

1941

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CANADA  
LAW REPORTS

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Exchequer Court of Canada

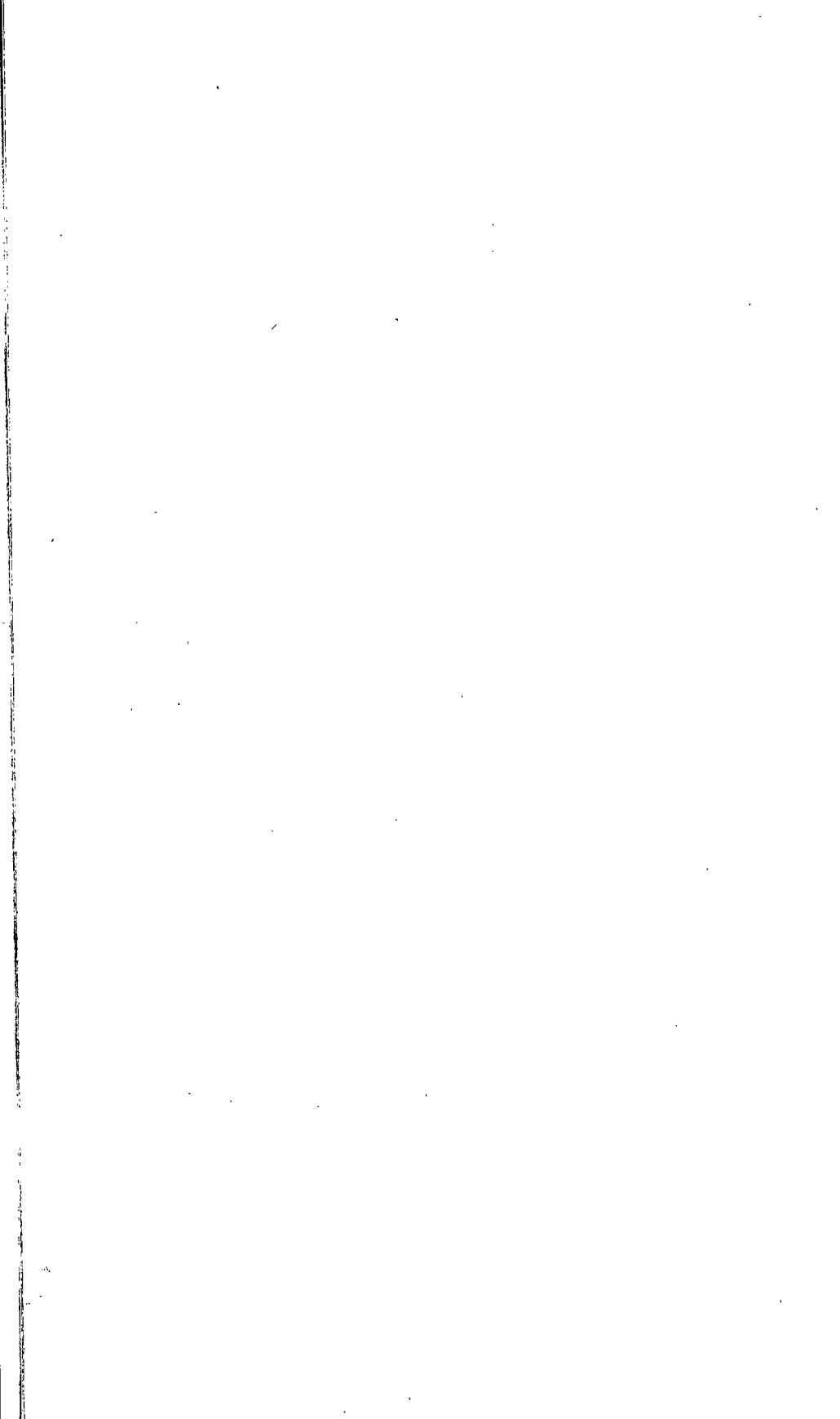
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RALPH M. SPANKIE, K.C.  
OFFICIAL LAW REPORTER

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OTTAWA  
EDMOND CLOUTIER  
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY  
1941



**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**

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.

The Honourable MALCOLM A. MACDONALD, British Columbia Admiralty District—  
appointed 18th May, 1940.

**DEPUTY DISTRICT JUDGES:**

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

do      J. B. M. Baxter—New Brunswick Admiralty District.

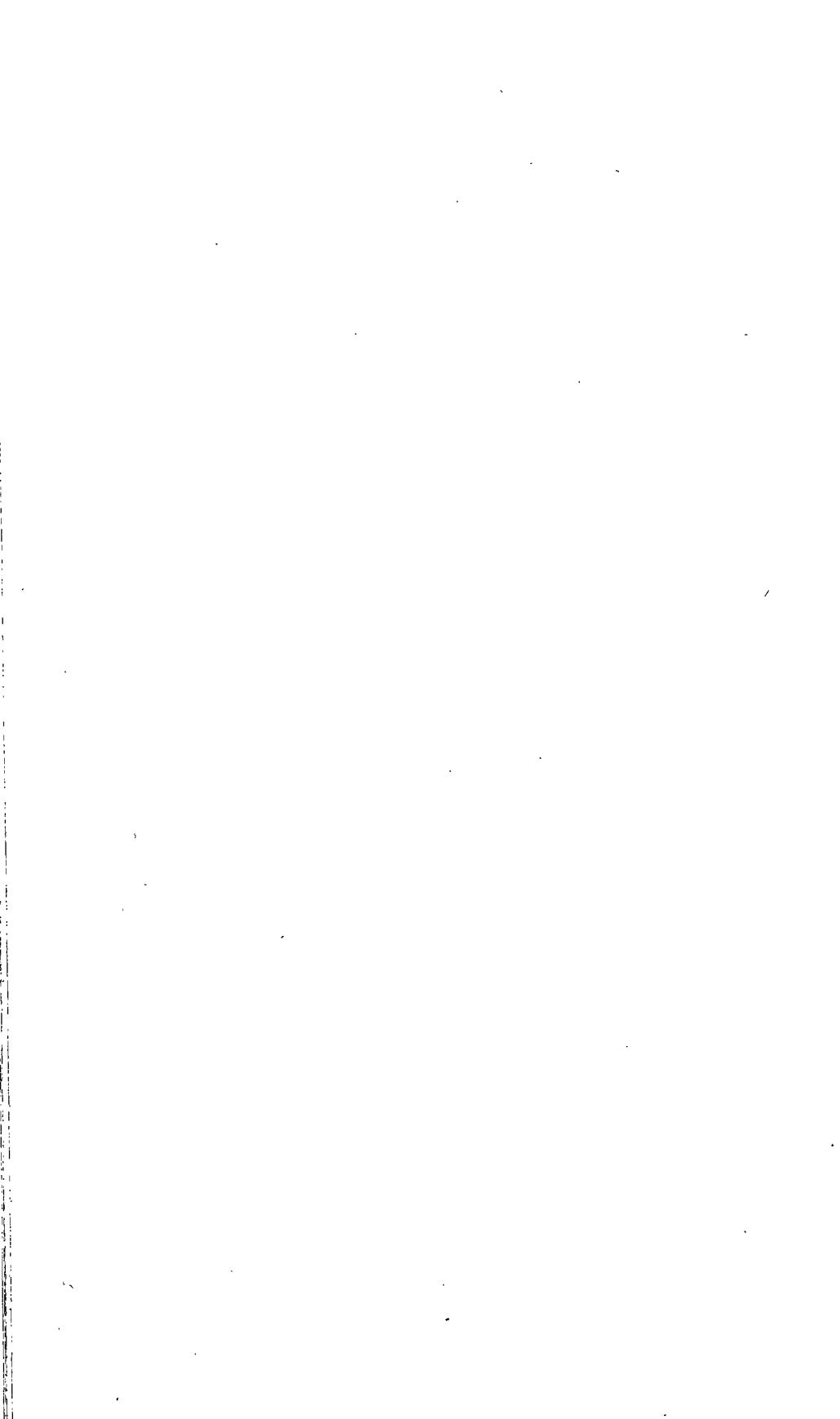
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**ATTORNEYS-GENERAL FOR THE DOMINION OF CANADA:**

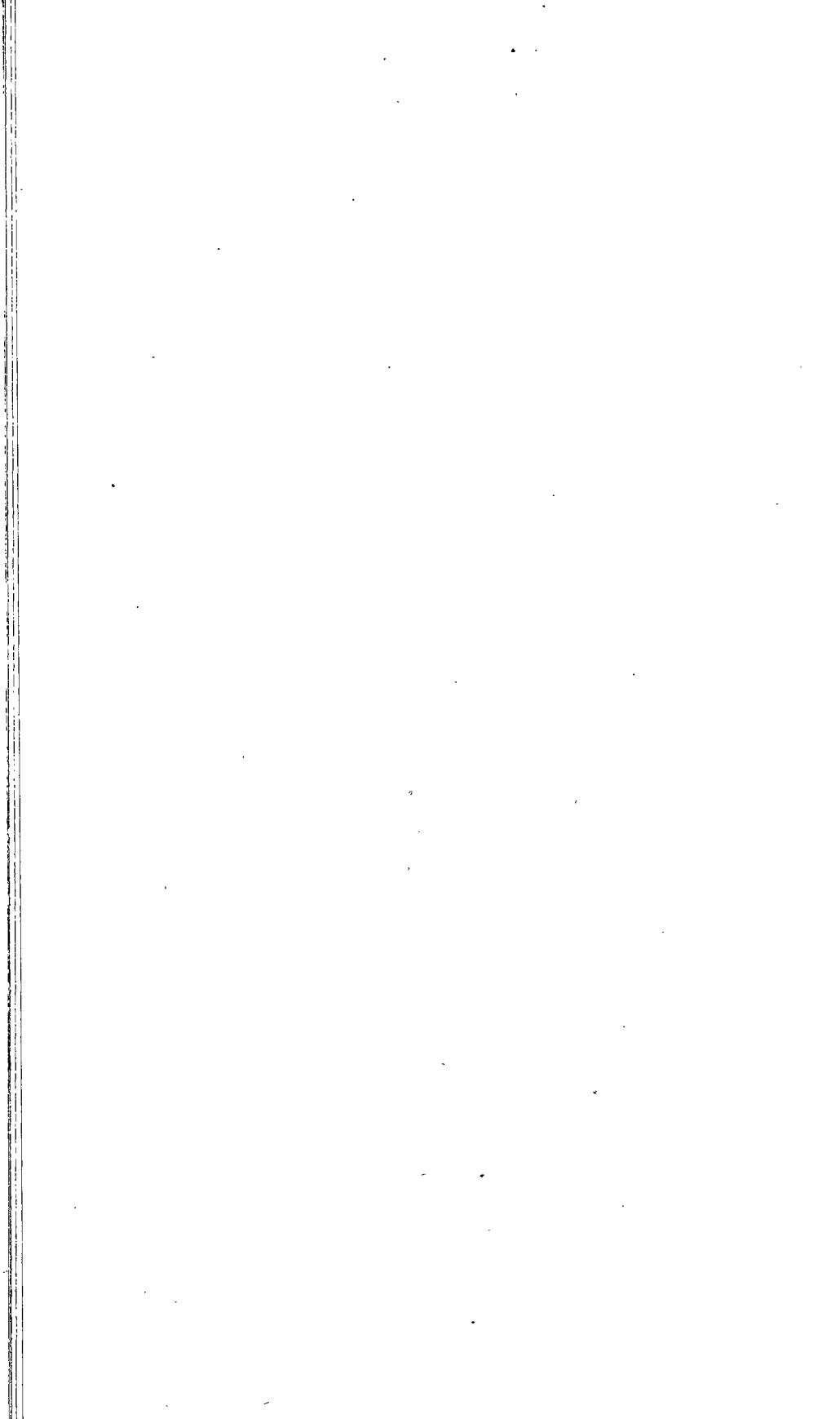
The Right Honourable ERNEST LAPOINTE, K.C.

and

The Honourable LOUIS ST. LAURENT, K.C.



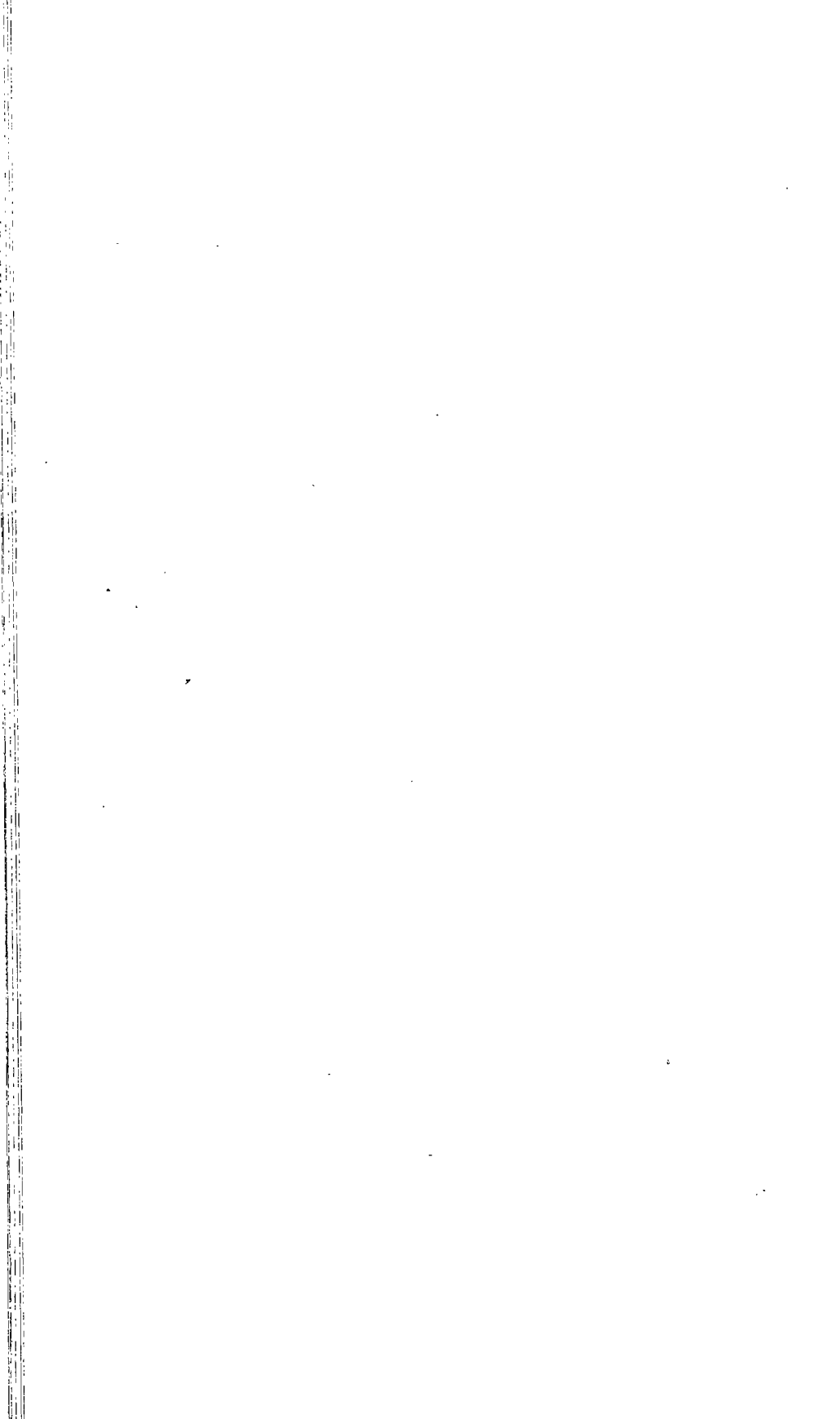
The Honourable Malcolm A. Macdonald, District Judge in Admiralty for the British Columbia Admiralty District, died during the current year.



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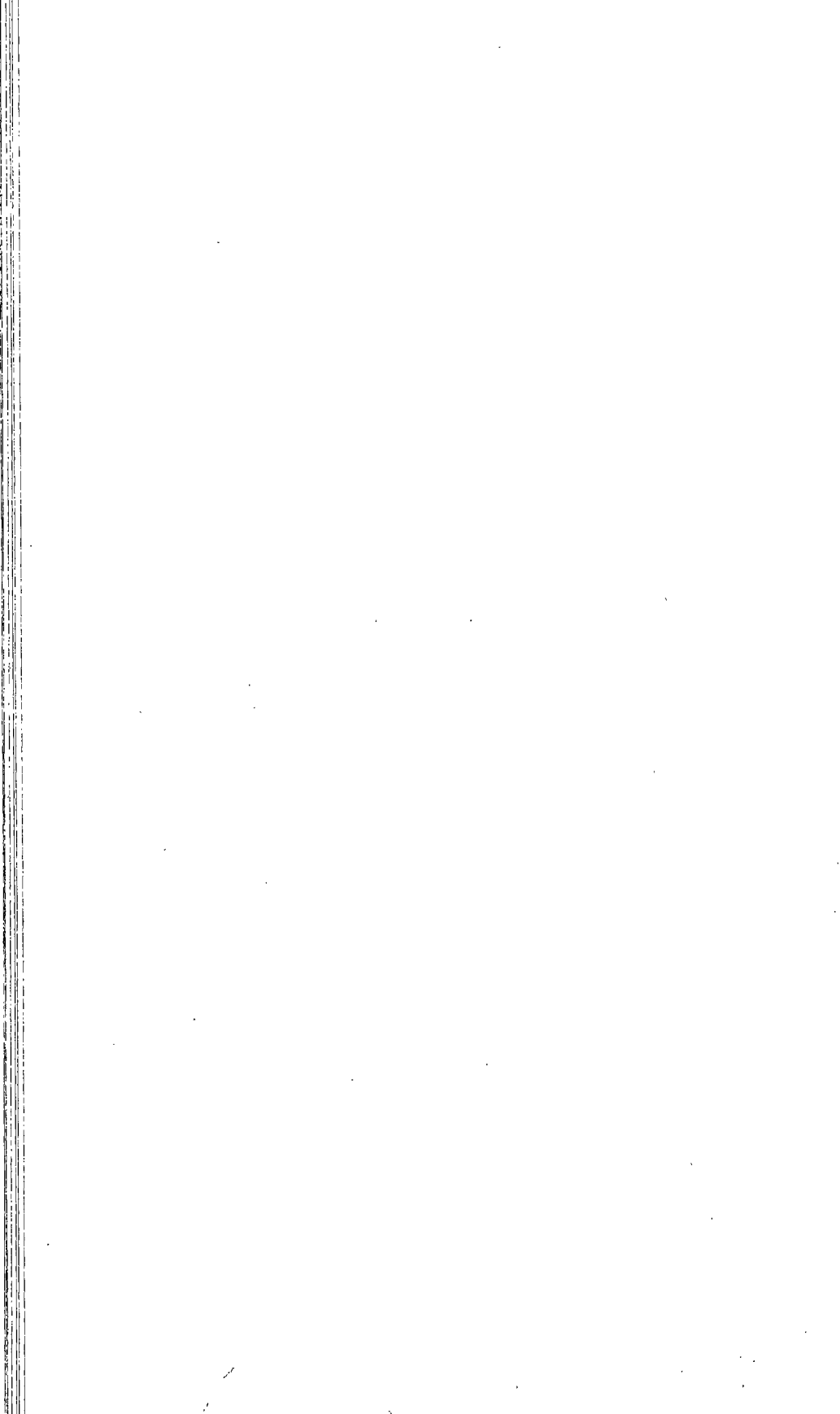
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A. To the Judicial Committee of the Privy Council:

1. *Lafayette et al. v. Maple Leaf Milling Co. et al.* (1939) Ex. C.R. 368. Appeal to the Supreme Court of Canada allowed. Appeal to the Privy Council pending.
2. *Lafayette et al. v. Port Colborne & St. Lawrence Navigation Co. Ltd.* (1939) Ex. C.R. 355. Appeal to the Supreme Court of Canada allowed. Appeal to the Privy Council pending.
3. *Underwriters' Survey Bureau Limited et al. v. Massie & Renwick Limited.* (1938) Ex. C.R. 103. Appeal to the Supreme Court of Canada dismissed. Leave to appeal to the Privy Council refused.

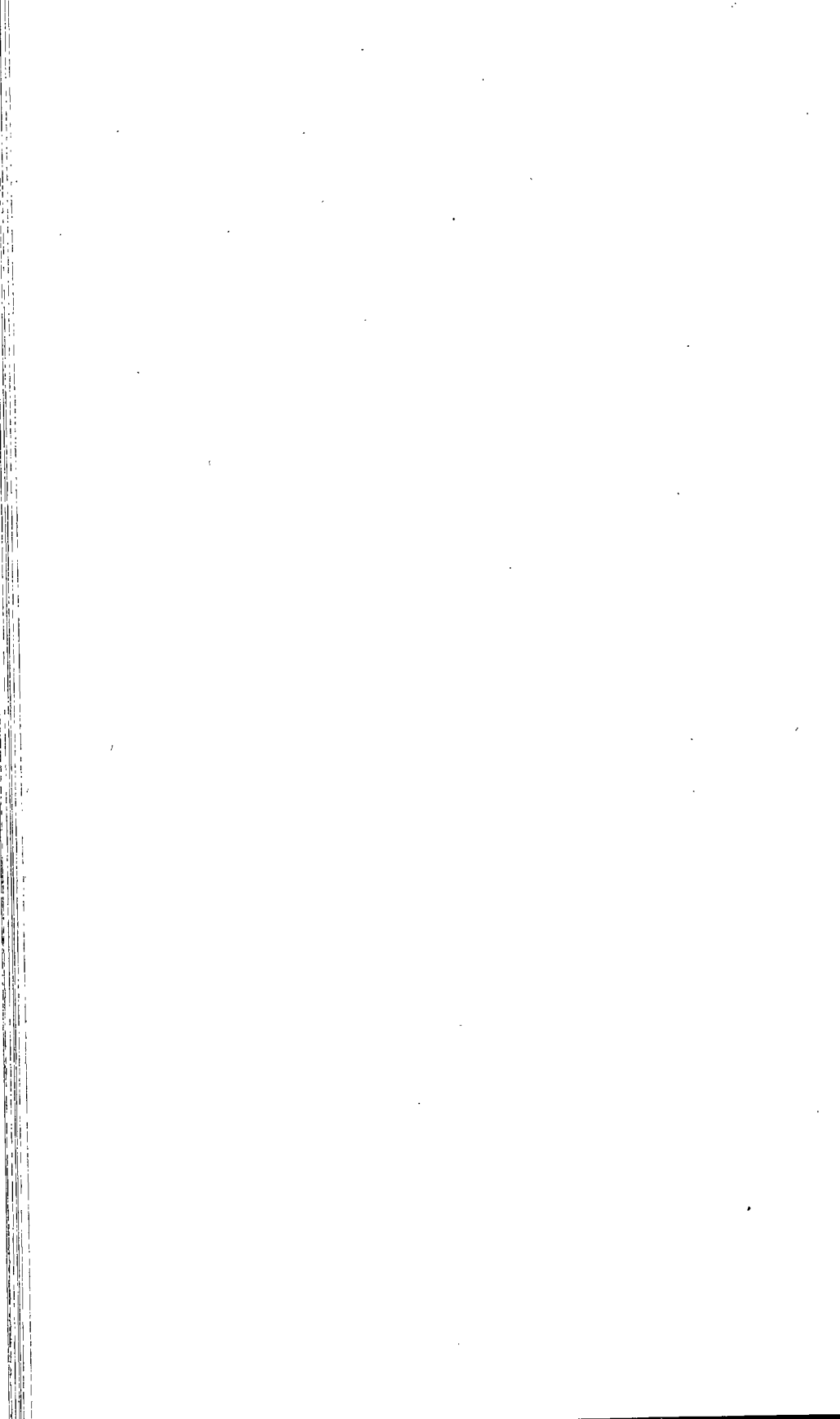
B. To the Supreme Court of Canada:

1. *Bradley, Robert A. v. The King.* (1941) Ex. C.R. 1. Appeal dismissed.
2. *Cosman, James, Trustees of Estate of v. Minister of National Revenue.* (1941) Ex. C.R. 33. Appeal dismissed.
3. *Dominion Textile Co. Ltd. v. Minister of National Revenue.* (1940) Ex. C.R. 130. Appeal abandoned.
4. *King, The v. Noxzema Chemical Co. of Canada Ltd.* (1941) Ex. C.R. 155. Appeal pending.
5. *Merritt, Emily L. v. Minister of National Revenue.* (1941) Ex. C.R. 175. Appeal pending.
6. *Montreal Coke & Mfg. Co. v. Minister of National Revenue.* (1941) Ex. C.R. Appeal dismissed.
7. *Montreal Light, Heat & Power Consolidated v. Minister of National Revenue.* (1941) Ex. C.R. 21. Appeal dismissed.
8. *New York News, The Ship v. Paterson Steamships Ltd.* (1941) Ex. C.R. 145. Appeal allowed.
9. *Short Milling Co. (Canada) Ltd. v. Continental Soya Co. Ltd. et al.* (1941) Ex. C.R. 69. Appeal pending.
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11. *Somerville Paper Boxes Ltd. et al. v. Cormier, Arthur et al.* (1941) Ex. C.R. 49. Appeal dismissed.
12. *Stackhouse, Russell T. v. The King.* (1940) Ex. C.R. 235. Appeal dismissed.
13. *Thermionics Ltd. et al. v. Philco Products Ltd. et al.* (1941) Ex. C.R. 209. Appeal pending.



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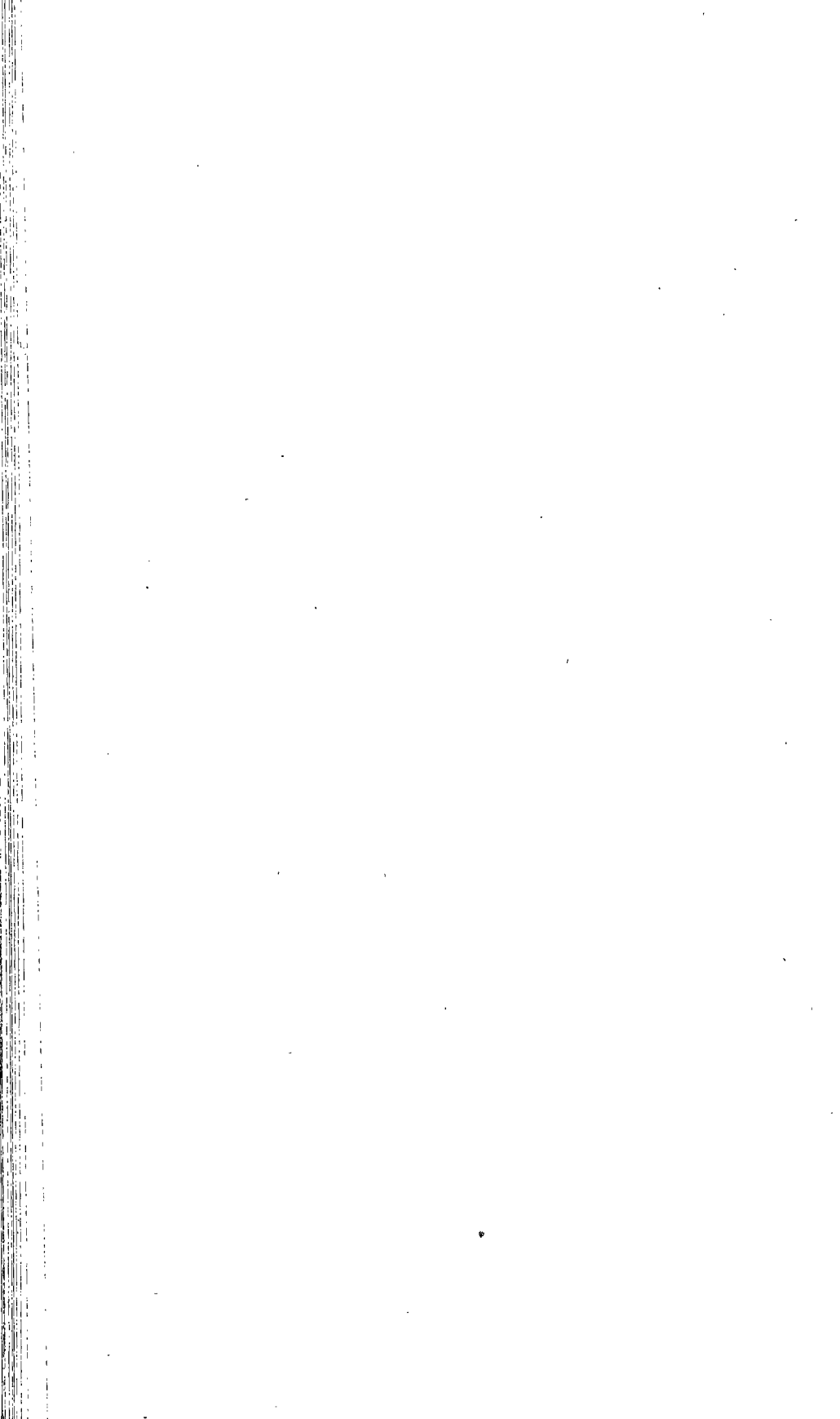


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**CASES**  
DETERMINED BY THE  
**EXCHEQUER COURT OF CANADA**  
AT FIRST INSTANCE

AND  
IN THE EXERCISE OF ITS APPELLATE  
JURISDICTION

BETWEEN:

ROBERT A. BRADLEY .....SUPPLIANT;

1940  
Feb. 1.

AND

HIS MAJESTY THE KING.....RESPONDENT.

Aug. 27.

*Patent—Petition of Right—Alleged user of invention by Government Department—Procedure—Action for declaration of validity of patent and for compensation for use of the patented invention by the Crown—Order setting down points of law to be disposed of before trial—Patent Act, 25-26 Geo. V, c. 32, s. 19—Exchequer Court Act, R.S.C., 1927, c. 34, s. 18—Jurisdiction of Court to make a declaratory order—Petition of Right Act, R.S.C., 1927, c. 142—Claim of patentee for user of patented invention by the Crown is not one in tort.*

An action was brought by B. against the Crown, claiming a declaration that a patent of 1936 granted to B. is valid and that the Crown has constructed and used his patented invention, and that the Commissioner of Patents be directed to ascertain and report under s. 19 of the Patent Act, 25-26 Geo. V, c. 32, what shall be a reasonable compensation to the suppliant by the Crown for the use of his invention, and that the Crown be condemned to pay to suppliant the amount of compensation so found by the Commissioner.

The respondent pleaded *inter alia* that the Petition of Right was bad in substance and in law and that any relief claimed therein was not relief for which under the law and practice a Petition of Right will lie or may be pleaded. The points of law raised were ordered to be set down for hearing and disposed of before the trial of the action. These questions were submitted to the Court:

1. Assuming the patent in suit to be valid and the invention covered thereby to have been used by the respondent, is the suppliant entitled in law to any of the remedies claimed against the respondent in respect of the use by the respondent of the patented invention, and
2. If so, does a Petition of Right lie to enforce such remedy or remedies?

For the purpose of a decision on the law points the Court assumed that the patent was valid and that the Crown had used the invention therein claimed, though such points were not conceded by the respondent in the statement of defence.

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*Held:* That the law points submitted for decision must be determined in the affirmative.

2. That a claim for compensation for the use of a patent is not a claim in tort because the Crown has the right to use the patent on the statutory terms set out in Section 19 of the Patent Act.
3. That where a statute authorizes the Crown to take away or use the property of a subject the Legislature cannot be considered as doing so without giving the subject a legal right to compensation unless such intention is expressed in unequivocal terms.
4. That there is no valid distinction between a sum due under a contract for the use of the property of a subject and a sum due for the lawful use of the property of a subject under a statutory authority.
5. That a Petition of Right lies when in consequence of anything legally done any resulting obligation emerges on behalf of the subject, and under the Petition of Right Act there is jurisdiction in this Court in respect of claims of the subject against the Crown to consider and determine what is right to be done, and to make a declaration as to the rights of the subject.

ARGUMENT on questions of law raised in the respondent's statement of defence ordered to be set down for hearing and disposed of before the trial of the action.

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

*Harold G. Fox, K.C.* and *M. B. Gordon* for suppliant.

*F. P. Varcoe, K.C.* and *W. R. Jackett* for respondent.

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

THE PRESIDENT, now (August 27, 1940) delivered the following judgment:

This proceeding, one of considerable importance, reaches the Court by way of Petition of Right, but the immediate matters for decision arise from an order to dispose of, in advance of the trial, certain law points emerging from the pleadings.

In October, 1936, there was granted the suppliant letters patent of invention relating to new and useful improvements in developments for the prevention of excessive wear in culverts. The suppliant alleges in his Petition that the Crown used his patented invention and that he thereupon requested the proper officer of the Crown, the Minister of Transport, to admit the use thereof and to pay any compensation therefor, but the Crown denied liability for such alleged use. Sec. 19 of the Patent Act

having provided that "the Government of Canada may, at any time, use any patented invention, paying to the patentee such sum as the Commissioner reports to be a reasonable compensation for the use thereof," the suppliant applied to the Commissioner of Patents under such provision of the Patent Act, to fix a reasonable compensation for the use of his said patented invention, but this application the Commissioner refused to entertain until use of the invention was first established either by admission of the Crown, or by judgment of the Court.

The suppliant then commenced this Petition of Right proceeding, claiming a declaration (1) that the Crown has constructed and used his patented invention, (2) that the said letters patent of invention are valid, (3) that the Commissioner be directed to ascertain and report, under s. 19 of the Patent Act, what shall be a reasonable compensation to the suppliant by the Crown for the use of his invention, and (4) that the Crown be condemned to pay to the suppliant the amount of compensation so found by the Commissioner.

The law points set down for hearing and disposition before the trial, are the following:—

1. Assuming the patent in suit to be valid and the invention covered thereby to have been used by the respondent, is the suppliant entitled in law to any of the remedies claimed against the respondent in respect of the use by the respondent of the patented invention, and

2. If so, does a Petition of Right lie to enforce such remedy or remedies?

For the purposes of a decision upon these points of law the allegations of fact in the suppliant's Petition must be taken as proved, and in a general way I have already stated them. However, I should perhaps recite paragraph 4 of the Petition because it alleges, in some detail, that the suppliant requested the Minister of Transport, the head of the Department of Government which the suppliant alleges used his patent, to admit the use of his patent, and also that the suppliant applied to the Commissioner of Patents to fix the compensation for the use of his patent, with the result therein appearing.

Paragraph 4 is as follows:—

4. The respondent has since the date on which the said Letters Patent were issued, constructed, and used in the Dominion of Canada, the said new and useful improvements in developments for the Prevention of Excessive Wear in Culverts, which embody the invention described in the above Letters Patent, without compensating the suppliant, therefor.

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 Maclean J.

4. (a) Your suppliant under date of March 23rd, 1938, Nov. 7th, 1938, December 5th, 1938, and December 21, 1938, requested the proper officer of the Crown, namely, the Honourable the Minister of Transport, to admit use of the said Letters Patent and to pay compensation therefor, but the Crown denied liability for use of the said Letters Patent under date of December 27th, 1938.

4. (b) Your suppliant applied to the Commissioner of Patents to fix compensation for the use of the said Letters Patent by the Crown in accordance with section 19 of the Patent Act, under date of October 11, 1938, and under date of October 14th, 1938, the Commissioner of Patents refused to fix compensation until use of the device was first established either by admission by the Crown or by judgment of the Court.

4. (c) Your suppliant again under date of June 12, 1939, requested the Commissioner of Patents to fix compensation for use of the said Letters Patent under section 19 of the Patent Act, but the Commissioner of Patents again refused to do so under date of June 15, 1939.

The statement of defence denies the validity and user of the patent, and there is no specific denial of the allegations of fact in paragraph 4 of the Petition. It will be seen therefore that the Crown by his denial of validity and user of the patent, and the Commissioner of Patents by his refusal to fix the compensation, prevented the suppliant from seeking any relief or remedy under s. 19 of the Patent Act, and apparently the only remedy available to him was to proceed by way of Petition of Right, at least it may be assumed that he was so advised.

Before approaching the principal question for decision here, whether a Petition of Right lies, I may first dispose of two or three other points raised by counsel in their arguments upon the law points. One contention put forward by Mr. Fox was that the suppliant's Petition was founded upon an implied contract, because s. 19 of the Patent Act authorizes the use of a patent by the Crown, and a use having been made by the Crown, there was therefore an implied contract to compensate the patentee. In any case of implied contract there must be an implied assent to a contract on both sides. Upon the facts appearing in this case I do not think this contention of Mr. Fox can be applied here, as there was no consensus on which to found an implied contract. The Crown, I think, must be assumed to have used the patent as a matter of right under the authority of s. 19 of the Patent Act. It may be contended that there was here a statutory contract, and in somewhat similar state of facts, in the case of *Rowland v. The Air Council* (1), Scrutton L.J., referring to s. 29 of the

English Patent Act of 1907, which corresponds with s. 19 of our own Patent Act, does refer to a "statutory contract," but he also uses the term "statutory liability" in the same connection. In the same case, Atkin L.J. refers to s. 29 of the English Patent Act as giving a "statutory right" of compensation to a patentee for the use of his invention by the Crown, and it seems to me that this more accurately describes the effect of s. 19 of the Canadian Patent Act. Then, Mr. Varcoe argued that the suppliant's Petition was essentially an action for infringement and therefore one sounding in tort, and being a wrong no claim founded on that wrong would lie against the Crown. The suppliant in this proceeding is, I think, saying that the Crown has used his invention lawfully and that he wants compensation for the use made of his invention, and which he claims he is entitled to under s. 19 of the Patent Act. That is not a claim in tort, because the Crown has a lawful right to use the patent on the condition set out in s. 19 of the Act. The suppliant's claim is, I think, one founded upon s. 19 of the Patent Act because the Crown had lawfully made use of his invention and because of that lawful use he claims the remedy or relief prayed for in his Petition. Further, for the purposes of a decision upon the law points mentioned, it is being assumed that the patent is valid and that the Crown has used the invention therein claimed. I do not think the question of infringement can be interjected into this matter because the validity and user of the patent is conceded for the purposes of the law points to be decided, and the Crown, it is conceded, had a legal right to use the invention. So therefore, I think, we may dismiss the idea that the suppliant's Petition cannot be heard because it is a claim in tort. Then, it was argued by Mr. Varcoe that the Court was without jurisdiction to make the declaratory order prayed for by the suppliant. As to the authority of the Court to make a declaratory order, to the effect here claimed, reference might be had to the following passages from the judgment of Lord Tomlin, in delivering the judgment of the Privy Council, in the case of *Dominion Building Corporation v. The King* (1):

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

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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 there is jurisdiction in respect of claims of the subject against 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.

Reference might also be had to *Dyson v. Attorney-General* (1), and *Qu'Appelle Long Lake & Saskatchewan Railroad & Steamboat Co. v. The King* (2). It would seem to me quite clear that in so far as the suppliant seeks relief in the premises by a declaratory order of the Court, such relief may be granted in exercise of the jurisdiction conferred upon the Court by the Petition of Right Act, and by s. 18 of the Exchequer Court Act. And further, it is to be remembered, the practice of the High Court of Justice in England has been made part of the practice of the Exchequer Court of Canada by the provision of Rule 2 of that Court.

I shall have occasion presently to refer in some detail to the case of *Rowland v. The Air Council* (*supra*) and to which I was referred by counsel. As this case in the end involved a consideration of section 29 of the English Patent Act of 1907, since amended, and which corresponded closely to s. 19 of our own Patent Act, it may be desirable to refer briefly to the terms of that provision of the English Patent Act of 1907, and also to the new section 29 as enacted in 1919. Before the Patent Act of 1907 the Crown might use the subject-matter of a patent right independently of the consent of a patentee, or of any liability on the part of the Crown to make compensation to the patentee for such use. The case of *Feather v. The Queen* (3), decided that the Crown had the prerogative right to make such an independent use of a patent. The Act of 1907 provided that "a patent shall have to all intents the like effect as against His Majesty the King as it had against a subject," and also that any Government Department might use the invention for the services of the Crown "on such terms as may, either

(1) (1911) 1 K.B. 410 at 417.

(2) (1901) 7 Ex. C.R. 105 at 115.

(3) (1865) 6 B. &amp; S. 257.

before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled by the Treasury after hearing all parties interested." That turned out to be a difficult procedure because the Treasury refused to determine a dispute as to the validity of a patent. Sometimes, this difficulty was overcome by an arrangement between the parties to determine the matter of validity as a preliminary point, and Terrell on Patents, 7th Ed., page 429, states that prior to the coming into force of the Act of 1919 it had been the practice where there was a substantial question as to either infringement or validity for the Treasury to refuse to settle the matter under the old section 29, but instead for the department concerned to nominate some person who would act as a defendant in an action brought by the patentee in the High Court for a declaration upon the questions of validity and infringement, and thereafter if the patentee had been successful, to award terms. The new procedure is, where agreement cannot be reached otherwise, by way of originating notice of motion, and the matter is decided before any one of the Judges of the Chancery Division to whom it is allotted. The Act of 1919 also provided that a patent was to have to all intents the like effect as against the Crown as it has against a subject, and then there is a proviso to the effect that a Government Department may use the patent without licence "on such terms as may, either before or after the use thereof, be agreed on, with the approval of the Treasury, between the department and the patentee, or, in default of agreement, as may be settled in the manner hereinafter provided." The "manner hereinafter provided" was that in the case of any question as to the making, use or exercise of an invention the matter should be referred to the Court for decision, who should have power to refer the whole matter to a special or official referee, or an arbitrator, and further provided that "the Court, referee, or arbitrator, as the case may be, may, with the consent of the parties, take into consideration the validity of the patent for the purposes only of the reference." The Act of 1919 provided no procedure by which that question should be referred to the Court, and no procedure was in fact laid down until Rules of Court under the Patents Act were made in the year 1925, when,

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as I have already stated, it was provided that the reference should be by means of originating notice of motion addressed to the Department and, on such a notice of motion, apparently the Court may make such orders as are appropriate for determining the dispute. The action in *Rowland v. The Air Council (supra)*, was commenced in 1921, before there was any Rule of Court at all, and it was commenced in the ordinary way by a writ addressed to the Air Council claiming a declaration of validity and compensation.

The case of *Rowland v. The Air Council* (1), was an action commenced by a writ issued on behalf of the plaintiff Rowland, the Trustee in Bankruptcy of one, Kennedy, who was the owner of a patent which related to improvements in the construction of the body of an aeroplane. The Air Council, the defendant, was a body established for the administration of matters relating to the Air Force and to the defence of the Realm by air. The plaintiff alleged breach of a contract having reference to Kennedy's patented invention, and claimed, *inter alia*, a declaration of the validity of the said patent, and that certain user and exercise of the invention, which need not be specified, constituted infringement of the patent. The defendants alleged, *inter alia*, that they were a Public Department of His Majesty's Government and were servants and agents of His Majesty and were not liable to be sued in respect of any contract made on behalf of His Majesty, and in so far as the plaintiff's action was founded upon any alleged infringement of the patent the defendants relied on s. 29 of the Patent Act of 1907, as a defence to the action, and claimed they were entitled lawfully to use and exercise the invention, if any, and that in default of agreement between the parties the sum to be paid for the use of the invention, if any, by the defendants, should be settled by the Treasury, under the said section and not otherwise. After the pleadings were closed it was ordered that the points of law raised by the defence in the action be disposed of before the trial of the action. The law points were argued before Russell J., and he decided the law points in favour of the defendants, and dismissed the whole action, holding, *inter alia*, that any claim for relief for breach of contract, or for the alleged infringements, was not sustainable,



and further, that it was not open to the plaintiff to proceed by action against the Government Department, the Air Council, for a declaratory judgment that the patent was a valid one, the defendants refusing to consent to the validity of the patent. In a footnote appearing on page 1 of the report of this case it appears that, on appeal by the plaintiff, the Court of Appeal, without deciding whether the conclusions to which Russell J. came were right or not, reversed and discharged the Order of Russell J., dismissing the action, the action to come on for trial on the question of liability, and liberty was given to amend the pleadings. The action then came on for trial before Lawrence J., who held (1) that the plaintiffs failed not only on their claim for damages and a declaration of validity, but also on the preliminary point of law put forward by the defendants that in the circumstances they were not liable to be sued at all, following the judgment of Russell J. on that point. Accordingly, the action was dismissed, and an appeal followed therefrom.

The Court of Appeal, in 1927, dismissed the appeal (2), holding that no action for a declaration of the validity of a patent, or for compensation for user of the invention by the Crown, against the Government Department concerned, was open to the patentee under the new section 29 of the Patents Acts 1907 and 1919 (and that would apply as well to the old section 29), and they expressed the view that if the Crown would not consent to its being dealt with under the provisions of the Patents Acts, the remedy was by Petition of Right, or by originating notice of motion, addressed to the Department. The Court of Appeal, I might add, also held that a claim for a declaration of the validity of the patent was not a claim in tort because the Crown had a right to use the patent on the statutory terms set out in the Patents Acts. This decision is important here because of the views expressed by the members of the Court of Appeal, as to a remedy by Petition of Right being available to a patentee, such as Kennedy, or the suppliant in the case under discussion, who claims a declaration as to the validity of his invention, when the Crown refuses to consent to its validity. I may

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(1) *Rowland et al. v. The Air Council* (1925) 42 R.P.C. 433.

(2) (1927) 44 R.P.C. 453.

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therefore refer to certain passages to be found in the judgments of the members of the Court of Appeal. Bankes L.J. said in dismissing the appeal (p. 458):

For these reasons, I think that the Plaintiff's remedy, if any, in respect of this matter, is either by Petition of Right, when he can proceed against the Crown, or, if he chooses to proceed by the method now laid down in the Rules, it would be open to him to take that particular course,

and what that course is I have earlier explained. Atkin L.J. said (p. 461):

The result of this Section (s. 29 of the Patents Act) is to give a statutory right of compensation to the patentee for the use of his invention by a Government department for the service of the Crown. That seems to me to be precisely similar to the *DeKeyser* case and to give rise to a claim for compensation for use of the plaintiff's property and would be the proper subject of Petition of Right to the Crown.

Scrutton L.J. said (p. 459):

This patent claim is not a claim in tort, because the Crown has a right to use the Patent on the statutory terms set out in section 29 of the Patents Act. If, therefore, you are wanting to get a decision as to the Patent, you are dealing with a statutory right, a right not for damages for tort, but a claim for an amount depending upon a statutory contract. First of all, it seems to me, therefore, as Sargant L.J., then Sargant J., seems to have thought, sitting as the President of the Commission which has dealt with claims by inventors, that, if you want to get a decision as to the validity of the patent and the Crown will not consent to its being dealt with under the proceedings under section 29, you must try and do it by Petition of Right. I am not saying you can do it; but that is the way you may try and do it, if you want to do it. That was Sargant J.'s view and at present it is mine; . . .

It will be seen therefore that the Court of Appeal expressed rather strongly the view that a remedy by way of Petition of Right was open to a patentee in England, in the case where the Crown refuses to concede the validity and user of the patentee's invention, and that the Patents Acts gave a statutory right of compensation to a patentee for the use of his invention by a Department of Government for the service of the Crown. For the purposes of a decision in the matter of the law points under discussion here we start with the assumption that the patent of the suppliant is valid and that it has been used by the Crown, but that of course is not conceded in the statement of defence of the Crown, in the Petition of Right proceeding.

I come next to a reference to the decision of the House of Lords in the case of *Attorney-General v. DeKeyser's Royal*

*Hotel Limited* (1), a case of great and general importance, and which, it will be remembered, was referred to by Atkin L.J., in *Rowland v. The Air Council*. I shall not attempt to state at any length the particular facts appearing in that case, or the terms of the statutes or statutory regulations involved, because they are of considerable length and are to be found fully set forth in the report of the case. I might say however, that in 1916, the Crown, purporting to act under what was known as the Defence of the Realm Regulations, made under the Defence of the Realm Consolidation Act, 1914, took possession of an hotel, belonging to the DeKeyser Hotel Co. Ltd., for housing the headquarters personnel of the Royal Flying Corps. The representatives of the Crown insisted throughout that possession of the premises was taken under the Royal Prerogative, and that therefore the suppliants were not entitled as of right to any payment by way of compensation, but that their sole remedy was to apply to a certain Commission, named the Defence of the Realm Losses Commission, for an *ex gratia* allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. The Receiver in possession of the premises belonging to the DeKeyser Hotel Co. was furnished with forms of claims for submission to the Losses Commission, and he was at the same time advised that compensation "is made *ex gratia*, and is strictly limited to the actual money loss sustained." As no settlement as to compensation was arrived at, and the Receiver declined to go before the Losses Commission, there was presented a Petition of Right by the DeKeyser Company. The relief asked for was a declaration that the suppliants were entitled to an annual rent during the use and occupation of the premises, or, in the alternative, that they were entitled to compensation under the Defence Act, 1842, which Act provided that the amount of compensation to be paid by the Crown was to be settled by a jury. It was held by the Court of Appeal, and by the House of Lords, that the entry of the Crown upon the premises was under the Defence Act, 1842. As was stated by Lord Dunedin, the question in the case narrowed down to one point only: "The Crown having legally taken, is it bound to pay compensation *ex lege*, or is the offer to

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pay compensation *ex gratia*, as that compensation may be fixed by the Losses Commission, a sufficient offer and an answer to all demands?" The House of Lords affirmed the decision of the Court of Appeal, and the declaration there made was in the following language: "And this Court doth declare that the suppliants are entitled to a fair rent for use and occupation of DeKeyser's Royal Hotel on The Thames Embankment in the City of London by way of compensation under the Defence Act, 1842."

It is not possible to state in brief terms all that is comprehended in the decision of the House of Lords in this case. The extent and limitation of the Royal Prerogative and of the power of the executive officers of the Crown to take possession of land compulsorily during an emergency arising out of a state of war were exhaustively discussed, and the earlier records, statutes and decisions, with regard to acts of interference by the Crown with private property for the purpose of the defence of the realm, were considered and reviewed, as they were by the Court of Appeal, but into all that I need not enter, interesting though it be. For all necessary purposes here, I think, I may safely say that the Law Lords were of the opinion that the Crown had no power to take possession of the suppliants' premises in right of its prerogative simpliciter, and that the suppliants were legally entitled to compensation in the manner provided by the Act of 1842; that when an Act of Parliament deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being abridged; that when the Crown acts under the authority of a statute, it, like any other person, must take the powers that it thus uses *cum onere*, and it cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers; and that when powers covered by the statute are exercised by the Crown it must be presumed that they were so exercised under the statute, and even if the commandeering of the DeKeyser Hotel had not been expressly done under statutory powers it was to be presumed that the Crown acted under those statutory powers, and therefore subject to the equitable provision for, or statutory right to, compensation. In respect of the remedy

available to the suppliants in that case, and of the question whether a Petition of Right would lie, I think I cannot do better than to quote one passage from the speech of Lord Dunedin, and another from that of Lord Atkinson. The former said: "The other point is as to the remedy. I am of opinion that a Petition of Right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal." Lord Atkinson in his speech said: "The only remaining point is whether a Petition of Right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *Reg. v. Doutré* (1), and *Windsor, &c. Ry. Co. v. Reg.* (2), there is no valid distinction between a sum due under a contract or grant made by or on behalf of the Crown as mentioned by Erle C.J. in *Tobin v. Reg.* (3), and such a liability, due for the lawful and authorized use and enjoyment by the officer of the Sovereign, on the Sovereign's behalf, of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no wrong." The Attorney-General apparently raised no objection to the procedure by Petition of Right if the suppliants could establish a claim to compensation, or to the form of the declaration made by the Court of Appeal.

I have now to consider whether a Petition of Right will lie in respect of the liability herein alleged against the Crown by the suppliant for the use of his patented invention. This involves a consideration of s. 19 of the Patent Act. That this provision of the Act is inadequate, in regard to the procedure for the ascertainment of compensation, would seem obvious. The corresponding clause in the English Patent Act of 1907 must have been regarded in the same light or it would not have been subjected to the comment directed against it in the case of *Rowland v. The Air Council* (*supra*), by Scrutton and Atkin L.JJ.

(1) (1884) 9 A.C. 745.

(2) (1886) 11 A.C. 607.

(3) (1864) 16 C.B.(N.S.) 310.

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It would seem to me that while s. 19 of the Patent Act plainly permits the Crown to use a patented invention, and creates a statutory liability for such use, it fails to provide suitable machinery for determining what is the reasonable compensation to be paid a patentee, in all cases. The section seems to contemplate only the case where the validity and user of a patent is admitted by the Crown, and no provision is made for the case where both validity and user are put into question by the Crown, which is the case here. As was said by Atkin L.J. in *Rowland and Kennedy v. The Air Council (supra)*, it is difficult to ascertain how the Court, or the Commissioner, "can determine what is the use of a patented invention when there still remains the doubt whether it is the true subject-matter of a patent or not. I should have thought that was the essence of the question of the amount of the remuneration." In the same connection, Sargant J. in *the Matter of Carbonit Aktiengesellschaft* (1) said:

By Section 29 of the Patents and Designs Act, 1907, provision was made for the ascertainment by the Treasury, as therein mentioned, of the terms on which any Government Department or their contractors might use an invention protected by a patent. But the Section was only appropriate to cases where both the validity of the patent and the fact of the user of the patented invention were admitted; and in cases where either validity or user or both were disputed no machinery was provided for determining the dispute.

He then makes reference to this omission being supplied by s. 8 of the Patent Act of 1919, which repealed s. 29 of the Act of 1907, and substituted for it a new section which does contain machinery, for dealing with any such dispute. I think it is quite clear that s. 19 of our Patent Act, in the state of facts here, does not provide machinery for determining the amount of compensation which should be paid the suppliant here, the Crown not consenting, and I cannot but think that it was impossible for the Commissioner to have done otherwise than he did, in the circumstances, until there had been some determination of the dispute as to the validity and user of the patent, and until those points were determined, or agreed to, no purpose would be served by attempting to compel the Commissioner to determine the compensation, assuming some machinery existed requiring him so to do. The Commissioner is not, I think, given jurisdiction to determine such

(1) (1923) 40 R.P.C. 360 at 366.

questions as the validity or user of a patented invention. But does the omission mentioned leave the suppliant without a remedy, and can it be said that a Petition of Right does not lie in the state of facts disclosed here? It is difficult to conceive of such being the case. I do not think that the absence of such procedure connotes that the subject is left without any right of compensation, and I can find no authority which would support that proposition. If that were so it would mean that an intention to take away property, or property rights, without compensation was intended by the Legislature, and it has been held that such an intention is not to be imputed to the Legislature unless it is expressed in unequivocal terms: *Newcastle Breweries v. Rex* (1); *Central Control Board v. Cannon Brewery Co.* (2), and *Attorney-General v. DeKeyser's Royal Hotel Limited* (*supra*). In the second of the cases just mentioned Lord Atkinson stated that it was recognized as a canon of construction that a statute will not be read as authorizing the taking of a subject's goods without payment unless an intention to do so is clearly expressed. He said:

That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature, unless that intention is expressed in unequivocal terms. I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given *ex gratia*, it cannot be so confined. I do not think the Attorney-General really contested this, nor, as I understood him, did he contest the principle that where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice.

If a statute creates an obligation or liability on the part of the Crown to pay to the subject compensation for the exercise of a statutory right, without providing a special tribunal for assessing the amount of compensation, it would seem clear that a Petition of Right will lie for the recovery of that compensation. If, on the other hand, a special tribunal, designated by the statute for that purpose, becomes non-existent, it would also seem clear that a Petition of Right will lie to have the amount of com-

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(1) (1920) 36 T.L.R. 276.

(2) (1919) A.C. 744 at 752.

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compensation assessed by a court of competent jurisdiction; as between subject and subject, in such a case, the one who had been damaged by the exercise of a statutory right would, I think, be entitled to have the amount of compensation for such damage assessed in an action. Now, I think, it would be equally true that if a tribunal named by the statute to assess the compensation for the legal use of a patent by the Crown, declines to hear a claim for compensation based upon that legal use of the patent, the Crown would not be relieved of its obligation or liability, and the claimant would have recourse, by way of Petition of Right, in the courts, for a declaration as to his rights in respect of compensation. Therefore, I cannot quite conceive of any sound reason why the suppliant here is not entitled to assert his alleged legal rights against the Crown in respect of compensation, by way of Petition of Right, where the Commissioner has refused to assess such compensation, and where apparently the statute has omitted to provide a tribunal for the assessment of compensation, in the particular facts here appearing. In such a case, I think, a Petition of Right will lie against the Crown to consider and determine what is right to be done. In this connection I might refer to a decision of the Court of Appeal in the case of *Robinson & Co. v. The King* (1). There the Food Controller requisitioned a quantity of bran and pollards, used as food for cattle, and manufactured by the suppliants. The goods in question were requisitioned under the Defence of the Realm Regulations but there was some doubt as to whether they were requisitioned under Regulation 2B, or Regulation 2F. If the goods were requisitioned under Regulation 2B, the price to be paid was to be determined by a tribunal, known as the Defence of the Realm Losses Commission, by which claims for compensation under the Defence of the Realm Regulations were determined, but the compensation was not to exceed a certain maximum price fixed by an Order in Council, and the maximum price had, in fact, been fixed by the Order in Council and had been paid to the suppliants. If the goods were requisitioned under Regulation 2F, then compensation for the goods was to be determined by an arbitrator, and the arbitrator in determining the amount of compensation was to have regard to the cost of

(1) (1921) 3 K.B. 183.



production of the article in question and to the allowance of a reasonable profit, without necessarily taking into consideration the market price of the article at the time. The Losses Commission refused to entertain a claim for compensation, on the ground they were "unable to entertain an application in respect of matters as regards which the applicant possesses, or claims to possess, any rights enforceable in a Court of law." The Minister and the suppliants were unable to agree as to the price which the suppliants were entitled to be paid, or as to the tribunal by which that price should be ascertained. The suppliants then presented a Petition of Right in which they prayed for a decision on those points. In the answer to the petition the Attorney-General set up that the requisitioning of the goods was made under Regulation 2B, and admitted the suppliants' legal right to be paid a price to be determined in accordance with that regulation by the Losses Commission, and that the Food Controller had always been ready to pay and had paid to the suppliants for their goods the maximum prices to which they could have been entitled under the said regulation. The trial judge held that the goods were requisitioned under Regulation 2B, and that the suppliants could recover no more than the maximum price fixed by the Order in Council. On appeal, it was held that the goods were taken under Regulation 2B, and that the suppliants were entitled to an order that the suppliants were entitled to be paid for the goods referred to in the Petition of Right, at prices to be determined in accordance with Regulation 2B, and to an account of what was due them on that basis. If I should quote a passage from the opinion of Bankes L.J. in this case, it will reveal the grounds upon which the Court of Appeal proceeded more clearly than I can state them. That passage is as follows (p. 197):

A serious question was raised in this Court in reference to the tribunal mentioned in reg. 2B, which does not appear to have been brought to the attention of the learned judge. The regulation provides that the price to be paid for goods acquired under the regulation shall, in default of agreement, be determined by the tribunal by which "claims for compensation under these regulations are . . . determined." It was not disputed by counsel for the Crown that "are determined" means are in fact determined. It was contended for the suppliants that the only tribunal in existence to which the regulation could apply was the Commissioners appointed by the Royal Warrant of March 31, 1915, and that this body had from the first refused to entertain any claims in which any statutory or contractual right to payment or compensation existed

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or was alleged, and had in fact refused to entertain the suppliants' claim. This was not disputed by counsel for the Crown, but it was said that the Commissioners are the tribunal indicated by the regulation, because they do deal with numbers of claims arising under the regulation, and that if they refused to entertain claims which come within the terms of the reference to them they could by proper means have been compelled to entertain them. I cannot accept this argument. I do not give any decision upon the question whether any machinery exists by which the Commissioners could have been compelled to deal with cases like the present. It is sufficient for me that they never have done so, and refused to do so in the present case. That fact brings this case, in my opinion, within the rule referred to by Lord Atkinson in the *Cannon Brewery* case (1) and his comment on it: "That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. I used the words "legal right to compensation" advisedly, as I think these authorities establish that, in the absence of unequivocal language confining the compensation payable to the subject to a sum given *ex gratia*, it cannot be so confined. I do not think that the Attorney-General really contested this, nor, as I understood him, did he contest the principle that where the statute authorizing the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of the compensation the subject is to receive, or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice." For all practical purposes the Commissioners were a non-existent tribunal so far as the claims of the suppliants are concerned. I come therefore to the conclusion that the suppliants have a legal claim to compensation, the amount of which claim must be ascertained in accordance with the directions laid down in reg. 2B for determining prices, and that inasmuch as the tribunal referred to in the regulation did not determine claims such as theirs the suppliants are not debarred from seeking to have the amount of their claim ascertained in the High Court, and that having established their legal right to be paid, and no agreement having been come to as to the amount to which they are entitled, they have established their right to an account at their own risk as to costs.

It would seem to me that the particular facts appearing in this case resemble closely those of the case before me, and that the decision of the Court of Appeal supports the contention that a Petition of Right will lie in the matter under discussion.

Now, by way of recapitulation. Sec. 19 of the Patent Act gives the Crown a right to use a patented invention and it creates a statutory liability to pay compensation to the patentee for such use. The user contemplated would appear to be in the nature of a special statutory licensing, running during the life of the patent. The suppliant could not therefore contest the right of the Crown to use his patent. From the authorities which I have mentioned and

(1) (1919) A.C. 744, 752.

discussed, I think I may say that the suppliant's claim is not one in tort, and that the user of the patent must be assumed to have been made under the statutory authority and not under the Royal Prerogative, as was suggested by Mr. Varcoe; that if a statute authorizes the Crown to take away or use the property of a subject no intention of doing so without giving to him a legal right to compensation for the loss of it is to be imputed to the Legislature unless that intention is expressed in unequivocal terms; that there is no valid distinction between a sum due under a contract for the use of the property of a subject and a sum due for the lawful use of the property of a subject under a statutory authority; that a Petition of Right lies when in consequence of anything legally done any resulting obligation emerges on behalf of the subject; and that under the Petition of Right Act there is jurisdiction in this Court in respect of claims of the subject against the Crown to consider and determine what is right to be done, and to make a declaration as to the rights of the subject. What is sought by the suppliant's Petition is a declaration as to his rights, and a determination of what is right to be done in the facts of his case. Substantially, the suppliant asks that it be declared that his patent is valid and has been used by the Crown, if he succeeds in establishing the facts alleged in his Petition. It is no answer, I think, to say that as the statute designates the Commissioner of Patents to determine the compensation payable to a patentee in the event of user of his patent by the Crown, that recourse can only be had to the Commissioner, if, in point of fact, the Commissioner has refused the patentee's application to determine the compensation. As was said by Bankes L.J. in the case of *Robinson & Co. v. The King (supra)*, it is sufficient that the Commissioner has not fixed the compensation, and has refused to do so; and the Crown here refused its consent to this being done. As I have already stated, s. 19 of the Patent Act seems to make provision only for the case where the user of a patent is not in controversy, but no provision is made for the case where both validity and user are put into question. I think the statute in question is to be construed as having made no provision for the assessment of compensation by the Commissioner, in the latter event, but the liability continues, and this Court is open to the suppliant by the appropriate

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procedure, that is, by Petition of Right. I have come to the conclusion that the suppliant has a legal claim to compensation if he succeeds in establishing the facts alleged in his Petition, but as validity and user of the patent by the Crown is to be assumed for our purposes here, the law points submitted for decision must be determined in the affirmative.

There is one other matter to which I have omitted to make reference. I was referred to the judgment of Burbridge J. in *McDonald v. The King* (1). This was a demurrer to a Petition of Right seeking compensation against the Crown for the alleged use of a patented invention; and it was held that a report by the Commissioner was a condition precedent to any right of action for such compensation. I wish to point out this distinction between that case and the matter I have to decide here, namely, that in the latter instance validity and user of the patent in question is assumed, and that an application to the Commissioner to assess the compensation claimed was refused, whereas in the case mentioned it is not clear that user by the Crown of the patent there in question was even alleged, but in any event no application was ever made to the Commissioner to assess the compensation claimed. The suppliant in his Petition alleged that the Government of Canada "adopted" his invention for use in Dominion elections, the invention claimed being a form of election ballot, and the "adoption" alleged appears to have consisted of the invention having been incorporated in section 48 of the Dominion Election Act, 63-64 Victoria, Chap. 12; and it is there also alleged that His Majesty, represented therein by the Minister of Justice, suggested for adoption by the Parliament of Canada a Bill providing for the use of the suppliant's invention, and that the Bill so submitted was adopted by the Parliament of Canada. But, assuming there was actual user of that suppliant's alleged invention, there is nothing in the record of the case, which I have examined, to indicate that any application was ever made to the Commissioner to assess the compensation for such user, or that the Crown ever refused its consent to such a procedure. The Petition did not seek a declaration of the suppliant's rights in the matter, and merely claimed that the suppliant be paid the sum of

(1) (1906) 10 Ex. C.R. 338.

\$10,000, less the sum of \$333.33 which the suppliant had been paid by the Crown, which payment the Crown pleaded was one in the nature of a gratuity. These facts distinguish that case from the matter before me, and that is all I think I need say concerning it.

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The matter of costs is reserved until the settlement of the minutes of judgment.

*Judgment accordingly.*

BETWEEN :

MONTREAL LIGHT, HEAT & }  
POWER CONSOLIDATED..... } APPELLANT;

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Jan. 11.  
—

AND

THE MINISTER OF NATIONAL }  
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*Revenue—Income—Deductions—Outlay on account of capital—Expenses incurred in refunding outstanding bond issue and replacing same by a new bond issue carrying lower rate of interest—Income War Tax Act, R.S.C., 1927, c. 97, Sects. 3, 5 and 6 (a) and (b)—“Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income”—Appeal from decision of Minister of National Revenue dismissed.*

Appellant, in 1936, redeemed a portion of an outstanding bond issue and replaced the same by a new issue of bonds bearing a lower interest charge. Appellant incurred certain expenses in connection with this operation, namely (1) Premium paid upon retirement of the issue of old bonds; (2) Exchange premium paid in connection therewith; (3) Discount on the issue of new bonds; (4) Expenses in connection with the retirement of the issue of old bonds; (5) Interest paid by appellant on funds necessary for the redemption of old bonds from the date of notice of redemption to actual date of redemption. Appellant proposed to amortize these disbursements over the term of the new bonds and claimed a deduction for income tax purposes of the amount required each year for such amortization. This deduction was disallowed by the Commissioner of Income Tax whose decision was affirmed by the Minister of National Revenue and an appeal was taken to this Court.

*Held:* That the disbursements or expenses incurred by appellant were not “wholly, exclusively and necessarily laid out or expended for the purpose of earning the income” of appellant.

- 2. That s. 5 of the Income War Tax Act is not exhaustive of all permissible exemptions and deductions for income tax purposes.
- 3. That all the expenses incurred by appellant are of a capital nature and constitute an outlay made on account of capital, they not having been incurred for earning the trading net revenue of appellant.

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4. That expenses incurred in redeeming, refunding or reducing borrowed capital constitute an outlay or payment on account of capital and fall within the prohibition of s. 6 (b) of the Act in computing the amount of profits or gains to be assessed.

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.

*Aimé Geoffrion, K.C., G. H. Montgomery, K.C. and G. H. Montgomery Jr.* for appellant.

*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 (January 11, 1941) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment levied against the appellant under the Income War Tax Act, for the fiscal year ended December 31, 1936. The question involved in the appeal is whether certain disbursements laid out or expended by the appellant in refunding a portion of an outstanding bond issue and replacing the same by a new issue of bonds at a lower rate of interest, and similar disbursements laid out or expended on the retirement, concurrently, of the balance of the same bond issue, for the purpose of effecting a saving in fixed charges, should be allowed as deductions in the assessment of the appellant for the income tax for the year in question. The appellant sought to amortize the said disbursements over the term of the new bonds, but this was refused by the Minister on the ground that these disbursements constituted outlays on account of capital and not expenses laid out for the purpose of earning the "income" as defined by s. 3 of the Act, and from that decision this appeal was asserted.

In January, 1936, the appellant had outstanding, in the par value of \$27,615,000, an issue of 5 per cent bonds payable both as to principal and interest in gold at either Montreal, Toronto, New York or London, at the holder's option. This issue of bonds, by a refunding operation, was replaced in part by an issue of 2½ per cent serial bonds in the par value of \$5,000,000, maturing in the years 1937

to 1941 inclusive, in the annual amount of \$1,000,000, and in part by an issue of 3½ per cent twenty-year sinking fund bonds, in the par value of \$10,000,000, maturing in 1956, making altogether a bond issue of \$15,000,000, payable as to principal and interest in Montreal or Toronto, Canada. The balance of the outstanding bond issue, some \$12,000,000, was retired from the proceeds of the sale of certain investments in the treasury of the appellant company.

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The result of the whole operation was to effect a direct saving of \$275,000 per annum in interest alone, being the difference between the old interest sum of \$750,000 per annum and the new interest sum of \$475,000 per annum. In the issue of the new bonds the gold payment clause was eliminated and this effected an additional average annual saving of \$303,119.18 based upon the appellant's experience during the last nine years in which the old bonds had been outstanding, in the payment of exchange rates upon its half yearly interest instalments, and which during that period ran from \$275,000 to \$354,453.12 per annum, or an average for the nine years of \$303,119.18. These savings reflected a corresponding increase in the net income of the appellant.

In the refunding and retirement operation which I have described certain outlays or disbursements became necessary, and the appellant claims they were wholly, exclusively and necessarily laid out for the purpose of earning the assessable income, that is to say, by reducing its fixed charges and thus correspondingly increasing its net income. These disbursements or expenses may be stated in the following form:

(1) Premium paid upon retirement of the issue of old bonds.....	\$1,104,600 00
(2) Exchange premium paid upon retirement of the issue of old bonds.....	676,726 00
(3) Expenses in connection with the retirement of the issue of old bonds....	25,753 42
(4) Discount on the issue of new bonds:	
\$ 5,000,000 par value at	
1½ per cent.....	\$ 75,000
\$10,000,000 par value at	
4 per cent.....	400,000 475,000 00
Total .....	\$2,282,079 42

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These outlays or disbursements the appellant proposed to amortize over the period of the new bonds and the amount applicable to the year 1936, from the date of issue of the new bonds to the end of that year, was \$104,596.04. In addition to the above items of expense, there was also expended an amount for overlapping interest from February 1, 1936, when funds had to be in hand by borrowing for the redemption of the issue of old bonds, up to April 1, 1936, when the old bonds were actually retired, and this amounted to \$79,166.64. This amount of expense the appellant claims was also incurred for the purpose of earning the income as in the case of the other items mentioned. The amounts of the several items of expense just mentioned are not in dispute.

I perhaps should here add by way of explanation that there was a provision in the trust deed securing the old bond issue which required the payment of a premium of 4 per cent in the event of redemption before maturity. Concurrently with the giving of notice of the redemption of the old bond issue to holders thereof the appellant was necessarily obliged to make definite financial provision for the redemption which it did by borrowing the requisite sum from its bankers and upon this sum it paid interest from February 1, 1936, to April 1, 1936, when the appellant was in funds from the proceeds of the new bond issue and the sale of certain investments. This interest payment, amounting to \$79,166.64, was obviously an unavoidable expenditure because the appellant had actually to be in funds in the amount necessary for the redemption operation before the notice of redemption issued to bond holders, but interest was, of course, running concurrently during the same period on the old bonds until the actual date of redemption. The amortization of the total outlay or disbursements incidental and necessary to the redemption of the old bonds and the issue of the new bonds, and the overlapping interest as just explained, during the term of the new bonds, amounted to \$184,652.46 per annum, and this the appellant claims to be an expense incurred to earn the income and therefore deductible in computing the amount of its profits or gains to be assessed for the income tax for the year 1936. The grounds upon which the Minister refused to allow the deductions claimed by the appellant,



and the grounds advanced by the appellant in support of the allowance of the deductions claimed by it, will sufficiently appear from what I have already stated.

The appellant in a statement accompanying its Notice of Dissatisfaction sets forth the reasons which prompted it to engage in the financial operations described and as that is the foundation for the claims which it now puts forward I should perhaps state them briefly. The interest rate upon the old bond issue was considered not only unduly high but the principal and interest were payable in gold at the places already mentioned, at the holder's option, and the taxable earnings of the appellant had been seriously reduced each year since the War in consequence of the heavy exchange rates which the company had been obliged to pay upon its half-yearly interest instalments. As the credit of the appellant was excellent it was decided, early in 1936, to take advantage of a favourable money market and to redeem the outstanding bonds and replace them in part with bonds carrying a lower coupon rate, payable as to principal and interest in certain Canadian centres only, thus relieving itself of its obligation as to the payment of principal and interest in gold. As the old bonds would not mature till 1951 and their redemption was subject to the payment of a premium of 4 per cent, and as new bonds would have to be issued to take their place in part, it was obvious that certain disbursements and expenses would necessarily have to be incurred in consummating the decision reached. The appellant, after consultation with its investment brokers, decided that the most advantageous method of reducing interest and exchange charges would be by the adoption of the refinancing plan which I have described and which was ultimately carried out. The redemption of the old bonds and the issue of new bonds received the approval of the Provincial Electric Board of the Province of Quebec, which, I assume, for some reason was necessary. I have no doubt that the foregoing substantially sets forth the reasons for the action taken by the appellant, and it would seem to be amply justified by sound business and accountancy practice, and the results would seem to have verified the expectations of the appellant.

As already mentioned the objection to the allowance of the deductions here claimed is that the expenditures

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therefor were incurred on account of capital and not wholly, exclusively and necessarily for the purpose of earning the income. The contention of the Minister, is based on sec. 6 (a) and 6 (b) of the Act, and those provisions read thus:

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

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

(b) any outlay, loss or replacement of capital or any payment on account of capital or any depreciation, depletion or obsolescence, except as otherwise provided in this Act.

Sec. 6 (a), as has often been observed, is expressed in negative form, but it has been repeatedly held that this may be read as a positive enactment. Lord Wright in *Hughes v. Bank of New Zealand* (1), in discussing a provision corresponding to s. 6 (a) of our Act, said: "That is put in negative form, but it is generally, and I think correctly, treated as being capable of being converted into a positive enactment, with the result, that it provides that 'money wholly and exclusively laid out or expended for the purpose of the trade,' may be deducted." Section 5 provides that "income," as defined by s. 3, shall be subject to certain enumerated exemptions and deductions, but that, as has often been pointed out, is not to be construed as exhaustive of all permissible exemptions and deductions. That section is silent as to many matters of the first importance, and the appellant's claim to the specific deductions mentioned is not to be dismissed merely because they are not expressly authorized by the Act. In computing the profits of a trade any expense (as to which there is no express prohibition) is to be deducted, if on the facts of the case it is a proper debit item to be charged against revenue. The generally recognized rule as regards trade expenses is that a deduction is permissible which is justifiable on business and accountancy principles; but this rule is affected by certain specific statutory provisions. To the extent that ordinary business and accountancy principles are not invaded by statute, they prevail.

There seems to be no authority which throws any direct light on the question involved in this appeal as one might expect, at least none was brought to my attention. In

(1) (1937) 1 K.B.D. at p. 448; (1938) A.C. 366.

England, limited companies must deduct the income tax at the appropriate rate from any debenture or other annual interest or annual payments which they may pay or make, and for that reason, it was explained to me, English decisions could have no application here. Whether that is so or not there seem to be no decided cases in England which throw any light on the precise question here to be decided. I might point out here that in Canada, under s. 5 (b) of the Act, such reasonable rate of interest on borrowed capital used in the business to earn the income as the Minister in his discretion may allow is permissible as a deduction, and the appellant, in the period in question was allowed a deduction on this account. In the United States, expenses incurred in connection with the refunding or retirement of bond issues are governed by a set of rules issued by the Treasury Department in 1938, and it is probable that there, under such rules, the disbursements here would be allowed as deductions. It is not of course contended here that the appellant should not in its own accounting treat the expenses and disbursements in question here as charges against revenue and not capital. What has to be determined here is the assessable income, the amount of the profits or gains to be assessed, which is not necessarily the same thing, as the profits or income ascertained by the accounting of the appellant for its purpose. A great many cases were cited before me and a great many arguments were adduced. If I do not refer to all those cases or to all those arguments it is not to be inferred that I have failed to do so from any disregard of those cases and arguments, to all of which I have given consideration. I have felt it best to decide the case, as far as I can, on the construction of the relevant sections of the Act and on the broad principles which seem to me to be necessary to be applied in construing these sections.

It was, I think, conceded by counsel for the appellant that expenses incident to the issue of the old bonds would be chargeable to capital and not revenue in computing the assessable income, on the ground, I assume, that it was so much paid for the cost of getting that capital, and it has been said that there could not be one law for a company having sufficient money to carry on all its operations and another which is willing to pay for the accommodation. Now, that much being conceded, I find it difficult to

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distinguish between that state of facts and that where expenses are incurred for redeeming, renewing or refunding, bonds or debentures. Substantially, what took place here was the redemption and renewal in part of an existing capital obligation from the proceeds of a fresh capital obligation, and a redemption of the balance of that first capital obligation from the proceeds of the sale of investments which really was working capital, and which involved a debit entry in the investment accounts because of redemption of a capital obligation. Therefore, I think, that all the expenses in question must be held to have been essentially of a capital nature, an outlay made on account of capital. If that be so does it matter for our purposes here what be the consequences upon the net revenues of the appellant? I think not. The original capital which was the proceeds of the old bonds was now in the form of fixed capital assets or working capital, and whatever was the net result of the financial operations that took place they related to and were on account of capital. It therefore seems to me to be difficult to say otherwise than that all the expenses in question here constituted an outlay on account of capital, within the meaning of the statute, even though on equitable grounds the appellant's view seems attractive and in many ways quite just.

In the case of *Archibald Thompson, Black and Co. Ltd. v. Batty* (1), it was held that costs incurred in connection with the reduction of capital were inadmissible as a deduction, because it was not a reduction of capital made for the purposes of the trade of the company. The object of the reduction was to enable the company to resume the payment of dividends out of the balance of each year's trading which would otherwise have fallen to be applied in reducing the debit balance in the profit and loss account until it was extinguished, and it was held that the cost of obtaining the order of the Court was inadmissible as a deduction. The Lord Justice Clerk there said: "The expenditure while being quite a proper expenditure and quite properly made in the interests of the company was not, as it seems to me for the purposes of the trade, but was made for the purposes of distributing more advantageously, as it was thought, the results of that trade,

namely, the profit, which on a trading account balance, would have been available for distribution among the shareholders, had it not been for the debit balance to which I have already referred. I don't think that is in a proper sense of the term, a disbursement made for the purposes of the trade. It is made for the purpose of dealing with the results of that trade, after these results have been realized; that is to say, it was made for the purpose of distributing the balance of profit and loss among the shareholders instead of, as had previously been the case, by placing it to the credit of this debit balance." It seems to me that the reasoning in that case is applicable to the one under consideration. The advantages of a bond issue carrying a lower rate of interest would undoubtedly decrease the outgo of the appellant as compared with a higher rate of interest and leave a larger surplus of receipts over outgo, but that would relate to the results of the trade after the results had been ascertained, and not to the amount of the assessable net profits or gains earned by the trade or business of the appellant, within the meaning of the Act. It did not increase the revenue but it decreased the fixed capital charges of the business, and could not therefore have been incurred exclusively to earn the net profits or gains to be assessed. But the appellant contends that in fact it did increase the assessable income, and that therefore that increase should not be taxed without making deductions for any expense incurred in making that increase possible. The answer to that is, I think, that the expenses were not incurred for earning the trading net revenue but were an outlay made on account of capital which is specifically barred as a deduction by the Act, and next, I think, there is a distinction between what is the net income of the taxpayer and what is the amount of the profits or gains to be assessed.

If the expenses incurred in raising a portion of the initial capital of a company by an issue of bonds are not permissible as a business deduction, and I do not think the contrary has ever been held, then it seems to me to follow that expenses incurred in redeeming, refunding or reducing that borrowed capital, even if the results be beneficial to the net revenues of the company concerned, constitute an outlay or payment on account of capital and fall within the prohibition of s. 6 (b), in computing the amount of

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the profits or gains to be assessed. Here, for example, the premium payable on the redemption of the old bonds before maturity, was the direct consequence of a specific obligation made on account of capital, and, I think, in substance that may be said of every item of the expenses incurred. The expenses were not, I think, wholly or exclusively incurred for the purpose of earning the annual net profit or gain of the trade or business of the appellant company. The principle is that it is expenses necessary to earn future profits that are allowable deductions, and this principle has been extended to include expenditure to avoid future trading expenses. The profit of a trade or business is the surplus by which receipts from the trade exceed the expenditure necessary for the purpose of earning the receipts. I think the true view of the facts of this case is that the expenditures here made were outlays on account of capital. That is the conclusion I have reached and I do not think I can usefully add anything further. The appeal must therefore be disallowed and with costs.

*Judgment accordingly.*

The appeal of *The Montreal Coke & Manufacturing Company* from the decision of the Minister of National Revenue was heard on the same date before the Hon. Mr. Justice Maclean as the appeal of *The Montreal Light, Heat and Power Consolidated*, the same counsel being engaged on the appeal. On January 14, 1941, the learned President delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue affirming an assessment levied against the appellant under the Income War Tax Act, for the fiscal years 1935 and 1936. The question involved in this appeal is whether certain disbursements laid out or expended by the appellant in refunding an outstanding bond issue and replacing the same by a new issue of bonds, at a lower rate of interest, for the purpose of effecting a saving in fixed charges, should be allowed as deductions in the assessment of the appellant for the income tax for the years in question. The appellant, in its tax returns, sought to amortize the said disbursements over the term of the new issue of bonds but this was refused by the Minister on the ground that these disbursements constituted outlays

on account of capital and not expenses incurred for the purpose of earning the income, within the meaning of the Act, and from that decision this appeal was asserted.

In 1935, the appellant company had outstanding first mortgage 5½ per cent bonds in the principal amount of \$3,457,000, maturing on June 1, 1947, redeemable at 102, and payable in United States funds at the option of the holder. In that year the appellant decided to take advantage of a favourable money market and to redeem the outstanding bonds, replacing them with bonds carrying a lower rate of interest, and it requested the Trustee for the old bond issue to give notice of intention to redeem the old bonds on the next interest date, December 1, 1935. The refunding operation was carried out by issuing \$1,200,000 of 3½ per cent serial bonds, maturing annually from 1936 to 1940 inclusive, and \$2,200,000 of 4 per cent fixed term bonds maturing on September 16, 1947. These bonds were sold to a brokerage firm in Montreal. The prices obtained were 99½ and accrued interest for the 3½ per cent serial bonds, and 99 and accrued interest for the 4 per cent fixed term bonds, resulting in a discount of one-half of one per cent in the case of the serial bonds and one per cent in the case of the fixed term bonds.

The refunding arrangements called for the certification and delivery of the new bonds on September 16, 1935. This required that the mortgage covering the old bond issue be discharged. The appellant, therefore, on September 16, 1935, deposited with the Montreal Trust Company, the Trustee for the old bond issue, the sum of \$3,621,207.50, being the par value of that bond issue, the accrued interest to December 1, 1935 (the date on which the old bonds were retired), and the 2 per cent premium payable on redemption of the old bonds before maturity.

The particulars of all disbursements made by the appellant in connection with the refunding operation were as follows:

(1) Interest on new bonds from September 16, 1935, to December 31, 1935, until when interest had to be paid on both the old and new bonds.....	\$23,207 54
(2) Various expenses on retiring the old bonds and issuing the new bonds.....	12,484 92
(3) Discount on issue of new bonds.....	28,000 00
(4) Premium paid upon retirement of the issue of old bonds .....	69,140 00
(5) Exchange premium paid on retirement of the old bonds .....	36,744 81

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It is the contention of the appellant that these several disbursements were incurred wholly, exclusively and necessarily for the purpose of earning the income which the Minister denies, and he further asserts that they were outlays made on account of capital and therefore not allowable as deductions from income.

The first two items of expense mentioned above were charged directly against the earnings for 1935, and the items numbered (3), (4) and (5) were amortized over the life of the new bond issue, by the appellant, all of which were disallowed by the Minister in the assessment of the appellant for the income tax. As I understand it, if all the expenses incidental to the refunding operation were amortized over the twelve-year life of the term bonds, which the appellant expressed willingness to do, the amount to be deducted annually would be \$14,131.44, but even in that event the saving in annual interest would still amount to something over \$40,000 per annum, with a corresponding increase in taxable income the appellant claims.

Such are the important facts of the case. This appeal was heard along with one asserted by The Montreal Light, Heat & Power Consolidated from a decision of the Minister confirming an assessment made against it under the Income War Tax Act. After the reception of certain evidence in each appeal they were both argued together, the arguments advanced in support of and against both appeals being identical. The questions involved in both appeals were precisely the same. I have rendered my decision in the case of The Montreal Light, Heat and Power Consolidated, holding that the disbursements and expenses therein made were not permissible deductions in computing the amount of the profits or gains to be assessed, and to my reasons for judgment therein I would refer. The conclusions I there expressed are equally applicable to this appeal, and there is nothing I can usefully add thereto. I therefore dismiss the appeal herein and with costs.

*Judgment accordingly.*



BETWEEN:

THE TRUSTEES OF THE ESTATE }  
 OF JAMES COSMAN, DECEASED } APPELLANTS;

AND

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

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*Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, Secs. 2 (h), 4 (e), 11 (2)—Income accumulating in trust for the benefit of unascertained persons—Charitable institution—Charitable trust—“Person”—Appeal from the decision of the Minister of National Revenue dismissed.*

James Cosman, resident in Nova Scotia, Canada, by his will provided that the executors thereof should pay over the residue of his estate to three trustees to be appointed by the Roman Catholic Archbishop of Halifax, N.S., to be held by them in trust and invested in certain securities. The income from these investments was to be applied to the payment of certain perpetual annuities and certain terminable annuities to definitely specified persons and institutions. Upon the termination of the personal annuities the accumulated funds of the estate were to be divided into two equal parts, one of which was to be paid over to trustees in Ireland. The other part was to be retained in Nova Scotia to be kept invested by the Nova Scotia trustees and one-half the income therefrom to be used “for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best.” The remaining half of the income was to be invested and allowed to accumulate for the term of one hundred years, or longer if necessary, to provide an amount sufficient “to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort.” The money paid over to the trustees in Ireland was to be used for similar purposes.

The Nova Scotia trustees were appointed as directed by the will and have acted in accordance with the terms of the trust imposed upon them. The personal annuities have not terminated and the total accumulated fund is in the hands of the Nova Scotia trustees. The income from the fund has been at all times greater than the amount required for the payment of the annuities and the surplus has been retained and invested by the Nova Scotia trustees.

The trustees were assessed for income tax in respect of the income of the invested fund retained and accumulated for the year 1931. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

*Held:* That the income is being accumulated in trust for the benefit of unascertained persons, and that it is not the income of any charitable institution within the meaning of the Income War Tax Act.

2. That the trusts declared by the will of the testator are not for the benefit of any persons who exist or may exist as individuals in the regard or intention of the testator.

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3. That the ultimate application of the income or how and by whom it shall later be applied or used is not presently of any consequence or relevant to the issue now before the Court.
4. That the Nova Scotia trustees do not constitute a charitable institution within the meaning of the Act.
5. That although a time was fixed for the division of the funds accumulated, namely, upon the termination of the personal annuities, the income is accumulating in the interval in trust for the benefit of unascertained persons.

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 Halifax.

*J. A. Walker, K.C. and W. B. Murphy Jr.* for appellants.

*B. W. Russell, K.C. and E. S. McLatchey* for respondent.

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

THE PRESIDENT, now (January 4, 1941) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment, made under the Income War Tax Act, in respect of certain income received and accumulated by certain trustees pursuant to the terms of the last will and testament of James Cosman, late of Meteghan, in the County of Digby, in the Province of Nova Scotia. The said income was assessed on the ground that the same was accumulating in trust for the benefit of unascertained persons, or of persons with contingent interests, within the meaning of s. 11, ss. (2) of the Income War Tax Act.

By his will, dated November 7, 1910, and a codicil thereto, dated June 29, 1911, the said Cosman made provision for certain bequests and legacies. He then provided that his executors, after settling the estate, should hand over the residue thereof to three trustees to be appointed by the Roman Catholic Archbishop of Halifax, Nova Scotia, to be held by them in trust and invested in such securities as may from time to time be authorized by law for trust investments. From the income of these investments the trustees were to pay certain terminable

annuities and certain perpetual annuities to certain specified persons and institutions. Upon the termination of the personal annuities the accumulated funds of the estate were to be divided into two equal parts, one of which was to be paid over by the trustees to three other trustees to be appointed by the Roman Catholic Bishop of Raphoe, County Donegal, Ireland, "to hold and manage the fund so paid over to them." The remaining half of the funds was to be retained in Nova Scotia, to be kept invested by the Nova Scotia trustees and one-half of the income arising therefrom was to be used by them "for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best." The other half of the income arising from such funds was to be invested by the said Nova Scotia trustees in trust securities and allowed to accumulate for the term of one hundred years, or longer if necessary, to provide an amount sufficient in the opinion of such trustees "to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort." The Archbishop of Halifax, Nova Scotia, and his successors in office, were to determine the number and location of such hospitals and homes to be established in Nova Scotia, and were to appoint a committee of three men to erect and manage such institutions.

The funds paid over to the Irish trustees by the Nova Scotia trustees were to be invested by the former trustees in trust securities and "one-half the income arising therefrom shall be used by the said Irish trustees for the benefit of the poor and needy in Ireland at such times and in such manner as the said Irish trustees may deem best," and the other half of the income was to be invested in trust securities and allowed to accumulate for one hundred years, or longer if necessary, to provide an amount sufficient in the opinion of such trustees "to establish hospitals or homes in Ireland for the needy where they may end their days in comfort." The Roman Catholic Bishop of Raphoe, and his successors in office were to determine the number and location of the hospitals and homes to be established in Ireland and were to appoint a committee of three men to erect and manage each of such institutions.

The amount of money required for the establishment and maintenance of each of the institutions to be estab-

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lished in Nova Scotia, is to be paid by the Nova Scotia trustees out of the funds under their control to the committee in charge of each institution at such times and in such sums as the Archbishop of Halifax and his successors in office may direct, and the similar provision was made in respect of each of the institutions to be established in Ireland, the amount required therefor is directed to be paid by the Irish trustees to the committee in charge of each institution, at such times and in such sums as the Roman Catholic Bishop of Raphoe and his successors in office may direct.

The Roman Catholic Archbishop of Halifax exercised the power vested in him by the will and appointed the three trustees as therein directed. One of these trustees died and another was appointed in his stead. These trustees, the appellants herein, have carried out the duties imposed on them and at the time with which we are concerned the personal terminable annuities have not all ceased and consequently the total accumulated fund is still in the hands of the Nova Scotia trustees. The income therefrom has at all times been greater than the amount required for the payment of the annuities and the surplus has been retained and invested by the Nova Scotia trustees in accordance with the provisions of the will and codicil.

To ensure a complete and accurate presentation of the facts material here I had better recite the following clauses of the will:

When all the aforesaid personal terminable annuities shall cease through the death of the beneficiaries or otherwise the sum of the accumulated funds of my estate shall then be divided into two equal parts and one of such parts shall be paid and handed over by my said trustees to three other trustees who shall be appointed by the Roman Catholic Bishop of Raphoe, in the County of Donegal, Ireland, to hold and manage the fund so to be paid over to them.

The remaining half of the funds then forming my estate shall be retained in Nova Scotia, and kept invested as aforesaid by the said Nova Scotia trustees and one half the income arising therefrom shall be used by said Nova Scotia trustees for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best. The other half of the income arising therefrom shall be invested by said Nova Scotia trustees in trust securities and allowed to accumulate for the term of one hundred years or longer if necessary to provide an amount sufficient in the opinion of such trustees to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort. In establishing such institutions in Nova Scotia, the County of Digby shall be first provided for, but with this limitation the Archbishop of Halifax, Nova Scotia, and

his successors in office shall decide the number and location of such hospitals and homes to be established in Nova Scotia, and he shall appoint a committee of three men to erect and manage each of such institutions . . . . .

The funds paid over by the Nova Scotia trustees to the trustees to be appointed by the Bishop of Raphoe aforesaid, shall be invested by the latter trustees in trust securities and one half the income arising therefrom shall be used by the said Irish trustees for the benefit of the poor and needy in Ireland at such times and in such manner as the said Irish trustees may deem best. The other half of the income arising therefrom shall be invested by said Irish trustees in trust securities and allowed to accumulate for the term of one hundred years, or longer if necessary to provide an amount sufficient in the opinion of such trustees to establish hospitals or homes in Ireland for the needy where they may end their days in comfort. In establishing such institutions in Ireland, the place called Greencastle, in said County of Donegal, the birthplace of my mother, Mary Collins, shall be first provided for and secondly the village of Carandonah, in the said County of Donegal, the home of my late wife's parents, John Carlan and Ellen Calaghan, but with this limitation the said Roman Catholic Bishop of Raphoe and his successors in office shall decide the number and location of the hospitals and homes to be established in Ireland as aforesaid, and he shall appoint a committee of three men to erect and manage each of such institutions.

The amount of money required for the establishment and maintenance of each of the institutions to be established in Nova Scotia under this my will shall be paid by the said Nova Scotia trustees out of the funds under their control to the committee in charge of such institutions at such times and in such sums as the said Roman Catholic Archbishop of Halifax and his successors in office may direct, and the amount required for the establishment and maintenance of each of the said institutions in Ireland shall be paid by the said Irish trustees out of the funds under their control to the committee in charge of such institutions at such times and in such sums as the said Roman Catholic Bishop of Raphoe and his successors in office may direct.

Any trustee or member of a committee appointed by the Roman Catholic Archbishop of Halifax, Nova Scotia, and his successors in office under this my will may at any time be removed by such Archbishop and any trustee or member of a committee appointed by the aforesaid Bishop of Raphoe or his successors in office may be removed at any time by such Bishop for cause that he may think sufficient and such Archbishop or Bishop as the case may be shall appoint others in the place of those so removed.

By a notice of assessment dated June 14, 1932, a tax was levied to the amount of \$1,479.53 in respect of the income of the invested fund retained and accumulated in the taxation period of 1931. The trustees appealed to the Minister of National Revenue who rendered a decision affirming the assessment, on the ground that the said assessment was made in respect of income accumulating in the hands of the appellants, the Nova Scotia trustees, in trust for the benefit of unascertained persons, or of

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persons with contingent interests, within the meaning of s. 11, ss. (2) of the Act. From that decision of the Minister an appeal was taken by the trustees to this Court. In their notice of appeal from the assessment in question the appellants gave as reasons therefor: (1) that no income has been accumulated for the benefit of any person as defined by s. 2, ss. (h) of the Income War Tax Act, whether ascertained or unascertained, and that at no time can there be any person, as so defined, having the right to sue for payment of the legacy contained in the will or entitled to enforce the trusts thereof; (2) that if there should ever be such a person it could be none other than a charitable institution such as is exempt from taxation under s. 4, ss. (e) of the Act; (3) that as to one half of the said accumulated income, being the portion which is to be paid to trustees to be appointed by the Bishop of Raphoe, the persons, if any, to benefit therefrom must be persons resident in Ireland and outside of Canada; and (4) that the whole of the said accumulated income is by the said will impressed with a trust for charitable purposes and accordingly upon a construction of the said Act in accordance with the spirit thereof the said income should not be held liable to taxation.

The argument of Mr. Walker in support of this appeal may be summarized thus: The income is not accumulating for the benefit of any person or persons, ascertained or otherwise, or any person having a claim therein, but, as to one half, for the purpose of establishing hospitals and homes, charitable institutions, in Ireland and Nova Scotia for the benefit of the poor and needy, and that the whole scheme of the testator contemplates a number of charitable institutions; that the income is in part accumulating in trust to provide the funds necessary for the establishment and maintenance of the charitable institutions just mentioned, and the same will never be distributed to persons ascertained or unascertained; that the Nova Scotia trustees constitute a charitable institution, and are presently functioning in that capacity, and that both bodies of trustees will be functioning in that capacity when the income from the other half of the accumulated funds becomes available for distribution for the benefit of the poor and needy in Ireland and Nova Scotia; and that the word "person" as defined by sec. 2 (h) of the Act, does not include trus-

tees and that therefore the income is accumulating for the benefit of a trust or trusts, or for the benefit of the Irish and Nova Scotia trustees, and not for persons. This will reveal substantially though perhaps not fully or precisely, or in the order of importance, the points urged by Mr. Walker in support of this appeal.

The case is not without its difficulties. However, it appears to me fairly clear that the income in question is being accumulated in trust for the benefit of unascertained persons, and that it is not the income of any charitable institution within the meaning of the taxing statute. I think the will is open only to the construction that from the time the residue of the estate is handed over to the Nova Scotia trustees the income here assessed for the tax is accumulating in trust for the benefit of unascertained persons. The will of Cosman makes it clear that from that time the income of his estate, less any income necessary for the payment of the terminable and perpetual annuities, was to accumulate in the hands of the Nova Scotia trustees, in trust, until the terminable annuities ceased, for the benefit of the poor and needy in Nova Scotia and Ireland. Such poor and needy are without question persons, and equally without question they are unascertained. Charitable trusts may and indeed must be for the benefit of an indefinite number of unascertained persons. That is one of their characteristics. The trusts here declared are not for the benefit of any persons who exist or may exist as individuals in the regard or intention of the testator. He designs them to be the objects of his bounty for no reason personal to them or himself. The income here assessed was, I think, plainly intended for the benefit of such unascertained persons, and it is now accumulating in trust for that purpose, and it seems to me that it was just this class of income that s. 11 (2) of the Act was intended to make liable for the tax. Its ultimate destination, and how and by whom it shall later be applied or used, is not, I think, presently of any consequence, or relevant to the question to be decided. The income will continue to accumulate for the benefit of the poor and needy until the terminable annuities shall cease, and when that time arrives the accumulated funds of the estate will be divided between the Nova Scotia and the Irish trustees, and the portion of the fund that goes to

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the Irish trustees, or any income therefrom, will no longer be of concern to the revenues of Canada. Up to that time we are only concerned with the income accumulating in Canada in trust, in the hands of the Nova Scotia trustees, for the benefit of unascertained persons. Thereafter, one half of the income arising from the balance of the accumulated funds remaining in Nova Scotia is directed to be used by the Nova Scotia trustees for the benefit of the poor and needy in that Province, and it may be assumed that this portion of the income will then be so expended and will no longer be accumulating; at any rate it does not now enter into a consideration of the income here assessed and in debate. The other half of that income is to be accumulated for one hundred years or more, at the end of which time it is to be used in establishing hospitals or homes for the poor and needy in Nova Scotia. How and by whom that income shall be applied is not presently, I think, of importance. All the income presently accumulating is for the benefit of the poor and needy in both Ireland and Nova Scotia. Therefore, at the time material, there was income accumulating in trust in the hands of the Nova Scotia trustees for the benefit of unascertained persons and therefore, I think, subject to the tax. That income seems to fall within the very words of s. 11 (2) of the Act. The case is not, I think, distinguishable in principle from the *Birtwistle* case (1).

I do not think it can be successfully contended that the Nova Scotia trustees constitute a charitable institution within the meaning of the Act. The Nova Scotia trustees were appointed to receive, invest and manage the residue of the estate handed over to them by the executors of Cosman, and to carry out the provisions of the will of the testator in pursuance of his directions. In the meantime the whole of such funds are accumulating in trust, and almost wholly for the benefit of unascertained persons, and it is a part of the income of such funds that has been assessed for the tax. When the funds accumulated are divided into two equal parts between the Irish trustees and the Nova Scotia trustees a new situation of course arises, as I have already explained. When the time arrives to establish and maintain hospitals or homes for the benefit of the poor and needy in Nova Scotia, the number and

(1) (1938) Ex. C.R. 95; (1940) A.C. 138.



location of such institutions is to be determined by the Archbishop of Halifax, and the trustees are then directed to pay out the sums required for such purposes to committees who are to erect and manage each of such institutions, in such sums as the Archbishop of Halifax may direct. It would seem that the expenditure of that portion of the income is to be under the control and direction of persons other than the trustees, but the unexpended trust funds are still to be in the hands of the trustees to invest and manage. In all this there is nothing purporting to give to the trustees the capacity or quality of a charitable institution. The testator does not seem to have contemplated such a situation. No institution of any kind has come into existence, and neither the corpus of the estate of Cosman, nor the revenue thereof, has passed nor is accruing due to any institution: in fact it is not clear that this can ever occur. It is not clear in whom will be vested the title to the hospitals and homes to be erected, and in any event it would not seem that they are to be administered or managed by the trustees. I see nothing in the will which indicates that the Nova Scotia trustees are to take on the status of a charitable institution, at any stage, in addition to their powers and duties as trustees under the will. The erection of hospitals or homes is but one form directed by the testator for applying a portion of the income of his charitable trust for the benefit of those who were the objects of his bounty. That does not, I think, constitute the trustees, or the hospitals or homes to be established, charitable institutions within the meaning of the Act, and it is to be doubted if the testator ever contemplated such a thing in the ordinary and practical sense. In the *Birtwistle* case their Lordships of the Privy Council used the following language which, I think, is quite applicable here. They said:

That it is a charitable trust no one can doubt. But their Lordships are unable to agree that it is a charitable institution such as is contemplated by section 4 (e) of the Act. It is by no means easy to give a definition of the word "institution" that will cover every use of it. Its meaning must always depend upon the context in which it is found. It seems plain for instance, from the context in which it is found in the subsection in question that the word is intended to connote something more than a mere trust. Had the Dominion legislature intended to exempt from taxation the income of every charitable trust, nothing would have been easier than to say so. In view of the language that has in fact been used it seems to their Lordships that the charitable

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institutions exempted are those which are institutions in the sense in which boards of trade and chambers of commerce are institutions, such, for example, as a charity organization society or a society for the prevention of cruelty to children. The trust with which the present appeal is concerned is an ordinary trust for charity. It can only be regarded as a charitable institution within the meaning of the subsection if every such trust is to be so regarded, and this, in their Lordships' opinion, is impossible. An ordinary trust for charity is, indeed, only a charitable institution in the sense that a farm is an agricultural institution. It is not in that sense that the word institution is used in the subsection.

There is another feature of the case which I have considered, and which I should mention. It might be argued that from the time when the residue of the estate was handed over by the executors to the Nova Scotia trustees and until the time when the terminable annuities cease, the income is not specifically accumulating for the benefit of the poor and needy in Ireland and Nova Scotia, but for the purpose of creating a fund for the time when the terminable annuities cease, when the sum of the accumulated funds of the estate are to be divided between the Nova Scotia trustees and the Irish trustees. If such a view is of weight then it might be said that no income is presently accumulating in trust for the benefit of unascertained persons. But, the funds received from the executors were held thereafter by the trustees in trust. They were to be held in trust for whom? First, for the annuitants, and then for the poor and needy in Nova Scotia and Ireland, unascertained persons, and for no one else. The vulnerable point in such a view of the case is that in point of fact the portion of the income accumulating during that period in trust, and assessed, was for the benefit of unascertained persons, and it was that class of income that the Act intended to make liable for the tax. It does not follow, I think, that because a time was fixed for the division of the funds accumulated, when the terminable annuities ceased, that the income was not accumulating in the interval, in trust, for the benefit of unascertained persons. As I have already stated, after paying the annual annuities there was a surplus of income accumulating and there was no one for whose benefit it was accumulating except the poor and needy in Nova Scotia and Ireland, and, I think, that is what was intended by the testator. Accordingly, I find myself obliged to conclude that this view of the case cannot be sustained.

The conclusion I have reached is that the income in question falls within the very words of s. 11 (2) of the Act, and is liable for the tax. That the income is presently accumulating in trust, in Canada, in the hands of the appellant-trustees, would seem an undoubted fact. The income, that is, the portion with which we are here concerned, must be accumulating for the benefit of unascertained persons because it is not for persons designated or ascertained, and clearly, I think, it is not the income of a charitable institution, within the meaning of s. 4 (e) of the Act. It is, I think, income of the precise character that was intended by the statute to be made liable for the tax. I do not think that liability for the tax under s. 11 (2) of the Act can be avoided by intervening a body of trustees between the executor of a testator's will and the ultimate beneficiaries of a charitable trust created under that will, which would seem to be the result of the argument, if valid, advanced in support of the appeal against the assessment here. The appeal is therefore dismissed.

I think this is a case where I would be justified in declining to make any order as to costs.

*Judgment accordingly.*

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NEW BRUNSWICK ADMIRALTY DISTRICT

BETWEEN:

ALEXANDER C. FRASER.....PLAINTIFF;

AND

SCHOONER *JEAN & JOYCE*, Her }  
 Tackle and Apparel..... } DEFENDANT.

1937  
May 13 & 20  
 1941  
 Jan. 9.  
1941  
 Jan. 20.  
      

*Shipping—Action for wages as master—Plaintiff a partner and temporary owner in operation of defendant vessel—Plaintiff's claim barred by laches—Loss of maritime lien through failure to prosecute claim diligently.*

The plaintiff seeks to enforce a claim for wages as master of defendant vessel. The Court found that the plaintiff was really in partnership with another in operating the vessel and therefore a temporary owner, and further that his claim was barred by laches.

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*Jean & Joyce.*  
 Baxter C.J.

*Held:* That a maritime lien may be lost by negligence or delay where the rights of third parties may be compromised.

2. That what contributes reasonable diligence depends upon the facts of each case and does not mean doing everything possible, but doing that which under ordinary circumstances and having regard to expense and difficulty, could be reasonably required.

ACTION by the plaintiff to recover wages as master of defendant vessel and to enforce a maritime lien therefor.

The action was tried before the Honourable Mr. Justice Baxter, Deputy District Judge in Admiralty for the New Brunswick Admiralty District, at Saint John, N.B.

*E. T. Richard* for plaintiff.

*C. F. Inches, K.C.* for defendant.

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

BAXTER, D.D.J.A., now (January 20, 1941) delivered the following judgment:

The writ in this cause was issued 2nd October, 1936, and the action was heard by me on the 13th and 20th days of May, 1937. The matter then stood for the plaintiff's solicitor to submit a brief which he failed to do and the hearing was brought on by the defendant who obtained an appointment for that purpose. I heard argument on 9th January instant, over three and a half years after the trial of the action. Needless to say it has been necessary to familiarize myself again with the testimony by carefully reading it and endeavouring to recall the impression made upon me by the witnesses.

The plaintiff's claim is that on 1st April, 1933, he was appointed by the owner of the *Marion L. Mason*, now called the *Jean & Joyce*, to serve on board of her as master at wages after the rate of \$60 per month, also that on 25th November, 1933, the owner wrongfully and without reasonable cause discharged him and appointed another master. The ship was arrested and bail given on a claim of \$420.

There is in evidence the crew's agreement which is dated 9th May, 1933, in the handwriting of the plaintiff. The document is stamped by the Customs at Belleoram on 9th May, 1933. According to that document the master

was to be on board 1st April, 1933, and his wages per calendar month were "as agreed." The mate's wages also were "as agreed" until the vessel reached Richibucto where the shipping master initialled an insertion of \$30 per month. The mate was William Long who was one of the witnesses.

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Baxter C.J.

The plaintiff alleges that he was hired by Nowlan, the then owner, as master. Nowlan says that he did not so hire the plaintiff; that he was owner of the schooner *Marion L. Mason*, now known as the *Jean & Joyce*; that Alex. C. Fraser Sr., father of the plaintiff, wanted to get the use of the vessel and that he let him have her for the summer of 1933, without any charge except that he was to make such repairs as were necessary, pay the bills against her and the caretaker. Fraser Sr. represented that he had money in the bank to pay the bills. Whether he had or not, later on he borrowed money from Nowlan to pay schooner's disbursements. The fact that Nowlan put out money for such purposes is strongly relied upon as evidence that the schooner was being run for him by the plaintiff as master.

The defendant put in evidence a letter dated at Rexton, 28th March (presumably 1933). It is addressed to Thos. Nowlan and says that "the bearer, Alex Fraser, my son, is going down to Nfld to bring Mason up to Halifax. From there she will bring 150 tons salt to Richibucto for O'Leary's. I want you to give him full authority to take charge of this vessel. I would like if you could go down with them and sell some cattle, if not, try and send your son. I understand the Gulf is full of ice so there would be no use to try that route before the middle of April. P.S. if you have anything to bring up whatever bargain you can make with him will be satisfactory." Shown this note, Fraser Sr. denies that he gave it to his son but admits that he may have given it to Wm. Long (the mate) to give to his son—the plaintiff. He admits that he had asked Nowlan for another vessel—the *Marion Emily*, which he did not get. This makes it clear that Fraser Sr. was at least looking for some vessel which he could get and intended to run. Now the plaintiff says he received a letter from Nowlan to the man in charge of the *Marion L. Mason* to hand her over to the plaintiff—who took charge of her in Belleoram, Nfld. He says that he had

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no agreement with Nowlan about wages, but that after he brought the vessel to Canada, Nowlan said he would get customary wages. He never received any wages. Nowlan would not pay him wages and never came to any settlement with him. Plaintiff collected for the ship and paid expenses out of what he received. He never gave any accounting and apparently never was asked for one. Now the plaintiff says he doesn't think his father gave him a letter to take to Nowlan, he might have but if he did plaintiff forgets about it. His father had told him that he was talking to Nowlan about the *Mason*. Shown the letter the plaintiff quibbled about it and in my opinion lied when he said he did not know whose writing it was and that he could not tell his father's writing from anybody else's. He admits that his father told him that Nowlan offered him the vessel for a year, to run it and put it in repair and see if there were anything to be made with her.

On 24th November, 1933, the crew were paid off at Richibucto. Capt. Ryan who was buying the vessel was present. The plaintiff, who had no fixed rate of wages on the articles, swears that he said there were his claim and those of the other two boys aboard the vessel, but did not state the amount of his claim. No one else heard him make this demand and I conclude that he stood by, made no claim, knowing that the vessel's ownership was to be changed and that the reason he acted as he did was because he knew that he had simply taken charge of the schooner for his father with whom there is some evidence that he was really in partnership, and who had been allowed the use of her on condition of paying what was against her and what was needed for repairs. The plaintiff confirms this by his statement that he did not communicate with Nowlan as to cargoes, but accepted them without reference to him.

The defence is corroborated by William Long whose testimony I accept. An attempt was made to discredit him with reference to a casual conversation but I do not consider that his testimony was in any way impeached. There was a material difference between what he was supposed to have said and what he did say.

I simply do not believe either the plaintiff or Fraser Sr., not only because of the self-contradictions in their testi-

mony, but as well because of the shifting and evasive manner of giving their testimony. I accept the evidence of Nowlan which has not been impeached in any particular and is consistent with Fraser's letter and many of the plaintiff's actions. I believe that Nowlan found that Fraser Sr. was unable to finance the vessel as he had undertaken to do and was placed in the unpleasant situation of having to advance money to save his vessel.

It is not necessary, I think, to pursue further an analysis of the evidence, a thorough re-reading of which convinces me that the plaintiff was not engaged as master by Nowlan.

This effectively disposes of the claim for breach of contract of hiring but the fact remains that Fraser Sr. was a charterer of the vessel. If he were the sole charterer the master engaged by him would have a remedy against the vessel. The articles did not specify his wages but he would be entitled to a reasonable amount.

Under the unusually peculiar circumstances of this case, I feel that I am obliged to invoke the rule which requires reasonable diligence in the prosecution of a claim. *The Bold Buccleugh* (1); *The Europa* (2). The law is summed up in *The Fairport* (3) by Sir Robert Phillimore who says:

The law on this subject is established by the cases of *The Bold Buccleugh* (*supra*) and *The Europa* (*supra*). It results from these cases that a maritime lien is not indelible and may be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien travels with the thing into whosoever possession it may come.

I have carefully considered the case of the *Charles Amelia* (4), where the plaintiff had not an opportunity of asserting his claim such as he had in the present case. I believe the witnesses who swear that he did not make any claim when the crew were being paid off. I also find that he knew that the transfer of the vessel was in immediate prospect. Under these circumstances he betrayed the new owner into believing that he had no claim. There is also the case of *The Chieftain* (5), where the master delayed for ten months but was allowed to bring his action

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|---|---|
| (1) (1849-51) 7 Moo. P.C. 267<br>at 285.                                    | (3) (1882) 52 L.J.P. 21 at 22.                      |
| (2) (1863) Br. & Lush. 89; (1863-5) 2 Moo. P.C.N.S. 1; (1863) 167 E.R. 313. | (4) (1869) 38 L.J. Adm. 17.                         |
|   | (5) (1863) Br. & Lush. 212;<br>(1863) 167 E.R. 340. |

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though mortgages had intervened. Dr. Lushington thought that was not a stale claim. This case was decided in 1863 and though the authority is undoubtedly a very high one, yet the circumstances are not the same as those of the present case. What constitutes reasonable diligence must depend upon the facts of each case,—*The Fairport (supra)*. Reasonable diligence means not doing everything possible, but doing that, which under ordinary circumstances and having regard to expense and difficulty, could be reasonably required,—*The Europa (supra)*. The plaintiff made no such effort as in that case to find and follow the vessel. It is true her name was changed but he knew her purchaser and where he came from.

*The Kong Magnus* (1) was a claim for damages by collision. Though twelve years elapsed the plaintiffs were permitted to recover. It was held that sale of shares in a company owning the ship was not equivalent to a change of ownership. The case turned upon the opportunities which the plaintiffs had of enforcing their claims by arrest of the ship. The cases are not analogous.

The master, in the present case, has not only failed to use due diligence; he has not used any diligence.

The pay-off took place on 24th November, 1933. The writ was issued 2nd October, 1936. The plaintiff has given no explanation of his failure to enforce his demand. He has not shown when the vessel's name was changed, nor that the change of name impeded him in the prosecution of his claim. He has not shown that the vessel was not at all times in the jurisdiction of this Court, nor has he given evidence of any efforts made by him to locate her.

The plaintiff fails upon two grounds: First, that there is evidence that the plaintiff was in partnership with his father and was therefore acting as a temporary owner in running the ship. He can not claim against his own property. Secondly, that in any view of the case his claim is barred by laches.

The action will be dismissed with costs.

*Judgment accordingly.*



BETWEEN:

SOMERVILLE PAPER BOXES LIM- ITED, LEON BENOIT, and COYLE } SAFETY CARTON CO. .... }	PLAINTIFFS;
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1938  
 ~~~~~  
 March 22-25,  
 28 & 29.  
 —  
 1939  
 Dec. 22.  
 —

AND

|                                                                                                                          |             |
|--------------------------------------------------------------------------------------------------------------------------|-------------|
| ARTHUR CORMIER, carrying on }<br>business under the name of A.<br>CORMIER & CO., and the said A.<br>CORMIER & CO. .... } | DEFENDANTS. |
|--------------------------------------------------------------------------------------------------------------------------|-------------|

*Patent—Infringement—Invention claimed for new improvements in egg boxes and cartons and machines for assembling the same—Subject-matter—Lack of novelty—Anticipation—Prior art—New use of known device.*

The action is one for infringement of three Letters Patent numbered 200,100, 282,212, and 282,214. The invention claimed in the first two patents relates to improvements in boxes and cartons for eggs and like commodities. The invention claimed in Patent No. 282,214 relates to alleged improvements in machines for assembling cartons.

The Court found that the alleged inventions relating to the boxes and cartons were not new but were old in the art and that a prior patent included the essential features found in plaintiffs' machine in that it applied to wooden crates or racks while the plaintiffs' patent related to cardboard boxes or cartons, the difference of material not being important.

*Held:* That in order that a new use of a known device may constitute the subject-matter of an invention, it is necessary that the new use be quite distinct from the old one and involve practical difficulties which the patentee has by inventive ingenuity succeeded in overcoming.

2. That where a new use of a known device does not require any ingenuity but is in manner and purpose analogous to the old use, although not exactly the same, there is no invention.

ACTION by plaintiffs herein to have it declared that three patents owned by them are valid and have been infringed by defendants.

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

*O. M. Biggar K.C.* and *R. S. Smart K.C.* for plaintiffs.

*H. Gerin-Lajoie K.C.* and *A. Demers* for defendants.

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

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ANGERS J., now (December 22, 1939) delivered the following judgment:

This is an action for the infringement of letters patent for invention bearing Nos. 200,100, 282,212 and 282,214, the first whereof issued to Joseph Leopold Coyle and Frederick Dundas Todd on May 11, 1920, and the other two to Leon Benoit on August 7, 1928.

By an agreement made on April 14, 1922, Joseph Leopold Coyle, Frederick Dundas Todd, Roderick Anderson Dundas Todd, Ian Dundas Todd, Henry Vours and Leon Benoit sold, transferred and conveyed to Coyle Safety Carton Co. all their rights, title and interest in and to, among others, the letters patent No. 200,100 aforesaid. This assignment was recorded in the Patent and Copyright Office, at Ottawa, on May 20, 1922, under No. 108,351.

How Roderick Anderson Dundas Todd, Ian Dundas Todd, Henry Vours and Leon Benoit acquired an interest in the said patent is not disclosed by the evidence, but the matter is unimportant as the title is not challenged.

By an agreement dated April 15, 1925, Coyle Safety Carton Co. granted unto Leon Benoit the exclusive licence to make and sell the egg cartons and boxes containing the invention covered by the letters patent No. 200,100 during the unexpired term thereof.

By an agreement dated January 28, 1927, Leon Benoit granted unto Somerville Paper Boxes Limited the exclusive licence to make, use and sell the egg cartons and boxes containing the invention covered by the letters patent No. 200,100 during the unexpired term thereof.

By a deed made on June 6, 1934, between Leon Benoit and Somerville Paper Boxes Limited it was agreed that the agreement of January 28, 1927, hereinabove referred to was continued in full force and effect through the remainder of the term for which the said letters patent No. 200,100 had been granted.

The invention covered by letters patent No. 200,100 relates to improvements in egg boxes.

The objects of the invention are stated as follows:

. . . the object of my invention is to provide a simple, inexpensive, and safe receptacle for the carrying and handling of eggs in which the eggs are suspended and supported clear of each other so that the breakage is reduced to the minimum and the construction of which is such that the removal of the eggs is accomplished with great facility. A further object

is to devise an egg box capable of being assembled from its knock-down form into receptacle form very quickly and with great convenience and which is very cheap to manufacture.

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The specification describes the invention thus:

The egg box is formed preferably of cardboard or the like and may be made in sizes suitable to the requirements of trade and while this description applies to the use of the device for the carrying of eggs it may be here stated that it can be used with equal facility and convenience for transporting other kinds of merchandise, such as glass bottles and other commodities of a fragile nature.

After referring to the drawings, the specification continues as follows:

It will be seen, therefore, that I have devised a carrier for eggs and other merchandise which is simple and inexpensive in construction and operation and of great convenience and utility to those engaged in the transportation of fragile articles.

One distinguishing characteristic of my device is that the partitions 10 are not permanently connected with the sides of the main body, so that they may be folded into the position shown in Figure 9 without bending. They lay substantially flat against the sides of the upstanding folded centre of the main body, which folded or doubled centre portion is indicated generally at 15. The ends of the partitions are entirely free from permanent connection with the sides of the body and being held at their centre portions by the slotted construction of themselves and the main body they are freely removable and thus the compartments are adjustable as to size for holding different sizes of articles. In other words by removing alternate partitions the carrier may receive apples, pears, oranges, or other articles larger than eggs.

After relating how the partitions free from permanent connection with the body of the box at their ends can be located automatically in a crosswise position from their folded position by unfolding the sides of the body, the specification adds:

In effect therefore the partitions are pivotally mounted at a point intermediate of their length to the body blank or member. They fold substantially parallel with the adjacent faces of the blank when folded.

In removing any one of the partitions it is simply moved down through the slot 9 in the main body, the notch 13 permitting this to be done.

It will be observed from Figure 1 that the box when folded is in the form of a strip no wider than the height of the partitions, plus the thickness of the material of which the body is composed, this body as it were being folded or wrapped around the doubled centre 15 with its folded and overlapping partitions. There are no protuberances extending laterally of the folded strip like form of the container.

The partitions as shown in Figures 5, 7 and 8 form a base for the body member to rest on and as they project both below and at each side of the body they serve as protectors for the body member and its contents being in the nature of projecting fins or webs, receiving any side blows or pressures to which the box may be subjected.

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Claims 1, 3, 4, 7, 8 and 9 of patent No. 200,100 are relied upon by plaintiffs; they read as follows:

1. An egg box comprising a foldable blank forming the body of the box, and partitions individually removably mounted on the body blank foldable longitudinally within the box and unfolding automatically when the body is extended, substantially as described.

3. An egg box having a body with an upstanding centre portion and side extensions, partitions pivotally mounted thereon to fold against the sides thereof and between the same and the extensions, said partitions having free ends, said extensions and the free ends of the partitions having means for detachably holding them together substantially as described.

4. An egg box having a body with an upstanding slotted portion, partitions extending through said slots, and thereby adapted to swing into folded position against the sides of said upstanding portion or to extend at right angles thereto, said body portion having extensions to fold up around the edges of the partitions with means for holding the said extensions inclosing said partitions; said partitions when folded lying between the extensions and the upstanding portions, substantially as described.

7. An egg box comprising a slotted blank and walls inserted in said slots each provided with end notches, said walls being adapted to lie flat one on the other longitudinally of the blank when the same is folded and to be erected transversely of the blank by the opening out of the same, the said blank when opened out forming sides adapted to be seated in the said wall notches so as to form with the said walls egg-carrying compartments.

8. An egg box comprising a slotted blank and walls inserted in said slots each provided with end notches and an upper edge slot, said walls being adapted to lie flat one on the other longitudinally of the blank when the same is folded and to be erected transversely of the blank by the opening out of the same, the said blank when opened out forming sides adapted to be first seated in the said end notches so as to form with the walls egg-carrying compartments and then folded so that its ends may be engaged in the upper edge slots whereby covers for the said compartments are formed.

9. An egg box comprising a slotted blank and walls inserted in the said slots each provided with end notches and a pair of inclined upper edge slots, said walls being adapted to lie flat one on the other longitudinally of the blank when the same is folded and to be erected transversely of the blank by the opening out of the same, the said blank when opened out forming sides adapted to be first seated in the said end notches so as to form with the walls egg-carrying compartments and then folded so that its ends may be engaged in the inclined upper edge slots whereby covers provided with a cushioning edge for the eggs are formed.

The invention forming the subject of letters patent No. 282,212 relates to improvements in a knock-down carton for eggs and like commodities.

The objects of the invention are stated as follows:

This invention which relates to certain improvements in a knock-down carton for eggs and like commodities is particularly concerned with

features which facilitate the assembly of the carton components, enhance the strength and utility thereof, and assure a more serviceable construction.

After referring to the drawings, the specification describes the invention thus:

The carton herein shown and described is of that type which utilizes a blank A which is formed into bottom, side walls, and covers, and in conjunction therewith a plurality of cross walls B which provide ends and intermediate partitions. The blank is folded upon itself at 20 in its middle region and is also bendable at other points as indicated at 21, 22, 23 and 24. The general form of the blank so folded is that of the letter W. The folds 22 occupies lowermost positions, the folds 23 are adjacent the upper edge of the carton, and the folds 24 are adapted to occupy substantially a centre position when the blank is closed over to provide covers for the carton. The bends 21 are disposed between the centre and bottom folds 20 and 22, as shown. The sections of the blank between the fold 20 and bends 21 provide a vertically extending double wall c. Between the bends 21 and 22 are oblique sections d, between the folds 22 and 23 are other sections e, and between the folds 23 and 24 are cover sections f. Joined to each cover section at the fold 24 is a flap g. In addition the blank is adapted to be further bent, when the carton is closed up, along the line 31 which define between itself and the fold 23 one additional section h which is substantially vertically disposed. In the manufacture of a blank having the characteristics noted, the material, preferably a commercial fibrous product, may be scored or otherwise weakened along the lines where the several folds are to be made, so as to facilitate the operation of bending the blank to the form described.

The blank is further provided upon opposite sides of its centre fold with two sets of aligned slots 35 which extend between the bends 31 and 21. In line with these slots are openings 36 arranged in a row along the centre line of the blank. When the blank is folded upon itself along its centre line, as shown in Fig. 1, these several openings take on the form of semi-circular notches.

After describing the cross walls and explaining the manner in which they are assembled in the blank, the specification adds:

The carton herein shown and described by way of exemplification is of the double row form; that is, its folds are so disposed in relation to the type of cross walls used as to present two rows of cells. Manifestly the length of these rows will be determined by the dimensions of the blank, and the number of compartments or cells will depend upon the number of cross walls which are used. In the construction shown, where the blank is bent to substantially W-formation, two such rows are provided, but this may be increased by duplicating the folds wherever necessary to add rows to whatever number is desired. In such instances, the essential features of the invention will remain unchanged both as regards the formation of the blank and of the cross walls which co-operate therewith.

The specification then deals with the possibility of varying the construction in various particulars (the fastening

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devices, the form of interlock between the blank and the cross walls, the notches along the centre fold of the blank, etc.); and the patentee concludes thus:

The features of my invention, as set out in the preceding description, tend to a more certain and secure assembly of the carton components. Without the provision of locking means by which to prevent accidental displacement of the cross walls from the blank, the use of the present carton will be attended with certain disadvantages. This tendency of the blank to separate from the cross walls is particularly noticeable before the covers are closed down. During the operation of filling the carton, the upper portions of the blank will be extended outwardly somewhat, as illustrated in Fig. 1, in which position it is important that the blank should remain engaged with the side edges of the cross walls. By the notch constructions which I have shown and described, any separation of the blank from the cross walls at these points is effectively prevented.

The claims of patent No. 282,212 on which the plaintiffs rely are claims 1, 2, 4, 6, 12 and 14.

It will suffice to quote claims 1, 4, 6 and 14, which are typical.

1. An egg carton in which is comprised a blank having plural sets of aligned slots, the blank being folded upon itself along a line between the two sets of slots, and a plurality of cross walls each having a slot proceeding inwardly from one edge adapted for insertion through the slots of the blank, each cross wall being provided with means partially obstructing the entrance to its own slot adapted to overlie an edge of the blank whereby to retain the cross walls in interlocked relation therewith, substantially as described.

4. A carton in which is comprised a blank folded upon itself to provide double walls and provided further with two sets of slots on opposite sides of the fold, and a cross wall adapted for insertion within the slots of the blank, each cross wall being provided with a slot extending inwardly from an edge which is disposed adjacent the folded edge of the blank, the entrance to the slot in the cross wall being flared in one direction and having an obstruction extending partly thereacross from the opposite side whereby the double walls of the blank when received within the slot of the cross wall may lie beneath said obstruction, substantially as described.

6. A carton in which is comprised a blank folded upon itself to present double walls, there being a cut through the two walls of the blank adjacent the fold and in line with each pair of slots, and a plurality of cross walls adapted for insertion within the slots of the blank, each cross wall having a slot extending inwardly from one edge thereof and provided with means partially obstructing the entrance to said slot, each cross wall, when moved to a final position in the blank, being adapted to present its obstructions through the cut in the double walls of the blank whereby to interlock the cross walls therewith, substantially as described.

14. A carton in which is comprised a plurality of slotted cross walls, and a slotted folded blank adapted to interlock with said cross walls, the slots of the one being obstructed by yielding means adapted to interlock with the other whereby to prevent disassembly of the cross walls from the blank, substantially as described.

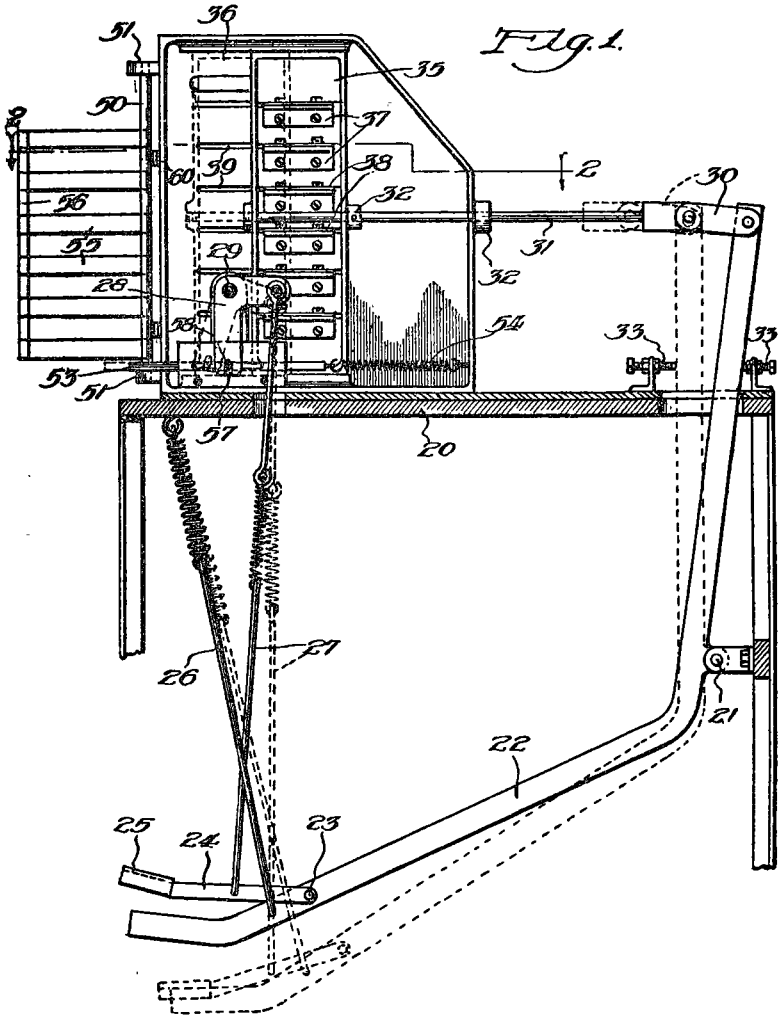
The invention covered by letters patent No. 282,214 refers to alleged improvements in machines for assembling cartons.

The object of the invention is stated as follows:

This invention relates to a machine for assembling loose partitions in a carton such, for example, as is suitable for the reception of eggs. The carton herein set forth consists of a blank which is doubled over along its longitudinal centre and which is provided in each of its two sections with registering transverse slots through which are inserted loose partition members. As these partitions are several in number for each carton, it follows that the operation of setting these partitions in place involves considerable time and effort. It is with a view to expediting this assembly of the partitions in such a carton that the present machine has been designed.

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Figures 1 and 4 of the drawings, reproduced below, will help in understanding the description of the alleged invention as set forth in the specification.



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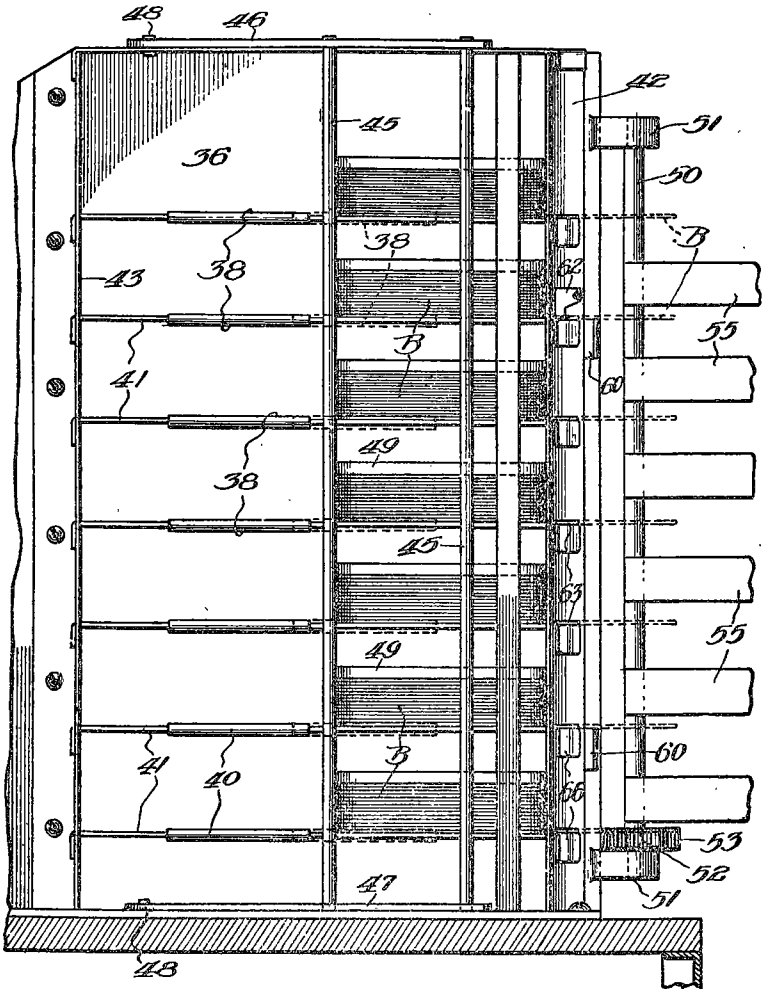
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Fig. 4.



The patentee describes his invention as follows:

The machine which assembles the partition cards within the slots of the carton blank will now be explained. As shown in Fig. 1, it may be mounted upon a bench or table 20 with which is associated a pivotal support 21 for a lever 22 constituting an operating treadle. Pivoted as at 23 to the treadle is a second lever 24 having a laterally extending pedal 25 adapted, when depressed, to engage with the proximate end of the treadle lever 22 whereby to move the same. A spring connection 26 extending between the treadle 22 and the table 20 normally holds the former in an upward position, and by means of a similar spring connection 27, which extends upwardly from the pedal lever 24, this latter element also is normally maintained in an upper position.

The upper end of the spring connection 27 is joined to a bell crank 28 pivoted as at 29 to a fixed part of the machine. A link connection 30 also extends between the upper end of the treadle lever 22 and a pusher



bar 31 slidably mounted within bearings 32 to reciprocate certain parts within the machine. As by means of adjustable stops 33 the movement range of the pusher bar can be definitely controlled. The effect of pressure applied to the pedal 25 is first to transmit movement to the bell crank lever 28, following which the treadle 22 is actuated to reciprocate the pusher bar 31.

A vertically extending head 35 connected to one end of the pusher bar is slidably mounted within the machine frame which includes a vertical wall 36. I provide also upon the pusher head a series of bracket supports 37 spaced equidistantly one above the other. These supports each afford a mounting for a blade 38 which extends laterally of the pusher head and through slots 39 in the frame wall 36. Each blade at its outer end may be bent upon itself as at 40 so as to embrace loosely one edge of a guide plate 41 carried between the respective front and rear walls 42 and 43 which are supported adjacent the ends of the frame wall 36. The front wall is, by preference, not quite perpendicular to the line of movement of the pusher rod 31 and ejecting blades 38 carried thereby.

The specification then deals with the compartments defined by the guide plates (41) upon which may be stacked a quantity of partitions (indicated by letter B on figure 4) and describes a swinging frame affording a partial closure for these compartments; and it continues thus:

Adjacent one side of the front of the machine is a vertically extending shaft 50 the ends of which are rotatively carried within upper and lower bearings 51. Mounted on the shaft near its lower end is a pinion 52 in meshing relation with a rack bar 53. This rack bar is extended rearwardly along one side of the machine, as indicated in Fig. 1, for connection with a spring 54 which tends to draw the bar rearwardly. Extending laterally from the shaft 50 are a plurality of bars 55 one for each card stack on the guide plates 41. The swinging ends of these bars may be connected to a common vertical bar 56. These several bars form, in effect, a gate which is normally held open, as shown in Figs. 1 and 2, by the spring 54. This gate is adapted to be closed, however, in response to movement of the bell crank 28 transmitted through a connection consisting of a slot 57 and pin 58 therein extended laterally from the rack bar.

The specification then explains how the carton blank folded upon itself is maintained in a vertical operative position and how the partition members are projected through each of the slots in the carton blank.

The patentee concludes thus:

The advantages of the present machine are that it facilitates assembly of the partition members into the carton blank. Were this operation to be performed by hand, it would be necessary to handle each of these partitions separately. With the present machine, however, all the partition members are correctly positioned in one operation. This is accomplished expeditiously and always with a uniformity which is sparing of damage to the carton.

All the claims are relied upon; claims 2, 4, 5 and 10, which are typical, may be quoted:

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2. A carton assembling machine in which is combined means for centering a slotted carton adjacent one edge of a partition member adapted to be inserted therethrough, means for advancing the partition into the carton slot, means for holding the carton stationary during such movement, and a single operating means for the two means last mentioned, substantially as described.

4. In a carton assembling machine, the combination of a plurality of ejectors adapted to advance a plurality of partitions, means for holding a carton blank in position for insertion through slots therein of said partitions, the blank being disposed angularly with respect to the line of advance thereof, said holding means permitting the carton blank thereafter to be shifted laterally and be straightened up perpendicularly to the line of partition advancement, and means for operating said partition ejectors simultaneously, substantially as described.

5. In a carton assembling machine, the combination with a frame, of a head slidably mounted therein, means for reciprocating the head, a plurality of ejectors connected for movement with the head and extended laterally therefrom through the frame, guide plates, one for each ejector, providing supports for a plurality of stacked partitions the lowermost of which is displaceable with each forward movement of the ejectors, and means for holding a slotted carton blank in position to receive there-through a plurality of partitions with a single operation of the ejector head, substantially as described.

10. In a carton assembling machine, the combination of a vertical frame wall having horizontal slots therein, a head slidably mounted on one side of said wall, ejector blades carried by the head and extended laterally through said slots to the opposite side of said wall, supports on said latter side of the wall whereon are arranged a plurality of card stacks one in operative relation to each ejector blade whereby the lowermost card in each stack may be displaced thereby, a movable closure for holding all of said stacks in position, and means for retaining a slotted carton blank in position to receive simultaneous insertion of a card from each stack, substantially as described.

The amended statement of claim alleges that the defendants have infringed the rights of the plaintiffs under the said letters patent, as set out in the particulars of breaches, and threatens to continue the said infringement.

The amended particulars of breaches state that the defendants have, since the issue of the letters patent, at their place of business in Montreal, sold, in the ordinary course of their business, egg cartons which constitute an infringement of the said letters patent; that the precise number and dates of the defendants' infringements are presently unknown to the plaintiffs, but that the latter will claim full compensation in respect of all such infringements.

In their statement of defence the defendants deny or say that they are ignorant of the allegations contained in the statement of claim, plead that the letters patent in suit have always been invalid, null and void for the reasons set forth in the particulars of objections and deny having

infringed them; the defendants also deny the particulars of breaches filed by the plaintiffs.

In their particulars of objections the defendants rely on lack of subject-matter, absence of utility and want of novelty.

The defendants aver that the alleged inventions were not new, but were made and used by others before they were made by the applicants for the said patents, as appears from the common knowledge of the art on said dates and from the prior knowledge shown by the patents hereinafter set out and the applications therefor.

The defendants claim that the alleged inventions covered by letters patent Nos. 200,100 and 282,212 were known to the persons to whom the following patents were granted and that they were anticipated and disclosed in the said patents and the applications therefor, to wit:

UNITED STATES PATENTS

|                  |                   |                |
|------------------|-------------------|----------------|
| Stevens .....    | March 10th, 1878. | No. 201,568.   |
| Page .....       | Nov. 9th, 1880.   | No. 234,141.   |
| Ferguson .....   | March 31st, 1896. | No. 557,371.   |
| Barkley .....    | Dec. 20th, 1898.  | No. 616,392.   |
| Batchelder ..... | Oct. 2nd, 1900.   | No. 658,906.   |
| Vernon .....     | Feb. 6th, 1906.   | No. 811,676.   |
| Keys .....       | April 21st, 1908. | No. 885,159.   |
| Wilson .....     | Dec. 1st, 1908.   | No. 905,615.   |
| Carter .....     | Aug. 30th, 1910.  | No. 969,087.   |
| Eddy .....       | Oct. 25th, 1910.  | No. 973,927.   |
| Wilson .....     | Jan. 6th, 1914.   | No. 1,083,512. |
| Tieman .....     | Nov. 24th, 1914.  | No. 1,118,702. |
| Weis .....       | May 25th, 1915.   | No. 1,140,643. |

The defendants claim that the alleged invention covered by letters patent No. 282,214 was known to the persons to whom the following patents were granted and that it was anticipated and disclosed in the said patents and the applications therefor, to wit:

UNITED STATES PATENTS

|                      |                 |                |
|----------------------|-----------------|----------------|
| Damren .....         | March 18, 1890. | No. 423,415.   |
| Bates .....          | Nov. 3, 1896.   | No. 570,621.   |
| Williams .....       | Dec. 29, 1896.  | No. 573,947.   |
| Herr .....           | July 13, 1897.  | No. 586,519.   |
| Weis & Starman ..... | March 3, 1908.  | No. 880,845.   |
| Schleicher .....     | March 17, 1914. | No. 1,090,655. |

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The defendants further state: that the claims in the letters patent in suit claim more than the applicants invented; that the specifications and claims do not set forth clearly the improvements and are not limited to the improvements on which the applicants base their invention; that the alleged inventions were not useful; that the specifications contain more than was necessary for obtaining the end for which they were made and that the additions were wilfully made for the purpose of misleading; that the specifications contain less than was necessary for obtaining the end for which they were made and that the omission was wilfully made for the purpose of misleading.

I shall first deal with patents Nos. 200,100 and 282,212, both of which relate to egg cartons. When I am through with them, I shall turn my attention to patent No. 282,214, which, as we have seen, concerns an entirely different subject, viz., a machine for assembling cartons.

The old type of egg carton, which has been on the market for a great number of years, is like a shoe box with a kind of honeycomb cell which is put into the box. The cells are square and consequently do not exactly fit the eggs.

The egg cartons of the defendants as well as of the plaintiffs are quite different from the old carton of the shoe-box type. They have a greater strength both in a vertical and in a lateral direction; the compartment cells are not square as in the old carton but are more or less a sort of tapered receptacle which offers more protection to the egg.

The body member of the carton is formed from a blank folded upon itself along its longitudinal centre line so as to provide a centre partition wall and folded on each side of this centre partition wall so as to provide the bottom of the two sections of the carton, the longitudinal side walls and the cover extending inwardly from each side wall. In the centre wall and the side walls there are slots through which the partitions or cross walls are inserted.

The type of collapsible or knock-down carton for eggs, comprising a foldable body member and cross walls or partitions is not new; it is disclosed in the following patents: U.S. patent No. 557,371 issued to William H. Ferguson on March 31, 1896 (exhibit P3); U.S. patent

No. 811,676 issued to Frederick R. Vernon on February 6, 1906 (exhibit P5); U.S. patent No. 885,159 issued to Benjamin Keys on April 21, 1908 (exhibit P7); U.S. patent No. 905,615 issued to Michael H. and Leonard B. Wilson on December 1, 1908 (exhibit P8); U.S. patent No. 969,087 issued to James H. Carter on August 30, 1910 (exhibit P9); U.S. patent No. 973,927 issued to Charles A. Eddy on October 25, 1910 (exhibit P11); U.S. patent No. 1,083,512 issued to Leonard B. Wilson on January 6, 1914 (exhibit P12); U.S. patent No. 1,118,702 issued to George Tieman on November 24, 1914 (exhibit P13).

It was contended on behalf of plaintiffs that new features comprised in patent No. 200,100 consisted in the facility of assembling the carton components and in the fact that the eggs are suspended and are thus less exposed to shock and breakage. These features, in my judgment, are found in the U.S. patents Nos. 905,615, 1,083,512 and 1,118,702 above mentioned.

With regard to patent No. 282,212, the proof discloses that the only substantial difference between it and patent No. 200,100 lies in a little projection at the top of the slot in the cross wall adapted for insertion within the slots of the blank so as to prevent the disassembly of the cross walls and the blank. I do not believe that the addition of this projection required the exercise of inventive ingenuity; it is merely the result of mechanical ability or, in other words, a workshop improvement.

I may say incidentally that, had I reached the conclusion that patents Nos. 200,100 and 282,212 were valid, I would not have felt disposed to declare that they had been infringed by the defendants. The defendants' carton, which like the plaintiffs' carton, contains the characteristics found in the anticipatory patents aforesaid, includes in addition features which are not found in the plaintiffs' carton and are not covered by patents Nos. 200,100 and 282,212. Seeing the conclusion to which I have arrived I do not think that dwelling upon these additional features at length would serve any useful purpose. It will suffice to note (*inter alia*) that the defendants' carton, when it is shipped to the purchaser, is complete and ready for use. In this connection I may perhaps quote an extract from the deposition of Leopold Limoges, manager of L. Limoges et Compagnie, wholesale provision dealers, a witness heard

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on behalf of defendants, who declared he had no interest whatever in the issue of the present case; at page 16 of his deposition we find the following remarks:

R. Ce qui m'a fait adopter la boîte Cormier, c'est que nous recevions la boîte Cormier faite, rendue en magasin toute complétée, faite, tout monté.

D. Voulez-vous expliquer ce point-là? Je vous réfère à la même boîte sous forme pliée; je comprends que c'est sous forme pliée que vous la recevez?

R. Oui.

D. Expliquez donc à la Cour ce que vous venez de dire?

R. Pour faire la boîte Cormier, on n'a pas à la faire, elle est toute faite.

La Cour:

D. Vous les receviez toutes faites?

R. Oui. C'est-à-dire pliées.

D. Pliées comme elles sont là?

R. Oui. Et je n'ai pas d'opération à faire. Je prends la boîte Cormier, je l'ouvre. Elle est faite en arrivant je suis prêt à déposer mes œufs dedans, dès la minute que je la reçois. Je n'ai pas besoin d'avoir d'aide additionnel pour préparer la boîte.

Reference may also be had, in this connection, to the deposition of Raymond A. Robic, professional technician graduate of the Montreal Technical School, member of the Association of Civil Engineers of France, president of the Patent Institute of Canada and director of technics of the firm of Marion et Marion, patent solicitors of Montreal, called as witness by defendants; at pages 105 (last line) and 106, Robic says:

R. Voici les parois—sauf une couple que je ne peux pas tenir—qui sont toutes couchées. Maintenant, dès qu'on lâche la boîte, il faut qu'elle s'écarte et c'est un écartement qui rend inévitable la position transversale que viennent prendre les cloisons par rapport au sens longitudinal de la boîte.

D. Cette tendance à s'ouvrir ou plutôt cette ouverture partielle offre-t-elle un avantage au point de vue de l'utilisation de ces boîtes?

R. Sans doute.

D. Cela nécessite moins de manipulation?

R. Cela nécessite énormément moins de manipulation. Il s'agit pour l'opérateur ou plutôt pour celui qui doit mettre les œufs dans la boîte de la prendre dans le magasin dans lequel elle se trouve empilée pardessus les autres et en la prenant il est immédiatement prêt à mettre les œufs qu'elle doit contenir dans chacune de ses cellules, dans chacun de ses compartiments.

The defendants' carton is completely erected; the cross walls or partitions are inserted through the slots of the side walls as well as of the longitudinal centre wall; it merely needs being unfolded to be ready to receive the

eggs. In the plaintiffs' carton the cross walls are only inserted through the longitudinal centre wall and, when the carton is unfolded, the cross walls have to be inserted through the side walls. The use of the defendants' carton saves to the egg dealer time, labour and cost; as Robie stated: "cela nécessite énormément moins de manipulation"; or as Limoges, speaking of the Cormier box, said: "Elle est faite, en arrivant je suis prêt à déposer mes œufs dedans, dès la minute que je la reçois. Je n'ai pas besoin d'aide additionnel pour préparer la boîte." A summary examination of the plaintiffs' and defendants' cartons folded will be sufficient to demonstrate the advantage of the Cormier carton over the plaintiffs' carton in this respect.

I shall now turn my attention to patent No. 282,214 concerning the machine for assembling egg cartons and deal with the question of anticipation. In their amended particulars of objections the defendants claim that the alleged invention covered by the said patent was disclosed and anticipated in seven patents and the applications therefor. At the trial the defendants only relied on three of these anticipatory patents, namely, Damren No. 423,415, Herr No. 586,519 and Schleicher No. 1,090,655.

The Damren patent relates to a machine for making paper boxes; the object of the invention is to provide a machine for automatically pasting the ends of the box and applying them to the body. The specification states that the principal features of the machine are "an open-ended receptacle for containing the box end pieces, a form for containing the box-body having a rearward recess or opening, a slide or carrier having an extensible end reciprocating by the open end of said receptacle and adapted to convey the box end from its receptacle to said form, an anvil-block above said form, cam mechanism for causing said anvil-block and form to press against each other to secure the end to the body, a paste-reservoir, and a row or series of fingers having a reciprocating motion from the paste to the surface of the end piece."

After a careful examination of this patent I may say that I have reached the conclusion that the Damren patent cannot be considered an anticipation of the plaintiffs' patent No. 282,214; it does not disclose all the essential features of the plaintiffs' invention.

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The second patent relied upon by defendants as anticipatory is that of Herr, No. 586,519, styled "Means for making cell cases." The invention relates to means for making cell cases in which eggs are packed for transportation. As in the case of the Damren patent I do not think that the Herr patent discloses all the essential features of patent No. 282,214 and can be looked upon as an anticipation.

There remains the Schleicher patent, No. 1,090,655, for a crate or rack making machine. The specification states that the invention pertains to crate or rack making machines and more specifically to machines for assembling strips of wood to produce racks such as used to hold bottles. It is hardly necessary to note that the Schleicher machine is double and that it is sufficient to consider one side of it for the purpose of comparison with the plaintiffs' machine.

The patentee describes his invention thus:

The machine stated in general terms may be said to comprise two heads or members, having a relative movement toward and from each other, said heads carrying means adapted to position and hold the main notched bars or members of the crate, combined with means for holding the cross strips or rods, preferably magazine holders, and means for forcing said strips into the notches of the bars, suitably timed mechanism being employed to operate the various parts and to effect the discharge of the assembled racks.

As in the case of the Benoit patent there is in the Schleicher machine a head slidably mounted carrying means adapted to position and hold the main notched bars or members of the crate, means for holding a stack of cross strips, means for ejecting the cross strips and forcing them into the notches of the bars or members and a mechanism to operate the various parts of the machine. After a careful comparison of the two machines I am satisfied that the Schleicher machine includes the essential features found in the plaintiffs' machine.

It is true that the Schleicher patent applies to wooden crates or racks while the plaintiffs' patent relates to cardboard boxes or cartons. I do not think that the difference of material has any importance. The substitution of material constitutes merely a new use of a known contrivance without any inventive ingenuity and, to my mind, it does not form proper subject-matter for a patent.



In order that a new use of a known device may constitute the subject-matter of an invention, it is necessary that the new use be quite distinct from the old one and involve practical difficulties which the patentee has by inventive ingenuity succeeded in overcoming; if the new use does not require any ingenuity but is in manner and purpose analogous to the old use, although not exactly the same, there is no invention; *Harwood v. Great Northern Railway Company* (1); *Penn v. Bibby* (2); *Blakey & Co. v. Latham and Co.* (3); *Morgan and Co. v. Windover and Co.* (4); *Gadd and Mason v. The Mayor, &c., of Manchester* (5); *Riekmann v. Thierry* (6); *Acetylene Illuminating Co. Ltd. v. United Alkali Co. Ltd.* (7); *Bonnard v. London General Omnibus Company* (8).

The remarks of Lord Lindley in *Gadd and Mason v. The Mayor, &c., of Manchester (ubi supra)* are interesting and may conveniently be quoted (p. 524):

These cases, and many others which might be cited, establish the following propositions applicable to the present case, viz.: 1. A patent for the mere use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties, is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no invention; no manner of new manufacture within the meaning of the Statute of James. 2. On the other hand, a patent for a new use of a known contrivance is good and can be supported if the new use involves practical difficulties which the patentee has been the first to see and overcome by some ingenuity of his own. An improved thing produced by a new and ingenious application of a known contrivance to an old thing, in a manner of new manufacture within the meaning of the Statute.

In the case of *Riekmann v. Thierry (ubi supra)* Lord Halsbury expressed the following opinion (p. 115):

My Lords, it appears to me that there is no invention in applying to eyelets either celluloid or any other similar material. Whether there is or is not invention such as will support a patent is a question of fact and degree, and the state of facts and degree in one case can never be any guide in another. It is certainly quite true that mere simplicity will not prevent there being invention. It is often justly urged in favour of a patent that its very simplicity is the merit of the invention. Sir George Jessel, in *Hinks and Son v. The Safety Lighting Company*, L.R. 4 Ch. D. 607, pointed out in his judgment that the substitution of a flat wick for a round one might well be, and was in that case, a sufficient invention to support a patent, where, as he held in that case, the round wick patented by a former inventor was not available for any useful purpose,

(1) (1865) 35 L.J.Q.B. 27.

(2) (1866) L.R. 2 Ch. App. 127.

(3) (1889) 6 R.P.C. 184.

(4) (1890) 7 R.P.C. 131.

(5) (1892) 9 R.P.C. 516.

(6) (1897) 14 R.P.C. 105.

(7) (1905) 22 R.P.C. 145.

(8) (1921) 38 R.P.C. 1.

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whereas the flat wick had supplied a great want, and had worked to a great extent with a useful result. On the other hand, the Court of Queen's Bench in *Brook v. Ashton*, 8 Ell. & B. 478, decided that there was no novelty in applying revolving beaters or burnishers by certain machinery which had been applied to cotton and linen, though never before to woollen threads, though the Court assumed that the effect produced on woollen thread was different from that produced on cotton or linen, and was new and beneficial.

I refer to these two cases only as illustrative of the proposition that no smallness or simplicity will prevent a patent being good, while mere novelty of manufacture, or usefulness in the application of known materials to analogous uses, will not necessarily establish invention within the meaning of the patent laws.

Perhaps I may cite a passage from the observations of Lord Chelmsford in the case of *Penn v. Bibby* (p. 135) :

The third and last question raised here, was upon the finding that the invention was the proper subject-matter of a patent.

To this it was objected that the finding is erroneous, because the alleged invention was merely a new application of an old and well-known thing. It is very difficult to extract any principle from the various decisions on this subject which can be applied with certainty to every case; nor, indeed, is it easy to reconcile them with each other. The criterion given by Lord Campbell in *Brook v. Astor* (8 E. & B. 485) has been frequently cited (as it was in the present argument), that a patent may be valid for the application of an old invention to a new purpose, but to make it valid there must be some novelty in the application. I cannot help thinking that there must be some inaccuracy in the report of his Lordship's words, because, according to the proposition, as he stated it, if the invention is applied to a new purpose, there cannot but be some novelty in the application. Lord Chief Justice Cockburn approaches much nearer to the enunciation of a principle, or at least of a rule for judging these cases, in *Harwood v. Great Northern Railway Company* (2 B. & S. 208), where he says, "although the authorities establish the proposition that the same means, apparatus, or mechanical contrivance, cannot be applied to the same purpose, or to purposes so nearly cognate and similar as that the application of it in the one case naturally leads to application of it when required in some other, still the question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent."

In every case of this description one main consideration seems to be, whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject, but to require some application of thought and study.

Reference may also be had with profit to the remarks of Lord Dunedin in the case of *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills* (1), relative to the question of anticipation; at page 275, he said:

The objections, as already stated, are based on want of novelty and subject-matter, that is, want of invention, and also of anticipation. It

will be convenient to examine anticipation first, as much of the argument on want of invention is bound up with what was disclosed by the patents which are said to anticipate. The test of anticipation has been dealt with in many cases. They were enumerated in the very recent case of *British Thomson Houston Co. v. Metropolitan Vickers Electrical Co.* (45 R.P.C. 1). A passage in the judgment (*ibid.* 23) runs thus: "In *Otto v. Linford* (1882) 46 L.T. 35, 46) Holker L.J. expresses himself thus: 'We have it declared in *Hill v. Evans* (1862, D.F. & J. 288) as the law, and it seems very reasonable, that the specification which is relied upon as the anticipation of an invention must give you the same knowledge as the specification of the invention itself.' And in *Flour Oxidising Co. v. Carr & Co.* (1908, 25 R.P.C. 428, 457, Parker J. (afterwards Lord Parker) says: 'Where the question is solely a question of prior publication, it is not, in my opinion, enough to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specification contains clear and unmistakable directions so as to use.' And the remarks of Lord Dunedin in *Armstrong, Whitworth & Co. v. Hardcastle* (1925, 42 R.P.C. 543, 555) are quite in line with these dicta." In the same case the test is stated (45 R.P.C. 1, 22), and turning the particular instance to the general may be expressed thus: Would a man who was grappling with the problem solved by the patent attacked, and having no knowledge of that patent, if he had had the alleged anticipation in his hand, have said, 'That gives me what I wish.?'

At page 281 Lord Dunedin, dealing with the questions of anticipation and analogous user, expressed himself as follows:

Having these views, it is clear that, in their Lordships' opinion, the learned trial judge misdirected himself. He arrived at the opinion that the invention was old by making a mosaic of other and prior descriptions. He also, in their Lordships' opinion, took quite an erroneous view as to an analogous user. Analogous user is what its name denotes, something which has to do with user. He has applied the doctrine not to things used but to things described. But as to things only described, there must either be anticipation or not. And anticipation must be judged by the canons already mentioned. Does the man attacking the problem find what he wants as a solution in the prior so-called anticipations? The distinction between anticipation by prior description and by prior user is well understood. The doctrine of analogous user only applies to cases as to things in actual use. The leading case is the fishplate case: *Harwood v. Great Northern Ry. Co.* (1865, 11 H.L.C. 654). That dealt with the question whether there could be a good patent for a fishplate on a railway where the same fishplate had been used on a bridge. Blackburn J., one of the consulted judges, who although he differed on the ground that the thought there was a real difference between the two fishes, yet concurred with all the others as to the law, states the problem thus (*Ibid.* 667): 'In every case arises a question of fact, whether the contrivance before in use was so similar to that which the patentee claims that there is no invention in the differences.' The contrivance, be it observed, must be a contrivance in use, not one merely described. Then there was the case of *Morgan & Co. v. Windover & Co.* (1890, 7 R.P.C. 131), the *C-spring* case. Throughout the judgment analogous user is only

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applied to a known thing. In the words of Lord Halsbury (*Ibid.* 134): 'The application of well known things to a new analogous use is not properly the subject of a patent.'

See also *Canadian General Electric Co. Ltd. v. Fada Radio Ltd.* (1); *British Celanese Ltd. v. Courtaulds Ltd.* (2); Terrell on Patents, 8th ed., p. 71; Fox, Canadian Patent Law and Practice, pp. 78 *et seq.* and pp. 113 to 116; Nicholas on Patent Law, p. 23.

Questions of invention and anticipation are questions of fact. No general rule can be laid down to determine whether any particular instance involves invention or not or whether any prior publication constitutes an anticipation or not. Each case must be determined on its own merits. After carefully perusing the evidence and the argument of counsel, I believe that the specification of the Schleicher patent was liable to disclose to Benoit the material elements and features found in patent No. 282,214.

I may state in passing that if I had decided that patent No. 282,214 was valid, I would have felt inclined to declare that the defendants' machine constitutes an infringement of the said patent. Although to a certain extent differently constructed, being more effectual and producing a complete carton instead of merely inserting partitions through the slots of a blank, it contains the same characteristics as those set forth in the said patent and reproduced in the plaintiffs' machine.

For the reasons hereinabove mentioned, I have reached the conclusion that the letters patent for invention Nos. 200,100, 282,212 and 282,214 are invalid, null and void as between the parties hereto and that the plaintiffs' action must accordingly be dismissed.

The defendants will be entitled to their costs against plaintiffs.

*Judgment accordingly.*

BETWEEN :

J. R. SHORT MILLING COMPANY } PLAINTIFF;  
 (CANADA) LIMITED ..... }

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 —

AND

GEORGE WESTON BREAD AND } DEFENDANT.  
 CAKES LIMITED ..... }

AND

J. R. SHORT MILLING COMPANY } PLAINTIFF;  
 (CANADA) LIMITED ..... }

AND

CONTINENTAL SOYA COMPANY } DEFENDANTS.  
 LIMITED AND GEORGE WESTON }  
 BREAD AND CAKES LIMITED. }

*Patent — Infringement — Invention — Subject-matter — “Obvious” — Anticipation — Divisional applications — Process patent — Patent Act, 25-26 Geo. V, c. 32, s. 40 (1) — “Substance” prepared or produced by a “chemical process” — “Intended for food” — Claims for product manufactured and for process of manufacturing such product.*

The actions are for alleged infringement of four different patents owned by the plaintiff, the invention in which relates to a substance of vegetable origin, derived from the soy-bean, for bleaching flour, particularly in bakeries, while mixing dough preparatory to the making of bakery products.

The Court found that there is invention in the bleaching agent disclosed by the patentee, and the process or processes of producing the same, and that the same had not been anticipated.

The Court further found that the defendant Continental Soya Company Limited had infringed plaintiff’s patents by manufacturing and selling a bleaching agent called Snowtex and that Geo. Weston Bread and Cakes Limited had infringed by using the substance Snowtex in its bakeries.

*Held:* That for a thing to be “obvious” it must be something that would directly occur to some one who was searching for something novel, a new manufacture or whatever it might be, without the necessity of his having to do any experimenting or research, whether the research be in the laboratory or amongst literature.

2. That in order to sustain the defence of anticipation the latter invention must be described in the earlier publication that is held to anticipate it; it must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own.
3. That if patents are granted on divisional applications directed by the Patent Office none of them shall be deemed invalid, or open to attack, by reason only of their numbers.

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4. That the bleaching material prepared by the processes described in the plaintiff's patents was not prepared or produced by a chemical process within the meaning and intendment of s. 40 (1) of the Patent Act; that such bleaching material is not a "substance" to which s. 40 (1) of the Patent Act applies.
5. That the patentee herein is entitled to claim not only for the product which is a new manufacture, but also for the processes by which it is made.
- ACTION by plaintiff herein to have it declared that four patents owned by it are valid and have been infringed by defendants.

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

*C. F. H. Carson, K.C.* for plaintiff.

*C. H. A. Armstrong, K.C.* for Geo. Weston Bread and Cakes Limited.

*E. G. Gowling and M. C. Holt* for Continental Soya Company Limited.

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

THE PRESIDENT, now (November 9, 1940) delivered the following judgment:

These two actions, which were heard together, relate to alleged infringements of four different patents acquired by the plaintiff by assignment. It will be convenient hereafter to refer to the defendant Continental Soya Company as "Continental," and to the defendant George Weston Bread and Cake Company Ltd. as "Weston." In two of the patents in suit one Haas was the inventor, while in the remaining patents Haas appears as joint inventor along with one Bohn. It will be convenient to refer to these inventors by the name of Haas only. Broadly, the inventions here relate to a substance, of vegetable origin, for bleaching flour, particularly in bakeries, while mixing dough preparatory to the making of bakery products. Whenever I refer to "flour" it will be understood that I have reference to wheat flour.

The bleaching agent which Haas claims to have discovered, a bleaching enzyme, is derived from a natural vegetable source, particularly and preferably from the soy-

bean, which, when prepared according to his disclosed methods, and when incorporated in unbleached or lightly bleached flour at the flour mills, or at the bakery when making a batch of dough preparatory to the making of bread, has the effect, in the presence of heat and moisture, of whitening the bread made from such flour or dough. This bleaching agent decolorizes carotin, a yellow pigment found in grains, vegetables, seeds, plants and the like. The carotin content of flour was something that had long been known. The incorporation of a bleaching agent in the dough at the bakery eliminates the time and expense of a separate bleaching operation at the mill, hitherto the usual practice, thus enabling flour to be sold unbleached, in which condition it is said to be best fitted to keep well in storage; and the employment of a flour bleaching agent in the bakery is claimed to have the further advantage that the baker is enabled to introduce it into the batch of dough in the proportion his experience deems the most desirable for his purposes, and this, it is claimed, avoids a lack of uniformity in the bleaching of flour, which is liable to occur when flour is bleached at the mill by the processes hitherto known and employed. It is claimed also that the bleaching agent in question eliminates certain other difficulties and objections incident to the use of chemical bleaching agents, the flour bleaching agents hitherto commercially known and employed.

The bleaching of flour came into practice in the early years of this century, prior to which time flour was sold by flour mills to the baking trade in an unbleached state. It had long been recognized that freshly milled flour required a maturing period before being used for bakery purposes in order to effect some degree of bleaching, and to develop its maximum baking qualities, and for that reason it was the practice to place in storage large stocks of milled flour, and wheat as well, which necessitated the provision of substantial storage space, a tie-up of capital for varying periods, thus incurring additions to milling costs. The results obtained from the maturing of flour in storage would vary from one crop year to another, and according to the type of wheat from which it was milled, the region of production, and other causes, and generally such results were variable and unsatisfactory. As already stated wheat contains carotinoid pigments which impart

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their colour to the ground flour, and to the baked loaf of bread, giving the latter a creamy or yellowish colour, and while a limited natural bleaching occurs while flour is in storage, due to the oxidation of the carotin, yet this is not sufficient to give the desired whiteness to bread baked therefrom, and particularly in the case of flour milled from some wheats. To whatever causes attributable, the lack of uniformity in the colour of bread came to be objectionable to bakers, because their patrons were coming to demand not only a white loaf of bread, but also uniformity in that colour.

Soon after the beginning of this century the matter of the bleaching of flour engaged the interest and study of millers and this resulted in the installation of bleaching systems in flour mills, primarily designed for the whitening of flour. The process then adopted was the chemical bleaching of flour, that is artificial bleaching by the use of chemical re-agents, and in due course this process of flour bleaching was widely practised in European countries, in the United States, and later in Canada. Four different chemical processes came to be well known and commercially employed for bleaching flour, and these are mentioned in the Specifications in question here. The first bleaching agent to be employed extensively on this continent, in the United States, was known as the "Alsop" process, but this process was held to have been earlier introduced in England where it was known as the "Andrews" process. Nitrogen peroxide was the chemical used in this bleaching process. Another chemical bleaching process which came into commercial use was one introduced in the United States by the Industrial Appliance Company, known as the "Beta Chlora" process, the chemical employed being chlorine, containing sometimes a small amount of nitrosyl chloride. Later, a third flour bleaching process came into use, known as the "Agene" process, the chemical employed being nitrogen trichloride, and, I was told, it largely displaced the other two processes just mentioned. I understand the Agene process is used to-day quite extensively by flour mills. The fourth process, a still later development, was known as "Novadel," the chemical employed in this process being benzoyl peroxide, and this bleaching agent entered into the flour at the mill in powder form, whereas in the other three pro-



cesses mentioned the bleaching agent was introduced into the flour in the form of gas, at the mill also. Each of these four chemical processes of flour bleaching had their disadvantages, it is alleged, and these disadvantages are mentioned by Haas in some, if not all, of his Specifications. It is to be remembered that in all the four chemical processes mentioned the bleaching agent was introduced into the flour at the mill, and in no case by the baker in his bakery, in the baking of bread.

Evidence was introduced to show that the bleaching of flour by chemical agents, in the form of gas or powder, when first introduced, met with more or less opposition in many countries and became the subject of considerable controversy. Investigations by public authorities into the use of such bleaching agents followed. In some instances the employment of certain chemicals for flour bleaching purposes was prohibited, or regulated, for a time, but apparently opposition to the use of chemical agents gradually diminished or entirely ceased. In point of fact the chemical bleaching of flour is still quite general in Canada and the United States, and elsewhere probably, and, I think, it was said that about fifty per cent of flours used in Canadian and American bakeries are still chemically bleached. Chemical bleaching agents provide one medium for the bleaching of flours and the precise extent of their use as compared with the particular bleaching agent disclosed by Haas is of no real practical consequence here. All of them are being used, in substantial quantities, and in fact unbleached flours are still being sold and used in substantial quantities.

It will be convenient now to refer to the Specifications of the several patents in question, and it will be necessary to do so at some length, in some instances at least, in order to present a fairly complete and accurate statement of that which Haas describes and claims as inventions. The first patent to be mentioned is that numbered 347,252, issued on January 1, 1935, the same being a reissue of patent No. 319,123, which was applied for in February, 1929, and issued in January, 1932. After stating that the invention relates "to a process of bleaching, and more particularly to a process of bleaching flour in the presence of warmth and moisture," and after describing the principal processes hitherto commercially employed for bleaching flour

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together with their disadvantages and difficulties, which are the chemical processes which I have already mentioned, the Specification proceeds to describe the invention thus:

The present invention seeks to eliminate these difficulties and complex treatments by the provision of a bleaching agent that is cheaply and readily prepared; that is easily obtained in the raw state; that in no way affects the flour except to decolorize the carotin therein; that possesses food value; that is efficient and satisfactory in use in that it may be and preferably is incorporated in the flour when the dough is mixed preparatory to baking the bread, thereby eliminating the time and expense of a separate bleaching operation.

This bleaching agent is entirely of vegetable origin and is probably itself an enzyme or enzyme-like substance. It decolorizes the yellow carotin which gives unbleached flour its characteristic yellowish colour. It contains an abundance of active bleaching or carotin-removing enzymes. The bleaching property of the agent is destroyed at the temperature of boiling water. It acts rapidly at temperatures between 40 and 50 degrees centigrade, and fairly rapidly at room temperature.

This process of bleaching flour, or more exactly the flour in the form of dough, has a number of advantages. In the first place, the use of the above mentioned chemicals, with their disadvantages, is avoided. Secondly, the danger of over-treatment of the flour or dough is non-existent since the sole active principle or bleaching agent employed is an enzyme obtained from a vegetable source, and the use of an excess of several times the amount necessary to bleach the flour will cause no damage whatever, although, if the soy-bean is used as the source of the enzymic agent, large excessive amounts will give an undesirable bean flavour. Similarly, the colour of the soy-bean flour will begin to become noticeable since the bleaching action operates selectively to whiten the unbleached wheat flour but does not whiten the bean flour. This is also true as to the flavour and colour imparted by other plant material which may be used in lieu of the soy bean. Thirdly, the baking characteristics of the flour are not changed. Thus the baker can obtain any further development of his dough and gluten he desires by use of a yeast food, and/or high speed mixing. The latter is the common practice in this country, and our process is especially adapted thereto. Fourthly, flour can be manufactured and sold unbleached, in which condition it is best fitted to keep well in storage.

The most practical and potent source of this enzymic principle of bleaching agent is the soy bean, although it is understood that the invention contemplates the use of enzymic vegetable material as a carotin decolorizing agent, from whatever source such material may be derived, as for example, from other equivalent members of the bean family. Numerous plants contain the enzymic agent obtainable therefrom in substantially the same manner as described herein in connection with the soy-bean. One method of obtaining this enzymic material in an active state and by a process commercially practicable, is by treating soy-beans as follows:

Soak the beans for twelve to forty-eight hours in water of approximately room temperature, using enough water to cover the beans at all times. At the end of the steep period, the water is drained off and the beans are well washed with two or three changes of fresh water. At this point the beans have swelled to about three times their original size. After draining off the wash water, the beans are ground in a mill which

reduces them to a paste or sludge. This paste or sludge is thoroughly mixed with a cornstarch or corn flour or other cereal flour which has preferably been gelatinized to increase its water absorbing capacity.

This particular treatment of the soy-beans was referred to as the "wet process," as distinguished from what is called the "dry process" and which is described in another patent. The Specification then proceeds:

The resulting mixture is a rather dry, friable mass. This mass is dried in vacuo at a temperature not exceeding 60° C. in order not to injure the enzyme, and it is then ground to a fine powder. If an amount of cereal flour which is to be mixed with the ground soaked soy beans is used which corresponds to two parts of cereal flour and one part of soy beans by weight before soaking, the resulting preparation will be of such strength that when used in a bread dough to the amount of 1-2% of the flour, a practically complete decolorization of the characteristic yellow colour of unbleached flour is obtained. No precautions for proper use are necessary.

Other methods of manufacture are quite feasible. The soaked soy beans (or other source of the enzymic material) may be ground to a paste and dried at a low temperature in vacuo, and then ground to a powder. By another method, the soaked soy beans may be ground with additional water, subjected to filtration through cloth to remove the fibre, and the filtrate, which has the appearance of cow's milk, dried at a low temperature and ground to a powder in which dry condition it will not spoil while in storage. It should be noted that the drying treatment does not destroy the bleaching principle which is in the filtrate. In lieu of drying the filtrate, the milk itself may be added directly to the mixture forming a dough batch. The invention is not limited to a specific method of obtaining the active principle, but includes any process by which the active principle which is apparently an enzyme, may be obtained. A necessary precaution in any method of preparing the product is to keep the temperature at all times below about 60° C. in order that the active principle or enzyme may not be injured or destroyed. The ground material or powder prepared from the beans or equivalent plant source by methods such as those above described, may be designated as bean meal or vegetable flour.

This bleaching agent is only active in the presence of warmth and moisture, and hence the ground preparation containing it may be mixed with the flour in a dry state at any time after the flour is made and the mixture stored indefinitely without deterioration. Or the bleaching material may be stirred into the water used to make the dough, or it may be even dumped into the dough mixer on top of the other ingredients before mixing has started, with good results. Extra water should be added to the dough at the rate of 2/3 lbs. of water for each pound of the powdered material containing the active principle made as described above. This makes the use of the product economical.

The specification discloses the bleaching agent as being best obtained from the soy bean and as being employed to bleach flour, but these disclosures are by way of example only and it is understood that it is immaterial from what source the enzyme-like principle or bleaching agent is derived, provided the equivalent plant contains the enzymic bleaching material which may be used without subjecting the plant to processes more involved than those hereinbefore described. It is also understood that the agent may be used to decolorize carotin in other relations.

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The final paragraph of the Specification may be stated because it may be of some legal consequence in certain events:

Claims to the bleaching agent and to the process of preparing the same, as distinguished from the process of bleaching flour while preparing the dough, are presented in the copending application for patent, Serial 377,916, filed May 18, 1931 (Patent No. 326,416, patented September 27, 1932).

The Claims of this patent alleged to be infringed, by the defendant Weston alone, are those numbered 1 to 6 inclusive, 10 to 13 inclusive, 17 to 23 inclusive, 25, 26 and 27, and those Claims are said to be infringed in that Weston used the method of bleaching flour and the process of making bread set forth in such Claims; and infringement is also alleged of Claims numbered 7, 8, 14, 15 and 24, in that Weston has made and sold bread of the kind set forth in such Claims. Of the first group of Claims it will, I think, suffice to mention Claims 1, 4, 13, 23, 24, 25 and 27, and they are as follows:

1. The process of making bread characterized by preparing the dough for baking and simultaneously whitening the flour thereof, which process consists in incorporating with unbleached flour in a dough batch a bleaching agent consisting of bean material in amounts of not more than two-thirds of one per cent of the mixture of combined unbleached flour and bean material, then fermenting the dough at a moderate temperature, and baking it.

4. The process of making bread characterized by preparing the dough for baking and simultaneously whitening the flour thereof, which process consists in incorporating with unbleached flour a bleaching agent consisting solely of material from vegetable origin in amounts of not more than two-thirds of one per cent of the total amount of unbleached flour and bleaching agent, then making a dough batch of the mixture, fermenting the dough at a moderate temperature, and baking it.

13. The process of producing bread, white in colour, which comprises adding to unbleached flour or lightly bleached flour a bleaching medium consisting solely of vegetable material containing an active carotin-removing enzyme and effecting the bleaching while the dough is being prepared for baking.

23. The process of preparing improved bread dough white in colour which consists in adding to dough materials including unbleached or slightly bleached flour and other ingredients of a dough batch, a small quantity of carotin decolorizing matter derived from a plant of the bean family, and subjecting the whole to a dough mixing process.

24. Bread, substantially white in colour, made of unbleached flour or lightly bleached flour, to which has been added a small quantity of bleaching material derived solely from a member of the bean family and containing an active carotin-removing enzyme.

25. The process of bleaching flour which process comprises incorporating with the flour to be bleached a carotin decolorizing agent consisting solely of vegetable material, both said agent and the flour being

sufficiently dry to prevent deterioration of the combination during storage, and then mixing with a portion of such combination the necessary moisture and other ingredients required to form a dough batch.

27. The process of making bread from flour having the yellowish tint characteristic of the presence of carotin and simultaneously bleaching the dough comprising incorporating with such unbleached flour and other ingredients to form a dough batch a carotin decolorizing vegetable material having an active bleaching enzyme, and subjecting the dough batch and decolorizing material to high speed mixing.

The second group of Claims, said to be infringed by Weston, are as follows:

7. Bread, substantially white in colour, made of unbleached flour or lightly bleached flour, to which has been added a small quantity of a bleaching agent solely derived from vegetable matter in the form of flour and containing an active carotin-removing enzyme.

8. Bread, substantially white in colour, made of dough comprising unbleached or lightly bleached flour to which one-third per cent. to 2 per cent of bean flour containing an active carotin-removing enzyme has been added.

14. Bread, substantially white in colour, made of unbleached flour or lightly bleached flour, to which has been added a small quantity of bleaching material derived solely from vegetable matter and containing an active carotin-removing enzyme.

15. Bread, substantially white in colour, made of dough comprising unbleached or lightly bleached flour to which one-third per cent. to two per cent. of bean material containing an active carotin-removing enzyme has been added.

24. Bread, substantially white in colour, made of unbleached flour or lightly bleached flour, to which has been added a small quantity of bleaching material derived solely from a member of the bean family and containing an active carotin-removing enzyme.

Patent No. 347,251 relates to improvements in an "Agent for Bleaching Flour and Process of Preparing the Same," and was granted on January 1, 1935, being a reissue of patent No. 326,416, granted in September, 1932, on an application made in May, 1931. This Specification contains substantially all the descriptive matter appearing in the first mentioned patent and that need not be repeated. The Specification however points out that the washing and soaking of the soy-beans, as directed in patent No. 347,252, can be dispensed with and it discloses another method, referred to during the trial as the "dry process," for obtaining the bleaching material with the enzyme in an active state, and which, it is claimed, affords subject-matter for patentable Claims. The Specification states:

In another embodiment of our invention, the washing and soaking methods described in our copending application can be dispensed with. One method of obtaining the material with the enzyme in an active state and by a process commercially practicable, is by treating soy-beans as follows:

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Wash the beans to free them from adhering dirt and immediately dry them at a temperature which must not be over 60 degrees C., for a sufficient length of time to reduce their moisture content to 8% or less. It is preferable that the conditions of operation are so chosen that the temperature may be so controlled that it does not rise over 120° to 130° F. By this drying process the beans are prepared for milling. After drying the beans to the required moisture contents, which may be readily determined by sample analysis, remove the beans from the drying apparatus and grind them to a flour, grinding them in such a way as to cause removal of the hulls as completely as possible by ordinary means, i.e., aspiration. Then further reduce the hull-free material to a fine powder, a granulation similar to wheat flour. The finer the granulation, the better, as long as during the grinding process the temperature of the material does not rise above 60° C. if treated in moist condition. Under these conditions of drying, the activity of the material is not harmed, while higher drying temperatures would seriously impair the bleaching action of the beans.

In the process of grinding and milling, the flour is passed repeatedly through sifting devices, so as to remove any coarse material and to obtain flour of fairly uniform and fine granulation.

The flour thus obtained is then mixed with a filler or diluent so as to reduce the bleaching strength and to improve the keeping qualities of the active bleaching material. It has been found that a good dilution is obtained by mixing one part of bean flour with four parts of another finely ground product, such as processed corn flour formerly known to the trade as "Ceratoose" and now as "Ceratex."

The mixture just described contains 20% of soy-bean material. Of this mixture as little as 0.75% to 100 lbs. of flour in the dough will have a perceptible bleaching effect and this quantity of bleaching material would be considered as the minimum for practical purposes. This would correspond to 0.15% of the bean material itself. The maximum quantity which one could use without imparting an appreciable foreign flavour to bread was found to be about 2.00% of the mixture, which corresponds to about 0.40% of the soy bean material itself.

According to the present invention, the quantity of soy bean material to be used for bleaching purposes is between 0.15% and 0.40%. If less than the minimum quantity is used, then little benefit can be observed and if more is used, the flavour of the bread is too adversely affected.

The Specification then points out that the invention is not limited to the use of soy-bean material alone, and it mentions and discusses in considerable detail other types of vegetable material containing active carotin-removing enzymes, of which examples are given, and the method of preparing the same for use.

The Specification concludes by saying:

All the commercial bean flours investigated have shown little or no bleaching strength. They evidently have been produced in such a way as to harm the bleaching principle contained in the raw beans. No doubt the beans were heated higher than the temperature specified herein, either to produce a more agreeable flavour of the bean flour or to prepare the beans for the extraction of the oil. This is especially true with the commercial soy-bean flours on the market, according to which, even though the beans have a rather high oil content (about 20%), it is necessary to heat the beans to facilitate expelling the oil, and always to a temperature too high for the enzymes to remain active.

Experience has shown that the bleaching agent may be mixed with unbleached flour at the mill, and that the mixture may be kept indefinitely without deterioration, so long as it is maintained in the dry state.

Emphasis is placed in this case, as in copending application, on the fact that the beans are used in the raw state, i.e., they have not been heat treated at a sufficient temperature to destroy the bleaching power.

This is a continuation of the application Serial No. 347,030 filed February 20, 1929, and entitled Bleaching Agent and Process of Utilizing the Same for Bleaching Flour which has resulted in patent No. 319,123.

The patent mentioned in the concluding paragraph was reissued as patent No. 347,252, one of the patents in suit.

The Claims of Patent No. 347,251 numbered 1, 2, 3, 5, 7, 8, 9 and 10 are said to be infringed by both Continental and Weston, by Continental in that it made and sold to Weston a soy-bean product called "Snowtex" embodying this invention, and by Weston in that it used a soy-bean product, believed to be "Snowtex," embodying this invention. Those Claims are as follows:

1. A bleaching agent for whitening flour, comprising a carotin decolorizing agent derived solely from vegetable material and of the nature of that found in the soy bean.

2. A bleaching agent for whitening flour, comprising an all-vegetable carotin decolorizing agent in dry condition which is adapted to decolorize carotin in the presence of warmth and moisture.

3. A bleaching agent for whitening flour, comprising an all-vegetable carotin decolorizing agent active in the presence of warmth and moisture under the conditions of dough mixing.

5. A bleaching agent comprising an all-vegetable carotin decolorizing material in dry condition and which has been treated to remove therefrom a portion of the ingredients native to the vegetable material.

7. A vegetable agent for bleaching flour, which agent consists solely of vegetable material having a strength sufficient to bleach unbleached wheat flour while being formed into dough and when used in amounts too small to perceptibly add its own colour to the mixture.

8. A vegetable agent for bleaching flour which agent consists solely of vegetable material in dry powdered form and derived solely from legumes and having a strength sufficient to bleach unbleached wheat flour while being formed into dough and when used in amounts too small to perceptibly add its own colour to the mixture.

9. A vegetable agent for bleaching flour which agent consists solely of vegetable material in dry powdered form and derived solely from the soy bean and having a strength sufficient to bleach unbleached wheat flour while being formed into dough and when used in amounts too small to perceptibly add its own colour to the mixture.

10. A vegetable agent for bleaching flour which agent consists solely of vegetable material from which some natural ingredients have been removed and characterized by ability to bleach unbleached wheat flour while being formed into dough and when used in quantities too small to affect the flavour of the product.

The next patent to be mentioned is that numbered 345,532, which issued in October, 1934, on an application

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made in October, 1932. As I understand it, while this application was pending a ruling for division was made by the Patent Office and this resulted in the patent just mentioned, and also patents numbered 345,533 and 345,534, the first of which is not sued upon in either of the actions here. Speaking generally, patent No. 345,532 is directed to the use in a bakery of a bleaching product prepared from soy beans by the so-called "dry process." The exact title given this patent is "Process of Making Bakery Products and Bleaching the Flour Thereof." It may be desirable to recite from this Specification the following passages even though they are much the same as those quoted from the last mentioned patent, No. 347,251.

Wash the beans to free them from adhering dirt and immediately dry them at a temperature which must not be over 155° F., for a sufficient length of time to reduce their moisture content to 8% or less. It is preferable that the conditions of operation are so chosen that the temperature may be so controlled that it does not rise over 140° F. to 150° F. By this drying process the beans are prepared for milling. After drying the beans to the required moisture content, which may be readily determined by sample analysis, remove the beans from the drying apparatus and grind them to a flour, grinding them in such a way as to cause removal of the hulls as completely as possible by ordinary means, i.e., aspiration. Then further reduce the hull-free material to a fine powder, a granulation similar to wheat flour. The finer the granulation, the better, as long as during the process the temperature of the material does not rise above 155°. Under these conditions of drying, the activity of the material is not harmed, while higher drying temperatures would seriously impair the bleaching action of the beans. By this latter method the vegetable bleaching material is not subjected to any wetting action after granulation is begun or after the vegetable itself is modified from its original shape. As applied to soy beans, the beans may be wet or otherwise treated in the process of cleaning them but after being cleaned the material is not further moistened at any stage to the very completion of the bleaching agent.

In the process of grinding and milling, the flour is passed repeatedly through sifting devices, so as to remove any coarse material and to obtain flour of fairly uniform and fine granulation.

The flour thus obtained is then mixed with a filler or diluent so as to reduce the bleaching strength and to improve the keeping qualities of the active bleaching material. It has been found that a good dilution is obtained by mixing one part of bean flour with four parts of another finely ground cereal product such as process corn flour formerly known to the trade as "Ceratose" and now as "Ceratex."

The mixture just described contains 20% of soy bean material. It has now been proved that of this mixture as little as 0.3125% to 100 lbs. of flour in the dough will have a perceptible bleaching effect and this quantity of bleaching material would be considered as the minimum for practical purposes. This would correspond to 0.0625% of the bean material itself. The amounts which one could safely use without imparting an appreciable foreign flavour to bread was found to be about 2.00% of the



mixture, which corresponds to about 0.40% of the soy bean material itself. Above that amount the agent's flavour appears noticeable and quality is thus lowered.

According to the present invention, the quantity of soy bean material to be used for bleaching purposes is between 0.0625% and 0.40%. If less than the minimum quantity is used, then little benefit can be observed and if more is used, the flavour of the bread is too adversely affected.

The last step of mixing or dough making just mentioned is preferably done in the presence of air or oxygen in a modern high speed mixer, although mixers having slower speeds may also be used, but with somewhat less satisfactory results.

The Claims of patent No. 345,532 numbered 1 to 5 inclusive are alleged to have been infringed by Weston only, in that it used the method of bleaching flour and the process of making or producing bread set forth in such Claims, and they are as follows:

1. A process of making bread comprising incorporating with unbleached or lightly bleached flour to further bleach it and with other ingredients to form a dough batch, a carotin-decolorizing agent comprising a vegetable material in proportions of not less than approximately 0.0625% by weight to the weight of the flour.

2. A process of making bread comprising incorporating with unbleached or lightly bleached flour to further bleach it and with other ingredients to form a dough batch, a carotin-decolorizing agent comprising a vegetable material in proportions of not less than approximately 0.0625% to not more than approximately 0.30% by weight to the weight of the flour.

3. A process of making bread comprising incorporating with unbleached flour and other ingredients to form a dough batch, a carotin-decolorizing agent comprising a raw comminuted vegetable material which has been maintained dry from the time of comminution until when used in the dough batch.

4. A process of making bread comprising incorporating with unbleached flour and other ingredients to form a dough batch, a carotin-decolorizing agent comprising a raw vegetable material in powder form and which has been maintained dry from the time of comminution until when used in the dough batch.

5. A process of making bread comprising incorporating with unbleached flour and other ingredients to form a dough batch, a raw carotin-decolorizing agent derived solely from vegetable origin and in the form of a powder having a moisture content of not over 8% and which has been maintained dry from the time of comminution until when used in the dough batch.

The last patent to be mentioned is that numbered 345,534, which issued in October, 1934, on an application made in August, 1933, and resulted from a Patent Office ruling for division as already explained. The title given to this invention is "Agent for Bleaching Flour," for use in the manufacture of dough, and is directed to the preparation of a flour bleaching agent according to the process described in

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patent No. 345,532, the so-called "dry process." It is unnecessary, I think, to refer to any portion of the Description of the Specification.

The Claims 1 to 8 inclusive, of patent No. 345,534, are alleged to have been infringed by Continental in that it made a soy-bean product embodying the invention described and claimed in this patent, and has sold the same under the name of "Snowtex" to the defendant Weston and others; and it is also alleged that the defendant Weston has infringed Claims 1, 2, 5 and 6 of the same patent in that it has used a soy-bean product embodying the invention therein claimed, and which product is said to be the same as that sold by Continental under the name of "Snowtex." As the Claims are small in number it will be convenient to mention all of them. They are as follows:

1. As a new ingredient in the manufacture of dough, a raw vegetable carotin-decolorizing agent in powder form and unwetted from the time of being made into powder.

2. As a new ingredient in the manufacture of dough, a raw comminuted vegetable carotin-decolorizing agent and unwetted since comminution.

3. As a new ingredient in the manufacture of dough, a raw carotin-decolorizing agent derived solely from vegetable origin and dried at a temperature of not over 155° F. to a moisture content of not more than 8%.

4. As a new ingredient in the manufacture of dough, a raw comminuted carotin-decolorizing agent derived solely from vegetable origin and dried at a temperature of not over 155° F. to a moisture content of not more than 8%.

5. As a new ingredient in the manufacture of dough, a raw vegetable carotin-decolorizing agent in powder form and unwetted from the time of being made into powder, said carotin-decolorizing agent containing enzymic material operative to decolorize carotin under all conditions of dough mixing.

6. As a new ingredient in the manufacture of dough, a raw comminuted vegetable carotin-decolorizing agent and unwetted since comminution, said carotin-decolorizing agent containing enzymic material operative to decolorize carotin under all conditions of dough mixing.

7. As a new ingredient in the manufacture of dough, a raw carotin-decolorizing agent derived solely from vegetable origin and dried at a temperature of not over 155° F. to a moisture content of not more than 8%, said carotin-decolorizing agent containing enzymic material operative to decolorize carotin under all conditions of dough mixing.

8. As a new ingredient in the manufacture of dough a raw comminuted carotin-decolorizing agent derived solely from vegetable origin and dried at a temperature of not over 155° F. to a moisture content of not more than 8%, said carotin-decolorizing agent containing enzymic material operative to decolorize carotin under all conditions of dough mixing.

Considerable confusion ensues here from the fact that there are involved four patents, all of which are closely related to one another. This transpires largely because at some stage divisional applications were required on the direction of the Patent Office, and the divisional applications here directed would appear to me to have been unnecessary, in part at least. However, I do not think a patentee is to be prejudiced by enforced divisional applications, made on the ground that an application describes and claims more than one invention. Sec. 37 of the Patent Act provides that in an action or other proceeding a patent is not to be deemed invalid by reason only that it has been granted for more than one invention, and it must follow, I think, that if patents are granted on divisional applications directed by the Patent Office none of them shall be deemed invalid, or open to attack, by reason only of their numbers. Then, some confusion arises from the fact that two of the patents in question are reissued patents. The reasons for the reissue of those patents have been satisfactorily explained to me and I do not propose discussing the grounds upon which they were reissued. I should like, however, to repeat a suggestion which I have made many times in the past, namely, that the provisions of the Patent Act in respect of the reissue of patents should be abandoned and suitable provisions substituted therefor enabling a patentee to apply for amendments to his patent, such, for example, as is to be found in the English Patents Acts. A reissue of a patent seems to suggest to rival patentees, and others, improper motives for the reissue, and other grounds of attack, which too frequently are trifling. If some procedure such as I suggest were adopted, and amendments to patents were permissible upon a formal application to, and after a hearing by, the Commissioner of Patents, of which due notice was given to the public, it would, I think, be in the interest of all concerned.

Disregarding for the moment such defences as anticipation, the adequacy or inadequacy of the Descriptions set forth in the several Specifications, the validity of particular Claims, and the construction and application of s. 40 of the Patent Act, I may first consider the question as to whether the disclosures of Haas contain any real or proper subject-matter for letters patent. Late in 1927, Haas, then the head chemist in the bakery laboratories of the W. E.

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Long Company of Chicago, was engaged by the plaintiff company to conduct research work in connection with the flour products produced by it, and upon this service Haas entered on January 1, 1928. Prior thereto Haas had occasion to study the effects which chemical bleaching had upon flour, and certain bakery problems arising therefrom, but no flour bleaching agents, other than purely chemical bleaching agents, were apparently then known or in use. Early in his research work in the service of the plaintiff, and while searching for a composition that would improve the quality and flavour of bread, Haas discovered while using a small quantity of fine flour ground from the soy-bean, with bleached or unbleached wheat flour, that the former contained something in the way of a bleaching enzyme, which had the effect of whitening the flour. The soy-bean had for a long period been grown and used in China, Manchuria and Japan, for various food purposes, but the evidence, which need not be reviewed, makes it quite plain that soy-bean flour had never been used anywhere, in any form, for the bleaching of flour, or for producing a loaf of white bread. It was in March, 1928, a date not disputed, that Haas discovered that by introducing a small quantity of yellowish soy-bean flour into a mixture of dough, made from unbleached flour, it would whiten the dough, and produce a loaf of bread that was white in colour, and in other respects highly satisfactory. In his experimental work he found that commercial soy-bean flours on the market possessed little or no bleaching property, but he also found that by preparing a soy-bean flour, according to the processes described in his Specifications, he could produce a flour-bleaching agent from the soy-bean, without injuring or destroying the active bleaching property therein. Haas therefore claims to have made a notable discovery, and by substantial experimental and research work to have invented and disclosed a new manufacture, and a process or processes, or means, of giving commercial utility to his discovery. It is claimed that the bleaching agent disclosed by Haas is superior to any chemical bleaching agent, but whether or not this superiority has been established is unimportant because in any event it is an entirely different bleaching agent. This bleaching agent is also claimed to have the novel advantage that the baker may carry out the bleaching of flour or dough in his own

plant, to the extent he desires, and this claim has been fully established; this bleaching agent may also be mixed with flour in a dry state at any time after the flour is made, and the mixture may be stored indefinitely without deterioration, for the reason that it is only active in the presence of warmth and moisture. It is also claimed that the bleaching of flour or dough according to the teachings of Haas has beneficial effects upon bread baked therefrom and there is considerable evidence to support that claim. It has been shown that the flour bleaching agent disclosed by Haas has been quite widely adopted, though it has by no means entirely displaced chemical bleaching agents. In 1939 the plaintiff sold soy-bean flour as a bleaching agent, prepared according to Haas, in sufficient quantities to make three and a half million loaves of bread per day, and its use would appear to be extending. No useful purpose is to be accomplished by a comparison of the quantities of the Haas bleaching agent used by flour mills or bakers with that of the chemical bleaching agents.

Then, pertaining particularly to the question of novelty, there is the evidence of Dr. Horvath, of the University of Delaware, a scientist who has devoted many years of study and research work to the soy-bean. He testified that no one before Haas ever recognized the existence of a bleaching enzyme in the soy-bean. Dr. Sumner, of Cornell University, whose scientific work since 1917 has been devoted to enzymes, and who, I am led to believe, is a recognized authority on enzymes and the author of text books on that subject, testified that no one before Haas had discovered the existence of a bleaching enzyme in the soy-bean, though many other enzymes were known, and he regarded it as a notable discovery. In respect of the question of the utility of Haas we have the evidence of Dr. Harcourt, the head of an Institute in Guelph, Ontario, sponsored by the Government of Ontario, the work of which is devoted to the scientific baking of bread; the evidence of five or six persons engaged in the bakery trade in Canada in a large way; and the evidence of Mr. Wilson of Clarksburg, West Virginia, U.S.A., who has had over forty years of experience in the bakery trade, all of whom spoke of the advantages of flour bleaching according to Haas over chemical bleaching. It is unnecessary to review

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in any detail all this evidence. There is no room for doubting the utility of Haas as a bleaching agent, and in fact this was admitted by counsel for the defendants.

That there is invention in the bleaching agent disclosed by Haas, and his process or processes of producing the same, is not, I think, subject to any serious doubt, assuming for the moment that anticipation is not to be found in any of the prior art cited, and this will be considered presently. I think Haas undoubtedly made an important discovery, and as the result of substantial and original research and experimental work he has disclosed a process or processes, or means, for translating his discovery into practical and useful ends, something that was not, I think, done before. The bleaching of flour or dough, and the production of a white loaf of bread, was and is being successfully attained by the use of the bleaching agent prepared according to the process, and by the means, described by Haas. This was, I think, something novel and useful, particularly because of its adaptability for use in bakeries as already mentioned, and I do not think there is any fair ground upon which it should be denied the merit of a patentable invention, unless, as I have already stated, anticipation of it has been definitely established. There would not seem to be any room for saying that Haas was something obvious. In order that a thing shall be "obvious," it must be something that would directly occur to some one who was searching for something novel, a new manufacture or whatever it might be, without the necessity of his having to do any experimenting or research, whether the research be in the laboratory or amongst literature. Haas discovered the existence of a flour bleaching enzyme in the soy-bean, he disclosed a process, and the sequence of the various steps in that process, by which a bleaching agent could best be made therefrom for commerce, and the property that it will have when so made or manufactured, and none of these things can, I think, be said to have been obvious.

I may now refer to certain prior art cited by the defendants in the way of anticipation of Haas. There are only two patents out of a lengthy list that need be mentioned, and in fact those would appear to be the only prior publications seriously relied on by Mr. Gowling. First, there is the United States patent, No. 1,427,645, granted to Satow,

in 1922. It is said that the object of this invention is "to provide vegetable proteid substances of improved quality and a simple, efficient and economical process of manufacturing the same from vegetable substances, such as cereals, leguminous products or other material for food purposes, or for use in the manufacture of celluloid-like substances, linoleum-like substances, lacquer, varnish, artificial rubber, artificial leather, and the like." Satow takes the soy-bean as a proteid containing substance, and he suggests a certain treatment of that bean, drying, rolling, the removal of the oil preferably by a solvent, and so on, all for the declared purpose of producing refined vegetable proteids. He was not attempting to deal with any problem concerned with the bleaching of flour, or the bread baking industry, or with the object of accomplishing any end or result which might be regarded as novel or useful in the baking industry. I cannot think that this patent has any real association with Haas, or with any of the objects which Haas had in mind and disclosed, and, I think, it is altogether irrelevant here. As has been laid down time and again, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate it, in order to sustain the defences of anticipation. It must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own. See *Fada Radio Ld. v. Canadian General Electric Co.* (1). By this test, Satow fails as an anticipation.

The next patent to be mentioned is the British patent, No. 186,571, granted to Van Der Lande, in 1923. This invention, as is stated, "relates to the process of treating flour or meal with peroxides which after being mixed with the flour or meal are decomposed," and it is described as "a process for conserving meal and improving its baking qualities and colour." It appears to me that what Van Der Lande discloses is nothing more than the bleaching of flour by a process which I referred to very early in this judgment, the Novadel process, a chemical bleaching of flour, which was well known before Van Der Lande. Haas refers to this process of flour bleaching in all of his

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Specifications, that is, bleaching with benzoyl peroxide, and he points out its disadvantages. Van Der Lande is, I think, fundamentally a flour bleaching by a purely chemical process, or what is generally described as a chemical process, as distinguished from the enzymic vegetable bleaching material described and claimed by Haas. Van Der Lande describes his invention as a process for treating flour or meal with peroxides, and one of his Claims is for the process of treating meal flour by means of peroxides. There is no mention whatever of the soy-bean as a source for his bleaching material, or of the existence therein of such an enzyme as would decolorize the carotin of flour, if mixed with the flour at the mill, or in the bakery in the preparation of dough for the baking of bread, and therefore it seems to me that whatever bleaching agent is disclosed by Van Der Lande, whatever the process of producing it, and whatever bleaching results it effects, it is not the bleaching agent that Haas disclosed and claimed. In any event, Van Der Lande fails as an anticipation if tested by the principle laid down in the *Fada* case, to which I have already referred. No one, I think, could read the Van Der Lande Specification and say that it describes Haas, or that it presented to the public the invention described by Haas. At most it is but a vague adumbration of the successful idea of Haas, and as has been said one must not look at prior documents with an eye which has been sharpened by the patentee. The step from Van Der Lande to Haas could not, in my opinion, be deemed to be an obvious one, and so far as I know Van Der Lande never went into use, which in the circumstances is an impressive fact. I think therefore that Van Der Lande cannot be construed as an anticipation of Haas. If it is not precisely the same process of flour bleaching known as Novadel, it is certainly not the invention described and claimed by Haas, and cannot therefore be an anticipation of the latter.

A French patent, granted to the plaintiff, and published on May 31, 1932, was cited as having described the invention disclosed in two of the patents in suit, Nos. 345,532 and 345,534, both of which were filed on October 23, 1934, more than two years subsequent to the date of publication of the French patent, and therefore subject to the provisions of s. 27 (2) of the Patent Act. The French patent



describes a bleaching agent made from soy-beans, in accordance with the wet process so-called, and as described by Haas in the Specifications here in question. Mr. Carson contended that the bleaching agent prepared according to the dry process so-called, and described in the two Canadian patents just mentioned, represents a patentable improvement over the so-called wet process, and that the same is independently claimed as a new and useful process in the preparation of his bleaching agent, and that therefore s. 27 (2) of the Patent Act is not applicable. Mr. Gowling's contention was that the French patent describes the same invention as is described in the two patents in suit which I have mentioned. This contention rests on the proposition that there is no patentable distinction between the Claims based on the wet processing of the soy-beans and those on the dry processing of the beans, and it was contended by Mr. Gowling that the French patent specifically or inferentially includes both the wet and dry process of preparing the soy-beans. This the plaintiff does not assent to. Any conclusion upon this point is one to be reached upon a construction of the Specifications and Claims involved, which I shall have to consider later when considering the Claims generally, and there I allow this matter to stand for the present.

I may now turn to the question of infringement, and this does not, I think, require any lengthy discussion, apart from any particular questions arising as to the form or scope of the Claims in issue. In January, 1936, Mr. Stethem, the President of Continental, commenced carrying on business under the name of Continental Soya Company, and in this business he dealt in soy-bean products. This business was taken over by the defendant Continental in 1937, and in August of that year it commenced the production and sale of a flour bleaching agent which was marketed under the name of "Snowtex," as, I think, did its predecessor for a short time. At the time of the commencement of the production of Snowtex, Continental, it is alleged, had on hand a quantity of soy-bean flour, in flake form, which had been purchased from an American concern known as Archer, Daniels Midland Company (hereafter referred to as "Archer"), with the view, it was said, of the same being sold to, and used by, concerns engaged in the brewing trade. In a printed circular issued by

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Archer there is prominent display of the fact that their product "soy-bean brew flakes provide the finest foam quality," and that it contained "valuable enzyme," but there is no suggestion that it is a flour bleaching enzyme, which, I assume, would be of no special interest in the brewing trade.

Then, so it is said, Mr. Stethem, or some one associated with Continental, "concluded," or "felt," that this flaked soy-bean flour, possessed some flour bleaching property, a bleaching enzyme, and would for this reason, and otherwise, be useful in the production of bread. Mr. Stethem was unable to explain satisfactorily when or how he came to entertain the belief that this soy-bean flour in flake form might be useful or made useful as a flour bleaching agent or otherwise, in the baking trade. It was not by reason of his own previous business experience, or by deductions reached from a study of the scientific literature relative to the flour bleaching art, or bleaching enzymes. There was a vague suggestion by Mr. Stethem that in the production of Snowtex, disclosures made in some patent granted to one Satow were followed, not under licence, but this evidence is not at all impressive. The evidence shows that Archer cleaned, cracked and flaked the soy-beans, removed the oil therefrom, and dried the same with care so as not to injure the sensitive enzymes—no doubt having in mind the bleaching enzymes—by keeping the drying temperatures within a certain range mentioned by Mr. Stethem.

In any event, it first occurred to Mr. Stethem in August, 1937, to manufacture, from this soy-bean flaked flour, a commercial product that might be used as a flour bleaching agent in the bakery trade, and it is quite clear that he understood that this product, in powder form, wetted or unwetted, when mixed in dough or sponge in the bakery, had the effect of bleaching flour, thus giving a white loaf of bread. And he understood that Archer, in the preparation and processing of its flaked soy-bean flour sold to Continental, was careful to preserve in active form the bleaching properties that it contained, that is, that the amount of heat generated and employed in the process of drying the same would not injure the sensitive enzymes therein, which Mr. Stethem no doubt understood to be bleaching enzymes. This was communicated to him by Archer. And it is also clear that in the sales of Snowtex to the baking trade,

printed instructions regarding the form of the use of Snowtex were furnished by Continental, and this substantially corresponds with the directions furnished by the plaintiff to its customers in the baking trade, in the use of Wytase. The flaked soy-bean flour purchased from Archer is, I should add, reduced to a fine powder by Continental, and in this form sold as a bleaching agent to the baking trade. That Snowtex has a bleaching effect upon unbleached flour is not open to dispute. I should also add that Mr. Stethem learned of Wytase, the plaintiff's flour bleaching product, early in 1932, and that it was being used as a flour bleaching agent. It is hardly open to serious controversy but that Wytase and Snowtex are substantially the same product, and produced primarily for the same purpose, namely, as a bleaching agent, and that they are both derived from the same source and for all practical purposes by the same process.

Upon the question of infringement little need be said concerning the other defendant. Weston commenced the use of Wytase in its bakeries in May, 1937, but in September of the same year it discontinued the same and commenced using Snowtex, the reason assigned for this transfer of patronage from the plaintiff to Continental being that Snowtex was to be purchased at a lesser cost, and that a much smaller quantity of Snowtex did the relative work of Wytase. The evidence satisfies me that Wytase and Snowtex are practically identical products, even though the quantity of each used in the making of dough or sponge differs; this distinction I do not regard as of importance in respect of the issues of either subject-matter or infringement. I might mention the fact that Haas suggests the use of a certain quantity of corn flour or other ground cereal product, as a filter or diluent, which is not employed in the preparation of Snowtex, but Haas claims the preparation of his bleaching agent with or without the use of such a diluent. Snowtex was used by Weston in a dry form, in its bakeries, in the dough or sponge, the latter being fermented at a moderate temperature and of the order prescribed by Haas. I might add that Weston ceased the use of Snowtex pending the determination of this litigation.

I think there can be no doubt but that Snowtex is, for all purposes with which we are here concerned, practically

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the same bleaching agent as Wytase; it is used in bakeries in powder form, in practically the same way and for the same ends as Wytase, that is, primarily for the production of a white loaf of bread, but also for any other beneficial qualities it may possess in relation to the production of bread. Any variations in the constitution of the two bleaching products, or in the process of making them, or in the method of using them in the baking of bread, do not, in my opinion, afford any defence in an action for the infringement of Wytase, which I hold to possess subject-matter for a patent.

I turn now to grounds of attack of another character, raised against the patents in suit, and which Mr. Gowling appraised as the most important and substantial of the defences raised in these actions. This involves the construction of s. 40 (1) of the Patent Act and its application to the particular facts appearing here, a provision which affords fertile ground for controversy not easily or perhaps satisfactorily determined. Sec. 40 (1) reads as follows:

40. (1) In the case of inventions relating to substances prepared or produced by chemical processes and intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the methods or processes of manufacture particularly described and claimed or by their obvious chemical equivalents.

Sub-s. (2) may be of some assistance in the construction of sub-s. (1), and possibly of importance in other respects, and may therefore be recited. It reads:

(2) In an action for infringement of a patent where the invention relates to the production of a new substance, any substance of the same chemical composition and constitution shall, in the absence of proof to the contrary be deemed to have been produced by the patented process.

The specific grounds for defence raised under s. 40 (1), may be stated as follows: (1) That the flour bleaching material disclosed and claimed by Haas is a substance prepared by a chemical process; (2) that this substance is one "intended for food" within the meaning of s. 40 (1), even if not primarily prepared or produced for consumption as a food; and (3) that the Claims for the processes for producing the bleaching substance are invalid because they are not described and claimed in conformity with the requirements of s. 40 (1), and that as a consequence of this all the patents in suit fall. I understood Mr. Gowling to con-

tend that as the bleaching substance is one produced by a chemical process and intended for food, any such process must be particularly described and claimed, and if the substance is claimed any such Claim must appear in the same Specification as describes the process, and is to be limited to the process of manufacture described and claimed. If the premises stated by Mr. Gowling are well founded, then, in the main, his contentions are rather formidable ones.

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During the discussion upon the construction of s. 40 (1) by counsel reference was made to the corresponding provision of the English Patents Acts, and to certain decisions of the Law Officers of England in respect of patent applications which involved the construction of the English section. It will be desirable therefore to refer to the provision of the English Patents Acts, as it was at the time material here, and when such decisions were rendered. That section, 38A (1), then read :

38A. (1) In the case of inventions relating to substances prepared or produced by chemical processes or intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the special methods or processes of manufacture described and claimed or by their obvious chemical equivalents . . .

This provision of the English Patents Acts has since been amended by striking out the word "special" immediately before the words "methods or processes of manufacture," and by striking out the word "claimed" in the last line of that section and substituting therefor the word "ascertained." In 1932, s. 38A (1) was further amended, and now it reads (leaving in brackets the words earlier deleted) as follows:

38A(1). In the case of inventions relating to substances prepared or produced by chemical processes or intended for food or medicine, the specification shall not include claims for the substance itself, except when prepared or produced by the (special) methods or processes of manufacture particularly described and (claimed) ascertained or by their obvious chemical equivalents.

Provided that in relation to a substance intended for food or medicine a mere admixture resulting only in the aggregation of the known properties of the ingredients of that substance shall not be deemed to be a method or process of manufacture.

Presently, the main distinction between the Canadian s. 40 (1) and the first paragraph of the English s. 38A (1) is that the former contains the word "and" before the words "intended for food or medicine" instead of the

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word "or" as in the English section, and so far as I can ascertain the Canadian section was always thus distinguished from the English section. In any event, I think it may be assumed that the word "and" was adopted instead of the word "or" after deliberation, because the Canadian section was manifestly copied from the English section. The consequence of the use of the word "and" instead of "or" is that the Canadian section 40 (1) relates only to substances prepared or produced by chemical processes when intended for food or medicine, whereas it would appear that all substances produced by chemical processes fall within the ambit of the English section, as also do substances intended for food or medicine whether produced by chemical processes or not, and I think that was so held by the Law Officer in the *Application of W.K.I., and W. Ld.*, (1). Consequently the English section has a much wider application than the Canadian section which relates only to substances prepared by chemical processes when intended for food or medicine. I emphasize this distinction because it may have some bearing in the construction of s. 40 (1) of the Canadian Patent Act.

It is usually of some interest and assistance to know, if one can, what was the object sought by any particular enactment, and if the purpose of the enactment of the English section were known that would probably indicate the general purpose of its reproduction in the Canadian Patent Act, with the few variations which I have pointed out. I find the purpose of the English enactment to be stated by Law Officers of the Crown in some reported English patent cases. In the matter of the *Application of G. & H.*, (2), the Law Officer, Sir Thomas Inskip, S.G., on the hearing of an appeal from the decision of the Assistant Comptroller said: "Section 38A (1) was enacted for a purpose and for reasons which are very familiar, and which have often been explained to me in connection with the increasing number of claims for products, and it was intended to prevent claims for a substance itself unless there is some feature connected with it which is described in words which I have often had to consider, and are rather difficult, namely, the words 'special method or process of manufacture'." Again, in the matter of the *Application of N.V.I.*, (3), the same Law Officer said: "This

(1) (1922) 39 R.P.C. 263.

(2) (1925) 42 R.P.C. 501.

(3) (1925) 42 R.P.C. 503.

enactment has been repeatedly considered by Law Officers, and it is well known that it was designed to prevent the appropriation by a patentee of certain substances in such a way as to preclude other explorers in the same field from devising improvements in the preparation or the quality of the substance in question," and in the same case he said "Section 38A (1) is not, as I read it, designed to prohibit or restrict bare process claims, and if every claim for a process were to be regarded as a claim for a substance prepared or produced by the process claimed, the scope of section 38A (1) would be unduly extended." A further explanation is to be found in the case of *Sharpe & Dohme Inc. v. Boots Pure Drug Co.*, (1), wherein Lord Hanworth, referring particularly to the word "special," as found in the English section, said: "The section was intended to give the security of a patent to substances in respect of which a method or process was described in the Specification, that has some intrinsic characteristics which are the invention of the inventor and for which a patent may be properly and legitimately claimed and granted." Generally, the purpose of the enactment would therefore seem to have been to limit the Claims for substances produced by a chemical process, or substances intended for food or medicine, to the process of manufacture described and claimed, but it was not designed to prohibit or restrict bare process Claims. This explanation of the purpose of the English enactment seems to be a reasonable one, although it is not absolutely clear to me that it effected any real change in the law. Generally, this explanation would apply to the Canadian enactment. Neither the English nor the Canadian section was designed for the purpose, as one might at first think, of maintaining standards of purity in food products or for the protection of the consumer of certain food products, because other legislation had anticipated any such need, in Canada at least. As I have already stated, section 40 (1) of the Patent Act is to be construed as meaning that in the case where a substance is produced by a chemical process, and is intended for food or medicine, the substance can be claimed only when prepared or produced by the process of manufacture described, and it would also seem that the process

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must be claimed as well as described, otherwise there can be no Claim for the substance. If the substance is not claimed no question arises as to the limitations prescribed by s. 40 (1).

I was referred by counsel to quite a number of decisions rendered by Law Officers in England, on appeals by applicants for patents from rulings made by officials of the Patent Office, amending or refusing to accept Applications, which appeals involved the construction of s. 38A (1), and any comments I have to make thereon may conveniently be made at this stage. I have considered these decisions, and several others of the same character which were not cited before me, but I have been unable to find them of any practical assistance in a construction of s. 40 (1) of the Patent Act, or in their application to the facts of the cases before me. In the main they relate to the meaning to be given the word "special" in the English section, and whether or not the statement of the Claims there in question complied with the requirements of that section. In some of these cases it was decided that what was claimed as a process was in fact a Claim for a product, or what was claimed as a product was merely a Claim for a process, or what was claimed as a process was not a "special" one within the meaning of s. 38A (1), all of which were questions of fact, and therefore the questions at issue there were resolved upon the facts appearing in the particular case. In other cases it was held, as a pure question of fact, that the substance in question was one prepared by a chemical process, or that the substance was not in fact a new manufacture, again depending upon the particular facts of the case. The conclusions reached by the Law Officers in all these cases were founded on the facts appearing in, or to be inferred from, the particular Application in question, and they are not, I think, of assistance in the matters I have to decide, and, of course, they are not in any event binding upon me. Moreover, these decisions were not rendered in infringement actions, which, I think, is of importance in a consideration of the cases before me for decision. I have concluded therefore to refrain from any extended discussion of these cases.

Whether the bleaching material here in question is a "substance" prepared or produced by a chemical process is one of the issues which I have to determine, and it pre-



sents some difficulties. It will be desirable therefore to examine in some detail the process of manufacture of the flour bleaching material described by Haas, even if I repeat what has been already recited from the Specifications in question. This may be of assistance also in a consideration of the Claims sued upon. Haas discovered that the soy-bean contained a bleaching enzyme but this discovery of itself would not entitle him to a patent of invention, and, of course, the soy-bean in its natural state could not be used as a flour bleaching agent, in the flour mill or in the bakery. By experimental work in his laboratory Haas demonstrated that a soy-bean flour could be produced commercially while at the same time preserving therein the sensitive bleaching enzyme of the soy-bean, which, I think, it is agreed might easily be destroyed in the production of the soy-bean flour by an application of excessive heat. This bleaching enzyme Haas found to be absent in the commercial soy-bean flours then on the market, and which enzyme, he suggests, had in some way been destroyed. In one process of producing his soy-bean flour he directs that the beans be soaked in water of approximately room temperature, for twelve to forty-eight hours, and at the end of that period that the beans be well washed with two or three changes of fresh water. At this point the beans will have swelled to about three times their original size. After draining off the wash water the beans are then ground in a mill to a paste or sludge, and this paste or sludge may be thoroughly mixed with cornstarch or corn flour, or other cereal flour, to increase its water absorbing capacity. The resulting mixture, a rather dry or friable mass, is then dried at a temperature not exceeding 60° C. in order not to injure the enzyme, and afterwards ground to a fine powder, as fine as the flour into which it ultimately enters. Then he describes and claims another process, which hitherto I have called the "dry process." In this process the soaking of the beans is dispensed with, and the beans are washed merely to free them of adhering dirt. They are then dried at a temperature not exceeding 60 degrees C. for a sufficient time to reduce their moisture content to 8 per cent or less. The beans, after being thus prepared for milling, are removed from the drying apparatus and ground to a flour in such a way as to cause removal of the hulls, and this flour is then further reduced to a fine

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powder, a granulation similar to the wheat flour. After the beans are cleaned the bleaching material is not further moistened at any stage to the very completion of the bleaching agent. In this process there may be added to the fine powder flour a filter or diluent, in stated proportions, so as to reduce the bleaching strength and to improve the keeping qualities of the active bleaching material. Other methods of manufacture are suggested by Haas. Now the bleaching agent thus produced is the practical embodiment of the discovery of Haas, it is the substance for which he claims a patent of invention. It is the substance which effects a practically complete decolorization of the characteristic colour of unbleached flour, and which is sold in the market as a flour bleaching agent, chiefly for use in the bakeries as explained. This was the substance, or its equivalent, that was sold by Continental to Weston, and used by Weston in its bakeries. However, this bleaching substance, in dry form, might be mixed with unbleached flour at the mill, or elsewhere, but it would effect no decolorization of the yellow colour of that flour, because as I shall later point out, as Haas does in his Specifications, the bleaching agent remains inactive in the absence of warmth and moisture.

The major difficulty in construing s. 40 (1) arises from the employment therein of the words "chemical process," without attempting to define the term, or without limiting its application. A statutory use of the words "substances prepared or produced by chemical processes and intended for food" immediately suggests the inquiry as to whether the Legislature, or the draftsman, intended those words to be construed in the sense which the chemist or physicist might construe them, or whether they are to be construed in what I might call the popular sense, which would give them a much narrower meaning. Practically every substance intended for food, may be said to have been either prepared or produced by a chemical process, as is all living matter, but did the Legislature approach the enactment of s. 40 (1) according to the conceptions of theoretical chemistry and thus open up a field of interminable controversy, for a purpose concerned with the administration of the law relating to patents, the necessity for which, in my opinion, is open to serious debate? In the scientific sense it is probably impossible to classify phenomena

in a rigorous manner, because border-line cases always exist and natural phenomena refuse to allow themselves to be classified into arbitrarily defined groups. I should think it doubtful if it were possible to decide always, with entire satisfaction, what is a chemical process and what is a non-chemical process. In the strict sense virtually everything involves a chemical process and therefore if this viewpoint is carried to the limit s. 40 (1), which purports to distinguish between chemical and non-chemical processes in preparing or producing substances intended for food or medicine, becomes almost meaningless.

The evidence, and the text books to which I was referred, would seem to make it clear that what occurs in the bleaching of flour is the oxidation of the carotin pigments therein. The change that occurs is in the one material or element, that is to say, the carotin in the flour is decolorized, the flour is not otherwise changed. By definition an enzyme, such as we are here concerned with, is a type of catalyst which speeds up a chemical reaction or change, but it does not cause a reaction to take place which would not occur to some extent at least in its absence. Catalysts in general may be considered as substances which hasten or retard chemical reactions or changes but which undergo no substantial change themselves, that is to say, in general catalysts come out of a reaction in the same form in which they enter it. Heat may be considered a catalyst in that one may hasten a chemical reaction or change by the application of heat, or one may retard the same reaction by a process of cooling. The bleaching of flour is primarily a bleaching by atmospheric oxygen, and if a bleaching enzyme is introduced into flour, in any particular form, it is for the purpose of speeding up the process of oxidation which was proceeding in any event, causing it to occur in a short time instead of over a lengthy period. The enzyme discovered by Haas, when employed as a catalyst, functions to speed up the oxidation of the carotin of flour. The principal question for decision here then is whether a soy-bean flour bleaching substance, a natural vegetable material, such as Wytase, employed to hasten the bleaching of flour, without the addition or aid of any chemical substance, can be said to be a substance prepared or produced by a chemical process within the meaning of s. 40 (1).

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I am unable to accept the view that the flour bleaching material of Haas is a "substance" prepared or produced by a "chemical process," and I think it is the only "substance" here to which s. 40 (1) could have any application. It is a vegetable material containing a bleaching enzyme, prepared mechanically and without the intervention or aid of any substance of a chemical nature intended to effect any particular reaction, and is not, I think, a material prepared by a method which might fairly be said to involve a chemical process set in motion by human agency; which, I think, the statute must have contemplated when it speaks of "inventions relating to substances prepared or produced by chemical processes." It is a substance entirely of vegetable origin and such it remained when completed for the market. The application of water or heat caused no chemical change in the soy-beans before being ground into a flour. The swelling of the beans in the water-soaking process did not cause any chemical change in the beans nor was that intended; that was a biological change, a process of growth, caused by water which changed something that was inert into something that was alive, a living plant, and this I do not think means the preparation or production of a substance by a chemical process, within the meaning of the statute. I do not think therefore that it can be said that the bleaching material prepared by the processes described, the substance sold by Continental and used by Weston, was one prepared or produced by a chemical process, within the meaning and intendment of s. 40 (1), and that is the conclusion which I have reached. If I am correct in this then it matters not whether the words "intended for food" means a substance that is actually prepared to be consumed as food—which is hardly the fact here—or whether it includes a substance to be used in the preparation of an article to be consumed as food, bread in the cases before me, as was decided in one or more of the English cases to which I was referred. I am therefore of the opinion that the bleaching material described and claimed by Haas is not a "substance" to which s. 40 (1) applies, and consequently the defences raised by Mr. Gowling, under this provision of the statute, and which I have already mentioned, fall.

The difficulty in determining what is a "chemical process" within the meaning of s. 38A (1) of the English Patents Acts was pointed out by the Law Officer in the matter of the *Application of R.R.* for a patent (1) and to that I might refer. The application there related to the fractional distillation of mineral oils, whereby a series of lubricating oils, defined by their viscosity values and other physical characteristics, were obtained, and on appeal from the Assistant Comptroller the Law Officer was required to decide whether or not the substance covered by the Claims in question was one prepared or produced by a chemical process, as was held by the Assistant Comptroller, and which view was in fact upheld on the appeal. I shall refer to two passages from the decision of the Law Officer, Sir Thomas Inskip, S.G. The passages are:

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Mr. Minty has pointed out the objections and difficulties that would arise if one were to divide certain substances into those that are, in fact, prepared or produced by a chemical process and those that are only prepared or produced by a chemical process in the sense that nature probably put them through those processes. I appreciate the difficulties which might arise. Mr. Potts, on the other hand, points out that the language of subsection (1) of Section 38A ought to be interpreted in its literal sense, and he says that, in fact, the particular article which is the subject of his invention has not been prepared or produced by a chemical process. Mr. Minty submits that the Section refers to the case of inventions relating to substances which are or can be prepared or produced by chemical processes, but there, again, as Mr. Potts points out, that leads to certain difficulties, and it sweeps in a vast amount of material, or it might sweep in a vast amount of material, which was not in contemplation when the Section was drafted.

I very much shrink from holding that "substances prepared or produced by chemical processes" includes substances which have only been prepared or produced in nature by chemical processes. I think that human agency is probably implied in the Section. I do not, however, propose to decide this case by any principle or rule which I am prepared to lay down as applying to this and to other cases, because broadly speaking, I think, in this particular case, the article is produced by a chemical process; and, even if Sir Ernest Pollock in the *S. Co.'s* case had not expressed the opinion which is merely obiter dictum for that particular case, that one must not interpret "chemical process" in a narrow way, I should have read that Section in such a way as to enable me to come to the conclusion in the present case that what is called the fractional distillation of these natural mineral oils is a chemical process, which has resulted in the production of a substance which is the subject-matter of the invention claimed. Therefore, without laying down any rule which might lead to complications or difficulties, and without extending the structure, which, Mr. Potts says, is being slowly built up on the basis of the decision in the *S. Co.'s* case, I have come to the conclusion, as a pure question of fact in this case, that the process in question is a chemical process within the meaning of Section 38A of the Act.

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I need not comment upon these observations of the Law Officer except to point out that he was inclined to distinguish between substances prepared or produced in nature by chemical processes and those prepared or produced by chemical processes at the instance of human agency.

I must in fairness pursue my discussion of this aspect of the case a step further. When the flour bleaching medium of Haas is incorporated in the dough in the bakery, as directed by Haas, along with several other ingredients, it necessarily becomes subjected to warmth and moisture and the bleaching enzyme contained therein then commences to function as a catalyst and it speeds up the oxidation of the carotin pigments in the flour, and this results in the whitening of the unbleached flour as has already been explained. That, in a technical sense, some chemical changes take place in the dough mixture in the bakery, in the process of making bakery products, must, I think, be conceded, but that is not, I think, preparing or producing the invented substance here by a chemical process. Some chemical change I have no doubt occurs in the baking of all bread, or in the cooking of practically every food product. For example, as I understand it, the addition of yeast to dough effects a chemical change, the enzymes of yeast changing the sugar into carbon dioxide, but one would hardly refer to this, at the date of the enactment of s. 40 (1), as the baking of bread by a chemical process, or the preparation of dough by a chemical process, and I do not think that s. 40 (1) of the Patent Act was intended to mean this. Any reaction or change brought about in the dough, or in the bread, by the incorporation of Wytase or its equivalent in the dough, preparatory to the baking of bread, is not, in my opinion, the preparation or production of an invented substance by a chemical process within the contemplation of the statute, and even if the bread should here be regarded as an invented "substance" within the purview of the statute, I do not think that it could be said to be a substance produced by a chemical process.

Finally, I come to the Claims of the Specifications sued upon and which I have earlier set out quite fully. I do not think it is necessary to repeat any particular Claims in any of the patents in question, or to engage in any

lengthy discussion of them. Read in the light of the several Descriptions, which seem to disclose clearly and unambiguously what is claimed, the Claiming Clauses do not appear to be difficult of construction. The Specifications, I think, fully comply in all respects with the requirements of s. 35 (1) and (2) of the Patent Act, which set forth the requirements of a Specification. The description, manufacture, operation and use, of all that is claimed as invention seem to be adequately set forth. I agree with Mr. Gowling that it was unnecessary that so many patents should have been issued, and which have caused more or less confusion, but, for reasons which I have already stated, I do not think that the patentee should suffer any penalty on this account. I do not know of any principle upon which the Claims for the bleaching material and the processes of making the same should be denied and I think it is well settled that a patentee is entitled, in cases of the nature before me, to Claims, not only for the product which is a new manufacture, but for the processes by which they are made as well. Nor do I think that the Claims for the product are too broad in their scope, that is to say, the patentee was entitled, in the state of facts here, to claim any carotin decolorizing agent derived solely from vegetable material and of the nature found in the soy-bean. I have in mind also the process described and claimed for preparing the bleaching medium and which has been referred to as the "dry process." I think there is sufficient distinction between that process and the so-called "wet process" to merit a valid claim for the former, and I can see no reason why the patentee should not be permitted to claim it. If the patentee had limited his Claims to either one or the other, one can easily imagine a defendant in an infringement action claiming non-infringement because he employed whichever of those two processes was not claimed by the patentee. That, I think, affords the answer to the contention that the French patent issued to the plaintiff, and which I earlier discussed, is an anticipation of Haas's bleaching material prepared by the so-called "dry process." And I might here refer to the contention that there was a distinction between Haas's bleaching material and that used by Weston, because in the latter case no cereal filter or diluent was used, but as Haas has claimed his bleaching

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agent both with and without a filter or diluent that defence cannot in any event prevail. I was disposed at first to be doubtful of those Claims in one or more of the patents which relate to the process of producing bread, white in colour, by incorporating with unbleached flour a bleaching medium consisting solely of vegetable material containing an active carotin-removing enzyme and effecting a bleaching while the dough is being prepared for baking. However, after a careful consideration of this class of Claims I have concluded that they are valid though possibly it was unnecessary to make them on the ground that their subject-matter was sufficiently protected by other Claims. I therefore think that the process thus claimed, and which was fully described and disclosed, affords subject-matter for valid Claims.

In the result I think the plaintiff must succeed and with the usual consequence as to costs.

*Judgment accordingly.*

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BETWEEN:

DAME EMMA DANIELS (SMITH)  
 McNICOLL ..... SUPPLIANT;

AND

HIS MAJESTY THE KING ..... RESPONDENT;

AND

CANADIAN PACIFIC RAILWAY }  
 COMPANY ..... } THIRD PARTY.

*Crown—Petition of Right—Exchequer Court Act, R.S.C., 1927, c. 34, s. 19 (c) as amended by 2 Geo. VI, c. 28—Negligence of employee or servant of the Crown acting within the scope of his duties or employment—Liability of Crown—Recovery from the Crown of money paid to a third person pursuant to award of Quebec Workmen's Compensation Commission—Subrogation—Quebec Workmen's Compensation Act, 21 Geo. V, c. 100, secs. 3, 9, 9a & 34; schedule 2, sec. 7.*

M., suppliant's husband, employed by the Canadian Pacific Express Company, died from injuries received when at work in Windsor Station, Montreal. By an award of the Quebec Workmen's Compensation Commission the Canadian Pacific Express Company was ordered to pay to suppliant a certain sum of money plus \$40 per month during her lifetime.



Suppliant brought action against the Crown to recover damages for the death of her husband. The Crown took third party proceedings against the Canadian Pacific Railway Company. The Court found that the accident which caused the death of M., was attributable solely to the negligence of one, C., while acting within the scope of his duties or employment as a servant of the Crown, and that there was no contributory negligence on the part of M. Suppliant died subsequent to the trial of the action and before judgment was rendered. The third party proceeding was dismissed and judgment given in favour of suppliant against the Crown.

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*Held:* That the cause being ready for judgment when suppliant died, there was no occasion for proceedings in continuance of suit; Articles 266 and 267 C.C.P.

2. That the suppliant is a proper party to produce marriage and burial certificates affecting her husband and to testify with regard thereto, certified copies of acts of civil status being authentic and making proof of their contents: Articles 50 and 1207 C.C.

PETITION OF RIGHT to recover from the Crown damages for the death of suppliant's husband alleged to have been caused by the negligence of a servant of the Crown acting within the scope of his duties or employment.

The action was tried before the Honourable Mr. Justice Angers, at Montreal, P.Q.

*T. E. Walsh, K.C.* for suppliant.

*Roger Ouimet and R. Gibeault* for respondent.

*W. C. J. Meredith and G. R. W. Owen* for third party.

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

ANGERS J., now (August 31, 1940) delivered the following judgment:

The suppliant, by her petition of right, seeks to recover from the respondent the sum of \$15,000 for damages allegedly caused to her by the death of her husband, who died as the result of an accident which occurred at the Windsor Station of the Canadian Pacific Railway, at Montreal, on the 8th of October, 1938.

An extract of marriage issued by the prothonotary of the Superior Court for the district of Montreal, filed as exhibit S2, shows that Dame Emma Daniels, widow of Harry Smith, in his lifetime of the City of Montreal,

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was, on the 13th of November, 1911, married to John McNicoll in Bethlehem Congregational Church, Westmount, by authority of licence.

A certified copy from the official records of Calvary Church (United Church of Canada), dated April 26, 1939, filed as exhibit S3, establishes that John McNicoll, husband of Emma Daniels, died in the Royal Victoria Hospital, Montreal, on October 10, 1938, and was buried in Mount Royal cemetery on October 13, 1938.

An objection was made by counsel for the respondent to the production of these marriage and burial certificates on the ground that the suppliant was not the proper party to testify with regard thereto; the objection is, in my judgment, unfounded and it is accordingly overruled: articles 50 and 1207 C.C.

The evidence discloses the following facts.

On October 8, 1938, between 6.30 and 6.45 p.m., John McNicoll, employed by the Canadian Pacific Express Company as warehouseman, was loading baggage on a mail and express car forming part of the Saint John, N.B., train stationed on track 4 of said Windsor Station, referred to in the evidence as train No. 42.

There were four trucks on the truck platform, lying between tracks 4 and 5, alongside train No. 42. The first three were mail trucks; the first one was stationed opposite the west end of the tender of the locomotive in a westerly direction; the second one which Paul E. Charbonneau and Charles Vezina, both employees of the Post Office Department, had just been unloading was opposite the door of the mail compartment of the mail and express car; the third one was a few feet behind. John McNicoll's express truck was behind these mail trucks and stood opposite the door of the express compartment of the mail and express car.

At about 6.43 p.m. the Ottawa train (No. 504), due to arrive at 6.40 p.m., pulled in on track 5. She hit a mail truck of the Post Office Department, the rear wheels of which had fallen from the truck platform, as Charbonneau, who jointly with Vezina, had unloaded part of the mail which they had on their truck and had transferred it on the mail compartment of the mail and express car of the Saint John, N.B., train, was endeavouring to turn the truck so as to bring it back to the door of the baggage car which was immediately behind the mail and express car.

The Ottawa train struck the mail truck and threw it back upon the platform; the truck hit the suppliant's husband and injured him fatally; McNicoll was taken to the Royal Victoria Hospital forthwith, where he received the necessary medical treatment; he died at the hospital as a consequence of his injury at about 6 p.m., on October 10, 1938.

John McNicoll, at the time of the accident, was fifty-four years old. He was in good health. He lived with his wife, the suppliant. He was earning \$140 per month and he had prospects of securing an increase of salary in the future.

McNicoll was in the habit of giving to the suppliant his salary every month, save what he needed for his own personal use. He was not only attentive to her financial wants, but he surrounded her with care and gave her moral support.

The suppliant was 77 years of age at the time of her husband's death, as shown by the birth certificate filed as exhibit R2 and as further admitted at the trial by counsel for suppliant.

The mail truck, the rear wheels of which Charbonneau shoved on track 5 and which struck and fatally injured the suppliant's husband, was the property of the respondent. At the time of the accident it was in charge of two servants of the Crown, namely, Vezina and Charbonneau, Post Office employees, acting within the scope of their duties and employment.

After they had put in the mail compartment the mail bags which were to go in it, Vezina gave instructions to Charbonneau to turn the truck so as to bring it opposite the door of the baggage car, where the remaining mail bags had to be unloaded. Charbonneau thereupon started to turn the truck.

The platform between tracks 4 and 5 is only used for trucks; its width is ten feet according to Ernest Rousseau, statistician in the Post Office Department, and nine feet and ten inches according to James L. Looney, draftsman for the Canadian Pacific Railway. The floor of the mail trucks is 10 feet long by 3·8 feet wide. The handle exceeds the floor of the truck by 27 inches.

The evidence is to the effect that, when there is no train on either side of the platform, a mail truck can be

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turned without difficulty. When a train is stopped on one of the tracks alongside the platform it is difficult to turn a truck, although apparently it can be done provided that the driver in charge of the truck is cautious.

Notwithstanding that train No. 42 was standing on track 4, Charbonneau, who had little experience in handling mail trucks, endeavoured to turn his truck, whilst Vezina who had more experience than he had, stood watching him. The rear wheels of the truck fell off the platform. Vezina and Charbonneau tried to lift the truck back on the platform but did not succeed. Almost simultaneously train No. 504 from Ottawa, which was due at Windsor Station at 6.40 p.m. but was about three minutes late, entered the station. When they saw the train approaching, Vezina and Charbonneau endeavoured to run to safety. The train hit the truck and threw it back on the platform. As a result of the collision, the truck was knocked against another truck. One of the trucks hit McNicoll; he fell between the edge of the platform and the axle box of the mail and express car of train No. 42 on track 4, from where he was picked up after the accident, to be taken on a truck to the ambulance.

Seeing that train No. 42 was standing on track 4 and that train No. 504 was liable to come in on track 5 at any moment, Charbonneau, who admitted he knew that train No. 504 was due at 6.40 p.m., should not have attempted to turn his truck the way he did. He could and, in my opinion, should have gone ahead of the engine of train No. 42 to turn his truck. The reason which he gives for not having done this is that he would have had to walk a distance of 100 feet in order to reach the nose of the locomotive and travel the same distance on his way back, which, in his estimate, would have taken three minutes. The least I can say is that he would have had to walk very slowly indeed to take three minutes to cover a distance of 200 feet. I do not believe that it was a question of time, but rather a question of laziness or carelessness.

In my judgment, Charbonneau was grossly negligent in allowing the rear wheels of his truck to fall on track 5 when he knew, or at least should have known, that the

train from Ottawa was due to come in at any moment; in fact the time of its arrival had already passed; train No. 504 pulled into the station at about 6.43 p.m.

Charbonneau, in order to explain the mishap, stated that McNicoll put his express truck in his way, that he (Charbonneau) got his feet entangled and that this is what caused him to push his mail truck beyond the edge of the platform. Charbonneau's evidence on this point is corroborated in part only by Vezina. On the other hand, it is contradicted by Felix Martin, warehouseman, Andrew Brown, warehouseman who on the evening of the accident was working with McNicoll, Lionel Robert Clark, assistant station master, Charles McCurry, fireman on train No. 504, and Andrew Hill, yard foreman; according to them, McNicoll's truck was, at the time Charbonneau pushed the rear wheels of his truck on track 5, alongside train No. 42. But even if McNicoll had tried to move his truck and turn it, I do not think that this would exculpate Charbonneau. The latter was doing an act which was difficult by reason of the fact that a train was standing on track 4 and required great caution particularly at a time when a train was expected to run in on track 5 at any moment. I may say that I was not very favourably impressed by the evidence of Vezina and Charbonneau. Having participated in the accident, they were naturally inclined to endeavour to exonerate themselves.

Two witnesses, namely, Joseph P. Grimard and Joseph Edmond Gaudette, both in the employ of the Post Office Department, testified that McNicoll was often negligent in handling his truck; he was in the habit, when his truck was unloaded, to shove it ahead and thereby obstruct the door of the mail compartment.

Grimard, who said he was senior agent at Windsor Station for the transfer of mail, declared that, at the time of the accident, he was on track 1. He went to the platform between tracks 4 and 5 a few minutes after the accident; he saw an express truck and a mail truck damaged. He stated that he had knowledge of McNicoll's negligence in handling his truck; according to him, when McNicoll had finished unloading his truck, he pushed it ahead, thereby obstructing the mail doorway. Grimard insisted that McNicoll did that every day. He asserted that on many occasions he was present when employees

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of the Post Office Department complained to McNicoll that he was obstructing the entrance of the mail compartment.

In cross-examination, Grimard stated that he had never made any complaints to his employers nor to employees of the Canadian Pacific Railway. He further declared that he could not say anything about the conditions which existed on the evening of the accident.

Gaudette, transfer agent in the Post Office Department, said that he heard Grimard's testimony and that he corroborated it. He added that he often saw McNicoll move his truck ahead and cause obstruction.

Charles Edouard Vezina, who was working with Charbonneau, testified that immediately before the accident the express truck was not opposite the door of the express compartment but was ten or twelve feet ahead. He added that there is a slope on the platform towards the west, which may cause a truck to move in that direction. He could not say if this slope caused the mail truck to fall off the platform.

Counsel for the suppliant objected to this evidence regarding McNicoll's habit of moving his truck ahead and obstructing the door of the mail compartment. I allowed the evidence under reserve of the objection. I think that the objection was well founded and that the evidence in question should be struck from the record. I may say however that, if this evidence were admissible, it would not, in my opinion, carry much weight. The fact that McNicoll may have, on various occasions, moved his truck ahead and left it opposite or near the door of the mail compartment seems to me immaterial. Besides, if, according to Grimard's statement, McNicoll did that every day, the mail as well as other employees should have been aware of it and should not have tried to turn trucks at or near the place where he was in the habit of placing his own truck.

If McNicoll really were a constant nuisance, as claimed by Grimard, it seems to me extraordinary that no report was ever made to the station master or his assistant or to the depot agent about it. I am inclined to believe, and perhaps I should add do believe, that there is a great deal of exaggeration in the versions of Grimard and Gaudette regarding McNicoll's conduct, of the former especially.

William Alex. McKay, depot agent, said that he knew McNicoll and met him every day. McNicoll worked under the witness's orders. McKay stated that McNicoll had worked for the Canadian Pacific Express for at least twenty-five years. His salary, at the time of the accident, was \$140 a month, including a bonus of \$15 a month for long service. As far as he could recall, McKay never had any report of a serious nature against McNicoll.

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After a careful perusal of the evidence, a large portion of which I may say is immaterial, I can reach no other conclusion than that the accident is attributable to the negligence of Charbonneau, while acting within the scope of his duties and employment as servant of the Crown.

McNicoll, as far as is disclosed by the evidence, left no will. His only heir at law was his wife. The suppliant was examined at her residence, owing to illness and incapacity to attend court; transcript of her testimony was produced as exhibit S1. She testified that her husband left no ascendant and no descendant relatives; that she lived with him and that he contributed to her support; that her husband gave her \$140 each month.

The suppliant said that her husband did not receive any compensation for his injuries by reason of the accident in question. This fact was admitted by counsel for respondent.

According to the suppliant, her husband was very good to her; he looked after her and gave her everything she wanted.

At the time of the accident McNicoll was in good health; according to the suppliant, he had never seen a doctor in his life. This last statement is broad and presumably applies to the period during which the suppliant lived with the deceased, a period of nearly twenty-seven years.

The suppliant declared that she had always been well until the accident to her husband; when it occurred and, as a result, her husband died, she got a terrible shock and became sick. Before the accident, she could walk; now she cannot get up; she has to have a nurse with her all the time.

The suppliant's recourse is governed by section 19, subsection (c), of the Exchequer Court Act (R.S.C., 1927, chapter 34, as amended by 2 Geo. VI, chapter 28):

The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:

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

Before the amendment made by 2 Geo. VI, chapter 28, subsection (c) of section 19 contained at the end thereof the words: "on a public work." The amendment came into force prior to the accident, viz., on the 24th day of June, 1938.

In the circumstances I am of the opinion that the suppliant had a valid and legal claim against the respondent for the damages occasioned to her as a consequence of her husband's death.

McNicoll was 54 years of age when he died; his expectation of life, according to Kenneth Maclure, an actuary with the Sun Life Assurance Company, was over twenty-one years.

The suppliant, as previously mentioned, was born on April 27, 1861, so that on October 8, 1938, date of the accident, she was 77 years, 5 months and 11 days old.

The expectation of life of a woman of 77 years was fixed as follows:

by Kenneth Maclure at 9.2 years;

by Paul Vallerand, actuary with l'Alliance Nationale, and previously for about ten years with the Sun Life Assurance Company, at about 6 years.

Dr. Ildefonse Côté, called as witness by the respondent, said that he had been in practice since 1912 and had specialized in industrial cases for the last fifteen years. He examined the suppliant a couple of days before the trial; he declared that he believed that she could live for a period of six years on the condition that she got out of her bed from time to time.

With the evidence before me concerning the probable longevity of the suppliant, I would have felt disposed to fix the suppliant's expectation of life, from the date of the accident, at seven years. The question however has been settled by the decease of the suppliant, which occurred on March 9, 1940, as shown by the burial certificate filed on



April 20, 1940, pursuant to an order dated April 16, 1940. The cause being ready for judgment, when the suppliant died, there was no occasion for proceedings in continuance of suit: Arts. 266 and 267 C.C.P.; *Burry et al. v. Shepstone* (1); *McAnulty Realty Co. Ltd. v. Mendelsohn et al.* (2).

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Dr. Thomas F. McCaffery examined the suppliant on March 25, 1939. He found her in bed with a very weak heart. He treated her and her condition showed some improvement. Later she complained about pains in her left hand and her left leg; he treated her since for rheumatism. According to Dr. McCaffery, the rheumatic condition of the suppliant is not attributable to the death of her husband. I may note that Dr. Côté expressed a similar view. In Dr. McCaffery's opinion, if the suppliant had a weak heart at the time of the accident, which he believed was the case, the news of the accident and of her husband's death would affect her heart condition. Dr. McCaffery said that he saw the suppliant two days before the trial and that she was unable to attend court.

Dr. McCaffery produced two bills, one for \$60 (exhibit S5) and one for \$6 (exhibit S6). Unfortunately these bills contain no details whatever. Dr. McCaffery could not state what proportion of these bills applied to services and treatments concerning the suppliant's heart condition. In the circumstances I do not think that the suppliant is entitled to claim from the respondent the full amount of these bills (\$66), a substantial portion whereof undoubtedly relates to treatments given to the suppliant with respect to her rheumatic condition. I believe that, if I allow her half of this sum, viz., \$33, I will be doing justice to both parties.

The same remarks apply to the bill produced by Mrs. Alice Bull (exhibit S7), for services rendered to the suppliant from October 12, 1938, to November 27, 1939 (412 days) as nurse and housekeeper. The charge of \$1 a day does not seem excessive. I think that I should allow the suppliant one-half of the amount of this bill (which should be \$412 instead of \$430), namely, \$206.

(1) (1858) 2 L.C.J. 122.

(2) (1924) 26 Q.P.R. 244.

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| <p>1940<br/>DAME EMMA DANIELS (SMITH)<br/>McNICOLL<br/>v.<br/>THE KING<br/>AND<br/>CANADIAN PACIFIC RAILWAY Co.<br/>Angers J.</p> | <p>After giving the matter my best consideration, I have reached the conclusion that judgment must be given against the respondent for \$1,389.05 as follows:</p> <p>for the loss by the suppliant of the receipts from her husband's earnings during 17 months, from October 8, 1938, to March 9, 1940, at \$80 per month.....</p> <p>for aggravation of the suppliant's heart condition caused by the news of the accident to and the death of her husband and the nervous shock resulting therefrom .....</p> <p>bill of Royal Victoria Hospital for treatment of suppliant's husband as a result of the accident (exhibit S8).....</p> <p>bills of Dr. McCaffery for medical attendance on suppliant following the accident to her husband (exhibits S5 and S6)—one-half .....</p> <p>bill of Mrs. Bull, nurse and housekeeper, from October 12, 1938, to November 27, 1939 (exhibit S7)—one-half.....</p> <p>medicines .....</p> | <p>\$1,360 00</p> <p>500 00</p> <p>55 05</p> <p>33 00</p> <p>206 00</p> <p>15 00</p> <hr/> <p>\$2,169 05</p> |
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less amount received from Canadian Pacific Express Company in compliance with an award by the Quebec Workmen's Compensation Commission dated April 3, 1939, a copy whereof was filed as exhibit R3, to wit 17 monthly payments of \$40 each from October 11, 1938, to March 9, 1940, date of suppliant's decease, and the special allowance of \$100 provided for by paragraph 3 of section 34 of the Workmen's Compensation Act.....

780 00

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**\$1,389 05**

On March 2, 1939, the suppliant made a claim under the Quebec Workmen's Compensation Act, 1931 (21 Geo. V, chap. 100); a certified copy of her claim was filed as exhibit R1. On April 13, 1939, the Workmen's Compensation Commission decided that the Canadian Pacific Express Company was liable towards the claimant, suppliant herein, and that it should pay her (*inter alia*) a sum of \$40 per month during her lifetime, the said sum being payable at the end of each month, from October 11, 1938; a certified copy of the Commission's award was filed as exhibit R3.

The Workmen's Compensation Act, 1931, contains, among others, the following enactments:

9. (1) Where an accident happens to a workman in the course of his employment under such circumstances as entitle him or his dependents to an action against some person other than his employer, such workman or his dependents, if entitled to compensation under this Act, may, at their election, claim such compensation or bring such action.

(2) If an action is brought and less is recovered and collected than the amount of the compensation to which the workman or his dependents are entitled under this Act, such workman or his dependents shall receive compensation for the difference.

Section 9 (a) was added to the Workmen's Compensation Act, 1931, by 1 Ed. VIII (2nd session), chap. 39, which came into force on November 12, 1936; section 9 (a) reads as follows:

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9. (a) Notwithstanding any provision to the contrary and notwithstanding the fact that compensation may have been obtained under the option contemplated by subsection 3 of section 9, the injured workman, his dependents or his representatives may, before the prescription enacted in the Civil Code is acquired, claim, under common law, from any person other than the employer of such injured workman any additional sum required to constitute, with the above-mentioned compensation, an indemnification proportionate to the loss actually sustained.

In compliance with the provisions of the Workmen's Compensation Act, counsel for the suppliant gave credit in his factum for the monthly payments received by his client to the date of the drawing thereof, amounting then to \$480.

After a careful perusal of the evidence I am satisfied that there was no contributory negligence on the part of the suppliant's husband.

There will be judgment against the respondent for \$1,389.05, with costs.

The next question arising for determination is the responsibility, if any, of the third party.

Train No. 504 from Ottawa came into Windsor Station on the evening of the 8th of October a few minutes late—three or four as disclosed by the evidence—at her usual speed, namely, between ten and twelve miles an hour. This speed was said by the witnesses who dealt with this subject to be normal and reasonable.

There is a curve on the railway line at a distance of about 196 feet from the entrance into the station. As soon as he saw the signals given by Clarke, assistant station master, Michael R. Martin, general yard master, and Hill, yard foreman, the engineer on train No. 504 (Thomas Allen) applied the full service brake and endeavoured to stop his train. When Charles McCurry, the fireman on train No. 504, who was on the left side of the cab of the locomotive and saw the mail truck on track 5, shouted to the engineer to stop, the latter was already in the process of applying the brake. Obviously no time was lost. The distance however was too short and the train struck the mail truck.

It was urged by counsel for the respondent that the engineer should have applied the emergency brake. The

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witnesses do not agree on this point. After weighing the evidence carefully, I have come to the conclusion that it would have been dangerous for the passengers on board the train, a certain number of whom were likely standing as the train entered the station and preparing to alight, to apply the emergency brake; the sudden jerk would have been liable to cause some of them to fall and thereby be more or less seriously injured. The evidence of William H. Blevins, chief inspector of air brakes for Canadian Westinghouse Company, who had been previously fireman and engineer on railway locomotives for several years, concerning the application of emergency brakes, is interesting. He stated that Allen handled the brake as he himself would have done. Blevins said that he would not have applied the emergency brake, because it is liable to cause injury to the passengers. I do not think that the engineer in acting as he did and trying to stop his train without the aid of the emergency brake, was guilty of negligence; he may have made an error of judgment, although I must say that I believe that he acted judiciously, but this, to my mind, does not constitute a fault or negligence and cannot render the third party responsible for the mishap.

Another ground on which the respondent relied in order to establish the liability of the third party is that the platform between tracks 4 and 5 has an incline or slope towards the west and that this caused the truck to roll down on the tracks. The evidence on this point is most indefinite and is not at all satisfactory. The question of the slope or incline on the platform was only brought up at the last moment, by way of amendment made at the trial. Nevertheless counsel for the third party agreed to proceed. This incline or slope was said to be towards the west. Now the west has been referred to in the evidence as the direction leading out of the station. Track 4 was mentioned as being north of the truck platform and track 5 as being south. These directions are not exact. The direction from the station outwards is approximately southwest; track 4 is to the northwest of the platform and track 5 to the southeast; see plan exhibit T.P.5. However, I must take the directions stated by the witnesses. A slope or incline towards what has been called the west would not drive a truck on track 5, but would rather lead it towards the end of the platform.

Charles Miller, investigator with the Canadian Pacific Railway, who made an investigation in connection with the accident in question herein, testified that there was no incline on the truck platform to cause a truck to move from north to south. Ernest Rousseau, statistician in the Post Office Department, called as witness on behalf of respondent, declared that there was an incline in the centre of the platform from east to west at a point 712 feet from the concourse for a distance of 61 feet. It seems evident that this incline or slope can have no relevant bearing upon the accident.

It was incumbent upon the respondent to establish that the accident was caused by the negligence of servants or employees of the third party; after carefully perusing the evidence adduced, I am satisfied that the respondent has failed.

There will accordingly be judgment declaring that the suppliant is entitled to the relief sought by her petition of right to the extent of \$1,389.05, without interest but with costs, and dismissing the third party proceedings, with costs against the respondent.

*Judgment accordingly.*

The action of *Canadian Pacific Express Co. v. The King* No. 18435, was tried before the Honourable Mr. Justice Angers immediately after the close of the trial of the case reported above, judgment being rendered on August 31, 1940. In that action the suppliant claimed from the Crown the money paid to M.'s widow under the award of the Quebec Workmen's Compensation Commission. Judgment was given in favour of the Canadian Pacific Express Company for the amount so paid, the learned judge holding that since the company was obligated to pay to M.'s widow the amount awarded by the Workmen's Compensation Commission and by paying the same became subrogated in the rights of M.'s widow pursuant to the Quebec Workmen's Compensation Act, 21 Geo. V, c. 100, it is therefore entitled to recover that amount from the Crown who was responsible for the accident and death of M.

*Reporter's Note:* Attention is called to the case of *Williamson v. John I. Thornycroft & Co. Ltd.*, reported in (1940) W.N. 308, in which the date in respect of which damages are to be assessed, the dependant having died before trial, is discussed.

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BETWEEN:

May 14-16.  
Dec. 10.

KINGSVILLE GAS APPLIANCES,  
LIMITED, ELMIRE BECKETT } PLAINTIFFS;  
AND FREDERICK K. JASPERSON }

AND

NEW IDEA FURNACES, LIMITED, } DEFENDANTS.  
AND NORMAN ROBINSON . . . . . }

*Patent—Infringement action—Heating apparatus for curing of tobacco—  
Prior user—Anticipation—No infringement—Alleged infringing device  
substantially the same as a patented device known in the art prior  
to application for patent in suit.*

The action is for infringement of Canadian Patent No. 381,441, granted to the plaintiffs Jasperson and Beckett; the plaintiff Kingsville Gas Appliances, Limited, is the exclusive licensee in Canada of Jasperson and Beckett. The invention claimed is said to relate to a "Method of and Apparatus for Curing Tobacco," and consists of a heating structure. The Court found that the alleged infringing apparatus is substantially the same as an apparatus known as the Smith burner which had been in use for some time prior to the application of Jasperson and Beckett for the patent in suit.

*Held:* That if an invention be nothing more than a particular means to attain a given result which is well known, all that can be claimed as an invention is the particular means described.

2. That since there is no distinction, in the patent sense, between the Smith burner and the defendants' apparatus, the defendants' apparatus cannot be said to infringe plaintiffs' patent.

ACTION by plaintiffs herein to have it declared that Canadian Patent No. 381,441 is valid and has been infringed by defendants.

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

*J. H. Rodd, K.C.* and *R. S. Rodd, K.C.* for plaintiffs.

*L. H. Carreau* for defendants.

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

THE PRESIDENT, now (December 10, 1940) delivered the following judgment:

This action is one for the infringement of a patent, No. 381,441, granted in May, 1939, to Frederick K. Jasperson and Elmire Beckett, assignees of William A. Beckett, the inventor, who applied for the patent of inven-

tion on March 1, 1938. It will be convenient to refer to the patentees as "Beckett." The invention is said to relate to a "Method of and Apparatus for Curing Tobacco." The first named plaintiff is the exclusive licensee in Canada of Beckett. It is alleged by the plaintiffs that the first-named defendant made and the other defendant used the patented invention in question, in the curing of tobacco, at a place or places in the tobacco growing counties of Western Ontario. The usual defences are pleaded by the defendants.

Generally, tobacco is cured in buildings, frequently called "kilns" and which term I shall likely find convenient to follow. Kilns are usually about 24 feet long, 18 feet wide, and about 18 feet high to the plate within a pitched roof, the kiln being ventilated from below and above, and the ground is usually the floor of the kiln. The usual practice is to tie together the ends of two stems of tobacco leaves and place them straddle of a stick, usually a lath, which is supported by cross beams in the kiln, about 1,000 to 1,200 of these sticks constituting one curing operation and producing about 1,200 pounds of tobacco.

There are two methods of curing tobacco, and the first to be mentioned is the air curing method. In the air curing method the kiln is left open so that the atmosphere cures the tobacco slowly. This method, I understand, is adopted with the coarser tobaccos, the Burley and Black, but in certain weather conditions heat is required to assist in this method. The other method is known as "flue curing." The name comes from the apparatus once generally used to cure tobacco. The old plan was to build a furnace at one end of the kiln, fed by fuel from the outside, with flues or pipes, somewhat similar to stove pipes, running along the bottom of the kiln for the purpose of distributing the heated air throughout the kiln and conducting off the smoke. The air, drawn into the flues by the heat of the furnace fire, passed through the flues and the radiated heat cured the tobacco, and it went out through a chimney into the outside atmosphere.

There are three distinct stages in the curing of tobacco, practised for many years, and well known in the art. First, there is what is called the yellowing stage, which means the bringing of the green tobacco leaf to a lemon-yellow colour, and this stage requires from 24 to 48 hours,

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in a closed and practically air-tight kiln. The moisture must be retained in the leaf to produce the desired colour, the temperature of the heated kiln, as the yellowing stage proceeds, being about ten degrees above that of the outside air. In very dry weather it becomes necessary to throw water on the floor of the kiln, or to introduce it otherwise, as there must be a certain amount of moisture in the air of the kiln at this stage. The second stage is called the fixing of the colour. When the yellowing process proceeds to a certain point the colouring must not be further increased, that is, it must be fixed, and for this purpose the temperature is made to rise gradually until it reaches 145 degrees F.; this stage requires about 15 hours, during which time the leaf and the web lose their moisture, some slight ventilation being introduced to permit the moisture coming from the leaf to pass out into the air through the top of the kiln. The third stage involves the drying of the mid-rib or stem, and as this requires intensive heat the temperature is raised to 180 degrees F. and great care must be exercised to prevent the tobacco being scorched which would lower its grade and price. The leaf of the tobacco, after being subjected to the intense heat of 180 degrees F., or so, is sometimes left very crisp, and under the old practice the doors and ventilators of the kiln were thrown open so that the tobacco leaf might reabsorb a certain amount of moisture so as to make it pliable and prevent its breaking up. This is called bringing the tobacco into the case. The chief difficulty in the flue-curing system—the introduction of air from outside through the flues—was lack of uniformity in curing. The heat rising from the flues nearest the furnace would dry the tobacco above it faster than it would the tobacco at the other end of the kiln.

The patentee, in his Specification, states that the objects of his invention are to provide an improved method of curing tobacco whereby a more uniform curing, without scorching or undercuring, may be effected in less time and at less cost than heretofore, and to provide an improved type of stove or heating structure for the accomplishment of this curing. The patentee then proceeds to describe in general terms his improved method and apparatus, and he states:



My improved process and apparatus comprises the disposition of a plurality of stoves or heating structures at spaced points within the house on the floor of the house. These stoves may be heated from a common source of fuel. Each stove draws air for combustion of its fuel from within the interior of the house, and in the form here shown discharges directly into the interior of the house. The atmospheric air which enters the house from the outside is drawn rapidly down into the stoves and heated and discharged therefrom with the products of combustion.

Functioning in this manner each stove creates a strong draft drawing air in substantial quantity through the stove and discharging the same back into the house. The entire volume of air within the house is therefore caused to pass through the stove within a relatively short time and the interior of the house is heated uniformly throughout and a uniform curing of the tobacco is effected. Currents of air are therefore set up within the curing house. The atmospheric air which enters the house through cracks or ventilation openings does not drift at random throughout the house chilling the tobacco and interfering with the uniformity of the curing but such air is rapidly drawn down through the stoves and discharged therefrom into the house so that the curing is kept at a substantially uniform temperature throughout and the air is kept moving therethrough.

If it is desired that moisture be added to the warm air being circulated through the tobacco, such addition of moisture is provided for in the stove here shown. Such moisture is added to the air being passed through the stove in the manner hereinafter described.

A meritorious feature of my stove is that air is drawn into the fuel tube to support combustion in an upright burner disposed within the surrounding enclosure of the stove and a large quantity of air is drawn into such enclosure about the burner and passes over the burner and is heated thereby and is thereafter mixed within the enclosure with the products of combustion discharged directly from the burner into the enclosure. Such heated air with mixed products of combustion is then discharged into the curing house. The burner is of such a character and the fuel used is such that the products of combustion are gases substantially free from carbon or soot and do not injure the tobacco during the curing.

The burner is so constructed that fuel mixed with primary air is discharged through a plurality of jets upon opposite sides of a space which is constantly being fed with secondary air in a greater amount. Specifically the secondary air passes through two air pipes arranged on opposite sides of the primary air and fuel pipe and these secondary air pipes discharge into an upwardly facing trough or channel. The fuel or primary air which forms the combustion is discharged from jets arranged along the upper margin of the side walls of this trough.

The heating structure of Beckett may be briefly described as follows. First, there is a cast iron rectangular box, referred to by Beckett as a "casing," about fifteen inches high, seven inches wide, and twelve inches in depth, standing on a base supported upon blocks, the casing being cut away at the bottom on each side so as to provide large openings through which the air may enter the casing. The casing is provided on each side near the top with air discharge pipes, similar to stove pipes; these

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four pipes extend laterally from the sides of the casing, terminating in a T shape end, their purpose being to diffuse within the kiln the air which is heated by passing upwards through and around the flame of a gas burner located inside the casing. The casing is also provided with a top portion which is in the form of a pan with a central opening, and this pan may be filled with water if it is desired to add moisture to the heated air passing out from the casing. This pan is in turn covered by a top closure in the shape of an inverted pan, resting within the pan which lies over the opening of the top of the casing. That describes generally the principal features of Beckett's apparatus.

The patented apparatus is, of course, described in much greater detail in the Specification, and I perhaps should describe it a little more fully, particularly the burner elements, and that will sufficiently reveal the mode of operation of the apparatus. The complete apparatus itself is called a "stove" in the Specification and to that designation I shall adhere. The invention provides for a plurality of stoves arranged at spaced points on the floor of the kiln. The casing, the exterior walls of the stove, houses an upright burner structure supported on a base, and embraces two burner units, a large unit and a smaller one. The small burner is merely supplemental to the other and is used to give a low heat when circumstances so require. The Specification describes the construction and arrangement of the burners in great detail, but I think I may describe the same with sufficient accuracy for our purposes here in comparatively short terms. It is to be kept in mind that here the burners are designed and constructed having in mind the use of gas as a fuel, and if oil or other fuel were to be used a burner arrangement adapted for the combustion of such other fuel would have to be provided. The large burner unit comprises an upright fuel and primary air pipe, the gas being fed to the lower end of that pipe from a main gas line, the flow of gas being controlled by a valve, and this regulates the volume of the gas flame. The lower end of the upright fuel pipe is open to receive air which passes upwardly with the gas, and this air Beckett refers to as "primary air." The upright fuel and primary air pipe, at or near the top and on two sides, supports two plates, semi-circular in

shape, and on the inside of each of those two plates are two other plates of the same shape, the two inner plates are apparently structurally united towards the bottom and at or near their centres by a semi-circular element or channel, and this channel forms an enclosure over the top of the fuel pipe. The outer and inner plates are united by screws, and between each of the two series of outer and inner plates there is a narrow space wherein the gas and air will flow from the upright fuel pipe. The inner plates adjacent the outer plates are provided with a series of corrugations which so engage the outer plate as to form between the outer and inner plates a series of ducts or jets for the discharge of the mixture of air and gas which flows upwardly between these two plates, and the gas emerging through these ducts or jets when lighted provides the flames which heat the air. The gas flames, I understand, are directed laterally across the space between the tops of the two inner plates. Between the lower ends of the two inner plates where they are united and the sides of the semi-circular channel which join the inner plates together at their centres, there are what is called "secondary" air pipes, openings through which air may flow upwardly into the space between the two inner plates. These secondary air passages are intended, it is said, to augment the supply of primary air, to be heated by the gas flames. The term secondary air is, I think, employed to distinguish between the air which reaches the burners through the bottom of the fuel pipe along with the gas, and any other air drawn from within the kiln and reaching the flame of the burners, between and around the inner plates. The small burner is of a similar construction except that the secondary air pipes are omitted and the air is drawn in entirely through the primary air pipe; and the channel between the inner plates is also omitted and these two plates come together, or are made as one, the air being fed throughout a single row of ducts on each side. As I have already stated this small burner is merely supplemental to the large burner, and may be used to provide a low heat. The small burner is supplied with gas independently of the larger burner through a separate valve controlled pipe.

The plaintiff relies on all the claims of the patent in suit but it will suffice to mention the following:

1. That process of curing tobacco under relatively high temperatures in a substantially closed tobacco curing house wherein the tobacco is

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suspended in the upper levels thereof which comprises arranging a plurality of air heating stoves at spaced intervals on the floor of the tobacco house, taking air from within the house and causing more than is sufficient for combustion purposes to enter each stove at a level adjacent to the floor, and to pass upwardly through the stoves causing the air to be heated to a relatively high temperature and to discharge from the stoves directly back into the house at a higher level therein but below the level of the tobacco suspended in the house.

2. That method of curing tobacco as defined in claim 1 wherein the additional air drawn from the interior of the house into the stoves and mixed within the stoves with the products of combustion therein exceeds by many times the amount of air drawn into the stoves and necessary to support combustion.

4. That method of curing and drying tobacco under relatively high heat in a tobacco house in which tobacco leaves are hung in the upper levels thereof which comprises substantially closing the house so that very little or no air enters the house or escapes therefrom, taking air from the inside the house and causing the same to enter the lower ends of a plurality of stove units arranged on the floor of the house and be heated therein and discharge from the upper ends thereof at a level spaced from the floor but below the hung tobacco leaves, the air thus passing through each stove unit exceeding by many times the amount of air necessary to support combustion and mixing with the products of combination so that upon discharge from the stoves the air mixture has a relatively high temperature and creates a circulatory action in the atmosphere of the house.

5. That method of curing tobacco in a tobacco curing house in which tobacco leaves are hung in the upper levels thereof which comprises arranging a plurality of stove units on the floor of the house in spaced relationship to one another, substantially closing the house so that only regulated small amounts of air are admitted thereto and discharged therefrom, causing the air from inside the house to enter the stove units adjacent to the floor level and rise therein and become heated therein and then discharge from all the stove units on substantially the same level in the house spaced from the floor but below the hung tobacco leaves, the continuous upward passage of the air through the stove units and the heating thereof creating a circulation of air within the house continuously repassing air already heated in preceding passages through the stove units.

10. In a house for curing tobacco under relatively high heat provided with supports in the upper portion thereof for tobacco leaves, a plurality of stoves arranged on the floor at spaced intervals, each of said stoves comprising a casing provided with a plurality of air openings adjacent to the bottom thereof communicating with the atmosphere within the house to draw air therefrom into the interior of the casing and a plurality of air discharge openings adjacent to the top thereof communicating with the interior of the house to discharge heated air therethrough, and a burner within said casing directing its flames of combustion upwardly within the casing thereby inducing air to enter the opening in the bottom of the casing and flow therethrough and out of the discharge openings at the top.

13. In a tobacco curing house provided with supports for tobacco, a plurality of stoves arranged at spaced intervals within said house, each of said stoves comprising, in combination, a casing having an air inlet opening adjacent to the bottom thereof communicating with the atmosphere within the house to draw air therefrom into the interior of the casing and an air discharge opening adjacent to the top thereof communi-

cating with the interior of the house to discharge heated air therethrough, a gas burner in said casing arranged to direct the ignited gaseous fuel issuing therefrom toward the top of the stove and thereby induce air to enter the stove through the bottom opening from the interior of the house, said top and bottom openings in the casing also permitting a substantial quantity of air in excess of combustion requirements of the burner to pass therethrough so that when the burner is in operation a large quantity of air in excess of combustion requirements is caused to flow through the stove from the bottom opening to the top opening and be heated by the burner in its passage through the casing prior to its discharge therefrom.

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19. In a tobacco curing and drying house, a plurality of stoves arranged therein each comprising, in combination, a casing opened adjacent its opposite ends and communicating through such openings with the atmosphere in the interior of the house, a burner of relatively large fuel capacity and a burner of relatively small capacity arranged in said casing for discharging the ignited fuel issuing therefrom toward one opened end of the casing so that air is induced to enter through the other opened end of the casing and be heated by the ignited fuel issuing from either one of the burners, said air thus induced to enter the casing mixing with the products of combustion of the burners and discharging in such mixed state from the end of the casing opposite to that which it entered, the burner of small fuel capacity adapted to be used for producing a low heat particularly adaptable to the curing of tobacco leaves and the burner of large capacity adapted to be used for producing a high heat particularly adaptable for the drying of tobacco leaves.

The features of Beckett's method of curing tobacco, and the apparatus for accomplishing the same, which were particularly accentuated in support of the validity of the patented invention might be mentioned. They are: (1) the disposition of a plurality of stoves at spaced points on the floor of the kiln; (2) the improved combustion obtained by mixing the air and gas on their way to the burner; (3) the construction and arrangement of the burner surrounded by the casing in such a way that a large volume of air is pulled in at the bottom, the burner acting as a pump to create a forced circulation of the air within the kiln, thus effecting a saving of time and money in the curing of tobacco; (4) the provision of the four pipes at the top of the stove, extending laterally, through which the heated air is forced to escape, thus permitting it to rise and be diffused over a wider zone than if it were permitted to rise directly upwards, and which, it is said, provides a uniformity of temperature throughout the kiln, thus effecting a more uniform curing of the tobacco; (5) the provision of two burners to provide a high and a low temperature; and (6) the provision of secondary air conduits or pipes through which air may enter into the

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space between the two rows of gas jets, thus, it is said, providing a more lively flame. That, I think, describes the principal features of Beckett's apparatus put forward by the plaintiffs to sustain the claim to invention, and to distinguish it from heating devices heretofore used or disclosed and intended for the same purpose, and which is said to be infringed by the heating structure of the defendants.

I may now refer to the defendants' heating structure, which is alleged to infringe Beckett. This is a plain and simple affair, of cheap construction, and may be described in very brief terms. The casing is circular in form and of ordinary sheet metal, with supporting feet resting on the ground or floor of the kiln, or on some suitable base. The bottom of the casing, which is elevated above the floor, has four or five openings, extending outwardly from the centre, sufficiently large to permit the entrance of any quantity of air necessary to cause combustion, but otherwise the bottom is closed. Inside the casing, and just above the openings in the bottom, is a gas burner, having a series of jets, into which by appropriate means, is fed the gas fuel. The burner itself is of a well known type of gas burner, the Barber Burner, available on the market to anyone. Near the top of the casing are about nine circular openings through which the air heated by passing through and around the flame of the burner may escape, below the tobacco, and out into the kiln. It was obvious that these apertures had to be provided to permit the escape of the heated air from the casing. Above the top of the casing is an inverted canopy, structurally united to the casing so as to close the opening at the top of the casing, its edges projecting considerably beyond the sides of the casing, for the purpose of preventing the heated air going straight up from the casing and causing it to flow laterally through the apertures just mentioned. In the centre of the inverted canopy is an opening provided with a cover. In the defendants' structure we have therefore a circular casing with openings in the bottom through which air is drawn upwards through and around the flame of the oil burner, with outlets above the flame and towards the top of the casing to permit the heated air to escape laterally out into the kiln, and with an inverted canopy superimposed on the top of the casing which prevents the

heated air rising directly upwards and causing it to flow through the openings at the top of the casing, and outwards beyond the sides of the casing. It is intended that a plurality of the defendants' heating apparatus be used, depending on the size of the kiln. That, I think, sufficiently describes the offending structure.

Certain prior users of Beckett were pleaded and referred to in evidence, and to one of them I may refer. One alleged prior user that was particularly stressed was an air heating device known as the Smith heater, and it was indubitably established by the evidence that this heater was used quite extensively, as early as 1934, and in years following, for curing tobacco in certain tobacco growing areas in the United States, and so far as I am aware it is still in use there. This use of Smith in the United States was anterior to any date claimed for the invention of Beckett. A Smith heating apparatus was installed in a kiln on some tobacco farm in Ontario, in 1936, for demonstration purposes, but it is not clear whether or not its use was there continued. This installation comprised forty units of Smith. One of the Smith heaters was produced at the trial and made an exhibit. In principle, its form of construction is substantially the same as that of the defendants. The opening at the bottom is somewhat different in form to that of the defendants, but that is of no consequence. Within the casing is fitted a well known oil burner placed on mountings, the oil being drawn up on a wick from a well which is fed from an outside storage tank by gravity, and there is an adjustment on the feed line whereby the flame may be raised or lowered. On the inner side of the burner is a series of shells perforated with small holes to give a circulation of air in order to intensify the heat of the burner. The top of the casing is wholly open but attached thereto, some inches above its top, is a canopy, its edges extending a little beyond the sides of the casing, and this canopy stops the direct upward flow of the air heated by the burner, causing it then to flow first downwards and thence outwards beyond the casing to be distributed throughout the kiln. This canopy is not inverted and does not extend so far beyond the sides of the casing as in the case of the defendants' apparatus; the Smith casing is not provided with apertures around the top as in the defendants' casing, this being unnecessary

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because there is an open space between the top of the casing and the canopy, and the heated air proceeds upwards until it strikes the canopy when it is deflected downwards and outwards into the kiln. In kilns in which the Smith heater was used in the United States there would be many units employed, as many as forty units, I think, in one kiln that was referred to in the evidence. The casing and canopy of a heating apparatus shown in Exhibit C, a publication issued in 1935, by the Tobacco Division of the Canadian Department of Agriculture is quite similar to Smith, except that it is charcoal that is to be used as a fuel and consequently the burner means would be different from that of a gas or oil burner. In that publication this charcoal burner is recommended for use "if the weather continues cold and damp and the tobacco is not curing well, the temperature should be raised to about 90° by means of charcoal burners, oil burners, or open charcoal fires to reduce the relative humidity . . . until conditions improve." One might take the structure shown in this exhibit, and install therein a gas burner similar to that found in the infringing structure, as is in fact suggested in the publication mentioned, and the result would be, in principle, a duplication of the defendants' heater. Other prior users were referred to by the defendants, and prior publications also, but it is not necessary to discuss them after a reference to Smith.

Now, if the infringing apparatus of the defendants is substantially the same as Smith, and the latter were in use prior to Beckett, it must then follow that the apparatus of the defendants cannot be held to infringe Beckett. When the plaintiffs contend that the defendants' apparatus infringes Beckett they in effect say that had the defendants devised their apparatus prior to Beckett they would have made an invention and would have been entitled to a patent from the Patent Office, upon application being made therefor. But, Smith having been earlier known and in use, it would seem hardly possible that the defendants would have been granted a patent for their apparatus, if the Patent Office were made aware of the existence and prior user of Smith, and probably such an application would not have been favourably considered even if Smith had never appeared in use. If that be so, then the defendants' apparatus could not be held to



infringe any air heating apparatus, invented in 1937 or 1938, even if it possessed subject-matter for a patent. It is obvious that any air heating structure of the defendants' type, for the curing of tobacco, must comprise a casing, a burner, and means for the admission and discharge of air. These general features were old, and it was well known that if a fire or flame were introduced inside the casing, as in the case of a chimney, it would create a draft of air in that direction, and thus create a circulation of air within the kiln. It was obvious that a plurality of heating units was desirable in order to secure a wide and uniform distribution of heated air throughout a tobacco curing building or kiln, and this had actually been practised before either Beckett or the defendants' structure. The defendants' apparatus comprised and exemplified these general features but surely that would not of itself constitute invention. In the defendants' combination of known elements, to achieve a result that was well known, there could hardly be invention in view of Smith, the common knowledge, and all that had been disclosed in the prior art. In that state of the art the field of invention was inevitably narrow, that is, in respect of heaters of the general character here in question. If an invention be nothing more than a particular means to attain a given result which is perfectly well known, then all that can be claimed as invention is the particular means described, and, I think, that, at the most, was all that was open to Beckett. And there are structural distinctions between Beckett and defendants' apparatus, but whether the distinctions are important is perhaps debatable. Beckett may be more durable, more efficient, more convenient, and less expensive to operate than the defendants' heater, or that of Smith, or any other similar structure, but while these improvements or advantages may be evidence of subject-matter in Beckett's particular construction they are not necessarily important or relevant factors in an action for alleged infringement of Beckett by the making and using of the defendants' apparatus. The issue of infringement here may, I think, be determined by reference to Smith alone. If there is no distinction between Smith and the defendants' apparatus, in the patent sense, and I do not think there is, then the latter cannot infringe Beckett.

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That, I think, affords an effective answer to the claim of infringement here. I do not think it can be said that the defendants' heating structure infringes Beckett and that is the conclusion which I have reached, and therefore on that ground alone the plaintiffs must fail. Having reached the conclusion that here there is no infringement it is not necessary to pronounce upon the question of the validity of Beckett. Whatever may be said in support of invention for Beckett, I see no ground for holding that it is infringed by the defendants' heating apparatus.

The action is therefore dismissed and costs will follow the event.

*Judgment accordingly.*

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BETWEEN:

HIS MAJESTY THE KING..... PLAINTIFF;

AND

RODRIGUE MESSIER..... DEFENDANT.

*Expropriation—Right to recover amount paid experts—Taxation—Claim therefor to be included in compensation—Discretion of Court.*

*Held:* Where the expropriated party by his defence to an Information asks to be paid, as part of the compensation, a sum paid by him to valuers for their services in preparing to give evidence as to value, the Court upon proof made of the nature of the services rendered, may include in the compensation payable to the expropriated party such sum as, in its discretion, it deems reasonable for the said services.

INFORMATION by the Crown to have certain properties expropriated by it valued by the Court. The defendant in his defence claims, *inter alia*, the sum of \$500 being an amount alleged to have been paid by him to experts for services rendered by them in preparing to give evidence of the value of the property expropriated. The present report is solely on the question of whether this amount or any part thereof should be allowed the defendant as part of the compensation to be paid him for the forceable taking of his land.

The action was tried before the Honourable Mr. Justice Angers, at Montreal.

*M. Rainville and R. Brossard* for plaintiff.

*B. Bissonnette K.C.* for defendant.

ANGERS J., now (April 3, 1940) delivered the following judgment:

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[The learned Judge, after giving a summary of the pleadings generally, and a discussion of the evidence as to value, proceeded as follows:]

Le défendeur a inclus dans sa réclamation une somme de \$500 pour frais d'expertise. Un compte du témoin Marquette au défendeur pour \$300 a été produit comme pièce H; il se lit comme suit:

Pour examen et évaluation de la propriété;  
Pour préparation de la cause avec M<sup>e</sup> Bernard Bissonnette;  
Pour tentatives de règlement hors de cour avec les autorités  
du département des Travaux Publics à Ottawa;  
Pour 3 jours d'assistance en Cour et témoignage rendu.

En tout:—

\$ 300 00

Il me semble juste et équitable que l'exproprié recouvre, comme partie de l'indemnité qui lui est allouée, les frais raisonnables nécessairement encourus pour établir sa réclamation. L'indemnité est censée représenter la valeur de la propriété au moment de l'expropriation; si l'exproprié devait déduire du montant qui lui est accordé de ce chef les frais légitimes et utiles faits pour la vérification et l'établissement de la valeur exacte de l'indemnité, il ne serait pas indemnisé de façon adéquate. L'exproprié ne doit pas être enrichi par une expropriation, mais il ne doit pas davantage être appauvri; à la suite d'une expropriation, il doit être laissé, au point de vue pécuniaire, dans une position égale autant que possible à celle où il se trouvait avant l'expropriation.

Le procureur du défendeur a déclaré qu'il n'avait pu trouver aucune décision de la Cour de l'Echiquier ou de la Cour Suprême sur ce point; j'ai fait des recherches et n'ai pas eu plus de succès. Il est possible que la question ait été débattue devant l'une de ces cours, mais les rapports et recueils que j'ai consultés n'en font point mention.

M<sup>e</sup> Bissonnette, au cours de l'argument, a fait allusion à une décision de la Cour Supérieure de la Province de Québec, par laquelle les frais des témoins experts entendus de la part de l'exproprié avaient été accordés; cette décision n'étant pas encore rapportée, il a été convenu d'en produire une copie au dossier, ce qui a été fait; la décision en question, rendue par l'honorable juge Surveyer in re *Leduc ès-qual v. Michaud*, a depuis été rapportée (1). Elle contient, entre autres, le considérant suivant (p. 69):

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Considérant que le propriétaire exproprié a droit de recouvrer, comme faisant partie de l'indemnité qui lui est due, les frais faits pour établir sa réclamation (*Université de Montréal v. Lacroix* (1930) 32 R.P. 358, et les précédents cités à la p. 362, auxquels on peut ajouter: *Sentenne v. Cité de Montréal* (1893) 2 B.R. 297, *Cité de Montréal v. Gauthier* (1892) 1 C.S. 309, *Carrier v. Corporation de N.-D. de Lévis* (1895) 8 C.S. 418).

Il me paraît à propos de citer ici un passage du jugement de l'honorable juge Coderre dans la cause de *l'Université de Montréal v. Lacroix* (1); à la page 362, le savant juge s'exprime ainsi:

Dans ces causes il a été décidé que les avocats ont droit non seulement aux frais entre partie et partie, mais encore aux frais entre avocat et client; que l'exproprié pour cause d'utilité publique a droit à tous les frais et dépenses encourues par lui pour mener sa cause à sa fin, de manière à ce que l'indemnité qui lui a été accordée par les arbitres lui reste entière.

En particulier, dans la cause de *The Shawinigan Water and Power Company*, requérante v. *Armand Magnan*, propriétaire exproprié, rapportée au 13 R.P., 365, le juge Dugas, lorsqu'il s'agissait d'une expropriation faite en vertu de la loi de Québec, celle suivie aussi dans la présente cause et qui se trouve aujourd'hui au chapitre 230 des S.R.Q., 1925, a déclaré que la Cour doit non seulement taxer les dépens accordés par l'article 79 du tarif des avocats, mais les frais d'arbitrage qui comprennent les dépenses et les autres frais encourus par l'exproprié. A la page 372 du rapport, le savant juge, au sujet des témoins experts, dit ce qui suit:

"Refuser à l'exproprié le droit de recourir aux hommes de l'art, pour l'examen de sa propriété, pour s'en faire des témoins compétents, qui renseigneront les arbitres serait encore une injustice. L'exproprié avait donc droit et il n'aurait pas agi en bon père de famille, s'il n'avait pas eu recours aux hommes de l'art, et à un avocat pour se défendre contre les procédures de la réquerante."

C'est aussi la manière de voir du juge dans la présente cause.

Dans la cause de *Canadian Northern Railway Company v. Robinson* (2), l'honorable juge Mathers de la Cour du Banc du Roi du Manitoba, parlant des honoraires des témoins experts, déclare ce qui suit (p. 250):

The owner objected to the taxation of the witness fees. Evidence was produced to shew that one expert witness had been paid \$150 and several others \$50 each. The taxing master allowed in respect of these fees only \$25 each. The cases cited on behalf of the owner do not bear out his contention that he should be allowed the amount actually paid. They shew that a fair amount may be allowed to an expert witness for the purpose of qualifying himself to give evidence; but what is a fair amount should be settled by the taxing master in view of all the circumstances. I have discussed with the taxing officer his reason for arriving at the conclusion he did with respect of these fees, and it appears to me he has exercised a proper discretion.

(1) (1930) 32 R.P. 358.

(2) 8 Canadian Railway Cases 244.

Voir aussi *Shawinigan Water & Power Company v. Magnan* (1); *Carrier v. Corporation de Notre-Dame de Lévis* (2); *La Cité de Montréal et Gauthier* (3).

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Picard, dans son *Traité Général de l'Expropriation pour Utilité Publique*, déclare ce qui suit (p. 202):

A notre avis, l'exproprié ayant droit à la vérification et à la constatation judiciaires du chiffre de l'indemnité, et l'expropriant étant tenu de l'établir puisqu'il a l'obligation de payer une indemnité préalable et complète, tous les frais légitimes de cette vérification incombent à ce dernier.

Par frais légitimes il faut entendre tous ceux qui sont en définitive reconnus avoir été utiles à l'établissement de la valeur exacte de l'indemnité. A ce titre il faut y comprendre les frais d'une seconde expertise aussi bien que ceux d'une première. De même les frais d'une enquête, à moins qu'elle n'ait été provoquée par l'articulation de faits sans aucune vérité. Et en général tous les devoirs quelconques d'instruction ordonnés d'office ou même provoqués par les parties s'ils ont eu leur utilité.

En Angleterre la loi intitulée "Lands Clauses Consolidation Act, 1845" est plus explicite que notre "Loi des Expropriations", qui non seulement ne définit point le terme "indemnité" mais laisse à la discrétion absolue de la Cour la question des frais: article 33. Le statut anglais contient les dispositions suivantes:

32. The said arbitrators or their umpire may call for the production of any documents in the possession or power of either party, which they or he may think necessary for determining the question in dispute, and may examine the parties or their witnesses on oath, and administer the oaths necessary for that purpose.

34. All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions.

Browne et Allan, dans leur traité *The Law of Compensation*, 2<sup>ème</sup> éd., disent (p. 61):

It appears that an arbitrator may consult men of science in every department where it becomes necessary (*Caledonian Rail. Co. v. Lockhart* (1860) 3 Macq. H.L.(Sc.) 808, p. 823), and if not restricted by the terms of submission he may call in a valuer to assist him, provided he does not delegate his authority to such valuer (S.C., and also *Anderson v. Wallace* (1835) 3 Cl. & F. 26).

A la page 63, traitant la question des frais, ils ajoutent:

Surveyor's charges are usually based on Hyde's scale, but there is no recognized custom in regard to it (see *Debenham v. King's College, Cambridge* (1884) 1 C. & E. 438), and taxing masters do not consider them-

(1) (1912) 13 R.P. 365.

(2) (1895) R.J.Q. 8 C.S. 418.

(3) (1892) R.J.Q. 1 C.S. 309.

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selves in any way bound by it. Taxing masters usually adopt a method of taxation less liberal than solicitor and client costs, but more liberal than between party and party (see *per* Smith, L.J., in *Malvern Urban District Council v. Malvern Link Gas Co.* (1900) 83 L.T. 326).

D'un autre côté, Nichols, dans son ouvrage *The Law of Eminent Domain*, 2<sup>ème</sup> éd., tome 2, paragraphs 43 (intitulé "The Right to Immunity from Costs"), fait les observations suivantes (p. 954):

The costs recoverable in eminent domain proceedings include only the usual court costs, and the owner is not made whole for the expenses he is put to in asserting his right to compensation. Under the ordinary statute costs do not include counsel fees, the fees of expert witnesses or the payment of a stenographer; but if the statute specifically provides that the owner shall be reimbursed for all his expenses, no constitutional right of the party taking the land is violated. Likewise an owner who unsuccessfully appeals from an award of damages may be compelled to pay the expenses of the new hearing as well as the taxable costs.

Dans la cause de *Studwell et al. v. Halsted et al.* (1), le juge Mills s'exprime ainsi (p. 70):

Whatever may be the custom in the counties composing the present Second judicial district, or in any of them, it has been the practice in this county to make to the parties in condemnation proceedings only quite moderate allowances for their expenses incurred for counsel fees and expert witnesses; and I still think that the allowances here made are quite in harmony with such practice, which has been of frequent application, as within the last 25 years there have been many condemnation proceedings in this county. While, doubtless, the constitutional "just compensation" requires a fair indemnity to the owner for his necessary expenses incurred in proving the value of his land taken, as was substantially held by our Appellate Division in the recent case of *Matter of Board of Rapid Transit R.R. Commissioners*, 128 App. Div. 103, 126, 112 N.Y. Supp. 619, 636, I do not think that such "just compensation" should be held to require indemnity for any unusual compensation which the owner may have chosen to pay to his counsel or expert witnesses. If, in the hope of securing an unusual award, he has deemed it best to incur such an excess beyond ordinary expenditure, I think he should be left himself to defray it. Voir aussi *The City of St. Louis v. Heintz et al.* (2).

Les décisions et les commentaires précités sont basés sur des lois d'expropriation un tant soit peu différentes de celle qui régit la présente cause. Ces différences, de peu d'importance, n'affectent point, à mon avis, le principe consacré par ces décisions et ces commentaires que l'exproprié devrait recevoir intégralement la valeur réelle de sa propriété et que les frais justes et raisonnables qu'il a dû encourir pour établir cette valeur ne devraient pas être

(1) (1909) 116 N.Y. Supp. 68.

(2) (1891) 107 Mo. 611.

déduits du montant de cette valeur mais, au contraire, y être ajoutée; en d'autres termes l'indemnité devrait comprendre la valeur réelle de la propriété expropriée et les frais légitimes faits pour la détermination exacte de cette valeur.

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En l'espèce je crois qu'il y a lieu d'accorder au défendeur non pas la somme qu'il a pu convenir de payer au témoin Marquette, mais la valeur des services de celui-ci pour examen et évaluation de la propriété du défendeur et pour préparation de la cause avec son procureur. Je dois prendre en considération que Marquette a eu à examiner cinq propriétés sur l'île Fryer expropriées pour la construction de la digue mobile dont il s'agit en la présente cause, savoir les propriétés Granger, Dupont, Succession William Fryer, Perrault et Messier et que l'examen de ces cinq propriétés, voisines les unes des autres, a pu être fait le même jour; il en est de même pour la visite des propriétés environnantes et les recherches au bureau d'enregistrement; il me semble convenable dans les circonstances de diviser les charges du témoin Marquette et de les répartir également entre chacune de ces causes. Par contre je ne crois pas qu'il y ait lieu pour moi de tenir compte du temps passé en cour par le témoin pour rendre son témoignage; les honoraires de témoin sont du domaine du registraire et doivent être inclus dans le mémoire de frais au taux prévu par le tarif.

Je crois qu'il y a lieu d'accorder au défendeur pour honoraires de son témoin expert Charles Marquette la somme de \$50, comme suit:

|                                                                                                                                                                                                                |       |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|
| pour examen et évaluation de la propriété, y compris la visite des propriétés environnantes et les recherches au bureau d'enregistrement, 2 jours à \$50 par jour \$100—soit un cinquième de cette somme ..... | \$ 20 |
| pour entrevues avec le procureur du défendeur pour préparation de la cause .....                                                                                                                               | \$ 30 |
|                                                                                                                                                                                                                | <hr/> |
|                                                                                                                                                                                                                | \$ 50 |

The learned Judge then concludes, declaring the property vested in the Crown, and fixing the Compensation at the sum of \$6,533.32 with interest and costs.

*Judgment accordingly.*

BETWEEN:

MURIEL S. RICHARDSON.....APPELLANT;

AND

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

*Revenue—Income Tax—Income War Tax Act, R.S.C., 1927, c. 97, Secs. 2 (i), 21 & 35 (3)—Deductions—Principal and subsidiary personal corporations—Deduction of loss of subsidiary personal company not allowed to taxpayer who owns stock in principal personal company—Appeal dismissed.*

Appellant owned 50 per cent of the issued capital stock of Interprovincial Trading Corporation Limited. That company owned all the stock, except qualifying shares, of North American Financial Corporation, Limited and Intercolonial Trading Corporation Limited. All these corporations are personal corporations within the meaning of s. 2, ss. (i) of the Income War Tax Act, R.S.C., 1927, c. 97, and have substantially the same powers.

Appellant in her income tax return for the year 1936 disclosed the sum of \$37,997.69 as income from these three corporations, arrived at by adding to the net profit of the Interprovincial Company the net profit of the North American Company and deducting therefrom the net loss of the Intercolonial Company and dividing the result into two equal amounts.

The Commissioner of Income Tax refused to allow as a deduction the loss sustained by the Intercolonial Company and assessed the appellant for further taxable income in an amount equal to 50 per cent of that loss. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

*Held:* That appellant is properly assessed for income tax purposes and the appeal must be dismissed.

2. That under the Income War Tax Act all corporations are taxable as persons for the income tax upon their annual net profit or gain and personal corporations are not an exception to this rule, even though the tax be assessable against the shareholders upon the income of such corporations and not against the corporations themselves.
3. That Interprovincial Trading Company Limited never having elected to put itself within the terms of s. 35 (3) of the Act, and not having filed a consolidated return thereunder, the appellant cannot avail herself of the terms of s. 35 (3) of the Act; *quaere* whether the word "company" in s. 35 (3) of the Act includes, or was intended to include, a "personal corporation" as contemplated by s. 2 (i) and s. 21 of the Act.

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 Toronto.



C. F. H. Carson, K.C. and G. E. Hill for appellant.

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

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

THE PRESIDENT, now (April 15, 1941) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment for income tax levied upon the appellant for the year 1936 by the Commissioner of Income Tax.

The appellant, the widow of the late James A. Richardson who died in 1939, is the owner of 50 per cent of the issued capital stock of Interprovincial Trading Corporation, Limited (hereinafter called "Interprovincial"). Interprovincial owns wholly, except for qualifying shares, all the stock of two other corporations, namely, North American Financial Corporation, Limited (hereafter called "North American"), and Intercolonial Trading Corporation Limited (hereafter called "Intercolonial"). All these corporations are admittedly personal corporations within the meaning of s. 2, ss. (i) of the Income War Tax Act, and all were shown to have substantially the same corporate powers, namely, to buy, sell, deal in and hold stocks, bonds and other securities for money.

The appellant in making her income tax return for the year 1936 disclosed, *inter alia*, the sum of \$37,997.69 as income from the three personal corporations just named. This amount was arrived at in the following manner:

|                                     |              |
|-------------------------------------|--------------|
| Net profit of Interprovincial ..... | \$102,473 09 |
| Net profit of North American .....  | 17,964 08    |
|                                     | \$120,437 17 |
| Net loss of Intercolonial .....     | 44,441 78    |
|                                     | \$75,995 39  |
| Net profit .....                    | 75,995 39    |
| 50 per cent of Net profit.....      | 37,997 69    |

The Commissioner of Income Tax allowed the net profit of North American to be considered as a gain or profit of Interprovincial but refused to allow as a deduction the loss sustained by Intercolonial. He directed that 50 per cent of this loss, namely, the sum of \$22,220.89, be added to the net taxable income of the appellant. The Minister of National Revenue affirmed this assessment and from that decision an appeal was taken to this Court.

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The question for decision is whether a taxpayer who is a shareholder in a personal corporation may deduct from his or her income for tax purposes a loss sustained by another personal corporation, which is wholly owned by the personal corporation in which the taxpayer is a shareholder, or, in other words, can a holding personal corporation, for the purpose of computing its net income, consolidate its profit and loss with that of subsidiary personal corporations which it owns or controls. The income of a personal corporation, whether the same is actually distributed or not, is deemed to be distributed as a dividend to the shareholders, according to their several interests, and taxable each year.

Before proceeding further the provisions of the Income War Tax Act which enter into the issue here may be mentioned. Sec. 2 (i) of the Act defines a personal corporation as follows:—

2. (i) "personal corporation" means a corporation or joint stock company, irrespective of when or where created, whether in Canada or elsewhere, and irrespective of where it carries on its business or where its assets are situate, controlled, directly or indirectly, by one individual who resides in Canada, or by one such individual and his wife or any member of his family, or by any combination of them or by any other person or corporation or any combination of them on his or their behalf, and whether through holding a majority of the stock of such corporation or in any other manner whatsoever, the gross revenue of which is to the extent of one-quarter or more derived from one or more of the following sources, namely:—

- (i) From the ownership of or the trading or dealing in bonds, stocks, or shares, debentures, mortgages, hypothecs, bills, notes or other similar property.
- (ii) From the lending of money with or without security, or by way of rent, annuity, royalty, interest or dividend, or
- (iii) From or by virtue of any right, title or interest in or to any estate or trust.

Section 21 of the Act provides that "the income of a personal corporation, whether the same is actually distributed or not, shall be deemed to be distributed . . . as a dividend to the shareholders, and the said shareholders shall be taxable each year as if the same had been distributed . . . ." Sec. 35 (3) of the Act relates to consolidated returns of the income of certain corporations, and it reads:

35. (3) A company which owns or controls all of the capital stock (less directors' qualifying shares) of subsidiary companies which carry on the same general class of business and have fiscal periods substantially

coincident with the owning or controlling company may, in respect of all such companies which carry on business in Canada, elect, before the commencement of the earliest fiscal period of any of the constituent companies in respect of which consolidation is desired and in such manner as may be prescribed by regulation hereunder, to file a return in which its profit or loss is consolidated with that of all of its subsidiary companies carrying on business in Canada, in which case the rate of tax provided by paragraph D of the First Schedule of this Act shall apply.

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Interprovincial was incorporated under the Dominion Companies Act to buy and sell securities, and it held securities formerly belonging to Mr. and Mrs. Richardson. It held a large number of shares of the capital stock of James Richardson & Sons Ltd., a grain company in which Mr. Richardson had his principal interest. Intercolonial was also incorporated under the Dominion Companies Act and to it were transferred 5,000 shares of James Richardson & Sons Ltd., some of such shares being owned by Interprovincial and some by members of Mr. Richardson's family, his sisters and other relatives. In the taxation year 1936 Interprovincial owned all the shares of Intercolonial. Intercolonial issued 7 per cent debentures in the amount of \$2,500,000 which were distributed to Mr. Richardson's relatives in exchange for their stock in James Richardson & Sons Ltd.; Interprovincial received \$1,000,000 in the par value of the stock of Intercolonial in payment of the shares of James Richardson & Sons, Ltd., transferred by it to Intercolonial. By agreement Intercolonial was not to deal in other securities, and the debentures were apparently considered a form of security for the 5,000 shares of the stock of James Richardson & Sons, Ltd. The officers and directors of Interprovincial and Intercolonial were the same persons. I should perhaps endeavour to explain more fully the facts relating to the transactions just mentioned. Mr. Richardson's principal business was the grain company of James Richardson & Sons Ltd. He had transferred to Interprovincial the stock which he owned in James Richardson & Sons Ltd. and he had suggested to his relatives that they also transfer to Interprovincial their holdings in James Richardson & Sons Ltd. They apparently did not accept this suggestion because of the varied holdings of Interprovincial so Mr. Richardson organized a new company, Intercolonial. This company gave 1,000,000 shares of its capital stock to Interprovincial in exchange for that company's stock in James Richardson & Sons Ltd. Aside from

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qualifying shares Intercolonial issued no other shares and Interprovincial holds all the issued stock of Intercolonial. Intercolonial then created a debenture issue of \$2,500,000 carrying interest at 7 per cent. These debentures were delivered to Mr. Richardson's relatives in exchange for their stock in James Richardson & Sons Ld. transferred by them to Intercolonial. In all, Intercolonial acquired 5,000 shares of the capital stock of James Richardson & Sons Ld., and this was and is the only asset of Intercolonial. And it was agreed between the members of the Richardson family that Intercolonial would carry on no other business, and would not deal in any other stock or securities, and would not dispose of the James Richardson & Sons Ld. stock held by it until the debentures had all been paid off. The debentures were made a charge on the assets of Intercolonial and were intended as a security for the shares of James Richardson & Sons Ld. These transactions suggest that Mr. Richardson was of the opinion that his relatives would be afforded greater safety of investment by having all the stock of James Richardson & Sons Ld. held by one concern. It was suggested that in the event of Intercolonial not earning enough to pay the debenture interest Interprovincial would come to the rescue and make up the deficiency, and we are told that this was actually done. However, it is to be noted that there was absolutely no legal obligation whatever on the part of either Interprovincial or Mr. Richardson, to guarantee or make good any default of Intercolonial in so far as the debenture interest was concerned.

Interprovincial had large holdings of United States securities amongst its assets. In order to simplify the assessment for the income tax in respect of such securities, by the taxing authorities of the United States and Canada, it was decided to incorporate a third company to which would be transferred all the United States securities held by Interprovincial. So these securities were segregated and put into North American, a company incorporated under the laws of Newfoundland. This company was granted exactly the same corporate powers as the other two companies and Interprovincial transferred to it all its holdings of United States securities, the consideration to Interprovincial being all the capital stock issued by North American. The officers and directors of North American

were the same as those of Interprovincial and Intercolonial. Interprovincial, thus owning all the issued stock of Intercolonial and North American, made or purported to make a return in which was shown its profit or loss for the period in question consolidated with that of the two subsidiary companies. Income tax returns were made by each of the three companies as well as by the appellant, but no consolidated return was filed in accordance with the terms of s. 35 (3) of the Act.

Intercolonial, in its tax return for 1936, showed the following result:

|                                                   |              |
|---------------------------------------------------|--------------|
| Interest paid to James Richardson & Sons Ld. .... | \$ 38,407 78 |
| (This was borrowed money)                         |              |
| Interest on Debentures .....                      | 93,450 00    |
| General and other expenses .....                  | 84 00        |
|                                                   | <hr/>        |
| Total expenses .....                              | 131,941 78   |
| Its income was .....                              | 87,500 00    |
|                                                   | <hr/>        |
| Net loss .....                                    | \$ 44,441 78 |

The Commissioner of Income Tax, in assessing the appellant for the tax, added one-half of the amount of this loss to her taxable income for the year 1936, that is, the appellant, who owned one-half of the issued shares of Interprovincial, had deducted that amount in her return showing the profit or loss of Interprovincial, and to that had added the net profit of North American. The taxing authorities refused this deduction, being \$22,220.89, to be made from the income of the appellant as a shareholder in Interprovincial and it is this refusal that furnishes the subject-matter of this appeal.

The question, then, is: Can the taxpayer claim as a deduction for income tax purposes a loss sustained by a personal corporation which is wholly owned by another personal corporation in which the taxpayer has an interest, fifty per cent in this instance? Perhaps the question may be stated better in this way: Can Interprovincial file a return in which its profit and loss is consolidated with that of Intercolonial and North American, its subsidiaries, and can the appellant, who owns a share interest in Interprovincial, the holding company, in making her tax return, take advantage of the result arrived at by a consolidation of the profit and loss of Interprovincial with that of Intercolonial and

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North American? All figures disclosed and appearing here are admitted to be correct, the *bona fides* of the appellant is not questioned, and the fact that all three companies are personal corporations under the Act is admitted.

I think there is a fundamental obstacle in the way of the appellant succeeding in her appeal. It is that the corporations here involved are separate taxable persons, and the profits of their respective businesses, if any, are separate taxable profits, and there is no provision in the Income War Tax Act applicable here which, in my opinion, in any way modifies that principle. Under the Act all corporations are taxable as persons for the income tax upon their annual net profit or gain, and if there be no such net profit or gain there can be no assessable tax; and personal corporations are not an exception to this rule, even though the tax be assessable against the shareholders upon the income of such corporations and not against the corporations themselves, and at a rate different from other corporations. The principle that corporations are, for the purposes of the income tax, separate taxable persons, and their profits separate taxable profits, I find well expressed in a passage of the judgment of Sir Wilfred Greene, M.R., in the case of *Odhams Press Ltd. v. Cook* (1), and which, I think, is quite applicable here. He said:

By way of preface, it is, I think, important to bear in mind in dealing with income tax cases what is, of course, elementary, but nevertheless sometimes seems to recede into the background, that limited companies who carry on businesses are separate taxable persons, and the profits of their respective businesses are separate taxable profits. Companies who, if I may use a convenient expression, choose to carry on their businesses with the assistance of subsidiaries not infrequently find that for taxation purposes certain inconveniences result, owing to the fact that their subsidiary is a taxable entity separate from themselves. For instance, if the holding company, the parent company, is carrying on a business, and makes a profit, and the subsidiary is carrying on a business which perhaps originally formed part of the parent company's business but which for convenience has been transferred to the subsidiary, and in that business the subsidiary makes a loss, obvious difficulties appear in the way of treating the loss made by the subsidiary as a trading loss of the parent company. One result of the present claim, if it were successful, would be to transfer into the accounts of the holding company a trading loss of the subsidiary. I am not suggesting for a moment that this particular method of accountancy has been adopted with income tax in view. Indeed, if it had been, there would have been nothing wrong about it. What has been done, as it appears, has been done for good commercial reasons. However, that

does not alter the fact that the result of the present claim, if it be correct, is to transfer for income tax purposes into the account of the holding company a loss suffered by the subsidiary company.

The same principle is laid down in many other authorities but it is unnecessary to mention them. There are no facts here, nor are there any provisions in the Income War Tax Act, which can, in my opinion, operate to modify that principle to the appellant's advantage.

In support of the appeal much reliance was placed upon s. 35 (3) of the Act which permits a company owning or controlling all the capital stock of subsidiary companies which carry on the same general class of business, to elect, within a prescribed time, to file a return in which its profit or loss is consolidated with that of all of its subsidiary companies, and in which case the Act prescribes that the rate of tax shall be that provided by paragraph D of the First Schedule of the Act. That section of the Act is perhaps wanting in clarity, but, as I suggested in *Wilson v. The Minister* (1), it is to be seriously doubted whether the word "company" in s. 35 (3) includes, or was ever intended to include, a "personal corporation" as contemplated by s. 2 (i) and s. 21, or whether Intercolonial is a subsidiary company carrying on the same general class of business as Interprovincial, the former being, in the period in question, only the holder of shares of James Richardson & Sons Ld. and which shares it was under agreement not to dispose of until the debentures earlier mentioned were retired; and further, Intercolonial was under agreement not to engage in any business within its corporate powers, other than the holding of such shares of James Richardson & Sons Ld. The provisions of the Act respecting personal corporations, s. 21, do not seem to contemplate the state of facts existing between a company and its subsidiary companies as provided for in s. 35 (3) of the Act. However, Interprovincial never elected to put itself within the terms of s. 35 (3), nor did it file a consolidated return thereunder, and the appellant cannot therefore now avail herself of the terms of that section of the Act. Reference was also made to the fact that certain provisions of the Companies Act provide that the income and expenditures of subsidiary companies may be included in the balance sheet and state-

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(1) (1938) Ex. C.R. 246; (1939) 1 D.L.R. 678.

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ment of profit and loss of a holding company. These provisions were designed for a purpose altogether different from that of the computation of taxable income under the provisions of the Income War Tax Act, and, in my opinion, would have no application here.

Maclean J. My conclusion therefore is that the appeal must be dismissed with costs.

*Judgment accordingly.*



ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

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—

BETWEEN:

THE SHIP *NEW YORK NEWS*.....APPELLANT;

AND

PATERSON STEAMSHIPS LIMITED...RESPONDENT;

AND

QUEBEC & ONTARIO TRANSPORTATION COMPANY LIMITED } APPELLANT;  
(COUNTER-CLAIMANT) ..... }

AND

PATERSON STEAMSHIPS LIMITED } RESPONDENT.  
(COUNTER-DEFENDANT) ..... }

*Shipping—Collision—Rules 19, 22 & 25—Both ships equally to blame for collision—Damages assessed equally on both ships—Judgment of District Judge in Admiralty varied.*

The ship *New York News*, owned by the Quebec and Ontario Transportation Company Limited, and the ship *Fort Willdoc*, owned by Paterson Steamships Limited, collided during a dense fog in Lake Superior while proceeding in opposite directions on or about the courses usually followed by ships in Lake Superior bound from Port Arthur or Fort William down the Great Lakes or vice versa.

The District Judge in Admiralty for the Quebec Admiralty District allowed an action brought by the Paterson Steamships Limited against the ship *New York News* for damages suffered by the *Fort Willdoc* as a result of the collision and dismissed the counter-claim of the owner of the *New York News* against Paterson Steamships Limited for damages suffered by the *New York News* in the same collision.

On appeal the Court found that both ships were to blame for the collision and the resulting damage, and directed that the judgment at trial be varied by apportioning the blame and damages equally between the two ships.

*Held:* That both ships were in error in proceeding at full speed contrary to Rule 19 which requires that every ship shall, in thick weather, by reason of fog or other causes, go at a moderate speed, observance of which rule is required whether the fog signals of approaching ships are heard or not.

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2. That both ships violated Rule 19 in not immediately reducing speed to bare steerage way on hearing the fog signal of another vessel less than four points from right ahead, and navigating with caution until they had passed each other.
3. That a delay of over half a minute before giving a signal is not a prompt answer within the meaning of Rule 25.
4. That both ships in the circumstances here erred in not blowing a danger signal promptly as required by Rule 22.

APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District.

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

*L. Beauregard, 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.

THE PRESIDENT, now (January 10, 1941) delivered the following judgment:

This is an appeal, heard with the assistance of a nautical assessor, Captain G. B. Frewer, from the judgment of Cannon J., District Judge in Admiralty for the Admiralty District of Quebec, maintaining an action brought by the respondent, Paterson Steamships Ltd., against the ship *New York News* (hereafter called "the *News*"), the appellant, for damages suffered by the respondent's ship *Fort Willdoc* (hereafter called "the *Willdoc*"), following a collision in Lake Superior between the two ships mentioned, and dismissing the counter-claim of the owners of the *News* against the respondent for damages suffered by the *News* in the same collision. As will appear from the narration of the material events the case is a complicated one and not without its difficulties.

The *News*, a canal type of steel ship of 2,310 gross tons, having a length of 256 feet over all, was on a voyage from Port Arthur to Montreal, laden with grain. The *Willdoc*, a steel single screw steamship of 4,542 gross tons, having a keel length of 416 feet, was proceeding light in the

opposite direction, from Port Colborne to Fort William. The *News* had a maximum speed, loaded, of 7 knots, while the full speed of the *Willdoc* was approximately 11½ knots. Both ships were proceeding on or about the courses usually frequented by ships in Lake Superior, bound from Port Arthur or Fort William to eastern Canadian ports on the Great Lakes, and vice versa. At all times material here the weather was a dense fog.

I may now state the principal events leading up to the collision, and the movements and manœuvres of both ships just prior to the collision. The *News* left Port Arthur on September 11, 1938, at 1 a.m. At about 5.20 a.m., daylight saving time, the *News* first heard the fog signal of an approaching ship, afterwards identified as the *Willdoc*. On hearing this fog signal the second time, a minute or so after the first signal was heard, the engines of the *News* were put at half speed, about four knots, but not before. The fog signals of the *Willdoc* appearing more distinct as the ships approached closer together, the *Willdoc* appeared to the master of the *News* to be a little to starboard and he thereupon gave a passing signal of two blasts, that is, the *News* proposed that the ships pass each other starboard to starboard, as provided by Rules 21, 24 and 25. The *News* then reduced her speed to slow, and then to dead slow. At this time the *News* states that her speed was between two and three miles an hour. While blowing her two whistles the *News* heard one whistle from the *Willdoc* and immediately the *News* was put full speed astern, followed shortly thereafter by a danger signal. She then proceeded full astern for about a minute, and during that time the *Willdoc* blew two whistles, which the *News* understood as an answer to her two whistles, and it was so intended by the *Willdoc*. Just before this, or at about the same time, the *News* saw the red light of the *Willdoc* bearing on her port bow and heading for about the bridge of the *News*. At that moment the ships were somewhere between 200 and 300 feet apart. Perceiving this situation, and realizing that a collision was imminent, the *News*, in order to minimize the consequences of a collision, if not to avoid it altogether, ordered full speed ahead and hard astarboard, giving at the same time a danger signal. Then it was

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realized that the *News* was swinging to starboard and the helm was ordered hard aport in order to swing her stern away from the *Willdoc*. But this did not avoid a collision, and the *Willdoc* struck the *News* a glancing blow at an angle of thirty-five or forty-five degrees, the damage sustained by the *News* being pretty well aft. The collision occurred at about 5.30 a.m. That is the story of the *News*.

At about 5.15 a.m., the *Willdoc*, while proceeding at full speed,  $11\frac{1}{2}$  knots, first heard a fog signal ahead, which would be about fifteen minutes before the collision. Upon hearing this signal her engines were ordered from full speed to slow speed ahead. It is to be assumed from the evidence that while the two blast signals of the *News* was being given, the *Willdoc* was simultaneously blowing one whistle, and this would indicate that the *Willdoc* was directing her course to starboard. Then, the *Willdoc* on hearing the two whistles of the *News* replied with the same signal, two whistles, and her helm was directed to port, but the first mate of the *Willdoc* states that this was from one-half to three-quarters of a minute after hearing the two whistles of the *News*, and it is claimed on behalf of the *News* that this signal should have been given immediately, "promptly," to use the word used in Rule 25, and that the failure to do so was perhaps the major factor contributing to the collision. The *Willdoc* states she was hard aport for about three minutes when she saw the red light and the mast head light of the *News*, on her starboard bow, at a distance of about 200 feet, the *News* coming across her bow at right angles. The *Willdoc* further states that her speed had in the meanwhile been ordered to bare steerage way, and that she had been proceeding at that speed for the last two miles. That is the story of the *Willdoc*.

It might be desirable now to turn briefly to the time when the ships were approaching each other, either head and head, or nearly so, or at least on close parallel courses, some little time before the collision. First, it is to be remembered that the weather was a dense fog, and the ships, as events disclosed, were only able to see one another at a distance of somewhere between two and three hundred feet, and they were each on about the course usually frequented by all ships, as I understand it, bound to or from

Port Arthur or Fort William. Prior to the time when each ship heard the fog signals of the other both ships were proceeding at full speed contrary to Rule 19 which requires that every ship shall, in thick weather, by reason of fog or other causes, "go at a moderate speed." In such circumstances observance of this rule is required by ships whether or not they hear the fog signals of approaching ships. It is an intelligible and common sense rule designed to avoid danger to ships in the navigation of the seas, and does not purport to make any alteration in the law. Apart from the rule the law requires a ship in fog to be navigated at a moderate speed. Moderate speed has often been defined as to mean that a ship navigating in fog must be able to stop within the distance she can see ahead. That definition may not in all circumstances be regarded as a practical working rule but it approximates the spirit of Rule 19. One of the reasons for this requirement is that it gives a better opportunity for one ship to hear the fog whistle of another ship, and so of ascertaining her whereabouts, always a matter of great difficulty by reason of the capricious way in which sound is conveyed in fog. As has often been stated, it is so absolutely well known that it is impossible to rely upon the direction of whistles in a fog, that no man is justified in relying with certainty upon what he hears when the whistle is fine on the bows, and he is not justified in thinking it is broadening or that it is far distant, unless he can make sure of it.

I must now refer briefly to the evidence pertaining to the relative positions of the ships as they were approaching closely one another, and when each was hearing the fog signals of the other. The evidence given on behalf of both the *News* and the *Willdoc* would indicate that on hearing the first fog signals ahead, the ships were pretty well head and head. But there is evidence on both sides to the effect that, as the ships came closer together, each was slightly on the starboard side of the other. For example, the first mate of the *Willdoc* testified that he heard signals of an approaching vessel which "seemed to be pretty well ahead," "my impression was it was on the starboard side," "as we approached closer to him the sound appeared to be coming a little bit to starboard," "we could not say he was really to starboard, what I mean is with the

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fog and everything we figured we were far away, that we would give the one whistle," and "the vessel was not so far to starboard to us that it mattered. The sound seemed to be coming just a shade to starboard pretty well ahead, and you could barely tell." The same witness stated in answer to a question by the Court, that if the master of the *Willdoc* had known the exact position of the approaching ship her signal would have been two blasts and not one blast, and this one blast was after consultation between the master and his first mate. When the first mate is speaking of the "position" of the *News* he has reference to the distance ahead. The master and first mate of each ship, just before or at the time each gave a passing signal, apparently were of the opinion that each was on the starboard side of the other; it was in that belief that the *News* gave the two-blast signal, and, as the first mate of the *Willdoc* stated, the master of the *Willdoc* would also have blown two whistles had he realized that the two ships were so close together, and in the end the *Willdoc* by giving a two-blast signal expressed assent to pass starboard to starboard and direct her course to port; and the evidence rather indicates that the *Willdoc* believed the *News* was in fact on her starboard bow. It seems to have been the opinion of the master and first mate of each ship, that when the passing signals were given the ships were on the starboard side of each other, and not head and head, or nearly so; whether this was in fact precisely so is perhaps another question. The whole situation, as it developed, shows how important it was that the ships should have been proceeding at a moderate speed, and with caution.

Now, Rule 25 states that when ships are approaching each other head and head, or nearly so, it shall be the duty of each ship to pass on the port side of the other, and either ship may be the first to determine to pursue this course and she shall give as a signal of her intention one short blast which the other ship "shall answer promptly by a similar blast of his whistle," and thereupon such ships shall pass on the port side of each other. But the rule further states that if the course of such ships is so far on the starboard of each other as not to be considered as meeting "head and head," or nearly so, the ship so first deciding shall immediately give two short and distinct

blasts of her whistle and they shall pass on the starboard side of each other. The master of the *News* evidently considered the ships were not head and head, or nearly so, and accordingly he gave two short blasts of his whistle. The master of the *Willdoc* gave one blast of his whistle indicating that he wished to pass port to port, but unfortunately this signal was given simultaneously with the two blasts of the *News*. This signal of the *Willdoc*, according to her first mate, was not one that was seriously considered, because it was thought that the ships were then far apart. The master and first mate of the *Willdoc* then apparently further conferred and decided that the two-blast signal of the *News*, which they both heard, was on their starboard bow, and after a lapse of about forty seconds they responded with two blasts of the whistle to indicate they would pass starboard to starboard; the *News* so understood this signal, and the *Willdoc* directed her course to port. But what transpired is another matter.

The situation then at one moment was that the *News* was proposing that they pass starboard to starboard and the *Willdoc* was proposing that they pass port to port, and this created an embarrassing situation for the *News*, and particularly because the *Willdoc* gave no danger signal and did not promptly give two blasts of her whistle in answer to the signal of the *News*, if she were going to assent to it at all. The one blast of the *Willdoc* meant to the *News* that the *Willdoc* was starboarding and would likely cross the bow of the *News*, and the delay of forty seconds, nearly three-quarters of a minute, in assenting to the passing signal of the *News* was obviously calculated to confuse and embarrass the *News*, because in the meanwhile it would be natural for her to assume that the *Willdoc* was crossing to starboard. Even the first mate of the *Willdoc* appears to have thought that the pause of forty seconds was excessive. In the meanwhile the *News* went full speed astern, on hearing the one blast of the *Willdoc* and shortly afterwards followed this with a danger signal. Had the *News* taken a definite course to port with engines ahead, after giving her two blasts, and had the *Willdoc* answered this signal promptly, and directed her course to port, there would probably have been no collision.

The fact that when the *News* and the *Willdoc* sighted each other the *News* had swung considerably to starboard

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and across the bow of the *Willdoc* is something quite easily understood, and in the situation obtaining it is quite plain why it would appear that the *News* had swung considerably to starboard and across the bow of the *Willdoc*. On hearing the one-blast signal of the *Willdoc* the *News* went full speed astern on her engines for a time, and her stern would therefore have a tendency to back to port thus throwing her bow to starboard, while stopping her headway. Up to this time the *News* could not have been proceeding at more than about three knots. The *News* had assumed for forty seconds that the *Willdoc* intended to cross her port bow and she went astern at full speed, to stop her headway and to swing her head to starboard, and my assessor advises me this was good seamanship, and, I think, that must be so. Then, after a delay of more than half a minute, the *News* heard her own two-blast signal answered but it was then too late for her to get her head back to port sufficiently to clear the bow of the *Willdoc*. It may be granted that the *News* had heard and understood the *Willdoc's* two-blast signal but it must be remembered that by this time the *News* was going full speed astern on her engines and her bow would be beginning to swing to starboard. My assessor tells me that it would take a little time for a loaded ship to steady by her head and recover herself from a natural swing to starboard caused by her engines going full speed astern, and before this recovery to port could happen the *Willdoc* appeared close to the port bow of the *News*, and to me that seems just what happened. The *News* had probably changed her course to starboard from her original course, but the act of going full astern on her engines after she heard the one-blast signal of the *Willdoc* would satisfactorily account for this, and I do not think it can be said that the *News* crossed the bow of the *Willdoc* in the sense suggested on behalf of the *Willdoc*, and, I think, by the learned trial judge. I think the later action of the *News* in going full speed ahead and starboarding her helm in an attempt to clear the bow of the *Willdoc* was justified under Rule 37, if by doing so her master thought he could minimize the effect of the collision which at the moment appeared unavoidable, and this manoeuvre apparently had the desired effect.



Just shortly before the collision each ship appears to have thought the other on her starboard bow. It is difficult to understand then why the *Willdoc* blew one blast of her whistle because she then would have to cross the bow of the *News*, or incur the risk of so doing, but apparently she did not act upon this signal as either the master or the mate stated that she did not starboard her helm. After the *Willdoc* answered the two blasts of the *News* it is claimed that she ran for about three minutes hard aport, during which time she appears to have altered her course to port only about sixteen degrees, or to about twenty-two degrees as the learned trial judge found. My assessor advises me that this is hardly believable, because even at slow speed, in three minutes, a ship, especially at light draft, would swing far more than that, and Mr. Beauguard in his argument upon this point seemed very convincing to me. Although the evidence is against it, there is, of course, the possibility that the *Willdoc* was swinging to starboard after she had blown the one blast of her whistle, and if that were the case it might account for the fact that it took her nearly four minutes, on a hard aport helm, to reach only sixteen or twenty odd degrees from her original course. Had the original scrap log of the *Willdoc* been produced this might have been explained, and, I think, it required some explanation, but that is a point upon which I do not propose to rest my conclusions. Again, as I have already indicated, the *Willdoc* gave no danger signal after hearing the two-blast signal of the *News*, and I think the *Willdoc* should have given such a signal and gone astern as did the *News* though the latter did not give a danger signal immediately. In any event, a delay of over half a minute before giving her two-blast signal was not, I think, a "prompt" answer within the meaning of Rule 25, and this was doubtless an important factor in contributing to the collision. A delay of forty seconds was a considerable time in the circumstances obtaining at the moment, and, I think, the *Willdoc* was at fault in not promptly changing her one-blast to a two-blast signal, and particularly when she seems to have believed that the *News* was on her starboard bow.

The conclusions I have reached are the following. Both ships were violating Rule 19 in proceeding at full speed

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in a dense fog. Both ships also violated Rule 19 in not immediately reducing speed to bare steerage way on hearing the fog signal of another vessel less than four points from right ahead, and navigating with caution until they had passed each other; in such a state of facts it is no defence for one ship to say that the fog signals of the other appeared to be far away. If on the evidence it be thought that the ships were approaching each other "head and head" or nearly so, then the *News* was at fault in not giving a one-blast signal at first instead of a two-blast signal, as required by Rule 25. But there came a time when the *News* considered that the ships were not approaching each other head and head, or nearly so, but were sufficiently on the starboard of each other that she decided to give two blasts of her whistle, which meant a signal to pass starboard to starboard, and to this the *Willdoc* expressed assent and signified her willingness and intention to direct her course to port, but the *Willdoc* was at fault, as I have already stated, in not having promptly responded with her answered signal. Rule 21 requires every vessel receiving a signal from another to respond promptly with the same signal, or to sound the danger signal as provided in Rule 22. Rule 22 states that when ships are approaching each other and there is a failure on the part of either ship to understand the course or intention of the other, the one in doubt shall immediately signify the same by the prescribed danger signal, and both ships shall be immediately slowed to bare steerage way, and, if necessary, stopped and reversed until the proper signals are given, answered, and understood, or until the ships have passed each other. Both ships, I think, in the circumstances here, failed in not blowing a danger signal promptly. The *News* went full astern on her engines and blew a danger signal though perhaps not promptly, but the *Willdoc* took no action. I am of the opinion that both ships were to blame for the collision and its consequences. It is always difficult to determine with confidence and precision the degree of blame to be attached to each ship in cases of this kind but I am of the opinion that in the facts and circumstances of this case the blame should be equally apportioned.

With great respect I am, therefore, of the opinion that the judgment appealed from should be varied to the extent I have indicated, and judgment will be in accordance with the terms of the opinion I have just expressed. I reserve the question of costs until the settlement of the minutes of judgment.

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Judgment accordingly.

BETWEEN:

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

1940  
Oct. 28, 29  
& 30.  
—  
1941  
April 1.

AND

NOXZEMA CHEMICAL COMPANY }  
OF CANADA LIMITED..... } DEFENDANT.

*Revenue—Sales Tax—Excise Tax—Special War Revenue Act, R.S.C., 1927, c. 179, Secs. 80 (1), 85 (a), 86, 98, 106 & 108—Manufacturing company selling to independent trading company for distribution to dealers—"Fair Price" as determined by the Minister of National Revenue not conclusive against taxpayer—Taxpayer sued for taxes as a debt is not precluded from raising any defence to action—Method of determining "Fair Price."*

The Special War Revenue Act, R.S.C., 1927, c. 179, s. 86, imposes a sales tax on "the sale price of 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." S. 85 (a) of the Act defines "Sale Price" as:

"(a) 'Sale Price' for the purpose of calculating 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 any charges for advertising, financing, servicing, warranty or any other charges of a similar nature contracted for at the time of sale whether these items be charged for separately or not and shall also 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; and in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof;"

S. 80 (1) of the Act provides:

"1. Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned. (a) In Schedule I,

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at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be; (b) In Schedule II, at the rate opposite to each item in the said schedule."

S. 98 of the Act provides:

"Where goods subject to tax under this Part or under Part XI of this Act are sold at a price, which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined."

Defendant, a United States corporation, has carried on in Canada, since 1932, the business of manufacturing and selling toilet articles and medicated preparations. In 1938 it entered into an agreement with Better Proprietaries Limited, a company incorporated under the laws of Ontario for the purpose, *inter alia*, of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations and other articles generally dealt in by drug stores, whereby Better Proprietaries Limited became the sole distributor in Canada of the products of defendant company. One, Shaw, was manager of defendant's Canadian business and also of Better Proprietaries Limited. The agreement became effective on January 1, 1939.

Better Proprietaries Limited paid to defendant for its products the prices stipulated in a certain schedule and sold these products at the prices formerly charged by defendant to its dealers, which prices were approximately 12½ per cent greater than the prices paid by Better Proprietaries Limited to defendant. This difference consisted of a certain cash discount, and charges for freight and selling cost, all of which were defrayed by Better Proprietaries Limited.

Defendant paid the sales tax and excise tax calculated on the prices at which it sold its products to Better Proprietaries Limited. The Minister of National Revenue ruled that these prices were not the fair prices for the sale of such products and he determined the fair prices to be those which Better Proprietaries Limited charged its dealers.

The Crown now seeks to recover from defendant sales tax under s. 86 of the Special War Revenue Act, R.S.C., 1927, c. 179, and excise tax under s. 80 of the Act imposed on such fair prices as determined by the Minister for the period commencing January 1, 1939, and ending July 31, 1939.

The Court found that the business arrangement entered into between the two companies and the association of Shaw with each of them, was conceived, entered into and at the material time was being carried out in good faith for what seemed to the parties concerned as fair and sound business reasons, and that it was in no way designed to avoid the taxes in question, or to defeat the public revenue.

*Held:* That the determination of the sale price by the Minister under s. 98 of the Act is not conclusive against the taxpayer, nor is the taxpayer, when sued for the taxes so determined as a debt, precluded from contesting the validity of such tax levy or raising any defence thereto.

2. That s. 98 of the Act contemplates the case where the producer has sold his goods to a dealer below the normal market prices, below the average of the prices of other manufacturers of the same class

of goods, and does not empower the Minister to fix the sale price of defendant corporation so as to include items of cost and expense which it has not incurred and which could not enter into the computation of its production costs or its sale prices.

3. That the Minister was not empowered to determine that the sale prices of defendant corporation should be those of the independent trading corporation, Better Proprietaries Limited, and that defendant is not liable to pay taxes on the sale price determined by the Minister.

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INFORMATION exhibited by the Attorney-General of Canada to recover from defendant sales tax and excise tax alleged due to 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 Toronto.

*J. C. McRuer, K.C.* and *J. J. Glass, K.C.* for plaintiff.

*C. F. H. Carson, K.C.*, *J. L. Wilson, K.C.* and *J. L. Grogan* for defendant.

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

THE PRESIDENT, now (April 1, 1941) delivered the following judgment:

This is an Information, exhibited by the Attorney-General of Canada, for the recovery of sales tax under s. 86 of the Special War Revenue Act, and of excise tax under s. 80 of the same Act, from the defendant, Noxzema Chemical Company of Canada Ld. (hereafter called "Noxzema"), an American corporation carrying on in Canada the business of manufacturing and selling articles commercially known as toilet articles and medicated preparations, since 1932, its head office being in the City of Toronto, in the Province of Ontario.

During the period commencing January 1, 1939, and ending July 31, 1939, Noxzema made sales of toilet articles and medicated preparations manufactured by it, to a company known as Better Proprietaries Limited, thereby incurring liability for the sales and excise tax thereon, but it is claimed by the Minister of National Revenue (hereafter called "the Minister") that the said sales were made at prices which, in his judgment, were less than the fair

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prices on which the said taxes should be imposed, within the meaning of s. 98 of the Act, and, accordingly, the Minister, in September, 1939, acting under the power claimed to be vested in him by s. 98 of the Special War Revenue Act, determined the fair prices on which the said taxes should be imposed, and this determination was in the following terms:

Whereas the Noxzema Chemical Company of Canada Limited did, prior to January 1st, 1939, sell the whole of its manufactured products to various wholesalers and chain stores, tax-included, and account for excise and sales tax on the basis of such sales to the trade;

And whereas, commencing January 1st, 1939, the Noxzema Chemical Company of Canada Limited entered upon an arrangement with Better Proprietaries Limited whereby the latter company obtained exclusive selling rights of the products of the Noxzema Chemical Company of Canada, Limited;

And whereas, during the period January 1st to July 31st, 1939, the Noxzema Chemical Company of Canada sold or purported to sell to Better Proprietaries Limited the whole of its manufactured products for resale to the wholesalers and chain stores aforesaid;

And whereas, in the judgment of the undersigned, the prices obtained by the Noxzema Chemical Company of Canada Limited from sales to Better Proprietaries Limited were less than the fair prices on which sales tax and excise tax should be imposed.

The undersigned, therefore pursuant to the powers vested by Section 98 of the Special War Revenue Act, does hereby determine that the prices at which Better Proprietaries Limited sold the goods in question to the wholesalers and chain stores were the fair prices on which the taxes payable by the Noxzema Chemical Company of Canada should be imposed.

If the Minister is empowered under the Act, and upon the state of facts here, to determine the fair prices on which the taxes should be imposed on the goods manufactured and sold by Noxzema within the period in question, and Noxzema is found liable for the said taxes upon the sale prices determined by the Minister, then, as I understand it, there is no dispute as to the quantity of the goods sold and liable for the taxes, or as to the rates of taxation imposed upon such sales, for the sales and excise tax respectively.

It is claimed by Noxzema that it paid all the sales taxes and excise taxes for which it, as a licensed manufacturer and wholesaler, was liable in respect of its sales within the period in question, the amount paid being \$18,494.86; that the prices at which the said sales were made were fair and *bona fide* prices of sale and not less than the fair prices on which the said taxes should be imposed; and that, in any event, the Minister erred in determining that

the said prices of sale were less than the fair prices on which the sales tax and excise tax should be imposed, and that there was no foundation for the judgment or discretion he purported to exercise.

It will be convenient to mention at once those provisions of the Special War Revenue Act which are relevant to the controversy here. The sales tax is imposed by s. 86 of the Act, and the important part of that provision reads:

86. (1) There shall be imposed, levied and collected a consumption or sales tax of eight 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 . . . . .

“Sale price” is defined by s. 85 (a) of the Act and that is as follows:

(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 any charges for advertising, financing, servicing, warranty or any other charges of a similar nature contracted for at the time of sale whether these items be charged for separately or not and shall also 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;

The excise tax is imposed by s. 80 of the Act, and s. 80 (1) reads as follows:

1. Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned.

(a) in Schedule I, at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be;

(b) In Schedule II, at the rate set opposite to each item in the said schedule.

Schedule I is the relevant one here as the goods there enumerated include those of the class manufactured and sold by Noxzema, and the rate of the excise tax thereon is ten per cent, and, as stated in subs. (a), is to be computed on the duty paid value or the “sale price,” as the case may be.

The next provision to be mentioned is s. 98, the important one in this case, the one under which the Minister

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purported to act in determining the fair price on which the sales tax and the excise tax should be imposed in respect of the goods manufactured and sold by Noxzema, and it reads:

Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.

The principal issue here is such that it becomes necessary to narrate carefully certain facts relating to the business affairs of Noxzema, and of another corporation known as Better Proprietaries Limited (hereafter called "Proprietaries"), a Canadian company incorporated under the laws of the Province of Ontario, and the business relations of a Mr. Shaw with both of these companies. The controlling interest in Noxzema is owned by Noxzema Chemical Company of Baltimore, an American corporation, the parent company of Noxzema. It is unnecessary to explain the capital structure of Noxzema except to say that its capital shares are divided into what are known as Class A shares, and Class B shares. When Noxzema determined to establish a factory and sales office in Canada, in 1932, it selected Shaw, whose name I have just above mentioned, to manage the manufacture and sale of its products in Canada, and the terms of his employment became the subject of a written contract. The principal terms of that contract were that Shaw was to manage the manufacture and sale of the products of Noxzema in Canada for a period of five years and he was not to engage in any other employment without the consent of Noxzema; Shaw was to be paid a salary of \$7,500 for the first year, and any upward change was to be at the discretion of the Directors of Noxzema, but as the contract was based upon the fulfilment of a planned schedule of operations, which if not fulfilled at the end of three years, it was provided that the contract was subject to termination at the option of Noxzema; and Shaw was to receive as a bonus or additional compensation a specified number of the B shares of the capital stock of Noxzema each year during the term of the contract, but if the employment of Shaw ceased at any time during such term then the said bonus or additional compensation was to cease. In due course, under



the terms of this contract, Shaw became the owner of 2,325 of the B shares of Noxzema. Such were the principal terms of the contract of employment, and this was renewed in 1937 for a further period of five years, but the terms of the renewal need not be stated.

On December 31, 1938, or a few days thereafter, Proprietaries was organized for the purpose, *inter alia*, of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations, and all articles and things which are commonly or may conveniently be dealt in by drug stores. The capital of Proprietaries was divided into four thousand non-voting preference shares of the par value of \$10, and four thousand common shares without any nominal or par value. Shaw, with the consent of Noxzema, became President and General Manager of Proprietaries and a shareholder therein, while at the same time continuing his employment with Noxzema under the terms of the contract mentioned. Noxzema then entered into a contract with Proprietaries whereby the latter was to take over, and did take over, the Canadian sales of Noxzema products, as from January 1, 1939. By the terms of that contract, which was to run for one year, Proprietaries was to become the sole distributor in Canada of the products of Noxzema and it was to maintain an adequate sales force at all times; Proprietaries was to pay Noxzema for its products the prices stipulated in a certain schedule and was to charge its dealers the prices stipulated in another schedule for such products which, I understand, were the prices formerly charged by Noxzema, to its dealers. The contract was renewable by mutual consent for such period as might be agreed upon, and it was a term thereof that if Shaw should at any time during the term of the contract, or any renewal thereof, cease to be the President and General Manager of Proprietaries, then Noxzema should have the right, upon notice, to cancel the contract. The prices which Noxzema was to charge for its products sold to Proprietaries were such as to net Noxzema approximately what it had been previously receiving from its sales to dealers, the prices to Proprietaries being about 12½ per cent below that previously charged to the dealers of Noxzema. The difference between the prices at which Noxzema had sold its goods to its dealers and those at which it sold the same goods to Proprietaries, approximately 12½

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per cent, was determined after a careful analysis of the sales of Noxzema for the year 1937, and of the expenses and cost of selling the same. The details of that difference are expressed in one Exhibit as follows: "2% cash discount, approximately 2 $\frac{8}{10}$ % freight, and approximately 7 $\frac{8}{10}$ % selling cost," and these items of expense of business Noxzema was relieved of by reason of its contract with Proprietaries. The prices which Proprietaries charged its dealers were, I understand, the prices which Noxzema had been charging its dealers, which were the "fair prices" fixed by the Minister on the sales from Noxzema to Proprietaries for taxation purposes, and which is the subject of this appeal. I should mention, if I have not already done so, that Shaw became a common shareholder in Proprietaries, holding one share therein, as did, I think, all the other common shareholders, four in number, one of whom was F. J. Andrews to whom I shall presently refer as Dr. Andrews. The preferred shareholders of Proprietaries were five in number, consisting, I think, of the five salesmen employed by Proprietaries, three of whom were formerly in the employ of Noxzema in the same capacity.

Concurrently with the arrangement entered into between Noxzema and Proprietaries an arrangement was entered into between Proprietaries and Bromo-Seltzer Ltd., a Canadian corporation carrying on business at Toronto, whereby the former was, on much the same terms as with Noxzema, to become the sole distributor in Canada of the goods manufactured by the latter, and of which concern Dr. Andrews was the directing head. I think I am correct in saying that the only product produced by Bromo-Seltzer Ltd. was the well known preparation called "Bromo-Seltzer." In 1937, Bromo-Seltzer Ltd. had an arrangement with McGillivray Bros. Ltd. (hereafter called "McGillivray"), a selling and marketing agency carrying on business at Toronto, to sell and distribute its product in Canada on much the same terms, if not precisely the same, as with Proprietaries, that is, the prices to McGillivray were at specified wholesale prices, and it in turn was to invoice its customers at specified prices. The occasion for referring to this business arrangement between Bromo-Seltzer Ltd. and McGillivray is that Bromo-Seltzer Ltd. was assessed by National Revenue for the sales tax on its sale prices to McGillivray, and not on the sale prices of McGillivray to

its customers. Proprietaries, on entering into this arrangement with Bromo-Seltzer Ld., took over the selling organization of Bromo-Seltzer Ld., just as in the case of Noxzema. Proprietaries also became the sole distributors in Canada for two other preparations or articles known as "Rem" and "Rel" respectively. As the customers for the products of Noxzema and Bromo-Seltzer Ld. were largely druggists and chain stores, it was expected that a saving would be effected in the sale and distribution of such products through the one selling organization of Proprietaries, and the latter expected to secure from time to time the sole selling rights in Canada of the products of other producers, the customers for which would be largely those who were the customers for the goods Proprietaries were already distributing under the arrangements mentioned.

The idea of creating such an organization as Proprietaries originated with Dr. Andrews, of Bromo-Seltzer Ld. He had some years earlier proposed to Shaw the organization of such a selling and distributing agency as Proprietaries, with a view to acquiring the exclusive selling rights for Canada of the products of Noxzema and Bromo-Seltzer Ld., believing that advantages to all concerned would accrue therefrom, but he was unable at that time to induce his associates to look with favour upon this suggestion or proposal. Later Dr. Andrews again approached Shaw with this proposal, which after a time resulted in the organization of Proprietaries, and Shaw became its President and General Manager, with the assent of Noxzema and the parent company. As already mentioned, while Shaw is associated with and interested in Proprietaries, and from which he receives a salary of \$2,500 a year, he still continues to be the General Manager of the manufacturing business of Noxzema, under the terms of his contract with Noxzema; he devotes the major portion of his time to the business affairs of Noxzema, but the working portion of Saturdays he devotes entirely to the affairs of Proprietaries, at its business office which is quite distinct and separate from that of Noxzema, and an hour or two on other days in supervising its business operations.

I have felt obliged to explain at length all these matters pertaining to the business affairs of Noxzema and Proprietaries in order to disclose fully their relations the one to

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the other, and the relations of Shaw to each of them, all of which matters were prominently mentioned during the course of the trial. The conduct of the business relations between Noxzema and Proprietaries is in some respects rather unusual, and in an issue of this kind they are liable to fall under suspicion. However, after hearing all the evidence, I have no difficulty whatever in finding that the business arrangement entered into between those two companies, and the association of Shaw with each of them in the capacities I have described, were conceived, entered into, and at the material time were being carried out, in good faith, for what seemed to the parties concerned as fair and sound business reasons, and that it was in no way designed to avoid the taxes in question, or to defeat in any way the public revenues. It is not possible, in my opinion, to reach any other conclusion upon the evidence. Whether this arrangement was a prudent engagement for the parties concerned to enter into, or whether the results are likely to be financially fruitful, is something with which the Court is not concerned. The arrangement was not an unusual one, and was one often made in this country and other countries, and illustrations of corresponding arrangements in Canada are shown in one of the exhibits put in evidence. It simply means that a manufacturer of goods contracts to sell his products to a selling and distributing organization instead of doing that himself. Bromo-Seltzer Ld. had the same arrangement with McGillivray prior to its arrangement made with Proprietaries. Such an arrangement cannot be condemned because, as was alleged, it creates an administrative problem in imposing the sales tax, that is, because the volume of the tax would vary in the case where a manufacturer himself disposes of his own products on the market from the case where another manufacturer sells the same class of goods to a selling and distributing organization. I am not at all sure that this does in fact constitute what might be called an administrative problem. In this case there is no ground, in my opinion, for doubting that the arrangement between Noxzema and Proprietaries was entered into in good faith and without any ulterior purpose, or that the sales to Proprietaries were not made at fair prices and were not based on the usual cost and profit factors determining the prices at which a manufacturer might transfer his products to

a purchaser, which is a selling and distributing organization. The fact that Shaw was an officer and employee of both concerns is not, I think, such an element in the combined facts here as should justify the conclusion that the relations of Noxzema and Proprietaries were of a character different from what I find them to be. There appears to have been the utmost frankness on the part of Noxzema and Proprietaries, and Mr. Wilson their solicitor, in disclosing to the tax authorities, prior to the bringing of this action, all the facts relating to the origin of the trading arrangement between them, and the manner in which that arrangement was being carried out. Such are my conclusions as to the facts of this phase of the case and probably I shall have occasion to revert to such facts in discussing other points which have been raised.

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Before proceeding to a discussion of the main point for decision there are one or two matters of a preliminary nature to which I should refer, and the first is the memorandum, or judgment as it was called by Mr. Carson, wherein the Minister determined the "fair price," and which I have already recited fully. I think it is correct to say that where by statute a power is given a member of the executive government, in his administrative capacity, to determine what is the "fair price" under s. 98 of the Special War Revenue Act, he is to act judicially, and the judicial act must be performed upon proper principles, which Mr. Carson contends the Minister failed to do here. In this connection Mr. Carson referred to *Pioneer Laundry & Dry Cleaners Ltd. v. The Minister* (1), and the authorities therein mentioned, wherein that principle is discussed. I do not think it is necessary to discuss further that principle or to refer to the many other authorities touching it. The memorandum of the Minister recites that Noxzema, prior to January 1, 1939, sold the whole of its manufactured products to various wholesale dealers, the sale prices for which included the sales tax, and it accounted for the sales and excise tax on the basis of such sales to the trade; that commencing January 1, 1939, Noxzema entered into an arrangement with Proprietaries whereby the latter obtained the exclusive selling rights of the products of the former, in Canada, and during the period from January 1st to July 31st of 1939, Noxzema "sold or purported to

(1) (1939) S.C.R. 1; (1940) A.C. 127; (1939) 4 D.L.R. 481.

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sell" the whole of its manufactured products to Proprietaries for resale to wholesalers and chain stores; that the prices received by Noxzema from such sales to Proprietaries were less than the fair prices on which the sales tax and excise tax should be imposed; and the final paragraph declares that the prices at which Proprietaries sold the goods in question to wholesalers and chain stores were the fair prices on which the taxes payable by Noxzema should be imposed. Such a formal presentment of the reasons for the Minister's determination was not, I think, imperative though perhaps desirable. Mr. Carson endeavoured in many ways to ascertain the evidence upon which the Minister acted, and its source. An administrator is, I think, in a relatively free position so far as the evidence upon which he acts is concerned. It has been said by some text-book writers on administrative law that he may act without evidence, he may act against what evidence there is, or he may accept as evidence testimony of a kind which would not for a moment be admissible in a court of law, and all this, I think, is in a general way correct. He may obtain the necessary material from any source to which he desires to resort. When Parliament entrusts a Department with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow its own particular methods of procedure, which is necessary if it is to do its work efficiently. In a large Department like that of National Revenue, where a large volume of work is entrusted to the Minister, he cannot be expected to do much of that work himself. As was said by the Lord Chancellor in *Local Government Board v. Arlidge* (1): "He is expected to obtain his material vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly . . . . Unlike a judge in a court, he is not only at liberty but is compelled to rely on the assistance of his staff." It may, I think, be said safely that the "fair prices" determined by the Minister were reached by adopting the distributor's prices, the prices of Proprietaries. I think the fair inference to be drawn from the written document is that the "fair prices" were determined by the Minister, on the ground of some association existing between the

(1) (1915) A.C. 120 at 133.

two companies, or that Proprietaries was but the selling agent of Noxzema, or that they both had a common interest in such sales, otherwise the sale prices of Proprietaries were entirely irrelevant. The sale prices of Proprietaries were, I think, adopted only because of a belief in the existence of some such relationship between the two companies, but if such there were not, the prices of Proprietaries cannot, I think, be translated into the prices at which Noxzema sold its goods. All the evidence introduced or brought out by Mr. McRuer at the trial supports such an inference, and plainly points to the fact that the taxing authorities were under the belief that the relations between Noxzema and Proprietaries were such that the Minister was warranted in holding that the sale prices of the latter were for taxation purposes the sale prices of the former. While perhaps Mr. McRuer did not unequivocally argue that Proprietaries was the mere selling agent of Noxzema, and was not an independent concern, yet he persistently suggested that idea. He urged, to use almost his exact words, that when the Minister found such a relation between Noxzema and Proprietaries as he did, when he found Proprietaries interposed between Noxzema and dealers in the trade, when he found the General Manager of Noxzema was the General Manager of Proprietaries, and when he observed the circumstances surrounding the set-up of both companies, all these, he said, were elements for the Minister to take into consideration when determining the sales price under s. 98. I cannot avoid the conclusion that the determination of the Minister here was induced by the fact that he had reached the conclusion, or was so advised by his officers, that the business relations between Noxzema and Proprietaries were such as to justify the conclusion that the sale prices of Proprietaries were the fair sale prices of Noxzema, and that the sale prices of Proprietaries should be treated as the "fair prices" of Noxzema, and the exposition of facts preceding the final paragraph in the Minister's determination would appear to support that inference; and without hearing all the evidence which I heard, the conclusion reached by the Minister is one that may be readily understood, but any such presumption I exclude by my findings upon the facts disclosed at the trial. That the "fair prices" were reached by the Minister in the manner

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I have indicated is, I think, a fair inference from the composition and form of the written determination, and that idea runs like a red thread throughout the whole of the case of the Crown. That, I think, was wrong. I have not been able to see how the Minister could determine the "fair prices" of Noxzema to be those of the sale prices of Proprietaries except upon the theory of the existence of the relationship which I have mentioned, because I think it is clear that Noxzema did sell its goods to Proprietaries at fair prices, considering the conditions of sale, and there was no suggestion that those prices were below the prices which such goods would fetch on a sale in the open market at the time, or below the sale prices of other manufacturers for similar goods, if sold for delivery at the factory.

Another matter, one of the most difficult points raised in this case is the following, and it is of general importance. It was contended that the Minister having determined the sale prices under s. 98, that determination is conclusive against the taxpayer, and further, that even if Noxzema is sued for the taxes so determined as a debt, it is precluded from contesting the validity of such tax levy, and virtually from raising any defence thereto, on the ground that the Court is without jurisdiction to entertain any claim to set aside or vary the determination made by the Minister under s. 98 of the Act. The real defence raised here by Noxzema is that it is not liable for the taxes sued upon at all, computed at any sale prices, and it claims that in fact and in law no such liability ever existed, that any taxes for which it was liable were already paid and at prices not less than the fair prices, and that the sale prices of Proprietaries are utterly irrelevant here, it being an independent trading unit and in no way associated with Noxzema, except as a purchaser of its goods. The Information here is based on the written determination of sale prices by the Minister, and it is contended that in this action for debt the determination of the fair prices under s. 98 is conclusive of the liability of Noxzema for the taxes sued upon. If that be so then there is a serious obstacle in the path of Noxzema in attempting to resist the claim of the Minister, even though this proceeding be an action for a debt alleged to be due the Crown.



While there appears to be no remedy by way of appeal available to the taxpayer from the determination made by the Minister under s. 98 of the Act still I do not think that precludes the taxpayer from raising any proper defence to this action. I do not think that any provision of the Act, expressly or by necessary implication, excludes the exercise of that common law right. The Special War Revenue Act makes no provision for an appeal from the imposition of the sales tax under s. 86, or from any sales price determined by the Minister under s. 98, in fact there does not appear to be any provision for an appeal by the taxpayer under any of the Parts of the Act. And probably it was on practical considerations that it was deemed undesirable to make any provision for appeals where a tax on sales of goods is imposed by reference to their value, and where the tax has so wide an application. Sec. 106 of the Act requires every person liable for the sales tax to make a return of his taxable sales monthly, verified by statutory declaration, and the tax is payable within a month of the time prescribed by the Act or by regulations established thereunder. Considering the large number of returns to be made and the small number likely to be seriously contested, on the ground of the sale price, it was likely deemed prudent to provide that any denial of liability by the taxpayer for the tax, in whole or in part, would be heard and determined when and if the tax levied were sued upon by the Crown. Sec. 108 (1) provides that all taxes or sums payable under the Act shall be recoverable at any time after the same should be accounted for and paid, as a debt due to or as a right enforceable by the Crown, in the Courts there mentioned. This would preserve the legal rights of the taxpayer and afford him an opportunity of presenting and establishing any defence as to his legal liability for the tax. It was in such circumstances that this proceeding was initiated, which is an action for debt, and so far as I know such has been the usual practice where the tax is unpaid and its validity is in dispute between the taxpayer and the revenue authorities. One can hardly imagine the Crown designedly refraining to provide some procedure whereby the subject might at some stage contest his liability for a tax imposed by the Crown, if such were his desire. In such cases as *The King*

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v. *Rice Mills* (1), *The King v. B.C. Brick & Tile Co.* (2), *The King v. The Palmolive Manufacturing Co.* (3), and *The King v. Plotkins* (4), the sales taxes claimed were sued upon as a debt, and the debt claimed by the Crown was in each case the difference between the prices at which the defendant and some other party sold the same goods, it being alleged by the Crown in each case that the defendant and the other party were so associated in connection with the manufacture or the sale of the goods in question, that the defendant was liable for the sales tax at the selling prices of that other party, just as in this case; the exact facts as they developed in each of those cases I need not pause to explain. It is true that in none of the cases mentioned did the Minister determine the fair price under s. 98 of the Act before action was brought, but the issues there were in principle nevertheless exactly the same as here, that is to say, the prices at which the other party sold the goods were said to be the fair prices upon which the defendant should be taxed because of its business association with that other party. But in none of such cases was it suggested or urged that the taxpayer could not be heard to say that the tax imposed was invalid, on grounds other than what was the fair sale price. In an action by the Crown for a debt, I think, it is the right of the subject to plead any proper and available defence thereto and to sustain the same by evidence if he can, and my attention has not been directed to any authority to the contrary, and I do not think that right has been taken away by any of the terms of the Special War Revenue Act. Nor do I think that in such a case as this the Court is without jurisdiction to entertain the defences here submitted by Noxzema, by reason of the determination of the "fair price" by the Minister under s. 98 of the Act. Sec. 108 (4) provides for the filing of a certificate of default in the payment of the tax and this operates as a judgment obtained upon the filing of such certificate in a Court. This section provides a summary procedure for obtaining judgment where there has been a default in the payment of the tax and this procedure is availed of in hundreds of cases annu-

(1) (1938) Ex. C.R. 257; (1939)  
 2 D.L.R. 45 & 544.  
 (2) (1936) Ex. C.R. 71; (1936)  
 3 D.L.R. 23.

(3) (1932) Ex. C.R. 120; (1933)  
 S.C.R. 131.; (1933) 2 D.L.R.  
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 (4) (1939) Ex. C.R. 1; (1939) 4  
 D.L.R. 128.

ally in this Court, by the taxing authorities, but, I assume, usually in cases where liability for the tax claimed is not in dispute. It is the equivalent of a judgment entered in default of pleading by a defendant in the ordinary action in any Court, and would be readily opened up by that Court on cause being shown. Here the real issue is whether Noxzema is liable at all for any portion of the amount sued upon, on the ground which I have already stated and need not repeat. I am of the opinion that Noxzema is entitled to present that defence in answer to the Information.

I come now to a consideration of the provisions of the Special War Revenue Act relevant to the matter to be decided here. The principal provisions of the Act with which we are concerned are found in Part XIII of the Act, consisting of sections 85 to 98 inclusive. Sec. 86 imposes the sales tax "on the sale price of all goods produced or manufactured in Canada," and the tax is made payable by the producer or manufacturer "at the time of the delivery of the goods to the purchaser thereof." Noxzema, as a manufacturer, was therefore liable for the sales and excise taxes on the sale price of goods produced by it and sold to Proprietaries, and the same were paid. But it is contended that the prices at which Noxzema sold the goods in question to Proprietaries were, in the judgment of the Minister, "less than the fair price on which the tax should be imposed," and s. 98 provides that in such a case the Minister "shall have the power to determine the fair price," and "the taxpayer shall pay the tax on the price so determined." What then is the "fair price" in the facts of this case, or within the meaning of the Act? Sec. 85 states that the "sale price," for the purpose of calculating the amount of the sales tax, means the price before the sales tax is added thereto, and includes any charges for advertising, financing, servicing, or any other charges of a similar nature contracted for at the time of the sale; the "sale price" therefore means the price at which such goods are sold by the manufacturer, plus such of those other charges just mentioned if they form a term of the contract of sale, but charges of that nature do not enter into this case. Ordinarily, the sale price would be

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the "fair price." The phrase "fair price" is a commercial term and not a legal term, and it involves a question of fact, into which many considerations may enter. The sale price of one manufacturer may not be the sale price of another manufacturer of the same class of goods, and the statute does not, I think, contemplate such a thing, and in fact could not in fairness and reason do so, because production costs vary with manufacturers. Business agencies organized for the purchase, sale and distribution of the goods of producers are well known, and in such cases such organizations purchase goods from producers and assume the expenses incidental to the selling and distribution of the same, whereas in other cases the producer who sells and distributes his own products assumes that expense, and that of course enters into the computation of his sale price. While Noxzema belongs to the first group, yet it is being held liable for the tax as if it belonged to the second group, and is asked to agree that its sale price should be the same as in the case of those of the second group who must bear all the expenses incurred in selling and distributing their products, which those of the first group do not incur. That does not seem to me the thing that the statute means, or that the legislature intended it to mean. No evidence was introduced on behalf of the Minister to show what were the sale prices charged by producers other than Noxzema, for goods of the class in question here, if sold to a sales and distributing organization, but it need not be doubted that they would be substantially the same; I have mentioned the case of the sales of Bromo-Seltzer Ld. to McGillivray, and I have no doubt other similar examples might be found. If the sales prices of Noxzema to Proprietaries were the normal prices of all manufacturers of a comparable class of goods to independent dealers, and such I think they were, I do not see how it can be said that the prices of Noxzema were less than the fair prices, as contemplated by the Act. That brings me to the definite question as to whether in the state of facts here the statute empowers the Minister to fix the sales prices of Noxzema so as to include items of cost and expense which it has not incurred, and which could not enter into the computation of its

production costs or its sale prices. Did the Act, in the circumstances here, empower the Minister to fix the sale prices of Noxzema at other than its actual sale prices, when they were not below the fair prices as between a manufacturer and a dealer, the dealer being an independent trading corporation? I think not. There is no evidence to show that the sale prices of Noxzema were less than the fair prices, in fact the evidence indicates that its prices were the fair prices when sold to a selling and distributing organization which had to assume the expenses of sale and distribution. I do not think the statute can be construed to mean that the Minister might arbitrarily advance the sale prices of Noxzema for the purposes of the tax, without evidence that such prices were less than the fair prices, when sold in the circumstances I have described. A test of the fairness of the prices at which Noxzema sold its goods to Proprietaries is that they were the same prices as those at which it had previously sold its goods to the trade, less the expenses of sale and distribution which were now to be borne by Proprietaries. The trading position of Noxzema was not adversely affected so far as net profits were concerned, and in fact its gross sales increased about thirty per cent in the first eighteen months of the arrangement with Proprietaries. I think that s. 98 contemplates the case where the producer has sold his goods to a dealer below the normal market prices, below the average of the prices of other manufacturers of the same class of goods, and was not designed or intended to meet the facts developed in the case under consideration. I am therefore of the opinion that the Minister was not empowered in this case to determine that the sale prices of Noxzema should be those of the independent trading corporation, Proprietaries, and that Noxzema is not liable to pay the taxes in question on the sale prices determined by the Minister.

The Information is therefore dismissed and with costs to the defendant.

*Judgment accordingly.*

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BETWEEN:

DANIEL WANDSCHEER, GERRIT  
 WANDSCHEER, JACOB WAND-  
 SCHEER, BEN WANDSCHEER,  
 WALTER E. KLAUER, CHARLES  
 L. OSTRANDER AND KLAUER  
 MANUFACTURING COMPANY

PLAINTIFFS;

AND

SICARD LIMITED ..... DEFENDANT.

*Practice — Patents — Exchequer Court Rule 22A—Changing date of invention.*

*Held:* That a party wishing to rely on a date anterior to the date determined by the records of the Patent Office is limited to the date on which the invention was actually made.

2. That a party having set forth a date under Rule 22A and wishing to change it must proceed by notice of motion duly supported by affidavit.

MOTION by plaintiffs for leave to change the date of invention relied upon under Rule 22A of the General Rules and Orders of the Exchequer Court.

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

*E. G. Gowling* for the motion.

*H. Gerin-Lajoie K.C. contra.*

ANGERS J., now (May 17, 1941) delivered the following judgment:

The defendant having made a motion to amend its particulars of objection by *inter alia* adding thereto further cases of anticipation, which motion was this day granted, counsel for plaintiffs moved the Court orally for leave to change the date of invention relied upon by his clients in respect of patent No. 309,848 from December to September, 1927, under rule 22A of the General Rules and Orders of this Court.

Rule 22A reads as follows:

The plaintiff in an action for impeachment of a patent for invention other than the action referred to in rule 12A, or the defendant in an action for the infringement of a patent, when said defendant contests the validity of the patent sued on, may serve on the patentee, defendant or plaintiff as the case may be, at any time within one month after the

statement of defence has been filed, a demand that the said patentee state whether or not he proposes to rely on a date of invention earlier than the date as of which he is entitled to priority according to the records of the Patent Office, and if the patentee proposes to rely upon any such earlier date, he shall furnish to the opposite party, within thirty days after service upon him of such demand, particulars of the date which he proposes to assert and the nature of the acts upon which he intends to rely for the purpose of establishing the same.

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It was submitted on behalf of plaintiffs that rule 22A enables a party to choose any date earlier than the date as of which he would be entitled to priority according to the records of the Patent Office. I must say that I cannot share this view. In my opinion, the party who wishes to rely on a date anterior to the date determined by the records of the Patent Office is limited to the date on which the invention was actually made.

If a party has in good faith but by mistake set forth a date under rule 22A and wishes to change it, he must proceed by notice of motion duly supported by affidavit. The plaintiffs' verbal application to change the date set forth in their statement under rule 22A is accordingly dismissed, save the right of the plaintiffs to renew their application by notice of motion duly served and upon proper material, if they deem fit.

Order accordingly.

BETWEEN :

EMILY L. MERRITT.....APPELLANT;

AND

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

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*Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, s. 19 (1)—1 Edw. VIII, c. 38, s. 22—“Winding up, discontinuance or reorganization of the business of any incorporated company”—“Distribution of the property . . . deemed to be the payment of a dividend to the extent that the company has on hand undistributed income”—Sale of business and assets by one corporation to another—Distribution of property of vendor company to its shareholders held to be within the terms of s. 19 (1) of the Income War Tax Act—S. 22 of 1 Edw. VIII, c. 38, construed not to include undistributed income earned prior to 1935.*

S. 19 (1) of the Income War Tax Act, R.S.C., 1927, c. 97, as amended by 1 Edw. VIII, c. 38, s. 11, reads as follows:

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"On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income."

By 1 Edw. VIII, c. 38, s. 22, it was also enacted that:

"Sections . . . eleven (now 19 (1) of the Income War Tax Act) . . . shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods."

Appellant, prior to March, 1937, owned 259 shares of the capital stock of the Security Loan and Savings Company. That company in March, 1937, agreed to sell and transfer to the Premier Trust Company all its assets and undertakings as a going concern, including the good will of its business and any reserves or undistributed profits to which it was entitled in connection with its business. The Premier Trust Company had the right to represent itself as carrying on in succession to the Security Loan and Savings Company such parts of its business as the Premier Trust Company was legally capable of carrying on and also to advertise that the Security Loan and Savings Company was amalgamated with it. The Premier Trust Company agreed to allot and issue to each shareholder of the Security Loan and Savings Company one and one-half fully paid shares of its capital stock for each fully paid share held by such shareholder, or, at the option of such shareholder, to pay \$102 in cash and to allot and issue one-half share of its capital stock for each fully paid share held by such shareholder, provision being made for the adjustment of fractions of shares by payment in cash; to pay in cash at the rate of 5 per cent per annum on each fully paid share held by shareholders of the Security Loan and Savings Company as accrued dividend from December 31, 1936, to the date of issuance of the shares of the Premier Trust Company; to pay the principal and interest on all debentures issued by the Security Loan and Savings Company and outstanding; to assume the payment of all other debts, liabilities and obligations of the Security Loan and Savings Company, and the adoption, performance and fulfilment of all contracts and engagements binding upon that company at the date when the agreement became effective. The Security Loan and Savings Company was taken over as at January 1, 1937, by the Premier Trust Company.

Appellant exercised the option of accepting the sum of \$102 cash and one-half share of the Premier Trust Company for each fully paid share held by her in the capital stock of the Security Loan and Savings Company, and on October 5, 1937, her trustees received the sum of \$26,690.75 from the Premier Trust Company and also a certificate for 130 fully paid shares of the Premier Trust Company registered in the name of the trustees for the appellant.

In May, 1939, the Commissioner of Income Tax assessed appellant for income tax purposes upon income in the sum of \$10,192.60 as the appellant's portion of the undistributed income which the Security Loan and Savings Company had on hand when its property was distributed on the discontinuance of its business. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court. At the hearing of the appeal it was admitted by counsel for appellant that at the material



time the Security Loan and Savings Company had on hand undistributed income which had accumulated over a period of years and had not been appropriated for any purpose permitted by the Act or according to sound business or accounting practice.

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*Held:* That there was a discontinuance of business on the part of the Security Loan and Savings Company in a real and commercial sense and it is immaterial whether that was brought about by a sale to or amalgamation with the Premier Trust Company.

2. That there was a distribution of the property of the Security Loan and Savings Company among its shareholders within the meaning of s. 19 (1) of the Income War Tax Act, and it is immaterial that appellant received the consideration for the sale of her shares directly from the Premier Trust Company.
3. That s. 19 (1) of the Income War Tax Act and s. 22 of 1 Edw. VIII, c. 38, are to be construed as meaning that the "undistributed income" mentioned in s. 19 (1) and taxable as a dividend is limited to that portion of the income of the year 1935 and subsequent periods that was undistributed and not intended to include income earlier earned but undistributed and on hand.

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 Toronto.

*H. G. Stapells, K.C.* for appellant.

*W. J. Beaton, K.C.* and *E. S. MacLachy* for respondent.

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

THE PRESIDENT, now (March 19, 1941) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue (hereinafter called "the Minister"), affirming an assessment levied against the appellant in respect of income under the Income War Tax Act, for the year ending December 31, 1937. In this matter the appellant was represented by two Trustees whom she had earlier appointed to collect her income and manage her affairs.

In April, 1938, the appellant, by her Trustees, filed an income tax return in respect of her income, amounting to \$13,972.20, for the taxation period in question, and the tax levied thereon was in due course paid. In May, 1939, the Commissioner of Income Tax assessed the appellant, for the same period, upon additional income in the sum

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of \$10,192.60, the subject-matter of this appeal. The additional assessment was made in respect of what the appellant contends was the payment to her of the purchase price of two hundred and fifty-nine (259) shares of the capital stock of the Security Loan and Savings Company which she sold and transferred to the Premier Trust Company, and which payment the Minister contends was, under the terms of s. 19 (1) of the Income War Tax Act, the payment of a dividend derived from the undistributed income of the Security Loan and Savings Company following the sale by the Securities Loan and Savings Company of all its property and assets to the Premier Trust Company, under the terms of a Provisional Agreement entered into between the Directors of the two said companies, and which Agreement was ratified by the shareholders of both companies. The Agreement involved the purchase by the Premier Trust Company of the issued shares of the Security Loan and Savings Company, of which the appellant was the holder of 259 shares. Sec. 19 (1) of the Income War Tax Act, as amended by s. 11 of Chap. 38 of the Statutes of Canada for the year 1936, provides that:

(1) On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.

What I have stated to be the contention of the appellant in respect of the additional assessment here in question and one paragraph of the decision of the Minister will reveal rather clearly the point in controversy between the parties and what is the issue for decision here, and that paragraph of the decision of the Minister is as follows:

The Honourable the Minister of National Revenue, having duly considered the facts set forth in the Notice of Appeal and matters thereto relating, hereby affirms the said assessment on the ground that Section 19 provides that on the winding-up, discontinuance, or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income; that Securities Loan & Savings Company as part of its winding-up proceedings entered into an agreement with Premier Trust Company whereby its assets and business as a going concern were sold to the said Premier Trust Company in consideration of the shareholders of said Security Loan & Savings Company receiving certain shares of Premier Trust Company and/or cash at the election of the shareholders; and that such payment by the Premier Trust Company to the Shareholders of Security Loan & Savings Company was a distribution by Security Loan

& Savings Company to its shareholders; that the Trustees for the taxpayer received the sum of \$10,192.60 as her portion of the undistributed surplus of Security Loan & Savings Company, and by the provisions of Section 19 of the Act this amount was taxable as income of the taxpayer. Therefore, by reason of the said Section 19 and other provisions of the Income War Tax Act in that respect made and provided, the assessment is affirmed as being properly levied.

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The issue here had its origin in a Provisional Agreement entered into, in March, 1937, between the Directors of the Security Loan and Trust Company (hereafter called "the Security Company"), a Loan Company incorporated under the laws of the Province of Ontario, and the Directors of the Premier Trust Company (hereafter called "the Premier Company"), a Trust Company incorporated by an Act of the Parliament of Canada, and the principal terms of the Agreement were the following. The Security Company agreed to sell and transfer to the Premier Company, and the Premier Company agreed to purchase from the Security Company, the whole of the assets and undertaking of the Security Company as a going concern, including the goodwill of its business, and the same was so described in the Agreement as to include any reserves or undistributed profits to which the Security Company was entitled in connection with its business. The Premier Company was to have the right to hold out and represent itself as carrying on in succession to the Security Company such parts of the latter's business as the former was legally capable of carrying on, and to use the words, "with which is amalgamated the Security Loan and Savings Company" or "any other words indicating that such business is carried on in continuation of or in succession to the said Vendor." The Provisional Agreement was to become effective only upon the ratification of the shareholders of the respective parties to the Agreement, and in due course the same was so ratified in accordance with all legal requirements. The consideration for the assets and property so agreed to be sold was that the Premier Company should allot and issue to each shareholder of the Security Company one and one-half fully paid shares (of the par value of \$100 each) of its capital stock for each fully paid share held by such shareholder, or, at the option of such shareholder, to pay \$102 in cash and to allot and issue one-half share of its capital stock, for each fully paid share held by such shareholder; and provision was made for the adjustment of

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fractions of shares of the Premier Company by payment in cash, and the shareholders of the Security Company were also to be paid a sum in cash equivalent to accrued dividend, at the rate of five per cent per annum, on each fully paid share held by them, for the period from December 31, 1936, to the date of the issuance of the shares of the Premier Company to which they would be entitled under the terms of the Agreement. Further, the Premier Company agreed to pay the principal and interest of all debentures issued by the Security Company and outstanding, and to assume the payment of all other debts, liabilities and obligations of the Security Company, and the adoption, performance and fulfilment of all contracts and engagements binding upon that company at the date when the agreement became effective.

In due course the appellant, by her Trustees, exercised the option of accepting as the consideration for her shares \$102 in cash and one-half share of the Premier Company for each fully paid share held by her in the capital stock of the Security Company. On October 5, 1937, the Premier Company remitted to the Trustees, on behalf of the appellant, a cheque for \$26,690.75, being, it was so stated in a covering letter, the cash consideration for the appellant's 259 shares in the capital stock of the Security Company, at \$102 per share, and an amount for an accrued dividend as provided for by the Agreement, less a deduction resulting from the cash adjustment of a fraction of one fully paid share receivable by the appellant, under the terms of the option exercised. Concurrently the Trustees received a certificate for 130 fully paid shares of the Premier Company registered in the name of the Trustees for the appellant.

As already stated, in May, 1939, the appellant was assessed for additional income in the period in question, in the sum of \$10,192.60, and that additional income is claimed to have been the appellant's proportion of the undistributed income which the Security Company had on hand, when its property was distributed on the discontinuance of its business. As stated by officers of National Revenue, this additional assessment was made on the grounds, "that the sale of the business of the Security Loan and Savings Company to the Premier Trust Company has been considered as falling within section 19 of

the Act"; that "your share of the undistributed income is fixed at \$10,192.69," and "is included in the amount of cash or fully paid shares of the Premier Trust Company which was paid to you under the terms of the agreement . . ."; and that "upon the winding-up of the Security Loan and Savings Company (taken over as at January 1, 1937, by the Premier Trust Company), there was made a distribution to shareholders of the undistributed income of the Company, which consisted of \$212,431.41 or \$39.35 each of the 5,398 shares in the hands of the shareholders." It was contended on behalf of the appellant that no part of the distributed property of the Security Company was received by the appellant within the meaning of s. 19 of the Act, and that anything she received for her shares was from the Premier Company, and further, that any distribution made of the property of the Security Company took place after the appellant ceased to be a shareholder therein. The principal question which I have therefore to consider is whether what was done here was a "winding-up, discontinuance or reorganization" of the business of the Security Company, and if so, whether there was a distribution "in any form" of its property among its shareholders, and particularly any undistributed income then on hand, within the meaning of s. 19 (1) of the Act. The appellant raises the further contention, namely, that by s. 22 of Chapter 38 of the Statutes of Canada for the year 1936, an Act amending the Income War Tax Act, it was only any undistributed income earned in the years 1935, 1936 and 1937, that was liable for the tax under s. 19 (1) of the Income War Tax Act, and that during such years the Security Company had no surplus undistributed income, and that therefore there was no undistributed income liable for the tax on the distribution of any property of the Security Company. The questions raised by the appeal would appear to turn almost entirely upon the construction to be placed on s. 19 of the Income War Tax Act, and s. 22 of Chapter 38 of the Statutes of Canada for 1936.

I entertain no difficulty over the construction to be given the words "winding-up, discontinuance or reorganization," as used in s. 19 (1) of the Act. In construing those words we must look at the substance and form of what was done here. In the case *In re South African Supply and Cold*

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*Storage Company* (1), Buckley J. had to consider whether or not there had been a winding-up "for the purpose of reconstruction or amalgamation," and he said "that neither the word reconstruction nor the word amalgamation has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term has no exact definite meaning." I think that would be equally true of the words of s. 19 (1) which I have just mentioned. There was no "winding-up" of the Security Company by a liquidator, but there was in fact, I think, a winding-up of the business of that company and I think the word "winding-up" may be given that meaning here, although I need not definitely so decide because, in any event, there was a "discontinuance" of the business of the Security Company, and whether that was brought about by a sale to or amalgamation with the Premier Company is, in my opinion, immaterial. I therefore think there is no room for any dispute of substance but that the Security Company discontinued its business in a real and commercial sense, and that for a consideration it disposed of all its property and assets, however far that may carry one in deciding the issues in this case. There is, therefore, no necessity for attempting any precise definition of the words "winding-up, discontinuance or reorganization." What was done with the business of the Security Company fell somewhere within the meaning and spirit of those words. Neither do I entertain any doubt that there was a distribution of the property of the Security Company among its shareholders, in the sense contemplated by s. 19 (1) of the Act, under the terms of the Agreement after its ratification by the shareholders of the Security Company. It is immaterial, in my opinion, that the consideration received by the appellant for her shares happened to reach her directly from the Premier Company and not through the medium of the Security Company.

I propose now to discuss the merits of the appeal just as if the only point involved therein were that of the construction of s. 19 (1) of the Act. At first it seemed to me that the additional assessment made on account of undistributed income was not ascertained upon a proper basis, particularly in that no allowance appeared to have been made in the assessment of that income for such por-

tion of it as represented a distribution of capital receipts, namely, the receipt of \$102 per share for each fully paid up share which the appellant held in the capital stock of the Security Company, which on its face would appear as a return of capital and should not therefore be taken into account in determining the amount of the dividend to be assessed. Sec. 19 (1) of the Act in effect says that on the "winding-up, discontinuance or reorganization" of the business of an incorporated company, and on the distribution in any form of the property or assets of the company among its shareholders, the same shall be deemed to be a dividend taxable, in so far as the same comprises any undistributed income on hand. Mr. Stapells admitted that there was on hand at the material time undistributed income of the Security Company in the amount of some \$212,000, and by that admission I feel bound. That means that the Security Company had on hand a reserve of over \$212,000, representing undistributed income which had accumulated over a period of years, and which had not been appropriated for any purpose permitted by the Act, or according to sound business or accounting practice. On the hearing of the appeal it was not explained to me how the amount of this undistributed income was ascertained. It is obvious that the book reserve of the Security Company for undistributed income, as appearing on its Balance Sheet for the year ending on December 31, 1936, was not accepted by the taxing authorities, which would be quite proper. That reserve there appears as a liability "To the Shareholders," in the sum of \$335,000. The undistributed income on hand here must have been ascertained by computing the total of the net profits or income of the Security Company over certain prior taxable periods, and deducting therefrom any dividends hitherto paid out of such income, and all other deductions properly allowable in a computation of the net profits or gains of the corporation. Upon this basis the total amount of undistributed profits would be ascertained, and the apportionment of such sum among the shareholders, on any distribution thereof, would be ascertained according to their several interests, and it would appear that this was the procedure followed here by the taxing authorities. In principle, that must have been the basis on which the undistributed income of the Security Company was ascertained and the apportionment made

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among its shareholders, and it would appear to me that there could hardly have been any other way of doing this with any degree of accuracy. Ordinarily, where a company possessing a balance of undistributed profits has wound up, or discontinued its business, and that balance is divided among the shareholders, each shareholder receives his portion as his share of the company's surplus assets, and it does not become a part of his total income, but here, by s. 19 (1), any distribution of such undistributed income is deemed to be a dividend and therefore taxable. In any event, it is here conceded that at the material time there was undistributed income on hand in the amount of \$212,000 and over, and the method of computing the same was not in any way attacked, so that is conclusive of the existence of undistributed income on hand at the material time here, and of the amount thereof, by whatever manner the amount was computed. Now, that much being settled the proportion of the undistributed income assessable against the appellant on the distribution of the property of the Security Company was ascertainable in the manner I have pointed out, and she is deemed to have received it as a dividend, and she is accordingly liable for the assessment of the tax thereon. The purpose of s. 19 (1) is, on the discontinuance of the business of a corporation and on a distribution in any form of its property among its shareholders, to tax as a dividend that portion of such property as is represented by undistributed income then on hand, just as if such income had been distributed in the form of dividends to shareholders in each taxation period as earned. That is a matter apart from what may be the capital position of the corporation. Therefore, upon a consideration only of s. 19 (1) of the Act, my conclusion would be that the appellant was liable for the tax in question.

As earlier intimated, Mr. Stapells submitted an alternative ground in support of this appeal, and that must be carefully considered. His submission was that any liability for the tax under sec. 19 (1) of the Act was limited by s. 22 of Chap. 38 of the Statutes of Canada for 1936, an Act amending the Income War Tax Act, to any undistributed income of the year 1935 and subsequent periods, and he alleged that there was no undistributed income of the Security Company of the year 1935 and material subsequent periods, which I understood to be conceded, and



that therefore there was no undistributed income on hand for distribution at the time material here, and that upon this ground alone the appeal must succeed.

Section 22 of Chap. 38 of the amending statute of 1936 provides that s. 11 of the same Act (enacted as s. 19 (1) of the Income War Tax Act) was to be applicable to the income of the year 1935 and all subsequent periods. The section reads:

(22) Sections ..... eleven ..... of this Act shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods.

The construction to be attributed to this section is not without its difficulties. Some assistance may be derived from the history of this section. In 1924, by Chap. 46 of the Statutes of that year, there was enacted for the first time as section 5 thereof what is now s. 19 (1) of the Income War Tax Act, and in precisely the same words, and by s. 8 (2) thereof it was enacted that:

Sections ..... five ..... hereof shall be deemed to be applicable to the income for the taxation period 1921 and subsequent periods.

The word "income" in that section must, I think, have been intended to relate to the "undistributed income" mentioned in s. 5 of the same Act, and it would seem also to mean that it was only the "undistributed income" of the year 1921 and subsequent years that was subject to the tax and not any income earned prior to the year 1921 and undistributed.

The above mentioned section 5 of the 1936 Act, which in the meantime had become s. 19 of the Income War Tax Act as found in Chap. 97 of the Revised Statutes of Canada, 1927, was repealed by s. 4 of the Statutes of Canada for the year 1930 and re-enacted as s. 19 (1) of the Income War Tax Act, and in the same language, except that there were added at the end thereof the words, "earned in the taxation period 1930 and subsequent periods," so that the concluding words of the section read: "to the extent that the company has on hand undistributed income earned in the taxation period 1930 and subsequent periods." There was added as a new subsection 19 (2), but that is not, I think, of any importance here. Apparently s. 8 (2) of the Act of 1924 was omitted from the Income War Tax Act as it appeared in the Revised Statutes, 1927, but the Act of 1930 enacted as s. 7 thereof the following:

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This Act shall be deemed to have come into force at the commencement of the 1929 taxation period and to be applicable thereto and to fiscal periods ending therein and to subsequent periods, . . .

This section would be applicable to s. 4 of the Act of 1930, enacted as s. 19 (1) of the Income War Tax Act, and while those two sections would appear to be in conflict as to the period when the tax became exigible, yet, it would seem clear that they are to be read as referring to "undistributed income" earned in either the 1929 or the 1930 taxation period, and subsequent periods, and not to income earlier earned, and on hand and undistributed.

In 1933, s. 19 of the Income War Tax Act was amended by Chap. 41 of the Statutes for the year 1932-33, by adding a new subsection thereto which had reference to private investment holding companies but that is not, I think, of interest in the present case. In 1934, by s. 10 of Chap. 55 of the Statutes of that year, s. 19 (1) of the Income War Tax Act was repealed and re-enacted but omitting the words "earned in the taxation period 1930 and subsequent periods," which words I pointed out just above had been added to s. 19 (1) by the Act of 1930, but so far as I can see s. 7 of the Act of 1930, which made s. 19 (1) of the Act applicable to the 1929 and subsequent periods, was not repealed, which again adds to the confusion.

Then we come back to Chap. 38, s. 11 of the Act of 1936, which re-enacted s. 19 (1) of the Income War Tax Act, as it is now in force, and which, as earlier mentioned, enacted s. 22 thereof which provides that s. 19 (1) shall be applicable "to the income of the year 1935 . . . and of all subsequent periods," and it is those sections that are in debate in this case and which must be construed.

It will appear from this historical review of s. 19 (1) that, in some periods at least, the undistributed income of a company subject to the tax, when wound up or on a discontinuance of its business, was not the total undistributed income of the company, but only that undistributed income that was earned in a specified year or taxation period and subsequent periods, as, for example "undistributed income earned in the taxation period 1930 and subsequent periods," as provided by s. 4 of the Act of 1930, which was enacted as s. 19 (1) of the Income War Tax Act. It is true that those words were subsequently

omitted from s. 19 (1) of the Act in subsequent amending Acts, but there was in force, for a portion of the time thereafter at least, a section corresponding to s. 22 of the Act of 1936. Therefore we have had it stated for a time, as a plain matter of public policy in a public statute, in unequivocal language, that where undistributed income of a company was made taxable as a dividend under s. 19 (1) of the Act the same was applicable only to that income earned and undistributed in a specified year and of all subsequent periods, and not to the total undistributed income on hand. And there would doubtless be a great deal to say in favour of the principle of such a provision, and it may be assumed that the same was enacted only after mature consideration on the part of those responsible for the administration of the Income War Tax Act.

Now, here we have s. 19 (1) of the Act saying that in certain events the undistributed income of a company on hand, is taxable as a dividend, and we have the qualifying s. 22 saying that s. 19 "shall be applicable to the income of the year 1935 . . . and of all subsequent periods." That section speaks of "the income of the year 1935," and it states that s. 19 "shall be applicable to the income of the year 1935 . . . and of all subsequent periods," and this I think must refer to the "undistributed" income of the year 1935 and succeeding years; otherwise there would have been no purpose in using such words in the Act, or in fact enacting section 22 at all, because s. 19 (1) by itself was complete and fairly easy of construction, if it were intended that the tax was applicable to all undistributed income on hand, regardless of when it was earned and accumulated. Moreover, it is, I think, fair to say that those two sections would appear to reflect the restoration of a principle that was quite plainly expressed in an earlier enactment of what is now s. 19 (1) of the Act, and it is not improbable that this would have continued had not some draftsman decided to make several sections of the Income War Tax Act subject to a common qualification, and thus we find such a section as that numbered 22 in the Act of 1936. I am of the opinion that s. 19 (1) and s. 22 of the Act of 1936 are to be read and construed as meaning that the "undistributed income" mentioned in s. 19 (1) and taxable as a dividend is limited to that portion of the income of the year 1935

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and subsequent periods that was undistributed, and was not intended to include income earlier earned but undistributed and on hand; at least one can say it is not clear, nor is it hardly possible to say with any confidence, that the contrary was intended, or that those sections were intended to be so construed against the taxpayer, and in those circumstances I do not think the taxpayer can be held liable for the tax under s. 19 (1) of the Act beyond that which I have stated. In any event that is the conclusion which I have reached after an anxious consideration of those two sections of the Act.

I therefore allow the appeal, but if on the settlement of the minutes of judgment there appears to be any doubt or diversity of opinion as to whether there were any undistributed income of the Security Company on hand at the time material here, and subject to the tax under this judgment, the assessment in question will be remitted back to the Minister for review and revision. In any event the appellant will have her costs of this appeal.

*Judgment accordingly.*

QUEBEC ADMIRALTY DISTRICT

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BETWEEN:

|                                                                                                          |   |             |
|----------------------------------------------------------------------------------------------------------|---|-------------|
| THE OWNERS OF THE STEAM-SHIP PANAGIOTIS TH. COUMANTAROS (Coumantaros Bros. of Piraeus, Greece) . . . . . | } | PLAINTIFFS; |
|----------------------------------------------------------------------------------------------------------|---|-------------|

AND

NATIONAL HARBOURS BOARD. . . . . DEFENDANT.

*Shipping—Vessel damaged by striking obstruction in harbour—Extent of obligation of National Harbours Board in assuring safety of harbours under its jurisdiction.*

Plaintiffs' vessel, while clearing from the port of Montreal, P.Q., struck a submerged obstruction on the bed of the channel in Montreal harbour and was damaged. The Court found that the Harbour Commissioners had no knowledge of the existence of any danger to navigation in the channel nor could they foresee the existence of any such danger.

*Held:* That the National Harbours Board does not warrant that a harbour, under its jurisdiction, is safe for ships invited to use it.

2. That the National Harbours Board must use reasonable care to ensure that the harbours under its control are reasonably safe for vessels invited to use them.

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ACTION by the plaintiffs to recover damages from defendant for injuries sustained by their vessel allegedly due to negligence of defendant.

The action was tried before the Honourable Mr. Justice Cannon, District Judge in Admiralty for the Quebec Admiralty District, at Montreal, P.Q.

*R. C. Holden, K.C.* for plaintiffs.

*Bernard Bourdon, K.C.* for defendant.

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

CANNON, D.J.A., now (June 25, 1941) delivered the following judgment:

Whereas the plaintiffs represent by their statement of claim:

The steamer *Panagiotis Th. Coumantaros* is a steel screw steamship of Greek registry of 5,839 tons gross and 3,699 tons net register, 424.4 feet in length and 53 feet in beam, which belongs to the plaintiffs and which belonged to the plaintiffs on the 19th August, 1936, when the said ship received damage through striking a submerged obstruction or obstructions in the Harbour of Montreal;

At the time the damage was so received the Harbour of Montreal was under the jurisdiction, control and management of The Harbour Commissioners of Montreal, a body corporate which had its head office and principal place of business in the City of Montreal in the Quebec Admiralty District of this Court;

In virtue of their statutory powers the said The Harbour Commissioners of Montreal levied rates on goods landed from or shipped on vessels in the Harbour, and for the services of the Commissioners Grain Elevator System, and other rates on or in respect of vessels in the Harbour and permitted and invited the *Panagiotis Th. Coumantaros* and other vessels to use the harbour;

Between August 14th, 1936, and August 19th, 1936, the *Panagiotis Th. Coumantaros* loaded 315,808.10 bushels of wheat from the said Harbour Commissioners said Grain

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Elevator System in the Harbour of Montreal, and rates amounting to \$1,263.23 were paid by the plaintiffs to the said Commissioners in that connection, the whole as appears by the four receipted accounts which are produced herewith as plaintiffs' Exhibit P-1;

That in addition, wharfage rates amounting to \$568.45 were paid to the said Commissioners in respect of the said grain loaded by the *Panagiotis Th. Coumantaros*;

The *Panagiotis Th. Coumantaros* loaded her grain cargo at the berths in the Harbour designated by the said Commissioners or their representatives and in accordance with their instructions, and with the permission of the Harbour Master and with a licensed Canadian Pilot on Board she left her berth at the Marine Tower Jetty in the upper harbour at or about 1 p.m. on the 19th August, 1936, for the purpose of proceeding to sea;

Her draft, at the time of her departure, was less than the draft permitted on that date for vessels navigating the Harbour, and she had been granted a proper clearance, as appears by a copy of the certificate issued by the Deputy Port Warden of Montreal which is produced herewith to form part hereof as Exhibit P-2;

After backing out from the said Marine Tower Jetty and turning with the assistance of tugs the *Panagiotis Th. Coumantaros* proceeded down the channel in the Harbour in the usual and proper manner;

When about abreast of the Victoria Pier the said ship struck a submerged obstruction or obstructions on the bed of the channel in the Harbour of which those on board her had no knowledge and had received no warning;

As a result, the vessel sustained severe bottom damage and commenced to leak, and it was necessary for her to discharge and store part of her cargo at Quebec, and to enter drydock at Lauzon and to effect repairs there;

The plaintiffs suffered serious loss and damage as a result of the casualty;

The said loss and damage were due to the fault and negligence and lack of care and breach of duty of the Harbour Commissioners of Montreal as herein alleged, and the said Harbour Commissioners were liable to the plaintiffs therefor;

As the Harbour authority having jurisdiction over and having the control and management of the said Harbour

of Montreal and levying rates in respect thereof as aforesaid, the said Harbour Commissioners were obliged to keep the Harbour in a safe condition for navigation;

Without waiver of the foregoing, the plaintiffs allege that the said Harbour Commissioners were obliged in any event to take reasonable care to see that the said Harbour was free from obstruction and in such a state that the *Panagiotis Th. Coumantaros* and other vessels could navigate the same without danger, and/or were obliged to warn those on the *Panagiotis Th. Coumantaros* and other vessels that such care had not been taken;

The part of the Harbour where the *Panagiotis Th. Coumantaros* struck was not in a fit and safe condition;

The said Harbour Commissioners improperly failed to take reasonable care to see that the part of the Harbour where the *Panagiotis Th. Coumantaros* struck was free from obstruction and in a safe condition for navigation;

They improperly failed to warn those on the *Panagiotis Th. Coumantaros* that such care had not been taken;

Without limiting the generality of the foregoing the plaintiffs allege that to the knowledge of the said Commissioners dredges had been operating in this part of the Harbour, and that they knew or should have known that these dredges were likely to dislodge boulders and otherwise create dangerous underwater obstructions;

After the *Panagiotis Th. Coumantaros* casualty was reported to the Commissioners boulders were found in the channel at a depth which created danger;

Subsequently other vessels which were ready to sail were refused clearance until steps had been taken by sweeping or otherwise to determine whether the channel in the Harbour was safe;

The said Commissioners could and should have closed the channel where dredging was done and, as they did subsequently, should have refused to permit vessels to sail until steps had been taken to see that there were no dangerous obstructions in the channel;

It was negligent and improper of the said Commissioners to have permitted the *Panagiotis Th. Coumantaros* to leave her berth and to proceed down the Harbour, without first ascertaining that the part of the channel where dredging had been done was safe;

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In virtue of the statute 1 Edward VIII, chapter 42, whereby the defendant National Harbours Board was created, the said Board has jurisdiction over the Harbour of Montreal, and has administration, management and control of all works and property which at the date of the coming into force of the said Act were administered, managed and controlled by the said The Harbour Commissioners of Montreal;

By section 37 of the said statute it is further provided as follows:

37. (1) The Board shall possess and be vested with all the powers, rights and privileges belonging to and possessed by or vested in each of the corporations at or before the coming into force of this Act, or to which they, or any of them, may be or become entitled, and shall be liable for all lawful claims against, and obligations of the said corporations.

(2) Nothing in this Act contained shall prejudice or affect the rights of any person which may have existed at or before the coming into force of this Act against any of the corporations or any action or legal proceeding taken to enforce such rights and such rights may be enforced by action against the Board and any action or legal proceeding instituted before the coming into force of this Act may be continued against the Board.

The defendant National Harbours Board is liable to the plaintiffs for the loss and damage claimed;

Payment of the said loss and damage has been duly demanded, but the defendant refuses and neglects to pay the same;

Whereas the defendant has pleaded that:

Il ignore le paragraphe 1 de la déclaration;

Il nie, tels que rédigés, les paragraphes 2 et 3 de la déclaration;

Les documents produits par les demandeurs, comme pièce P-1 et allégués au paragraphe 4 de la déclaration font foi de leur contenu, et le défendeur nie tout ce qui est allégué audit paragraphe 4 et non conforme aux susdits documents;

Le défendeur nie, tels que rédigés, les paragraphes 5 et 6 de la déclaration;

Il nie la première partie du paragraphe 7 de la déclaration et ajoute que l'exhibit allégué audit paragraphe fait foi de son contenu;

Il nie les paragraphes 8, 9, 11, 12, 13, 14, 15, 16, 17 de la déclaration;

Il ignore le paragraphe 10 de la déclaration;



Il nie les paragraphes 18, 19, 20, 21, 22 de la déclaration, comme mal fondés en droit, et il demande acte des admissions contenues auxdits paragraphes, à l'effet que l'accident aurait été causé à la suite des opérations de creusage dans le chenal qui s'exécutaient alors à cet endroit;

Le statut allégué aux paragraphes 23 et 24 de la déclaration parle par lui-même et le défendeur nie tout ce qui est allégué auxdits paragraphes et qui n'est pas conforme à la loi y alléguée;

Le défendeur nie les paragraphes 25 et 26 de la déclaration;

De plus, le défendeur plaide expressément que la présente action est illégale, mal fondée, nulle et de nul effet, et devrait être renvoyée, pour les raisons suivantes;

(a) Au moment du prétendu accident, les travaux de creusage s'effectuant dans le chenal du fleuve St-Laurent, et qui furent la cause du susdit accident, comme l'admettent les demandeurs, n'étaient pas sous le contrôle, l'administration, la gestion, la construction et l'exécution du défendeur, mais étaient sous le contrôle et l'administration exclusive du Ministre de la Marine, en vertu d'un contrat intervenu le 14ème jour d'août, 1935, entre Sa Majesté le Roi, alors représentée par l'honorable Ministre de la Marine du Canada, et "The General Dredging Contractors Limited", suivant tous les termes, clauses, et conditions mentionnés audit contrat . . . . . dont copie est produite avec les présentes comme exhibit D-1 du défendeur;

(b) En vertu des dispositions de la Loi intitulée "Loi sur la Construction d'Ouvrages Publics Supplémentaires 1935", le gouverneur en conseil est autorisé à placer l'administration, la gestion, la construction et l'exécution de l'un quelconque des ouvrages mentionnés dans l'annexe "A" de ladite Loi sous l'autorité du Ministre, ou du Département du gouvernement qui peut être considéré comme le plus approprié, dans l'intérêt public;

(c) Les travaux de creusage ci-haut mentionnés étaient compris dans l'annexe alléguée dans la Loi susdite, et étaient exécutés en vertu de ses prescriptions;

(d) Effectivement, suivant les prescriptions de l'article 5 de la Loi ci-haut allégué, le gouverneur en conseil a le 11 juillet 1935, transporté au Ministre de la Marine toute l'administration, la gestion, la construction et l'exé-

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cution desdits travaux de creusage, tel qu'il appert plus amplement à copie de l'arrêté en conseil produit au soutien des présentes, comme pièce D-2 du défendeur;

e) En conformité de la Loi et de l'arrêté en conseil ci-haut allégués, le gouverneur en conseil, en vertu d'un autre arrêté en date du 10 août, 1935, a autorisé le Ministre de la Marine à prendre charge de l'exécution et de l'administration des susdits travaux et à confier ces travaux à "The General Dredging Contractors Ltd."; tel qu'il appert à copie de l'arrêté en conseil susdit, produite au soutien des présentes, comme pièce D-3 du défendeur;

f) Il n'y a aucun lien de droit entre les demandeurs et le défendeur et tous prétendus recours que pourraient exercer les demandeurs ne pourraient l'être que contre Sa Majesté le Roi, représentée actuellement par le Ministre des Transports, et, ce, devant la Cour de l'Échiquier du Canada, au moyen de pétition de droit;

De plus, sous réserve de ce que ci-dessus allégué, le défendeur plaide ce qui suit;

Même si la partie du chenal où l'accident serait arrivé était sous la juridiction et le contrôle du défendeur, ce qui est formellement nié, ce dernier ne peut être tenu responsable des prétendus dommages réclamés par les demandeurs parce que, à raison des circonstances particulières se rapportant au creusage du chenal, il ne pouvait prévoir un accident de la sorte; il lui était impossible d'apporter à l'entretien du chenal plus de précautions qu'il n'en a prises; à ce moment, ni le défendeur, ses employés, préposés ou mandataires ne pouvaient agir avec plus de prudence qu'ils n'en ont apportée au bon maintien et à l'entretien du chenal, et si l'obstacle qui a causé les dommages allégués résulte du fait des opérations de creusage à cet endroit, comme l'allèguent les demandeurs eux-mêmes, le défendeur ne peut en être tenu responsable et il invoque spécialement le cas fortuit et la force majeure;

Les demandeurs, leurs préposés, employés et mandataires connaissaient les opérations de creusage qui se faisaient à cet endroit, ainsi que les dangers en découlant, et ils ont imprudemment, négligemment et contrairement aux règles les plus élémentaires de la prudence, manœuvré leur navire trop près des travaux en cours d'opération de cette zone, pour la bonne conduite du navire dont ils avaient la charge;

De plus, sous réserve de ce que ci-haut allégué le défendeur plaide expressément que la présente action est illégale, mal fondée, nulle et de nul effet, et devrait être renvoyée, pour les raisons suivantes;

a) Le défendeur est un corps constitué et politique, ayant juridiction sur le port de Montréal, qu'il administre, gère et contrôle, suivant les prescriptions de la Loi;

b) Le défendeur est un corps constitué et politique, et, dans l'exercice de ses fonctions, il est censé être le mandataire de Sa Majesté le Roi, pour le compte du Dominion du Canada et, à ce titre, il est en droit de jouir de tous les privilèges et de l'immunité appartenant à la Couronne;

c) Les demandeurs ne peuvent exercer contre le défendeur aucun des recours qu'ils prétendent exercer par la présente action, sauf au moyen de la pétition de droit devant la Cour de l'Echiquier du Canada;

d) La présente Cour n'a aucune juridiction dans l'occurrence et aucun bref de sommation ne peut être émis contre la Couronne, ses agents ou ses mandataires et, conséquemment, contre le présent défendeur;

Whereas the plaintiffs deny all the allegations contained in the Statement of Defense except in so far as the same are in accordance with the plaintiffs' Statement of Claim, and the plaintiffs join issue upon the whole.

Considering that the facts, as disclosed at the trial, show that:

The *Panagiotis Th. Coumantaros* came light to Montreal on August 13th, 1936, and loaded a cargo of grain on August 17th, 18th, 19th at the Harbour Commissioners Grain Elevator System at Jetty No. 2;

The usual rates were levied and collected in respect to the ship herself and to her outward cargo by the Harbour Commissioners;

In order to reach her berth and later to proceed to sea, the *Panagiotis Th. Coumantaros* used the ship channel abreast of Victoria Pier, followed the rules of good seamanship and complied with the instructions and regulations of the Harbour Commissioners;

On August 19th, 1936, when about abreast of the lower end of shed 18 and the upper end of shed 19, and about the middle of the channel, well within the limits of the Harbour, the *Panagiotis Th. Coumantaros* hit a hidden

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obstruction; her bottom was damaged, she proceeded to Quebec but had to be repaired and drydocked at Lauzon before resuming her ocean trip;

The submerged obstruction was a boulder which had been turned up during the course and on account of the dredging operations which were then carried on in that vicinity;

These dredging operations were undertaken under the provisions of a special Act of Parliament, 25-26 George V, Chapter 34, and of several implementing orders in council P.C. 1932 and P.C. 2120;

On August 14th, 1935, under the authority of the said legislation and Orders in Council, a contract was signed between the Minister of Marine and the General Dredging Contractors Limited for the purpose of dredging and deepening the ship channel in the Harbour of Montreal;

The contract clearly shows that the Minister of Marine and his departmental officials had the full and exclusive control, management, administration and supervision of these public works;

The agreement contains a great number of precautionary provisions in relation to navigation and is most definite as to the protection of ships and shipping in the Harbour;

The Dredging Company had an excellent reputation for efficiency, its material and equipment were fully adequate and up-to-date, its personnel was experienced and competent;

Prior to August, 1935, when these dredging operations were begun by the Marine department, the Harbour of Montreal was in a safe condition for navigation and the channel was free of any obstruction;

While the Marine department was carrying on the dredging operations, during 1935 and 1936, the Harbour Commissioners exercised,—within their limited authority,—proper and reasonable care in relation to navigation; and as a result of the extra precautions taken by their officials, 12,000 ships passed through the channel without any trouble;

On the 19th of August, 1936, the Harbour Commissioners did not know of the existence of any danger to navigation in the channel opposite Victoria Pier, nor could they foresee the existence of any such danger;

On the contrary, the Harbour Commissioners had every reason to believe that the channel, at that point, was safe as it was open to a width of 630 feet and as it was free and clear of any dredge;

Considering that the Harbour authorities do not warrant that the Harbour, under their jurisdiction, is safe for ships invited to use it;

Considering that the unanimous jurisprudence, both in England and in Canada is to the effect that the Harbour authorities must use reasonable care to ensure that the harbours under their control are reasonably safe for the vessels which they invite to use them;

Considering that the Harbour Commissioners of Montreal have used such reasonable care to ensure that the Harbour under their control was reasonably safe for the *Panagiotis Th. Coumantaros*;

Considering that the plaintiffs have not proved their claim, either in fact or in law;

Doth dismiss the action with costs.

*Judgment accordingly.*

BETWEEN:

GEORGES ALBERT LANGLOIS AND } PLAINTIFFS;  
DAVID ELZEAR BESSETTE ..... }

AND

DONAT ROY.....DEFENDANT.

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1940  
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*Patents—Infringement—Burden of proof—Invention or subject-matter—  
“ Public use.”*

The patent in suit granted to O. on April 11, 1933, on application therefor filed on July 18, 1932, and subsequently assigned to B., one of the plaintiffs herein, was for improvements in mixing machines and has particular reference to a machine adapted to the mixing and kneading of dough and the like, for use in homes and was operated by hand crank. For many years prior to this alleged invention a large machine had been used in the bakery trade and in institutions for the same purpose, which was in all essential particulars similar to the machine covered by the patent in suit, save as to size and the fact that it was operated by motive power, not by hand.

*Held:* That there is a presumption of validity of a patent in favour of the owner, and the burden of proof that the same is invalid is upon the party attacking such patent whether by an action by way of impeachment or by defence to an action for infringement.

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2. That the mere fact of reducing the size of a piece of machinery, used industrially, for use in the home and operating it by hand instead of by steam or other motive power, does not constitute invention.
3. That commercial success may tend to show utility but this alone does not constitute invention or justify the granting of a patent.
4. That in a combination patent, for an inventor to adopt all the elements of any particular machine in the public domain, save one element, and replace this one by something not in the machine copied, but also known and in public use, does not constitute invention.
5. That public use required to constitute anticipation need not be a use or exercise by the public, but a use or exercise in a public manner.

ACTION by plaintiffs to have it declared that Canadian Patent No. 331596, owned by them, is valid and has been infringed by the defendant.

The action was tried before the Honourable Mr. Justice Angers, at Quebec, P.Q.

*H. Gerin Lajoie, K.C.* for plaintiffs.

*C. A. Cannon* for defendant.

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

ANGERS J., now (April 19, 1941) delivered the following judgment:

Il s'agit d'une action en contrefaçon de brevet d'invention.

La machine que les demandeurs prétendent avoir été contrefaite par le défendeur est un malaxeur servant à mélanger la pâte.

Le brevet qui est censé protéger ce malaxeur a été accordé le 11 avril 1933 à Joseph Olivier, d'East Angus, province de Québec, il porte le numéro 331596; une copie en a été produite comme pièce 1.

La demande de brevet a été déposée au bureau du Commissaire des Brevets le 18 juillet 1932, tel qu'il appert du certificat produit comme pièce 2.

Ledit brevet a été cédé au demandeur Bessette par le breveté par acte fait le 3 mai 1934, enregistré au bureau des brevets le lendemain sous le numéro 195159; un duplicata de l'acte de cession a été produit comme pièce 3.

Le demandeur Langlois est le détenteur d'une licence exclusive du dit brevet pour un terme de deux ans à compter du 23 janvier 1939, en vertu d'un "bail conditionnel" fait devant Me Edouard Boudreau, N.P., le 23 novembre 1938, dont une copie authentique a été produite comme pièce 4.

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Le brevet déclare que l'invention a trait à des perfectionnements dans les malaxeurs et se rapporte particulièrement à une machine propre à mêler et pétrir la pâte.

Les objets essentiels de l'invention sont ainsi exposés:—

An important object of the invention is the provision of a mixing machine designed so as to thoroughly and effectively mix and knead dough.

A further object of the invention is the provision of a machine of the above character having a double inverted crank as the mixing and kneading element.

Another object of the invention is the provision of a mixing machine of the above type having means for conveniently rotating the mixing member.

Le breveté décrit son invention comme suit:

Referring to the drawings, wherein for the purpose of illustration is shown a preferred embodiment of the invention, the numeral 10 generally designates a trough shaped container having a substantially semi-circular bottom. At the ends, the container has formed, integral therewith, vertically depending support frame elements 11.

Le breveté décrit ici le couvercle de son pétrin et continue ainsi:

Rotatably disposed in the container section 10 is a double reverse crank member 16 having formed at one end a stub shaft 17 journaled in an apertured bearing 18 formed in the rear end portion of the container.

In a corresponding apertured bearing 19, formed in the front end portion of the container, is rotatably mounted a stub shaft 20 having formed at one end an inwardly projecting reduced threaded extension 21. One end of the member 16 is provided with an interiorly threaded aperture threadedly engageable with the extension 21 of the shaft 20. The reverse angular crank sections of the member 16 are formed so as to rotate adjacent the semi-circular bottom portion of the container which is curved on an arc of a circle of which the axis of the crank member is the centre.

Après avoir décrit les pièces requises pour mettre en mouvement le vilebrequin à doubles coudes opposés ci-dessus mentionné, telles que la projection de l'arbre à l'extérieur du boîtier, les roues d'engrenage, la manivelle, etc., éléments qui, bien que nécessaires à l'opération du pétrin, ne décèlent séparément aucun caractère inventif, le breveté complète la description de son invention en ces termes:

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In use, the cover 12 is removed and the container partly filled with dough or other matter to be mixed therein. The cover is then restored to its closing position and the hand crank rotated, causing rotation of the pinion 26, the gear 23 and the rotary mixing crank 16. As the gear 23 is of substantially increased diameter relative to the pinion 26, these gearing elements form a reduction drive so that the mixing member 16 may be conveniently rotated without unusual effort.

Angers J.

L'unique revendication est ainsi conçue :

In a mixing machine, a container rounded at the bottom, a cover adapted to be removably fitted on the top of the container, a double reverse crank rotatably journaled longitudinally in the container adapted to mix matter therein, a spur gear attached to one shaft of the crank and arranged exteriorly of the container, a stub shaft journaled exteriorly of one end wall of the container, a spur pinion fixed on the stub shaft and in mesh with the spur gear, a hand crank connected with the stub shaft for operating the gearing and mixing crank, and a covering structure attached to one end of the container and disposed to partly cover the spur gear and pinion.

Dans leur exposé de réclamation, les demandeurs, après avoir désigné les parties demanderesse et défenderesse, avoir référé au brevet en cause et avoir dit que le breveté l'a cédé au demandeur Bessette qui en est le propriétaire et que le demandeur Langlois est détenteur d'une licence exclusive de l'exploiter, déclarent que le défendeur a violé les droits des demandeurs résultant du dit brevet, tel que mentionné dans les détails des violations signifiés avec l'exposé de réclamation, et qu'il fait prévoir qu'il continuera de les violer. L'exposé de réclamation contient les demandes ordinaires, savoir: (a) une déclaration qu'entre les parties les lettres patentes concernant le brevet en question sont valides et qu'elles ont été violées par le défendeur; (b) une injonction prohibant au défendeur de continuer à violer les droits conférés par les dites lettres patentes; (c) des dommages au montant de \$5,000 ou tout autre montant plus élevé qui pourrait être adjugé, ou alternativement un compte des profits réalisés, à l'option des demandeurs; (d) une ordonnance enjoignant au défendeur de livrer aux demandeurs tous les articles en sa possession ou sous son autorité fabriqués en violation des dites lettres patentes ou adjugeant que les dits articles soient détruits; (e) toute autre réparation que la justice de la cause peut exiger; (f) les dépens.

Dans leurs détails des violations, les demandeurs disent que depuis l'émission des lettres patentes et avant la production de l'exposé de réclamation, le défendeur, à sa place d'affaires à Saint-Raphaël, comté de Bellechasse, province



de Québec, a fabriqué et vendu, dans le cours ordinaire de ses affaires, partout dans la province de Québec et ailleurs au Canada, des malaxeurs propres à mêler et pétrir la pâte qui constituent une violation des lettres patentes en question.

Dans son plaidoyer le défendeur, après avoir reconnu comme exacte la désignation des parties contenue dans l'exposé de réclamation, avoir admis que Joseph Olivier a, le 11 avril 1933, obtenu le brevet dont il s'agit en cette cause mais déclaré qu'il ignorait les droits des demandeurs Bessette et Langlois en rapport avec ce brevet et avoir nié les autres allégués de l'exposé de réclamation, plaide en substance ce qui suit:

il a manufacturé et vendu des machines pour la fabrication du pain mais celles-ci ne violent point le prétendu brevet de demandeurs;

depuis environ trois ans, il a manufacturé des pétrins à Saint-Raphaël, comté de Bellechasse, mais il n'a violé en aucune façon le brevet des demandeurs, parce que longtemps avant que le défendeur manufacture des pétrins et avant que ledit brevet ait été accordé à Joseph Olivier, des pétrins à peu près identiques étaient manufacturés à divers endroits dans le pays; Léon D'Amour, de Trois Pistoles, entre autres, fabriquait des pétrins à peu près identiques depuis longtemps et, le 17 juin 1933, il a demandé un brevet;

depuis nombre d'années et longtemps avant la date où le brevet en question a été émis, la fabrication de pétrins à peu près semblables était connue du public et il n'y a rien dans les pétrins des demandeurs qui soit une découverte et qui soit susceptible d'être breveté;

ces pétrins ne démontrent aucune ingéniosité d'invention et n'importe quel mécanicien expérimenté aurait pu en contruire de semblables sans s'inspirer du pétrin manufacturé par les demandeurs;

le pétrin breveté n'est qu'une réunion de machines connues, qui ne présente aucune nouveauté;

le pétrin manufacturé par le défendeur est d'ailleurs différent de celui breveté par Joseph Olivier en ce qu'il est uniquement un pétrin pour mêler la pâte, tandis que celui des demandeurs a un double objet; (a) le mélange de la pâte; (b) la fabrication du beurre; de plus le malaxeur intérieur ne s'enlève pas de la même façon et les roues d'engrenage ne sont pas de même dimension;

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tous ces pétrins manufacturés par les demandeurs, par le défendeur et par d'autres manufacturiers dans le pays sont identiques en principe et, en manufacturant le sien, Joseph Olivier ou ses successeurs n'ont pas créé une machine nouvelle, mais ils ont mis sur le marché une machine que bien des manufacturiers avaient manufacturée longtemps avant l'émission du brevet susdit;

pour ces raisons le défendeur conclut à ce qu'il soit déclaré que la machine décrite dans le brevet en cause n'était pas susceptible d'être brevetée; à ce qu'en conséquence le brevet soit annulé; et à ce que l'action des demandeurs soit rejetée, avec dépens.

Dans ses détails d'objections amendés, le défendeur déclare que des pétrins à peu près identiques étaient manufacturés par la Fonderie de Saint-Anselme à Saint-Anselme, comté de Dorchester, depuis 1921, par Léon D'Amour, de Trois-Pistoles, depuis 1933 et par Gaudiose Vézina, de Québec, depuis 1912 et qu'Adalbert Mercier, de Berthier, a en sa possession un pétrin à peu près semblable à celui des demandeurs depuis au delà de trente-cinq ans; le défendeur ajoute que ce sont là les seuls cas d'antériorité qu'il connaisse.

Le défendeur, comme nous l'avons vu, plaide: (a) nullité du brevet pour manque d'objet brevetable; (b) invalidité pour cause d'anticipation; (c) absence de contrefaçon.

La preuve démontre et il a été d'ailleurs admis que le pétrin mû par une force motrice et utilisé par les boulangers et les communautés, que pour raison de brièveté j'appellerai le pétrin industriel, est depuis de nombreuses années universellement connu. Selon la prétention du procureur du défendeur le fait d'avoir réduit le volume et la capacité du pétrin industriel pour fabriquer un pétrin domestique à l'usage des familles et d'avoir remplacé le mécanisme mû par l'électricité, la vapeur ou une autre force motrice pour mouvoir le vilebrequin par une manivelle opérée à la main, assumant que ce soit les seuls changements effectués, ne constitue pas une invention; c'est tout au plus le résultat de l'ingéniosité d'un mécanicien expérimenté. Le procureur du défendeur, au soutien de sa prétention, a cité la décision de l'honorable juge Audette dans le cause de *The Nieblo Manufacturing Co. Inc. v. Reid et al.* (1). Le jugement du juge Audette a été con-

(1) (1928) Ex. C.R. 13; (1927) 4 D.L.R. 785.

firmé par la Cour Suprême (1). Je crois la prétention du procureur du défendeur sur ce point bien fondée. Il restera à déterminer si le pétrin domestique des demandeurs est un fac-similé ou une copie substantiellement exacte du pétrin industriel, exception faite de sa dimension et de la manière de le manœuvrer.

Ceci nous amène à examiner la question principale de savoir s'il se trouve dans le brevet des demandeurs un produit industriel brevetable.

La preuve établit que, jusqu'à la fabrication et la mise sur le marché par le breveté, Joseph Olivier, de son pétrin domestique, l'on se servait, dans les familles qui faisaient leur pain, de la huche et que l'on rélait et pétrissait la pâte avec les mains. Ce travail était lent et fatigant. Quand le pétrin domestique a fait son apparition sur le marché, il a été bien reçu et la preuve démontre qu'il s'en est vendu en peu de temps une quantité assez considérable. Le succès du pétrin Olivier, au point de vue commercial, me paraît clairement établi. Le succès commercial d'un produit peut en démontrer l'utilité, mais l'utilité seule ne suffit pas à constituer une invention et justifier un brevet: *Morgan & Co. v. Windover & Co.* (2); *Gosnell v. Bishop* (3); *Longbottom v. Shaw* (4); *In the matter of Erickson's Patent* (5); *John Wriacht and Eagle Range Ld. v. General Gas Appliances Ld.* (6); *Wilday and Whites Manufacturing Company, Ld. v. H. Freeman and Letrik Ld.* (7).

En plus du succès commercial qui a pu accueillir un produit et de l'utilité qu'il peut avoir, il est nécessaire pour que ce produit soit brevetable qu'il ait résolu un problème. La loi n'accorde un brevet qu'autant qu'il y a eu invention. Il me paraît bien que le pétrin Olivier a comblé une lacune. Jusqu'au moment où Olivier a obtenu son brevet et a commencé à fabriquer son pétrin et à le vendre, il n'existait pas sur le marché de petits pétrins à l'usage des familles; celles-ci, pour faire leur pain, utilisaient la huche et le pétrissage de la pâte se faisait à la main. Peut-on dire que le pétrin domestique Olivier constitue une invention? C'est la première question à résoudre. Dans l'affirmative, il restera à déterminer si le pétrin du défendeur est une contrefaçon du pétrin Olivier.

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(1) (1928) S.C.R. 579; (1929)

2 D.L.R. 186.

(2) (1890) 7 R.P.C. 131, 136.

(3) (1888) 5 R.P.C. 151, 158.

(4) (1891) 8 R.P.C. 333, 336.

(5) (1923) 40 R.P.C. 477, 487.

(6) (1928) 46 R.P.C. 169, 179.

(7) (1931) 48 R.P.C. 405, 414.

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Il me paraît à propos de récapituler sommairement la preuve, ce que je ferai à l'instant.

Peut-être n'est il pas hors de propos de noter en passant que la validité du brevet est toujours présumée: *Halsey v. Brotherhood* (1); *Amory v. Brown* (2). Le brevet constitue un titre au profit de l'inventeur et il est réputé valable tant qu'il n'est pas contesté; ce titre peut-être débattu, mais il doit l'être à la diligence du défendeur accusé de contrefaçon qui en attaque la validité. Il découle de là que le breveté n'a pas à prouver la nouveauté de son invention; c'est au tiers qui conteste la validité du brevet de faire preuve contre lui et d'établir, le cas échéant, les antériorités qui l'affectent.

Le défendeur, comme nous l'avons vu, nie la validité du brevet et demande qu'il soit annulé. Il me semble convenable, dans les circonstances, de commencer par examiner la preuve apportée par la défendeur tendant à démontrer absence de sujet dans le brevet et anticipation, avant d'analyser la preuve produite par les demandeurs en vue d'établir contrefaçon de la part du défendeur.

[His Lordship here gives a resumé of the evidence and then proceeds.]

La première question à décider est celle de la validité du brevet.

Prenant en considération la présomption de validité existant en faveur du brevet, le poids de la preuve de sa nullité incombait au défendeur. Celui-ci a-t-il réussi à établir manque de sujet suffisant pour justifier le brevet ou à prouver l'existence d'antériorités affectant la qualité de nouveauté requise? Après un examen minutieux de la preuve orale, documentaire et matérielle versée au dossier, une comparaison soignée des deux pétrins, de la baratte et des esquisses, la lecture attentive des plaidoiries des procureurs des parties et une étude approfondie de la loi et des autorités, j'en suis arrivé à la conclusion que le brevet en litige est invalide pour défaut de sujet et manque de nouveauté.

La preuve démontre clairement que le pétrin industriel était connu et utilisé depuis nombre d'années quand Olivier a obtenu son brevet et mis sur le marché son pétrin domestique. La preuve révèle également que le pétrin industriel possédait les mêmes éléments que le pétrin

(1) (1880) 15 Ch. D. 514, 521.

(2) (1869) L.R. 8 Eq. 663.

domestique, la seule différence entre eux consistant dans le mode d'opération, le premier étant mû par un moteur et le second par une manivelle.

Il est établi que la Fonderie de Saint-Anselme fabriquait et vendait des pétrins industriels depuis 1920. Ces pétrins avaient, comme ceux des parties, un boîtier à fond arrondi et, à l'intérieur de ce boîtier, un vilebrequin dont la forme variait quelque peu selon la dimension du pétrin. Bégin, le président de la compagnie, a fait en cour des esquisses des trois modèles de vilebrequins employés dans ses pétrins et les a produites comme pièces A et B et C. Les vilebrequins que l'on voit sur les pièces A et C, particulièrement celui ébauché sur la pièce C, sont semblables au vilebrequin utilisé par les demandeurs dans leur pétrin et constituent, à mon avis, une antériorité adéquate, sinon parfaite, de ce vilebrequin.

Les pétrins industriels de la Fonderie de Saint-Anselme étaient mûs par un moteur; à la place de la manivelle que l'on trouve sur le pétrin des demandeurs il y avait une poulie activée au moyen d'une courroie ou bien par le moteur attaché directement au pétrin. Moteur et poulie ont été remplacés dans le pétrin domestique Olivier par une manivelle. Ce changement constitue-t-il une invention? Une manivelle servant à mouvoir une roue d'engrenage et un pignon est un système universellement connu depuis longtemps, utilisé dans une multitude de machines différentes. Mais, soutient le procureur des demandeurs, le brevet dont il s'agit en est un de combinaison d'éléments, et parmi les éléments divers se trouve la manivelle; et dans un brevet-combinaison tous les éléments y compris sont protégés, quoique, pris en eux-mêmes et isolément, ils soient connus et d'usage courant. Je ne crois pas qu'il y ait lieu de conclure de là qu'un manufacturier puisse adopter tous les éléments d'une machine quelconque dans le domaine public à l'exception d'un seul, remplacer celui-ci par un élément différent, lui-même connu et d'usage courant, et obtenir pour sa machine un brevet d'invention qui soit valide.

Après avoir examiné la question sous ses divers aspects, j'en suis arrivé à la conclusion que le pétrin de la Fonderie de Saint-Anselme constituait, à la date où Olivier a obtenu son brevet, une anticipation du pétrin de ce dernier et que le brevet qui lui a été accordé est en conséquence nul et invalide.

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Par contre le pétrin fabriqué par Vézina et vendu par lui depuis 1912 diffère de celui des demandeurs par son vilebrequin et je ne pense pas qu'il puisse être considéré comme une antériorité.

Je suis enclin à croire cependant que la machine produite par Hectorine Mercier constitue une antériorité du pétrin Olivier. Au dire du témoin, cette machine, utilisée dans sa famille pendant trente-cinq ans, servait uniquement à faire le beurre; c'était une baratte et non un pétrin. Il est évident néanmoins que cette machine pouvait être facilement transformée en pétrin; tout ce qu'il s'agissait de faire était de remplacer le rouleau en bois avec ses palettes, qui se trouvait dans le boîtier, par un vilebrequin métallique, opération qui ne requérait point d'ingéniosité ou de faculté inventive, mais pouvait être accomplie aisément et rapidement par un mécanicien quelque peu expérimenté. C'est en effet ce qu'a fait le défendeur ou quelqu'un pour lui; la baratte pièce 1 a été apportée en cour avec un vilebrequin, dans le but manifeste de suggérer que cette machine pouvait tout aussi bien servir comme pétrin que comme baratte. J'avouerai que j'aurais préféré que cette baratte eût été produite dans l'état où elle avait toujours servi, savoir avec, dans le boîtier, son rouleau et ses palettes en bois. Il aurait été facile pour le défendeur, séance tenante, d'enlever ce rouleau et de mettre à sa place le vilebrequin qui s'y trouve actuellement: il me semble que cela aurait été plus loyal. Il est vrai que mademoiselle Mercier a franchement et spontanément avoué que le vilebrequin n'était pas dans la machine quand elle l'a vue; et elle a ajouté que, lorsqu'elle a vu la machine pour la dernière fois, il y a au delà de trente ans, elle "servait de baratte à beurre".

Dans cette machine pièce 1, appelée tantôt baratte et tantôt pétrin, nous trouvons le fond arrondi, les trous aux deux extrémités du boîtier pour tenir le rouleau à palettes ou le vilebrequin, le système d'engrenage à l'une des extrémités du boîtier, comprenant une roue d'engrenage et un pignon, avec une manivelle pour l'actionner. Il manque le couvercle, mais je ne crois pas qu'un simple couvercle, communément employé pour fermer une quantité innombrable de récipients divers, exige le moindre exercice d'ingéniosité ou de faculté inventive. Quant à la substitution d'un vilebrequin métallique à un rouleau en bois avec pa-

lettres, cela ne requérait pas non plus d'esprit inventif, mais pouvait être l'œuvre d'un mécanicien un tant soit peu averti. Je ne puis voir dans cette modification aucun caractère inventif. La machine fabriquée par le demandeur Langlois, dont un exemplaire a été déposé au dossier comme pièce 7, est peut-être une amélioration sur le malaxeur Olivier original; on a ajouté à celui-ci des palettes en bois à chacun des coudes du vilebrequin et combiné de la sorte une baratte et un malaxeur; de cette amélioration je n'ai pas à m'occuper.

L'appareil utilisé par la famille Mercier comme baratte pendant nombre d'années possédait tous les éléments du pétrin domestique, moins le vilebrequin que l'on trouvait dans les pétrins industriels, et il était susceptible, pour qui connaissait le pétrin industriel, de suggérer la transformation que l'on en a faite avant de le produire en cour. Le fait que cette baratte ne servait qu'à l'usage d'une famille et qu'il n'est pas établi qu'il s'en trouvait dans le commerce n'a aucune importance. Il suffit pour qu'un objet ait le caractère d'antériorité qu'il ait été utilisé ouvertement, au su et vu du public. Comme l'a dit Lord Abinger dans la cause de *Carpenter v. Smith* (1): "Public use does not mean a use or exercise by the public, but a use or exercise in a public manner." Voir en ce sens, en sus de la cause précitée, les décisions suivantes: *Stead v. Williams* (2); *Stead v. Anderson* (3); *In the matter of Taylor's Patent* (4); *Patterson v. Gas, Light and Coke Co.* (5); *In the matter of Miller's Patent* (6); *In the matter of the Patent of the Stahlwerk Becker Aktiengesellschaft* (7). Voir en sens contraire, dans des cas d'espèce, les arrêts suivants: *Hills v. The London Gas Light Co.* (8); *Boyce v. Morris Motors Ltd.* (9); *Harwood v. Great Northern Railway* (10).

La première condition d'une invention, pour être brevetable, est la nouveauté. Le défaut de nouveauté est une cause de nullité du brevet. Celui-ci confère au détenteur du brevet des droits exclusifs sur l'objet breveté. Il serait injuste de lui conférer ces droits si l'on ne pouvait les lui

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(1) (1841) 1 W.P.C. 530.

(2) (1843) 2 W.P.C. 126, 137.

(3) (1846) 2 W.P.C. 147.

(4) (1896) 13 R.P.C. 482, 487.

(5) (1877) 3 App. Cas. 239, 244.

(6) (1898) 15 R.P.C. 205, 211,

(7) (1918) 36 R.P.C. 13, 18.

(8) 5 H. & N., Exchequer Reports, 312, 336.

(9) (1927) 44 R.P.C. 105, 145.

(10) (1860) 29 L.J.Q.B. 193, 202.

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accorder sans léser des droits acquis à des tiers, soit que ces droits acquis dépendent du domaine public, soit qu'ils fassent partie d'un patrimoine privé. L'on ne peut dire, en pareil cas, que l'invention était nouvelle, puisqu'elle existait déjà et était connue. Il semble donc raisonnable de faire de la nouveauté une des conditions essentielles de l'invention brevetable. Voir la Loi de 1935 sur les brevets, article 2 (f); Fox, Canadian Patent Law and Practice, pp. 8 et 85; Terrell on Patents, 8ème édition, p. 83; Edmunds on Patents, 2ème édition, p. 46.

Une autre raison invoquée de la part du défendeur à l'encontre de la validité du brevet est que le mémoire descriptif diffère de la revendication sur deux points importants, savoir:

a) le mémoire descriptif (page 4, lignes 17 et suivantes) stipule que le petit essieu ou piton fini en forme de vis, auquel est assujétié la roue d'engrenage, est vissé dans le bout de l'arbre; or la revendication ne prévoit pas pareil dispositif; au contraire la revendication mentionne simplement un vilebrequin a doubles coudes opposés monté longitudinalement dans le boîtier, ce qui implique que les extrémités du vilebrequin pénètrent dans deux trous, dont un à chaque bout du boîtier. Dans la revendication aucune mention n'est faite du petit essieu ou piton auquel est attachée la roue d'engrenage; celle-ci paraît être posée sur une extension du vilebrequin lui-même passant à travers un trou dans le bout du boîtier;

b) le mémoire descriptif (page 5, lignes 1 et 2) dit que la roue d'engrenage est solidement fixée sur une extension de l'arbre projetant à l'extérieur; or, d'après le mémoire descriptif, cette extension de l'arbre (indiquée dans les dessins sous le numéro 20) est le petit essieu ou piton qui se visse dans le bout du vilebrequin; cet essieu ou piton n'est pas mentionné dans la revendication; d'après celle-ci, la grande roue d'engrenage est montée sur une extension du vilebrequin passant à travers la paroi du boîtier.

Différences de détail et sans importance, à mon avis, qui ne peuvent affecter la validité du brevet. Le fait que le vilebrequin ne se prolonge pas à l'extérieur de la paroi du boîtier pour être annexé directement à la roue d'engrenage, mais qu'il y a un piton intermédiaire servant à relier la roue d'engrenage au vilebrequin me paraît être un détail de construction, qui constitue tout au plus une améliora-



tion permettant de détacher le vilebrequin. Cette pièce additionnelle ne me paraît pas être en conflit avec la condition de la revendication que la roue d'engrenage doit être fixée à un tourillon du vilebrequin, ou, selon les termes mêmes de la revendication, "attached to one shaft of the crank".

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Au surplus, si la revendication n'est pas aussi claire et aussi précise qu'elle pourrait l'être, il y a lieu, je crois, de se reporter au mémoire descriptif pour en saisir pleinement le sens exact et la portée; voir Terrell on Patents, 8ème édition, page 134, et les autorités citées dans la note (b) au bas de la page.

Pour ces raisons, je suis d'opinion que le brevet dont il s'agit en la présente cause, accordé à Joseph Olivier le 11 avril 1933, portant le numéro 331596, doit être annulé et que l'action des demandeurs doit être rejetée.

Le défendeur aura droit à ses frais contre les demandeurs, moins cependant la taxe du témoin Alphonse Morin et le coût de sa déposition.

*Judgment accordingly.*

BETWEEN:

THERMIONICS LIMITED, CANADIAN MARCONI COMPANY, THE CANADIAN GENERAL ELECTRIC COMPANY LTD., CANADIAN WESTINGHOUSE COMPANY LTD., AND ROGERS - MAJESTIC CORPORATION, LTD. ....

PLAINTIFFS,

AND

PHILCO PRODUCTS LIMITED, AND CUTTEN-FOSTER & SONS, LTD. ...

DEFENDANTS.

1940  
 Dec. 12-14,  
 17-20.  
 1941  
 July 28.

*Patents—Action for infringement—Subject-matter—Invention—Anticipation—Admissibility of parol evidence in construing prior publications—Patent Act, 25-26 Geo. V, c. 32—Combines Investigation Act, R.S.C., 1927, c. 36—Alleged combination in restraint of trade as defence to action for infringement—Patents held valid and to have been infringed.*

The action is one for the infringement of two patents acquired by the plaintiff Thermionics Limited, by way of assignment from the patentees. The other plaintiffs are licensees under the patents so assigned.

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The Langmuir patent relates to an "Electron Discharge Apparatus" and the invention claimed is the combination of a highly evacuated tube, three electrodes, namely, a cathode, an anode, and a grid which is claimed to comprise certain novel features, and a method or means for connecting and supporting the electrodes in predetermined relationships. The Freeman patent had for its principal object the provision for radio service of a tube which may be used in the ordinary receiving and amplifying circuits with alternating current on the filament, thereby eliminating the major alternating current hums or noises and obviating the necessity of storage batteries or of dry cells for supplying the filament current. Other objects of Freeman were the provision of a vacuum tube structure wherein a high voltage amplification factor might be obtained while simultaneously securing a comparatively low plate impedance, and the provision of a vacuum tube device adaptable for quantity production methods of manufacture and which would embody parts capable of manufacture in existing automatic machinery with minimum expenditures of time and of money.

The Court found that there was fit subject-matter for a valid patent in Langmuir, especially in the inclusion of a fine wire grid, wound upon and supported by a frame-work or bars, in the combination of elements described by him and that any structural distinctions between the device of Langmuir and that of defendants were not of substance or of a character to avoid infringement. The Court also found that Freeman contained subject-matter and was a patentable combination since it was a novel and useful one and no one had ever combined the same elements together in order to accomplish the results described by Freeman in his Specification, he being the first to disclose a device which could use alternating current and at the same time eliminate the major alternating current hums or noises. The Court also found that the defence of anticipation of Freeman failed and that defendants' device was only a slight departure in form from that of Freeman and infringement could not be avoided since in principle they were practically the same.

*Held:* That though every invention capable of supporting a patent must be a new manufacture, it does not follow that every novelty, though an important and useful one, is good subject-matter, and a new combination which is obvious and consists merely in putting together known things, each being applied to do that which it had been used to do before, without making any other experiments or gaining other information, is not proper subject-matter, neither is the mere duplicating of a known thing, though the result is eminently useful.

2. That the art of combining two or three 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 were necessary to make the combination.
3. That in order to establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent; the latter invention must be described in the earlier publication that is held to anticipate it, in order to main-

tain the defence of anticipation, and where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification could have been used to produce a certain result; it must be shown that the Specifications contain clear and unmistakable directions so to use it; it must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own.

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4. That a mosaic of facts derived from prior publications, or a symposium of facts known to physicists, does not constitute anticipation.
5. That the question of anticipation by prior publication is one of construction and that parol evidence is only admissible for the purpose of explaining words or symbols of art and other similar technical matters and of informing the Court of relevant surrounding circumstances.
6. That evidence of prior user in support of a plea of anticipation, depending upon the recollection of witnesses over a number of years, and implying fine distinctions or close diversities between two things, should be considered with great caution and should be disregarded unless established beyond a reasonable doubt, before it is accepted to defeat a patent under which a patented article is made, and particularly where it has gone into substantial use by the public. *William H. Cords et al. v. Steelcraft Piston Ring Co. of Canada et al.* (1935) Ex. C.R. 38.
7. That the Patent Act 25-26 Geo. V, c. 32 and amending Acts protect the particular exclusive rights attaching to patents and exempt them from the operation of those provisions of the Combines Investigation Act and the Criminal Code which are designed to restrain and punish anything in the nature of a combine or conspiracy in restraint of trade and commerce, and which might be against the public interest.
8. That if different patentees should combine in such a way as to offend against the intent and spirit of the relevant provisions of the Combines Investigation Act, or the Criminal Code, the procedure of attack would be that set forth in such statutes, and not by way of a defence in an action for infringement of a patent or patents.

ACTION by plaintiffs herein to have it declared that two patents owned by Thermionics Limited—the other plaintiffs being licensees under the patents—are valid and have been infringed by defendants.

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 plaintiffs.

*W. F. Chipman, K.C.* for Canadian Marconi Company.

*D. L. McCarthy, K.C., E. G. Gowling* and *J. C. Osborne* for defendants.

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

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THE PRESIDENT, now (July 28, 1941) delivered the following judgment:

This is an action for the infringement of two patents of invention. The plaintiff Thermionics Limited (hereafter called "Thermionics"), at the date of the commencement of this action was, by assignment, the owner of a patent of invention granted in August, 1921, the invention of one Irving Langmuir, relating to the invention of improvements in an Electron Discharge Apparatus, and which patent is numbered 213,178. This patent expired since the commencement of this action, and the remedy of the plaintiffs, if any, is restricted to that of damages. Thermionics is also, by assignment, the owner of a patent of invention granted in November, 1926, numbered 265,517, relating to improvements in Thermionic Vacuum tubes, the joint invention of Herbert M. Freeman and Wallace C. Wade. The plaintiffs other than Thermionics are licensees under the said patents. It will be convenient to refer to the first-mentioned patent as "Langmuir" and to the other as "Freeman."

The invention of Langmuir, the first to be considered, relates to electron discharge devices, that is, discharge tubes having an incandescent cathode. As the Specification points out devices of this nature are provided with an electron-emitting cathode, an anode, and a conducting body, commonly termed a "grid," consisting ordinarily of an electrical conductor located between the cathode and anode for statically controlling the electrical discharge conditions of the tube. The Specification, after stating that electron discharge devices of the nature therein described may be operated at exceedingly high voltages, and have a high load capacity, and that they are suited for use in a much wider field than former devices of this nature which were limited to low voltages and very feeble currents, proceeds to state:

The present invention comprises various structural features of novelty which co-operate to increase the range and capacity of a device of this type. For example, in accordance with my invention the grid is supported on a frame-work in such manner that mechanical displacement of the grid by static strains or by mechanical shocks cannot easily occur. Other features of novelty are pointed out with particularity in the claims.

In the accompanying drawings various forms of apparatus are shown illustrative of my invention. Fig. 1 illustrates an electron discharge tube with its parts assembled, and Figs. 2 to 5 inclusive show alternative forms of electrode and grid construction.

As shown in Fig. 1, the various parts of the apparatus may be mounted in a tube, or globe 1 upon a pedestal 2 similar to the mount employed for incandescent lamps. The cathode construction is shown in Fig. 2. It consists of a substantially straight filament 4 consisting of highly refractory material, preferably tungsten, and provided with terminals 5, 5'. The filament 4 is mounted, preferably attached to a light spring 6, between two oppositely disposed supports 7 and 8 constituting a frame-work, which may consist of insulating material, such as glass or quartz, but in some cases may to advantage consist of metal. Upon this frame-work is wound a wire 9, the turns of which are closely adjacent to each other and are also very closely adjacent to but are out of contact with the incandescent cathode. The conductor 9, which may be very fine, constitutes a grid which by means of applied potential exerts a static control upon the electron discharge, as explained fully in my copending application, Serial No. \_\_\_\_\_ filed.

The supporting frame-work for the cathode and grid is attached to a rod 10, mounted upon the stem of the tube. Adjacent to the cathode grid is the anode 11 which in the present case has been indicated as consisting of a wire strung in a zig-zag manner over hooks 12 upon fork-shaped supports 13 and 14 but it is not necessary that it should assume this particular form. Both anode and grid preferably consist of tungsten, but other gas-free refractory metals may be used. By constituting the anode a continuous conductor it can be conveniently heated by passage of current during evacuation of the device and for this purpose is attached to leading-in conductors 15, 15'. The cathode terminals 5, 5' are supplied with current through leading-in wires 16, 16'. Although it is not necessary for all purposes to provide connections for each end of the grid it is desirable to do so when the potential applied to the grid is small and in the case of a straight or linear cathode the potential gradient along the grid may to advantage be the same as that on the filament. In this manner the potential drop from grid to cathode is the same along its length. The grid is indicated in Fig. 1 as being attached to leading-in conductors 17, 17' at opposite ends.

In some cases it is desirable to use a V-shaped incandescing conductor for the cathode and to attach to its bight a spring as shown at 18, 19 in Fig. 3. In this manner contact of the conductor with the grid by sagging when the metal is expanded at high temperature is prevented. In Fig. 3 a plurality of loops are used in order to increase the amount of cathode surface. The filaments are connected in parallel by means of conductors 20, 20'.

In Fig. 4 the cathode 4 has been shown as being mounted in a frame 21, consisting of ferrochrome, tungsten, or other suitable metal upon which the wire 22 constituting the grid is wound. As the grid wire is thus wound upon a conductive frame its turns are in parallel and electrical contact may be made directly to the frame 21 by conductor 23. The leading-in conductors 5, 6 for the cathode are insulated from the frame by glass supports 24 as indicated.

Upon the frame 21 are placed mica sheets 25 and 26 which serve to insulate the wire 27 constituting the anode from the grid. The leading-in conductors 28, 28' to which the ends of the wires are anchored may be attached to glass beads 29 fused upon the frame 21.

In Fig. 5 not only the grid 32 is wound upon the frame 33 but also the cathode wire 34 is wound upon stout metallic conductors 35, 36, consisting preferably of tungsten. The conductors 35, 36 are attached respectively to an anchoring wire 37 and to two springs 38 and 39 serving

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to hold taut the turns of the tungsten wire constituting the cathode and to prevent them from coming into contact with the grid wire 32. A stranded copper conductor 40 may be used to conduct current to the cathode.

In preparing the apparatus, the preliminary exhaust is carried out by the most improved methods such as used in incandescent lamp manufacture. The anodes are then subjected to an electron discharge, or bombardment, by impressing a suitable voltage between the cathode and anode. When the anode consists of a conductor such as wire 11, Fig. 1, it is preferably heated by passage of current either before or during the bombardment. When the anode is plate-shaped the heating may form part of the treatment by electron bombardment, the discharge current being made heavy enough to heat the anode, but heating is not essential. The removal of the gas from the anode is not due to heat alone, but is due to an electrical effect. The voltage should be so chosen, at the beginning of the electron discharge treatment that blue glow is absent in the tube as this indicates that ionization of the residual gas by collision of gas molecules with electrons is taking place and under these conditions disintegration of the cathode is apt to take place. The discharge voltage is progressively increased, the gas being removed as fast as evolved, preferably by a Gaede molecular pump. This treatment is ordinarily continued until the discharge voltage is higher than the voltage at which the device is normally operated but this rule will not hold true when the operating voltage is very high as substantially all the gas may be removed before the operating voltage is exceeded. Evacuation of the device should preferably be carried to a pressure as low as a few hundredths of a micron or even lower although no definite limits may be assigned. In any event evacuation should be so low that no appreciable gas ionization takes place during normal operation. When the cathode and anode are very close together and the discharge is confined to a direct path, a greater gas pressure is permissible than when the opposite is true.

An electron discharge tube may be used in various electrical systems, for example, as in receiving systems for radio-telegraphy, the passage of electron current across the evacuated space between cathode and anode is controlled by the static potentials impressed upon the grid. A tube prepared as above described may be used to transmit currents limited in potential only by the dielectric strength of the glass, quartz or other material of the tube and the mechanical strength of parts subjected to static forces.

The claims relied upon by the plaintiffs may conveniently be stated here, and they are the following:

2. The combination of a highly evacuated envelope, an electron-emitting cathode, a co-operating anode, rods spaced apart and adjacent said cathode, a conductor constituting a grid supported by said rods, and having a plurality of sections transverse to said rods, and external connections for said electrons and said grid.

3. An electron discharge apparatus comprising an evacuated envelope, an electron-emitting cathode, a co-operating anode, a frame-work spaced about said cathode, and a conductor mounted thereon closely adjacent said cathode.

4. An electron discharge apparatus comprising an evacuated envelope, a refractory conductor, connections for transmitting energy to incandesce said conductor, bars located on opposite sides of said conductor, a wire wound with closely adjacent turns on said bars to constitute a grid, but

out of contact with said incandescing conductor, a second set of bars closely adjacent to the first set but insulated therefrom and a conductor constituting an anode mounted thereon in a plane substantially parallel to said grid, and leading-in conductors to said grid and anode.

5. A vacuum discharge tube comprising a highly evacuated envelope, a cathode adapted to be heated, a co-operating anode, a frame-work located adjacent thereto, a conductor mounted thereon, and located between the cathode and anode, and external connections for said electrodes and said conductor.

As the title indicates it is an "Electron Discharge Apparatus" that is the subject of the patent of invention in question. Substantially, the invention claimed is the combination of a highly evacuated tube, three electrodes, namely, a cathode, an anode, and a grid which is claimed to comprise certain novel features, and a method or means for connecting and supporting the electrodes in predetermined relationships. All these elements assembled together in the manner described in the Specification co-operate to function as an electron discharge apparatus, a combination patent for which invention is claimed. It will be observed from the Specification that the patent addresses itself to certain constructional details of a three-electrode vacuum tube. It describes how the tube or envelope may be evacuated so that no appreciable gas ionization takes place during the normal operation of the device. It describes certain structural features in each of the three electrodes, the method of their support in order to ensure rigidity and to prevent their sagging and coming into contact with each other, and the mounting of the three electrodes in such a way as to confine them in fixed or predetermined relation to one another. The characteristic feature of the cathode is a single longitudinal wire supported at both ends by springs to keep it taut, or a V cathode similarly supported at the apex of the V, or, a spirally wound cathode supported by the grid. The characteristic feature of the grid is a fine wire wound upon and supported by two or more parallel rods or wires, referred to in the Specification as a "frame-work," and which frame-work is embedded in the glass press, the turns of the wire being closely adjacent to each other and closely adjacent to but out of contact with the incandescent cathode, and which wire, it is said "may be very fine." The characteristic feature of the anode is that of a wire strung in a zig-zag manner over hooks upon fork-shaped supports, or, two plates supported by wires embedded in the glass press. The important fea-

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or 1932 and onwards to and including 1938, the defendants equipped a large number of imported radio sets with tubes made in Canada by licensees under the patent in suit, but in 1939 they began to import into Canada the same type of tubes, the infringing tubes, which were made abroad by manufacturers who were not licensed in Canada; in fact the second named defendant, in 1938, entered into a licensed radio tube sales agreement with the plaintiff Canadian Marconi Company, which tubes comprised the invention here in question. This, I think, may fairly be treated as some evidence of weight that the defendants must have regarded Langmuir as being a device that was meritorious and not something that was obvious to those competent in the art, or to manufacturers of and dealers in such a type of tubes, though, of course, such a course of conduct is not necessarily conclusive of subject-matter. It is probably not now open to the defendant Cuten-Foster & Sons Ltd. to contest the validity of the patent, and that was a submission made by Mr. Smart. Then, it is to be mentioned that it was stated by Mr. Gowling that the defendants deliberately refrained from importing and vending the offending tubes until the expiration of a patent granted to Langmuir in Canada, in 1920, which described and claimed a highly evacuated tube, which I understood Mr. Gowling to say was substantially the same highly evacuated tube as that described and suggested for use in the electron discharge device in question. It was contended that all the possible patentable merits disclosed and claimed in the patent in suit were obtainable from the highly evacuated tube disclosed in the patent granted to Langmuir in 1920. On the expiration of this patent in Canada the defendants commenced to import and vend the alleged infringing tubes in this case, and it is now one of the defences urged against infringement here that the expiration of the 1920 patent to Langmuir permitted the defendants to import and vend such tubes without incurring infringement of the patent in suit. This seems to me tantamount to an admission that the combination patent of Langmuir here in question would have been infringed if the offending tubes in this case had been imported and sold in Canada during the life of Langmuir's patent of 1920. That contention seems to suggest that while the combination patent here in question may have been valid up to the time of the expiration of the patent granted to



Langmuir in 1920, that validity terminated with the expiration of the patent of 1920. Such a contention, it seems to me, fails to realize that it is a combination patent with which we are here concerned, and that it matters not whether the evacuated tube or envelope in the combination patent in suit was something old or something new, or whether it was patented or not. If the combination patent in suit were valid at the time of issue I do not apprehend that as a matter of law that that validity terminated merely because one of the elements in that combination had been earlier patented by Langmuir, and which patent had expired during the life of the combination patent in suit. I think that if the patent in suit were a valid one at the date of issue it was still valid at the time material here, and it is to be pointed out that invention was not separately claimed for the highly evacuated tube in the combination patent here in question. And finally, it is to be pointed out that in a consideration of the question of invention in respect of any patent it is essential to keep in mind the date of the alleged invention, which here was in 1913, and the state of the art at that date, now more than twenty-five years ago. As the authorities have frequently urged, we must beware of the wisdom that comes after the event, and this is a case where that admonition must be carefully observed, for there is always the danger of viewing the disclosures of a patent which has run almost its whole period, or which perhaps has even expired, in the light of subsequent developments in the particular art involved in that patent. Prior to 1913 three-electrode vacuum tubes were, I think, comparatively new devices in the art, and it is fairly clear from the evidence that the behaviour of such tubes was not uniform or dependable, or even too well understood, and attempts at improvements in the same would likely have the attention of trained experimental workers in the art, a very technical art, so that it may fairly be assumed that if any patented improvement made in such devices came to be recognized when disclosed as of importance and utility, and gradually went into almost universal use, it must have possessed in some degree such qualitative merits as are usually regarded as evidence of invention. All the foregoing matters which I have mentioned are, I think, fairly to be considered in determining whether or not there is subject-matter in Langmuir.

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I come now more specifically to the question of invention. In the first place, Langmuir required the use of a highly evacuated tube, not merely an evacuated tube, and the Specification describes how the envelope containing the electrodes may be highly evacuated; he suggests that evacuation should preferably be carried to a pressure as low as a few hundredths of a micron or even lower, although he assigns no definite limits; and he appears to suggest also that the electrodes be so thoroughly freed from gas that gas would not be liberated from them during the operation of the device. It is agreed that the earlier types of vacuum tubes, such as the DeForest audion, were not at all well evacuated and there was a deal of gas left in the bulb at the completion of the evacuation process which made the tubes very erratic and undependable in their behaviour, that is to say, tubes supposedly similar had very different characteristics and would not act consistently, due to the effect of the residual gas in the tube, and which irregularities had previously been thought inherent in vacuum discharges from hot cathodes. Langmuir recognized the value of a highly evacuated tube, such as he suggests for his electron discharge device, in correcting the irregularities found in the operation of tubes that were not completely evacuated. Now, having stabilized the tube against irregularities of action due to irregularities of gas content, he found the importance and value of fixing the spatial relations of the electrodes the one to the other for particular purposes, and maintaining such relations by the structural arrangements which he minutely describes, and he points out that by varying such spatial relations he could make the tube available for many uses from which it had been excluded up to that time. The highly evacuated vessel or tube was not specially stressed before me as contributing invention to the combination, yet, it would appear that the direction to use a highly evacuated tube, so as to practically eliminate irregularities in the action of the tube due to irregularities of gas content therein, was of great importance and productive of useful results. The predetermined spatial relationships of the electrodes in the tube and the maintenance of the same was, I think, of very substantial importance and value because this made it possible to predetermine tube operation and thus the construction of tubes for special performances, as Langmuir pointed out in

his Specification, and Langmuir seems to have been the first to suggest how this might be done, and this construction has been followed now for many years and it therefore must have been considered, by those competent to judge, a desirable and novel structural improvement in three-electrode vacuum tubes.

But it was the inclusion of a fine wire grid, a wire grid wound upon and supported by a frame-work or bars, that the plaintiffs particularly relied upon to sustain their claim to invention, in the combination of elements described by Langmuir. The wire grid, which may be of very fine wire, thus wound and supported, is claimed to have effected new and advantageous results in the operation of an electron discharge device, and this was made possible by supporting the fine wire wound grid upon a frame-work or bars, such as that described, or something equivalent thereto. A grid in its normal form is a wire structure of some formation or other, or a metal sheet with perforations therein, interposed between the plate and the filament; the electrons passing from the filament to the plate have to go through the openings in the grid whatever its precise form, and their passage to the plate is controlled, as I understand it, to any desired extent by the potential of the grid with respect to the filament. The grid was the notable invention of DeForest, in which case the wire was spirally formed, with considerable spacing between the turns of the wire, and the wire was of sufficient strength to maintain its original form when placed in position. It is correct to say, I think, that a wire grid will exercise the most control over the electrons when its wires are fine and closely wound together, and I find that stated in a reliable text book, and it was this form of construction Langmuir disclosed in his Specification; and it is conceded, as I have already stated, that this form of grid construction was not earlier disclosed in any of the published prior art, and, it was not said, that this form of grid had been earlier used by others. In that form the fine wire grid accomplished certain results which Langmuir desired, that is to say, its form and substance were inseparable, and the form given to the grid by Langmuir expressed his idea of means and alone could accomplish the results he desired. Now this grid, it is claimed, made possible the use of high voltages; it increased the load capacity of the tube; it made a better amplifier by increasing the capacity

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of the electrical end of it; and it made the tube, by reason of its rigid structure, safe from short circuits occasioned by mechanical shock or by reason of the application of high voltages which would have destroyed the DeForest tube had they been applied to it, and, I think, the evidence sustains all those claims. It is claimed that the two significant things about the grid structure of Langmuir is the wire wound grid supported on a frame-work, and the structural arrangements which maintain that frame supported grid in proper position with respect to the other electrodes, and the other electrodes with respect to each other and to it. Langmuir was the first, I think, to point out the importance of the spatial relationships of the electrodes in the tube and thus made it possible to predesign and predetermine tube operation, and to build a large number of types of tubes for special performances. By combining together all the structural features and arrangements which I have mentioned, and by the elimination of the irregularities due to gas, there resulted an electron discharge tube on which might be used plate voltages amounting to hundreds of thousands of volts instead of being limited to voltages of thirty or forty volts, which was characteristic of earlier known devices of this nature, and which was characteristic of the DeForest audion. And since 1920 or 1921 practically all three-electrode vacuum tubes have used the Langmuir wire wound grid. For the foregoing reasons, I have reached the conclusion that Langmuir possessed fit subject-matter for a valid patent.

If there were invention in the patent in question, as I hold, then I find no difficulty in holding that there was infringement. True, there are to be found structural departures from Langmuir in the offending devices of the defendants. But they are very slight and by no means substantial, and for all practical purposes, the devices are the same. I cannot attach any weight whatever to the various contentions advanced on behalf of the defendants wherein it was sought to establish real structural distinctions between the different elements in the two devices, or in the method of their assembly, or in their operation. There is no real difference between the two devices. I therefore find that Langmuir contained subject-matter and was a valid patent, and was infringed by the defendants.

I come now to a consideration of Freeman, the second patent in suit, a structural patent, but which goes further in that it introduces new means of heating the cathode of a vacuum tube. I might at once attempt to describe in general terms this patent, before referring to the objects and any particular description of the invention to be found in the Specification, or in other material before me.

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The ordinary filament type of cathode is primarily intended for use with a continuous current source, such as a battery, as the source of heating energy. Such a cathode if heated by means of commercial alternating current from the ordinary lighting circuits will introduce objectionable hum in the vacuum tube circuit. This patent covers a cathode made of electron emitting substances such as thorium oxyde moulded into a tiny tube about the size of the lead of an ordinary pencil. Inside this tube is introduced a heater in the form of a spirally wound metal wire which is heated by the alternating current. The heater is electrically insulated from the electron emitting cathode tube by some refractory substance and the heat is transferred through this refractory substance to the cathode. The cathode in this arrangement is at the same voltage at every point of its surface which is an advantage in a vacuum tube, and it is also electrically independent from the alternating current used in heating, with the resultant elimination of what is usually referred to as "hum." This heater type cathode apparently is used universally to-day in all radio devices intended to be operated from the house lighting circuit as, for instance, the modern broadcasting receivers in use in the home and also in almost all commercial receivers, amplifiers and radio devices.

The principal object of Freeman was to provide for radio service a tube which may be used in the ordinary receiving and amplifying circuits with alternating current on the filament. As was explained to me, a tube of this kind will obviate the necessity of storage batteries with their constant need of attention or of dry cells with their frequent replacements, for supplying the filament current. It is not feasible to use the common type of receiving tube satisfactorily with alternating current supply because of the pronounced 60-cycle hum that is introduced into the telephones, although a number of circuits have been developed which reduce this hum to a considerable extent. Another

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object of Freeman was to provide a vacuum tube structure having highly desirable operating characteristics, wherein a high voltage amplification factor may be obtained while simultaneously securing a comparatively low plate impedance, and a still further object was the provision of a vacuum tube device, of the class described in the Specification, adaptable for quantity production methods of manufacture and which would embody parts capable of manufacture in existing automatic machinery with minimum expenditures of time and of money.

In his Specification Freeman sets forth the causes why it was not practical theretofore to use an alternating current on the filament in the ordinary receiving and amplifying circuits used in tubes constructed for radio service, and how he proposed to solve the problem. The Specification states:

Heretofore, it has not been practical to employ alternating currents for the excitation of the cathode or filament of a receiving or amplifying tube for the reason that such currents introduce variations in the plate current of the tube. Such variations are thought to be due to the following causes:

- (1) The variations in the intensity of the magnetic field established by the alternating currents traversing the filament, thereby resulting in a variable deflection of the electron stream emanating from the filament;
- (2) The variations in the electric field around the filament which are caused by the reversals in the potential distribution along the filament;
- (3) The variations in the emissivity which are caused by the alternate heating and cooling of the filament.

We have found that the desirable results outlined hereinabove may be obtained by applying a cathode construction having an operating cathode surface which has no fall of potential along its surface, that is, a so-called "equipotential surface." Such cathode surface may be rendered thermionically active in a number of different ways, as by subjecting the same to heat or to an electron bombardment. In one form of embodiment of our invention, we provide a cathode construction comprising a central heater element and a co-operating equipotential cathode surface which is positioned immediately adjacent to the heater element. The thermal energy of the heater element may be transferred to the cathode surface either by conduction or by radiation.

With these and other objects and applications in view, our invention further consists in the combinations and details of construction and in the circuit arrangements hereinafter more fully set forth and claimed and illustrated in the accompanying drawing, . . .

There was introduced into evidence by the defendants an article contributed by Freeman to a publication called *The Electric Journal*, in December, 1922, wherein he discussed in fairly simple and understandable terms the problems which he enumerated in his Specification, their causes, and the method or means by which the causes have been



substantially removed. It is agreed that this article by Freeman describes the invention under discussion. I think I may therefore usefully quote freely from this article, and this will obviate the necessity of my referring to the detailed and perhaps more technical description of the various embodiments of the invention in question, their construction and principle of operation, as set forth in the Specification. The passages which I propose to recite will make clear the nature of the invention here claimed, and if in that description of the invention there appears to be included some material which is not to be found in precisely the same form in the Specification, that will not however modify the substance or principle of the construction of the device described in the Specification. In this publication the following passages occur:

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The hum that is heard when alternating current is used to light the filament of the ordinary receiving tube is due to three factors. The first one is the variation of temperature produced in the filament, which causes the emissivity of the filament to vary periodically and consequently produces periodic variations in the electron current in the plate circuit.

The hum due to this cause can be eliminated by burning the filament at a temperature high enough to produce temperature saturation of the electron current, in which condition slight variations in filament temperature will not change the electron flow. Also by having sufficient mass in the filament, the heating lag may be made great enough so that the temperature of the filament will not follow the rapid changes in current.

The second contributing cause of hum is the magnetic field which surrounds the filament when the heating current is flowing. The effect of this field is to deflect some of the electrons leaving the filament so that they must traverse a path longer than normal in their transit from filament to plate. When the field is produced by a direct current this effect is constant, and a constant plate current is obtained. But if the filament is heated with alternating current the magnetic field periodically reverses its direction, and the consequent changes in the paths of the electrons produce fluctuations in the plate current which give rise to an audible hum in the receivers. This source of disturbance is a function of the current required for heating the filament, and is particularly prominent in the case of the simple straight or helical filament. The hum can be reduced by making the filament in the form of an inverted V with the two sides close together, and by cutting the heating current to as low a value as possible.

The third most pronounced cause of disturbance from the use of alternating current filament supply is due to the voltage drop along the filament caused by the heating current. For example with the WD-11 tube used as a detector, a circuit may be used as shown in Fig. 1 The plate P is at a potential of 22.5 volts positive with respect to the end A of the filament, and will therefore draw from that point a number of electrons determined by that potential. The end B of the filament is positive with respect to A by an amount equal to the voltage drop

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along the filament, which in this case is about one volt. The plate is therefore only 21.5 volts positive with respect to the point B, and fewer electrons will reach the plate from that position and from the point A. At the same time the grid is at the same potential as the point B but is 1.5 volts positive with respect to point A. Therefore the number of electrons reaching the plate from the point A will be still further increased over the number from the point B. We thus have the condition that the stream of electrons flowing from the filament to the plate is not of uniform density over the whole length of the filament. If direct current is used on the filament, this condition does not seriously affect the operation of the tube, the only noticeable effect being that the characteristics of the tube will depart widely from what would be expected from a theoretical consideration of the structure.

If, however, the 1.5 volt battery of Fig. 1 be replaced by a source of alternating current with a peak voltage of 1.5 volts, the situation described above will exist only for the instant during which the end A of the filament is at the negative peak of the alternating potential, and as the cycle progresses the distribution of the density of the electron stream will change to the condition where more electrons will reach the plate from the point B than from the point A. This variation in the distribution of current density in the space between filament and plate gives rise to a very pronounced hum in the telephone receivers. This same effect exists whether the tube is used as a detector or as an amplifier.

There have been numerous attempts to reduce the effect of this potential drop along the filament, as for example by making the ground connection to a centre tap on the winding of the transformer used for lighting the filament or to the midpoint of a resistance bridged across the filament terminals. None of these methods has proved satisfactory, although it is possible to reduce the hum to a certain extent in this way.

In the tube here described, each of these three possible sources of disturbance has been considered, and the cathode element has been designed to eliminate the effects described above. The obvious way to combat the difficulties arising because of the fall of potential along the cathode is to utilize some form of equipotential surface as a source of electrons. Such devices have been used in a number of cases, the electrons being obtained from a surface which is heated by some means entirely independent of the actual electron circuit. Nicholson, Round, and Morecroft have described tubes for radio work in which the cathode consists of a metallic cylinder which is heated by radiation from a straight or helical filament at the axis of the cylinder. There is considerable practical difficulty in obtaining sufficient heat for the cathode surface by this method, and the difficulty due to the magnetic field around the filament is not overcome.

In the tube here described, the equipotential surface is obtained by the indirect heating of the cathode surface, with a special construction which eliminates the effect of the magnetic field and at the same time permits a more efficient heating of the cathode than the radiation method described above. The cathode of this tube consists of a cylinder or sleeve of nickel coated on the outside with a mixture of barium and strontium oxides. The material of which the sleeve is made is 0.003 inch thick, and the complete cylinder  $\frac{7}{8}$  inch long with an inside diameter of approximately 0.09 inch. The heating element is a filament of tungsten 0.0035 inch in diameter and 2 inches long, in the form of a V with the

sides parallel and about 0.010 inch apart. To maintain the relative positions of sleeve and filament, and to insulate the sides of the filament from one another, a tube of refractory insulating material is used. This tube has an outside diameter of 0.085 inch and is pierced with two longitudinal holes 0.005 inch in diameter and 0.010 inch apart. Fig. 2 shows the filament, insulating tube, and cathode cylinder before assembling, and Fig. 3 shows the complete cathode assembly ready for the grid and plate.

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The insulating tube conducts the heat directly from the filament to the cathode surface, thus making possible a sufficient heating of the cathode with less filament current than is required where the heating is accomplished by radiation alone. The tube described here operates satisfactorily with an alternating current of 0.85 ampere at about 5.5 volts. The hairpin construction of the filament eliminates the effect of the magnetic field through the opposing of the magnetic fields of the two parallel sides.

The grid is a helix of nickel wire, and is  $\frac{3}{8}$  inch inside diameter and  $\frac{1}{4}$  inch long. The plate is a cylinder of nickel  $\frac{3}{8}$  inch in diameter and  $\frac{1}{4}$  inch long. Grid and plate are supported co-axially with the cathode structure. The complete assembly ready for sealing in the bulb and the finished tube are shown in Fig. 4.

\* \* \*

The circuits in which these alternating current tubes may be used are in all essential particulars similar to the conventional circuits employed with direct current tubes. The important feature to be observed in designing circuits for use with this tube is that, as far as possible, all leads carrying alternating current be kept out of the actual radio circuits, or at least be kept to as low a resistance as possible in order to reduce the voltage drop in the leads. A circuit built up with careful attention to this detail will operate with direct current tubes exactly like the conventional circuits, and at the same time can be used with the alternating current tube, with no further change.

\* \* \*

The foregoing is a very brief description of the first truly practical tube for alternating current operation. The tube described has the very desirable feature of being workable in almost any type of radio circuit without the necessity of any special apparatus or wiring. The object of the development has been to eliminate the objectionable storage batteries or dry cells heretofore found necessary for filament lighting. There are a number of ways in which alternating current can be used to supply the voltage for the plate in a tube circuit but all of them require elaborate circuit arrangements and special equipment, and in general demand extremely delicate adjustment for satisfactory operation. The ordinary B battery gives such excellent service that it seems hardly desirable to sacrifice the convenience and simplicity of this means of obtaining plate voltage in favour of a complex and expensive arrangement which is at best only partially satisfactory.

By using the above described tube and retaining the B battery, a receiving set can be made which is in every way as simple and convenient as the common set for direct current operation, while giving

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much better results than can ordinarily be obtained with direct current. No auxiliary equipment is required, the substitution of a transformer for the filament lighting battery being the only change necessary.

The Claims of the patent upon which the plaintiffs rely may now be stated and they are as follows:

1. In combination, an equipotential cathode structure comprising an equipotential surface, a non-inductive electrical heater for rendering said surface thermionically active and an alternating current supply circuit operatively associated with said electrical heater for energizing the same.

4. In a cathode structure, a mass of refractory material and a filament comprising branch portions disposed in said mass, said branch portions being so arranged that the magnetic fields established by currents traversing the branch portions balance one another.

8. In a space-current device, the combination with a heater element comprising adjacently disposed portions so arranged that the magnetic fields established by currents traversing said portions balance, of a member providing an equipotential cathode surface and refractory means for insulatingly supporting said heater element and for providing a thermally conductive path between said heater element and said member.

24. In a vacuum-tube device, a heater element in the form of a U-shaped conductor, the parallel members of said conductor being so closely adjacent that the resultant field is without substantial effect on the space current.

57. In an electron-discharge tube, a cathode member comprising a tubular casing having an outer surface adapted to emit electrons and a heating element comprising a plurality of parallel disposed wires within said casing, said heating wires being insulated from each other and from said casing by tubular insulating members individually surrounding said heater wires.

58. In an electron-discharge device, a cathode member having an outer surface adapted to emit electrons when heated, a U-shaped heater wire longitudinally disposed in said tubular casing and refractory tubular members for insulating the same with respect to each other and to the walls of said outer casing.

The principal ground of defence raised by the defendants in regard to this patent was the lack of subject-matter having regard to the state of the art as shown by earlier patent specifications, and other publications. Before entering upon a consideration of the state of the prior art as pleaded here it will be convenient at this stage to state what appears to be the settled law upon the subject of anticipation by publication. As was laid down in *Canadian General Electric v. Fada Radio Ltd.* (1), any information as to the alleged invention given by any prior publication must be for the purpose of practical utility, equal to that given by the subsequent patent. The latter invention must be described in the earlier publication that is held to anticipate

it, in order to sustain the defences of anticipation. Where the question is solely one of prior publication, it is not enough to prove that an apparatus described in an earlier specification could have been used to produce this or that result. It must be shown that the specifications contain clear and unmistakable directions so to use it. It must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own. Another concise and searching test of anticipation by prior publications was stated by Lord Dunedin in *British Thompson-Houston Co. v. Metropolitan-Vickers Electrical Co.*, (1), and it was this, as applied to this case: Had the attention of Freeman, in his early experimental work directed to the problem of eliminating the noises or hums resulting from the use of alternating currents in ordinary receiving and amplifying circuits, been directed to any one of the prior publications here cited as anticipations, would it be likely or possible for him to say "this publication gives me what I wish," or, "from this publication I can readily construct a tube which may be used in the ordinary receiving and amplifying circuits with alternating current on the filament, which will do away with storage batteries and dry cells, and will practically eliminate the hum that is heard when alternating current is used to light the filament." I may perhaps here add also that it is well settled law that a mosaic of facts derived from prior publications, or a symposium of facts known to physicists, does not constitute anticipation. As has been frequently observed, there is scarcely a discovery in the arts or in physics for which some antetype may not be found in the earlier writings.

Again, in considering prior publications cited as anticipations of the invention in controversy, it is well settled, for example, as laid down in *Canadian General Electric Co. v. Fada Radio Ltd.*, just above mentioned, that the question of anticipation by prior publications is one of construction and that parol evidence is only admissible for the purpose of explaining words or symbols of art and other such-like technical matters, and, of course, of informing the Court of relevant surrounding circumstances. It is the true construction of the document itself which alone can be looked at or relied upon to ascertain the intention of the author, or

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to determine whether or not it constitutes anticipation of another and later disclosure described in the specification of a patent or other publication. Conversations between the author of the earlier document with others, or drawings not reproduced in the earlier document, are not proper evidence if they purport to add to or subtract from, or in any way modify that which is described in that document, and should not be considered in a construction of it. The question always is whether or not the prior publication describes the invention claimed in the patent attacked, and the reason for that will be obvious upon reflection. Whether a prior publication constitutes anticipation of an alleged invention is entirely one of the true construction of that publication.

Now, in the light of these settled principles of law, I may turn to a consideration of two publications relied on as anticipations of Freeman, and the first I would mention is the British patent, No. 6476, which issued in 1915, to Marconi and Round, and which may hereafter be referred to as "Marconi." It is quite clear from the Specification of Marconi that the main object of the invention there, as expressed in the one and only Claim, was the employment of "a cathode formed of a tube of platinum and heated by an internal filament or filaments substantially as described." It was proposed to heat the tube by means of an internal filament and not by passing the heating current through the platinum tube itself, and by this means, the patent states, the platinum might be heated to the high degree necessary more readily than if the heating current were passed through the platinum. Marconi was not concerned with any of the problems resulting from the use of alternating current in a receiving and amplifying circuit, and there is no suggestion whatever of the use of an alternating current; in fact, the specification states that the tube or sleeve of platinum was to be heated by carbon filaments connected to a B battery, and, I think, it may be asserted with confidence that Marconi had in mind the use of direct current only, and therefore he could not have contemplated the use of his cathode for the purposes proposed by Freeman, nor did he give directions so to construct and use it. The cathode of Marconi, if required for the purpose of eliminating some of the hums caused by the use of alternating current, might, with certain alterations, be successfully used for that purpose, but Marconi does not suggest the use of

his cathode for such a purpose and there is nothing remotely suggesting that this was his object, and it is entirely improbable that he had this in mind at all. I cannot conceive of any reasonable ground for construing Marconi as an anticipation of Freeman. It fails to meet the tests applicable to a prior publication pleaded as an anticipation of an invention described in a subsequent patent, here the patent to Freeman.

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The other publication pleaded as an anticipation of Freeman is the United States patent, No. 1,368,584, granted to one Torrissi in 1921, and it was this publication that was particularly stressed by the defendants to sustain the defence of anticipation by publication. This patent was the subject of considerable evidence adduced at the trial, of evidence taken in the United States on behalf of the defendants, pursuant to agreement between counsel, and of lengthy argument by counsel at the trial. The object of this invention was stated to be the elimination of the filament cathode, and substituting for it a cathode which was constructed so as to contain in its inside a heating coil, heating the cathode walls, causing the walls to emit electrons, and which heating coil was renewable from the outside of the instrument. The Specification states that a recognized defect in the filament cathodes then in use was its small exposed surface and its duration of life, which although lasting a reasonable length of time, eventually must burn out, thus making the whole instrument useless, and it is stated that one object of the invention was to provide a cathode which had "a larger surface." There is no mention of the purpose of a cathode with "a larger surface," and it appears to relate merely to "its duration of life"; and there is no mention of this feature of the cathode in the Claims. Broadly, the cathode is described as being made of metal, preferably nickel, cylindrical in shape, and airtight. The Specification states that "running through the whole length this tube is a rod of mica, porcelain or any other heat resisting composition F wound on its tip with the heating coil C with leads E running down this rod to the outside of the tube making two connections J and M"; this rod running through the tube with the heating coil wound thereon was removable, and this would appear to be the main object of the invention, and that feature is claimed. There is no reference in Torrissi to the

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use of alternating current, or to alternating current hums and their elimination, and everything indicates the patentee contemplated only the use of direct current. It is not suggested that the cathode construction described was designed for any other purpose than that of making the heating coil or filament removable, and of course for heating the walls of the cathode. There is nothing in the Specification to indicate any special winding of the heating coil upon the rod enclosed in the cathode, or that it was intended for any purpose other than to heat the walls of the cathode, and particularly is there no suggestion or direction that the winding of the heating coil upon the rod was to be so arranged as to eliminate the magnetic hum, assuming an alternating current was to be used. This cathode never went into commercial use. On any fair construction of the Specification, aided by the drawings, I cannot see how it is possible to hold that Torrasi discloses and describes that which is described and claimed by Freeman, or that there is in his Specification any directions to use his device for the purposes for which Freeman was designed. On any fair construction of the Specification of Torrasi I do not think the invention there described can be held to anticipate Freeman and I entertain no difficulty in reaching that conclusion.

But I should perhaps comment a little further upon Torrasi because of the importance attached to it by the defendants. The debate over Torrasi largely revolved around the question as to whether or not the winding of the heating coil was a double or a single helix. If the winding of the heating coil took the form of a double helix, that is turning the heating coil back upon itself, it might function so as to eliminate the magnetic hum due to alternating current heating, but not so if it took the form of a single helix winding, and it was contended that it was a double helix winding that Torrasi intended, and showed by his drawing Fig. 2. But there is no suggestion in the Description of the Specification that the winding of the heating coil should take the form of a double helix, thus being the equivalent in function and purpose of the U heater of Freeman, or that such a winding would overcome the magnetic hum due to the use of alternating current but which is not suggested or directed in the Description. Mr. Hogan, the expert witness of the plaintiffs, was of



the view that Fig. 2 of Torrasi was suggestive of a single helix, but that in any event the drawing was in this respect ambiguous. Dr. Chaffee, the expert witness of the defendants, was of the opinion that Fig. 2 indicated a double helix winding. It is clear that in the corresponding original drawing accompanying his application in the United States Torrasi showed a single helix winding; nearly two years later that drawing Fig. 2 was replaced by the present Fig. 2, but no material amendment was made in the Description of the invention. Again, there is nothing in the Specification suggesting that the wires of the heating coil should be placed closely together which rather negatives the idea of a double helix being intended or designed for the purpose of eliminating any objectionable effect caused by the magnetic field. Now, if the Description of the invention and Fig. 2 of the drawings are so in conflict, or that the drawing is so ambiguous, as to cause a diversity of opinion between the two experienced experts as to the interpretation of Fig. 2, then the Specification may fairly be held to be ambiguous, or, lacking in that clarity required by the Patent Act, and the contention of the plaintiffs in this regard must, I think, prevail; and it would appear most inequitable to destroy a patent that has been almost universally used for so many years, a very practical and useful device, upon the meaning attributed by the defendants to a patent drawing which at best is ambiguous, or upon the parol testimony of Torrasi himself and others, which purports to give to that drawing a meaning that cannot clearly be gathered from the whole Specification. My own conclusion is that Torrasi never intended to show, when his Specification was signed and filed, a double helix, or that his cathode was ever intended to function for the purpose of avoiding the magnetic hum due to alternating current heating. If that were in his mind it is difficult to believe he could have failed to make this plain and unambiguous in his Specification. It is well settled that a specification must be complete without requiring the public to perform further research; a patentee must not set a problem and call it a description. Further, the American evidence introduced to elucidate or explain what should have been clearly stated in the Specification of Torrasi, given about twenty years after the date of the patent, is not the sort of evidence that should be lightly accorded any weight in construing that Specification, and I feel that I cannot fairly

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do so. I had occasion to discuss evidence of this character in the case of *Cords v. Steelcraft Piston Ring Co.* (1), and to that I would refer. I think a great deal of the American evidence was probably inadmissible but in my view of the case I do not think it is necessary that I should pause to engage in any analysis of it.

It was next contended that Freeman was invalid for the lack of invention, and it was sought to sustain that contention on the following grounds. First, Mr. Gowling argued, a Canadian patent granted to Nicolson, in 1915, described an equipotential cathode, that is, a cathode in which all parts of its active surface can be maintained at the same potential, thus eliminating the electrostatic field and the consequent hum. There is no suggestion in this patent of the use of an alternating current, nor is there any direction to use such a current, but it was, I think, agreed that the cathode described by Nicolson might be used on alternating current and might overcome the portion of the electrostatically produced hum caused by the voltage drop along the emitting surface of the cathode, but it is perhaps doubtful whether it would overcome the portion due to the electrostatic induction along the wire. However, Mr. Gowling argued that Nicolson having shown how to eliminate the electrostatic field by an equipotential cathode, it was to be presumed that this would be known to Freeman. And then he argued that inasmuch as Nicolson employed a straight wire heating filament Freeman would at once know there would be a magnetic field surrounding that wire, he would know that if an alternating current were used the magnetic field and the electron stream would alternate, and if he got a hum he would at once recognize the magnetic field as its source. Then, in the same connection, he contended that a patent granted to Sutherlin, in 1933, showed how to eliminate the magnetic hum by doubling the filament wire back upon itself, and this he seems to say would be known to Freeman because Sutherlin worked with or under him on the development of this invention in the same laboratory in the United States, and that thus having acquired knowledge of the results developed by Sutherlin he, Freeman, filed his application for the patent which is here in question, and that therefore there was no invention by Freeman as to this feature

of his patent. As I construe the evidence, Freeman appears to have made his invention prior to Sutherlin, but the evidence is somewhat confusing to me. However, in my view of the case that is not of serious consequence. It was conceded on behalf of the plaintiffs that Sutherlin might reduce but would not eliminate substantially the electromagnetic hum caused by alternating current, because, if I understand it correctly, the close proximity of the active cathode wire ends shown in Sutherlin would not neutralize the magnetic field at the cathode surface where the electrons are emitted. However, be that as it may, from all this Mr. Gowling argued that Nicolson having earlier solved the problem of the electrostatic hum, and Sutherlin the electromagnetic problem, two of the three problems claimed to have been solved by the device of Freeman, there would remain only the question of how to overcome the thermal hum, the third cause of hum, and this Mr. Gowling contended required no invention. The objectionable thermal hum was overcome by Freeman, it is claimed, by having his cathode and heating element of the requisite "mass" to effect that result. Mr. Gowling contended that while theoretically an alternating current causes a heating and then a cooling of the heating filament, yet this, and the thermal hum, is automatically overcome by the use of an equipotential cathode because its weight or mass will prevent it cooling instantly, just as an electric iron will retain its heat for a time after the current has been withdrawn from it, and while at one precise instant of time there is no current heating the filament of an equipotential cathode that, Mr. Gowling contended, is of no consequence in the case of such a cathode, because of its "mass". From that Mr. Gowling proceeded to argue that as the Nicolson and Sutherlin cathodes had in fact sufficient mass to overcome automatically the thermal lag and hum, Freeman would have observed this, or would be presumed to know it, and accordingly there could be no invention in the means described by him for overcoming the thermal hum resulting from the heating of the filament with alternating current. In this way Mr. Gowling built up the contention that there was no invention in the combination of Freeman, because Freeman merely suggested the putting together what was earlier disclosed by Nicolson and Sutherlin, what were matters of common knowledge or

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knowledge acquired from a fellow-worker in the art, and what was elementary in physics; and thus, it was claimed, Freeman constructed the particular device described in his patent, what is known in patent law as an aggregation of known and independently operative means, which cannot constitute a true combination patent, and was therefore unpatentable.

I think the line of argument adopted by Mr. Gowling against the validity of Freeman, for lack of invention, and which I have just outlined, is fallacious. In the first place, I do not think that the receiving radio tube of Freeman is in fact open to the criticism of its being a mere aggregation of independently operative means. All the principal elements of the combination described by Freeman must co-operate in order that the device may perform the functions and bring about the results for which it was designed, and it is, I think, a good example of a true combination patent. Then, in the next place, if it requires a mosaic of extracts from publications and annals spread over a series of years, and of isolated facts alleged to be elementary in physics or of common knowledge, to prove the contention that there was no invention in Freeman, that contention, I think, stands thereby self-condemned. It appears to me quite clear that Freeman contains subject-matter, and is a patentable combination; even if some of the elements of the combination and their functions had been earlier disclosed yet the combination described by Freeman was a novel and useful one, one that was not, I think, obvious, and no one, so far as I am informed, had ever combined the same elements together in order to accomplish the results which Freeman described in his Specification, and which combination appears to have been accorded a very favourable reception from the interested and discerning public. Any receiving radio tube which would dispense with the use of direct current and enable the use of commercial alternating current instead, and at the same time eliminate alternating current noises or hums, seems to me to merit a patent of invention. There can be no doubt that it was obviously desirable that generally radio receiving tubes be operated, if possible, by commercial alternating current, and apparently that was an object that engaged the attention of prominent workers in the art, prior to the date of Freeman. Freeman was the first to disclose a device which

could use alternating current and at the same time eliminate the major alternating current hums or noises, and his device has been almost universally used for the purposes described and directed by him. It seems to me that a very strong case has been made for sustaining the validity of this patent. My conclusion is that Freeman is a true combination patent, a novel and useful device, almost universally used in all receiving and amplifying radio circuits using alternating current, and apparently it solved problems which were recognized, the solution of which was deemed desirable and sought for by others, and that there is subject-matter in Freeman.

Holding then that there is invention in Freeman, there remains the question of infringement to dispose of. That the tubes of the defendants infringe Freeman seems to me so obvious as to require little discussion. The offending tubes show an equipotential cathode, comprising an equipotential surface, and which is indirectly heated. They show a heater element within the cathode structure, the sides or legs of which heater are in parallel and arranged so close together that the magnetic field established by currents traversing one portion or section substantially neutralizes the magnetic field established by traversing the other section. The heater element in the cathode of the defendants is in the form of an M, which is clearly, I think, the equivalent of Freeman's U shaped heater element, and infringement cannot be avoided by this slight departure in form from that of Freeman, for in principle they are precisely the same. Then the defendants' cathode structure comprises a mass of refractory material in the form of a slender solid cylinder of such size as will receive the filamentary heating element, and of such proportions as will eliminate substantially the effect of the potential drop along the surface of the cathode, that is, the temperature of the cathode will not follow the rapid changes in the alternating current, thereby overcoming substantially the so-called thermal hum, and in fact owing to the construction of this cathode there is no serious thermal hum found in the defendants' tubes. Broadly, that describes the material features of the defendants' structure and I think there can be no doubt but that it is substantially the same as that described and claimed by Freeman. I see no fundamental distinction in the structural or operating

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means embodied in the patent of Freeman and in the offending tubes of the defendants; if Freeman possesses subject-matter it does not appear doubtful to me but that the defendants' tubes embody the invention of Freeman and that there has been infringement. The written admissions made on behalf of the defendants, and to which I referred in my discussion of the Langmuir patent, are intended, I understand, to apply to the Freeman patent as well. If I am right in that assumption then my comments in connection with Langmuir, in reference to the importation, licensing and sale of radio tubes by one or other of the defendants, would be applicable in the case of the patent to Freeman and need not be repeated.

A defence of another character entirely has been raised in this action, and must now be considered. It is that the assignments of the patents here in question, to the plaintiff Thermionics Ld. (hereinafter called "Thermionics") by the other named plaintiffs, were made for an illegal consideration, and in pursuance of an agreement among the plaintiffs, or some of them, whereby the plaintiffs control and unreasonably enhance the prices at which radio tubes are sold to dealers and users, thereby restricting competition, and detrimentally affecting the public, contrary to the provisions of the Combines Investigation Act and the Criminal Code. It is therefore claimed that the assignments by which Thermionics acquired and hold the patents in suit are invalid because made for an illegal consideration, and that therefore the plaintiffs are not entitled to bring this action, or entitled to the relief claimed therein.

At an earlier stage in this action the defendants (hereafter called "Philco") moved for leave to amend their statement of defence by adding thereto the following paragraph:

4. The defendants deny the allegations in paragraph 4 of the plaintiffs' amended statement of claim and put the plaintiffs to the strict proof thereof, and the defendants allege that the plaintiffs, or some of them, together or with others, have entered into an illegal conspiracy or combine contrary to the common and statute law of the Dominion of Canada, and, in particular, contrary to The Combines Investigation Act (R.S.C., 1927, c. 26) and The Criminal Code (R.S.C., 1927, c. 146) and are disentitled to any relief in this action because:

(a) The assignments, transmissions, agreements or other means whatsoever, by which rights in the patents in suit are claimed, were made in pursuance, or as a result, of the said conspiracy or combine and were ineffective to convey such rights; or

(b) In the alternative, if any rights in the patents in suit were acquired, such rights have been used, in this action and otherwise, in pursuance of the said conspiracy or combine in such a way as to disentitle the plaintiffs to any relief.

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On that motion for leave to amend the statement of defence it was ordered that the question whether or not the proposed defence could be an answer to an action for the infringement of a patent be set down for argument as a question of law for decision by the Court in advance of the trial. Subsequently, and after hearing counsel, I determined that question in the negative, holding that the proposed amendment could not be raised as a defence in this infringement action, and from that decision an appeal was asserted to the Supreme Court of Canada. The appeal was dismissed by the Supreme Court of Canada, the final order for judgment stating: "This Court did order and adjudge that the judgment of the Exchequer Court of Canada should be and the same was affirmed, and that the said appeal should be and the same was dismissed without prejudice to the right of the appellants to apply to amend their defence by properly framed amendments." In the judgment of the Supreme Court of Canada, delivered by the learned Chief Justice, no pronouncement was made upon any question of law, but it was held that the proposed amendment was not a proper one and ought not to be allowed, on the ground that the proposed pleading was merely a bald allegation of an illegal conspiracy in restraint of trade, contrary to the law of the Dominion of Canada, and that the facts constituting the illegality were not set up. The judgment expressed doubt on the proposition that in no circumstances could the existence of an illegal conspiracy in restraint of trade, to enhance the prices for example, be an answer to an action for the infringement of a patent, because of the principle that no cause of action can have its origin in fraud. This principle, the Court thought, would apply to an action for infringement of a patent where the plaintiff must necessarily prove, in order to establish his cause of action, or in order to establish his title to sue, that he was a party to an illegal conspiracy upon which his cause of action rested, or that his title was founded upon an agreement which amounted to a criminal conspiracy to which he was a party, and that in such a case the plaintiff could not succeed.

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Subsequently, on application made before me, I granted leave to Philco to amend its statement of defence, the question whether or not the proposed amended defence was one which constituted a good defence to this action to be determined when the action came on for trial. In due course the following amended defence was pleaded:

7. The defendants allege that the assignments by which the plaintiff, Thermionics, Limited, purports to have acquired and held the patents in suit are invalid because they were given for an illegal consideration, having been made in pursuance, or as a result of an agreement between or among the plaintiffs or some of them, whereby the said plaintiffs fix control, and unreasonably enhance the prices at which radio tubes are sold to dealers in and users of the said tubes, thereby restricting competition and detrimentally affecting the public, all of which is contrary to the provisions of the Combines Investigation Act, R.S.C., 1927, chap. 26, section 2, and amending Acts, and the Criminal Code, R.S.C. 1927, chap 36, section 498.

It was contended on behalf of the plaintiffs that the defence now proposed adds no new material to that set out in the first proposed defence, that the facts constituting the illegal acts complained of are not now set up any more than they were in the pleading pronounced upon by the Supreme Court of Canada, and that in fact the defence now proposed is considerably narrower in its scope than was the former one. The first proposed defence alleged (1) an illegal conspiracy or combine contrary to the common and statute law of Canada, (2) that the assignments or agreements by which any rights in the patents in suit were claimed were made in pursuance of the said conspiracy or combine and were ineffective to convey such rights, and (3), in the alternative, that if any rights in the patents in suit were acquired, such rights were used in pursuance of the said conspiracy or combine in such a way as to disentitle the plaintiffs to any relief. The defence presently proposed appears only to allege that the assignments by which Thermionics acquired and holds the patents in suit are invalid because given for an illegal consideration, or because made in pursuance of an agreement whereby the plaintiffs control and fix the prices at which radio tubes are sold to dealers and users, and which have the effect of restricting competition and unduly enhancing the said prices, thus detrimentally affecting the public interest. This defence seems to allege that the matters complained of were inherent in the assignments themselves from the beginning, and not by reason of any subsequent conduct



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on the part of the plaintiffs. In fact, no illegal conspiracy or combine is alleged in specific terms, no facts constituting the alleged illegal consideration are set up, and it is not alleged in what manner competition was restricted or the prices of radio tubes were enhanced, or how or in what sense the public interests were detrimentally affected. It is to be emphasized that sub-paragraph (b) of the original amended defence, which alleged illegal use of the patent rights in suit subsequent to the assignments, is now entirely abandoned. It may also be mentioned that the proposed defence does not allege any direct injury to Philco occasioned by reason of the alleged illegal acts complained of, or that the same constituted an equitable defence available to Philco. It was contended by counsel for the plaintiffs that the amended defence, in substance, merely pleads the provisions of the statute law mentioned, and that it sets forth nothing more than that the assignments transmitting rights in the patents in suit were invalid because made contrary to the provisions of the statute law of Canada, and consequently for an illegal consideration, and that therefore no valid title was conveyed thereby to Thermionics. Consequently, it was urged, that the judgment of the Supreme Court of Canada was as applicable to the amended defence now proposed as it was to the first proposed amended defence, and that the said judgment of the Supreme Court of Canada was conclusive of the matter.

In the course of his argument in support of maintaining the amended defence Mr. McCarthy referred to certain evidence earlier taken on discovery, at the instance of Philco, the witness being Mr. John C. MacFarlane, an officer of Thermionics; to an agreement entered into between the plaintiff Canadian General Electric Company and Thermionics, which I understood to be illustrative of agreements entered into between other of the plaintiffs and Thermionics, under which said agreement Canadian General Electric Company agreed to grant to Thermionics licences to make, use and sell, and the right to grant to others licences to make, use and sell, radio tubes under each of the patents owned or controlled by it; and also an agreement entered into between the plaintiff Canadian Marconi Company and Cutten-Foster & Sons Ltd., under

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which the former as a manufacturer licensed by Thermionics agreed to sell to the latter as a "jobber" such radio tubes as might be mutually agreed upon from time to time pursuant to the terms of that agreement, and this agreement I understood to be illustrative of other agreements entered into between other of the plaintiffs and other jobbers.

The substance of the said agreements, was, I think, fairly and succinctly stated by Mr. McCarthy, and if I can accurately restate his summary of such documents I shall have sufficiently set forth such of their provisions as are material here, and their purpose and effect. First, there was assigned to the plaintiff Thermionics by the other named plaintiffs, their right, title and interest in the patents in suit, and other patents as well, and it was by virtue of such assignments that Thermionics is one of the parties to this action, and the other named plaintiffs are parties to the action because they in turn became licensees of Thermionics to manufacture and sell radio tubes. The consideration for the assignments apparently was that Thermionics was to grant to the assignors, the other named plaintiffs, the right to manufacture and sell radio tubes under the patents so assigned, and such other plaintiffs in some way not explained became shareholders of Thermionics. The effect of the assignments, agreements and licences referred to was apparently to constitute what is frequently referred to as the pooling and cross-licensing of patents, by and between the owners of such patents. Thermionics was, Mr. McCarthy said, in effect a holding company, which licensed the other named plaintiffs to manufacture and sell radio tubes protected by the patents or patent rights assigned to Thermionics by such other plaintiffs. Thermionics does not itself manufacture or sell radio tubes, and receives no royalties or profits from its co-plaintiffs licensed to manufacture or sell such tubes; to this I understand there was one exception but that is unimportant and I need not pause to explain the reasons for this exception. The plaintiffs so licensed to manufacture radio tubes would in the ordinary course sell such radio tubes to jobbers at the manufacturers current price list, but these prices had to be approved by the manager of Thermionics, after consultation with a committee of Thermionics. Mr. McCarthy suggested that the selling

prices of the jobber to the retailer were in turn regulated by the manufacturer but there is nothing in the documents mentioned which would indicate this, and Mr. McFarlane testified on discovery that Thermionics did not attempt to regulate the prices at which the jobber should sell to the retailer or to the public. The effect of the assignments or agreements, which I hope I have interpreted with reasonable accuracy, was, Mr. McCarthy urged, that prior to 1936 the plaintiffs other than Thermionics were each exercising their rights under their patents and in open competition, but in consequence of the arrangements entered into the fixing and control of the prices of radio tubes manufactured and sold in Canada under such patents, including those in question here, were placed in the hands of the one concern, Thermionics, thus eliminating all competition and stifling trade therein, all contrary to the statute law of Canada, and to the detriment of the public.

It was upon the state of facts above related that Mr. McCarthy, largely if not wholly, proposed to rely in establishing the alleged illegal acts complained of, and which he contended constituted a bar to the success of the plaintiffs in this action. It was not proposed to tender evidence for the purpose of showing that the prices of radio tubes had been unduly enhanced by reason of the assignments, agreements or licences, mentioned; he plainly stated that he was not "concerned with the prices or whether they were fair or unfair," which I understood to include the prices exacted by either the manufacturer, the jobber, or the retailer. He relied, at least I so understood him, upon bringing the plaintiffs within the provisions of the Combines Investigation Act and the Criminal Code by showing that the prices of the licensed manufacturers to jobbers were fixed or controlled by Thermionics, the holder of the titles to the patents in suit and the licensor of the said manufacturers, which, he said, was beyond and in excess of any monopoly rights acquired under the patents owned or held by Thermionics, and which had the effect of restricting competition and unduly enhancing the price of radio tubes to the public.

I come now to the question as to whether or not the proposed defence could constitute an answer to the action for the infringement of the patents in suit. I fear I cannot usefully add much, if anything, to what I said in my

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reasons for judgment in refusing the first application to amend the statement of defence. I would refer to what I said in my former judgment in respect of the procedure laid down for the enforcement of the provisions of the Combines Investigation Act, and the provisions of the Patent Act which provide relief in the case where it is alleged that there has been an abuse of the exclusive rights granted under a patent of invention. The latter provisions appear sensible and practical, and while they may curtail or suspend the exclusive rights of the patentee they do not deprive him of his property rights in his patent, which would be the practical effect here if the proposed defence were to constitute an answer to the action for infringement of the patents in suit. It was not contended before me that there was any legal impediment in the way of the assignment of a patent by the owner thereof, or in the acquisition by a patentee of any other patents covering improvement in his patent of invention, or, in fact, in the pooling of patents and the establishment of a system of cross-licensing by and between owners of patents, and there would, I think, be no penalty for doing so unless it be that the same were consummated with the intent of entering into some conspiracy or combine in restraint of trade, and which did in fact restrain trade and restrict competition and was detrimental to the public interests. It is conceivable that a pooling of patents with cross-licensing arrangements, such as we have here, might be in the public interests. Such arrangements in connection with patents have been the subject of much discussion, both for and against, in the United States, but I do not know of any case where such arrangements were held to be from the beginning illegal; and I do not think that this can be inferred or presumed from the assignments or agreements put in question here. Mr. McCarthy appeared to me to contend that the illegal acts complained of were inherent in the documents themselves, and he stated that he did not propose to adduce evidence to show that the prices of radio tubes had been unduly enhanced by reason of the agreements complained of. I do not think that it was intended that the provisions of the Combines Investigation Act and the Criminal Code should operate as an answer in actions for the infringement of a patent where another statute of Canada purported to make ample provisions for relief, on behalf of interested parties and of

the public, in the case where there had been an abuse of the exclusive rights granted under a patent. I do not mean to say that there cannot be such a thing as an unlawful combine in restraint of trade, within the meaning of the statutes mentioned, by and between patent owners, or that parties thereto may not be subject to the penalties and consequences provided by such statutes, but that must be established in the proper way and by the prescribed procedure. I fail to see, for example, how sec. 498 of the Criminal Code could be an answer to an action for infringement of a patent unless the party bringing such action had first been indicted, tried and found guilty, of the offence therein mentioned. Further, I am of the opinion, for the reasons earlier enumerated, that the proposed defence does not meet the requirements laid down by the Supreme Court of Canada in connection with the first proposed amendment to the statement of defence, and that of itself is, I think, conclusive of the matter.

The question arising here has frequently been considered, in actions for infringement of patents, by the Courts of the United States, where so-called anti-trust legislation, corresponding in principle to the Canadian statutes in question here, is to be found. In *Western Electric Company v. Wallerstein* (1), a motion was made to strike out various paragraphs of the answer to an action for infringement of patent rights wherein it was alleged that the title of the plaintiffs, as licensees of the patents in question, derived from an agreement which was claimed to constitute a violation of the anti-trust laws and a combination in restraint of trade. It was held that violation of the anti-trust laws was not a proper defence in a patent suit for infringement of patent rights, that a defendant who was an infringer could not shield himself from liability on any such ground, and the paragraphs of the answer in question were ordered to be struck out. In *Radio Corporation of America et al v. Majestic Distributors* (2), a motion was made to strike from the record a paragraph in the defendant's answer in a patent infringement suit which alleged that the plaintiffs had no standing in a Court of Equity in that case because the plaintiffs were parties to agreements which formed an unlawful combination in restraint of trade contrary to the statutes

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(1) (1930) 48 F.R. 2d, 268.

(2) (1931) 53 F.R. 2d, 641.

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of the United States, and because one of the plaintiffs, Radio Corporation of America, derived its alleged titles and rights from the provisions of the said illegal agreements. The motion was granted, it being held that the paragraphs of the defence in question were irrelevant to the cause of action and afforded no defence to the allegations set forth in the bills of complaints. In *Radio Corporation of America et al v. Hygrade Sylvania Corporation* (1), an action for infringement of patents, the plaintiffs moved to strike out certain paragraphs of the defendant's defence, alleging, *inter alia*, that the plaintiffs had by several agreements acquired numerous patents and patent rights in the radio art, including the patents there in suit; that they had combined and pooled their patents and had agreed to license only those in the combination to manufacture under the patents, and had refused to grant the right to others, for the purpose of restraining competition; that they had by cross-licensing and exclusive licensing agreements combined to restrain and prevent all competition; and that they had refused to license the defendant on reasonable or any terms. Upon those and other grounds it was pleaded that the infringement action of the plaintiffs should not be maintained. The motion to strike out the paragraphs in question was granted, the Court holding that the law was too well settled to question the general rule that an allegation in a suit for infringement of a patent to the effect that the plaintiff is a party to an unlawful combination does not constitute a defence. The subject of patent monopoly in relation to the anti-trust laws of the United States is treated at length in Chapter 16 of Volume 2 of Deller's Edition of Walker on Patents. The author states, at page 1500, that it is no defence to a bill for alleged infringement of a patent that plaintiffs have entered into a combination or conspiracy among themselves or with third parties to violate the anti-trust laws, and apparently that is well settled law in the United States. I was referred by Mr. McCarthy to the case of *Ethyl Gasoline Corporation v. United States of America* (2). That was a suit brought by the Government of the United States, in a District Court, under the provisions of the Sherman Anti-Trust Act, to restrain Ethyl Gasoline Corporation from granting licences under patents controlled

(1) (1934) 10 F. Supp. 879.

(2) (1939) 309 U.S.R. 436.

by it to jobbers, and from enforcing certain provisions in licences granted to oil refiners which restricted their sale of the motor fuel in question to the licensed jobbers, as violations of the Sherman Anti-Trust Act. The trial court granted the relief sought, generally on the ground that the corporation had by its licensing system exercised unlawful control over the jobbers, and the case then went on appeal to the Supreme Court of the United States which sustained the decision of the District Court. In short the Supreme Court held that while the corporation could by virtue of the power conferred by its patent lawfully exclude any and all others from selling the patented article, it did not follow that it could lawfully exercise that power in such manner as to control the patented commodity in the hands of the licensed jobbers who had purchased it, or their actions with respect to it in ways not within the limits of the patent monopoly: "and conspicuous among such controls which the Sherman law prohibits and the patent law does not sanction is the regulation of prices and the suppression of competition among the purchasers of the patented articles." Now that case differs in many respects from that under consideration, but particularly in that the action was not one for the infringement of a patent and in which alleged violations of the anti-trust laws were pleaded as a defence. I do not think that case furnishes any assistance here.

In the result, the plaintiffs succeed and are entitled to the relief claimed, and with costs. If in any interim proceeding in this action the matter of costs was reserved and remain undisposed of, the same may be spoken to on the settlement of the minutes of judgment.

*Judgment accordingly.*

Following are the reasons for judgment delivered by the learned President on May 4th, 1939, and referred to above:

This action was brought by the plaintiffs against the defendants for the infringement of two patents of invention, of which the plaintiffs are owners, or licensees thereunder. The defendants now move for an order permitting them to amend their statement of defence by inserting the following:

"4. The defendants deny the allegations in paragraph 4 of the plaintiffs' amended statement of claim and put the plaintiffs to the strict proof thereof, and the defendants allege that the plaintiffs, or some of them, together or with others, have entered into an illegal conspiracy or combine contrary to the common and statute law of the Dominion of

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Canada, and, in particular, contrary to *The Combines Investigation Act (1923, c. 9, s. 1)* and *The Criminal Code (R.S. c. 146, s. 1)* and are disentitled to any relief in this action because:

(a) The assignments, transmissions, agreements or other means whatsoever, by which rights in the patents in suit are claimed, were made in pursuance or as a result, of the said conspiracy or combine and were ineffective to convey such rights; or

(b) In the alternative, if any rights in the patents in suit were acquired, such rights have been used, in this action and otherwise, in pursuance of the said conspiracy or combine in such a way as to disentitle the plaintiffs to any relief."

Sec. 2 of the Combines Investigation Act Amendment Act, 1935, Chapter 54 of the Statutes of Canada, 1935, defines "combine" as meaning a combination having relation to any commodity which may be the subject of trade and commerce, of two or more persons by way of actual or tacit contract, agreement or arrangement having or designed to have, *inter alia*, the effect of preventing, limiting or restraining the manufacture, production and supply of commodities, or lessening competition therein, or enhancing the price thereof, or otherwise restraining or injuring trade or commerce in such a way as is likely to operate against the interest of the public. Sub-s. (4) of s. 2 defines a "merger, trust or monopoly", and it states that the same applies only to the business of manufacturing, producing, transporting, purchasing or dealing in commodities which may be the subject of trade and commerce, and it is therein provided that this subsection "shall not be construed or applied so as to limit or impair any right or interest derived under the Patent Act, 1935, or under any other statute of Canada."

The Combines Investigation Act provides for an investigation and enquiry, and report, into any alleged combine, and if an offence against the Act has, in the opinion of the Minister administering the Act, been established, the Minister may remit to the attorney general of any province within which such offence shall have been committed, any evidence, returns, or any report of the Registrar, relative to the offence, for such action as such attorney general may be pleased to institute.

Section 498 of the Criminal Code provides that every one is guilty of an indictable offence and liable to certain penalties for certain offences therein stated, and which for all practical purposes here may be said to be those which fall within the definition of a "combine" in the Combines Investigation Act.

Prior to April, 1937, the Combines Investigation Act contained the following provision, sec. 30, in respect of patents:

"30. If the owner or holder of any patent issued under the Patent Act has made use of the exclusive rights and privileges which as such owner or holder he controls, so as

(a) unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject of trade or commerce; or

(b) to restrain or injure trade or commerce in relation to any such article; or

(c) unduly to prevent, limit or lessen the manufacture or production of any article; or

(d) unreasonably to enhance the price of any article; or

(e) unduly to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any article; such patent shall be liable to be revoked.

2. If the Minister reports that a patent has been so made use of, the Minister of Justice may exhibit an information in the Exchequer Court



of Canada praying for a judgment revoking the patent; and the Court shall thereupon have jurisdiction to hear and decide the matter and to give judgment revoking the patent, or otherwise, as the evidence before the Court may require."

The above mentioned provision of the Combines Act, Sec. 30, was repealed by sec. 13 of Chap. 23 of the Statutes of Canada, 1937. I have no doubt the repeal of this section was attributable to the fact that the Patent Act, 1935, by sections 65 to 75 inclusive, conferred upon the Attorney General of Canada, or any other interested party, the right to apply to the Commissioner of Patents, after three years from the date of the grant of any patent, for relief, in the case where it was alleged that there had been an abuse of the exclusive rights granted under any such patent. Those sections of the Patent Act set forth the circumstances under which the exclusive rights under a patent may be deemed to have been abused, and they provide certain remedies for any such abuses. Parliament would appear, in my opinion, to have deliberately legislated so as to exclude from the operation of the Combines Investigation Act and the Criminal Code, anything in the nature of a monopoly derived from the exclusive rights under a patent, and the Patent Act provides the procedure and the remedies for the case where there has been an abuse of such exclusive rights. Sub-s. 4 of s. 2 of the Combines Investigation Act, to which I have already referred, in defining a "monopoly" expressly preserves any right or interest in the nature of a monopoly derived under the Patents Act, 1935. The long title of the Combines Investigation Act is "An Act to provide for the Investigation of Combines, Monopolies, Trusts and Mergers". The exclusive rights and privileges granted to a patentee are those of making, constructing, using and vending to others to be used, his invention, during the life of the patent.

I think the motion of the defendants must be denied. The Patent Act and the Combines Investigation Act seem designed to protect the particular exclusive rights attaching to patents, and to exempt them from the operation of those provisions of the Combines Investigation Act and the Criminal Code which are designed to restrain and punish anything in the nature of a combine or conspiracy in restraint of trade and commerce, and which might be against the public interest. If different patentees should combine in such a way as to offend against the intent and spirit of the relevant provisions of the Combines Investigation Act, or the Criminal Code, which is conceivable, then the procedure of attack would be that set forth in such statutes, and not by way of a defence in an action for infringement of a patent or patents and I do not think that anything else was ever intended. Even if there were established a combine or conspiracy relative to a particular patented article it would not, I think, thereby follow that the patented article might not be infringed, or that the patent would thereby become invalid. That situation is not contemplated by the Combines Investigation Act or the Criminal Code, and it would seem unreasonable if they did. The infringement of a patent is one thing, and whether patentees have entered into a combine or conspiracy in restraint of trade is another thing. My conclusion is that the proposed amendments to the statement of defence cannot be raised as defences in an infringement action, and must be refused, and with costs to the plaintiffs.

It was agreed by counsel that this motion should be treated as an order of the Court directing that the questions of law involved therein be raised for the opinion of the Court, in advance of the trial, under Rule 151. And I so treat the motion.

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dian Pacific Express Company, died from injuries received when at work in Windsor Station, Montreal. By an award of the Quebec Workmen's Compensation Commission the Canadian Pacific Express Company was ordered to pay to suppliant a certain sum of money plus \$40 per month during her lifetime. Suppliant brought action against the Crown to recover damages for the death of her husband. The Crown took third party proceedings against the Canadian Pacific Railway Company. The Court found that the accident which caused the death of M. was attributable solely to the negligence of one, C., while acting within the scope of his duties or employment as a servant of the Crown, and that there was no contributory negligence on the part of M. Suppliant died subsequent to the trial of the action and before judgment was rendered. The third party proceeding was dismissed and judgment given in favour of suppliant against the Crown. *Held*: That the cause being ready for judgment when suppliant died, there was no occasion for proceedings in continuance of suit; Articles 266 and 267 C.C.P. 2. That the suppliant is a proper party to produce marriage and burial certificates affecting her husband and to testify with regard thereto, certified copies of acts of civil status being authentic and making proof of their contents: Articles 50 and 1207 C.C. **DAME EMMA DANIELS (SMITH) McNICOLL v. HIS MAJESTY THE KING.**

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**DAMAGES ASSESSED EQUALLY ON BOTH SHIPS.**

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**DEDUCTIONS.**

See REVENUE, Nos. 2 and 4.

**DEDUCTION OF LOSS OF SUBSIDIARY PERSONAL COMPANY NOT ALLOWED TO TAXPAYER WHO OWNS STOCK IN PRINCIPAL PERSONAL COMPANY.**

See REVENUE, No. 4.

**"DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME."**

See REVENUE, No. 2.

**DISCRETION OF COURT.**

See EXPROPRIATION, No. 1.

**DISTRIBUTION OF PROPERTY OF VENDOR COMPANY TO ITS SHAREHOLDERS HELD TO BE WITHIN THE TERMS OF S. 19 (1) OF THE INCOME WAR TAX ACT.**

See REVENUE, No. 1.

**"DISTRIBUTION OF THE PROPERTY... DEEMED TO BE THE PAYMENT OF A DIVIDEND TO THE EXTENT THAT THE COMPANY HAS ON HAND UNDIS-TRIBUTED INCOME."**

See REVENUE, No. 1.

**DIVISIONAL APPLICATIONS.**

See PATENTS, No. 5.

**1 EDW. VIII, C. 38, S. 22.**

See REVENUE, No. 1.

**EXCHEQUER COURT ACT, R.S.C., 1927, C. 34, S. 18.**

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**EXCHEQUER COURT ACT, R.S.C., 1927, C. 34, S. 19 (C) AS AMENDED BY 2 GEO. VI, C. 28.**

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**EXCHEQUER COURT RULE 22A.**

See PATENTS, No. 7.

**EXCISE TAX.**

See REVENUE, No. 3.

**EXPENSES INCURRED IN REFUNDING OUTSTANDING BOND ISSUE AND REPLACING SAME BY A NEW BOND ISSUE CARRYING LOWER RATE OF INTEREST.**

See REVENUE, No. 2.

**EXPROPRIATION**

1. CLAIM THEREFORE TO BE INCLUDED IN COMPENSATION, No. 1.
2. DISCRETION OF COURT, No. 1.
3. RIGHT TO RECOVER AMOUNT PAID EXPERTS, No. 1.
4. TAXATION, No. 1.

**EXPROPRIATION—Right to recover amount paid experts — Taxation—Claim therefor to be included in compensation—Discretion of Court.]—Held:** Where the expropriated party by his defence to an Information asks to be paid, as part of the compensation, a sum paid by him to valuers for their services in preparing to give evidence as to value, the Court upon proof made of the nature of the services rendered, may include in the compensation

**EXPROPRIATION—Concluded**

payable to the expropriated party such sum as, in its discretion, it deems reasonable for the said services. *HIS MAJESTY THE KING v. RODRIGUE MESSIER*..... 130

**EXTENT OF OBLIGATION OF NATIONAL HARBOURS BOARD IN ASSURING SAFETY OF HARBOURS UNDER ITS JURISDICTION.**

*See SHIPPING, No. 2.*

**“FAIR PRICE” AS DETERMINED BY THE MINISTER OF NATIONAL REVENUE NOT CONCLUSIVE AGAINST TAXPAYER.**

*See REVENUE, No. 3.*

**HEATING APPARATUS FOR CURING OF TOBACCO.**

*See PATENTS, No. 3.*

**INCOME.**

*See REVENUE, Nos. 1, 2 and 5.*

**INCOME ACCUMULATING IN TRUST FOR THE BENEFIT OF UNASCERTAINED PERSONS.**

*See REVENUE, No. 5.*

**INCOME TAX.**

*See REVENUE, No. 4.*

**INCOME WAR TAX ACT, R.S.C., 1927, C. 97.**

*See REVENUE, Nos. 1, 2, 4 and 5.*

**INFRINGEMENT.**

*See PATENTS, Nos. 2, 4 and 5.*

**INFRINGEMENT ACTION.**

*See PATENTS, No. 3.*

**INTENDED FOR FOOD.**

*See PATENTS, No. 5.*

**INVENTION.**

*See PATENTS, Nos. 5 and 6.*

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*See PATENTS, No. 2.*

**INVENTION OR SUBJECT-MATTER.**

*See PATENTS, No. 4.*

**JUDGMENT OF DISTRICT JUDGE IN ADMIRALTY VARIED.**

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**JURISDICTION OF COURT TO MAKE DECLARATORY ORDER.**

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**LACK OF NOVELTY.**

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**MANUFACTURING COMPANY SELLING TO INDEPENDENT TRADING COMPANY FOR DISTRIBUTION TO DEALERS.**

*See REVENUE, No. 3.*

**METHOD OF DETERMINING “FAIR PRICE.”**

*See REVENUE, No. 3.*

**NEGLIGENCE OF EMPLOYEE OR SERVANT OF THE CROWN ACTING WITHIN THE SCOPE OF HIS DUTIES OR EMPLOYMENT.**

*See CROWN, No. 1.*

**NEW USE OF KNOWN DEVICE.**

*See PATENTS, No. 2.*

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**“OBVIOUS.”**

*See PATENTS, No. 5.*

**ORDER SETTING DOWN POINTS OF LAW TO BE DISPOSED OF BEFORE TRIAL.**

*See PATENTS, No. 1.*

**OUTLAY ON ACCOUNT OF CAPITAL.**

*See REVENUE, No. 2.*

**PATENT ACT, 25-26 GEO. V, C. 32.**

*See PATENTS, Nos. 1, 5 and 6.*

**PATENTS FOR INVENTION.**

1. ACTION FOR DECLARATION OF VALIDITY OF PATENT AND FOR COMPENSATION FOR USE OF THE PATENTED INVENTION BY THE CROWN, No. 1.
2. ACTION FOR INFRINGEMENT, No. 6.
3. ADMISSIBILITY OF PAROL EVIDENCE IN CONSTRUING PRIOR PUBLICATIONS, No. 6.
4. ALLEGED COMBINATION IN RESTRAINT OF TRADE AS DEFENCE TO ACTIONS FOR INFRINGEMENT, No. 6.
5. ALLEGED INFRINGING DEVICE SUBSTANTIALLY THE SAME AS A PATENTED DEVICE KNOWN IN THE ART PRIOR TO APPLICATION FOR PATENT IN SUIT, No. 3.

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6. ALLEGED USER OF INVENTION BY GOVERNMENT DEPARTMENT, No. 1.
7. ANTICIPATION, Nos. 2, 3, 5 and 6.
8. BURDEN OF PROOF, No. 4.
9. CHANGING DATE OF INVENTION, No. 7.
10. CLAIMS FOR PRODUCT MANUFACTURED AND FOR PROCESS OF MANUFACTURING SUCH PRODUCT, No. 5.
11. CLAIM OF PATENTEE FOR USER OF PATENTED INVENTION BY THE CROWN IS NOT ONE IN TORT, No. 1.
12. COMBINES INVESTIGATION ACT, R.S.C., 1927, C. 36, No. 6.
13. DIVISIONAL APPLICATIONS, No. 5.
14. EXCHEQUER COURT ACT, R.S.C., 1927, C. 34, S. 18, No. 1.
15. EXCHEQUER COURT RULE 22A, No. 7.
16. HEATING APPARATUS FOR CURING TOBACCO, No. 3.
17. INFRINGEMENT, Nos. 2, 4 and 5.
18. INFRINGEMENT ACTION, No. 3.
19. INTENDED FOR FOOD, No. 5.
20. INVENTION, Nos. 5 and 6.
21. INVENTION CLAIMED FOR NEW IMPROVEMENTS IN EGG BOXES AND CARTONS AND MACHINES FOR ASSEMBLING THE SAME, No. 2.
22. INVENTION OR SUBJECT-MATTER, No. 4.
23. JURISDICTION OF COURT TO MAKE DECLARATORY ORDER, No. 1.
24. LACK OF NOVELTY, No. 2.
25. NEW USE OF KNOWN DEVICE, No. 2.
26. NO INFRINGEMENT, No. 3.
27. "OBVIOUS," No. 5.
28. ORDER SETTING DOWN POINTS OF LAW TO BE DISPOSED OF BEFORE TRIAL, No. 1.
29. PATENT ACT, 25-26 GEO. V, C. 32, Nos. 1, 5 and 6.
30. PATENTS HELD VALID AND TO HAVE BEEN INFRINGED, No. 6.
31. PETITION OF RIGHT, No. 1.
32. PETITION OF RIGHT ACT, R.S.C., 1927, C. 142, No. 1.
33. PRIOR ART, No. 2.
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35. PROCEDURE, No. 1.
36. PROCESS PATENT, No. 5.
37. "PUBLIC USE," No. 4.
38. SUBSTANCE "PREPARED OR PRODUCED BY A CHEMICAL PROCESS," No. 5.
39. SUBJECT-MATTER, Nos. 2, 5 and 6.

**PATENT—Petition of Right—Alleged user of invention by Government Department—Procedure—Action for declaration of validity of patent and for compensation for use of the patented invention by the Crown—Order setting down points of law to be disposed of before trial—Patent Act, 25-26 Geo. V, c. 32, s. 19—Exchequer Court Act, R.S.C., 1927, c. 34, s. 18—Jurisdiction of Court to make a declaratory order—Petition of Right Act, R.S.C., 1927, c. 142—Claim of patentee for user of patented in-**

## PATENT—Continued

*vention by the Crown is not one in tort.*—An action was brought by B. against the Crown claiming a declaration that a patent of 1936 granted to B. is valid and that the Crown has constructed and used his patented invention, and that the Commissioner of Patents be directed to ascertain and report under s. 19 of the Patent Act, 25-26 Geo. V, c. 32, what shall be a reasonable compensation to the suppliant by the Crown for the use of his invention, and that the Crown be condemned to pay to suppliant the amount of compensation so found by the Commissioner. The respondent pleaded *inter alia* that the Petition of Right was bad in substance and in law and that any relief claimed therein was not relief for which under the law and practice a Petition of Right will lie or may be pleaded. The points of law raised were ordered to be set down for hearing and disposed of before the trial of the action. These questions were submitted to the Court: 1. Assuming the patent in suit to be valid and the invention covered thereby to have been used by the respondent, is the suppliant entitled in law to any of the remedies claimed against the respondent in respect of the use by the respondent of the patented invention, and 2. If so, does a Petition of Right lie to enforce such remedy or remedies? For the purpose of a decision on the law points the Court assumed that the patent was valid and that the Crown had used the invention therein claimed, though such points were not conceded by the respondent in the statement of defence. *Held:* That the law points submitted for decision must be determined in the affirmative. 2. That a claim for compensation for the use of a patent is not a claim in tort because the Crown has the right to use the patent on the statutory terms set out in section 19 of the Patent Act. 3. That where a statute authorizes the Crown to take away or use the property of a subject the Legislature cannot be considered as doing so without giving the subject a legal right to compensation unless such intention is expressed in unequivocal terms. 4. That there is no valid distinction between a sum due under a contract for the use of the property of a subject and a sum due for the lawful use of the property of a subject under a statutory authority. 5. That a Petition of Right lies when in consequence of anything legally done any resulting obligation emerges on behalf of the subject, and under the Petition of Right Act there is jurisdiction in this Court in respect of claims of the subject against the Crown to consider and determine what is right to be done, and to make a declaration as to the rights of the subject. ROBERT A. BRADLEY v. HIS MAJESTY THE KING... I

**PATENT—Continued**

2.—*Infringement action—Heating apparatus for curing of tobacco—Prior user—Anticipation—No infringement—Alleged infringing device substantially the same as a patented device known in the art prior to application for patent in suit.*—The action is for infringement of Canadian Patent No. 381,441, granted to the plaintiffs Jasperson and Beckett; the plaintiff Kingsville Gas Appliances Limited, is the exclusive licensee in Canada of Jasperson and Beckett. The invention claimed is said to relate to a "Method of and Apparatus for Curing Tobacco," and consists of a heating structure. The Court found that the alleged infringing apparatus is substantially the same as an apparatus known as the Smith burner which had been in use for some time prior to the application of Jasperson and Beckett for the patent in suit. *Held:* That if an invention be nothing more than a particular means to attain a given result which is well known, all that can be claimed as an invention is the particular means described. 2. That since there is no distinction, in the patent sense, between the Smith burner and the defendants' apparatus, the defendants' apparatus cannot be said to infringe plaintiffs' patent. **KINGSVILLE GAS APPLIANCES, LIMITED ET AL V. NEW IDEA FURNACES, LIMITED ... 118**

3.—*Infringement—Burden of proof—Invention or subject-matter—"Public use."*—The patent in suit granted to O. on April 11, 1933, on application therefor filed on July 13, 1932, and subsequently assigned to B, one of the plaintiffs herein, was for improvements in mixing machines and has particular reference to a machine adapted to the mixing and kneading of dough and the like, for use in homes and was operated by hand crank. For many years prior to this alleged invention a large machine had been used in the bakery trade and in institutions for the same purpose, which was in all essential particulars similar to the machine covered by the patent in suit, save as to size and the fact that it was operated by motive power, not by hand. *Held:* That there is a presumption of validity of a patent in favour of the owner, and the burden of proof that the same is invalid is upon the party attacking such patent whether by an action by way of impeachment or by defence to an action for infringement. 2. That the mere fact of reducing the size of a piece of machinery used industrially, for use in the home and operating it by hand instead of by steam or other motive power, does not constitute invention. 3. That commercial success may tend to show utility but this alone does not constitute invention or justify the granting of a patent. 4. That in a combination patent, for an inventor to adopt all the elements of any particular machine in the

**PATENT—Continued**

public domain, save one element, and replace this one by something not in the machine copied, but also known and in public use, does not constitute invention. 5. That public use required to constitute anticipation need not be a use or exercise by the public, but a use or exercise in a public manner. **GEORGES ALBERT LANGLOIS ET AL. V. DONAT ROY..... 197**

4.—*Infringement—Invention—Subject-matter—"Obvious"—Anticipation—Divisional applications—Process patent—Patent Act, 25-26 Geo. V, c. 32, s. 40 (1)—"Substance" prepared or produced by a "chemical process"—"Intended for food"—Claims for product manufactured and for process of manufacturing such product.*—The actions are for alleged infringement of four different patents owned by the plaintiff, the invention in which relates to a substance of vegetable origin, derived from the soy-bean, for bleaching flour, particularly in bakeries, while mixing dough preparatory to the making of bakery products. The Court found that there is invention in the bleaching agent disclosed by the patentee, and the process or processes of producing the same, and that the same had not been anticipated. The Court further found that the defendant Continental Soya Company Limited had infringed plaintiff's patents by manufacturing and selling a bleaching agent called Snowtex and that Geo. Weston Bread and Cakes Limited had infringed by using the substance Snowtex in its bakeries. *Held:* That for a thing to be "obvious" it must be something that would directly occur to some one who was searching for something novel, a new manufacture or whatever it might be, without the necessity of his having to do any experimenting or research, whether the research be in the laboratory or amongst literature. 2. That in order to sustain the defence of anticipation the latter invention must be described in the earlier publication that is held to anticipate it; it must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own. 3. That if patents are granted on divisional applications directed by the Patent Office none of them shall be deemed invalid, or open to attack, by reason only of their numbers. 4. That the bleaching material prepared by the processes described in the plaintiff's patents was not prepared or produced by a chemical process, within the meaning and intendment of s. 40 (1) of the Patent Act; that such bleaching material is not a "substance" to which s. 40 (1) of the Patent Act applies. 5. That the patentee herein is entitled to claim not only for the product which is a new manufacture, but also for the processes by which it is

**PATENT—Continued**

made. *J. R. SHORT MILLING COMPANY (CANADA) LIMITED v. GEORGE WESTON BREAD AND CAKES LIMITED*. . . . . 69

*J. R. SHORT MILLING COMPANY (CANADA) LIMITED v. CONTINENTAL SOYA COMPANY LIMITED ET AL.* . . . . . 69

5.—*Infringement—Invention claimed for new improvements in egg boxes and cartons and machines for assembling the same—Subject-matter—Lack of novelty—Anticipation—Prior art—New use of known device.*—The action is one for infringement of three Letters Patent numbered 200,100, 282,212, and 282,214. The invention claimed in the first two patents relates to improvements in boxes and cartons for eggs and like commodities. The invention claimed in Patent No. 282,214 relates to alleged improvements in machines for assembling cartons. The Court found that the alleged inventions relating to the boxes and cartons were not new but were old in the art and that a prior patent included the essential features found in plaintiff's machine in that it applied to wooden crates or racks while the plaintiffs' patent related to cardboard boxes or cartons, the difference of material not being important. *Held*: That in order that a new use of a known device may constitute the subject-matter of an invention, it is necessary that the new use be quite distinct from the old one and involve practical difficulties which the patentee has by inventive ingenuity succeeded in overcoming. 2. That where a new use of a known device does not require any ingenuity but is in manner and purpose analogous to the old use, although not exactly the same, there is no invention. *SOMERVILLE PAPER BOXES LIMITED, ET AL. v. ARTHUR CORMIER, carrying on business under the name of A. CORMIER & Co., and the said A. CORMIER & Co.* . . . . . 49

6.—*Action for infringement—Subject-matter—Invention—Anticipation—Admissibility of parol evidence in construing prior publications—Patent Act, 25-26 Geo. V, c. 32—Combines Investigation Act, R.S.C., 1927, c. 36—Alleged combination in restraint of trade as defence to action for infringement—Patents held valid and to have been infringed.*—The action is one for the infringement of two patents acquired by the plaintiff Thermionics Limited, by way of assignment from the patentees. The other plaintiffs are licensees under the patents so assigned. The Langmuir patent relates to an "Electron Discharge Apparatus" and the invention claimed is the combination of a highly evacuated tube, three electrodes, namely, a cathode, an anode, and a grid which is claimed to comprise certain novel features, and a method or means for connecting and supporting the electrodes in predetermined relationships. The Freeman patent

**PATENT—Continued**

had for its principal object the provision for radio service of a tube which may be used in the ordinary receiving and amplifying circuits with alternating current on the filament, thereby eliminating the major alternating current hums or noises and obviating the necessity of storage batteries or of dry cells for supplying the filament current. Other objects of Freeman were the provision of a vacuum tube structure wherein a high voltage amplification factor might be obtained while simultaneously securing a comparatively low plate impedance, and the provision of a vacuum tube device adaptable for quantity production methods of manufacture and which would embody parts capable of manufacture in existing automatic machinery with minimum expenditures of time and of money. The Court found that there was fit subject-matter for a valid patent in Langmuir, especially in the inclusion of a fine wire grid, wound upon and supported by a frame-work or bars, in the combination of elements described by him and that any structural distinctions between the device of Langmuir and that of defendants were not of substance or of a character to avoid infringement. The Court also found that Freeman contained subject-matter and was a patentable combination since it was a novel and useful one and no one had ever combined the same elements together in order to accomplish the results described by Freeman in his Specification, he being the first to disclose a device which could use alternating current and at the same time eliminate the major alternating current hums or noises. The Court also found that the defence of anticipation of Freeman failed and that defendants' device was only a slight departure in form from that of Freeman and infringement could not be avoided since in principle they were practically the same. *Held*: That though every invention capable of supporting a patent must be a new manufacture, it does not follow that every novelty, though an important and useful one, is good subject-matter, and a new combination which is obvious and consists merely in putting together known things, each being applied to do that which it had been used to do before, without making any other experiments or gaining other information, is not proper subject-matter, neither is the mere duplicating of a known thing, though the result is eminently useful. 2. That the art of combining two or three 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 were necessary to make the combination. 3. That in order to es-



**PATENT—Continued**

establish that a patent has been anticipated, any information as to the alleged invention given by any prior publication must, for the purpose of practical utility, be equal to that given by the subsequent patent; the latter invention must be described in the earlier publication that is held to anticipate it, in order to maintain the defence of anticipation, and where the question is solely one of prior publication it is not enough to prove that an apparatus described in an earlier specification could have been used to produce a certain result; it must be shown that the Specifications contain clear and unmistakable directions so to use it; it must be shown that the public have been so presented with the invention that it is out of the power of any subsequent person to claim the invention as his own. 4. That a mosaic of facts derived from prior publications, or a symposium of facts known to physicists, does not constitute anticipation. 5. That the question of anticipation by prior publication is one of construction and that parol evidence is only admissible for the purpose of explaining words or symbols of art and other similar technical matters and of informing the Court of relevant surrounding circumstances. 6. That evidence of prior user in support of a plea of anticipation, depending upon the recollection of witnesses over a number of years, and implying fine distinctions or close diversities between two things, should be considered with great caution and should be disregarded unless established beyond a reasonable doubt, before it is accepted to defeat a patent under which a patented article is made, and particularly where it has gone into substantial use by the public. *William H. Cords et al. v. Steelcraft Piston Ring Co. of Canada et al.* (1935) Ex. C.R. 38. 7. That the Patent Act, 25-26 Geo. V, c. 32 and amending Acts protect the particular exclusive rights attaching to patents and exempt them from the operation of those provisions of the Combines Investigation Act and the Criminal Code which are designed to restrain and punish anything in the nature of a combine or conspiracy in restraint of trade and commerce, and which might be against the public interest. 8. That if different patentees should combine in such a way as to offend against the intent and spirit of the relevant provisions of the Combines Investigation Act, or the Criminal Code, the procedure of attack would be that set forth in such statutes, and not by way of a defence in an action for infringement of a patent or patents. **THERMIONICS LIMITED, ET AL. V. PHILCO PRODUCTS LIMITED, ET AL.** ..... 209

7.—*Practice—Exchequer Court Rule 22A—Changing date of invention.*]—*Held:* That a party wishing to rely on a date

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anterior to the date determined by the records of the Patent Office is limited to the date on which the invention was actually made. 2. That a party having set forth a date under Rule 22A and wishing to change it must proceed by notice of motion duly supported by affidavit. **DANIEL WANDSCHEER, ET AL. V. SICARD LIMITED.** ..... 174

**PATENTS HELD VALID AND TO HAVE BEEN INFRINGED.**

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**PETITION OF RIGHT.**

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**PETITION OF RIGHT ACT, R.S.C., 1927, C. 142.**

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**PRIOR USER.**

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**PROCEDURE.**

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**"PUBLIC USE."**

See PATENTS, No. 4.

**QUEBEC WORKMEN'S COMPENSATION ACT, 21 GEO. V, C. 100, SECS. 3, 9, 9a & 34; SCHEDULE 2, SEC. 7.**

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**RECOVERY FROM THE CROWN OF MONEY PAID TO A THIRD PERSON PURSUANT TO AWARD OF QUEBEC WORKMEN'S COMPENSATION COMMISSION.**

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2. APPEAL FROM THE DECISION OF THE MINISTER OF NATIONAL REVENUE DISMISSED, Nos. 2 and 5.
3. CHARITABLE INSTITUTION, No. 5.
4. CHARITABLE TRUST, No. 5.
5. DEDUCTIONS, Nos. 2 and 4.
6. DEDUCTION OF LOSS OF SUBSIDIARY PERSONAL COMPANY NOT ALLOWED TO TAXPAYER WHO OWNS STOCK IN PRINCIPAL PERSONAL COMPANY, No. 4.
7. "DISBURSEMENTS OR EXPENSES NOT WHOLLY, EXCLUSIVELY AND NECESSARILY LAID OUT OR EXPENDED FOR THE PURPOSE OF EARNING THE INCOME," No. 2.
8. DISTRIBUTION OF PROPERTY OF VENDOR COMPANY TO ITS SHAREHOLDERS HELD TO BE WITHIN THE TERMS OF S. 19 (1) OF THE INCOME WAR TAX ACT, No. 1.
9. "DISTRIBUTION OF THE PROPERTY . . . DEEMED TO BE THE PAYMENT OF A DIVIDEND TO THE EXTENT THAT THE COMPANY HAS ON HAND UNDISTRIBUTED INCOME," No. 1.
10. 1 EDW. VIII, C. 38, S. 22, No. 1.
11. EXCISE TAX, No. 3.
12. EXPENSES INCURRED IN REFUNDING OUTSTANDING BOND ISSUE AND REPLACING SAME BY A NEW BOND ISSUE CARRYING LOWER RATE OF INTEREST, No. 2.
13. "FAIR PRICE," AS DETERMINED BY THE MINISTER OF NATIONAL REVENUE NOT CONCLUSIVE AGAINST TAXPAYER, No. 3.
14. INCOME, Nos. 1, 2 and 5.
15. INCOME ACCUMULATING IN TRUST FOR THE BENEFIT OF UNASCERTAINED PERSONS, No. 5.
16. INCOME TAX, No. 4.
17. INCOME WAR TAX ACT, R.S.C., 1927, C. 97, Nos. 1, 2, 4 and 5.
18. MANUFACTURING COMPANY SELLING TO INDEPENDENT TRADING COMPANY FOR DISTRIBUTION TO DEALERS, No. 3.
19. METHOD OF DETERMINING "FAIR PRICE," No. 3.
20. OUTLAY ON ACCOUNT OF CAPITAL, No. 2.
21. "PERSON," No. 5.
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24. S. 22 OF 1 EDW. VIII, C. 38, CONSTRUED NOT TO INCLUDE UNDISTRIBUTED INCOME EARNED PRIOR TO 1935, No. 1.
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27. TAXPAYER SUED FOR TAXES AS A DEBT IS NOT PRECLUDED FROM RAISING ANY DEFENCE TO ACTION, No. 3.
28. "WINDING UP, DISCONTINUANCE OR REORGANIZATION OF THE BUSINESS OF ANY INCORPORATED COMPANY," No. 1.

**REVENUE—Income—Income War Tax Act, R.S.C., 1927, c. 97, s. 19 (1)—1 Edw. VIII, c. 38, s. 22—***Winding up, discontinuance or reorganization of the business of any incorporated company*—*"Distribution of the property . . . deemed to be the payment of a dividend to the extent that the company has on hand undistributed income"*—*Sale of business and assets by one corporation to another*—*Distribution of property of vendor company to its shareholders held to be within the terms of s. 19 (1) of the Income War Tax Act—S. 22 of 1 Edw. VIII, c. 38, construed not to include undistributed income earned prior to 1935.*—S. 19 (1) of the Income War Tax Act, R.S.C., 1927, c. 97, amended by 1 Edw. VIII, c. 38, s. 11, reads as follows: "On the winding up, discontinuance or reorganization of the business of any incorporated company, the distribution in any form of the property of the company shall be deemed to be the payment of a dividend to the extent that the company has on hand undistributed income." By 1 Edw. VIII, c. 38, s. 22, it was also enacted that: "Sections . . . eleven (now 19 (1) of the Income War Tax Act) . . . shall be applicable to the income of the year 1935 and fiscal periods ending therein and of all subsequent periods." Appellant, prior to March, 1937, owned 259 shares of the capital stock of the Security Loan and Savings Company. That company in March, 1927, agreed to sell and transfer to the Premier Trust Company all its assets and undertakings as a going concern, including the good will of its business and any reserves or undistributed profits to which it was entitled in connection with its business. The Premier Trust Company had the right to represent itself as carrying on in succession to the Security Loan and Savings Company such parts of its business as the Premier Trust Company was legally capable of carrying on and also to advertise that the Security Loan and Savings Company was amalgamated with it. The Premier Trust Company agreed to allot

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and issue to each shareholder of the Security Loan and Savings Company one and one-half fully paid shares of its capital stock for each fully paid share held by such shareholder, or, at the option of such shareholder, to pay \$102 in cash and to allot and issue one-half share of its capital stock for each fully paid share held by such shareholder, provision being made for the adjustment of fractions of shares by payment in cash; to pay in cash at the rate of 5 per cent per annum on each fully paid share held by shareholders of the Security Loan and Savings Company as accrued dividend from December 31, 1936, to the date of issuance of the shares of the Premier Trust Company; to pay the principal and interest on all debentures issued by the Security Loan and Savings Company and outstanding; to assume the payment of all other debts, liabilities and obligations of the Security Loan and Savings Company, and the adoption, performance and fulfilment of all contracts and engagements binding upon that company at the date when the agreement became effective. The Security Loan and Savings Company was taken over as at January 1, 1937, by the Premier Trust Company. Appellant exercised the option of accepting the sum of \$102 cash and one-half share of the Premier Trust Company for each fully paid share held by her in the capital stock of the Security Loan and Savings Company, and on October 5, 1937, her trustees received the sum of \$26,690.75 from the Premier Trust Company and also a certificate for 130 fully paid shares of the Premier Trust Company registered in the name of the trustees for the appellant. In May, 1939, the Commissioner of Income Tax assessed appellant for income tax purposes upon income in the sum of \$10,192.60 as the appellant's portion of the undistributed income which the Security Loan and Savings Company had on hand when its property was distributed on the discontinuance of its business. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court. At the hearing of the appeal it was admitted by counsel that at the material time the Security Loan and Savings Company had on hand undistributed income which had accumulated over a period of years and had not been appropriated for any purpose permitted by the Act or according to sound business or accounting practice. Held: That there was a discontinuance of business on the part of the Security Loan and Savings Company in a real and commercial sense and it is immaterial whether that was brought about by a sale to or amalgamation with the Premier Trust Company. 2. That there was a distribution of the property of the Security Loan and Savings Company among its share-

**REVENUE—Continued**

holders within the meaning of s. 19 (1) of the Income War Tax Act, and it is immaterial that appellant received the consideration for the sale of her shares directly from the Premier Trust Company. 3. That s. 19 (1) of the Income War Tax Act and s. 22 of 1 Edw. VIII, c. 38, are to be construed as meaning that the "undistributed income" mentioned in s. 19 (1) and taxable as a dividend is limited to that portion of the income of the year 1935 and subsequent periods that was undistributed and not intended to include income earlier earned but undistributed and on hand. *EMILY L. MERRITT v. MINISTER OF NATIONAL REVENUE*.... 175

2.—*Income — Deductions — Outlay on account of capital—Expenses incurred in refunding outstanding bond issue and replacing same by a new bond issue carrying lower rate of interest—Income War Tax Act, R.S.C., 1927, c. 97, Sects. 3, 5 and 6 (a) and (b)—“Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income”—Appeal from decision of Minister of National Revenue dismissed.*—Appellant, in 1936, redeemed a portion of an outstanding bond issue and replaced the same by a new issue of bonds bearing a lower interest charge. Appellant incurred certain expenses in connection with this operation, namely (1) Premium paid upon retirement of the issue of old bonds; (2) Exchange premium paid in connection therewith; (3) Discount on the issue of new bonds; (4) Expenses in connection with the retirement of the issue of old bonds; (5) Interest paid by appellant on funds necessary for the redemption of old bonds from the date of notice of redemption to actual date of redemption. Appellant proposed to amortize these disbursements over the term of the new bonds and claimed a deduction for income tax purposes of the amount required each year for such amortization. This deduction was disallowed by the Commissioner of Income Tax whose decision was affirmed by the Minister of National Revenue and an appeal was taken to this Court. *Held*: That the disbursements or expenses incurred by appellant were not "wholly, exclusively and necessarily laid out or expended for the purpose of earning the income" of appellant. 2. That s. 5 of the Income War Tax Act is not exhaustive of all permissible exemptions and deductions for income tax purposes. 3. That all the expenses incurred by appellant are of a capital nature and constitute an outlay made on account of capital, they not having been incurred for earning the trading net revenue of appellant. 4. That expenses incurred in redeeming, refunding or reducing borrowed capital constitute an outlay or payment on account of capital

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and fall within the prohibition of s. 6 (b) of the Act in computing the amount of profits or gains to be assessed. MONTREAL LIGHT, HEAT & POWER CONSOLIDATED v. MINISTER OF NATIONAL REVENUE.... 21

3.—*Sales Tax—Excise Tax—Special War Revenue Act, R.S.C., 1927, Secs. 80 (1), 85 (a), 86, 98, 106 & 108—Manufacturing company selling to independent trading company for distribution to dealers—“Fair Price” as determined by the Minister of National Revenue not conclusive against taxpayer—Taxpayer sued for taxes as a debt is not precluded from raising any defence to action—Method of determining “Fair Price.”*—The Special War Revenue Act, R.S.C., 1927, c. 179, s. 86, imposes a sales tax on “the sale price of 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.” S. 85 (a) of the Act defines “Sale Price” as: “(a) ‘Sale Price’ for the purpose of calculating 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 any charges for advertising, financing, servicing, warranty or any other charges of a similar nature contracted for at the time of sale whether these items be charged for separately or not and shall also 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; and in the case of imported goods, the sale price shall be deemed to be the duty paid value thereof;” S. 80 (1) of the Act provides: “1. Whenever goods mentioned in Schedules I and II of this Act are imported into Canada or taken out of warehouse, or manufactured or produced in Canada and delivered to a purchaser thereof, there shall be imposed, levied and collected, in addition to any other duty or tax that may be payable under this Act or any other statute or law, an excise tax in respect of goods mentioned. (a) In Schedule I, at the rate set opposite to each item in the said Schedule computed on the duty paid value or the sale price, as the case may be; (b) In Schedule II, at the rate opposite to each item in the said schedule.” Sec. 98 of the Act provides: “Where goods subject to tax under this Part or under Part XI of this Act are sold at a price which in the judgment of the Minister is less than the fair price on which the tax should be imposed, the Minister shall have the power to determine the fair price and the taxpayer shall pay the tax on the price so determined.” Defendant, a United States corporation, has carried on in Canada, since 1932, the business of manufacturing and

**REVENUE—Continued**

selling toilet articles and medicated preparations. In 1938 it entered into an agreement with Better Proprietaries Limited, a company incorporated under the laws of Ontario for the purpose, *inter alia*, of dealing in proprietary and patent medicines, pharmaceutical and toilet preparations and other articles generally dealt in by drug stores, whereby Better Proprietaries Limited became the sole distributor in Canada of the products of defendant company. One, Shaw, was manager of defendant's Canadian business and also of Better Proprietaries Limited. The agreement became effective on January 1, 1939. Better Proprietaries Limited paid to defendant for its products the prices stipulated in a certain schedule and sold these products at the prices formerly charged by defendant to its dealers, which prices were approximately 12½ per cent greater than the prices paid by Better Proprietaries Limited to defendant. This difference consisted of a certain cash discount, and charges for freight and selling cost, all of which were defrayed by Better Proprietaries Limited. Defendant paid the sales tax and excise tax calculated on the prices at which it sold its products to Better Proprietaries Limited. The Minister of National Revenue ruled that these prices were not the fair prices for the sale of such products and he determined the fair prices to be those which Better Proprietaries Limited charged its dealers. The Crown now seeks to recover from defendant sales tax under s. 86 of the Special War Revenue Act, R.S.C., 1927, c. 179, and excise tax under s. 80 of the Act imposed on such fair prices as determined by the Minister for the period commencing January 1, 1939, and ending July 31, 1939. The Court found that the business arrangement entered into between the two companies and the association of Shaw with each of them, was conceived, entered into and at the material time was being carried out in good faith for what seemed to the parties concerned as fair and sound business reasons, and that it was in no way designed to avoid the taxes in question, or to defeat the public revenue. *Held*: That the determination of the sale price by the Minister under s. 98 of the Act is not conclusive against the taxpayer, nor is the taxpayer, when sued for the taxes so determined as a debt, precluded from contesting the validity of such tax levy or raising any defence thereto. 2. That s. 98 of the Act contemplates the case where the producer has sold his goods to a dealer below the normal market prices, below the average of the prices of other manufacturers of the same class of goods, and does not empower the Minister to fix the sale price of defendant corporation so as to include items of cost and expense which it has not incurred and which could not

**REVENUE—Continued**

enter into the computation of its production or its sale prices. 3. That the Minister was not empowered to determine that the sale prices of defendant corporation should be those of the independent trading corporation, Better Proprietaries Limited, and that defendant is not liable to pay taxes on the sale price determined by the Minister. **HIS MAJESTY THE KING**, on the Information of the Attorney-General of Canada *v.* **NOXZEMA CHEMICAL COMPANY OF CANADA LIMITED**..... 155

4.—*Income Tax—Income War Tax Act, R.S.C., 1927, c. 97, Secs. 2 (1), 21 & 35 (3) — Deductions — Principal and subsidiary personal corporations—Deduction of loss of subsidiary personal company not allowed to taxpayer who owns stock in principal personal company—Appeal dismissed.*—Appellant owned 50 per cent of the issued capital stock of Interprovincial Trading Corporation Limited. That company owned all the stock, except qualifying shares, of North American Financial Corporation, Limited, and Intercolonial Trading Corporation Limited. All these corporations are personal corporations within the meaning of s. 2, ss. (i) of the Income War Tax Act, R.S.C., 1927, c. 97, and have substantially the same powers. Appellant in her income tax return for the year 1936 disclosed the sum of \$37,997.69 as income from these three corporations, arrived at by adding to the net profit of the Interprovincial Company the net profit of the North American Company and deducting therefrom the net loss of the Intercolonial Company and dividing the result into two equal amounts. The Commissioner of Income Tax refused to allow as a deduction the loss sustained by the Intercolonial Company and assessed the appellant for further taxable income in an amount equal to 50 per cent of that loss. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court. *Held:* That appellant is properly assessed for income tax purposes and the appeal must be dismissed. 2. That under the Income War Tax Act all corporations are taxable as persons for the income tax upon their annual net profit or gain and personal corporations are not an exception to this rule, even though the tax be assessable against the shareholders upon the income of such corporations and not against the corporations themselves. 3. That Interprovincial Trading Company Limited never having elected to put itself within the terms of s. 35 (3) of the Act, and not having filed a consolidated return thereunder, the appellant cannot avail herself of the terms of s. 35 (3) of the Act; *quære* whether the word "company" in s. 35 (3) of the Act includes, or was intended to include, a "personal corporation" as contemplated

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by s. 2 (i) and s. 21 of the Act. **MURIEL S. RICHARDSON v. MINISTER OF NATIONAL REVENUE** ..... 136

5.—*Income—Income War Tax Act, R.S.C., 1927, c. 97, Secs. 2 (h), 4 (e), 11 (2)—Income accumulating in trust for the benefit of unascertained persons—Charitable institutions—Charitable trust—"Person"—Appeal from the decision of the Minister of National Revenue dismissed.*—James Cosman, resident in Nova Scotia, Canada, by his will provided that the executors thereof should pay over the residue of his estate to three trustees to be appointed by the Roman Catholic Archbishop of Halifax, N.S., to be held by them in trust and invested in certain securities. The income from these investments was to be applied to the payment of certain perpetual annuities and certain terminable annuities to definitely specified persons and institutions. Upon the termination of the personal annuities the accumulated funds of the estate were to be divided into two equal parts, one of which was to be paid over to trustees in Ireland. The other part was to be retained in Nova Scotia to be kept invested by the Nova Scotia trustees and one-half the income therefrom to be used "for the benefit of the poor and needy in Nova Scotia, at such times and in such manner as the said Nova Scotia trustees may deem best." The remaining half of the income was to be invested and allowed to accumulate for the term of one hundred years, or longer if necessary, to provide an amount sufficient "to establish hospitals or homes in Nova Scotia for the needy where they may end their days in comfort." The money paid over to the trustees in Ireland was to be used for similar purposes. The Nova Scotia trustees were appointed as directed by the will and have acted in accordance with the terms of the trust imposed upon them. The personal annuities have not terminated and the total accumulated fund is in the hands of the Nova Scotia trustees. The income from the fund has been at all times greater than the amount required for the payment of the annuities and the surplus has been retained and invested by the Nova Scotia trustees. The trustees were assessed for income tax in respect of the income of the invested fund retained and accumulated for the year 1931. This assessment was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court. *Held:* That the income is being accumulated in trust for the benefit of unascertained persons, and that it is not the income of any charitable institution within the meaning of the Income War Tax Act. 2. That the trusts declared by the will of the testator are not for the benefit of any persons who exist or

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may exist as individuals in the regard or intention of the testator. 3. That the ultimate application of the income or how and by whom it shall later be applied or used is not presently of any consequence or relevant to the issue now before the Court. 4. That the Nova Scotia trustees do not constitute a charitable institution within the meaning of the Act. 5. That although a time was fixed for the division of the funds accumulated, namely, upon the termination of the personal annuities, the income is accumulating in the interval in trust for the benefit of unascertained persons. **THE TRUSTEES OF THE ESTATE OF JAMES COSMAN, DECEASED v. MINISTER OF NATIONAL REVENUE... 33**

**RIGHT TO RECOVER AMOUNT PAID EXPERTS.**

See EXPROPRIATION, No. 1.

**RULES 19, 22 & 25.**

See SHIPPING, No. 3.

**S 22 OF 1 EDW. VIII, C. 38, CONSTRUED NOT TO INCLUDE UN-DISTRIBUTED INCOME EARNED PRIOR TO 1935.**

See REVENUE, No. 1.

**SALE OF BUSINESS AND ASSETS BY ONE CORPORATION TO ANOTHER.**

See REVENUE, No. 1.

**SALES TAX.**

See REVENUE, No. 3.

**SHIPPING.**

1. ACTION FOR WAGES AS MASTER, No. 1.
2. BOTH SHIPS EQUALLY TO BLAME FOR COLLISION, No. 3.
3. COLLISION, No. 3.
4. DAMAGES ASSESSED EQUALLY ON BOTH SHIPS, No. 3.
5. EXTENT OF OBLIGATION OF NATIONAL HARBOURS BOARD IN ASSURING SAFETY OF HARBOURS UNDER ITS JURISDICTION, No. 2.
6. JUDGMENT OF DISTRICT JUDGE IN ADMIRALTY VARIED, No. 3.
7. LOSS OF MARITIME LIEN THROUGH FAILURE TO PROSECUTE CLAIM DILIGENTLY, No. 1.
8. PLAINTIFF A PARTNER AND TEMPORARY OWNER IN OPERATION OF DEFENDANT VESSEL, No. 1.
9. PLAINTIFF'S CLAIM BARRED BY LACHES, No. 1.
10. RULES 19, 22 & 25, No. 3.
11. VESSEL DAMAGED BY STRIKING OBSTRUCTION IN HARBOUR, No. 2.

**SHIPPING—Action for wages as master—Plaintiff a partner and temporary owner in operation of defendant vessel—Plaintiff's claim barred by laches—Loss of maritime lien through failure to prosecute claim diligently.]—The plaintiff seeks to enforce a claim for wages as master of defendant vessel. The Court found that the plaintiff was really in partnership with another in operating the vessel and therefore a temporary owner, and further that his claim was barred by laches. *Held*: That a maritime lien may be lost by negligence or delay where the rights of third parties may be compromised. 2. That what contributes reasonable diligence depends upon the facts of each case and does not mean doing everything possible, but doing that which under ordinary circumstances and having regard to expense and difficulty, could be reasonably required. **ALEXANDER C. FRASER v. SCHOONER Jean & Joyce, Her Tackle and Apparel. .... 43****

2.—*Vessel damaged by striking obstruction in harbour—Extent of obligation of National Harbours Board in assuring safety of harbours under its jurisdiction.]—Plaintiff's vessel, while clearing from the port of Montreal, P.Q., struck a submerged obstruction on the bed of the channel in Montreal harbour and was damaged. The Court found that the Harbour Commissioners had no knowledge of the existence of any danger to navigation in the channel nor could they foresee the existence of any such danger. *Held*: That the National Harbours Board does not warrant that a harbour, under its jurisdiction is safe for ships invited to use it. 2. That the National Harbours Board must use reasonable care to ensure that the harbours under its control are reasonably safe for vessels invited to use them. **THE OWNERS OF THE STEAMSHIP Panagiotis Th. Coumantaros (COUMANTAROS BROS. OF PIRAEUS, GREECE) v. NATIONAL HARBOURS BOARD ..... 188***

3.—*Collision—Rules 19, 22 & 25—Both ships equally to blame for collision—Damages assessed equally on both ships—Judgment of District Judge in Admiralty varied.]—The ship *New York News*, owned by the Quebec and Ontario Transportation Company Limited, and the ship *Fort Willdoc*, owned by Paterson Steamships Limited, collided during a dense fog in Lake Superior while proceeding in opposite directions on or about the courses usually followed by ships in Lake Superior bound from Port Arthur or Fort William down the Great Lakes or vice versa. The District Judge in Admiralty for the Quebec Admiralty District allowed an action brought by the Paterson Steamships Limited against the ship *New York News* for damages suffered by the *Fort Willdoc**

**SHIPPING—Concluded**

as a result of the collision and dismissed the counter-claim of the owner of the *New York News* against Paterson Steamships Limited for damages suffered by the *New York News* in the same collision. On appeal the Court found that both ships were to blame for the collision and the resulting damage, and directed that the judgment at trial be varied by apportioning the blame and damages equally between the two ships. *Held*: That both ships were in error in proceeding at full speed contrary to Rule 19 which requires that every ship shall, in thick weather, by reason of fog or other causes, go at a moderate speed, observance of which rule is required whether the fog signals of approaching ships are heard or not.

2. That both ships violated Rule 19 in not immediately reducing speed to bare steerage way on hearing the fog signal of another vessel less than four points from right ahead, and navigating with caution until they had passed each other.

3. That a delay of over half a minute before giving a signal is not a prompt answer within the meaning of Rule 25.

4. That both ships in the circumstances here erred in not blowing a danger signal promptly as required by Rule 22. *QUEBEC & ONTARIO TRANSPORTATION COMPANY LIMITED (Counter-Claimant) v. PATERSON STEAMSHIPS LIMITED (Counter-Defendant)*. . . . . 145

**SPECIAL WAR REVENUE ACT, 1927, C. 179, SECS. 80 (1), 85 (a), 86, 98, 106 & 108.**

See REVENUE, No. 3.

**SUBJECT-MATTER.**

See PATENTS, Nos. 2, 5 and 6.

**SUBROGATION.**

See CROWN, No. 1.

**"SUBSTANCE" PREPARED OR PRODUCED BY A "CHEMICAL PROCESS."**

See PATENTS, No. 5.

**TAXATION.**

See EXPROPRIATION, No. 1.

**TAXPAYER SUED FOR TAXES AS A DEBT IS NOT PRECLUDED FROM RAISING ANY DEFENCE TO ACTION.**

See REVENUE, No. 3.

**VESSEL DAMAGED BY STRIKING OBSTRUCTION IN HARBOUR.**

See SHIPPING, No. 2.

**"WINDING UP, DISCONTINUANCE OR REORGANIZATION OF THE BUSINESS OF ANY INCORPORATED COMPANY."**

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**WORDS AND PHRASES.**

"*Chemical process.*" See *J. R. SHORT MILLING COMPANY (CANADA) LIMITED v. CONTINENTAL SOYA COMPANY LIMITED, ET AL.* . . . . . 69

"*Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income.*" See *MONTREAL LIGHT, HEAT & POWER CONSOLIDATED v. THE MINISTER OF NATIONAL REVENUE* . . . . . 21

"*Distribution of the property . . . . . deemed to be the payment of a dividend to the extent that the company has on hand undistributed income.*" See *EMILY L. MERRITT v. THE MINISTER OF NATIONAL REVENUE* . . . . . 175

"*Fair price.*" See *THE KING v. NOXZEMA CHEMICAL COMPANY OF CANADA LIMITED* . . . . . 155

"*Intended for food.*" See *J. R. SHORT MILLING COMPANY (CANADA) LIMITED v. CONTINENTAL SOYA COMPANY LIMITED, ET AL.* . . . . . 69

"*Obvious.*" See *do.*

"*Person.*" See *THE TRUSTEES OF THE ESTATE OF JAMES COSMAN, DECEASED v. THE MINISTER OF NATIONAL REVENUE*. . . . . 33

"*Public use.*" See *GEORGES ALBERT LANGLOIS ET AL. v. DONAT ROY*. . . . . 197

"*Substance.*" See *J. R. SHORT MILLING COMPANY (CANADA) LIMITED v. CONTINENTAL SOYA COMPANY LIMITED, ET AL.* . . . . . 69

"*Winding up, discontinuance or reorganization of the business of any incorporated company.*" See *EMILY L. MERRITT v. THE MINISTER OF NATIONAL REVENUE*. 175