en son conseil. L'article 399 de la Loi de la Marine Marchande au Canada décrète que la commission des pilotes de Halifax constitue l'administration de pilotage de la circonscription de Halifax et l'article 400 de la même loi décrète que la commission des pilotes de Saint-Jean constitue l'administration de pilotage de la circonscription de Saint-Jean. L'article 411 stipule que "le gouverneur en son conseil peut constituer des administrations de pilotage dans toutes les circonscriptions qu'il établit ailleurs que dans les circonscriptions de Québec, de Montréal, de Halifax ou de Saint-Jean"; l'article ajoute que chacune de ces administrations doit être composée de trois membres au moins et de cinq au plus.

Il ressort de ces dispositions, il me semble, que le ministre de la Marine, quand il agit comme administrateur du pilotage dans les circonscriptions de Montréal ou de Québec, n'exerce pas les devoirs qui lui sont dévolus en vertu de la Loi du Ministère de la Marine mais ceux qui lui sont attribués par les articles 395 et 397 de la Loi de la Marine Marchande au Canada; en ce cas il me



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paraît être un officier de la Couronne comme le seraient les membres de toute autre administration de pilotage créée par les articles 399 et 400 ou constituée en vertu des dispositions de l'article 411. Comme tel il est, à mon avis, sur le même pied qu'un autre officier de la Couronne et il ne peut lier celle-ci par ses erreurs, bévues, omissions, négligences ou abus de pouvoir, si ce n'est dans les cas spécialement prévus par la loi.

Je ne crois pas que le paiement des frais adjugés contre Boulay dans la cause Gariépy-Boulay, le dépôt des montants de \$200 et \$500, à titre de cautionnement en appel non plus que le fait de retenir les services d'un conseil devant la Cour d'Appel aient eu pour effet de rendre la Couronne responsable des dommages subis par le pétitionnaire.

Le pétitionnaire aurait-il un recours contre l'assistant-surintendant des pilotes, voire contre l'administration de pilotage pour avoir commis un abus de pouvoir et avoir imposé ou maintenu une amende et une suspension de service sans motif valable? C'est là une question qui n'est pas de mon domaine et sur laquelle je ne crois pas opportun de me prononcer. Je me permettrai cependant de noter que les décisions dans les causes de *McGillivray v. Kimber et al* (1) et de *Boyd & Co. v. Smith* (2) offrent quelque intérêt relativement à cette question. Voir aussi *Buron v. Denman* (3).

Si j'en étais arrivé à la conclusion que l'intimé est responsable à l'égard du pétitionnaire pour les dommages que celui-ci a subis, j'aurais été enclin à lui accorder une somme de \$1,497.81, comme suit:

perte de salaire du 1er au 10 septembre, date à laquelle le ministre a maintenu la sentence de l'assistant-surintendant des pilotes et à laquelle ladite sentence est en conséquence devenue définitive .....	\$ 191 81
frais d'avocats et dépenses légales .....	795 00
dépenses de voyages .....	211 00
dommages à la réputation .....	300 00
	\$1,497 81

Je dois dire que je suis arrivé au chiffre de \$191.81 en prenant les item A et C du paragraphe 15 de la pétition qui forment un total de \$1,879.80, divisant celui-ci par 14,

(1) (1915) 52 S.C.R. 146. (2) (1884) 4 Ex. C.R. 116, 126.  
 (3) (1848) 2 Ex. Rep. 167.

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le nombre de semaines à partir du 1er septembre à aller à la clôture de la navigation, et déterminant à l'aide de ce quotient le montant du salaire qu'aurait pu retirer Gariépy du 1er au 10 septembre inclusivement.

Les antécédents du pétitionnaire étaient excellents; sa suspension comme pilote a certainement causé un préjudice à sa réputation. Si le pétitionnaire eût payé l'amende de \$40 sous protêt, comme le lui avait suggéré Boulay et comme le lui avait conseillé Hamelin, le secrétaire du comité des pilotes du district de Montréal, à qui il avait soumis son cas (voir les télégrammes produits comme pièces B, C, D et E) et comme, à mon avis, il aurait dû le faire, dès que la sentence de l'assistant-surintendant des pilotes a été maintenue par le ministre, sa suspension n'aurait pas eu la notoriété qu'elle a obtenue et il aurait de la sorte diminué dans une large proportion, sinon totalement évité, le dommage causé à sa réputation.

Pour les raisons ci-dessus je suis arrivé à la conclusion—à regret je dois dire, étant convaincu que Gariépy n'a pas été traité de façon équitable—que le pétitionnaire n'a point de recours contre l'intimé, qu'il n'a droit à aucune partie du remède réclamé par sa pétition et que celle-ci doit en conséquence être rejetée.

L'intimé aura droit à ses frais contre le pétitionnaire, s'il juge à propos de les lui réclamer.

*Judgment accordingly.*

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BETWEEN:

HIS MAJESTY THE KING, on the  
 Information of the Attorney-General  
 of Canada . . . . . } PLAINTIFF;

AND

ISABEL GERTRUDE SPENCER. . . . . DEFENDANT.

*Expropriation—Fair value of land expropriated—Municipal assessment—Value to owner—Replacement cost and depreciation of buildings at time of expropriation—Compensation for moving expenses.*

Plaintiff expropriated certain land in Vancouver, B.C., the home property of defendant. In an action to determine the value of the property the Court found that the amount offered by the plaintiff in payment therefor was too low.

*Held:* That municipal assessment for taxation purposes may assist in arriving at a fair valuation of a property, but it is not in itself a determining factor.

2. That one of the main factors to consider to arrive at a fair valuation is the market value, but the market price is not necessarily a conclusive test.
3. That the proper manner in which to value the particular property expropriated in this instance is to arrive at the replacement cost and deduct therefrom the depreciation which the buildings now standing have suffered since their erection.
4. That the defendant has a right to be compensated for expenses necessarily incurred for moving.

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INFORMATION by the Crown to have certain property expropriated in Vancouver, B.C., valued by the Court.

The action was tried before the Honourable Mr. Justice Angers, at Vancouver.

*W. B. Farris, K.C.* and *Dugald J. McAlpine* for plaintiff.  
*H. I. Bird* for defendant.

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

ANGERS J., now (August 21, 1939) delivered the following judgment:

This is an information exhibited by the Attorney-General of Canada whereby it appears that the land hereinafter described belonging to the defendant was expropriated for the purpose of a public work of Canada, to wit, the Jericho Beach Air Station, by depositing under the provisions of the Expropriation Act (R.S.C., 1927, chap. 64) on the 25th day of April, 1938, a plan and description of the said land in the Land Registry Office of the City of Vancouver, in the Province of British Columbia, in which registration division such land is situate.

The land so expropriated is described as follows:

All and singular those certain parcels of land and premises situate, lying and being in the City of Vancouver, in the Province of British Columbia, and more particularly known as lots three (3) and four (4), Block one hundred and thirty-two (132), District Lot five hundred and forty (540), Group one (1), New Westminster District.

The information alleges that by an order dated November 11, 1927, made under the Plans Cancellation Act, a certain road allowance theretofore running through the

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said land was vested in the defendant, subject to a condition that the northerly ten feet of such land should be dedicated to the City of Vancouver as a lane, and pursuant to such order the whole of the land above described, less the northerly ten feet, was redescribed as "Lot 'A' of Block one hundred and thirty-two (132), district lot five hundred and forty (540), group one (1), New Westminster District Plan 2125," and that upon such plan the said northerly ten feet are shown as a lane and is therefore dedicated to and vested in the City of Vancouver as such.

The information further sets forth that at the time of the taking of the said land the defendant was seized of an estate in fee simple in the said land, except the northerly ten feet thereof, and claims that she has sustained loss and damage in respect of her estate and title as aforesaid by reason of the said expropriation.

The information states that His Majesty the King is willing to pay to the defendant the sum of \$49,150 in full satisfaction of her estate, right, title and interest, free from encumbrances, in the said land and of all claims in respect of damages or loss, if any, that may be occasioned to the defendant by reason of the said expropriation.

The information in addition says that on June 4, 1938, His Majesty the King tendered to the defendant the sum of \$49,150 and that she refused to accept it.

In her statement of defence, the defendant admits the allegations contained in the information, save those set forth in paragraphs 5 and 7 thereof, in which it is averred that His Majesty is willing to pay to the defendant the sum of \$49,150 in full satisfaction of her estate, right, title and interest, free from encumbrances, in the said land and of all claims in respect of damages or loss, if any, that may be occasioned to her by reason of the expropriation, and that His Majesty is not aware of any other facts material to the determination of the question involved herein.

The statement of defence then alleges in substance:

The strip of land ten feet wide lying north of Lot "A," Block 132, District Lot 540, Group 1, New Westminster District, Plan 2125, was dedicated to the City of Vancouver as a lane by the order mentioned in the information

and the said strip of land is not now or never has been the property of the defendant;

on or about the 18th of August, 1919, the defendant acquired by purchase title in fee simple to the land described in the information;

subsequently the defendant applied for, under the provisions of the Plans Cancellation Act, R.S.B.C., 1924, chap. 194, and was granted an Order on November 11, 1927, whereby the road allowance extending from the east to the west boundaries of the said lots at the northerly end thereof was vested in the defendant subject to the dedication to the City of the ten-foot lane allowance mentioned in the information;

since the purchase of the said land and premises the defendant has maintained the buildings situate thereon in a perfect state of repair, has installed therein all modern conveniences and has made extensive improvements to the residence;

the defendant has developed and improved the said land by the erection of a garage with living quarters, a gardener's cottage, two greenhouses, a barn, chicken house and outbuildings, as well as a non-skid tennis court;

the defendant has further developed and improved the said land comprising approximately six acres, by laying out the said land in lawns and gardens, by the planting of shade and ornamental trees and shrubs, by the construction of a pool, driveways and paths and by the erection of stone, concrete and ornamental iron fences, walls and gates;

the said land and premises were acquired and have since been developed and improved with a view to establishing a permanent home for the defendant, her husband and her family of seven children ranging in age from five to twenty-four years and the defendant neither needed nor desired to sell the said land and premises;

the defendant has installed in the said residence furniture, rugs, curtains, drapes and fittings adapted thereto, which will not be adaptable to other residential premises;

the said land and premises are of unusual character;

there are no other properties in the City of Vancouver or its vicinity with which the said land and premises can be fairly compared and by reason of these facts the market value of the said land and premises is incapable of ascer-

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tainment; the defendant therefore claims that the compensation to be awarded her should be assessed upon the basis of the intrinsic value to her of the said land and premises which she places at the sum of \$120,000 computed as follows:

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5.86 acres of land as developed by the defendant, \$40,000;  
 residence and outbuildings..... 80,000;

the defendant, by reason of the expropriation, will be put to an expense of \$5,000 in obtaining other premises, in storing her furniture and in moving; she will also suffer loss from depreciation in the value of the furniture and other contents of the said premises to the extent of \$7,500;

the defendant prays that it be declared that the tender of \$49,150 is not a sufficient compensation and that the defendant is entitled to the sum of \$145,750 computed as follows:

value of 5.86 acres of land.....	\$40,000
value of residence and outbuildings.....	80,000
depreciation on contents of residence.....	7,500
removal expenses and expenses to be incurred on the acquisition of other premises.....	5,000
10% for compulsory taking.....	13,250
	<hr/>
	\$145,750

The defendant purchased the property in question from Canada Loan & Mortgage Company in 1919 for \$25,000. She has lived in it since and was living in it at the time of the expropriation with her husband and her seven children, ranging in age from five to twenty-four years. She acquired it and improved it with a view to establishing a home for herself, her husband and her family. She neither needed nor desired to sell it; she received at various times offers of purchase but constantly declined them. Since her acquisition, the defendant made many additions and improvements to the property. Colonel Spencer, the defendant's husband, said that it was now about two-thirds larger than it was when his wife bought it. Among the additions effected are a living room, a den, four bedrooms and also bath rooms. The plumbing and the electric wiring were renovated. The basement was excavated and cemented and a laundry room with all the necessary fixtures and refrigeration plant were installed therein. A new furnace was put in. The garage was reconditioned and a dwelling built for the chauffeur. A gardener's cot-

tage, two greenhouses, a barn and a chicken house were constructed. Entrance gates and iron fences were installed; stone and concrete walls were erected in the garden; driveways and paths were made; shade and ornamental trees and shrubs were planted. An asphalt tennis court with its necessary accessories was laid. A concrete fish pond was built. Other additions and improvements of lesser importance were effected which I do not think expedient to enumerate.

The plan filed as exhibit A indicates clearly the site of defendant's property at the corner of Trimble street and Second avenue, in a suburban residential district. It is bounded at the back by Imperial street, now partly closed, on the other side of which are the Jericho Golf Links; almost in front, across Trimble street, is Locarno Park Addition. The property is situated at approximately 1,250 feet from English Bay and, as the land slopes down toward the beach, there is from the defendant's property an unobstructed view of the bay.

The area of the land is mentioned in the statement of defence as being 5.86 acres. Douglas Reeve, real estate agent and chartered surveyor, called as witness on behalf of defendant, estimated the area at 5.87 acres. I shall adopt the figure mentioned in the defence, viz., 5.86 acres.

Reeve inspected the house and prepared a detailed description of the interior thereof, a copy of which he produced as exhibit B. I had the opportunity, during the trial, to visit the property, accompanied by counsel. I may say that, as far as my memory goes, Reeve's description on the whole—there are details which, after a single and comparatively short visit, it is practically impossible to recollect—is accurate and trustworthy. I may add that the house impressed me as being a fine, spacious, comfortable and cozy home, in a good state of repair. The property as a whole appeared to me well kept.

Reeve placed a value of \$38,166 on the land and cultivation (trees, shrubs, hedges, etc.) and of \$73,648 on the buildings (house, garage, cottage, greenhouses and boiler house, barn and chicken house), the driveways and walks, the iron fences and the entrance gates, the stone walls, the fish pond, the tennis court and the manure pit, making a total valuation for the property of \$111,814, as shown

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by the memorandum prepared by the witness and produced as exhibit C.

Witness arrives at the figure of \$38,166 for the land and cultivation as follows (exhibit C):

5.87 acres at \$4,392 per acre.....	\$25,781(04)
cultivation and planting, 4.25 acres at \$1,500 per acre.	6,375
trees, hedges, etc. (as appraised by witness F. B. Williams).....	6,010
	\$38,166

The sum of \$73,648 for the buildings, the stone walls, fences and gates, the driveways and walks, the fish pond, the tennis court and the manure pit is made up thus:

house .....	\$82,620,	less depreciation	\$24,340.....	\$58,280
garage .....	2,940,	"	1,470.....	1,470
cottage .....	890,	"	445.....	445
greenhouse .....	730,	"	365.....	365
greenhouse .....	1,930,	"	965.....	965
boiler house ....	220,	"	110.....	110
boiler and pipes..	400,	"	200.....	200
cow barn and chicken house..	400,	"	200.....	200
manure pit..\$ 75				
fish pond ...	40			
driveways ..	680			
walks .....	215			
steps .....	60			
	1,070,	"	270.....	800
stone walls (as appraised by witness John McCarter) .....	7,210,	"	910.....	6,300
entrance gates and piers — cost in 1936 .....	1,818,	"	nil .....	1,818
iron fence .....	1,187,	"	463.....	724
tennis court ....	1,500,	"	150.....	1,350
fence .....	480,	"	48.....	432
concrete base to fence .....	210,	"	21.....	189
	\$103,605		\$29,957	\$73,648

Reeve estimated the replacement cost of the house at \$82,620, as summarized in the statement filed in exhibit E. This figure is the same as the one appearing in the memorandum of valuation (exhibit C) hereinabove referred to.



Reeve distributed the replacement cost thus (exhibit D):

for the house as it stood when purchased by the defendant .....	\$42,201
for the west wing erected by the defendant since acquisition of the property and for the additions and renewals made by her in the old section of the house .....	40,419
	\$82,620

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The original house having been erected 26 years prior to the expropriation and the additions and renewals therein as well as the new wing having been made 13 years prior thereto, Reeve, fixing the rate of the depreciation at 1½ per cent per year, computed the total thereof at \$24,340 (the amount set forth in the statement exhibit C) as follows:

39%, i.e., 26 years at 1½%, on \$42,201.....	\$16,458
19·5%, i.e., 13 years at 1½%, on \$40,419.....	7,882
	\$24,340

A memorandum showing the mode of reckoning the depreciation, prepared by Reeve, was produced as exhibit D.

Reeve said that it was difficult to place a market value on the Spencer property; demands for properties of this size and character are rather scarce. In witness' opinion, a fair value would be \$80,000; according to him, a property of this size is generally sold at a loss of about 25 per cent.

In cross-examination Reeve stated that he would probably be able to sell the Spencer property, within a delay of ten years, for the sum of \$80,000.

In his opinion airplane hangars affect to a certain extent the value of the surrounding properties.

Reeve said he considered the city assessment of \$49,150 too low. This assessment, according to him, is made up as follows:

land .....	\$16,850
residence .....	30,000
out buildings .....	2,300
	\$49,150

The assessment for the land would seem fair enough to the witness, if it were not for the cultivation thereon.

The assessment in 1931 was higher; the value of the residence was then fixed at \$55,000.

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Reeve said that lots 1 and 2 in block 132 were sold to the Dominion Government in 1937 or 1938 in their natural state for \$15,930; these lots are approximately six feet lower than lots 3 and 4. The Spencer lots have been filled and they are underdrained. I believe that, at the date of the expropriation, lots 3 and 4 were worth more than lots 1 and 2.

According to witness, the assessment of lots between Second and Third avenues in the neighbourhood is \$4,537 per acre.

The assessment of lots on Second avenue, opposite the Spencer property, is \$18 per front foot; the assessment of the Spencer property is equivalent to \$12.50 a front foot.

The eastern portion of lot 133 is assessed at \$2,811 an acre.

The assessment of block 130 between Sasamat and Trimble streets is \$18,225, representing \$5,023 per acre.

Block 129, having an area of 3.45 acres, is assessed at \$22,060, which is equivalent to \$6,394 per acre.

Henry V. Sharples, a real estate agent, was engaged by the Dominion Government for the purchase of property for the Jericho Beach Air Station during the early part of 1937. He acquired lots 1 and 1A to lots 11 and 11A of block 128 and lots 1 and 1A to lots 9 and 9A of block 129, situate between the Marine Drive and English Bay and between Blanca Drive and Sasamat street: see plan exhibit F. These lots were bought for a total price of \$123,050, as shown on the list of prices prepared by Sharples and filed as exhibit G. They were later exchanged with the City of Vancouver for the lots marked with the letter A in pencil on plan exhibit F. The price paid for the lots purchased by Sharples for the Crown amounted to a little over \$5,000 an acre. In witness' opinion, a property having a water frontage has a greater value.

William D. Jacobs, real estate agent, cited the following sales made in 1937 or the early part of 1938:

lot 12 of block 139, district lot 540, for	\$1,180
lot 9 " " " " " " "	900
lot 7 " " " " " " "	975
lot 15 " " " " " " "	800
lot 28 " " " " " " "	650

In witness' opinion these prices were low on account of the dullness of the real estate market.

Maurice Helyer, structural engineer with the firm of McCarter & Nairne, architects and structural engineers, inspected the Spencer property during the month of August, 1938; he went there several times and made a survey of all the materials contained in the residence and the out buildings; with this he prepared an estimate of the cost (see exhibit H).

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His total estimate was \$97,521.83, as follows:

house .....	\$80,134 33
garage .....	2,657 00
chauffeur's house .....	1,394 00
entrance gates .....	1,932 50
greenhouse No. 1 .....	795 00
greenhouse No. 2 .....	2,130 00
greenhouse heating plant.....	674 00
barns .....	595 00
garden walls .....	7,210 00
	\$97,521 83

Helyer said that the first page of the survey and estimate filed as exhibit H was the work of Mr. McCarter, but that the following pages represented his own work; all the measurements were taken by the witness. The cost of replacement of the house is estimated at \$80,580, as indicated on page 2 of the survey and estimate aforesaid.

The estimate of the cost of the out buildings includes all the buildings apart from the residence.

In cross-examination Helyer said that he had made no allowance for depreciation; he estimated all the buildings as new. He admitted that there was some depreciation but said that he could not figure it out.

John McCarter, architect, who said that he had had 25 years experience as such in British Columbia and had obtained several important contracts (Marine Building, Medico-Dental Building, Hall Building, Post Office Extension, Vancouver) and made plans for various residential buildings ranging in price from \$12,000 to \$35,000, testified that he had inspected the Spencer property during the two weeks preceding the trial and had made an estimate of the cost of replacement. He said that he used the method generally adopted for estimates of buildings, known as the "cube cost." The cubic contents of the house are, according to his figures, 240,403 cubic feet. McCarter drafted plans of each of the floors of the house,

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which were produced as exhibit I. According to witness, the figures set forth in the survey and estimate exhibit H can be checked on the plans exhibit I; after verification, I may say they can. The sum of  $33\frac{1}{2}$  cents per cubic foot is, in McCarter's opinion, fair and reasonable. He considers that the house could be built to-day for the sum of \$80,134.33 mentioned on the first page of exhibit H.

In cross-examination McCarter stated that he had not taken the depreciation into consideration. He estimated the depreciation of the residence in use for about 25 years at one half of one per cent per year.

James C. Macpherson, real estate broker for 28 years, president and manager of the Pemberton Realty Corporation and chairman of the Vancouver Town Planning Commission, inspected the Spencer property in August and September, 1938. He made an estimate of the land and cultivation, the residence and the out buildings, of the fences and gates, of the garden walls, the driveway and cement walks, of the fish pond, of the tennis court and of the manure pit and arrived at a figure of \$113,464.48 for the whole. He said that the house contained 235,295 cubic feet and that a sum between 33 and 34 cents per cubic foot was fair. He thus fixed the cost of the house at \$80,000.30; he deducted however for depreciation the sum of \$20,800, being 1% per cent per year during 26 years, leaving a net value to-day of \$59,200.30. Macpherson prepared a summary of his valuation and filed it as exhibit J.

Macpherson also indicated on a plan (marked as exhibit K) certain lots in the vicinity of the Spencer property, mentioning, as the case may be, the amount of the assessment or the purchase price. Taking these figures as basis, he estimated the value of the land of the defendant at \$4,500 an acre; he said that he considered this valuation fair and equitable.

In witness's opinion, blocks 129 and 130 being nearer to the beach are worth about \$500 more an acre than the Spencer property.

Macpherson allowed an additional sum of \$1,500 per acre for four acres for the cultivation. I may note in passing that Reeve, in his estimate, allowed a similar sum with regard to four and a quarter acres.

Macpherson said that he was the agent who made the sale of the property to the defendant in August, 1919, for the price of \$25,000. The property at the time consisted of only fifteen lots; it comprises now thirty-three lots. Witness said that he could not recognize to-day the house he had sold in 1919; considerable improvements and enlargements had been made to it since the purchase. According to Macpherson the defendant got her property at a bargain. Canada Permanent Mortgage Corporation, which had acquired the property through foreclosure, asked \$35,000; Mrs. Spencer made an offer of \$25,000 which was accepted. If the defendant had asked witness to list her property for sale, he would have advised her to list it at \$75,000 or \$80,000, if she wished to sell it. The market for large residential properties is limited.

Allwyn Buckley, horticulturist for several years, was gardener for the defendant. A week or so before the trial, he made an inventory of the trees, shrubs and plants in the garden; a copy of his inventory was filed as exhibit M. The prices quoted in this inventory are not his.

Francis B. Williams, horticulturist and gardener, stated that he knew the garden on the Spencer property; he made extensions to it and did some grading; he has done work in the garden at different intervals since 1921.

Williams took cognizance of the inventory prepared by Buckley and he set down in it the cost of the stock at the time of planting and its value in September, 1938, when the inventory was made.

George Dorrell, president of the Vancouver Real Estate Exchange, heard as witness on behalf of the Crown, declared that he had not attempted to determine the replacement cost. He merely considered the marketableness of the property on the date of the expropriation; its market value at the time did not, in his opinion, exceed \$40,000. Witness said he took into consideration the site of the property and all its future possibilities. He believes that the value of real estate in the neighbourhood will decrease owing to the proximity of the airplane hangars.

In cross-examination Dorrell stated that he had not considered the replacement cost, that he does not accept the figures mentioned by the defendant's witnesses in reference thereto and that the cost of replacement of a property does not represent its value.

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Dorrell said that it was not easy to find a willing buyer for the Spencer property or, in fact, for any large residential property.

Witness referred to the Shannon property, containing approximately ten acres and fronting on Granville street; he said that it had cost over \$400,000 and had been sold for \$106,000.

Frederick A. Cleland, real estate broker, vice-president of the Vancouver Real Estate Exchange, called as witness by the plaintiff, testified that he had inspected the Spencer property recently. He placed on it a value of \$42,000 for a sale by a willing vendor to a willing purchaser.

In cross-examination he said that he had taken into consideration the fact that the house had been remodeled. In his opinion, there are very few purchasers for a house of the size of that of the defendant; it is easier to sell small houses.

The offer made by the Crown corresponds exactly with the municipal assessment. No evidence was adduced to establish the relation between the assessment and the real value of real estate in the City of Vancouver. My experience, limited as it may be, has convinced me that municipal assessments are usually lower than the real value. Municipal assessment for taxation purposes may in certain cases assist in arriving at a fair valuation of a property, particularly when evidence has been offered to show the proportion of the assessment to the real value, but it is not in itself a determining factor: *The King v. Turnbull Real Estate Co. et al.* (1); *Dumble v. The Cobourg and Peterborough Railway Co.* (2).

One of the main factors to consider in endeavouring to arrive at a fair valuation of a property is the market value. *Dodge v. The King* (3); *The King v. Macpherson* (4). In the present case, however, the evidence discloses that it is extremely difficult, nay, even practically impossible to determine the market value of the Spencer property on account of its size and character. It is not unique in its kind, but it is not at all common. Demands

(1) (1902) 8 Ex. C.R. 163;

(1903) 33 S.C.R. 677.

(2) (1881) 29 Grant's Ch. R.  
 121, 131.

(3) (1906) 38 S.C.R. 149, 155.

(4) (1914) 15 Ex. C.R. 215.

for this type and standard of residential property are very limited.

I may note that the market price is not necessarily a conclusive test of the real value: *South Eastern Railway v. London County Council* (1); *Pastoral Finance Association Limited v. The Minister* (2); Cripps on Compensation, 8th ed., p. 182.

Sales of parcels of land in the vicinity have been mentioned and the prices paid therefor in 1937 or 1938 offer a basis to value the land of the Spencer property. In the sales referred to there is nothing however to compare with the Spencer residence; the properties forming the object of these sales differ from the Spencer property either in size, location or character. In these circumstances it seems to me that the only manner in which a value may be set on the Spencer buildings is to figure out the replacement cost and deduct therefrom the depreciation which the buildings now standing have suffered since their erection. The figure thus obtained will, in my opinion, represent the value to the owner at the time of the expropriation, which is the basis of the compensation allowable in cases of compulsory taking: *Federal District Commission v. Dagenais* (3); *Cedars Rapids Manufacturing and Power Co. v. Lacoste et al.* (4); *Pastoral Finance Association Ltd. v. The Minister* (5); *In re Lucas and Chesterfield Gas and Water Board* (6); *Sidney v. North Eastern Railway Co.* (7); *Stebbing v. Metropolitan Board of Works* (8); *The King v. Quebec Skating Club* (9); *The King v. Wilson* (10); Cripps on Compensation, 8th ed., p. 174; Nichols on Eminent Domain, 2nd ed., vol. 1, p. 630, No. 208.

The defendant is claiming a sum of \$7,500 for depreciation on the contents of the residence and a sum of \$5,000 for removal expenses and expenses which will be incurred on the acquisition of other residential premises.

Col. Spencer stated that most of the curtains and rugs, all made to order, would not suit and could not be used in another house. As the defendant had not yet selected another residence on the date of the trial, it is impossible to say with any amount of precision what rugs and cur-

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(1) (1915) 2 Ch. 252, 258.

(2) (1914) A.C. 1083, 1087, 1088.

(3) (1935) Ex. C.R. 25, 31.

(4) (1914) A.C. 569, 576.

(5) (1914) A.C. 1083, 1087.

(6) (1909) 1 K.B. 16.

(7) (1914) 3 K.B. 629, 637.

(8) (1870) L.R., 6 Q.B. 37.

(9) (1931) Ex. C.R. 103.

(10) (1914) 15 Ex. C.R. 283.

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tains will not fit in the new house. There will undoubtedly be some loss the exact amount whereof it is, with the evidence of record indefinite and incomplete as it is, difficult to determine with any accuracy.

I believe that the defendant has a right to be compensated for the expense which she will necessarily incur for moving: Cripps on Compensation, 8th ed., p. 184; Nichols on Eminent Domain, 2nd ed., p. 697; Browne and Allan, Law of Compensation, 2nd ed., pp. 102 (in fine) and 103. Evidence on this subject, however, is lacking and I do not think, in the circumstances, that I can grant any indemnity in this connection.

After a careful perusal of the evidence adduced I have reached the conclusion that a sum of \$85,860 will be a fair and adequate compensation to the defendant for the land and real property expropriated as well as for all damages arising out of the expropriation, the said sum being made up as follows:

5.86 acres of land at \$3,500 an acre.....	\$20,510
house \$72,000 less depreciation, viz., \$24,000.....	48,000
garage and chauffeur's living quarters.....	1,600
greenhouses .....	1,200
barn and chicken house .....	160
entrance gates .....	1,400
iron fence .....	500
garden stone walls .....	5,000
driveway and cement walks .....	800
tennis court and wire mesh fence .....	1,600
trees, shrubs, hedges, flowers, etc.....	5,000
fish pond .....	30
manure pit .....	60
	\$85,860

I think fair and reasonable to grant to the defendant the customary additional allowance of 10% to cover incidental costs and charges (depreciation of contents of house, removal, acquisition of new premises, etc.) to which the defendant will unavoidably be subject as a direct consequence of the expropriation.

The defendant, through her counsel, declared that, as she had been allowed to remain in possession of the property after the expropriation, she agreed to withdraw her claim for interest from the date of the expropriation to the date of the vacation of the property.

There will be judgment as follows:

1. The land and real property herein expropriated are declared vested in His Majesty the King;



2. The compensation for the land and real property so expropriated and for all damages arising out of or resulting from the expropriation is hereby fixed at the sum of \$94,446 with interest from the date on which the defendant had to give up possession of the property, such date to be established before the Registrar on the settlement of the minutes of the judgment;

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3. The defendant, upon giving to the Crown a good and valid title to the said land and real property, free from all mortgages, charges and encumbrances whatsoever, is entitled to recover the said sum of \$94,446, with interest as aforesaid;

4. The defendant is also entitled to the costs of the action.

*Judgment accordingly.*

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN:

THE SHIP *LAFAYETTE* AND HER OWNERS, LA COMPAGNIE GENERALE TRANSATLANTIQUE (DEFENDANT AND COUNTER CLAIMANT)..

1938  
April 21 & 22  
1939  
July 29.

APPELLANTS;

AND

PORT COLBORNE AND ST. LAWRENCE NAVIGATION COMPANY LIMITED .....(PLAINTIFF)

AND

THE MASTER, OFFICERS, MEMBERS OF THE CREW OF THE STEAMSHIP *BENMAPLE*, AND THE PASSENGERS WHO WERE ON BOARD HER

(ADDITIONAL PLAINTIFFS)

AND

LEONARD LABATTE ET AL. (INTERVENANTS)

AND

JOHN L. DICKEY ET AL. (INTERVENANTS)

RESPONDENTS.

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*Shipping—Collision in St. Lawrence River during fog—Article 16, International Rules of the Road—Negligence of respondent ship—Appeal allowed and cross-appeal dismissed.*

The ships *Lafayette* and *Benmaple* collided in the St. Lawrence River, during a dense fog. The trial Court found both ships to blame and assessed the damages accordingly.

*Held:* That the proximate and direct cause of the collision was due to the fault and negligence of the *Benmaple* in failing to give proper fog signals at proper intervals, in not keeping a careful look-out, in navigating at an excessive speed through a dense fog and in not exercising reasonable care and prudence.

2. That the speed of the *Lafayette* from the time she picked up her pilot at Father Point until she heard a whistle signal, is irrelevant; it is the speed that she was making at the material time that must be considered.
3. That the breach of an article of the International Rules of the Road by a vessel is not in itself sufficient to warrant a finding that the vessel guilty of such breach is to blame; it must be shown that the breach caused, or at least contributed to, the accident.

APPEAL and CROSS-APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District. Judgment of Demers D.J.A., (1938, Ex. C.R. 10) reversed.

The appeal and cross-appeal were argued before the Honourable Mr. Justice Angers, at Ottawa.

*Lucien Beauregard, K.C.* for appellants.

*R. C. Holden, K.C.* for respondents.

*H. H. Harris* for intervenants.

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

ANGERS J., now (July 29, 1939) delivered the following judgment:

This is an appeal from a decision of Mr. Justice Philippe Demers, District Judge in Admiralty for the Quebec Admiralty District, rendered on November 10, 1937, as follows:

(a) condemning the ship *Lafayette* and her bail to one-fourth of the damages and the ship *Benmaple*, owned by plaintiff, Port Colborne & St. Lawrence Navigation Company Limited, to three-fourths of the damages, without costs on the action nor on the counter-claim;

maintaining the action of the additional plaintiffs against the ship *Lafayette* and her bail in the same proportion for the damages to be proved, without costs;

maintaining the intervention of the intervenants Leonard Labatte *et al.* against the ship *Lafayette* and her bail for one-fourth of their damages, without costs;

maintaining the intervention of the intervenants Mr. and Mrs. Dickey, who are really additional plaintiffs, against the ship *Lafayette* and her bail, with the condition that any amount coming to Mrs. Dickey should go to Port Colborne & St. Lawrence Navigation Company Limited, which was subrogated to her rights, without costs.

The action arose out of a collision which occurred on the 31st of August, 1936, at about five o'clock in the morning (daylight saving time), in the St. Lawrence River, at a point approximately seven nautical miles west of Bicquette Island, between the motor vessel *Lafayette*, owned by La Compagnie Générale Transatlantique, and the steamer *Benmaple*, owned by Port Colborne & St. Lawrence Navigation Company Limited.

The *Lafayette* was a motor steel passenger vessel with a length of 184 metres, a width of 26 metres and a net registered tonnage of 14,430 tons. The *Benmaple* was a steel screw steamer 250.1 feet in length and 43 feet in beam, having a gross tonnage of 1,729 tons and a net registered tonnage of 1,074 tons.

On the day of the accident, the *Lafayette* was proceeding up the River St. Lawrence on her way to Quebec; the *Benmaple* was on a trip from Montreal to Halifax, laden with a cargo of flour and feed.

As a result of the collision the *Benmaple* was sunk with her cargo; a sailor on board the *Benmaple*, John Dickey, a son of the intervenants Mr. and Mrs. Dickey, was thrown overboard and drowned.

At first an action was taken by the owners of the *Benmaple*, Port Colborne & St. Lawrence Navigation Company Limited, against the ship *Lafayette*, claiming condemnation of the latter and her bail in damage and costs. Subsequently the master and other officers and members of the crew of the *Benmaple* and four passengers on board the steamer were added as plaintiffs for loss of clothing and personal effects. An intervention was made by members of the crew of the *Benmaple* for a joint claim of \$2,000

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for damages arising from the loss of their gear and clothing. Finally another intervention was made by Mr. and Mrs. John L. Dickey for a joint claim of \$10,000 arising from the loss of life of their son John, killed in the collision between the two vessels.

La Compagnie Générale Transatlantique filed a counter-claim against the plaintiff, Port Colborne & St. Lawrence Navigation Company Limited, for \$75,000 for damage caused to the ship *Lafayette* by the collision in question.

Another action was taken by Maple Leaf Milling Company Limited, Canada Linseed Oil Mills Limited, United Chemical Company Limited and other owners of cargo or goods laden on the *Benmaple*; I will deal with this last action in a separate judgment. I may note in passing that a motion was made asking that the two cases be united for purposes of argument; the motion was granted by consent.

On the day of the accident, the *Lafayette* picked up a pilot at Father Point a few minutes after three o'clock in the morning. It was foggy and the lights at Father Point were not visible. After leaving Father Point, the *Lafayette* proceeded at full speed with her engines at "stand by," but she had to reduce her speed from time to time when she overtook or met other vessels. I may say that the speed at which the *Lafayette* was going from the time she left Father Point to the time she heard the faint whistle signal hereinafter referred to and stopped her engines is, to my mind, irrelevant; the speed which must be considered is the one at the material time; *The Induna* (1); *The Upwey Grange* (2). The *Lafayette* passed Bicquette Island, shown in the charts filed as exhibits P1 and P15, at a distance estimated at between three and three and a half miles; the Bicquette light could not be seen. Shortly after passing Bicquette Island the *Lafayette* overtook a vessel, the *Daghild*. The *Lafayette* was then proceeding at full speed, with her engines at "stand by."

The full speed of the *Lafayette* was mentioned as being normally between 17 and 17½ knots; at "stand by" her speed is reduced by about 2 knots. The master said that her speed at "stand by" would be about 15 knots; the chief officer estimated it at 14 knots.

(1) (1927) 28 Lloyd's L.R. 198.

(2) (1927) 28 Lloyd's L.R. 336.

The evidence discloses that the *Lafayette* passed the *Daghild* on the latter's starboard side at a distance of between a quarter and a half mile; at that time the *Daghild's* lights were plainly visible, as were also those of the *Lafayette*. The *Lafayette* kept on proceeding at full speed with her engines at "stand by." There were two look-outs forward on the forecastle head of the *Lafayette* and two look-outs on the bridge, one standing on each side; besides these look-outs there were on the bridge the master, the officer on watch, the quartermaster and the pilot.

A few minutes before five o'clock one of the look-outs on the forecastle head telephoned to the bridge saying that a faint whistle signal had been heard ahead, slightly on the port bow. This signal was not heard by those on the bridge although they were keeping a sharp look-out. The engines of the *Lafayette* were stopped and the officers listened attentively; they waited for three minutes and they did not hear any other signal ahead. They heard however the signals of the *Daghild* astern, which were gradually growing louder. Taking for granted that the *Daghild* was approaching, the master and pilot of the *Lafayette* considered it was good seamanship to put their engines slow ahead. The tide was ebbing and there was then a current against the *Lafayette* of some two to three knots. The master and the pilot of the *Lafayette*, taking into consideration the effect of the current, estimated that, after having stopped the engines for three minutes, the vessel's speed had been reduced to 5 or 6 knots. They kept a sharp look-out to see if there would be any further signal, but they heard none. The master inquired from the look-outs forward on the forecastle head if they had heard any other signal and they replied that they had not. The master thereupon gave orders to put the engines half speed ahead. A couple of minutes later a white light was seen on the port bow of the *Lafayette* at a distance which was estimated to be between 500 and 1,000 feet. The engines of the *Lafayette* were immediately stopped. The green light of the oncoming steamer was noticed; the engines of the *Lafayette* were reversed and the helm ordered hard to starboard. The *Benmaple* however approached steadily, no alteration appearing to have been made in her

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course. The ships collided; as a result, the *Benmaple* swung around, heading then in the same direction as the *Lafayette*. She sank with her cargo in a little over an hour.

Shortly after the collision a lifeboat was lowered from the *Lafayette* and sent to the rescue of the persons of the *Benmaple*, all of whom were saved with the exception of the sailor John Dickey, who was drowned.

The evidence discloses that the stem of the *Lafayette* struck the starboard bow of the *Benmaple* between her stem and her starboard anchor. She cut into her about 33 feet, going from starboard to port and from stem to stern, heaving up the windlass by the roots and throwing it up on the forward house, knocking down the forecastle and the wheel-house, penetrating into the watchman's cabin (marked with the figure 6 in a circle on plan exhibit P6), demolishing a bulkhead and continuing as far aft as the rear end of the deckhouse (marked with the figure 3 in a circle on the same plan).

The plaintiff, in its amended statement of claim, charges the *Lafayette* with the following acts of negligence:

- excessive speed through a dense fog;
- failure to keep a proper look-out;
- failure to sound the proper fog signals;
- failure to navigate with caution until all danger of collision was over, after hearing forward the fog signal of the *Benmaple*;
- failure to take the proper steps to avoid the collision;
- improper handling of the engines;
- improper alteration of the course to starboard and failure to give a signal of such alteration;
- failure to exercise the precautions required by the ordinary practice of seamen or by the special circumstances of the case;
- failure to comply with articles 15, 16, 27, 28 and 29 of the International Rules of the Road.

The defendant, in its amended statement of defence, imputes to the *Benmaple* the following acts of negligence:

- failure, when proceeding in a fog, to give at intervals of not more than two minutes a prolonged blast, in violation of article 16 of the International Rules of the Road;
- navigating at an excessive speed through fog;

failure to stop the engines and navigate with caution until danger of collision was over, after hearing the fog signal of the *Lafayette*, in violation of article 16 aforesaid;

absence of a pilot and the master not on the bridge, although navigating through fog, in violation of all rules and customs of good seamanship;

failure to keep a proper look-out;

the *Benmaple* was not in charge of competent officers and was insufficiently manned and equipped;

the *Benmaple* was improperly steered and she neglected to keep clear of the *Lafayette*;

the engines of the *Benmaple* were improperly handled and those in charge neglected to ease the engines and to stop and reverse in due time;

failure to exercise reasonable care and prudence and to take in due time proper steps to try to avoid the collision;

failure to comply with rules 15, 16, 18, 19, 22, 23, 27, 28 and 29 of the International Rules of the Road.

As stated by Mr. Justice Demers, the collision not being inevitable, the Court is bound to examine the behaviour of both ships.

I shall first deal with the *Benmaple*. She had no pilot; she was not legally bound to have one; in such a case however, it was her duty to have on board competent and vigilant officers, fully conversant with the difficulties of navigation on the River St. Lawrence and familiar with the course usually followed by vessels going down the river. For a reason undisclosed, possibly on account of the fog, the *Benmaple*, at the time of the accident, was not following the way generally used by outbound vessels.

The *Benmaple* was properly equipped and would, in my opinion, have been sufficiently manned had her master met his responsibilities. But, around midnight, Captain Johnson retired into his cabin, undressed, got in his bunk and went to sleep; in so doing, I believe that he failed in his duty and I may say that my assessor shares this opinion. If Captain Johnson needed a rest, he could have retired for a short while but he should not have taken off his clothes so as to be ready at any moment to respond to a call. Captain Johnson left Captain Lebrun in charge

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of the vessel; Lebrun, a master mariner, holds a Board of Trade Master's Foreign Going Certificate since 1905; he has had apparently a certain experience in command of ocean going vessels. He was acting as sailing master on the *Benmaple*. Captain Lebrun, in August, 1936, was 64 years old; he was slightly deaf. He had been on duty for approximately seventeen hours, except for a few moments rest. In the circumstances, I feel that the task imposed upon him was too heavy.

The learned trial judge held that a proper look-out was not kept on the *Benmaple*; I concur with him. The *Lafayette* was equipped with an exceptionally powerful diaphone whistle placed forward of the funnel. Fog signals were given by the *Lafayette* regularly every two minutes. They were heard distinctly by the crew of the *Daghild* both before and after the *Lafayette* overtook her a few moments before the accident. Those on board the *Benmaple* testified that they had not heard these signals; the reason for not hearing them is either that they were not keeping a proper look-out or that they were inside the pilot-house with the windows closed; the night was quite cool and those on board the *Benmaple* did not wear overcoats, which may explain, if not excuse, their not staying at their posts on the bridge. The vagaries of sound in fog are well known to those having experience in navigation but the evidence shows beyond doubt that this condition did not exist during the night of the collision.

Moreover, if the *Benmaple* had kept a proper look-out, she could have sighted the *Lafayette* at a distance of about 1,000 feet, instead of 50 to 100 feet as stated by members of her crew. My assessor is of the opinion that the evidence of the witnesses of the *Lafayette* that they saw the *Benmaple* at a distance of about 1,000 feet is supported by the *Lafayette's* movements as evidenced by the course recorder (exhibit D3). Had the *Benmaple* sighted the *Lafayette* at that distance, as she ought to have done, and immediately put her engines full speed astern and her helm hard astarboard, in compliance with article 18 of the International Rules of the Road, it is quite possible that the collision would have been averted.

The only conclusion to which I can arrive is that a very poor and lax look-out was being kept on board the *Benmaple*.



Let us now consider the question of speed. It is proven that the *Benmaple* was, at the time immediately preceding the collision, going at half speed; the *Benmaple's* half speed has been estimated at between five and a half and six knots. The ebb tide has been mentioned as being two or three knots. From this I may conclude that the speed of the *Benmaple*, at the time of the collision, was approximately eight and a half knots. The visibility being limited to 50 or, at the utmost, 100 feet, if we are to accept the version of the plaintiff's witnesses, this speed was, in my opinion, excessive.

Dealing with the question of signals, the learned trial judge says that there is positive evidence that they were given regularly. On that point there is the evidence of the sailing master, of the mate, of the wheelsman, of one of the engineers, of two watchmen of the *Benmaple*, all of whom, I may say, are, to a certain extent, interested witnesses. Against this version, there are the testimonies of the master of the *Lafayette*, the officer on watch, the quartermaster, the pilot, the wheelsman, two look-outs forward and two look-outs on the bridge, all on the alert and keeping a sharp look-out, particularly after the first and only faint signal had been heard; they all swear that no other signals were given by the *Benmaple*; these witnesses of course, as in the case of the witnesses of the *Benmaple*, are all more or less interested; their evidence however is supported by that of Captain Lewis, David Hook and Joseph Emile Lachance, respectively master, chief officer and pilot of the *Daghild*; neither of these witnesses appear to have any interest in the issue of the present case. I must say, with all due respect, that on this point I differ in opinion with the learned trial judge. Had it not been that the two officers and the pilot of the *Daghild*, although on the alert and apparently keeping a proper look-out, had not heard the alleged signals of the *Benmaple*, I must say that I would have hesitated to accept the version of the officers and sailors of the *Lafayette* in preference to that of the crew of the *Benmaple*. I would in that case have felt inclined to share the opinion of the learned trial judge. The trial judge, who heard and saw the witnesses, is certainly in a better position to appreciate their competency and truthfulness than the judge of an appeal court: *Powell et al.*

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v. *Streatham Manor Nursing Home* (1); *The Corton* (2); *Clarke v. Edinburgh and District Tramways Co.* (3); *Owners of Steamship Hontestroom v. Owners of Steamship Sagaporack* (4); *Montgomerie & Co. Ltd. v. Wallace-James* (5). In the present instance, however, we are not only concerned with the competency and good faith of the masters, officers and sailors of the *Lafayette* and of the *Benmaple* and the veracity of their assertions; we have the testimonies of Lewis, Hook and Lachance, all three independent and disinterested witnesses, which seem to me to deserve much consideration and to shift the weight of the evidence in favour of the defendant-appellant.

It was urged on behalf of the plaintiff-respondent that preference should be given to affirmative evidence; in support of his contention counsel cited *Canadian National Railways v. Dame Montpetit* (6); *McCrea v. La Compagnie de Chemin de Fer de Napierville Jonction* (7); *Lefeunteum v. Beaudoin* (8). The facts and circumstances in each of these cases differ materially from those disclosed herein; in my humble opinion these decisions have no application in the present case.

Let us now consider the case of the *Lafayette*. She was unquestionably properly manned. As previously stated, the master, the officer on watch, the pilot, the quartermaster, the wheelsman, two look-outs forward on the fore-castle head and two look-outs on the bridge were at their posts, on the alert and attentive, and particularly so after one of the look-outs forward had telephoned to the bridge to say that he had heard a very faint whistle signal ahead, slightly on the port bow.

As soon as this whistle signal was reported, the engines of the *Lafayette* were stopped in compliance with the provisions of article 16 of the International Rules of the Road which read thus:

Every vessel shall, in a fog, mist, falling snow or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

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| (1) (1935) A.C. 243, 249.                     | (5) (1904) A.C. 73, 75.                    |
| (2) (1935) 52 Lloyd's List L.R. 261, 262.     | (6) (1925) R.J.Q., 39 K.B., 114, 121.      |
| (3) (1919) Sess. Cas. (H.L.) 35, 36, in fine. | (7) (1920) R.J.Q., 29 K.B., 414, 417, 419. |
| (4) (1926) 17 Aspinall's M.L.C. (N.S.), 123.  | (8) (1897) 28 S.C.R., 89, 93.              |

A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The engines were stopped for three minutes. Having heard no other signal and thinking that the vessel of which one of the look-outs had heard the whistle signal ahead was proceeding upstream, the master ordered the engines put slow ahead. They were kept at that speed for two minutes. There being still no further signals the engines were put at half speed. The *Lafayette* proceeded at that speed for two or three minutes when she noticed the *Benmaple* at a distance estimated at between 500 and 1,000 feet ahead slightly to port.

The engines of the *Lafayette* were stopped and reversed and a few seconds later the *Lafayette* and the *Benmaple* collided, with the result aforesaid.

Was half speed a reasonable one in the circumstances? The half speed of the *Lafayette* in normal conditions was estimated at eleven and a half or twelve knots.

The *Lafayette* was going against an ebb tide, the speed of which was said to be between 2 and 3 knots. The half speed of the *Lafayette* was thereby reduced to somewhere between eight and a half and ten knots. From the time the *Lafayette* sighted the *Benmaple* and stopped and reversed her engines, putting them full speed astern, and the time the ships collided, the speed of the *Lafayette* was undoubtedly decreased, but I am unable to admit, as contended by some of the witnesses heard on behalf of the appellant, that, when the collision occurred, the *Lafayette* was at a standstill; she certainly had some advance, the speed whereof is not easy to determine with any precision.

The deck log and the two engine logs of the *Lafayette* have been altered; the alterations are very crude and apparent; had they been effected with a view to deceive, it seems to me that they would have been made with more care. However it may be, it is possible that these alterations had for object the shortening of the time during which the *Lafayette* proceeded at half speed, after having stopped during three minutes and proceeded slow ahead during two minutes, so as to minimize as much as possible the speed at which she was going at the time of the collision. However I do not think that one more minute at

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half speed would have made a very great difference in the speed of the *Lafayette* at the time of the accident.

Was there negligence on the part of the *Lafayette* in proceeding at half speed, after stopping her engines during three minutes and going slow speed ahead for two more minutes in view of the dense fog which existed? Was she in the circumstances, navigating with caution as prescribed by article 16 of the International Rules of the Road?

It seems to me very probable, nay, quite certain, that, if the *Benmaple* had given signals regularly, at intervals not exceeding two minutes, as she should have done, the collision would have been averted. If the *Lafayette* had heard another signal before the expiry of the interval of three minutes during which she stopped her engines, as she should, had the *Benmaple* given her signals regularly, she undoubtedly would have kept her engines stopped and navigated with much greater caution; and on hearing a third signal she, in all likelihood, would have gone astern; the collision would have thus been rendered impossible. After stopping her engines for three minutes and then proceeding at slow speed for two more minutes and not hearing any signal, the *Lafayette* took for granted that there was no vessel ahead in the vicinity and that her way was clear; and for this I do not think that any blame can be imputed to her in the circumstances.

To the lack of fog signals on the part of the *Benmaple* must be added the absence of proper look-out. I am satisfied that, if the *Benmaple* had sighted the *Lafayette* at the same distance as the *Lafayette* saw the *Benmaple*—and there is, in my opinion, no reason why this should not have occurred seeing that the *Lafayette* was a much larger vessel than the *Benmaple*—and put her helm hard astarboard and her engines full speed astern, thereby complying with rule 18 of the International Rules of the Road, the collision would likely have been avoided or at least made much less severe and injurious.

It was contended on behalf of respondents and held by the learned trial judge that the *Lafayette* in proceeding at half speed violated article 16 of the International Rules of the Road. It was urged that half speed in a dense fog was excessive and that the *Lafayette* should have proceed-

ed at slow speed and stopped intermittingly. I am inclined to believe that half speed, in the circumstances disclosed by the evidence, was not an unreasonable one, particularly when taking into consideration that the *Lafayette* is a powerfully equipped motor vessel and that she reacts quickly to her engines.

I may note in passing that the breach of an article of the International Rules of the Road by a vessel is not in itself sufficient to warrant a finding that the vessel guilty of such breach is to blame; it must be shown that the breach caused, or at least contributed to, the accident; Marsden's *Collisions at Sea*, 9th ed., pp. 2, 5 and 37.

But even if I came to the conclusion that the speed at which the *Lafayette* was going after she had stopped her engines for three minutes and had proceeded at slow speed for two minutes was too great, I do not think that this was the proximate cause of the accident. If the *Lafayette* had continued to proceed at slow speed, the damages would very likely have been less serious. I do not think, however, that this is a sufficient reason to hold the *Lafayette* partly responsible for the damages incurred, as, in my opinion, the collision could and would have been avoided had the *Benmaple* given regular fog signals and kept a proper look-out.

After a minute perusal of the oral evidence and a careful examination of the numerous exhibits produced and an attentive study of the able and exhaustive arguments presented by counsel and of the authorities cited, I have reached the conclusion that the proximate and direct cause of the collision is attributable to the fault and negligence of the *Benmaple* in failing to give at intervals of not more than two minutes the proper fog signals, in not keeping a careful look-out, in navigating at an excessive speed through a dense fog and in not exercising reasonable care and prudence.

I may add that the speed of the *Lafayette*, if it, to a certain extent, aggravated the damage incurred by the *Benmaple*, cannot, in my opinion, be considered as the determining cause or, in other words, the *causa causans* of the accident.

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For these reasons I feel that the appeal of the ship *Lafayette* and her owners La Compagnie Générale Transatlantique must be maintained and the cross-appeal of the plaintiff Port Colborne & St. Lawrence Navigation Company Limited must be dismissed and that the judgment of the learned trial judge must be varied as follows: the action of the plaintiff against the defendant is dismissed with costs;

the action of the additional plaintiffs, the master, officers and members of the crew of the steamship *Benmaple* and the passengers on board her is dismissed, with costs;

the intervention of the intervenants Leonard Labatte and others is dismissed, with costs;

the intervention of Mr. and Mrs. John L. Dickey is dismissed with costs;

the counter-claim of the owners of the ship *Lafayette*, La Compagnie Générale Transatlantique, for the damage caused by the collision to the ship *Lafayette* is maintained; there will be a reference to the District Registrar, assisted by merchants, to assess such damage.

Costs of the appeal and the cross-appeal to be borne by the respondent Port Colborne & St. Lawrence Navigation Company Limited.

*Appeal allowed and cross-appeal dismissed.*

NOTE: The appeal of the ship *Lafayette* from the judgment of Demers D.J.A., in the action brought against it by the Maple Leaf Milling Company Limited, Canada Linseed Oil Mills Limited and United Chemical Company Limited, was also allowed by the Honourable Mr. Justice Angers in a judgment rendered on July 29, 1939.

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**COPYRIGHT—Concluded**

official of the Canadian Automobile Underwriters Association. The alleged infringing manual was issued by the defendant, American Home Fire Insurance Company, and distributed by the other defendant, Central Fire Office Incorporated, as its agent. That manual was prepared by one, L'Esperance, who acted as automobile insurance underwriter for the American Home Fire Insurance Company. He used the plaintiffs' Quebec Manual and also manuals issued by the British Oak Insurance Company, the Toronto General Insurance Company and the Canadian General Insurance Company. These latter two companies have manuals which are almost photostatic copies of the plaintiffs' manual. The British Oak Manual is prepared from material supplied by King to the Western Canada Insurance Underwriters Association. It was not disputed that this alleged infringing manual was printed and distributed by the defendants. *Held*: That there is subject-matter for copyright in the manuals of the plaintiffs, and there has been infringement and conversion by the defendants. 2. That it is not sufficient to show that common sources of information existed from which the defendants could have obtained material for their manual; it must be shown that they went to those sources and obtained from them the information contained in their manuals. 3. That pursuant to The Copyright Act, R.S.C., 1927, c. 32, s. 20, ss. 5, as enacted by 21-22 Geo. V, c. 8, s. 7, it is not necessary that all the plaintiffs should be members of the Canadian Underwriters Association. 4. That infringement cannot be avoided by copying from an unauthorized copy of a work in which copyright subsists. UNDERWRITERS' SURVEY BUREAU LTD. ET AL. v. AMERICAN HOME FIRE ASSURANCE CO. ET AL. .... 296

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2—*Petition of right—Responsibility—Pilotage authority—Damages for wrongful suspension—Jurisdiction.]—Held:* That by the Regulations for the Pilotage District

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of Montreal, made under the Merchant Shipping Act, the powers of the Superintendent of Pilots or his assistant are limited to the imposition of a fine, and do not confer on them the right to suspend a pilot and strike his name from the list, until payment of the fine. That the right to suspend is reserved to the Administrator of the Pilotage Authority. 2. The Crown is not bound by nor responsible for the errors, omissions, negligences, blunders or abuse of power of its officers or servants save as provided by law. 3. The jurisdiction of the Court is entirely statutory and the present action does not come within the ambit of section 19 and subsections thereof of the Exchequer Court Act. 4. By the acts of the Ministers of the Crown in providing security for costs of appeal in an action taken against the Superintendent of Pilots and in retaining counsel to argue the appeal in the Court of Appeal of the Province of Quebec, the Crown did not assume responsibility for the acts of the Superintendent of Pilots. 5. In the present case the Minister of Marine, in affirming the decision of the Superintendent of Pilots of Quebec, was not acting as a Minister of the Crown but was solely acting in his capacity of administrator of the pilotage authority, and as such is on the same footing as any officer or servant of the Crown, which act would not bind the Crown. *J. ARTHUR GARIEPY v. THE KING*..... 321

3.—*Alien enemy — Nationality — German-born subject—Loss of German nationality by residence abroad—Treaty of Peace (Germany) Order 1920, Par. 41—Exchequer Court Act, R.S.C., 1927, c. 34, s. 30 (e)—Motion to strike out statement of claim because of lack of jurisdiction of the Court to entertain the action allowed.*—Plaintiff, a German-born subject, emigrated to the United States of America in 1898, where he resided until 1902. He applied for and obtained First Letters of Citizenship in the United States, but did not acquire full citizenship in that country. From 1902 to 1909 he resided in Montreal, Quebec. In 1909 he returned to the United States where he resided until 1914 when he returned to Germany, where he has since resided. Plaintiff, while a resident of Montreal, purchased through a brokerage firm certain securities of a United States corporation. These securities were deposited for his account in the Agency of the Bank of Montreal in New York City. In April, 1921, the defendant as Custodian of Enemy Property, demanded that the brokerage firm which had purchased the securities, deliver them to him. This was done and they were sold by the Custodian.

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The plaintiff now claims the sum realized from such sale, together with any interest derived therefrom. Plaintiff alleges that he had lost his German nationality through absence from that country and was treated by the German Authorities as having no nationality. He had never acquired any other nationality. The Custodian declined to treat plaintiff as being stateless and declared him an enemy national. The Custodian further refused to proceed in the Exchequer Court for a declaration as to ownership of the money and also refused to consent to the plaintiff proceeding in this Court. The present action is for a mandamus commanding the defendant, as Custodian, to refer the plaintiff's claim to this Court, for trial, under paragraph 41 of the Treaty of Peace (Germany) Order, 1920. The plaintiff bases his action on s. 30 (c) of The Exchequer Court Act, R.S.C., 1927, c. 34, which provides that the Exchequer Court shall have concurrent original jurisdiction in Canada "in all cases in which demand is made or relief sought against any officer of the Crown for anything done or omitted to be done, in the performance of his duty as such officer." The defendant now moves for an order striking out the statement of claim upon the ground that this Court is without jurisdiction to deal with the claim. *Held*: That the claim of the plaintiff did not constitute a "dispute" within the meaning of Paragraph 41 of The Treaty of Peace (Germany) Order, 1920. 2. That no occasion arose for the Custodian to exercise the power given to him to proceed in the Exchequer Court, or to consent to the plaintiff so proceeding, after the Custodian had determined that the plaintiff was an enemy national. *ERNST KELLER v. SECRETARY OF STATE*..... 221

4.—*"Public work"—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c)—The Relief Act, 1933, 23-24 Geo. V, c. 18—Projects proposed and carried out pursuant to agreement entered into between the Governments of Dominion and Province for financial assistance in carrying out relief measures are not "public works" within the terms of the Exchequer Court Act.*—Under the authority of The Relief Act, 1933, 23-24 Geo. V, c. 18, an agreement was entered into between the Government of the Dominion of Canada and that of the Province of British Columbia, which provided for the carrying out of certain relief projects by the Government of the Dominion, pursuant to certain conditions. The Province proposed that the Dominion should initiate work upon a certain highway known as the Spokane-Nelson highway. The nature and extent

**CROWN—Continued**

of the project were determined by the authorities of the province which owned the highway; the actual work was carried out by the men on the strength of the project recruited or selected by a Department of the Government of the Dominion. In the carrying out of the project burning operations were necessary, and a fire started on the project spread to timber lands owned by the suppliant, causing damage. The suppliant alleges that the loss of the timber was due to the negligence of the officers and servants of the respondent. The matter comes before the court on an order upon consent of the parties that the points of law raised in the pleadings should be heard in advance of the trial. *Held*: That the project was not a "public work" within the terms of the Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c) as in force in 1934. 2. That the project was in reality a provincial work; the fact that it took the form of highway improvement carried out by and under the direction of the Dominion, does not alter the substance of the arrangement entered into and its real purpose, which was to render financial assistance to the province in carrying out necessary relief measures. **SALMO INVESTMENTS LTD. v. THE KING** ..... 223

5.—*Government Annuities Act, R.S.C., 1927, c. 7—Crown bound by doctrine of waiver—Mistake of fact—Unilateral mistake—Loss to be borne by party making the mistake—Specific performance decreed against the Crown—Exchequer Court Act, R.S.C., 1927, c. 34, s. 18 and s. 36—Rule 2, Exchequer Court Rules.*—Suppliant, on December 20, 1934, applied to the Government of Canada for the purchase of a deferred annuity of \$1,200 per annum, payable in quarterly instalments, the first payment to be made on December 20, 1936. The suppliant agreed to pay for this annuity at the monthly rate of \$260.20 or \$3,122.40 yearly. The application contained a clause reading "... reserving, however, the right to complete the contract by periodical payments and lump sums; or by paying lump sums of varying amounts and at regular intervals; or by a single payment; or by such other plan as may be authorized and approved by the Government; and with the understanding that such an annuity will in any event be granted to me as the total amount paid in by me improved at four per cent compounded yearly will purchase at the rates in effect at the date of this application, the same not to exceed \$1,200; and with the further understanding that in case the payments made by me are not sufficient to purchase an annuity of \$10 the payments I make will be returned to

**CROWN—Continued**

me or to my legal representatives with compound interest at four per cent." Pursuant to the Government Annuities Act, R.S.C., 1927, c. 7, a contract, duly signed by the proper officers of the Government, was issued to suppliant. It provided for payments by the suppliant at the rate of \$260.20 on the 20th day of each month, commencing on December 20, 1934, for a period of two years; for the payment to suppliant of \$1,200 per annum in quarterly instalments, the first instalment to be payable on December 20, 1936, if the suppliant be then living, and an instalment of \$300 every three months thereafter, the contract to end with the last payment prior to the annuitant's death. The contract contained a clause reading: "This contract witnesseth further that in consideration of payments made in any other manner than in the manner above indicated, such an annuity shall be paid at the date fixed for the commencement of the annuity as the total payments made (increased at 4 per cent compounded yearly), will purchase at the rate in effect at the date of this contract." Payments made by the suppliant were made irregularly and not in strict compliance with the terms of the application and the contract. He did pay the full amount called for by the contract, within the two years, the last payment of \$444.80 being made on October 2, 1936. Prior to making the last payment, suppliant was advised by the Superintendent of Annuities that the yearly premium of \$3,122.40 quoted to him was due to "an error in computing the rate" and that the annual premium for such an annuity contract as that issued to suppliant was \$3,834.24. Suppliant was advised that after crediting the last payment made by him the balance necessary to be paid was \$1,783.18. Suppliant by his petition of right asks specific performance of the contract by His Majesty, or in the alternative, damages for non-fulfilment of the contract. *Held*: That the Crown is bound by the doctrine of waiver as related to conditions or forfeitures in contracts to which the Crown is a party, and by accepting payment of instalments subsequent to the dates stipulated in the contract the officers of the Government waived any right arising on behalf of the Crown to rescind or vary the contract by reason of suppliant's defaults. 2. That the error in computing the proper rate for payment of the annuity in question was a mistake of fact. 3. That the mistake was a unilateral one, made by the officers of the Government, and of which the suppliant could not be cognizant, nor did he silently acquiesce in the making of the mistake. 4. That any loss ensuing

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from the error in question should be borne by the respondent. 5. That the Court has jurisdiction to decree specific performance of the contract by the Crown. **WILLIAM JOHN SYKES v. THE KING.. 77**

6.—*Consolidated Orders respecting trading with the Enemy, P.C. 1023, 1916—Treaty of Peace—Treaty of Peace (Germany) Order, 1920—Interpretation of War Measures—Purchaser of shares from an enemy national before termination of Great War is not entitled to registration of same—Registered enemy shareholder not entitled to notice of application for order vesting such shares owned by him in Custodian of Alien Property—Nationality of transferee immaterial.*—P.C. 1023, dated May 2, 1916, and entitled "Consolidated Orders Respecting Trading with the Enemy" provided *inter alia*: 6. (1) No transfer made after the publication of these orders and regulations in the *Canada Gazette* (unless upon licence duly granted exempting the particular transaction from the provisions of this subsection) by or on behalf of an enemy of any securities shall confer on the transferee any rights or remedies in respect thereof and no company or municipal authority or other body by whom the securities were issued or are managed shall, except as herein-after appears, take any cognizance of or otherwise act upon any notice of such transfer. (2) No entry shall hereafter, during the continuance of the present war, be made in any register or branch register or other book kept within Canada of any transfer or any securities therein registered, inscribed or standing in the name of an enemy, except by leave of a court of competent jurisdiction or of the Secretary of State. By leave of the Court and by consent of the parties to this proceeding five questions were set down for hearing. The issues involved in these questions are, whether or not the claimant, who acquired for a consideration from a German national, before the termination of the Great War, certain shares of the common stock of the Canadian Pacific Railway Company, and the certificates representing such shares, can now claim ownership of such shares, and require registration of the certificate of such shares in his own name, in the share register of the Canadian Pacific Railway Company. In April, 1919, on application of the Custodian, of which the Canadian Pacific Railway Company had notice, an order was made by a Judge of the Superior Court of the Province of Quebec under Order 28 of the Consolidated Orders, vesting in the Custodian a considerable number of C.P.R. Company shares, including those here in question, which were registered on the New York register of the

**CROWN—Concluded**

C.P.R. Company. The C.P.R. Company acted upon the vesting order and has refused to act upon any transfer, made by an enemy national, of the shares in question. *Held*: That in interpreting war measures such as the Consolidated Orders above referred to, the objects of the same must be held strictly in mind, and such measures must be given that construction which will best secure the end their authors had in mind. 2. That Order 6 (1) effectively prevented the claimant from acquiring a legal or equitable title, or any rights or remedies, to or in the shares under the transfer to him by the German national. 3. That Order 6 (1) does not require that the transferee must be a Canadian, or that the transfer must be made in Canada, or that the registration of the securities must be in Canada, or that the *locus* of the certificates must be in Canada. 4. That the registered enemy owner of the shares in question was not entitled to notice of the Custodian's application for an order vesting ownership of the shares in the Custodian. 5. That the sole right or claim of an enemy national, whose property has been retained and liquidated by Canada, is one for compensation against his own State. 6. That the Treaty of Peace and The Treaty of Peace (Germany) Order, 1920, effectually validated and confirmed the vesting order, and also operated as a vesting order to vest in the Custodian the legal and equitable title to the shares in question. 7. That the nationality of the transferee, under any Treaty, is immaterial. **ARPAD SPITZ v. SECRETARY OF STATE ..... 162**

**CROWN BOUND BY DOCTRINE OF WAIVER**

*See* CROWN, No. 5.

**CUSTOMS ACT, R.S.C., 1927, c. 42, AS AMENDED BY 21 GEO. V, c. 2, s. 4**

*See* REVENUE, No. 3.

**DAMAGES FOR BREACH OF CONTRACT**

*See* CROWN, No. 1.

**DAMAGES FOR WRONGFUL SUSPENSION**

*See* CROWN, No. 2.

**DEDUCTIONS**

*See* REVENUE, No. 5.

**DEFENCE OF COMMON SOURCES**

*See* COPYRIGHT, No. 1.

**DUTY OF OVERTAKING SHIP**

*See* SHIPPING, No. 7.

**DUTY OF STEAMSHIP IN FOG***See SHIPPING, No. 5.***DUTY OF TUG***See SHIPPING, No. 1.***EQUIVALENCY***See PATENTS, Nos. 5, 8 and 10.***EVIDENCE***See REVENUE, No. 2.***EVIDENCE THAT CUSTOMERS WOULD NOT HAVE PURCHASED PLAINTIFF'S PATENTED ARTICLE***See PATENTS, No. 3.***EXAMINATION OF PARTIES BY COMMISSION OR LETTERS OF REQUEST***See PRACTICE, No. 1.***EXCHEQUER COURT ACT, R.S.C., 1927, c. 34, s. 18, and s. 36***See CROWN, No. 5.***EXCHEQUER COURT ACT, R.S.C., 1927, c. 34, s. 19 (c)***See CROWN, No. 4.***EXCHEQUER COURT ACT, R.S.C., 1927, c. 34, s. 30 (c)***See CROWN, No. 3.***EXCHEQUER COURT ACT, R.S.C., 1927, c. 34, s. 64***See PRACTICE, No. 1.***EXCHEQUER COURT RULE 169***See PRACTICE, No. 1.***EXCLUSIVE LICENCE TO MANUFACTURE AND SELL IN CANADA THE INVENTIONS COVERED BY CERTAIN PATENTS***See PATENTS, No. 2.***EXPROPRIATION**

1. COMPENSATION FOR MOVING EXPENSES, No. 1.
2. FAIR VALUE OF LAND EXPROPRIATED, No. 1.
3. MUNICIPAL ASSESSMENT, No. 1.
4. REPLACEMENT COST AND DEPRECIATION OF BUILDINGS AT TIME OF EXPROPRIATION, No. 1.
5. VALUE TO OWNER, No. 1.

**EXPROPRIATION**—*Fair value of land expropriated — Municipal assessment — Value to owner — Replacement cost and depreciation of buildings at time of expropriation—Compensation for moving expenses.*—Plaintiff expropriated certain land in Vancouver, B.C., the home property of defendant. In an action to determine the value of the property the Court found that the amount offered by the

**EXPROPRIATION—Concluded**

plaintiff in payment therefor was too low. *Held:* That municipal assessment for taxation purposes may assist in arriving at a fair valuation of a property, but it is not in itself a determining factor. 2. That one of the main factors to consider to arrive at a fair valuation is the market value, but the market price is not necessarily a conclusive test. 3. That the proper manner in which to value the particular property expropriated in this instance is to arrive at the replacement cost and deduct therefrom the depreciation which the buildings now standing have suffered since their erection. 4. That the defendant has a right to be compensated for expenses necessarily incurred for moving. *THE KING v. ISABEL GERTRUDE SPENCER* ..... 340

**FAILURE TO FILE STATUTORY OATH WITHIN TIME PRESCRIBED BY THE PATENT ACT***See PATENTS, No. 9.***FAIR VALUE OF LAND EXPROPRIATED***See EXPROPRIATION, No. 1.***FILING DATE OF PATENT***See PATENTS, No. 4.***FILING OF ASSIGNMENT OF PATENT***See PATENTS, No. 4.***FOREIGN VESSEL***See SHIPPING, No. 8.***FORM OF ORDER***See PATENTS, No. 12.***GERMAN-BORN SUBJECT***See CROWN, No. 3.***GOVERNMENT ANNUITIES ACT, R.S.C., 1927, c. 7***See CROWN, No. 5.***GOODS SOLD AND DELIVERED***See REVENUE, No. 1.***"GRATUITY"***See REVENUE, No. 2.***IMPEACHMENT ACTION***See PATENTS, No. 11.***"INCOME"***See REVENUE, Nos. 2 and 6.***INCOME***See REVENUE, Nos. 5 and 7.***INCOME TAX***See REVENUE, Nos. 2 and 6.*

**"INCOME FROM BUT NOT THE PROCEEDS OF LIFE INSURANCE POLICIES"**

*See* REVENUE, No. 6.

**INCOME WAR TAX ACT, R.S.C., 1927, c. 97**

*See* REVENUES, Nos. 2, 5, 6 and 7.

**INDEPENDENT TRADING UNITS**

*See* REVENUE, No. 4.

**INFRINGEMENT**

*See* TRADE MARK, No. 3.

*See* PATENTS, Nos. 3, 7 and 10.

**INFRINGEMENT ACTION**

*See* PATENTS, Nos. 5, 6 and 8.

**INFRINGEMENT OF COPYRIGHT BY COPYING FROM AN UNAUTHORIZED COPY OF A WORK IN WHICH COPYRIGHT SUBSISTS**

*See* COPYRIGHT, No. 1.

**INQUIRY AS TO DAMAGES**

*See* PATENTS, No. 3.

**INTERPRETATION OF WAR MEASURES**

*See* CROWN, No. 6.

**INVENTION**

*See* PATENTS, Nos. 6, 8 and 10.

**ISSUES RAISED IN PETITION RES JUDICATA**

*See* TRADE MARK, No. 1.

**JURISDICTION**

*See* CROWN, No. 2.

**LACK OF INVENTION**

*See* PATENTS, No. 11.

**LACK OF NOVELTY**

*See* PATENTS, No. 5.

**LIABILITY FOR TAX**

*See* REVENUE, Nos. 4, 6 and 7.

**LIABILITY OF OWNER**

*See* SHIPPING, No. 8.

**LICENCE TO USE NAME AS TRADE MARK**

*See* TRADE MARK, No. 3.

**LIMITATION OF RIGHT OF MASTER TO BIND OWNER OF VESSEL**

*See* SHIPPING, No. 3.

**LOSS OF CARGO**

*See* SHIPPING, No. 2.

**LOSS OF GERMAN NATIONALITY BY RESIDENCE ABROAD**

*See* CROWN, No. 3.

**LOSS OF PROFIT ON ACTUAL SALES**

*See* PATENTS, No. 3.

**LOSS TO BE BORNE BY PARTY MAKING THE MISTAKE**

*See* CROWN, No. 5.

**"MANUFACTURER"**

*See* REVENUE, No. 4.

**MISTAKE OF FACT**

*See* CROWN, No. 5.

**MONEY SPENT BY BREWER FOR TREATING PURPOSES**

*See* REVENUE, No. 5.

**MOTION TO STRIKE OUT STATEMENT OF CLAIM BECAUSE OF LACK OF JURISDICTION OF COURT TO ENTERTAIN THE ACTION ALLOWED**

*See* CROWN, No. 3.

**MUNICIPAL ASSESSMENT**

*See* EXPROPRIATION, No. 1.

**NATIONALITY**

*See* CROWN, No. 3.

**NATIONALITY OF TRANSFEREE IMMATERIAL**

*See* CROWN, No. 6.

**NECESSARIES**

*See* SHIPPING, No. 8.

**NEGLIGENCE OF RESPONDENT SHIP**

*See* SHIPPING, No. 6.

**NEGLIGENT OPERATION OF VESSEL**

*See* SHIPPING, No. 4.

**NO LIABILITY FOR TAX**

*See* REVENUE, No. 2.

**NO NEGLIGENCE ON PART OF TUG OR ITS OFFICERS**

*See* SHIPPING, No. 1.

**NOTICE TO APPLICANT OF OFFICIAL ACTION TAKEN BY PATENT OFFICE**

*See* PATENTS, No. 1.

**OBLIGATION ON PART OF LICENSEE TO SURRENDER ANY RIGHTS ACQUIRED UNDER THE LICENCE UPON TERMINATION THEREOF**

*See* TRADE MARK, No. 3.

**ONUS OF PROOF**

*See* SHIPPING, No. 2.

**ORDER 43A, RULE 21A, OF THE RULES OF THE SUPREME COURT IN ENGLAND**

*See* PATENTS, No. 12.

**OWNERSHIP OF COPYRIGHT***See* COPYRIGHT, No. 1.**PARTNERSHIP AND LIMITED COMPANY***See* REVENUE, No. 4.**PATENT ACT, 25-26 GEO. V, c. 32***See* PATENTS, Nos. 2, 4 and 9.**PATENT ACT, R.S.C., 1927, c. 150, s. 50***See* PATENTS, No. 6.**PATENT ACT RULES***See* PATENTS, No. 1.**PATENT FOR ANESTHETIC COMPOSITION AND PROCESS OF MAKING THE SAME***See* PATENTS, No. 7.**PATENT INVALID***See* PATENTS, No. 11.**PATENTS CAPABLE OF BEING WORKED IN CANADA***See* PATENTS, No. 2.**PATENTS FOR INVENTION**

1. ABUSE OF PATENT RIGHTS, No. 2.
2. APPEAL ALLOWED, No. 4.
3. APPEAL FROM COMMISSIONER OF PATENTS, Nos. 2 and 4.
4. APPEAL FROM COMMISSIONER OF PATENTS DISMISSED, Nos. 3 and 9.
5. APPLICANT REQUIRED TO PROCEED WITHIN SIX MONTHS AFTER NOTIFICATION OF OFFICIAL ACTION BY PATENT OFFICE, No. 1.
6. APPLICATION HELD TO HAVE BEEN ABANDONED, No. 9.
7. ARTICLE 4 OF THE UNION CONVENTION OF PARIS FOR THE PROTECTION OF INDUSTRIAL PROPERTY, No. 4.
8. CHEMICAL EQUIVALENT, No. 7.
9. CHEMICAL PATENT, No. 7.
10. COMBINATION PATENT, No. 5.
11. CONTENTION OF DEFENDANT THAT PLAINTIFF ENTITLED TO NOMINAL DAMAGES ONLY, No. 3.
12. EQUIVALENCY, Nos. 5, 8 and 10.
13. EVIDENCE THAT CUSTOMERS WOULD NOT HAVE PURCHASED PLAINTIFF'S PATENTED ARTICLE, No. 3.
14. EXCLUSIVE LICENCE TO MANUFACTURE AND SELL IN CANADA THE INVENTIONS COVERED BY CERTAIN PATENTS, No. 2.
15. FAILURE TO FILE STATUTORY OATH WITHIN TIME PRESCRIBED BY THE PATENT ACT, No. 9.
16. FILING DATE OF PATENT, No. 4.

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17. FILING OF ASSIGNMENT OF PATENT, No. 4.
18. FORM OF ORDER, No. 12.
19. IMPEACHMENT ACTION, No. 11.
20. INFRINGEMENT, Nos. 3, 7 and 10.
21. INFRINGEMENT ACTION, Nos. 5, 6 and 8.
22. INQUIRY AS TO DAMAGES, No. 3.
23. INVENTION, Nos. 6, 8 and 10.
24. LACK OF INVENTION, No. 11.
25. LACK OF NOVELTY, No. 5.
26. LOSS OF PROFIT ON ACTUAL SALES, No. 3.
27. NOTICE TO APPLICANT OF OFFICIAL ACTION TAKEN BY PATENT OFFICE, No. 1.
28. ORDER 53A, RULE 21A, OF THE RULES OF THE SUPREME COURT IN ENGLAND, No. 12.
29. PATENT ACT, R.S.C., 1927, c. 150, s. 50, No. 6.
30. PATENT ACT, 25-26 GEO. V, c. 32, s. 27 (1) and s. 31, No. 4.
31. PATENT ACT, 25-26 GEO. V, c. 32, s. 29 and s. 31, No. 9.
32. PATENT ACT, 25-26 GEO. V, c. 32, secs. 65, 66, 67, 68 and 69 (1), No. 2.
33. PATENT ACT RULES, No. 1.
34. PATENT FOR ANESTHETIC COMPOSITION AND PROCESS OF MAKING THE SAME, No. 7.
35. PATENT INVALID, No. 11.
36. PATENTS CAPABLE OF BEING WORKED IN CANADA, No. 2.
37. PRACTICE, Nos. 1 and 12.
38. PRIOR ART, No. 8.
39. QUALIFICATION OF LICENCE GRANTED BY THE COMMISSIONER OF PATENTS, No. 2.
40. REFEREE'S REPORT FINDING AMOUNT, No. 3.
41. ROYALTY, No. 3.
42. SALES BY INFRINGER, No. 3.
43. SUBJECT-MATTER, Nos. 5, 6, 8, 10 and 11.
44. SUBSTITUTION OF ONE MATERIAL FOR ANOTHER MAY BE INVENTION, No. 8.
45. WORKING OF THE PATENTS ON A COMMERCIAL SCALE, No. 2.

**PATENTS—Practice—Patent Act Rules—Notice to applicant of official action taken by Patent Office—Applicant required to proceed within six months after notification of official action by Patent Office.]—Held:** That every official action taken in the Patent Office must be communicated to the applicant for a patent, and if the applicant takes no further action within six months after being notified of such

## PATENTS—Continued

official action his application shall be held to be abandoned. 2. That the judgment of the Exchequer Court deciding upon the claims in a conflict action is not to be construed as official action taken by the Patent Office. *AIR REDUCTION CO. INC. v. COMMISSIONER OF PATENTS*..... 65

2.—*Appeal from Commissioner of Patents—Abuse of patent rights—Exclusive licence to manufacture and sell in Canada the inventions covered by certain patents—Patent Act, 25-26 Geo. V, c. 32, secs. 66, 66, 67, 68 & 69 (1)—Patents capable of being worked in Canada—Working of the patents on a commercial scale—Qualification of licence granted by the Commissioner of Patents.*—The Commissioner of Patents granted an application made by the respondent herein for an exclusive licence to manufacture and sell in Canada the inventions covered by two patents known as the Trader and Mazer patents, on the ground that there had been an abuse of the exclusive rights thereunder, in that they had never been worked in Canada, and fixed the royalty to be paid by the licensee. The Trader patent is owned by Celotex Corporation and that company is also the exclusive licensee, in Canada, under the Mazer patent. The invention disclosed by the Trader patent relates to sound-absorbing board or material, and that of the Mazer patent relates to an improved "sound-absorbing material for halls, auditoriums or other enclosures and adapted to be used, without change of structure, as a surface material for walls, ceilings, and the like, or, between walls, ceilings and floors and the like." Celotex Corporation and Dominion Sound Equipment appealed from the decision of the Commissioner of Patents. The Court found that there had been an abuse of the exclusive rights under the two patents mentioned, and that Donnacona had qualified itself as an applicant for a licence to work the said patents in Canada. The licence granted by the Commissioner of Patents was qualified to permit Celotex to import its acoustical board or material into Canada for sale, when manufactured only from begasse fibres, according to the disclosures of Trader and Mazer. *Held*: That a patentee who has claimed a wholly new invention must manufacture it in Canada or subject himself to the provisions of s. 65 of the Patent Act. 2. That the importation into Canada of a patented article in sufficient quantities to meet the demand in Canada for that article is not a working of a patent in Canada as contemplated by the Patent Act. 3. That engineering work done in advance of any sale of acoustical board in order to determine the particular character and formation of the material most suitable to meet

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any particular sound problem, the appointment of selling agents, the licensing of individuals or acoustical engineers, is not a working of the patents on a commercial scale, as contemplated by the Patent Act. *CELOTEX CORPN. ET AL. v. DONNACONA PAPER CO. LTD.*..... 128

3.—*Infringement—Inquiry as to damages—Referee's report finding amount—Sales by infringer—Loss of profit on actual sales—Royalty—Evidence that customers would not have purchased plaintiff's patented article—Contention of defendant that plaintiff entitled to nominal damages only—Appeal from report of Referee dismissed.*—In an action for infringement of a patent relating to coffin handles it was held that plaintiff's patent was valid and infringed by the defendant. (See (1933) Ex. C.R. 141 and (1934) S.C.R. 436). An inquiry as to the damages suffered by the plaintiff was ordered, the Registrar of this Court being appointed Referee. By his report the Referee found that the plaintiff would have made a total profit of \$17,078.41 had it made the sales which the defendant made of the patented article; that the damages should be estimated on a royalty basis for the unauthorized sale of every one of the infringing articles sold, and that each sale was to be considered as an invasion of the right of the patentee; that 10 per cent of the total profit which the plaintiff would have made would be a fair compensation for the use of the plaintiff's invention by the defendant. The defendant appealed and contended that the plaintiff was entitled to nominal damages only; that the plaintiff had only a portion of the total trade in coffin handles in Canada, and that if the defendant's customers had not bought their requirements of coffin handles from the defendant they would not have bought from the plaintiff. *Held*: That the Referee had assessed the damages on a right principle and in a manner consistent with the evidence before him, and the allowance made in respect to each one of the infringing articles, was not excessive. (*Meters Ld. v. Metropolitan Gas Meters Ld.* (1911) 28 R.P.C. 157, followed). *DOMINION MANUFACTURERS LTD. v. ELECTROLIER MFG. CO. LTD.*..... 204

4.—*Appeal from Commissioner of Patents—Article 4 of the Union Convention of Paris for the Protection of Industrial Property—Patent Act, 25-26 Geo. V, c. 32, s. 27 (1), s. 31—Filing date of patent—Filing of assignment of patent—Appeal allowed.*—Article 4 of the Union Convention of Paris for the Protection of Industrial Property, ratified by the Dominion of Canada, provides: "(a) Any



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person who has duly deposited an application for a patent . . . in one of the contracting countries . . . shall enjoy, for the purposes of deposit in the other countries . . . a right of priority during the periods hereinafter stated. (b) Consequently, a subsequent deposit in any of the other countries of the Union before the expiration of these periods shall not be invalidated through any acts accomplished in the interval, either, for instance, by another deposit . . . (c) The above-mentioned periods of priority shall be twelve months for Patents . . . These periods start from the date of deposit of the first application in a country of the Union, the day of deposit is not included in the period." The Patent Act, 25-26 Geo. V, c. 32, s. 27 (1) provides: "An application for a Patent for an invention filed in Canada by any person entitled to protection under the terms of any treaty or convention relating to patents to which Canada is a party who has . . . previously regularly filed an application for a patent for the same invention in any other country which by treaty, convention or law affords similar privilege to citizens of Canada, shall have the same force and effect as the same application would have if filed in Canada on the date on which the application for patent for the same invention was first filed in such other country, provided the application in this country is filed within twelve months from the earliest date on which any such application was filed in such other country" . . . *Held*: That where an application for a patent was filed in Italy on December 31, 1936, and another application for a patent for the same invention was filed in Canada by the same applicant on December 29, 1937, the applicant for such patent is entitled to a filing date in Canada of December 29, 1937, and to the benefit of the filing date in Italy of December 31, 1936. 2. That the filing with the Commissioner of Patents of an assignment of a patent within the delay prescribed by s. 31 of the Patent Act for completion of an application for a patent, is sufficient and valid. *MONTecatini v. Commissioner of Patents*. . . . . 99

5.—*Infringement action—Combination patent—Lack of novelty—Subject-matter—Equivalency.*—The action is one for infringement of a patent. The invention relates to improvements in the construction of electric conductors having a flexible metallic outer sheath or jacket, commonly known as armored cables or conductors. The Court found that the patent sued upon lacked subject-matter. *Held*: That, though the device used by the patentee may be simpler and more

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convenient than those previously known and used for the same purpose, it is only an equivalent of a well known device and it did not require invention to place it in the combination, and it performed the same function in the patentee's combination as in previous combinations. 2. That in combination patents the invention must be found in the combination and not in the parts unless claimed. *NATIONAL ELECTRIC PRODUCTS CORPN. v. INDUSTRIAL ELECTRIC PRODUCTS LTD.* . . . 282

6.—*Infringement action—Subject-matter—Invention—Patent Act, R.S.C., 1927, c. 150, s. 50.*—The action is one for infringement of three patents owned by the plaintiff. The inventions claimed in two of the patents relate to methods of joining the ends of a woven wire belt to form an endless belt particularly for use in Fourdrinier paper machines. The invention claimed in the third patent relates to woven wire fabric that is used in the manufacture of belts for Fourdrinier paper machines. The Court found that with respect to the first two patents the art of joining the two ends of a woven wire cloth by wire stitching as described in the patents was quite old and that the patents lacked subject-matter. With respect to the third patent the Court found that there is no invention disclosed in the patent and also that the defendant had been making the wire belt claimed to have been infringed since a date more than two years before the application for the patent in question. *Held*: That small variations from, or slight modifications of, the current standards of construction, in an old art, rarely are indicative of invention. 2. That under the Patent Act, R.S.C., 1927, c. 150, s. 50, the defendant is entitled to continue the manufacture and sale of its wire belt, having commenced the manufacture and sale of the same more than two years prior to the issue of plaintiff's patent. *NIAGARA WIRE WEAVING CO. LTD. v. JOHNSON WIRE WORKS LTD.* . . . . . 259

7.—*Chemical patent—Patent for anesthetic composition and process of making the same—Chemical equivalent—Infringement.*—The action is for infringement of plaintiff's Canadian Patent No. 355,246. The invention relates to an anesthetic composition and the process of making the same. It is claimed that if a buffer salt is added to the main ingredients of an anesthetic solution, namely, procaine, a vaso-constrictor, a salt and an anti-oxidant, the solution will retain its neutral condition. Defendants manufacture and distribute an anesthetic solution which they contend does not contain a buffer salt but which is a buffered solution

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by virtue of the manner in which it is compounded, since procaine is used as a base and converted into a salt by bubbling carbon dioxide through the solution, thereby making an alkaline salt of procaine. Defendants did not question the validity of plaintiff's patent. *Held:* That the solution manufactured and sold by the defendants is the chemical equivalent of the invention claimed by the plaintiff and is not so distinguishable from that of the plaintiff's as to be in fact a different solution, or one made by a process entirely different from that of the plaintiff, and there is infringement of plaintiff's patent. **NOVOCOL CHEMICAL MFG. CO. OF CANADA LTD. v. W. R. MACFARLANE ET AL. . . . 151**

8.—*Infringement action—Invention—Subject-matter—Prior art—Equivalency—Substitution of one material for another may be invention.*—The action is one for infringement of a patent owned by Samson-United Corporation. The invention claimed relates to improvements in a fan. Claim 3 is typical of the claims in suit and reads: "3. A fan comprising a hub with radially projecting blades, formed of material sufficiently flexible to bend readily without permanent distortion, the inner end portions of said blades being maintained sufficiently rigid by said hub and of a configuration to increase the resistance of said blades to axial thrusts without materially increasing their resistance to deformation upon encountering an object in their path of rotation." The Court found that the whole idea of means and method in defendant's fan is the same as plaintiffs' and small variations in structure adopted by the defendant are plainly the equivalent of that found in the plaintiffs' fan. *Held:* That there is invention disclosed in plaintiffs' patent and the same has been infringed by the defendant. 2. That the use of one material in lieu of another, in the formation of a manufacture, may be the subject of a patent, if such substitution involves a new mode of construction, or develops new uses and properties of the article formed, or there is some new and useful result. **SAMSON-UNITED OF CANADA LTD. ET AL. v. CANADIAN TIRE CORP. LTD. . . . . 277**

9.—*Failure to file the statutory oath within time prescribed by the Patent Act—Application held to have been abandoned—Patent Act, 25-26 Geo. V, c. 32, s. 29 and s. 31—Appeal from Commissioner of Patents dismissed.*—Application for a Canadian patent was made on November 13, 1935, by one, Robson. The oath required by the Patent Act did not accompany the application. The applicant was notified by the Patent Office on November

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20, 1935, that the oath must be filed within the time limit of three months from that date. The petition, specifications and drawings were filed within one year from the date of application. Nothing further was done until May, 1938, when application to amend the specification was made. Four days later the Patent Office advised that the application must be held to have been abandoned because the oath required to complete the application had not been filed within the time limit fixed, and also that the application had not been completed within one year from the date of it being filed. *Held:* That the oath is part of the application for a patent, and must be filed within the time prescribed by s. 31 of the Patent Act. 2. That the Commissioner of Patents was right in holding that the application had been abandoned. **SCARBOROUGH GUILD LTD. v. COMMISSIONER OF PATENTS. . . . . 244**

10.—*Infringement—Subject-matter—Equivalency—Invention.*—Defendant's patent no. 368,042, relates to a Method and Mold for setting diamond-cutters in core bits, tools and devices as in rotary drill-bits for earth boring. Plaintiff is engaged in the business of selling diamonds for industrial purposes, and in connection therewith manufactures a machine for casting diamond core bits. Plaintiff seeks a declaration that the machine, manufactured by it, and the sale and use thereof in Canada, do not constitute an infringement of defendant's patent. The validity of defendant's patent is not questioned. The Court found that the structure of the plaintiff and that of the defendant perform the same functions and are governed by substantially the same structural law; that that of the plaintiff is a mere equivalent and did not require an inventive step. *Held:* That the plaintiff has taken the substance of defendant's invention and any difference in the arrangement of parts, the material employed, or the order of the different steps in the manufacture, are diversities of form and not diversities of substance. 2. That the taking of two steps to accomplish what patentee does in one step does not void an invention, unless the former represents an entirely different conception of means and method for securing the same end. **J. K. SMIT & SONS INC. v. RICHARD S. McCLINTOCK. . . . . 121**

11.—*Impeachment action—Patent invalid—Lack of invention—Subject-matter.*—The action is one to impeach claims numbered 1 and 2 of Canadian Patent no. 255,629 granted to defendant on November 24, 1925. The patent relates to improvements in drawing apparatus for textile rovings. Plaintiff contends that

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claims 1 and 2 of the patent disclose no invention and therefore are invalid and void. Plaintiff also contends that any invention or inventions covered by claims 1 and 2 of the patent in suit had been already described and patented in and under United States Patents nos. 1,240,670 and 1,297,794 granted to defendant in September, 1917, and in March, 1919, respectively, and one British Patent, no. 9,692, granted to defendant in February, 1919. The Court found that the belts described in United States Patent no. 1,240,670, and in the patent in suit, are described by the patentee as performing the same function in the same manner; and that the drawing mechanism described in the patent in suit performs the same function as that referred to in the United States Patent no. 1,297,794. *Held*: That there is no subject-matter in claims 1 and 2 of Canadian Patent no. 255,629. 2. That the introduction of "slack" or "loose" belts, as described in the patent in suit, does not add such a new and useful element to the known mechanism as to constitute a new combination possessing that degree of novelty and utility to justify ascribing to it the quality of invention. *WHITIN MACHINE WORKS v. FERNANDO CASABLANCAS*..... 70

12.—*Practice—Particulars—Order 53A, Rule 21A, of the Rules of the Supreme Court in England—Form of order.*—*THERMIONICS LTD. v. PHILCO PRODUCTS LTD. ET AL*..... 147

**PAYMENTS MADE ON CESSATION OF OFFICE.**

*See* REVENUE, No. 2.

**PETITION FOR REGISTRATION OF MARK.**

*See* TRADE MARK, No. 1.

**PETITION OF RIGHT.**

*See* CROWN, No. 2.

**PETITION OF RIGHT TO RECOVER MONEY PAID TO THE CROWN FOR SALES TAX.**

*See* REVENUE, No. 1.

**PETITIONER NOT ENTITLED TO RELIEF PROVIDED FOR IN s. 29 OF ACT IN CASE OF MARK ALREADY REGISTERED.**

*See* TRADE MARK, No. 1.

**PILOTAGE AUTHORITY.**

*See* CROWN, No. 2.

**PRACTICE.**

*See* PATENTS, Nos. 1 and 2.

**PRACTICE.**

1. EXAMINATION OF PARTIES BY COMMISSION OR LETTERS OF REQUEST, No. 1.
2. EXCHEQUER COURT ACT, R.S.C. 1927, c. 34, s. 64, No. 1.
3. EXCHEQUER COURT RULE 169, No. 1.

**PRACTICE** — *Exchequer Court Act, R.S.C., 1927, c. 34, s. 64—Exchequer Court Rule 169—Examination of parties by commission or letters of request.*—*Held*: That the Exchequer Court Act, R.S.C., 1927, c. 34, s. 64, does not provide for the examination of a party giving evidence in his own behalf, by commission or letters of request. *RITA LEMAY v. MINISTER OF NATIONAL REVENUE*.... 248

**PREMIUMS PAID OUT OF AND CHARGED AGAINST SURPLUS ACCOUNT OF COMPANY.**

*See* REVENUE, No. 7.

**PRESUMPTIONS AS TO COPYRIGHT AND OWNERSHIP THEREOF.**

*See* COPYRIGHT, No. 1.

**PRIOR ART.**

*See* PATENTS, No. 8.

**PROJECTS PROPOSED AND CARRIED OUT PURSUANT TO AGREEMENT ENTERED INTO BETWEEN THE GOVERNMENTS OF DOMINION AND PROVINCE FOR FINANCIAL ASSISTANCE IN CARRYING OUT RELIEF MEASURES ARE NOT "PUBLIC WORKS" WITHIN THE TERMS OF THE EXCHEQUER COURT ACT.**

*See* CROWN, No. 4.

**"PUBLIC WORK".**

*See* CROWN, No. 4.

**PURCHASER OF SHARES FROM AN ENEMY NATIONAL BEFORE TERMINATION OF GREAT WAR IS NOT ENTITLED TO REGISTRATION OF SAME.**

*See* CROWN, No. 6.

**QUALIFICATION OF LICENCE GRANTED BY THE COMMISSIONER OF PATENTS.**

*See* PATENTS, No. 2.

**REDEMPTION OF COMPANY'S SHARES AT A PREMIUM.**

*See* REVENUE, No. 7.

**REFEREE'S REPORT FINDING AMOUNT.**

*See* PATENTS, No. 3.

**REGISTERED ENEMY SHARE-HOLDER NOT ENTITLED TO NOTICE OF APPLICATION FOR ORDER VESTING SUCH SHARES OWNED BY HIM IN CUSTODIAN OF ALIEN ENEMY PROPERTY.**

See CROWN, No. 6.

**REPLACEMENT COST AND DEPRECIATION OF BUILDINGS AT TIME OF EXPROPRIATION.**

See EXPROPRIATION, No. 1.

**RESPONSIBILITY.**

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**REVENUE.**

1. "CORPORATION HAVING UNDISTRIBUTED INCOME ON HAND," No. 7.
2. CUSTOMS ACT, R.S.C. 1927, c. 42, as amended by 21 Geo. V, c. 2, s. 4, No. 3.
3. DEDUCTIONS, No. 5.
4. EVIDENCE, No. 2.
5. GOODS SOLD AND DELIVERED, No. 1.
6. "GRATUITY," No. 2.
7. "INCOME," Nos. 2 and 6.
8. INCOME, Nos. 5 and 7.
9. "INCOME FROM BUT NOT THE PROCEEDS OF LIFE INSURANCE POLICIES," No. 6.
10. INCOME TAX, Nos. 2 and 6.
11. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 3, No. 2.
12. INCOME WAR TAX ACT, R.S.C. 1927, c. 97, s. 3 (b) and s. 5 (k), No. 6.
13. INCOME WAR TAX ACT, R.S.C., 1927, c. 97, s. 6 (a), No. 5.
14. INCOME WAR TAX ACT, R.S.C., 1927, c. 97, s. 17, No. 7.
15. INDEPENDENT TRADING UNITS, No. 4.
16. LIABILITY FOR TAX, Nos. 4, 6 and 7.
17. "MANUFACTURER," No. 4.
18. MONEY SPENT BY BREWER FOR TREATING PURPOSES, No. 5.
19. NO LIABILITY FOR TAX, No. 2.
20. PARTNERSHIP AND LIMITED COMPANY, No. 4.
21. PAYMENT MADE ON CESSATION OF OFFICE, No. 2.
22. PETITION OF RIGHT TO RECOVER MONEY PAID TO THE CROWN FOR SALES TAX, No. 1.
23. PREMIUM PAID OUT OF AND CHARGED AGAINST SURPLUS ACCOUNT OF COMPANY, No. 7.
24. REDEMPTION OF COMPANY'S SHARES AT A PREMIUM, No. 7.
25. SALES TAX, No. 4.
26. SPECIAL WAR REVENUE ACT, R.S.C., 1927, c. 179, s. 85 (a), s. 86, ss. 1 (a and b), No. 4.

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27. SPECIAL WAR REVENUE ACT, R.S.C., 1927, c. 179, secs. 86, 87, 104 and 105, No. 1.
28. TAX LEVIED "ON THE SALE PRICE . . . AT THE TIME OF DELIVERY", No. 1.
29. VALUE OF GOODS IMPORTED INTO CANADA AS FIXED BY THE GOVERNOR IN COUNCIL IS NOT TO BE DETERMINED IN TERMS OF CURRENCY OF THE COUNTRY OF EXPORT, No. 3.

**REVENUE—Petition of right to recover money paid to the Crown for Sales Tax—Special War Revenue Act, R.S.C., 1927, c. 179, secs. 86, 87, 104 and 105—Goods sold and delivered—Tax levied "on the sale price . . . at the time of delivery."**

—By certain contracts entered into between the suppliant and His Majesty the King, represented by the Minister of Public Works in His Majesty's Government for the Province of Quebec, the suppliant undertook to erect the structural steel superstructure of three bridges in the Province of Quebec, in consideration of the sums set out in each contract. The contracts provided that the suppliant was to furnish all the materials, merchandise, tools, labour, implements, carriages and scaffoldings, the requisite number of mechanics and workmen, and all things needful and proper for the due and proper performance and completion of the work undertaken and all matters and things incident to the same. Suppliant erected the three bridges and was paid according to the contracts. In respect of the materials incorporated in the bridges, suppliant was assessed for sales tax, alleged due under the terms of the Special War Revenue Act, R.S.C., 1927, c. 179, and amendments. It paid, under protest, a proportion of the amounts so assessed, to the Commissioner of Excise by cheque made to the order of the Collector of National Revenue at Montreal. Suppliant now claims a return of the moneys so paid on the grounds that no tax was payable by it in respect of the materials supplied in virtue of the contracts or, alternatively, that, if the materials were taxable, suppliant was entitled to a refund by reason of the fact that the materials were sold, if sold at all, to His Majesty the King in the right of the Province of Quebec. Respondent denies that the materials in question were sold to His Majesty the King in the right of the Province of Quebec and that the provisions of the Civil Code apply. Respondent further alleges that the materials in respect of which the suppliant was assessed for sales tax were manufactured or produced by the suppliant for the performance of the contracts mentioned and that suppliant became liable to pay sales tax

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in respect of such materials and was rightly assessed. *Held*: That the materials supplied by the suppliant and incorporated by it in the superstructure of the three bridges are goods sold and delivered to His Majesty the King in the right of the Province of Quebec within the terms of s. 86 (a) of The Special War Revenue Act and are liable to sales tax. 2. That the goods were not purchased by His Majesty the King in the right of the Province of Quebec for purposes of resale, and suppliant is therefore entitled to a refund of the money paid to respondent, pursuant to s. 105, ss. 1, of The Special War Revenue Act. **DOMINION BRIDGE CO. LTD. v. THE KING**..... 235

2—*Income tax—Income War Tax Act, 1927, c. 97, s. 3—Evidence—“Income”—Payment made on cessation of office—“Gratuity”—No liability for tax.*—Appellant, in December, 1933, was appointed Chairman of the Trustees of the Canadian National Railways for a term of five years at a salary of \$30,000 per annum. By 1 Edw. VIII, Chapter 25, the appellant's office was abolished, and his employment as Chairman of the Trustees terminated on October 1, 1936. Appellant was advised by the Minister of Railways that he would be granted a gratuity of \$30,000 and later, on the recommendation of the Minister of Railways, an Order in Council was passed approving of the payment of such sum by the Canadian National Railways to appellant “in relation to his services as Chairman, to be paid to and accepted by him as a remunerative payment subject to income tax.” The Board of Directors of the Canadian National Railways passed a resolution in substantially the same terms as the Order in Council and a cheque for \$30,000 was delivered to appellant accompanied by a voucher, embodying the language of the resolution, for his signature, the latter portion of which stated that the money was being paid to and accepted by the appellant “as a remunerative payment subject to income tax.” The voucher was signed by the appellant concurrently with the receipt of the cheque. Immediately after receipt of the cheque the appellant wrote to the President of the Canadian National Railways and also to the Minister of Railways in protest against the form of the voucher and the manner in which the payment was therein described. Appellant was assessed for income tax purposes on this sum of \$30,000. The assessment was affirmed by the Minister of National Revenue from whose decision the appellant appealed. *Held*: That the payment was personal to appellant, made because of the cessation of his office, and not for past services rendered

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in office and therefore not subject to income tax. **C. P. FULLERTON v. MINISTER OF NATIONAL REVENUE**..... 13

3—*Customs Act, R.S.C., 1927, c. 42, as amended by 21 Geo. V, c. 2, s. 4—Value of goods imported into Canada as fixed by the Governor in Council is not to be determined in terms of currency of the country of export.*—*Held*: That s. 43 of the Customs Act, R.S.C., 1927, c. 42, as enacted by 21 Geo. V, c. 2, s. 4, granting the Governor in Council the right to fix the value for duty purposes of certain goods imported into Canada does not authorize the fixing of such value in the terms of the currency of the country of export. **W. J. McCART & Co LTD. v. THE KING**..... 27

4—*Sales tax—Special War Revenue Act, R.S.C., 1927, c. 179, s. 85 (a), s. 86, ss. 1 (a & b)—“Manufacture”—Independent trading units—Partnership and limited company—Liability for tax.*—Defendant Plotkins is the sole owner of Lion Refining Company, a partnership engaged in the business of manufacturing petroleum products. Lion Oils Limited is engaged in the marketing and distribution of petroleum products and other articles. Approximately sixty per cent of the business of Lion Oils Limited consists of selling petroleum products manufactured by and purchased from Lion Refining Company. Its business is carried on on premises owned by Lion Refining Company. The accounting and clerical work of both concerns are carried on by the staff of Lion Oils Limited in whose name a banking account is maintained into which are deposited the receipts of both concerns from all sources. The business transactions of each are kept distinct and in separate books. The salaries and wages of officers and employees of both concerns and all bills payable by Lion Refining Company are paid through the common banking account. Lion Refining Company sells to Lion Oils Limited and also to others. The goods are invoiced in the name of Lion Oils Limited. The two concerns share profit and loss in the proportion of \$5,700, the paid up capital of Lion Oils Limited, to \$20,000, the amount of Plotkins' original investment in Lion Refining Company. The action is one to recover sales tax assessed upon the selling price of Lion Oils Limited. The Crown alleges that both concerns are to be treated as one business, or, in the alternative, that Lion Refining Company was the agent of Lion Oils Limited and that the sales to it by Lion Refining Company were fictitious and illusory and made with the intent of avoiding payment of the sales tax properly payable. *Held*: That the Lion Refining Company and Lion Oils

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Limited are independent trading units, and Lion Refining Company is the manufacturer of the petroleum products disposed of and is liable for the sales tax. **THE KING v. LEON L. PLOTKINS ET AL. 1**

**5—Income—Deductions—Money spent by brewer for treating purposes—Income War Tax Act, R.S.C. 1927, c. 97, s. 6 (a).—Held:** That money paid by appellant, a brewer, for the purpose of treating in the premises of beer licensees, does not constitute a disbursement or expense "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" of appellant. **RIEDLE BREWERY LTD. v. MINISTER OF NATIONAL REVENUE . . . . . 314**

**6—Income tax—Income War Tax Act, s. 3 (b), s. 5 (k)—"Income from but not the proceeds of life insurance policies"—"Income"—Liability for tax.]—The Sun Life Assurance Company of Canada issued a policy of insurance upon the life of appellant's husband, appellant being named the owner and beneficiary therein. The policy was described as "Guaranteed Income Life—Monthly Instalments—Annual Dividend Plan" and provided that on the death of the assured the company would pay to the beneficiary mentioned therein "the sum of Seven Hundred Dollars and a like monthly instalment on the same day in each succeeding month until one hundred and twenty monthly instalments in all shall have been paid . . . . The company further agrees that if the beneficiary . . . shall still survive after the payment in full of the one hundred and twenty monthly instalments . . . the company shall continue to pay to the said beneficiary the sum of Seven Hundred Dollars monthly on the same day in each month . . . so long as she may survive thereafter; . . . It is further agreed that when the first instalment under this policy becomes due, as above, the person or persons legally entitled to receive said first instalment shall have the option of commuting all instalments into a single cash payment of Seventy-One Thousand Four Hundred Dollars and the payment of this amount shall completely discharge the company from all liability in connection with this contract." Appellant, upon the death of the assured, did not elect to accept the cash payment of \$71,400, and the monthly instalments stipulated in the contract have been paid to and received by her since that time. In the year 1934 she received the sum of \$8,400 which was assessed for income tax. The assessment was affirmed by the Minister of National Revenue from whose decision appellant appealed. *Held:* That such monthly payments constitute**

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"income" and appellant is liable for tax thereon. 2. That the contract herein is not like the annuity contracts mentioned in s. 5 (k) of the Act and the appellant is not entitled to any exemption or deduction. **BESSIE L. SHAW v. MINISTER OF NATIONAL REVENUE . . . . . 35**

**7—Income—Income War Tax Act, R.S.C., 1927, c. 97, s. 17—"Corporation having undistributed income on hand"—Redemption of company's shares at a premium—Premium paid out of and charged against surplus account of company—Liability for tax.]—S. 17 of the Income War Tax Act, R.S.C., 1927, c. 97, at the material time herein, read as follows: "Where a corporation, having undistributed income on hand, redeems its shares at a premium paid out of such income, the premium shall be deemed to be a dividend and to be income received by the shareholder." Massey-Harris Co. Ltd. in 1929 redeemed its outstanding 7 per cent cumulative preference shares at 110 per cent of their par value. The premium of 10 per cent was paid out of and charged against the Surplus Account of the company as shown in its Annual Report for the year 1929. Appellants received the sum of \$91,220 as a premium on the redemption of shares owned by the estate of W. E. H. Massey. This sum was assessed for income tax, which assessment was affirmed by the Minister of National Revenue. *Held:* That the premium was paid out of "undistributed income on hand," and therefore taxable. **WALTER E. H. MASSEY'S EXECUTORS v. MINISTER OF NATIONAL REVENUE . . . . . 41****

**"ROYAL CROWN"**

*See TRADE MARK, No. 4.*

**ROYALTY**

*See PATENTS, No. 3.*

**RULE 2, EXCHEQUER COURT RULES**

*See CROWN, No. 5.*

**RULE 36 OF THE RULES OF THE ROAD**

*See SHIPPING, No. 7.*

**RULES 25, 30 & 32 OF THE RULES OF THE ROAD FOR THE GREAT LAKES**

*See SHIPPING, No. 4.*

**SALES BY INFRINGER**

*See PATENTS, No. 3.*

**SALES TAX**

*See REVENUE, No. 4.*

**SERVICES NOT IN NATURE OF SALVAGE**

*See SHIPPING, No. 3.*

**SERVICES RENDERED PURSUANT TO CONTRACT**

See SHIPPING, No. 3.

**SHIPPING**

1. ADMIRALTY RULE 172, No. 3.
2. APPEAL ALLOWED, Nos. 1, 2 and 3.
3. APPEAL ALLOWED AND CROSS-APPEAL DISMISSED, No. 6.
4. APPEAL DISMISSED, Nos. 4 and 7.
5. APPEAL FROM DISTRICT JUDGE IN ADMIRALTY, Nos. 2, 3 and 4.
6. ARTICLE 16, INTERNATIONAL RULES OF THE ROAD, No. 6.
7. AUTHORITY OF MASTER, No. 8.
8. CANADA EVIDENCE ACT, R.S.C., 1927, c. 59, secs. 7 and 35, No. 1.
9. CANADA EVIDENCE ACT DETERMINES NUMBER OF EXPERT WITNESSES THAT MAY BE CALLED IN PROCEEDINGS OVER WHICH PARLIAMENT OF CANADA HAS LEGISLATIVE JURISDICTION, No. 1.
10. CHARTER-PARTY, No. 8.
11. COLLISION, Nos. 4 and 5.
12. COLLISION BETWEEN TWO UPBOUND SHIPS, No. 7.
13. COLLISION IN ST. LAWRENCE RIVER DURING FOG, No. 6.
14. CONTRACT FOR CARRIAGE OF GOODS BY WATER, No. 2.
15. DUTY OF OVERTAKING SHIP, No. 7.
16. DUTY OF STEAMSHIP IN FOG, No. 5.
17. DUTY OF TUG, No. 1.
18. FOREIGN VESSEL, No. 8.
19. LIABILITY OF OWNER, No. 8.
20. LIMITATION OF RIGHT OF MASTER TO BIND OWNER OF VESSEL, No. 3.
21. LOSS OF CARGO, No. 2.
22. NECESSARIES, No. 8.
23. NEGLIGENCE OF RESPONDENT SHIP, No. 6.
24. NEGLIGENT OPERATION OF VESSEL, No. 4.
25. NO NEGLIGENCE ON PART OF TUG OR ITS OFFICERS, No. 1.
26. ONUS OF PROOF, No. 2.
27. RULE 36 OF THE RULES OF THE ROAD, No. 7.
28. RULES 25, 30 & 32, OF THE RULES OF THE ROAD FOR THE GREAT LAKES, No. 4.
29. SERVICES NOT IN NATURE OF SALVAGE, No. 3.
30. SERVICES RENDERED PURSUANT TO CONTRACT, No. 3.
31. TIME FOR APPEALING FROM JUDGMENT RENDERED IN ADMIRALTY COURT, No. 3.
32. TOW DAMAGED BY COMING IN CONTACT WITH A HIDDEN OBSTRUCTION UNKNOWN TO EXIST TO EITHER PARTY, No. 1.

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33. TUG AND TOW, No. 1.
34. VESSEL SAILED UNDER THE "QUARTER LAY" OR SHARING SYSTEM, No. 8.
35. WATER CARRIAGE OF GOODS ACT, R.S.C., 1927, c. 207, No. 2.

**SHIPPING—Tug and tow—Tow damaged by coming in contact with a hidden obstruction unknown to exist to either party—No negligence on part of tug or its officers—Duty of tug—Canada Evidence Act, R.S.C., 1927, c. 59, s. 35 & s. 7—Canada Evidence Act determines number of expert witnesses that may be called in proceedings over which Parliament of Canada has legislative jurisdiction—Appeal allowed.]—Respondent's SS. *Hamonic* had laid in her winter moorings up a narrow and uncharted channel leading from the St. Clair river. Appellant tug was engaged by the captain of the *Hamonic* to tow her from her winter berth to another berth in the Port of Sarnia, Ontario. During the towing operations the *Hamonic* encountered a submerged and unknown obstruction and sustained damage to her rudder. Respondent brought action against the appellant. Judgment at trial was rendered in favour of respondent. On appeal the Court found that appellant tug was a "named" tug; that neither the appellant nor those in charge of her were negligent and that the accident was not due to any default of the tug. *Held*: That the obligation to carry out a towage contract requires only that degree of caution and skill which prudent navigators usually employ in such services. 2. That it was the appellant that was hired and any complaint alleged against her must relate entirely to the question of the performance of her duty under the towage contract. 3. That the restriction of the number of expert witnesses that may be called in proceedings over which the Parliament of Canada has legislative jurisdiction is controlled by the Canada Evidence Act, R.S.C., 1927, c. 59, and s. 35 of that Act is applicable here. THE TUG *Champlain v. CANADA STEAMSHIP LINES LTD.*..... 39**

2—*Appeal from District Judge in Admiralty—Contract for carriage of goods by water—Loss of cargo—Onus of proof—Water Carriage of Goods Act, R.S.C., 1927, c. 207—Appeal allowed.]—Respondent entered into a contract with appellant for the carriage of a cargo of gasoline from Montreal, P.Q., to Sydney, N.S. During the course of the voyage appellant's ship, with the gasoline on board, stranded on the south shore of the St. Lawrence river. The ship suffered serious damage and a large part of the cargo of gasoline was lost. The respondent contended that most of the lost cargo was pumped overboard in order to lighten the*

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ship. The appellant contended that the loss of cargo was due entirely to the stranding of the ship which seriously damaged her hull, causing the oil to leak from the tanks. *Held*: That the appellant's explanation of the loss of cargo was a reasonable one and consistent with the occurrence of the stranding and the severe damage done to the ship. 2. That the onus on a person relying on an exception relieving him from liability does not go so far as to make him prove all the circumstances which could explain an obscure situation. Judgment of Demers D.J.A., for the Quebec Admiralty District [(1938) Ex. C.R. 338] reversed. DOMINION TANKERS LTD. v. SHELL PETROLEUM CO. OF CANADA LTD. . . . . 192

3.—*Appeal from District Judge in Admiralty—Limitation of right of master to bind owner of vessel—Services rendered pursuant to contract—Services not in nature of salvage—Time for appealing from judgment rendered in Admiralty Court—Admiralty Rule 172—Appeal allowed.*—Appellant yacht, United States Registry, while on a cruise from Galveston, Texas, to Nova Scotia, stranded on the coast of Nova Scotia. The owner of appellant yacht refused an offer made by the master of the respondent vessel to haul the yacht off the shore. He also instructed the master of the *Dr. Brinkley II* that he was not to employ any tow boat that day. Later, on the same day, the managing owner of respondent vessel offered to tow the yacht off, and look to the hull underwriters for his compensation, and not to the yacht itself, or her owner. The master of the *Dr. Brinkley II* accepted this offer. Unknown to either the owner or the master of the *Dr. Brinkley II* the policy of insurance did not cover her while in Canadian Atlantic waters. The yacht was floated easily at high tide and was towed to Yarmouth, N.S., by respondent vessel. No demand for payment was made on the owner or the master of the *Dr. Brinkley II* while at Yarmouth, nor prior to her departure from Yarmouth two days later. The trial judge found that the *Dr. Brinkley II* was in distress and danger, that the services rendered by the respondent vessel were voluntary and in the nature of salvage, and he awarded compensation to respondents. On appeal the Court found that appellant yacht was not, at the time the services were rendered, in any imminent danger or distress. *Held*: That the owner of appellant yacht was justified in preferring his own means of releasing the yacht and any services rendered by respondent vessel were not in the nature of salvage. 2. That the master of a ship cannot bind her owner in any transaction concerning

## SHIPPING—Continued

the ship, when the owner is on the ship or easily accessible. 3. That the agreement entered into between the master of appellant and the master of respondent vessel was for the assistance of respondent vessel in releasing the appellant on certain definite terms, and cannot be interpreted as conceding the right of salvage against appellant or her owner, with the insurance company acting as arbitrator in fixing the amount of salvage. 4. That the time for appealing in any matter being an action, from a judgment or order in Admiralty, runs from the date the judgment or order is perfected and not from the time when it is decided or pronounced. THE MOTOR YACHT *Dr. Brinkley II* v. THE MOTOR VESSEL *Shanahan* . . . . . 181

4.—*Appeal from District Judge in Admiralty—Collision—Rules 25, 30 and 32 of the Rules of the Road for the Great Lakes—Negligent operation of vessel—Appeal dismissed.*—The SS. *Joseph P. Burke*, proceeding up Lake Ontario, and the SS. *James B. Eads*, on a voyage from Fort William to Toronto, collided immediately outside the entrance to the Welland Canal at Port Weller. The primary cause of the collision was the decision of the Master of the *James B. Eads* to cross from starboard to the port side of the channel when approaching the exit on Lake Ontario. The trial judge allowed an action brought by the *Joseph P. Burke* against the owners of the *James B. Eads* and dismissed an action brought by the *James B. Eads* against the owners of the *Joseph P. Burke*. On appeal the Court found that the collision was the result of the negligent operation of the *James B. Eads* and that there was no negligence on the part of the *Joseph P. Burke*. *Held*: That the section of the Welland Canal where the collision occurred is not the type of narrow channel contemplated by Rule 25 of the Rules of the Road for the Great Lakes. *James B. Eads* v. *Joseph P. Burke*. . . . . 289

5.—*Collision—Duty of steamship in fog*—*Held*: That it is the duty of a steamship at anchor in a dense fog to remain at anchor and not attempt to make port, especially by a route known to the master of the ship to be frequented by many small fishing boats. CALEB W. HIRTLE ET AL v. THE SHIP *Shanahan*. 50  
6.—*Collision in St. Lawrence River during fog—Article 16, International Rules of the Road—Negligence of respondent ship—Appeal allowed and cross-appeal dismissed.*—The ships *Lafayette* and *Bermaple* collided in the St. Lawrence River, during a dense fog. The trial Court found both ships to blame and assessed the damage accordingly. *Held*:



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That the proximate and direct cause of the collision was due to the fault and negligence of the *Benmaple* in failing to give proper fog signals at proper intervals, in not keeping a careful look-out, in navigating at an excessive speed through a dense fog and in not exercising reasonable care and prudence. 2. That the speed of the *Lafayette* from the time she picked up her pilot at Father Point until she heard a whistle signal, is irrelevant; it is the speed that she was making at the material time that must be considered. 3. That the breach of an article of the International Rules of the Road by a vessel is not in itself sufficient to warrant a finding that the vessel guilty of such breach is to blame; it must be shown that the breach caused, or at least contributed to, the accident. **THE SHIP *Lafayette* ET AL v. PORT COLBORNE & ST. LAWRENCE NAVIGATION CO. LTD. ET AL. 355**

7.—*Collision between two upbound ships—Duty of overtaking ship—Rule 36 of the Rules of the Road—Appeals dismissed.*—The *Soreldoc* and the *Baird*, both laden and upbound from Quebec ports, were in collision off Weaver's Point gas buoy on July 15, 1937. About 11:00 p.m., July 14, 1937, the *Baird* anchored for the night in Pillars Bay, about three-quarters of a mile from Weaver's Point gas buoy. The *Soreldoc* came around Steen Island and shortly after saw the anchor lights of the *Baird*. The *Soreldoc* saw the green light of the *Baird* and blew a two-blast signal which the *Baird* answered with a two-blast signal. The *Baird* weighed anchor and proceeded on her way to Weaver's Point. The *Soreldoc* gave a second two-blast signal which was also answered by the *Baird*. The two vessels collided at a point where the navigable channel is 1,000 feet wide. The trial judge found that the *Soreldoc* had plenty of room to the port of the *Baird* in which to navigate and keep out of the way of the *Baird* whilst the *Baird* could not safely have gone any closer to the buoy than she did. The trial judge also found that the *Baird* could have avoided the collision by slowing her speed and remaining in Pillars Bay. Both ships being equally at fault the trial judge ordered the damages assessed on the basis of 50 per cent to each. On appeal to this Court the judgment was affirmed. **Held:** That it is the duty of a vessel overtaking another to keep out of the way of the overtaken vessel. 2. That the master or pilot of the *Baird* after answering the signal of the *Soreldoc* should have exercised more caution and facilitated in every reasonable way the passage of the *Soreldoc* towards the buoy. **THE SHIP *Frank B. Baird* v. THE SHIP *Soreldoc*. 308**

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8.—*Foreign vessel—Necessaries—Charter-party—Authority of master—Liability of owner—Vessel sailed under the "quarter lay" or sharing system.*—The action was brought by the plaintiff against a foreign vessel for necessaries supplied on her account at a Canadian port. The vessel was engaged in the fishing business and at the time the necessaries were supplied she was operated on what is known as the "quarter lay." The owners appointed the Master who hired the crew and after certain deductions from the gross proceeds of a voyage the balance was distributed between the owners, the master and the crew. The plaintiff supplied bait and ice to the ship on the order of the master and the credit of the ship and owners. **Held:** That considering the nature of the business defendant ship was engaged in, the bait and ice were necessaries. 2. That upon the true inference to be drawn from the facts as proved, there was no demise or bailment of the ship to the master; that he managed and sailed the ship for the joint benefit of himself and the owners whose servant or agent he was, and that the ship was liable for the amount claimed. **WESTERN NOVA SCOTIA BAIT FREEZERS LTD. v. THE SHIP *Shamrock*. 53**

**SPECIAL WAR REVENUE ACT, R.S.C., 1927, c. 179**

See REVENUE, Nos. 1 and 4

**SPECIFIC PERFORMANCE DECREED AGAINST THE CROWN**

See CROWN, No. 5.

**SUBJECT-MATTER**

See PATENTS, Nos. 5, 6, 8, 10 and 11.

**SUBSTITUTION OF ONE MATERIAL FOR ANOTHER MAY BE INVENTION**

See PATENTS, No. 8.

**TAX LEVIED "ON THE SALE PRICE . . . AT THE TIME OF DELIVERY"**

See REVENUE, No. 1.

**TERMINATION OF CONTRACT BY THE CROWN BEFORE FULFILLMENT**

See CROWN, No. 1.

**TIME FOR APPEALING FROM JUDGMENT RENDERED IN ADMIRALTY COURT**

See SHIPPING, No. 3.

**TOW DAMAGED BY COMING IN CONTACT WITH A HIDDEN OBSTRUCTION UNKNOWN TO EXIST TO EITHER PARTY**

See SHIPPING, No. 1.

## TRADE MARK

1. ACQUESCENCE IN USE OF MARK, No. 3.
2. AMENDMENT OF REGISTERED TRADE MARK, No. 3.
3. APPEAL FROM REGISTRAR OF TRADE MARKS, No. 2.
4. APPEAL FROM REGISTRAR OF TRADE MARKS ALLOWED, No. 4.
5. INFRINGEMENT, No. 3.
6. ISSUES RAISED IN PETITION RES JUDICATA, No. 1.
7. LICENCE TO USE NAME AS TRADE MARK, No. 3.
8. OBLIGATION OF PART OF LICENSEE TO SURRENDER ANY RIGHTS ACQUIRED UNDER THE LICENCE UPON TERMINATION THEREOF, No. 3.
9. PETITION FOR REGISTRATION OF MARK, No. 1.
10. PETITIONER NOT ENTITLED TO RELIEF PROVIDED FOR IN s. 29 OF ACT IN CASE OF MARK ALREADY REGISTERED, No. 1.
11. "ROYAL CROWN", No. 4.
12. UNFAIR COMPETITION ACT, 22-23 Geo. V, c. 38, s. 2 (d) and (m), No. 2.
13. UNFAIR COMPETITION ACT, 22-23 Geo. V, c. 38, s. 14 and s. 26 (1) (g), No. 4.
14. UNFAIR COMPETITION ACT, 22-23 Geo. V, c. 38, s. 26 (1), s. 14 (1) and s. 29, No. 1.
15. WORD MARK NOT PROHIBITED BY UNFAIR COMPETITION ACT, No. 4.

**TRADE MARK** — *Unfair Competition Act, 22-23 Geo. V, c. 38, s. 29, s. 26 (1) and s. 14 (1)*—*Petition for registration of mark—Issues raised in petition res judicata—Petitioner not entitled to relief provided for in s. 29 of Act in case of mark already registered.*—Petitioner seeks a declaration of the Court, pursuant to s. 29 of the Unfair Competition Act, 22-23 Geo. V, c. 38, that the words "Shredded Wheat" may be registered as a trade mark, on the grounds, *inter alia*, that on March 20, 1928, the petitioner registered under the Trade Mark and Design Act, the words Shredded Wheat as a specific mark for use in association with the sale of biscuits and crackers, and also registered, on April 3, 1929, the said words for use in connection with the sale of cereal foods, and that on May 5, 1933, the petitioner filed an application for registration under the Unfair Competition Act, of the words Shredded Wheat for use as a trade mark in connection with cereal food, which application was accompanied by a request for cancellation of the aforesaid registrations, to take effect upon the re-registra-

## TRADE MARK—Continued

tion of the said words as a trade mark. Notice of the filing of such petition was given in the *Canada Gazette* pursuant to Rule 35 of the Rules of the Exchequer Court. The Objecting Party filed a statement of objections, and, on order of the Court, certain points of law raised therein were set down for hearing. In June, 1934, the petitioner herein commenced an action in the Supreme Court of Ontario against the objecting party herein and another, for an injunction to restrain infringement of the petitioner's registered trade mark "Shredded Wheat." That action was dismissed and an appeal therefrom to the Ontario Court of Appeals was dismissed. A further appeal to the Judicial Committee of the Privy Council was also dismissed. The Judicial Committee found against the validity of the mark, that it was descriptive of the goods sold, and that it had not acquired a secondary meaning in respect to petitioner's goods. *Held:* That the issues raised in the petition are *res judicata*, the judgment of the Judicial Committee being conclusive of the matter. 2. That the existence upon the Register of petitioner's mark is a bar to the petition. 3. That the declaration provided for in s. 29 of the Unfair Competition Act is not to be made in the case of a registered mark. 4. That the relief provided for by s. 29 of the Unfair Competition Act may be the subject of a petition to the Court. **CANADIAN SHREDDED WHEAT CO. LTD. v. KELLOGG CO. OF CANADA LTD. . . . . . 58**

2.—*Appeal from Registrar of Trade Marks—Unfair Competition Act, 22-23 Geo. V, c. 38, s. 2 (d) and (m)*—Appellant applied for registration of a trade mark to be applied to tobacco in all its forms, and consisting of a flat sheet of cellophane to be used as an outer wrapper, and a narrow coloured band of the same material extending around the package, this outer wrapper being entirely distinct from the container or package containing the tobacco. The Registrar of Trade Marks refused registration of the mark on the grounds that the coloured band performed the function of indicating where the tear strip was located, thereby facilitating the opening of the wrapper, and that such wrapper being in use by manufacturers other than the applicant the same would not identify the wares so wrapped as those of the applicant. The applicant appealed to this Court. *Held:* That any combination of elements which are primarily designed to perform a function, as here, a transparent wrapper which is moisture proof, and a band to open the wrapper, is not subject-matter for a trade mark. 2. That the proposed mark is not

## TRADE MARK—Continued

a "distinguishing guise" within the meaning of the Unfair Competition Act, 22-23 Geo. V, c. 38, s. 2 (d); It is not a "mode of shaping, moulding, wrapping or packing wares." 3. That the proposed mark is not one which has become adapted to distinguish the wares of the appellant within the meaning of s. 2 (m) of the Unfair Competition Act. **IMPERIAL TOBACCO CO. OF CANADA, LTD. v. REGISTRAR OF TRADE MARKS**..... 141

3.—*Infringement—Licence to use name as trade mark—Obligation on part of licensee to surrender any rights acquired under the licence upon termination thereof—Acquiescence in use of mark—Amendment of registered trade mark.*—The action is for infringement of a trade mark, consisting of the word "Schick," registered by the Magazine Repeating Razor Company, in August, 1927, to apply to safety razors of all kinds, razor blades . . . "shaving machines" . . . and other articles. The defendant by counter-claim, asks that the trade mark registration be modified so as to exclude therefrom any reference to "shaving machines." Plaintiffs' razors are sold under the name of "Schick Injector Razor" and "Schick Repeating Razor"; the defendant uses the word "Schick" in connection with what it calls "shaving machines," an electrically operated dry shaving apparatus which is sold under the name of "Schick Shaver." By certain agreements made in March, 1925, and in May, 1927, one, Jacob Schick, agreed to transfer to the plaintiff, Magazine Repeating Razor Company, or its predecessor, Sharp Manufacturing Company, a patent owned by him and several pending patent applications, and the exclusive right to manufacture and sell throughout the world the safety razors and blades covered by the patent and patent applications, and also certain inventions and discoveries he had made in connection with razors or blades, or machinery or processes for manufacturing the same. Schick agreed that the Corporation might use the word "Schick" in connection with the razors, blades and other articles and that such razors, blades or other articles might be marked or associated with the name of "Schick." He also agreed, by paragraph XI of the agreement of May, 1927, that if, during the life of that agreement, he should "make any invention or discovery relating to the art of shaving, other than inventions or discoveries relating to razors or blades or machinery or process for the manufacture thereof," he would disclose the same to the company and make application for letters patent thereon and assign the same to the company. By an

## TRADE MARK—Continued

agreement entered into on January 1, 1929, the company released Schick from his obligations under paragraph XI of the 1927 agreement in so far as that paragraph applied to "shaving machines." By a licence agreement dated January 1, 1929, Schick, then the owner of letters patent relating to "shaving machines" which had been named "Schick Dry Shavers," licensed the company to manufacture and sell in the United States, and foreign countries, under the name "Schick;" the shaving machines described and disclosed in his patents or patent applications relative to the same. The licensee agreed that all shaving machines which it or its agents might manufacture, would be marked with the name "Schick," and would be advertised, offered for sale, and sold, under the name "Schick." The company later terminated the licensing agreement effective as of July 1, 1930, by an agreement entered into in May, 1930; certain mutual releases were agreed upon, and the company agreed that "all rights relative to Schick Dry Shavers and Shaving Machines . . . heretofore granted to it by Schick under said agreement dated January 1, 1929, is now terminated and at an end." Schick then organized a company in the United States, known as Schick Dry Shavers Inc. to manufacture the shaving machine and sell it in the United States and other countries, which article became widely known and was widely advertised as "Schick Shaver." The Magazine Repeating Razor Company continued to sell and advertise its safety razor under the name of "Schick Injector Razor" and "Schick Repeating Razor." The Razor Company, in 1938, brought this action against defendant company. *Held:* That by the agreement of May, 1927, the Magazine Repeating Razor Company was to have the right to use the name of Schick only in connection with the safety razors and blades covered by the Schick patents and patent applications referred to in that agreement. 2. That the compulsory use of the name "Schick" in connection with dry shavers, in the licensing agreement of January 1, 1929, was a condition imposed by Schick, and the acceptance of that condition was an admission that Schick had a right to use his own name, on his dry shaver, if he chose so to do. 3. That if the owner of a patent licences another to make his invention, and requires as a term of the licence that the inventor's name be marked on the article invented, which condition the licensee accepts, and the licensee later terminates the licence and surrenders back to the licensor all rights acquired under the licence, then the

**TRADE MARK—Concluded**

licensor is free to make and sell his invention with his name marked thereon.

4. That the Magazine Repeating Razor Company had not the right to register or maintain on the register the trade mark "Schick" in connection with "shaving machinery." 5. That the plaintiffs acquiesced in the use of the word mark "Schick" by the defendant in connection with its dry shavers. 6. That any confusion resulting from the use of the name "Schick" is a consequence of the agreement and understanding of the parties and the plaintiffs must accept any inconvenience resulting from a situation which they helped to create. *MAGAZINE REPEATING RAZOR Co. OF CANADA LTD. ET AL. v. SCHICK SHAVER LTD.* ..... 108

4.—*Unfair Competition Act, 22-23 Geo. V, c. 38, s. 14 and s. 26 (1) (g)*—*"Royal Crown"*—*Word mark not prohibited by Unfair Competition Act—Appeal from Registrar of Trade Marks allowed.*—*Held:* That the use of the words "Royal Crown" as a word mark is not proscribed by the Unfair Competition Act, 22-23 Geo. V, c. 38. *NEHI INC. v. REGISTRAR OF TRADE MARKS.* ..... 217

**TREATY OF PEACE**

*See* CROWN, No. 6.

**TREATY OF PEACE (GERMANY) ORDER 1920**

*See* CROWN, Nos. 3 and 6.

**TUG AND TOW**

*See* SHIPPING, No. 1.

**UNFAIR COMPETITION ACT, 22-23 Geo. V, c. 38**

*See* TRADE MARKS, Nos. 1, 2 and 4.

**UNILATERAL MISTAKE**

*See* CROWN, No. 5.

**VALUE OF GOODS IMPORTED INTO CANADA AS FIXED BY THE GOVERNOR IN COUNCIL IS NOT TO BE DETERMINED IN TERMS OF CURRENCY OF THE COUNTRY OF EXPORT**

*See* REVENUE, No. 3.

**VALUE TO OWNER**

*See* EXPROPRIATION, No. 1.

**VESSEL SAILED UNDER THE "QUARTER LAY" OR SHARING SYSTEM**

*See* SHIPPING, No. 8.

**WATER CARRIAGE OF GOODS ACT, R.S.C., 1927, c. 207**

*See* SHIPPING, No. 2.

**WORD MARK NOT PROHIBITED BY UNFAIR COMPETITION ACT**

*See* TRADE MARK, No. 4.

**WORKING OF THE PATENTS ON A COMMERCIAL SCALE**

*See* PATENTS, No. 2.

**WORDS AND PHRASES**

*"Corporation having undistributed income on hand"*. *See* WALTER E. H. MASSEY'S EXECUTORS *v.* MINISTER OF NATIONAL REVENUE ..... 41

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