1942

# CANADA LAW REPORTS

## Exchequer Court of Canada


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



*Published under authority by Arnold W. Duclos, K.C.*
*Registrar of the Court*

OTTAWA
EDMOND CLOUTIER
PRINTER TO THE KING'S MOST EXCELLENT MAJESTY
1942

# JUDGES

OF THE

# EXCHEQUER COURT OF CANADA

*During the period of these Reports:*

PRESIDENT:

THE HONOURABLE ALEXANDER K. MACLEAN

*(Died, July 31, 1942)*

THE HONOURABLE JOSEPH T. THORSON

*(Appointed, October 6, 1942)*

PUISNE JUDGE:

THE HONOURABLE EUGENE REAL ANGERS

*(Appointed, February 1, 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, July 20, 1935.

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

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

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

do FRED. H. BARLOW, Ontario Admiralty District—appointed, October 18, 1938.

do SIDNEY ALEXANDER SMITH, British Columbia Admiralty District—appointed, January 2, 1942.

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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ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Honourable LOUIS S. ST. LAURENT, K.C.

The Honourable Alexander Kenneth Maclean, President of the Exchequer Court of Canada, died during the current year.

## *CORRIGENDUM*

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# CASES

DETERMINED BY THE

# EXCHEQUER COURT OF CANADA

## AT FIRST INSTANCE

AND

## IN THE EXERCISE OF ITS APPELLATE JURISDICTION

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BETWEEN:

UNDERWRITERS' SURVEY BUREAU LIMITED, ET AL (PLAINTIFFS)........ } APPELLANTS; 1941

June 23.

AND

Sept. 8.

MASSIE & RENWICK LIMITED (DEFENDANT) ........................... } RESPONDENT.

*Copyright—Infringement and conversion of infringing copies—Inquiry to assess damages—Referee's report and appeal therefrom—No actual loss or damage sustained by plaintiffs—Nominal and exemplary damages—Report varied by increasing amount of exemplary damages—Copyright Act, R.S.C., 1927 c. 32.*

In an action for infringement of copyright in fire insurance plans and rating schedules and conversion of infringing copies, it was held that infringement and conversion had been proved; (1938) Ex. C.R. 103 and (1940) S.C.R. 218. An inquiry to determine the damages suffered by the plaintiffs was ordered, the Registrar of this Court being appointed Referee.

By his report the Referee found that the plaintiffs had sustained no actual loss or damage as a result of the infringement and conversion; that the plaintiffs are entitled to recover the sum of $200 by way of damages for plans ordered by the judgment of the Court to be delivered up to plaintiffs and not so delivered, and the sum of $5,000 as nominal and exemplary damages.

On appeal by the plaintiffs to this Court, the report of the Referee was varied by fixing the amount of the exemplary damages at the sum of $10,000.

*Held:* That damages include any loss sustained by the plaintiffs due to the tortious act of the defendant and also any profit which the defendant made as a result of the infringement.

2. That the word "profit" referred to in the Copyright Act is not a synonym for benefit or convenience. This benefit or convenience cannot be estimated in terms of money.

3. That since the plans in this particular case had been copied and retained by the defendant for its own use the question of profit does not enter into the consideration of damages.

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4. That in the absence of proof of specific damage or actual loss the plaintiffs are entitled to recover damages at large, including nominal and exemplary damages.

APPEAL from the Report of the Referee appointed to ascertain the damages recoverable by the plaintiffs from the defendant under a judgment obtained by the plaintiffs against the defendant for infringement of copyright in fire insurance plans and rating schedules and conversion of infringing copies.

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

*J. A. Mann, K.C.* and *H. G. Lafleur* for appellants.

*W. N. Tilley, K.C.* and *O. M. Biggar, K.C.* for respondent.

The facts and questions of law raised are stated in the reasons for judgment of the learned President and in the Report of the Referee.

THE PRESIDENT, now (September 8, 1941) delivered the following judgment:

This is an appeal from a Report made by the Registrar under an Order of Reference made in this action to assess damages.

The action was one brought by the plaintiffs for the infringement of copyright and conversion of infringing copies, in what are known as fire insurance plans and rating schedules, which I fully described in my judgment pronounced in this action (1). The expenditures made by the plaintiffs in the production of such plans and schedules, particularly the former, involved some millions of dollars over a period of time, but it is only the insurance plans with which we are here concerned. Apparently the experience of some fire insurance companies had demonstrated the necessity of their joining together to share in the expense of producing the rate making machinery and facilities required to transact fire insurance throughout the country, including the production of plans such as are in question here, and the revision of the same from time to time; it was to this end that very substantial expenditures were made from time to time in the production and revision

(1) (1938) Ex. C.R. 103; (1938) 2 D.L.R. 31.

of the fire insurance plans here in question. It will be obvious that no single fire insurance company could afford the cost of producing and revising such plans; thus it was that a great number of companies joined together to divide the cost of producing and revising such works, which accounts for the great number of plaintiffs joined in this cause. Each plaintiff has an interest in the said plans, and each contributed to the cost of producing and revising such plans, upon a basis which I need not take time to explain.

In my judgment in this action I decided that the defendant had infringed the copyright of the plaintiffs in the insurance plans in question, which judgment was affirmed by the Supreme Court of Canada (1), and in due course a Reference was made to the Registrar to assess the damages. The Registrar found the plaintiffs entitled to damages at large, to nominal and exemplary damages, in the sum of $5,000; and he found the plaintiffs were entitled to recover the additional sum of $200 by way of damages for failure to deliver up to the plaintiffs certain plans as directed by the judgment pronounced in this action. From the assessment of damages made by the Registrar the plaintiffs asserted this appeal, but the defendant entered no appeal therefrom. While the subject of this appeal has given me considerable anxiety I think I may express the conclusion which I have reached, without the necessity of discussing in any detail the Report of the Registrar, and in comparatively short terms.

Briefly, the Registrar found, upon the evidence adduced before him, that the plaintiffs had sustained no actual loss or damage as the direct result of the infringements. I do not think that finding is open to adverse comment; and in the circumstances of the case I am not surprised that the plaintiffs were unable to establish specific damages directly attributable to the infringements. However, the Registrar concluded that the plaintiffs were entitled to recover damages at large, including exemplary and nominal damages, and in this connection he said: " I think the sum allowed in this case should be commensurate with the gravity of the tort committed, and in view of the special circumstances of this case and of the wilful and fraudulent

(1) (1940) S.C.R. 218; (1940) 1 D.L.R. 625.

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invasion of the plaintiffs' right of ownership in the plans in question, and acting as a jury, I have decided that the plaintiffs are entitled to recover from the defendant as damages at large, including exemplary and nominal damages, the sum of $5,000." Accordingly, he recommended in his Report that judgment be entered for the plaintiffs for such sum of $5,000, and for the further sum of $200, for the reason already explained, making altogether the sum of $5,200. In the case of *Exchange Telegraph Co.* v. *Gregory & Co.* (1), referred to by the Registrar in his Report, Lord Esher M.R. said: "A man who does such a wrongful act as the defendant has done lays himself open to be told by the tribunal before whom he appears, 'You have damaged the plaintiff. You have done a contemptible and fraudulent act against him, . . . and therefore you must have damaged him.' In such a case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are damages at large." The facts of that case are in close analogy with the facts of the case under discussion.

It is the amount of the damages at large, the exemplary damages, found by the Registrar which is the subject of this proceeding, and the plaintiffs now ask to vary the Report of the Referee by increasing the amount of such damages. Rule 185 of the Exchequer Court Practice provides that the Report of a Referee may be confirmed, varied or reversed by the Court. The matter which I have to decide is therefore whether or not the damages found by the Registrar are in the circumstances adequate, and, if not, by what amount they should be increased. The matter for precise decision is not one which lends itself to any lengthy discussion.

I cannot escape the conviction that in the circumstances of this case the amount of the damages determined by the Registrar are inadequate, and, with great respect, I think the amount fixed by him should be increased. The defendant committed a series of infringements and acts of conversion against the owners of very costly and valuable works in which copyright subsisted, over a period of years, with deliberation, with persistency, with premeditated secrecy in several instances at least, and, in many

(1) (1896) 1 Q.B.D. at page 153.

instances, its managers and officers expressly directed its own employees and servants to commit the tortious acts of which the plaintiffs complained. While the possession of the plans thus secured, or the copies made thereof, was not perhaps the cause of a loss of insurance business to the plaintiffs, or a gain of insurance business to the defendant, yet they were convenient, useful and valuable facilities employed in the conduct of the defendant's business over a period of years, and probably their possession would reduce the defendant's cost of doing business in various sections of the country. The trial of this cause at one stage had to be adjourned to Toronto from Ottawa, when some of the plans in question and perhaps other material were required to be produced before the Court, because the defendant urged that the same could not be produced at Ottawa without causing a great inconvenience and possible interruption or delay in the conduct of the defendant's daily business. In order that the plaintiffs should protect their copyright in the plans, and prevent and discourage their infringement not only by the defendant but by other underwriters, who paid nothing for their production, the plaintiffs felt obliged to take the appropriate action against the defendant; and this action must have cost the plaintiffs a very substantial sum of money above any taxed costs recovered. But I apprehend that any such sum or sums would not afford a basis for the assessment of damages, and that, I think, was not urged upon me. In any event, the plaintiffs must have been put to much annoyance, inconvenience and disturbance, in the conduct of their businesses during the course of the litigation, which extended over a very lengthy period. This action the defendant resisted most strenuously at every step; it never approached the plaintiffs with a suggestion of any kind of a settlement, nor did it ever intimate, so far as I know, its willingness to abandon its infringements. Moreover, the defendant charged that the plaintiffs were guilty of a conspiracy contrary to the terms of the Combines Investigation Act, and also were guilty of an indictable offence under the Criminal Code, in the restrictions placed upon the use of such plans by persons other than the plaintiffs, and in their efforts to prevent their free and uninterrupted use by the defendant and others; and fur-

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ther, the defendant appeared to express great indignation that it should be called upon to answer to this action, or that it should be compelled to cease using the plaintiffs' plans and making copies of the same. It was said that the plaintiffs delayed the assertion of their rights in the copyrights in question and that thus the defendant was encouraged to its detriment to believe that the plaintiffs would never assert any monopolistic right in the said plans. At one stage in the history of these insurance plans perhaps the defendant would be entitled to some degree of sympathy on this account, but there came a time, long before this action ever came on for trial, when the defendant must have abandoned any hope that the plaintiffs would refrain from bringing an action and pursuing it to a conclusion.

It seems to me that in all the facts and circumstances of this case that the damages at large, the exemplary damages, determined by the Registrar, are inadequate and can hardly do justice in the premises; at least that is my view of the matter considering the magnitude and character of the infringements committed, and there is nothing more I can usefully say in support of that view. The assessment of damages in a case of this kind is, of course, difficult, but it seems to me that something should be added to the amount recommended by the Registrar and I propose to increase the same by $5,000, and to that extent vary the Report of the Registrar. I therefore fix the damages at $10,200.

The plaintiffs will have the costs of the Reference and of this appeal.

*Judgment accordingly.*

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Following is the Report of Arnold W. Duclos, K.C., Registrar of the Exchequer Court of Canada, the Referee herein.

*Aimé Geoffrion, K.C., J. A. Mann, K.C.* and *H. G. Lafleur* for plaintiffs.

*W. N. Tilley, K.C., O. M. Biggar, K.C.* and *Christopher Robinson* for defendant.

This case comes before me as Referee, under an order made in the judgment of this Court, to assess the damages.

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~~Maclean J.~~

I think it would be advisable to give those parts of the judgments which may be material to the assessing of damages. By the judgment of this Court, it was ordered and adjudged that:

> (1) each of the fire insurance plans of which particulars are set out in the list hereto attached and marked "A," and (2) each of the rating schedules, rate cards, rate books and slips, and underwriting rules, of which particulars are set out in the list hereto attached and marked "B," is the subject of subsisting copyright of which the plaintiffs or some of them are the owners with other persons, firms or corporations . . . that the defendant has infringed the said copyright in such of the aforesaid works as are specified in the list hereto attached and marked "C," by authorizing their reproduction on the dates and in the quantities mentioned in the said list "C" . . . that the plaintiffs are entitled to recover from the defendant all damages sustained by them by reason of the infringements aforesaid and in respect of the conversion of any infringing copies which the defendant is unable to deliver up . . . that the question of the amount of damages sustained by the plaintiffs by reason of any and all of the said infringements and conversions be referred to the Registrar of this Court for enquiry and report.

Reference is hereby made to Schedules "A," "B" and "C" aforesaid.

Upon appeal from the said judgment to the Supreme Court of Canada, it was by the said Court, on the 19th day of January, 1940, ordered and adjudged "that the said appeal should be and the same was allowed in respect of the rating material brought into existence after the first of January, 1924, and in other respects that the said appeal should be and the same was dismissed."

At the opening of the hearing, counsel for plaintiffs asked whether the entire record, including the evidence, exhibits and other documents on the trial before the Court, formed part of the exhibits and evidence on the reference in so far as the same might be material or pertinent. I told counsel that I considered all exhibits, evidence or other material in the record before the Judge presiding at the trial should be before me in so far as useful to me in the assessment of damages.

I then asked counsel for the plaintiffs whether he intended to file the six undertakings previously left with me (now filed as Exhibit No. 2), namely, undertakings by certain insurance companies to pay, in proportion therein mentioned, their respective shares of the damages and costs which might be found due by the defendant to the plaintiffs. The remarks made by counsel will be found

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in the transcription of the proceedings before me. I can see no reason or object in filing this exhibit before me. They are nothing more than undertakings by these companies to recoup the defendant for any amount which it might be condemned to pay.

Exhibit No. 1 which was filed on my suggestion, is not exactly what I had asked for, that is, particulars of their claim, but it sets out the evidence which the plaintiffs would adduce as a basis for damages alleged to have been sustained, substantially as follows:

1. What it would have cost the companies represented by Massie & Renwick Limited, namely, Northwestern National Insurance Company, National-Ben Franklin Insurance Company, Ensign Insurance Company, Girard Fire and Marine Insurance Company, Dominion Fire Insurance Company and Firemen's Insurance Company of Newark, for the years beginning 1927, to the end of June, 1940, approximately the last date upon which the infringing copies were returned.

2. The amount which it would actually have cost the companies to procure the plans and copies for themselves, their agents and representatives, the servicing or bringing up to date of plans, independent of reissues and revisions, included in No. 1.

3. As rating cards, cabinets and rate books are included in the annual assessments, the defendant should be called upon to pay, and the plaintiff will claim the value based upon actual cost of this material, which they retain, and in addition, the cost of the rating schedules infringed, as these are not for use except by rating inspectors, and alternatively the cost of producing them, or such value as the court may place upon them.

4. The actual value of plans which have not been returned based upon what it would have cost the six companies to have purchased them outright, and an additional value resulting from their being able to keep the infringing copies, add information to, and use them *ad infinitum.*

5. Damages at large, including exemplary and punitive damages.

Item 3 having subsequently been abandoned, the plaintiff's claim now resolves itself into three items; namely:

1. They claim, as an element of the damage sustained, what it would have cost the defendant to obtain the plans in question, e.g., what they or the insurance companies they represented would have been called upon to pay during the $13\frac{1}{2}$ years referred to in the action, as members of the Association. (This covers Nos. 1 & 2 of the particulars Ex. No. 1.)

2. The costs of the plans which defendant by the judgment was ordered to deliver up to plaintiffs, and which order has not been complied with, e.g., plans not yet returned.

3. Damages at large, including exemplary and punitive damages.

The relationship between the plaintiffs, the Underwriters' Survey Bureau Limited, the Canadian Fire Underwriters' Association and its member companies, is fully explained and set out in the reasons for judgment of the President of this Court and of the Chief Justice of the Supreme Court of Canada, and will be referred to by me only in so far as may become necessary for the purpose of the reference herein.

In a sense this is an unusual, and in fact a unique case, but I see no reason why it should not be decided and the damages assessed under the general principles for the assessment of damages, the loss sustained by plaintiffs, and the profit made by defendant as direct results of the infringement.

I have been unable to find any case which is in its entirety similar to this case. A number of cases are reported where pictures, books and other works have been copied and sold, and one simply has to find the profit made, or the value, or fix a royalty. Such cases offer little trouble.

The general principles and the law as to the assessing of damages are well known, namely, that the damages must flow directly from the tortious act complained of and they must not be too remote; that is, the "pecuniary compensation for the injury (a person) has sustained by reason of the act or default of another."

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At page 82 of Halsbury, Vol. 10, 2nd Edition, it is stated that the underlying principle by which courts are guided in awarding damages is *restitutio in integrum:* "By this is meant that the law will endeavour, so far as money can do it, to place the injured person . . . in the position he occupied before the occurrence of the tort."

I quote here from a note on page 82 of the same volume:

> The whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless it is remitted to the jury, or those who stand in the place of the jury, to consider what compensation shall be given in money for what is a wrongful act.

At the same page Lord Lindley is reported as saying:

> It must be remembered that the rules as to damages can in the nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries.

In the case of *Hildesheimer* v. *W. & F. Faulkner, Limited* (1), also to be found at page 506 of Mayne on Damages under the word "Copyright." This was an action to recover penalties for sales of a million copies of pictures, and the Court of Appeal considered itself not bound to award for each offence a penalty of at least one farthing. Judgment was given for a lump sum, which, if divided by the number of offences, gave for each a fraction less than the least recognized coin of the realm.

In the case of *United Horse Nail Co.* v. *Stewart* (2), the remarks of Lord Kinnear, 3 R.P.C. 141, and Lord Watson, 5 R.P.C. 267, show that in assessing damages they were trying to find the "loss" sustained by the plaintiff, and only such loss as was the "natural and direct consequence of the respondent's (infringer's) acts."

In *Meters Ltd.* v. *Metropolitan Gas Meters Ltd.* (3), Cozens-Hardy M.R. is reported as saying that the matter before him (measure of damages in patent action) "is to be dealt with in the rough—doing the best one can, not attempting or professing to be minutely accurate" . . . And later, "dealing with the matter broadly, and as best we can as men of common sense."

*Exchange Telegraph Co. Ltd.* v. *Gregory & Co.* (4). This was a case where the matter of stock exchange prices was the subject of copyright. Lord Esher M.R. at page 153 says:

(1) (1902) Ch. D 552.
(2) (1885) 2 R.P.C. 122; 3 R.P.C. 139 and 5 R.P.C. 260.
(3) (1911) 28 R.P.C. 157 at 161.
(4) (1896) 1 Q.B.D. 147.

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Persons to whom this information, supplied from hour to hour, is valuable must, if they could not get it in any other way, buy the plaintiff's newspaper. That is some damage. To say that the damage must be such as can be measured—that you must show how much the wrongful act complained of would injure the person against whom it was done—is no answer. In such a case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are *damages at large*.

In addition to the above, I have referred to and consulted the following text books and authorities: Bowker (Amer.) Copyright 272 and 273; Weil (Amer.) Copyright Law 470, para. 1240, and page 476, para. 1266, and page 477; Copinger (Eng.) The Law of Copyright, page 158, and cases there referred to: *Brady* v. *Daly* (1); *Gross* v. *Van Dyke Gravure Co.* (2); and specially remarks of Learned Hand J. at p. 413 and of Lacombe J. at p. 414.

It appears, from the evidence of the plaintiffs and particularly from Exhibits 5 and 7, that if the defendant or rather the Insurance Companies it represented had been members of the C.F.U.A. during the 13½ years in question herein, these companies would have been assessed, as their share of the expenses of the C.F.U.A., the sum of $126,954.38 and further they would have had to pay plaintiffs or the Bureau, for copies of the plans defendant had, in the further sum of $30,945.10. Plaintiffs also claim interest on these sums from the date when each would have become payable if members. This interest claimed amounts to $44,198.34 on the first mentioned sum, and $8,509.89 on the latter sum, making a total claim of $210,607.71. Exhibits Nos. 7, 5 and 8 show the amount which each member of the Association would have saved, if the five companies above referred to had been members, and had shared in the expenses of the Association. It further appears that the defendant, as agent, could not become a member of the plaintiffs' Association but that it could get the plans and other material, if the five companies, for whom it acted as agent, became members and agreed to be bound by the Constitution and Rules of the Association; that the cost of the plans to it are multiplied by the number of companies it represented; that if only one of the companies it represented became a member of the C.F.U.A. it could not get the plans in question; that the Under-

(1) (1899) 175 U S. p. 148 at p. 154.

(2) (1916) 230 Fed Rep. 412.

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writers' Survey Bureau, which replaced the old Plans Branch of the C.F.U.A., and the C.F.U.A. are non-profit organizations: that the Bureau, though a separate legal entity, is, in effect, a servant of the Association; that the Bureau does the work of preparing and amending plans, including the required field work, the preparation of the Rates Manuals, and renders a multiplicity of other services, such as inspection of industrial plants, sprinkler systems, and so forth. The cost of all these services is paid for by all the Member Companies in the proportion of their respective premium incomes. It follows that if five more companies become members, the assessments on the others would be reduced proportionately.

The evidence also proved the cost of the plans ordered to be delivered up by the judgment and not yet received by the plaintiffs.

There is no proof of what the damage at large might comprise or the amount claimed under this head. At p. 324-5 of the trial evidence it is stated that the same agent might represent both Board and Non-Board Companies. The only evidence adduced by the defendant was to explain the errors in the number of plans ordered to be delivered up and alleged to have not yet been received. It is clear from this that the amount claimed for plans not returned was excessive, and that, in the result, there remained only a few to be returned, which the defendant claims were destroyed or could not be found. The plaintiffs could not fix a price or the cost of these plans. It was finally admitted that the plans, reproduced by defendant or by others for it, would amount to something between 25 and 50. The value of this will be dealt with later.

Before entering upon the discussion of various items of damages claimed in Exhibit No. 1, I wish to dispose of the question of profits alleged to have been made by the defendant as resulting from the infringement.

During the course of the examination of Mr. Massie, the question was put by Mr. Geoffrion, K.C., as to the profits made by the six companies represented by the defendant. An objection was taken by Mr. Tilley, K.C. that the matter was not relevant to the inquiry and, it was argued, among other things, that the judgment only referred to damages and that I was thereby prevented from making an inquiry as to the possible profits which the defendant might have made.

I cannot, I am afraid, adhere to the argument that the judgment refers only to damages and therefore restricts me accordingly. It seems to me that the word damages, used in the judgment, must be read in its broad sense, and would include damages due to loss sustained by the plaintiffs from the tortious act of the defendant, and also the profit which the defendant would have made from the infringement. I do not think that the word damages, as used in the judgment, is limitative in the sense which it is attempted to give it. The Act provides that the plaintiffs, upon proof of infringement of their copyright, may claim damages and in addition profits made by the defendants. This, of course, means profits made by the defendant as a result of the infringement. Where the plaintiffs prove clearly that the defendant's profit would have been theirs but for the infringement, these profits then become plaintiffs' loss and in that sense are an element of damage sustained by them, the plaintiffs.

Undoubtedly the fact that the defendant had these plans was a convenience to it in its business but it has not been proved, and, I doubt if proof is possible, that any profit was made by defendant due to such use, for so many considerations come into the question.

The choice of an insurance company, or its agent, is generally a matter of confidence in a particular company or its agent, or a question of friendship, or other considerations. I am perfectly satisfied that no insured chooses a particular insurance company for the reason that it had the plans in question; it is doubtful if he would know anything about it. In any event, it is useless to further elaborate, for, on the examination of Mr. Massie, after the objection and discussion above referred to, Mr. Massie declared it would be impossible for him to state what would be the profits, if any; and, moreover, I think that the word profits used and referred to in the Act is restricted to cases where, for instance, a book or other copyrighted work is illegally copied and sold at a profit. The word profit, as above referred to, could in no way be said to be a synonym for benefit or convenience and these last two words could not

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be estimated in dollars and cents. In this particular case the plans, as found by the judgment, were copied and retained by the defendant for its own use. Therefore on the evidence before me I find that the question of profit does not come into the consideration of damages at all.

In discussing the elements of damage as set out in Exhibit No. 1, it must be kept in mind that the tortious acts of the defendant alone, are to be taken into consideration, and only such as directly flow from and are due to the infringement by the defendant, and the damages must be a compensation for the *loss* sustained by the plaintiffs. I found it impossible to find any proof of *actual* damage (loss) sustained by the plaintiffs as resulting from the infringement. I think, however, that the defendant must pay something for its tortious act and for the invasion of the plaintiffs' property. There can be no doubt that even in the absence of proof of specific damage or actual loss the plaintiffs are entitled to judgment for a sum to be fixed, under the head of damages at large, including nominal, as explained further, and exemplary damages. I am of opinion that the authorities above cited and those to which I will refer amply justify such a course.

I now take up a discussion of the various items of damages as set out in Exhibit No. 1, with the amounts claimed under each head, save the last, damages at large, namely, Exhibits 5, 7 and 6. Items covered by paragraphs 1 and 2 of Exhibit No. 1, can conveniently be taken and discussed together, amounting in all to $210,607.71; this amount is what the plaintiffs claim the defendant, or rather the insurance companies it represented, would have been called upon to pay, as its or their share of the expenses of the Association for the plans, had it been a member of the C.F.U. Association for the 13½ years in question herein—or as Mr. Geoffrion, K.C. put it—the amount the defendant would have had to pay to do lawfully what it did unlawfully. Counsel for plaintiffs cited the case of *Watson, Laidlaw & Co. Ld.* v. *Pott, Cassells & Williamson* (1), and especially the remarks of Lord Justice Shaw, in support of this claim. I do not think this case is very helpful, for the court was dealing with patents, and their Lordships were called upon to assess damages

(1) (1914) 31 R.P.C. 104.

following upon the infringement of a patent, where it was proved that the plaintiff would not have made the sales made by the defendant and therefore could not claim damages for loss of sales; and his Lordship stated that in such a case the proper basis for assessing damages was on the principle of price or hire, to a royalty, where invasion of property has occurred. (See p. 120). In the instant case the defendant paid approximately $10,000 for obtaining the copies of the plans which they did get and the plaintiffs say that if the defendant had been members it would have cost them $30,000 to get the copies of the plans in question, and surely it cannot be said that the sum of over $200,000 would be a fair royalty in the premises.

The amount claimed is not a damage or loss suffered by the plaintiffs, due to the infringement, but is more in the nature of a punishment for refusing to join. Neither is it open to the plaintiff to say that as the defendant could only have got the plans and other material in question upon paying the sum claimed, therefore they lost this sum. Before 1927 defendant had no plans and is now carrying on without the plans and therefore they were not a necessity but a convenience. Moreover, the defendant could not be a member and would not have been allowed to join. True, the insurance companies it represented could probably have joined; thus defendant could have received these plans on payment of a price arbitrarily fixed, but these companies would not join.

I am of the opinion that this amount is not a loss sustained by plaintiffs as a result of the infringement, and therefore is not a damage sustained by them by reason of the infringement. There is no proof that the companies represented by defendant, if asked, would have become members; in fact, the opposite is evident, and therefore this amount was not lost to the plaintiffs, because of the infringement.

Before defendant could get plans, it must requisition and pay for them, as shown by Exhibit 5 and the evidence of Brown and Long, see Item 2 of the particulars, Exhibit No. 1. It is also worthy to note that as defendant represented five companies it is now charged for *five* copies or five times what it would have cost if it had represented

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only one company—further that had only one of the five companies become a member it could not have got the plans—nevertheless it is recognized that some agents represent both Board and Non-Board companies, and have the use of plans. This claim raises two questions:

(1) is this proposed manner of assessing damages a sound and proper way of fixing the amount of damages, and

(2) have the plaintiffs sustained any such sum or any sum in damages due to the infringement?

To the first question I would answer in the negative. There is a fallacy in this proposed basis for damage. Moreover, this sum, claimed, represents a multiplicity of services rendered the members none of which the defendant got. Witness Baldwin says there was a constant flow of information to members. This would cover reports and information regarding manufacturing or special risks, and other matters, none of which was available to the defendant. True, they authorized the copying of plans covered by the Copyright—but they did not get the amendments nor the many other services which the members enjoyed. It must be kept in mind also that the damages claimed under this head are based on the prices and charges which the plaintiff companies, for mutual benefit and protection, have agreed to pay, for the reason, *inter alia,* that there is a minimum price fixed for premiums, thus preventing price cutting among the member companies.

I am of opinion that this basis for assessing damages is unsound. It follows that the basis being unsound the damages claimed under this head must fall. Moreover, there is no proof that the plaintiffs have sustained this or any actual loss as a result of the infringement, under this head. I will deal later with the damages at large, but this item, depending as it does upon many contingencies is too remote to be allowed as damages. There is no proof that the act of defendant kept insurance companies from joining the ranks of the plaintiffs, though I can imagine that this might be so, but it was not even suggested. I am now faced with the necessity of assessing the damages at large—nominal and exemplary. These and any such damages defendant argues cannot be allowed and very able arguments were made by Mr. Tilley, K.C. and Mr. Biggar, K.C. in support of this contention.

Before discussing the question of damages at large, I will dispose of the item No. 4 or Exhibit No. 1—the cost of the plans copied and not delivered up to the plaintiffs—as ordered to do by the judgment herein. The claim under this head was originally for the sum of $5,366.04 but finally after further deliveries made, and after the testimony of Mr. Massie had been given, explaining errors in Exhibit No. 6, it was agreed that between 25 to 50 plans had not been returned, having been lost or destroyed, but plaintiffs could put no value on this. I am forced to arrive at a figure, basing it upon what evidence is to be found of record. I fix the damages for non-delivery of these plans at $200.

Now coming to Item No. 5 on Exhibit No. 1 "damages at large, exemplary and punitive." The concise and most able arguments of counsel on this point have been transcribed and form part of the proceedings before me, and I will not attempt to summarize them in this report, for to do them justice would necessitate my quoting at length.

In substance of course, defendant contended that there was no actual damage, and that I was not authorized under the judgment to go beyond that.

Mr. Tilley, K.C. cited the case of *Birn Bros.* v. *Keene* (1) and especially remarks of Peterson J., p. 285. The learned judge there says that in that case, the Master was wrong in including damages under the head of conversion, and that the damages to be assessed are such as have been occasioned by selling copies. "The damages are confined to damages for infringement and do not include damages for conversion." On page 286 the judge confirms an item for injury to trade, i.e., £210. He says:

> Now this was an extensive and deliberate piracy, and it was directed to what the defendants themselves admit was a substantial number of the plaintiffs' customers, and I have no doubt that the defendants have not in their admissions exaggerated the extent of their depredations on the plaintiffs' trade. Their conduct was aggravated by the fact that they offered the cards at a much lower price than that which the plaintiffs asked. In such cases as these the damages must necessarily be to a large extent a matter of conjecture but on the whole, having regard to the extent of the defendant's illicit operations, I am not prepared to disagree with the Master in his finding that £210 is a fair sum to be allowed under this head.

It is to be noted that the learned judge says "the damages must necessarily be to a large extent a matter of *conjecture.*"

(1) (1918) 2 Ch. D. 281.

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In the *Exchange Telegraph Co.* case above referred to (1), Lord Esher M.R. says:

'You have done a contemptible and fraudulent act against him, and have invaded his common law right, and therefore you must have damaged him.' In such a case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are damages at large.

Extracts from the judgment of this Court are cited above at p. 2 and the Court has found there was damage from the infringement and referred the matter to the Referee to report as to the amount sustained. It appears from the reasons for judgment (2), that the Court found that the right of the plaintiffs in the plans in question was property belonging to the plaintiffs; that the defendant knew of the copyright in these plans and that it secretly, clandestinely and fraudulently authorized the copying of the same.

The President cites, at p. 114, the case of *Jefferys* v. *Boosey* (3), as follows:

"The nature of the right of an author in his work is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying, after publication in print, which is the limited meaning of copyright." Erle J.'s opinion as to the nature of copyright, and that of Lord Brougham in the same case, has been accepted by the courts as correct and authoritative. Lord Watson, in *Caird* v. *Sime* approves Lord Brougham's opinion In *Mansell* v. *Valley Printing Co.*, after referring to Lord Watson's judgment in *Caird* v. *Sime*, Cozens-Hardy M.R. said: "The law thus laid down is based upon property, irrespective of implied contract or breach of duty. It does not depend upon property in the paper or manuscript. It is an incorporeal property." In the same case, Farwell L.J. said: "Every invasion of right of property gives a cause of action for damages to the owner against the invader, whether the invasion be intentional or not, and whether it is innocent or malicious. This applies to all rights of property, real and personal, corporeal or incorporeal . . ."

At page 121 reference is made to sections 3, 17, 20 and 21 of the Copyright Act. The learned President cites:

S. 3 of the Act defines what is copyright. It states: "For the purposes of this Act 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever . . .; if the work is unpublished, to publish the work or any substantial part thereof . . . and shall include the sole right . . . to authorize any such acts as aforesaid." Therefore, the sole right to "publish," to "produce" or to "reproduce," is in the owner of the copyright, and the owner of the copyright is the only person who can "authorize" others to do the thing or things which the Act gives to him the sole right to do.

(1) (1896) 1 Q.B.D. 153, line 17. (2) (1938) Ex. C.R. 103.
(3) (1855) 24 L.J. Exch. 81 at 85.

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From the remarks on pages 127 and 128 it is clear that the Court found that there was fraud in this case and the judgment as finally settled in this case provides that the plaintiffs are entitled to recover from the defendant all damages sustained by them by reason of the infringements aforesaid.

Mr. Biggar, in his argument based entirely upon the statute, contended that it is a statutory claim and that the claim must come within the statute. He cited section 20 which gives three distinct categories of claims, injunction, damages and accounts. He further stated that under the judgment as now approved by the Supreme Court the plaintiff is only entitled to *damages* "sustained" by them by reason of the infringement; that section 3 of the Act confers upon the owner the sole right to copy any original work, and that section 17, defining infringement, states that infringement is the act of doing without authority that which is conferred solely upon the owner of the copyright but that there is nothing in the Act making user by anyone an infringer; that the cause of action is complete upon the copying, reproducing or authorizing to reproduce without authority of the owner. Referring to the wording of the judgment "damages sustained," this does not limit the damages to "loss," but includes all classes of damages, actual or real, exemplary, nominal and punitive. It seems to me that if it is held that infringement is limited to unauthorized *reproducing* then there never would be damages (loss) *from such an act.*

Mr. Geoffrion, K.C. referred me to sec. 20 of the Copyright Act—which declares a person "entitled to all such remedies by way of injunction, damages, accounts, and *otherwise,* as are or may be conferred by law for the infringement of a right."

Now this is a clear case of a wilful and fraudulent invasion of the rights of the plaintiffs in their property, giving rise to a right to recover, nominal, exemplary and punitive damages, though actual damage is disproved.

I do not believe that the law contemplates allowing a wrongdoer to go scott free just because it is difficult or impossible to prove actual damages.

Mayne on Damages at page 2 says:

> The amount of damages recoverable depends upon the nature of the action and the evidence. Where the plaintiff gives no evidence of his

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loss, the damages generally are, but need not necessarily be, nominal, which are distinguished from small or contemptuous damages on the one hand, and from substantial and exemplary damages on the other.

And at page 5 says:

A distinction, however, must be taken here between absolute and relative rights. A man has an absolute right to have a promise performed, *or to keep his estate inviolate;* and he may sue and obtain nominal damages for an infringement of this right, although its maintenance is no benefit to him, and its violation no injury.

And at page 6 says:

Setting aside this exceptional class of cases, it may be broadly stated that an infringement of a right will support a claim to nominal damages, *though actual damage is disproved.*

And at page 7 says:

But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of paying damages for his wrong. In such a case the jury must do the best they can, although it may be that the amount of their verdict will really be a matter of guesswork.

In the United States the law provides for a minimum and maximum amount within which the jury or any one acting as such may assess the damages.

This is not so here, and the Referee, acting as a jury, must do the best he can to render justice between the parties.

Nominal damages are not necessarily small, and on this point I would like to quote from the remarks of the Earl of Halsbury, in the case of *The Mediana* (1). He says:

There is no doubt in many cases a jury would say there really has been no damage at all: "We will give the plaintiffs a trifling amount"—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious. It appears to me, therefore, that what the noble and learned Lords who gave judgment in your Lordships' House intended to point out, and what Lord Herschell gives expression to in plain terms, was that the unlawful keeping back of what belongs to another person is of itself a ground for real damages, not nominal damages at all. Of course I observe that it has been suggested that this was not an action for tróver or detinue; but although those are different forms of action, the principle upon which damages are to be assessed does not depend upon the form of action at all. I put aside cases of trespass where a high-handed procedure or insolent behaviour has been held in law to be a subject of aggravated damages, and the jury might give what are called punitive damages. Leaving that aside, whatever be the form of action, the principle of assessing damages must be the same in all Courts and for all forms of what I may call the unlawful detention of another man's property.

(1) (1900) A.C. 113, at p. 118.

I would also refer to *Griffiths* v. *Fordyce Motors* (1), and especially the remarks of Phillips J.A. at p. 454 regarding exemplary damages and his quotation from Pollock on Torts, on the same page:

> Where there is great injury without the possibility of measuring compensation, by any numerical rule, and juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss.

I think the sum allowed in this case should be commensurate with the gravity of the tort committed, and in view of the special circumstances of this case and of the wilful and fraudulent invasion of plaintiff's right of ownership in the plans in question, and acting as a jury, I have decided that the plaintiffs are entitled to recover from the defendant as damages at large, including exemplary and nominal damages, the sum of $5,000.

Therefore, to summarize my holdings, for the reasons above given, and upon authorities above cited and referred to, and after careful reading of the evidence adduced before me, and before the Court, including the exhibits to which counsel referred me, both those filed before the Court at the trial and those filed on this Reference and after hearing the eminent counsel who were before me and the able arguments made for both sides, I have come to the following conclusions:—

1. That the basis for assessing the damages as set out in paragraphs 1 and 2 of Exhibit No. 1 is erroneous, fallacious and unsound.

2. That the sum of $210,607.71 claimed to be due on the basis above set out is not a fair sum to allow and such alleged damages are too uncertain and too remote.

3. That the plaintiffs have sustained no actual loss or damage as a result of the infringement.

4. That the plaintiffs are entitled to recover the sum of $200 by way of damages for the plans ordered by the judgment of the Court to be delivered up to plaintiffs and not so delivered.

5. That the plaintiffs are in the circumstances of this case entitled to nominal and exemplary damages, which I fix at the sum of $5,000.

(1) (1930) 4 D.L.R. 451

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6. That the defendant having made no offer of any amount, the plaintiffs are entitled to their costs of this Reference.

AND I DO RESPECTFULLY RECOMMEND that judgment be rendered accordingly for the sum of $5,200, with interest from date hereof and costs of Reference to be taxed.

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1941 July 14-Oct. 20. — 1942 March 4.

BETWEEN:

FINE FOODS OF CANADA, LIMITED ...................... PETITIONER;

AND

METCALFE FOODS, LIMITED.......RESPONDENT.

*Trade mark—Failure to register trade mark as prescribed by Unfair Competition Act—Petition to expunge dismissed.*

Petitioner began using the trade mark "Garden Patch" sometime prior to 1929, and on October 2nd, 1929, caused it to be registered. In 1935 petitioner began using the trade mark "Summer Pride", also, but failed to obtain registration of the same. It continued to use both marks and large quantities of goods were sold by it under both marks.

Respondent in June, 1940, began to use the trade mark "Garden Pride" for goods similar to the petitioner's goods bearing the marks "Garden Patch" and "Summer Pride". Respondent obtained registration of the mark "Garden Pride" on October 17, 1940. Petitioner now applies to have the mark "Garden Pride" expunged from the register on the ground that confusion in the trade would arise since the mark would cause purchasers to think that the respondent's goods were put on the market by petitioner.

*Held:* That since petitioner's marks were not registered subsequent to the coming into force of the Unfair Competition Act, 22-23 Geo. V, c. 38, the petition must be dismissed.

PETITION by petitioner herein to have respondent's trade mark expunged from the Register of Trade Marks.

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

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

*A. George McHugh, K.C.,* for respondent.

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

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THE PRESIDENT, now (March 4, 1942) delivered the following judgment:

The petitioner and respondent here are incorporated companies, each carrying on the business of canning vegetables in the Province of Ontario.

The predecessor in title of the petitioner began, prior to 1929, to use the trade mark "Garden Patch" for the purpose of distinguishing its products and caused the said mark to be registered on October 2, 1929. In the year 1935 the petitioner commenced to use the trade mark "Summer Pride", also for the purpose of distinguishing its products, and, it is said, shortly thereafter instructed agents in Ottawa to cause the said mark to be registered but by some oversight no registration was made.

Thereafter the petitioner continued to use both the trade mark "Garden Patch" and the trade mark "Summer Pride", believing that the latter as well as the former had been registered, and large quantities of its products were distributed under each mark year by year. Prior to the end of the year 1941 the petitioner sold under the former mark its products in the value of $394,606.10, and under the latter mark in the same period its products in the value of $110,910.50.

The respondent commenced in the month of June, 1940, or thereabouts, to make use, as a trade mark for goods made by it, similar to the petitioner's goods bearing the marks aforesaid, the mark "Garden Pride", and the said mark was registered on October 17, 1940, as applied to canned fruits, vegetables, jams, jellies and pork and beans. The petitioner now alleges that the use of this mark directed public attention to the wares of the respondent in such a way that it might reasonably be apprehended that its course of conduct was likely to cause confusion in Canada between the wares of the respondent and those of the petitioner, and that the respondent's registration does not accurately express or define the respondent's existing right in respect of the said mark since the respondent is not entitled to use the same, owing to the reasonable apprehension of confusion consequent upon its use between the petitioner's goods and those of the respondent bearing it, and accordingly the petitioner prays that the respondent's said mark, "Garden Pride" be expunged from the register.

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Upon the hearing of this petition, by affidavit evidence, the petitioner presented twenty affidavits, from retail grocers carrying on business in various cities throughout Canada, in which each affiant states that he was familiar with the canned vegetables put out by the petitioner under the brand "Summer Pride" and which brand was well known in his community. Each of these affidavits contains the following paragraph:—

> If I saw the name "Garden Pride" on canned vegetables I should assume that it was another grade of canned vegetables put out by the petitioner, and I believe that the use of this name by any one else than the petitioner would cause confusion in the trade, and be likely to cause purchasers to think that the goods were put out by the petitioner.

The petitioner also presented affidavits from twelve wholesale grocers carrying on business in various Canadian cities, in which each affiant states:

> That for some years past my company has in each year sold a substantial quantity of canned vegetables canned by Fine Foods of Canada, Limited, and sold under the brand "Summer Pride", which brand is well known in this vicinity.
>
> I believe that if canned vegetables were put out under the brand "Garden Pride" it would cause confusion in the trade between the goods of the petitioner and the goods of whatever company were putting out goods under the name "Garden Pride". As for myself, if I did not know the name of the manufacturer of the brand "Garden Pride" I would assume it was another grade of the goods put out by Fine Foods of Canada, Limited.

There was also presented the affidavit of the President of the petitioner company and therein is to be found the following paragraph:

> Confusion between the petitioner's goods bearing the said marks and goods of the respondent bearing the mark "Garden Pride", is in my opinion inevitable if the respondent continues to use on similar goods the mark "Garden Pride", consisting of one word taken from one of the petitioner's marks and the second word taken from the other of the said marks

Altogether four affidavits were presented on behalf of the respondent, one of which was made by the President of the respondent company, and he therein states that at the date of the registration of the respondent's mark, "Garden Pride", he believed the said mark was not being used by any other person or organization in connection with the sale of the products to which it was intended to apply and that he was unaware that the petitioner was using the mark "Summer Pride", and that he had seen no goods sold under that mark by any

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of the firms with which he had come in contact in the usual course of business. The last two paragraphs of that affidavit, 4 and 5, are as follows:

4. The Respondent uses the trade mark "Garden Pride" in connection with its sale of choice and fancy quality goods. I am informed and believe that the Petitioner uses the trade mark "Garden Patch" in connection with its choice quality goods, and the unregistered trade mark "Summer Pride" in connection only with standard quality goods

5 I have not personally become aware of any confusion arising between the products sold by the petitioner and those sold by the respondent because of the respondent's use of the trade mark "Garden Pride". Nor has any such confusion been reported to me by any salesman of the respondent, as would ordinarily be done should such confusion exist and be observed by him It is my definite opinion that no such confusion has arisen or will arise between goods marked with the trade mark "Garden Pride" and goods marked with the trade mark "Garden Patch" or "Summer Pride".

Another affidavit presented on behalf of the respondent, merely states that the affiant could not recall having seen or heard of goods bearing the label "Summer Pride"; another affiant expresses the opinion that there was no reason why anyone should be confused by the use of the trade marks here in question and that any one would readily note the distinction between them whether by ear or eye; and another affiant states that he had seen and examined the trade marks "Garden Pride" and "Garden Patch" as used in connection with the sale of food products and he could detect no similarity of the sort that might confuse a purchaser between the trade marks "Garden Pride" and "Garden Patch", that the colouring and design of the labels are sufficiently different, so whether the eye or the ear is depended upon, no one should be misled, and that he could not see any reason for confusion arising between the two marks "Garden Pride" and "Garden Patch". All of the affiants just referred to were engaged in the grocery trade in one way or another.

The question for decision is not one altogether free from difficulties. I may be permitted to say respectfully that I doubt if such marks as "Garden Patch" or "Summer Pride", or "Garden Pride" should be registered at all, on the ground that they seem to suggest the place or time of production. Then, as was shown by one of the respondent's affidavits, the marks "Garden City" and "Garden Gate" are registered by other Canadian producers of canned goods, and if registration of the word "Garden",

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along with another word, is to be continued it is difficult to see why all engaged in the production of canned vegetables should not be free to use that word in association with another word so long as the latter word is not one already in use. The petitioner's case for expunging the respondent's mark "Garden Pride" is built up on the contentions: (1) That confusion in the trade would arise because this mark would cause purchasers to think that the respondent's goods were put out by the petitioner, (2) that purchasers would assume that the brand "Garden Pride" was another grade of the goods put out by the petitioner, and (3) that confusion would be occasioned by the use of the mark "Garden Pride" because this mark consists of one word taken from the petitioner's registered trade mark "Garden Patch" and one word from its unregistered mark "Summer Pride".

In respect of the mark "Summer Pride" it is to be observed that the petitioner's rights and remedies are affected by its failure to register the same, and this at once raises a difficulty which, I think, is difficult for the petitioner to overcome. One very important feature of the Unfair Competition Act is that it requires the registration of all marks coming into use in Canada, within a certain period, as mentioned in s. 4 (1). The provision, I think, was very desirable. Sec. 4 (2) states that the use of a trade mark by a person who is not registered as the owner thereof shall not confer upon such person any right, title or interest therein as against the person who is registered as the owner of the same or a similar mark. That section envisages the precise situation before me, and it would appear that this is conclusive against the petitioner obtaining the relief it here asks for, unless it is materially qualified by some other section of the Act.

Sec. 3 of the Unfair Competition Act provides that "no person shall knowingly adopt for use in Canada in connection with any wares any trade mark or any distinguishing guise which . . . (*c*) is similar to any trade mark or any distinguishing guise in use, or in use and known as aforesaid". Then, sec. 10 of the Act provides that if any person adopts a trade mark similar to a trade mark which was in use, or in use and known as aforesaid, he shall be presumed to have knowingly adopted the same, unless it is established either (*a*) that, the same was adopted with the consent of the person by whom the same was in use, or (*b*) that, the person who adopted it was in ignorance of the use of the same or of a similar unregistered trade mark, and that in adopting it he was acting in good faith and believed himself to be entitled to adopt and use it, or (*c*) that, the person by whom such mark was adopted has continuously used the same in the ordinary course of his business for five years immediately before the commencement of the proceedings, which was not the fact in this case. Therefore, if the marks in question here can be said to be similar, the respondent shall be presumed to have knowingly adopted its mark unless it can place itself within either of the provisos 10 (*a*) and 10 (*b*), and the former may at once be disregarded. The respondent, by the affidavit of its President, disclaims any knowledge of the use of the mark "Summer Pride" by the petitioner, or by any other person or organization, which means that the respondent acted in good faith in adopting for use its registered mark, and to this there is no evidence to the contrary. Had the persons making the affidavits produced on behalf of the respondent been examined orally before me, it is possible I might have reached another conclusion. However, it is possible that the managing officers of the respondent company had never learned that the petitioner sold any of its products under the mark of "Summer Pride". In this state of facts I think the terms of the statute are in the way of the petitioner being granted the relief here asked for.

Mr. Smart urged that in deciding the question of similarity between the marks "Garden Patch" and "Garden Pride" I was entitled to take into consideration the use of the petitioner's mark "Summer Pride", even if not registered. I am unable to agree with this view, and it would seem an untenable position where, as I find, the petitioner must fail in having the respondent's mark removed from the register. Then, as to whether there is that similarity between the marks "Garden Patch" and "Garden Pride" as to cause confusion in Canada, between the wares of the petitioner and those of the respondent, I am unable to reach an affirmative conclusion. I am not convinced that any similarity is such as to cause confusion between the goods of the petitioner and those

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of the respondent; and I perhaps should point out that, on the labels used by the petitioner and respondent on the containers containing their respective goods, the names of the appellant and respondent companies are plainly printed in.

I am therefore of the opinion that the petition herein must be refused and with costs to the respondent.

*Judgment accordingly.*

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Sept. 27.

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March 2

BETWEEN:

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

AND

GUARANTEE HOUSEHOLD STERILIZERS ........................ DEFENDANT.

*Revenue—Sales tax—Special War Revenue Act, R S C, 1927, c 179, s 86—Used mattresses renovated or rebuilt for customers—No liability for sales tax.*

Defendant, a manufacturer of mattresses for sale to the public, also renovates or rebuilds old mattresses and supplies certain material and labour therefor. These rebuilt mattresses are then delivered to the owner or customer who pays for such labour performed and material supplied.

*Held* That defendant is not liable for sales tax on mattresses renovated or rebuilt and returned to customers.

INFORMATION exhibited by the Attorney-General of Canada to recover from defendant money alleged due for sales tax on mattresses alleged to have been manufactured and sold by it.

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

*A. G. Duncan Crux* for plaintiff.

*A. H. Fleishman* and *J. F. Meagher* for defendant.

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

THE PRESIDENT, now (March 2, 1942) delivered the following judgment:

This proceeding is one to recover from the defendant the sum of $849.31, for the consumption or sales tax imposed under the provision of the Special War Revenue Act, and for certain statutory penalties. The particulars of the claim for the taxes due and payable, and penalties, are set forth in paragraph 4 of the Information. Assuming that there is liability on the part of the defendant for the taxes and penalties claimed it is agreed that the particulars of the same as set forth in the Information are correct.

The defendant is a manufacturer of mattresses which it sells to the public, but such sales are not involved in this issue. The defendant also renovates and repairs for customers mattresses that have been in use and for which it makes certain charges for material supplied and labour performed. These mattresses are referred to as "rebuilt" mattresses, and it is in respect of such mattresses that it is here sought to recover the sales tax in question. The Crown claims that such transactions constitute taxable sales within the terms of the Special War Revenue Act, and this claim the defendant resists. The defendant also purchases from owners old or used mattresses which it rebuilds and sells to the public and it pays the sales tax upon the selling price of the same, and no question arises here as to the sales tax on such transactions.

The labour and services performed, and the material supplied, by the defendant, in connection with the mattresses delivered by customers to it, and with which we are here concerned, are the following. First, any mattress so delivered is sterilized or disinfected by some chemical process. Then the covering or ticking of the mattress is removed and a new cover or ticking is made up, the material for which is supplied by the defendant. The original mattress filling or felt is then put through a picking machine to loosen up or refluff the same; that is to say, any portion of the felt that has become wadded or matted is restored to its original fluffy condition, or nearly so, and the felt as thus treated is then blown into the new mattress cover or ticking. The final operation is to bind or sew the cover and its contents together, I assume by vertical binding or sewing at predetermined points through the mattress cover. The mattress is then ready for return delivery to the owner or customer. It was stated by Mr. Crux, for the Crown, that in the case where the mattress

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covering was merely patched or repaired, and the sterilizing and refluffing operations were performed, the sales tax was not claimed.

For the material supplied and the labour performed a charge of $5.75 is made to the customer. This amount is made up as follows—$2.25 would be the charge for the new mattress cover or ticking supplied or sold the customer; 18 cents would be the sales tax on the new cover or ticking supplied the customer and which in all cases here the defendant paid to the Crown and was credited therefor; 50 cents would be the charge to the customer for the sterilization, and the remainder, $2.82, would be the charge for the labour performed in the rebuilding of the mattress. The Crown is here claiming the sales tax upon the total charge to the customer less the tax which has been already paid for the new mattress cover or ticking supplied or sold to the customer. I assume the customer might, if he desired, furnish his own mattress cover or ticking to the defendant.

The question for decision then seems to be: Does the material supplied and the labour performed by the defendant in the rebuilding of the customer's mattress constitute a sale of goods by a manufacturer, within the meaning of s. 86 of the Act?

In the case of *The King* v. *Boultbee Limited* (1), I decided that the defendant there was not liable for the sales tax where it retreaded automobile tires for customers and to whom it returned the identical tires given it for treatment. It would seem to me that what I said in my reasons for judgment in connection with that class of transactions, and which appear on pages 190 and 191 of the Report of that case, are applicable here and I need not repeat what I there said. I do not think that the transactions here in question fall within the meaning and intendment of sec. 86 of the Special War Revenue Act. It is true that the mattresses in question did undergo quite extensive repairs but I do not think it can be said that the defendant manufactured and sold the same. My conclusion is that the Information must be dismissed and with costs to the defendant.

*Judgment accordingly.*

(1) (1938) Ex. C.R. 187.

ONTARIO ADMIRALTY DISTRICT

BETWEEN:

THE INSURANCE COMPANY OF NORTH AMERICA .............. PLAINTIFF;

AND

COLONIAL STEAMSHIPS, LIMITED ..DEFENDANT.

*Shipping — Practice — Application for particulars of the "danger of navigation or peril of the sea" pleaded — Motion granted.*

*Held:* That where the cause of a loss is a matter of common knowledge the party pleading danger of navigation or peril of the sea should give particulars of the occurrence in so far as he is able to do so.

MOTION by plaintiff for particulars of the "danger of navigation or peril of the sea" pleaded by defendant.

The motion was argued before His Honour Judge Barlow, District Judge in Admiralty for the Ontario Admiralty District, in Chambers.

*Francis King, K.C.,* for the motion.

*Frank M. Wilkinson, K.C., contra.*

BARLOW D.J.A. (March 12, 1940) delivered the following judgment:

This is an application by the plaintiff for particulars of the "danger of navigation or peril of the sea" alleged in paragraph 15 of the statement of defence as to the cause of the sinking of the S.S. *Northton.*

The S.S. *Northton,* which was loaded with a cargo of grain on the 25th day of November, 1938, while moored in her winter berth in Port Colborne harbour, sank with resultant damage to her cargo. The plaintiff was the insurer of the cargo and by reason of the transfer to it of the bills of lading and all rights of action, now brings this action.

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The defendant, among other defences, in paragraph 15 of the statement of defence pleads as follows:

15. The defendant says that on or about the 1st day of February, 1939, the S.S *Northton* sank at her winter berth with resultant damage to her storage cargo as a result of a danger of navigation or a peril of the sea.

The plaintiff makes this application for particulars for the purpose of pleading. From the material before me it is quite clear that both the plaintiff and the defendant are familiar with what took place as to the sinking of the S.S. *Northton.*

It has been held that where an insurer insures against danger of navigation or peril of the sea that the insured when bringing an action against the insurer for loss and damage is not required to give particulars of the peril of the sea pleaded. It is sufficient to plead what is set out in the proofs of loss. See *Munro, Brice & Co.* v. *War Risks Association Limited et al.* (1). I followed this decision in *Climie* v. *The Western Assurance Co.* (2), but in this latter case the vessel and crew were lost and the plaintiff could have no knowledge of the particulars. It is well settled law that the same rules as to particulars apply in the Admiralty Court as in the other Courts. On the material before me it would appear that the S.S. *Northton* by reason of low water had her hull punctured by some object on the bottom of the harbour. What happened is of more or less common knowledge and so far as the defendant has particulars of the occurrence it should give the same in order that the issues may be defined as narrowly as is reasonably proper. It is not the ordinary case of the loss of a ship in a storm.

The motion will, therefore, be granted, with costs in the cause.

*Order accordingly.*

(1) (1918) 2 K B.D. 78 at 85. (2) 1938 O.W.N. 333.

BETWEEN:

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Nov. 24.
1942
March 31.

KELLOGG COMPANY OF CANADA LIMITED ........................ APPELLANT;

AND

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

*Revenue—Income—Income War Tax Act, R.S.C., 1927, c. 97, secs. 3, 5 and 6—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—"Any payment on account of capital"—Legal expenses incurred in defending action at law brought to restrain appellant from using certain trade name in connection with the sale of its products—Expenditures properly charged against revenue—Appeal allowed.*

Appellant is a manufacturer of cereal products which it sells to customers. One of these customers and appellant were made defendants in an action at law brought by the S. Company which claimed infringement by both defendants of certain trade mark rights of the S Company. The S. Company claimed an injunction and damages and when action was started obtained from appellant an undertaking which had the effect of stopping the alleged wrongful sales of appellant's products until the final disposition of the action. Appellant successfully defended the action on behalf of both defendants.

Appellant in computing its income for the years 1936 and 1937 deducted the sums of money it had paid out for legal expenses on account of the aforesaid action. These deductions were disallowed by the Commissioner of Income Tax. This disallowance was affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

*Held:* That the payments were made involuntarily in the course of business to enable appellant to continue the sales of its products as before action was taken against it, and not to secure or preserve an actual asset or enduring advantage to appellant; nor were they made expressly for its permanent benefit or for the purpose of earning future profits; the litigation merely affirmed the common law right which appellant was already entitled to and enjoyed; the payments were, therefore, properly deductible in arriving at appellant's net income.

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.

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

*A. A. McGrory* for respondent.

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

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THE PRESIDENT, now (March 31st, 1942) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue (hereafter called "the Minister"), affirming assessments for income tax levied against Kellogg Company of Canada, Limited (hereafter called "Kellogg"), for the fiscal years ending December 31, 1936, and December 31, 1937, respectively. The appeal relates particularly to two specific amounts which Kellogg claims were expenses laid out and incurred for the purpose of earning its income. It claims that these amounts are proper deductions in computing the assessment of its net income for the taxation periods mentioned.

The facts may be briefly stated. Kellogg carries on business in the City of London, in the Province of Ontario, and its business consists in the manufacture of cereal products and their sale to merchants for resale to customers. Among the products produced and thus marketed was one known as Shredded Wheat which Kellogg sold to, among other persons, one Solomon Bassin, and which Bassin resold to his customers. In 1934 an action was instituted against Kellogg and Bassin by the Canadian Shredded Wheat Company Ld. as plaintiff, in respect of the sales of Shredded Wheat made by Kellogg, and resales made by Bassin. It was claimed by the plaintiff in that action that the sales made by Kellogg and Bassin constituted an infringement of its rights in respect of certain registered trade marks consisting of the words "Shredded Wheat", used in association with biscuits, crackers and cereal foods, produced and sold by the said plaintiff, and which products were claimed to be similar to certain of the products produced and sold by Kellogg. The defendants Kellogg and Bassin contested the action, which was brought in the Supreme Court of Ontario, with the result that the action was dismissed with costs by the trial judge, and on an appeal being taken from the said judgment to the Court of Appeal for Ontario the same was dismissed with costs, and a further appeal taken by the plaintiff to the Judicial Committee of the Privy Council was also dismissed with costs. The net amount of costs incurred and paid by Kellogg in connection with the said action during the year 1936 was $5,392.99, and during the year 1937 was $11,585.72, which said sums were assessed in the said years as part of the income of Kellogg under the Income War Tax Act. These assessments are the subject of the controversy in this appeal. Apparently, as one would expect, Kellogg felt in duty bound to carry the defence of the said action and save harmless its customer Bassin from any expense or damages in connection therewith.

The Canadian Shredded Wheat Company, in its action claimed, (1) an injunction restraining the defendants from using the words "Shredded Wheat" or "Shredded Whole Wheat", or "Shredded Whole Wheat Biscuit", or any words only colourably differing therefrom, and (2) $25,000 damages, or, in the alternative, profits as the plaintiff might elect. In the judgment of the Judicial Committee of the Privy Council, it is stated that in the year 1934 the defendant Kellogg began to sell in Canada biscuits made of shredded wheat, and that among its customers was a retail grocer, one Bassin (the second defendant in the action), who in turn resold some of the said biscuits to his retail customers, and, further, that when the plaintiff issued the writ in its action it obtained "an undertaking (without prejudice) which had the effect of stopping the alleged wrongful sales until the trial or other final disposition of the action". I assume this undertaking remained effective until after the decision rendered in such action by the Judicial Committee of the Privy Council. It is to be assumed, therefore, that during the interval in which the said undertaking was in force Kellogg made no sales of its shredded wheat biscuits complained of in the action, and consequently in that period no income was earned from any such alleged wrongful sales.

The formal decision of the Minister in this matter was that the legal fees and expenses incurred by Kellogg were not expenses wholly, exclusively and necessarily laid out or expended for the purpose of earning the "income", in other words "net profit or gain", but were "expenses incurred in defence of capital which falls within the specific provisions of section 6 (*b*) of the Act and were properly disallowed as deductions from income for income tax purposes". That means that the Minister maintained the assessments made on the ground that the expenses in question were incurred on account of capital and not of income. This was in substance the position taken by Mr. McGrory, on behalf of the respondent on the hearing of this appeal. He argued:

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That the expenditures in question were made by Kellogg, (1) to preserve its right to carry on a portion of its business, (2) to assert and defend its common law right to manufacture and sell certain cereal products under the descriptive name of such products, (3) to maintain the right to earn future profits as distinguished from current profits, to assure an "asset" or "an advantage or enduring benefit" for its business, by making an expenditure "once and for all", and (4) that the expenses incurred for such purposes were not deductible in computing the annual profits or gains to be assessed for the income tax, and were of a capital nature and properly attributable to capital. It will at once be observed that the grounds advanced by Mr. McGrory are of a familiar character, and that he had in mind a line of well known cases which I shall have occasion to mention later on. On the other hand, Kellogg is claiming that the items of disbursements in question were expenses properly attributable to income.

As has so often been pointed out by the Courts, in dealing with cases of this kind, the Income War Tax Act nowhere contains a definition of what constitutes the balance of the profits or gains of a trade or business, but, as was said by Lord Haldane in *Sun Life Assurance Office* v. *Clark* (1),

> it is plain that the question of what is or what is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business. Questions of law can only arise when . . . . some express statutory direction applies and excludes ordinary commercial practice, or where, by reason of its being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap.

The Income War Tax Act does expressly exclude a number of deductions and allowances, some of which according to ordinary principles of commercial accounting might be allowable, but where these ordinary principles are not invaded by the Act they must be allowed to prevail. Therefore in considering what is an allowable expense, or deduction, we must first enquire whether it is one prohibited by the Act; if it is not prohibited, then we must consider next whether it is of such a nature that, according to the principles of ordinary commercial standards, it is a proper item to be charged against income in a computation of profits or gains, and was expended for earning the same, or,

(1) (1912) A.C. 443 at 455

whether it is an expense that should be charged as a capital expenditure and therefore not deductible in computing the amount of the profit or gain to be assessed.

Again, while the Act describes the sources of income it nowhere defines "income" and nowhere does it define "capital". Inasmuch as there is no statutory definition of "income" or "capital" it is to the decided cases that one must return for light, and, as was said by Lord Macmillan in *Van den Berghs Ld.* v. *Clark* (1),

> while each case is found to turn upon its own facts, and no infallible criterion emerges, nevertheless the decisions are useful as illustrations and as affording indications of the kind of considerations which may relevantly be borne in mind in approaching the problem

of discriminating between an income receipt and a capital receipt and between an income disbursement and a capital disbursement.

I propose therefore, first, to refer to certain of a well known line of cases, to which I was referred, and the first to be mentioned is that of *Vallambrosa Rubber Co. Ltd.* v. *Farmer* (2). In that case a company owned a newly planted rubber estate. Rubber trees do not reach production stage until about six years old, but in the meantime expenditure must be incurred on the immature trees, on weeding and maintenance of the plantation, and on superintendence. Only one-seventh of the estate in question was yielding rubber. The Crown contended that only one-seventh of the expenditure incurred on weeding, maintenance, etc., should be allowed as a revenue charge. It was held that the fact that the balance of the expenses was incurred to earn profit in future years, and was not referable to profits earned in the year in which incurred, did not prevent it from being a proper deduction and that as they were annually recurring expenses they were *prima facie* not capital expenditures but income expenditures, and so fell to be deducted. In that case the Lord President (Lord Dunedin) said that the word "capital" was to be given its common commercial meaning, and that "capital expenditure" as against what is income expenditure is something that is going to be spent "once for all", and income expenditure is something that is going to recur annually. He plainly stated that he did not regard this rule as absolutely final or determinative, but in a "rough

(1) (1935) A.C. 431

(2) (1910) 5 T.C. 529

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way" he thought it not a bad criterion of what is capital expenditure as against what is income expenditure. The Lord President (Lord Strathclyde) in *Moore* v. *Hare* (1), referred to this rule as "a rough and ready test", and he said that Lord Dunedin did not claim any higher merit for it than that. Lord Dunedin's test of a capital expenditure as a thing that is going to be spent "once and for all", and an income expenditure as a thing that is going to "recur every year" is to be regarded as a broad definition of the position, not true in all cases, for example, it was modified in the case of *Smith* v. *Incorporated Council of Law Reporting for England and Wales* (2). There a reporter of the Council who was in no way entitled to a retiring gratuity, was paid a gratuity on retirement, and it had been a habit of the Council to give a gratuitous pension, or a gratuity, to a reporter who retired after long service, and it was held that the finding of the District Commissioners of Taxes, that the gratuity in question was allowable as a business expense, should be sustained and that the grant must be regarded as a proper deduction. The "once and for all" rule was further modified in *Atherton* v. *British Insulated and Helsby's Cables Ld.* (3), by Lord Cave's doctrine of capital expenditures as being money expended with a view of bringing into existence "an asset or an advantage for the enduring benefit of a trade". There, a company found that owing to the absence of any provision for pensions, valuable employees from time to time left the company and obtained employment elsewhere. A pension fund was accordingly set up by trust deed, the company agreeing to make annual contributions, and an initial contribution of £31,874 was made to provide a nucleus or capital sum in order that past years of service of existing employees might rank for pension, and the question was whether the sum of £31,784 was admissible as a deduction in computing the company's profits. The expenditure was ultimately held to be an expenditure of capital, and not admissible as a deduction. The Crown argued that the sum ought to be attributed to capital on the ground that "it was not in its nature recurrent but was made 'once and for all'." The Lord Chancellor (Lord Cave) in that case said:

(1) (1914) 6 T.C. 572. (2) (1914) 6 T.C. 477.
(3) (1925) 10 T.C. 155.

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> . . . when an expenditure was made not only once and for all but with a view of bringing into existence an asset or advantage for the enduring benefit of a trade, I think that is a very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to a revenue, but to capital.

Lord Atkinson indicated that the word "asset" ought not to be confined to "something material". The "enduring benefit" principle was further modified in *Anglo Persian Oil Co. Ld.* v. *Dale* (1), by the development by Lawrence L.J. of the "enduring benefit" principle by the distinction drawn by him between "fixed" and "circulating capital". There the taxpayer had merely changed its methods of carrying on business by bringing agreements entered into with another company, its business agent in Persia, to an end by paying a sum of £300,000 so that they could carry on their business more economically, and it was held that this sum was an admissible deduction for purposes of income tax. A distinction was drawn between fixed and circulating capital, and in determining whether it was capital or revenue expenditure, the test applied was whether it created an addition to "fixed" as distinct from "circulating capital". Lawrence L.J. said that by "enduring" is meant enduring in the way that fixed capital endures, and the payment in question was allowed as a deduction being a payment in respect of its circulating capital; and Romer L.J. added that the advantage paid for need not be "of a positive character" and that the advantage may consist in the getting rid of an item of fixed capital that is of an onerous character. The Court of Appeal followed this reasoning in *Van Den Berghs Ld.* v. *Clark* (2), where a large sum received in the way of damages for the cancellation of agreements with a rival company for pooling profits was regarded as circulating capital, and was treated as a revenue receipt. The House of Lords apparently did not accept the distinction between fixed and circulating capital. It held that the price paid for the surrender of the rights under the agreements was a capital asset and not a revenue receipt, on the ground that the agreements were not incidental to the working of their profit-making machine but were essential parts of the mechanism itself; they provided the means of making profits, but they themselves did not yield profits. I have

(1) (1932) 1 K.B. 124; (1931) 16 T.C 253.

(2) (1934) 19 T.C. 390.

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referred to this line of cases at such length because they discuss or embody the principles advanced by Mr. McGrory in his argument supporting the decision of the Minister in the present case. At the same time they reveal the problem of discriminating between an income disbursement and a capital disbursement.

Then there is a second line of cases, so often referred to in support of cases where the Crown is claiming that the expenditure in question is one of a capital nature and not one made for the purpose of earning profits or gains. I shall refer only to two or three of such cases, and the first one is that of *Addie & Sons Collieries Ld.* v. *Commissioner of Inland Revenue* (1). In that case the taxpayer was the lessee of a coal mining area for a period of years. When the lessee began to work its mine it was obvious that it would require to use a certain amount of the surface of the lessor's estate for certain purposes, such as the making of roads and foot paths. That was one of the conditions precedent to starting work in the mine. The lessee might, if it had thought fit, have purchased the land required for its purposes, or it might have acquired some form of servitude right across the surface owner's property. The lessee did none of these things, but got under the lease the right to use the surface for, *inter alia,* these purposes; and, as the consideration for the right so acquired, the lessee came under obligation, at the end of the lease, to restore the land so occupied to its original agricultural condition, or otherwise to pay to the lessor the equivalent of its agricultural value. The lessee chose to pay a sum of money. It was held that the expenditure was made for the acquisition of an asset in the form of the means of access and passage, which was part of the capital establishment of the lessee. The lessee got the lease on the term of either restoring the land to its original condition, or by paying the value of the land if it were not restored. It was the latter condition which he chose to accept and perform. As was observed by the Lord President, the expenditure was not any less a capital expenditure than, for example, the cost of sinking the shaft. I find it difficult to imagine that this expenditure could be anything else than one made on account of capital. Another case is that of *Tata Hydro-Electric Agencies Limited, Bombay,*

(1) (1924) S.C. 231.

v. *Income Tax Commissioners* (1). The facts of this case are set forth in the early paragraphs of the judgment of Lord Macmillan, and as they are lengthy and difficult of comprehension I shall not repeat them. It was held that the obligation to make the payments in question was taken over by the taxpayer as part of the transaction whereby it acquired the business agency from Tata Sons, Ld. In delivering the judgment of the Judicial Committee Lord Macmillan said:—

> Their Lordships recognize, and the decided cases show, how difficult it is to discriminate between expenditure which is, and expenditure which is not, incurred solely for the purpose of earning profits or gains. In the present case their Lordships have reached the conclusion that the payments in question were not expenditure so incurred by the appellants They were certainly not made in the process of earning their profits; they were not payments to creditors for goods supplied or services rendered to the appellants in their business; they did not arise out of any transactions in the conduct of their business. That they had to make those payments no doubt affected the ultimate yield in money to them from their business, but that is not the statutory criterion. They must have taken this liability into account when they agreed to take over the business. In short, the obligation to make these payments was undertaken by the appellants in consideration of their acquisition of the right to conduct the business, and not for the purpose of producing profits in the conduct of the business.

Accordingly the deductions made were held to be inadmissible. It might be pointed out that the Judicial Committee observed that if the same question had arisen with Tata Sons Ld., they would have been entitled on the facts stated to deduct their payments to Dinshaw Ld., and Smith as being expenditure incurred solely for the purpose of earning their profits and gains, and in fact this was later held in *Commissioner of Income Tax* v. *Tata Sons Ld.* (2). I have referred to those two cases because they were referred to in the case of *The Minister of National Revenue* v. *Dominion Natural Gas Co. Ld.* (3), to which case Mr. McGrory referred in his argument, and to which I must presently make reference. I am unable to see any analogy between the *Addie* and *Tata* cases and the one presently before me, or that any useful aid can be derived from them here.

The present case is somewhat analogous to that of *The Minister* v. *Dominion Natural Gas Co. Ld.* (3), and to

(1) (1937) A.C. 685. (2) (1938) 7 I T R. 195
(3) (1941) S C R. 19; (1940) 4 D.L.R. 657.

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which I must now refer briefly. In that case an action was brought against the Dominion Natural Gas Co. It put in question its right to maintain in the streets of the City of Hamilton facilities for supplying gas to the inhabitants of that city, and the plaintiff in the action claimed an injunction restraining the respondent from continuing to do so. The Dominion Natural Gas Co. claimed a deduction in the assessment of its income for the amount of legal costs disbursed by it in resisting the action. It was held by the Supreme Court of Canada that the deduction claimed was inadmissible. The judgment of the Chief Justice and Davis J. proceeded on the ground (1) that the expenses in question were not working expenses, that is to say, they were not expenses incurred in "the process of earning the income", and (2) that the expenditure was incurred "once and for all", and "for the purpose and with the effect of procuring for the company "the advantage of an enduring benefit", that is, the right to carry on its undertaking. They held there was no distinction between expenditures incurred in procuring the company's by-laws authorizing the undertaking and the expenses incurred in their litigation with the plaintiff in that action, and that such expenses were therefore of a capital nature. Mr. Justice Crocket proceeded upon the ground that the expenditure was not "incidental to the trade", of the Dominion Natural Gas Co. Kerwin and Hudson JJ. proceeded on the ground that the expenditure was "a payment on account of capital", because it was made "with a view of preserving an asset or advantage for the enduring benefit of the trade". If I understand the view of the Supreme Court to be as I have stated it, then the "advantage of an enduring benefit", and the preservation of "an asset or advantage", must have been intended to relate to the franchise rights or privileges under which the company commenced and continued its undertaking, which comprised the foundation and totality of all its assets, and which rights or privileges were the means of making profits though they themselves did not yield profits, and that therefore the expenses in question were directly related to capital assets. I think there is a distinction between that case and the present case, and as my reasons for thinking so will presently appear in my discussion of the present case, and will, I think, differentiate the two cases, I need not anticipate them just at this stage.

Now turning to the specific question here to be determined. The broad principle laid down by Lord Cave in *British Insulated* v. *Atherton* (1) is not, in my opinion, of any assistance in the present case. Applying that test to the present case, the payment here made was not, I think, an expenditure incurred or made "once and for all", with a view of bringing a new asset into existence, nor can it, in my opinion, properly be said that it brought into existence an advantage for the enduring benefit of Kellogg's trade within the meaning of the well known language used by Lord Cave in a certain passage of his speech in that case. What the House of Lords was considering in that case was a sum irrevocably set aside as a nucleus of a pension fund established by a trust deed for the benefit of the company's clerical staff, and, as was said by Lawrence L.J. in the *Anglo Persian Oil* case, *supra,* I have no doubt that Lord Cave had that fact in mind when he spoke of an advantage for the enduring benefit of the company's trade. Such an expenditure differs fundamentally from the expenditure with which we are concerned in the present case. Here, the expenditure brought no such permanent advantage into existence for the taxpayer's trade. I do not think it can be said that the expenditure in question here brought into existence any asset that could possibly appear as such in any balance sheet, or that it procured an enduring advantage for the taxpayer's trade which must pre-suppose that something was acquired which had no prior existence. No "material" or "positive" advantage or benefit resulted to the trade of Kellogg from the litigation except perhaps a judicial affirmation of an advantage already in existence and enjoyed by Kellogg. I do not think that the Crown can be heard to say that because the litigation affirmed a right which Kellogg, in common with others, was already entitled to and enjoyed that therefore Kellogg acquired something which should be treated as an asset or an enduring advantage to its trade. Such reasoning would lead to many strange and undesirable results. In any event, Kellogg never disbursed any money to acquire something, and it would appear hardly tenable to say that the payment of the legal expenses in question was something paid to acquire an asset or a trade advantage. That was an involuntary expense, not a disburse-

(1) (1926) A.C. 205 at 213.

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ment incurred once and for all, or for the benefit of a trade, within the meaning of such cases as I have earlier discussed. Again, this is not a case of a payment made once and for all in substitution of a "recurring" annual payment, as no such payment was ever made by Kellogg, and equally true is it, I think, that the expenses here were not incurred for the purpose of earning future profits. In all the decided cases I have mentioned the taxpayer voluntarily made specific disbursements, for one reason or other connected with his trade; whether they were held to be attributable to capital or revenue is presently irrelevant, the important and relevant thing being that they were made in pursuance of settled business policy. Kellogg made no such comparable disbursement; the disbursement here was one virtually imposed upon the taxpayer. It is to be remembered that the plaintiff in the action against Kellogg claimed the choice of either an account and payment to it of the profits or income which Kellogg had gained in its trade, or an enquiry as to damages alleged to be occasioned by the wrongful conduct of Kellogg. The profits of Kellogg were made by the sale of certain cereal products in cartons, on which was printed the common name of the product, as, I think, is required by regulations made under the Food and Drugs Act. That is part of the selling mechanism and not of the production mechanism of Kellogg, almost the final step in the selling of the product itself and in the earning of profits, or gains. It was to maintain this trading and profit-making position that Kellogg was obliged to make the expenditure in question. It was against actual sales, the earning of income, that the Canadian Shredded Wheat Company sought an injunction against Kellogg, and also against its customer Bassin to whom it had actually sold its goods for resale.

Nor were the disbursements in question here comparable to those in the case of *Warnes* (1), or the case of *Glehn* (2), where the taxpayers incurred penalties and costs for infringements of the Customs Act, breaches of the law, and the payments of such penalties and costs were held not to be sums laid out for the purposes of the trade of such taxpayers. The present case, I think, closely resembles that of *Noble* v. *Mitchell* (3). There a large sum of

(1) (1919) 12 T.C. 227.
(2) (1919) 12 T.C. 232
(3) (1927) 11 T.C. 372.

money was paid by a company to get rid of a managing director and it was held that the payment was properly chargeable to income. The Master of the Rolls there said:

It is a payment made in the course of business, dealing with a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company, but to enable them to continue, as they had in the past, to carry on the same type and quality of business,

and Lord Justice Sargent said that

it is quite impossible to put against the capital account of the company . . . . a payment of this nature. It seems to me that the payment . . . . was not of such a nature; it certainly was not capital withdrawn from the company, or any sum employed or intended to be employed as capital in the business . . . . To my mind, it is essentially different from those various payments in the cases which have been referred to, which were of the nature of adding to, or improving the equipment, or otherwise made for the permanent benefit of the company.

These remarks would appear to be applicable to the present case. Here, Kellogg had encountered a business difficulty, one associated directly with the sales branch of its business, which it had to get rid of, if possible, in order to continue the sales of its products as it had in the past. I have no doubt but that there are many cases in which legal expenses incurred are properly attributable to capital and not revenue, in computing the profits or gains assessable for the income tax. For example, in the case of *Moore* v. *Hare* (1), a firm of coal masters promoted two Bills in Parliament for the construction of a railway line in consequence of the unsatisfactory facilities afforded by a railway company. The railway company having agreed to grant improved facilities the Bills were dropped. It was held that the expenditure was of a capital nature and not an expenditure out of revenue.

The conclusion which I have reached is that the appeal herein should be allowed, and with costs to the appellant.

*Judgment accordingly.*

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(1) (1914) 6 T.C. 572.

1941 June 30. — 1942 April 24.

BETWEEN:

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

AND

THE TORONTO GENERAL TRUSTS CORPORATION .................. DEFENDANT.

*Revenue—Income tax—Mortgage—Agreement extending time for payment of principal and interest due on mortgage—Principal and interest treated as one sum with payments to be made thereon by quarterly instalments with interest on that sum—Whether such quarterly payments include payment on account of interest due on original mortgage—Whether agreement evidenced an intention to merge principal and interest into a new debt or obligation which was to extinguish old mortgage debt—Interest payments made to non-resident of Canada—Income War Tax Act, R S C , 1927, c. 97, s. 9B, ss. 2 (b) and s. 84, ss. 1—Liability for tax.*

The action is brought by the Crown to recover from defendant the tax imposed by s. 9B, ss. 2 (*b*) of the Income War Tax Act, on certain alleged payments of interest to a non-resident of Canada, and for interest as provided by s. 84, ss. 1, of the Act.

Defendant is the agent in Canada of the trustees of the estate of the late William Ramsay, in his lifetime a resident of Scotland. Ramsay, in 1912, loaned $200,000 at 5½ per cent per annum on real estate in Toronto, Ontario. Ramsay is now dead and the equity of redemption in the mortgaged premises is owned by Scholes Limited. The trustees in 1932 brought an action for foreclosure and possession of the mortgaged premises. During the course of the action an order of Court was obtained requiring that the judgment be one for sale of the property. On July 1, 1936, an agreement was entered into between the trustees and Scholes Limited which set forth that there was owing the sum of $127,000 for principal and $52,000 for interest, a total of $179,000 on account of the mortgage. The agreement provided that the trustees grant and extend to Scholes Limited "time for payment of the said sum of $179,000, being the consolidated amount of principal money and interest due at the date hereof as follows": $1,000 on 1st October, 1936; $1,000 on 1st days of January, April, July and October in each of the years 1937, 1938, 1939 and 1940; $1,000 on 1st January and 1st April, 1941; the balance of the principal sum on 1st July, 1941. Scholes Limited was to pay interest on the unpaid principal at the rate of 4½ per cent per annum on the 1st day of the months of October, January, April and July in each year. The defendant as agent for the trustees has received $13,000 from Scholes Limited pursuant to the terms of the agreement and interest thereon at 4½ per cent per annum. Defendant has paid income tax on the interest, but has not paid any income tax on the $13,000 or any part thereof. The Crown claims that there is income tax payable on 52/179 of each quarterly payment of $1,000 made under the agreement to defendant as agent for the trustees.

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*Held*: That the undertaking of Scholes Limited to pay interest on interest as per the agreement of July 1, 1936, is not to be construed as evidence of an intention to merge the principal and interest due under the mortgage into a new debt or obligation which was to extinguish or vacate the old mortgage debt.

2. That where a tax is imposed upon what are in substance and in fact interest payments, an obligation to pay interest will not be deemed to have been extinguished and a new obligation substituted therefor except on the clearest of evidence, and that when principal and interest have become mixed, any payments made may be disintegrated to ascertain what portions, if any, of such payments were on account of capital and what were on account of interest.

3. That some payment on account of interest was included in the quarterly payments made and defendant is liable for the tax thereon.

INFORMATION exhibited by the Attorney-General of Canada to recover from the defendant the tax and interest alleged due to the Crown under the provisions of the Income War Tax Act, R.S.C., 1927, c. 97, s. 9B, ss. 2 (*b*) and s. 84, ss. 1.

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

*F. P. Varcoe, K.C.*, and *H. H. Stikeman* for plaintiff.

*E. G. McMillan, K.C.*, and *R. J. Dunn* for defendant.

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

THE PRESIDENT, now (April 24, 1942) delivered the following judgment:

This is an Information exhibited by the Attorney-General of Canada, seeking recovery from the Toronto General Trusts Corporation of the tax imposed by s. 9B, sub-s. 2 (*b*) of the Income War Tax Act in respect of certain alleged payments of interest made to a non-resident of Canada, and for interest at the rate of 10 per cent. per annum as provided by s. 84, sub-s. 1, of the Act. No *viva voce* evidence was heard and the matter was presented to the Court by means of a Special Case prepared and agreed upon by the parties to the action.

The defendant is the agent in Canada of the trustees of the estate of the late William Ramsay of Scotland, a person within the terms of sub-s. (*h*) of s. 2 of the Income War Tax Act and a non-resident of Canada.

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William Ramsay, in 1912, laid out $200,000 at $5\frac{1}{2}$ per cent. per annum by way of mortgage on certain lands and premises in the City of Toronto. The mortgagor was one, Benjamin Harding Bramble. Ramsay is now dead and the defendant is the agent of the trustee of Ramsay's estate. The equity of redemption in the mortgaged lands is now claimed by a corporation known as Scholes Limited (hereafter called "Scholes") through transfer to it, in 1924, of the mortgaged premises by the purchaser thereof from the original mortgagor.

In 1932 an action for foreclosure and possession of the mortgaged premises was commenced in the Supreme Court of Ontario by the trustees of Ramsay's estate; and during the progress of the action an Order of Court was obtained requiring that the judgment be one for sale of the property rather than foreclosure. The judgment, dated April 27, 1932, directed that Scholes deliver immediate possession of the premises to the plaintiffs in the action and that the premises be sold, unless Scholes paid the sum of $141,665.83 before October 28, 1932. This sum was not paid but the sale was not proceeded with and the whole matter was held in suspension until May, 1936, when Scholes, not wishing to be held in continual default under the judgment, proposed a method of consolidation and capitalization of interest and principal then owing. Accordingly on July 1, 1936, an agreement was entered into between the trustees of Ramsay's estate and Scholes which recited *inter alia,* that on that date there was unpaid under the said mortgage, the sum of $127,000 for principal and $52,000 for interest, altogether $179,000; and it provided that the trustees grant and extend to Scholes "time for payment of the said sum of $179,000, being the consolidated amount of principal money and interest due at the date hereof as follows":—$1,000 the first day of October, 1936; $1,000 on the first day of the months of January, April, July and October in each of the years 1937, 1938, 1939 and 1940; $1,000 on the first day of January and April in the year 1941; and the whole balance of the said principal sum on the first day of July, 1941, Scholes "in the meantime and until final payment of the principal money paying interest on the unpaid principal quarterly on the first day of the months of October, January, April and July in each year at four and one-half per cent. per annum, as well after as before maturity".

The agreement provided that if at any time during the said term Scholes should make default in payment of the interest secured by the mortgage, or any part thereof, or in performance of any of the covenants contained in the said mortgage, the extension granted by the agreement should become void, if the trustees did so elect. The Special Case states (Par. 13) that "no default has been made in any of the payments provided for in the said new agreement and therefore no election has been made by the Executors that it became void". Therefore, the agreement is in full force and effect and the defendant, as agent for the trustees of Ramsay's estate, has received from Scholes the sum of $13,000, pursuant to the terms of the agreement. The defendant has also received from Scholes on the said quarterly dates interest at the new rate of $4\frac{1}{2}$ per cent. per annum on the principal instalments from time to time remaining due and has paid income tax on that interest, but has not paid any income tax on the said sum of $13,000 or any part thereof.

The Crown claims that there is income tax payable on 52/179 of each quarterly payment of $1,000 made under the agreement to the defendant as agent for the trustees; that is to say, that that fraction represents the amount of interest that was received by the defendant on account of the original mortgage loan; and it is agreed that if the defendant is liable for the tax as claimed by the Crown, then the said fraction of the said quarterly payments received by the defendant, is the amount subject to the tax claimed.

The defendant contends that the interest of $52,000 owing on account of the original mortgage loan was merged in the single amount represented by the judgment, and that in any event any interest then outstanding was intended by the parties to be and was consolidated and capitalized for all purposes by and as of the date of the agreement, and that therefore the amount of $179,000 is new principal or capital; and that the whole of each of the said quarterly payments, amounting to $13,000, is a repayment of capital.

As a dispute on construction arises here on the meaning of certain words or phrases in the agreement entered into between the trustees of Ramsay and Scholes it may be

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desirable to quote the exact language of certain paragraphs of the same. Passing over several of the earlier recitals of the agreement it proceeds to state:

And whereas, the party hereto of the Second Part has applied to the parties of the First Part to extend further the time for payment upon the terms hereinafter set forth which the parties of the First Part have agreed to do on the express condition that should default be made in the payments hereinafter provided for this agreement shall cease to have effect and the parties of the First Part shall be entitled to exercise all rights under the said Judgment and Final order of sale as if this agreement had not been executed;

And whereas, there still remains unpaid under the said mortgage the sum of one hundred and twenty-seven thousand dollars for principal and the sum of fifty-two thousand dollars for interest up to the date of this agreement;

Now this indenture witnesseth that in consideration of the premises and the sum of one dollar to them paid by the said party of the Second Part they the said parties of the First Part do subject to the terms hereinafter set forth grant and extend to the said party of the Second Part time for payment of the said sum of one hundred and seventy-nine thousand dollars being the consolidated amount of principal money and interest due at the date hereof as follows: . . . , with the privilege to the party hereto of the Second Part to pay without notice or bonus any further sum in even multiples of one hundred dollars on account of principal upon any interest day, the said party of the Second Part in the meantime and until final payment of the principal money paying interest on the unpaid principal quarterly on the First day of the months of October, January, April and July in each year at Four and one-half per cent per annum, as well after as before maturity. The first of such quarterly payments of interest to be made on the First day of October, 1936.

The said party of the Second Part doth hereby covenant with the said parties of the First Part to pay said principal money and interest at the rate and in manner hereinbefore mentioned, and to well and truly keep, observe, perform and fulfill all the covenants, provisoes and agreements in said mortgage contained and to keep the said principal money until the expiration of the said extended term.

And it is expressly declared and agreed that if at any time during the said term the said party of the Second Part shall make default in payment of the interest secured by the said mortgage, or any part thereof, or in the performance of any of the covenants contained in said mortgage, the extension hereby given shall, if the said parties of the First Part so elect, become void, and the said principal money and every part thereof shall become due and payable, and the said parties of the First Part shall be at liberty to take any proceedings they may see fit for the purpose of enforcing payment of the said principal and interest, or of the interest only and performance of the said covenants or to proceed under the Judgment and Final Order of sale hereinbefore referred to in like manner as if these presents had not been executed.

It is hereby agreed and declared that nothing herein contained shall in any way affect or prejudice the rights of the said parties of the First Part as against the said party of the Second Part, its successors and assigns, or as against any party to the said mortgage or as against any surety or other person whomsoever for the said mortgage debt or any part thereof or as against any collateral which the said parties of the First Part may now or hereafter hold against the said mortgage debt or any part thereof.

The foregoing will reveal the point at issue between the parties and there is no other matter in controversy. So the neat point before the Court raised by the Special Case is: does interest on a mortgage loan in arrear lose its identity as interest and become principal by a declaration that it be capitalized with the amount due for principal on account of the mortgage when an agreement is entered into providing for an extension of the time for payment of both interest and principal and varying the method of payment of the original loan?

Section 9B, sub-s. 2 (*b*) of the Income War Tax Act reads:

> In addition to any other tax imposed by this Act an income tax of five per centum is hereby imposed on all persons who are non-residents of Canada in respect of (*b*): All interest received from or credited by Canadian debtors, if payable solely in Canadian funds, except the interest from all funds of or guaranteed by the Dominion of Canada.

And sub-s. 8 reads:

> Whenever an agent of a non-resident person receives payment of any interest or dividends taxable under this section from which the tax has not been withheld, such agent shall withhold the tax from his principal and remit the same to the Receiver-General of Canada.

I need not traverse the arguments of counsel at any length as the course they would take would readily be conjectured from my reference to the Special Case and the agreement between the trustees and Scholes. Mr. Varcoe contended that a debt for interest cannot be extingished unless it is plain that the liability therefor has been replaced by another liability which was of a capital nature and not a payment of interest, or, unless the liability for the interest debt was extinguished by a *bona fide* payment in money's worth received in satisfaction of interest payable under the original obligation. In this connection he referred to the case of *Cross* v. *London & Provincial Trust Ld.* (1), where the Brazilian Government having suspended interest payments upon certain bonds had issued funding bonds in lieu of unpaid interest to bond holders and it was held that the issue of the funding bonds was the issue of a capital asset and not a payment of interest and therefore not taxable. Another case to which Mr.

(1) (1938) 1 A.E.R. 428.

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Varcoe referred was *Re White Star Line Ld.* (1), where it was held that what were called "deferred creditors' certificates" did not constitute a valid release of a claim made by the liquidator of the White Star Line upon the Royal Mail Steam Packet Company (also in liquidation), the holders of shares in the White Star Line, as contributories in respect of such shares, on the ground that upon the particular facts of the case there was no payment in money's worth of the calls upon the shares and that the consideration for the release was illusory and did not amount to a payment under the Companies Act. Then reference was made to the case of *Lord Howard De Walden* v. *Beck* (2), in which it was held that payments made by a company, under a written obligation which contained no reference to interest or any rate of interest might be disintegrated to ascertain what part of such payments represented capital and therefore tax free and how much represented interest and therefore liable to the tax. This was done in that unusual case, and the taxpayer was held liable for the income tax upon such part of the payments as were held to represent interest. The case of *In re Middlesborough & Building Society* (3) might usefully be referred to as being against the proposition that where principal and interest are mixed together they must both be treated as capital.

Mr. Varcoe referred to two other cases, which cannot be readily abbreviated, and the first to be mentioned is *In re Craven's Mortgage* (4). Craven was indebted to one Lewis in a large sum of money but being unable to pay the same it was agreed by a memorandum of August 10, 1887, that payment should be postponed. Then, by a mortgage of June 1, 1888, in consideration of the sum of £18,042 then owing, Craven covenanted that on his death or on his son's death, whichever event should first happen, he, or his executors, would pay to the mortgagee the principal sum secured, together with simple interest thereon at the rate of 5 per cent. per annum, reckoned from August 10, 1887, up to the time of such death, and, if the aggregate amount of such sum and interest or any part thereof should not then be paid and in such case and so long as the same aggregate sum or any part thereof should remain unpaid,

(1) (1938) 1 A E R. 607.
(2) (1940) 23 T.C. 384.
(3) (1885) 53 L T R 492.
(4) (1907) 2 Ch. D. 448

would pay to the mortgagee interest for the said aggregate sum or for the unpaid part thereof for the time being, at the rate of 5 per cent. per annum by equal half-yearly payments. Craven predeceased his son. At that date the simple interest at 5 per cent. per annum from August 10, 1887, calculated on the principal due, amounted to £15,937, without making any deductions for income tax. Craven's executor paid to Lewis's executors interest at 5 per cent. on the aggregate amount of principal and interest, then amounting to £32,479, after deducting income tax. The executor of Craven now proposed to pay off the aggregate amount due on the mortgage, but he claimed the right in doing so to deduct income tax on the £15,937 which represented interest, on the ground that the mortgage deed did not effect a capitalization of that interest in any sense which would discharge the covenant to pay interest. It was held by Warrington J. that the interest had not been capitalized by the contract between the parties, and that the mortgagor's executor was entitled to deduct income tax. The other case was *In re Morris* (1), in which the *Craven* case was followed and approved. By deed dated June 6, 1898, some of the then next of kin of a lunatic, for valuable consideration, conveyed by way of mortgage their expectancies in the estate of the lunatic to an insurance society subject to redemption on payment to the society of £40,000 at any time after the death of the lunatic with compound interest thereon at the rate of 4½ per cent. per annum with annual rests. The mortgage may be shortly stated in these terms—that in consideration of £20,000 paid to the mortgagors by the mortgagees, subject to redemption on payment by the mortgagors at any time after the death of the lunatic to the insurance society of the sum of £40, 000 with compound interest on the same at the rate of 4½ per cent. per annum from the day of the death of the lunatic, with yearly rests. In consideration therefore of an advance of £20,000 the mortgagors were to pay £40,000 on the death of the lunatic; and if that £40,000 were not then paid, compound interest at the rate of 4½ per cent., with yearly rests, was to be paid from that date. The question to be decided was stated by Lord Sterndale M.R. to be this:

(1) (1922) 1 Ch. D. 126.

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On payment off of the mortgage the mortgagors seek to deduct income tax upon the amount of the interest from the date of the death of the lunatic, whereas it is contended by the mortgagees that that amount cannot be deducted, but that all that can be deducted is the tax upon the interest for the last year, if that were paid in the last year, because it is contended that the meaning of the words "compound interest" is that at the end of each year, when the rest is taken, any interest which is overdue at that time, at once becomes capital for all purposes, and therefore when it is paid to the mortgagees it is a repayment of capital, and not a payment of interest. The question is whether an amount which is equal to a number of years' interest until then unpaid, is "interest of money, whether yearly, or otherwise, or any annuity, or other annual payment", within the meaning of the Income Tax Act (1). If it be, then income tax is payable upon it, and if the income tax is payable upon it, the mortgagors, when the money comes to be paid over would be entitled to deduct this tax.

It was held by the trial judge that the mortgagees were entitled to deduct income tax from the annual payments of interest on the mortgages, and it was held by the Court of Appeal that the case was rightly decided. Lord Sterndale M.R. in his judgment discusses at some length the meaning to be attached to the words "compound interest" and this discussion he concludes thus:

I think that the word "capitalization" used in many of the books quoted is a convenient word, but for the purpose for which it has been used in the argument before us it is a fallacious word, because it is taken as referring to capitalization for all purposes, income tax and otherwise. I do not think that is the meaning of the word In my opinion—not to beg the question—when these sums of interest come to be paid at the end of the time when payment is made, although interest has been charged upon them, and although, as a matter of bookkeeping, they have from time to time been added to capital, they do not cease to be interest of money—that is to say, they are overdue interest upon which interest has been paid.

I should perhaps here add that Mr. Varcoe discussed many other authorities but it is not my intention to make reference to them.

The question here to be determined does not lend itself to any extended discussion, and my opinion of it, whether right or wrong, may be stated in comparatively short terms. It seems to me that it is the agreement that affords the foundation for any conclusion to be reached. In the first place the agreement between the trustees and Scholes was essentially one for the extension of the time for payment of the sums due for principal and interest under the mortgage, with a modification of the interest rate. I cannot but feel that if the agreement were intended

(1) (1918) Sch. D., Case III, r. 1 (*a*).

by the parties to represent what was so ably argued by Mr. McMillan, a consolidation of the principal and interest due under the mortgage and the creation of a new mortgage loan principal, altering the effect of the Judgment and Final Order of sale which was to stand as if the agreement had never been executed, it would have been so easy to have expressed that intention in clear and unequivocal language. The language of the agreement is far from showing a clear intention by the parties to make what is claimed to be virtually a new mortgage contract. It is true that the agreement does state that the sum of $179,000 is "the consolidated amount of principal money and interest due at the date hereof". The word "consolidated" was a convenient word to employ but, I think, it was only intended to mean that the extension of the time for the payments, due under the mortgage, applied to both principal and interest; and, therefore, it was convenient to state the aggregate amount in that way; and also because under the terms of the extension a new rate of interest was being established for the balance due and owing on the date of the quarterly payments. The word "aggregate" might have been used just as well as the word "consolidated", and it would, I think, have more accurately expressed just what was in the minds of the parties. Then it is stipulated that the terms of the agreement were not to prejudice the rights of Ramsay's trustees as against any party to the mortgage, and that, in case of default by Scholes, the trustees were at liberty to "proceed under the Judgment and Final Order of sale hereinbefore referred to in like manner as if these presents had not been executed." I do not think that the undertaking on the part of Scholes to pay interest upon interest can be construed as evidence of an intention to merge the principal and interest, due under the mortgage, into a new debt or obligation which was to extinguish or vacate the old mortgage debt. On the whole I think the agreement was not intended to mean or effect what is claimed here on behalf of the defendant; and I think that the agreement is the controlling factor in the controversy, and not particular words used in the Special Case, for example, the words " . . . . and that the interest and principal then owing to be consolidated for all purposes . . .", used in one paragraph of the Special Case. Whatever con-

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struction is to be put on those words I do not think there was any warrant for their employment in the Special Case, particularly the words "for all purposes". I think the Court can look only to the agreement to ascertain what was the purpose and intent of the agreement between the parties.

The authorities to which I have referred, and others which I have not mentioned, indicate that the Courts have been astute in holding, in cases where a tax is imposed upon what are in substance and in fact interest payments, that an obligation to pay interest will not be deemed to have been extinguished and a new obligation substituted therefor, except upon the clearest of evidence, and that when principal and interest for some cause or other have become mixed up, any payments made may be disintegrated to ascertain what portion, if any, of such payments were on account of capital and what were on account of interest. Here, there can be no doubt but that some payment on account of interest was included in the quarterly payments made, and that fact cannot, I think, be altered or defeated in so far as the income tax here in question is concerned. And the trustees could lawfully have appropriated the whole of the payments made in liquidation of any overdue interest under the mortgage; but there is no evidence one way or the other how these payments were treated in the books of the trustees.

My conclusion is that the Crown must succeed and is entitled to the amounts claimed, and to the costs of this proceeding.

*Judgment accordingly.*

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Sept. 11 & 12.

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May 11.

BETWEEN:

HIGHWOOD-SARCEE OILS LIMITED... APPELLANT;

AND

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

*Revenue—Income tax—Limited company—Objects of incorporation—Trade or business—Capital losses—Profits from investments—Income—Income War Tax Act, R.S.C., 1927, c. 97, secs. 3 & 6—Liability for tax—Appeal from decision of Minister of National Revenue dis-*

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*missed—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income."*

Appellant company was incorporated for the purpose, *inter alia*, "to search for and recover and win from the earth petroleum, natural gas, oil, salt, metals, minerals and mineral substance of all kinds" . . . It also was authorized "to purchase, underwrite, guarantee the principal and interest of, subscribe for and otherwise acquire and hold and vote upon the shares, debentures, debenture stock, bonds or obligations of any company" . . .

Appellant from time to time acquired leases of oil lands in its own name but never drilled oil wells itself or developed such leases. It purchased shares of a company of which it later secured complete control. It also purchased shares in and loaned money to other companies. These latter investments proved losses for appellant.

In 1933, appellant entered into an agreement with certain parties whereby appellant advanced the sum of $60,000 for the drilling of an oil well on the understanding that appellant would receive back out of production of the well the money advanced by it and also acquire a 65 per cent interest in the well, its production and equipment This venture proved successful and appellant received in the taxation year 1935, the sum of $70,896 13 in cash, as the net proceeds of production of the well.

Appellant filed a return for the taxation year 1935 It deducted from receipts the amount of the losses incurred in its former ventures These deductions were disallowed by the Commissioner of Income Tax, whose assessment was affirmed by the Minister of National Revenue and an appeal was taken to this Court.

*Held*· That appellant was carrying on, in the material period, a trade or business within the terms of s. 3 of the Income War Tax Act, and that trade or business was one within the purposes and objects for which it was incorporated.

2 That the losses which appellant claims to set off against profits are capital losses and not expenditures incurred for the purpose of earning the income within the meaning of the Income War Tax Act.

3. That such losses are not deductible in arriving at appellant's taxable income and appellant is therefore liable for income tax.

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

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

*H. S. Patterson, K.C.* and *E. D. Arnold* for appellant.

*C. J. Ford, K.C.* and *A. A. McGrory* for respondent.

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

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THE PRESIDENT, now (May 11, 1942) delivered the following judgment:

This is an appeal from a decision of the Minister of National Revenue (hereafter called "the Minister"), affirming an assessment made by the Commissioner of Income Tax upon the appellant, Highwood-Sarcee Oils Limited, in respect of income tax for the taxation year 1935, under The Income War Tax Act. The appellant was assessed for the said taxation period on a taxable income of $30,254.94, and the tax thereon was fixed at $4,538.24, together with interest in the sum of $350.50, altogether $4,888.74. The taxable income of the appellant was arrived at after disallowing certain amounts which the appellant claimed as deductible items in computing its net income for the year 1935.

The appellant, in its statement of claim, raised certain points, all of which were contested by the respondent in his statement of defence. Paragraphs 5, 6 and 7 of the statement of claim were abandoned at the hearing of the appeal by counsel for the appellant. The subject-matter of the appeal was therefore narrowed down to the one question as to whether the appellant was properly assessed as a corporation engaged in the development of prospective oil properties in Western Canada, or, whether it should be considered as "carrying on the business of financing other concerns engaged in or interested in the development of prospective oil properties and in trading and dealing in oil lands, leases, oil stocks, and other properties and securities", as alleged in paragraph 3 of its statement of claim, and therefore allowed to set off against profits any losses sustained as a result of such operations.

The Minister in affirming the assessment in question did so on the ground "that the expenditures representing development prior to the commencing of the 1935 accounting period and investments in shares of and advances to other companies and persons were not expenditures of the taxpayer wholly, exclusively and necessarily laid out or expended for the purpose of earning its income, but were in fact capital in their nature, specifically disallowed for income tax purposes under the provisions of section 6 and other provisions of the Income War Tax Act."

The appellant company was incorporated on June 7, 1928, by letters patent, issued by the Secretary of State of Canada. The principal purposes and objects for which the company was incorporated are set out in paragraph 1 (*a*) of the letters patent. They are as follows:

1. (*a*) to search for and recover and win from the earth petroleum, natural gas, oil, salt, metals, minerals and mineral substance of all kinds, and to that end to explore, prospect, mine, quarry, bore, sink wells, construct works or otherwise proceed as may be necessary to produce, manufacture, purchase, acquire, refine, smelt, store, distribute, sell, dispose of and deal in petroleum, natural gas, oil, salt, chemicals, metals, minerals and mineral substances of all kinds, and all products of any of the same, to trade in, deal in and contract with reference to lands and products thereof, or interests in land, mines, quarries, wells, leases, privileges, licences, concessions and rights of all kinds covering, relating to or containing or believed to cover, relate to or contain petroleum, natural gas, oil, salt, chemicals, metals, minerals or mineral substances of any kind;

For the purpose of considering the specific issue here raised it might be well to quote also paragraph 3 (*k*) of the letters patent. It reads:

3. (*k*) To purchase, underwrite, guarantee the principal and interest of, subscribe for and otherwise acquire and hold and vote upon the shares, debentures, debenture stock, bonds or obligations of any company or of any principal, public or other authority in the Dominion of Canada, the United Kingdom or elsewhere, and upon a distribution of assets or division of profits to distribute any such shares, stocks, bonds or obligations amongst the members of this company in specie, and to promote any company or companies, either in the Dominion of Canada, the United Kingdom or elsewhere, for the purpose of its or their acquiring all or any of the property, assets, rights and liabilities of the company, or for any other purpose which may seem directly or indirectly calculated to benefit the company, and to pay all or any of the expenses in connection with such promotion.

The letters patent states that "the capital stock of the said company shall consist of two million (2,000,000) shares without nominal or par value, subject to the increase of such capital stock under the provisions of the said Act; provided, however, that the said shares may be issued and allotted for such consideration as may be determined from time to time by the Board of Directors, not exceeding in the aggregate the sum of two million ($2,000,000) dollars or its equivalent."

The appellant began business shortly after its incorporation and, from time to time, acquired leases of oil lands in its own name but never drilled oil wells itself or developed such leases. The first venture of the appellant was to purchase shares in a company known as Highwood Petroleum & Natural Gas Company, Limited. Later on the appellant obtained control of this company. The agreement entered

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into between the appellant and this company was evidenced by a written document, dated May 15, 1930. It provided in clause 1 that: "The Old Company (Highwood Petroleum & Natural Gas Company, Limited), shall transfer, assign, set over and deliver to the New Company (Highwood-Sarcee Oils, Limited, the appellant) all its petroleum and natural gas leases, rights and concessions and all other of its properties, rights and other assets whatsoever and wheresoever situate, including all moneys and securities held by it or to which it is entitled, and the full benefit of all contracts and engagements to which the Old Company is or may be entitled." The consideration was the issue to the Old Company of certain fully paid shares of the capital stock of the appellant company and the assumption by the latter company of the liabilities of the former company, as of the date when the agreement was approved by the Old Company. The agreement also provided for the exchange by shareholders of the Old Company of their shares in that company for shares in the appellant company on the basis set out in the agreement.

The appellant also made an agreement with a company known as Western Alberta Oil Company, Limited, as evidenced by a written document dated April 11, 1930. This agreement was made between Western Alberta Oil Company, Limited, of the first part, Highwood-Sarcee Oils, Limited, of the second part (the appellant company), Clark, Martin & Company, Limited, of the third part, and William Martin Jr. of the fourth part. Counsel for the appellant referred to this agreement as a loaning agreement whereby appellant loaned $15,000 to Western Alberta Oil Company, Limited. It will be well to set forth the operative clauses of this agreement. After the introductory clauses have recited certain facts, and that William Martin Jr. held an option from Western Alberta Oil Company, Limited, to purchase from the said company 116,919 shares of its capital stock, it goes on to say:

Now therefore in consideration of the premises, and the sum of $15,000 now paid by Highwood-Sarcee Oils, Limited, to Western Alberta Oil Company, Limited, the receipt of which sum is hereby acknowledged, it is mutually agreed between the Parties hereto as follows:—

(1) Western Alberta Oil Company, Limited, shall forthwith issue and deliver to Highwood-Sarcee Oils, Limited, 50,000 fully paid up shares of its capital stock, being part of the aforesaid option held by William Martin, Jr., and the said William Martin, Jr., hereby consents to the

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said 50,000 shares being issued and delivered to Highwood-Sarcee Oils, Limited, on account of the aforesaid Option, held by him from Western Alberta Oil Company, Limited.

(2) William Martin, Jr., covenants to and with the Parties hereto to forthwith pay to Western Alberta Oil Company, Limited, the sum of $15,000 in consideration of the said Western Alberta Oil Company, Limited, issuing and delivering to him 50,000 fully paid up shares of its capital stock, the same being issued on account of the aforesaid Option.

(3) William Martin, Jr., and Clark, Martin & Company, Limited, hereby covenant with Highwood-Sarcee Oils, Limited, that the total liabilities of Western Alberta Oil Company, Limited, as of this date do not exceed the sum of $14,000 and that Calgary & Edmonton Corporation, Limited will forthwith issue to Western Alberta Oil Company, Limited, a Lease covering the Petroleum and Natural Gas Rights in the following lands and premises, namely,—Legal Sub-divisions Eleven (11) to Sixteen (16), in Section Seven (7), Township Seventeen (17) and Range Two (2), West of the Fifth Meridian, and the East Half of the North East Quarter of Section Seven (7), Township Sixteen (16) and Range Two (2), West of the Fifth Meridian, being a total of 320 acres, in form and subject to conditions satisfactory to Highwood-Sarcee Oils Limited.

(4) William Martin, Jr., hereby gives to Highwood-Sarcee Oils, Limited, an irrevocable option to purchase from him 50,000 fully paid no par value shares of Western Alberta Oil Company, Limited, at the price of thirty cents per share at any time within two months after petroleum or natural gas has been struck in commercial quantities on any of the aforesaid land.

(5) Western Alberta Oil Company, Limited, covenants with Highwood-Sarcee Oils, Limited, that Highwood-Sarcee Oils, Limited, shall have the right to appoint two of the Directors to the Board of Western Alberta Oil Company, Limited.

(6) Clark, Martin & Company, Limited, and William Martin, Jr., each covenant with Highwood-Sarcee Oils, Limited, that on the breach of any of the covenants herein by any of the Parties hereto that they will repay to Highwood-Sarcee Oils, Limited, the sum of $15,000 paid by it to Western Alberta Oil Company, Limited, on delivery to either or both of them of 50,000 fully paid no par value shares of Western Alberta Oil Company, Limited.

This agreement is not a loan agreement at all. It provides for the outright purchase of 50,000 shares of Western Alberta Oil Company, Limited, by appellant for $15,000 in cash. There was no obligation whatever for repayment to the appellant of that amount. This was a straight capital investment made by the appellant but which turned out to be a loss. Any attempt, in 1935, to write off this loss against income of that year would therefore appear to be wholly untenable.

The appellant also advanced the sum of $500 to a company known as the Signal Hill Company. It, also, in 1933, bought shares in and made advances to a corporation known as Pine Hill Petroleum, Limited, in the aggregate

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amount of $56,511.28, and consequent upon this venture the appellant, in 1933, also advanced to a company known as Sheldon Burden of Canada, Limited, the sum of $2,500.

We may now turn to the appellant's balance sheet, as of June, 1935, and there we find that the appellant purports to write off and deduct from revenue the investments made and moneys advanced by it in some of the ventures outlined above, namely: Pine Hill Petroleum, Limited, $56,511.28, Western Alberta Oils, Limited, $15,000, and Sheldon Burden of Canada, Limited, $2,500, altogether $74,011.28. The appellant takes the position, on the ground I have already explained, that it is entitled to set off these amounts, which it considers as investment losses, against any revenue received by it during the taxation year in question.

We may now consider the source of the appellant's revenue for the taxation period in question. On July 20, 1933, a written agreement was entered into between T. O. Renner, S. J. Davies and C. H. Snyder, therein called "the Operators", of the one part, and the appellant company, therein called "the Company", of the other part. This agreement may be summarized by saying that the Company made available to the Operators, upon terms and conditions, $60,000 for the purpose of drilling a well on a lease which the Operators had secured from the trustee of a bankrupt. The Company was to be paid back the said $60,000 out of production and to receive a 65 per cent. interest in the well, its production and equipment. There are clauses in the agreement providing for the payment of prior charges, the termination of the agreement, and so on, but these provisions are unimportant. It is to be noted, however, that the Operators were to assign to the Company an undivided 65 per cent. interest in the lease. This venture proved successful and a producing well resulted which became known as Highwood-Sarcee Well No. 1. The lease also provided for participation by the Operators and the Company in drilling further wells if desired.

The appellant company also sold some of its securities from time to time and reinvested the proceeds in other bonds and securities, sometimes profiting from the transactions and, at other times, losing. It also renewed from time to time oil leases that it held, and dropped other leases which it considered not worth holding, thereby saving rental charges,—all of which would be the usual course pursued by any other company similarly situated or engaged. The appellant received according to the evidence of the auditor of the appellant company, in the taxation year 1935, the sum of $60,000, the amount advanced under the agreement with Renner et al., and in addition the sum of $10,896.13. These amounts, totalling $70,896.13, were received in cash as the net proceeds of production of the Highwood-Sarcee Well No. 1. It is against this income that the appellant seeks to set off the losses of $74,011.28, which I have already mentioned. The appellant had not been in receipt of any revenue or earnings prior thereto, except for any interest it had derived from investments. It will be observed therefore that the appellant claims it had sustained a deficit in its operations for the taxation period in question.

The reports of the directors of the appellant company to the shareholders thereof should be of some significance here. The directors' report submitted to the shareholders at its annual meeting of October 27, 1932, contains the following paragraph:

> The policy of your Directors has been to keep in touch with and carefully examine all likely oil development work within the Province and keep the expenditures within its income, so that the capital of the Company will not be depleted. Following this policy, examinations and investigations have been made in connection with the following areas:
> . . . . .

This report contains a reference to an area known as Two Pine structure and it reads as follows:

> The chief operations of the Company over the past year have been carried on in this area. For the purpose of assisting in intensive geological examination of the area considerable trenching and pit-digging was carried out in the Fall of last year and the early Spring of this year. This work was done under the supervision of our own Geologist, Dr. Willis, in co-operation with the Geological Survey Staff of the Dominion Government. When this work was completed Dr. Willis prepared as complete a report as he was capable of from surface geology, but in view of the information obtained from the results of the operations so far carried forward at the Cotton Belt, Elbow Oils and Signal Hill Wells, some doubt as to proper interpretation of the structural conditions maintained and it was strongly recommended that we endeavour to arrange for a Seismograph Survey to be made of the area under observation. This meant bringing a Seismograph Survey party and outfit in from the States. After considerable negotiations, arrangements were made to do this in conjunction with the Nordon Company. The Seismograph Survey party is now in the field and the results of their work and report will have a large

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bearing on the immediate further work of the Company in this neighbourhood. It is hoped that arrangements can be made to have this outfit make a report on the Company's holdings in the Highwood and Sarcee Reserve as well as on the Two Pine, but this will be largely dependent on weather conditions, and the success of the work as it proceeds.

The report of the directors submitted at the annual meeting of the shareholders held on October 30, 1933, contains the following:

In regard to the policy of the Company, it will be recalled by the shareholders who have followed the history of the Company with interest, that previously care had been taken to conserve the liquid assets of the Company, whilst at the same time investigating all prospects of a promising nature in various fields where tests for oil and gas were either being conducted or where there was reasonable promise of profitable operations. During the year previous to the one under review there were many such propositions investigated and reported upon. It was felt, however, that the time had arrived when the Company should go into activity and with that in view, after many further offerings had been considered and analysed, your directors decided to enter into agreements for two distinct enterprises.

One was a proposition to become interested with the lease owners of the NE. ¼ of Section 21, Township 18, Range 2, West of the 5th Meridian, being in the South end of Turner Valley, with the object of drilling a well thereon.

The other was concerned with the acquisition of rights in approximately 12,000 acres in Southern Saskatchewan known as the Dirt Hills area upon a structure which had been surveyed geologically by several authorities on different occasions and highly recommended.

The commitment of the Company in connection with the NE. ¼ of Section 21, in the South end of Turner Valley is an amount of $60,000, and your Directors see no reason why this sum will have to be exceeded.

The commitment in connection with the well at Avonlea, Saskatchewan, will involve the Company ultimately in a sum of from $30,000 to $35,000, for which the Company expects to hold its present controlling interest in Pine Hill Petroleum, Limited, the Company which owns the well and acreage. In this connection there is a Turnkey Contract with Sheldon Burden of Canada, Limited.

The wells in both the above areas are progressing satisfactorily and a successful and profitable outcome is the hope of your Directors. The depth of the well in Turner Valley on Saturday, the 28th inst., was 1,685 ft., the Benton contact having been passed at 520 feet. The depth of the Saskatchewan well was 2,217 ft. on Saturday, and there have been several showings of gas that have been tested out during the drilling.

Your Directors have in view that, having regard to the present condition of the Company and value of its liquid assets, the present commitments of the Company will leave a substantial sum in the treasury.

In the report of the Directors last year you were informed that arrangements had been made in conjunction with the Nordon Company to bring in to this district a Seismograph Survey party and outfit, in order that some testing by this method might be made to confirm the findings of the geologists who had previously gone over the structures in which the Company is interested. These arrangements were eventually carried out and reports were made and data furnished by the seismograph party, which, so far as the Southern Saskatchewan area is concerned, were entirely confirmatory of previous reports of geologists, and which furnished a substantial recommendation for the drilling of a test well in the area mentioned. This may fairly be said to have been the deciding factor upon which your Directors proceeded to make the arrangements for the investment in the Dirt Hills well and acreage.

With regard to the Two Pine area, the Seismograph Operator who was in charge reported that the results obtained only served to show that his apparatus was not able to furnish reliable data and results owing to the peculiarly faulted and disturbed nature of the strata in the foothills area.

It may be mentioned that a somewhat similar result was reported from an attempt made by the Seismograph party to make determinations in the Southern end of the valley. Your Directors consider it of the highest importance that the tests made by the Seismograph Apparatus, which is considered to be the last word in scientific sub-surface surveying, and which has been eminently successful in prairie structures in the United States of America, was available for use in Southern Saskatchewan area.

The report of the directors submitted at the annual meeting of August 22, 1934, contains the following:

The inclusion in the current assets of the actual expenditures on Highwood-Sarcee Well No. 1 naturally gives a very conservative value to such current assets, and there is no doubt that this item is worth a great deal more to the Company than the figures would suggest.

In regard to development work it is with the utmost satisfaction that your Directors refer to the successful completion of what is known as the Highwood-Sarcee Well No. 1 located on the NE. ¼ of Section 21, Township 18, Range 2, West of the 5th Meridian. This well has now been completed and is definitely ascertained to be capable of producing 500 barrels per day of Naphtha. The production is being marketed under contract to Imperial Refineries for the present.

In this connection there are some deferred liabilities to be paid out of production and these will absorb the proceeds of the production for several months to come. Your Company's position, however, is that it will be repaid its outlay of approximately $60,000, and will then succeed to a 65 per cent. interest in the well and equipment and the lease of the quarter section. This is considered to be a most favourable situation, and your Directors have given very close attention to the whole of the details over the past year. Your Company is sensible of the very able co-operation of its associates in this venture, and particularly appreciative of the expert work of Mr. Clarence Snyder, who was in charge of the operations throughout the whole period of drilling.

With reference to the well in Saskatchewan, this was referred to in your Directors' report of last year and the commitment in connection was mentioned as ranging from $30,000 to $35,000 representing a controlling interest in Pine Hill Petroleum, Limited, the Company which owns the well and controls approximately 12,000 acres in the vicinity. There was a turnkey contract with Sheldon-Burden of Canada, Limited, you were informed. Unfortunately, operations had to be given up at a late date in 1933 owing to severe weather and lack of water, and shortly afterwards disaster overtook Sheldon-Burden of Canada, Limited, of such a nature that it is scarcely hoped the Company will ever revive. The well on shutting down last Fall was approximately 3,000 feet deep, and, as the objective was 4,000 feet, arrangements have been made for a new contract with another drilling company to complete the well. This unfortunate situation has been met by your Directors subscribing for a further block

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of shares in Pine Hill Petroleum, Limited. Work under the new contract is now in full swing. The hole has been cleared out, and on the morning of the 31st of July 400 feet of new hole had been drilled, the depth attained being 3,350 feet.

Your Directors last year informed you of an Agreement with Dr. Robin Willis under which your Company split several of its leases in the Pekisko Hills area and made over some acreage to Dr. Willis on condition that a well would be drilled by him and his associates to prove the area This situation resulted in operations by the Pekisko Hills Company, Limited, which has drilled a well on the acreage adjoining that assigned by your Company, so far successfully to the extent that the well has obtained a depth of 1,400 feet and is certified to be in the limestone formation, with an eight inch hole. It is understood that casing has been cemented in the lime and drilling is proceeding. Considerable gas is flowing from the well and, according to the anticipation of Dr Willis and his associates, it may be reasonably expected that final success will be achieved in the production of oil or naphtha from the limestone in paying quantities. Your Directors feel that in dealing with these leases in the way they have been handled, as outlined, the position of your Company has been considerably improved and strengthened, and its remaining holdings in the Pekisko Hills area very much enhanced in value.

Considerable information is furnished in the auditor's report in regard to leases held by your Company. After extensive negotiation, arrangements regarded by your Directors as being of a favourable nature were made with the Department at Edmonton. The question of these leases is engaging the earnest attention of your Directors at this time and decisions will be shortly made as to the surrender or retention of the various leases held by the Company as a matter of policy.

In regard to the general policy of the Company, your Directors are continuing to investigate every proposition of consequence where tests for oil and gas can be made with fair promise of returns In the immediate future the policy of the Company will be guided in a great measure by the outcome of the operations in Southern Saskatchewan, the facts on which should be available at a relatively early date.

Arrangements have been recently completed with the Stock Exchange in Toronto where Highwood-Sarcee stock is now listed for trading. An application for similar privileges on the Vancouver Stock Exchange has been recently submitted and it is fully expected that as soon as certain details have been approved, your Company's stock will be listed in that City. Arrangements have also been made with the Toronto General Trusts Corporation to act as transfer agents in the Cities of Toronto and Vancouver, and it is felt by these measures that adequate facilities have been provided for the convenience of shareholders and others in regard to the purchase and sale of holdings in the Company.

Then, in the directors' annual report submitted to the shareholders at the annual meeting of the company held on October 7, 1935, we find the following:

During the year of operation covered by the report two outstanding accomplishments are recorded, the first being the completion of the well in Saskatchewan by Pine Hill Petroleum, Ltd, in which concern your Company held a controlling interest, and the second, the recovery of the loan, approximately $60,000, made by your Company to the Highwood-Sarcee Well No 1 undertaking and the placing of your Company in the position of enjoying a majority interest in this producing well, the drilling equipment, and the lease of the quarter section on which the well stands.

The well in Saskatchewan was completed and abandoned in the Fall of last year after every precaution had been taken to exploit all its possibilities. The failure to find gas production was a disappointment to your Directors Since that time good gas production has been found in other parts of Saskatchewan where perhaps the indications were not so favourable for success, and certainly where geology did not give so much encouragement However, the business of gas and oil prospecting to which your Company is committed, is highly speculative, and it is refreshing to turn from the failure, and to survey the brighter side of the picture

The well in Turner Valley, since the last report was before you, has yielded so satisfactorily that it has paid off the deferred drilling charges, and by April of this year had repaid to your Company the whole of the cash advanced for drilling costs, etc. Since that date to the date of the Auditors' Report, revenue to the amount of $10,896 13 had been brought into the Company's treasury flowing from its interest in the production from the well. This is shown in the figures as "Deferred Revenue". Highwood-Sarcee Well No. 1 is standing up reasonably well as a producer, subject to normal depletion, and your Directors are anticipating a favourable future for this well.

Arrangements have recently been completed to participate in the drilling of a further well in Turner Valley. This new well will be known as Highwood-Sarcee Well No. 2, and it will be drilled and operated under similar conditions to those obtaining regarding Well No 1

An agreement has been made with the British American Oil Company, Limited, under which that Company acquires for cash, 30 per cent of the Lessee's interest in the Well, and of the remainder your Company will own 65 per cent, the other 35 per cent being held by the Company's associates in No 1 Well, which associates are bearing their proportion of the cost of drilling the No. 2 Well.

Having carefully considered the position of your Company, your Directors feel that the past year can be regarded as one of progress, and perhaps the most successful year in the history of the Company. At present the recently arranged venture of drilling Highwood-Sarcee Well No 2, gives the Company reasonable expectation of further improving and strengthening its position. Looking to the future, it would appear to be good policy to continue to develop along lines which will keep the Company active in the producing field, and to take every opportunity of investigating new situations of a promising nature.

I have already stated the question for decision here, and the opposing contentions of the parties. These I need not repeat. In all these cases the initial difficulty which presents itself is that the matter for decision is a question of fact. As was stated by the Lord Justice Clerk in the case of *Californian Copper Syndicate* v. *Harris* (1), it is quite a well settled principle in dealing with questions of assessment of income tax, that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than that at which he originally acquired it, the enhanced price is not profit assessable to income tax. He pointed out that it was equally well established

(1) (1904) 5 T.C. 159.

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that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case, the Lord Justice Clerk stated, is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits, which, as I understand it, is the position here claimed for the appellant, and in which cases losses, incurred in the same taxation period, may be set off against gains. The line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts. The question to be determined is whether the sum or gain that has been made is a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making.

In considering such cases it is not sufficient to consider merely what are the powers and objects of the company concerned, though that is of importance, but rather what, in fact, the company was doing in the taxation period in question. That is my apology for quoting at such length from the reports of the directors of the appellant company to its shareholders, in order to ascertain what its real position was.

I may quote from the judgment of the Lord Justice Clerk in the case of the *Californian Copper Syndicate supra,* and this will disclose the facts of that case and what was the opinion of the court upon the point there in issue. He said:—

> This Syndicate was formed with a capital of £30,000, *inter alia,* to acquire copper and other mines, and certain mines named in particular, and to prospect and explore for the purpose of obtaining information, and to enter into treaties, contracts, and engagements with respect to mines, mining rights, and a number of other matters in the United States and elsewhere. It was also to carry on mercantile, commercial, financing and trading businesses, and to work minerals, to establish and form companies for such objects, to subscribe for purchase, or otherwise acquire, shares or stock of any company, and accept payment in shares for properties sold or business undertaken or services rendered, and to hold, sell, or dispose of the same, to promote companies for the purpose of acquiring the undertaking, property, and liabilities of the Company, or carrying on business being conducive of the prosperity of the Company
>
> These are shortly some of the main purposes of the Company, and they certainly point distinctly to a highly speculative business, and the

mode of their actual procedure was in the same direction Of the £28,332 realized by shares which were subscribed for, £24,000 was invested in a copper-bearing field in the United States, and the balance was spent in development of the field and in preliminary and head office expenses.

The Company then were successful in selling the property to the Fresno Company—£300,000 in fully paid up shares being given by the Fresno Company for the property. Although that was a sale, the price to be paid in shares, I feel compelled to hold that this company was in its inception a Company endeavouring to make profit by a trade or business, and that the profitable sale of its property was not a truly substitution of one form of investment for another

It is manifest that it never did intend to work this mineral field with the capital at its disposal. Such a thing was quite impossible. Its purpose was to exploit the field, and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental, but was, as the Lord President put it in the case of the *Scottish Investment Company,* the essential feature of the business, speculation being among the appointed means of the Company's gains.

Another case, which is of some assistance here, is that of *The Commissioners of Inland Revenue* v. *Korean Syndicate Ld.* (1). The head note of this case will sufficiently set out the facts. It reads:

A company was incorporated as a limited company having for its principal object the acquisition and working of concessions and turning the same to account. In 1908 the company entered into an agreement to lease a concession in Korea which it had acquired in consideration of the lessees paying what was therein described as a royalty, but which was in fact a percentage based on the profits made by the lessees. The company also received the interest on a certain sum of money on deposit at a bank. The company's operations were confined to the collection and distribution of these two sources of income and to the payment of the premiums on a sinking fund policy.

It was held, upon the construction of the memorandum and articles and the agreement of 1908 that the company was carrying on the business for which it was incorporated—namely, the acquisition of concessions and the turning of the same to account—and was, therefore, carrying on a business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and was accordingly liable to be assessed to excess profits duty under that Act. The point at issue in this case, and the conclusion reached by the Court of Appeal were clearly stated in one paragraph of the judgment of Atkin L.J., and that is as follows:

Now I quite agree that it does not necessarily follow that because a company is incorporated under the Companies (Consolidation) Act, 1908, it is carrying a business. The Act allows any number of persons

(1) (1921) 3 K.B. 258.

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associated together for any lawful purpose, to be registered in accordance with its provisions, and one knows that a company may be registered for professional purposes, or as what is called in the Act an association for purposes not for gain; but in this case there is a Syndicate formed by an association of persons clearly for a profit, and the purpose for which they are associated is described by it in its memorandum as that (*inter alia*) of acquiring concessions and turning them to account for the purpose of making a profit, which it may distribute amongst its shareholders; and, having taken those powers, it has in fact availed itself of them, and that is the course it has adopted. It has acquired concessions, and it has turned them to account, and the profits that arise in this matter are profits that arise from its so turning them to account. It seems to me that it does not at all matter how it chooses to turn them to account In this case, dealing with the question of the mining, concessions, it has obtained a part share in a very important concession in Korea which gives it the right to prospect over a very large area, and exclusive rights of working minerals within a particular district in that area. That concession it proposed at one time to work itself and with its own capital, and if it had done that, no question at all would have arisen; but after some two or two and a half years it came to the conclusion that it would not be advantageous to it to do so, and it therefore proceeded to do what many persons have done as a matter of business before—namely, instead of working its rights with its own capital, it handed them over to another company to work on the terms that the Syndicate would receive an annual payment. I think it matters very little what that annual payment is called or how it is calculated, and in the case of a company of this kind, to my mind, it would make no difference whether the payment was based upon a calculation of the output or was a mere rent; but in fact in this case the payment is called, in the agreement of March 25, 1908, a sum equal to 8 per cent of the net profit, and in the other part it is called a share of the profits, but whatever way it was, it was the way in which the Syndicate chose to make a profit It made it by turning this concession to account in this way, and it has received annually, and still receives, a regular sum, and that sum, together with the other income that is received from a sum of money that it has made placed on deposit, it distributes as profits, and it distributes them as a dividend among the shareholders on the terms of an article (art. 125) which provides that no dividend shall be payable except out of profits arising out of the business of the company.

I would also refer to the case of *The Commissioners of Inland Revenue* v. *The Budderpore Oil Co. Ltd.* (1), in which the decision of the Court of Appeal in the *Korean Syndicate* case, *supra,* was followed.

Upon the facts here I find no difficulty in reaching the conclusion that the appellant company was in point of fact carrying on, in the material period, a trade or business within the meaning of sec. 3 of the Income War Tax Act, and which trade or business was one within the purposes and objects for which it was incorporated. Where a limited

(1) (1921) 12 T.C p. 467.

company comes into existence for some particular objects or purposes, and if, in fact, it becomes engaged in some or all of such objects or purposes, then, that is a matter to be considered, when you come to decide whether doing that is carrying on an ordinary trading business or not. The account of the activities of the appellant company, as found in the annual reports of its directors to the company's shareholders, would seem to make it quite conclusive, or so it appears to me, that the company was carrying on a trade or business for profit-making. The money invested by the appellant in oil leases was not made primarily with a view to a resale of its interest in the well or wells to be developed, but to something that would produce a revenue to the appellant, and this it did. And it was that alone that earned income for the appellant company. It was only the appellant's money that made possible the successful development of the Highwood-Sarcee Well No. 1, and it purchased a 65 per cent interest in the lease of this property and its equipment. It might have been of interest to have had in evidence the correspondence exchanged between the appellant and the managers of the stock exchanges to whom the former applied for the listing of its shares, to see if they were to be listed as the shares of a trading or business organization, or that of an investment company only. The fact that the appellant associated itself with others in leasing oil lands, or in developing or operating oil lands or oil wells, or that it disposed of some of its interests to others under the terms of an agreement whereby, in certain events, it was to participate in any profits ultimately realized, does not make it any the less a trading or business organization. It is immaterial whether the appellant hired prospecting or drilling crews to work on any of the leases under its control or whether it hired others to do this work. The fate of the ventures in which it placed its funds and lost is of no consequence. The form in which it pleases to deal with any profit is not of importance; that it so deals with it, in some form other than in cash, would not affect the claim of the taxing authorities for the tax payable on such profit, if any. This is, I think, a case where the appellant was engaged in a trade or business for the purpose of profit-making, and any profit made is subject to the tax. The losses made, and which the appellant claims to set off against

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profits, were, I think, clearly capital losses, and not expenditures incurred for the purpose of earning the income, within the meaning of the Act, and are not therefore admissible as deductions. The appeal must therefore be dismissed and with costs.

*Judgment accordingly.*

BETWEEN:

FIBERGLAS CANADA LIMITED.......PLAINTIFF; 1942 April 14, 15

1942 July 2

AND

SPUN ROCK WOOLS LIMITED AND THE CUSTODIAN .............. } DEFENDANTS.

*Patents — Infringement action — Anticipation — Novelty — Invention — Patentability.*

The action is one for infringement by defendant, Spun Rock Wools Limited, of a patent, the plaintiff being the licensee of the patentee. The invention relates to new and useful improvements in the production of Fibres or Threads from Glass, Slag and the Like Meltable Materials The defendant admitted that its method of manufacturing rock wool is quite similar to or the equivalent of the method described and claimed in the patent in suit. The defendant pleaded that plaintiff's patent was invalid and alleged lack of novelty and lack of invention.

*Held:* That since none of the prior publications cited by the defendant has so presented to the public the method of manufacture or the device for producing fibres from molten glass, slag and the like meltable material which is described in the invention in question, so as to put it out of the power of any subsequent person to claim the invention as his own, the plea of anticipation was not substantiated.

2. That the method of manufacture described in the patent in suit was something new and useful and possessed certain marked improvements and advantages over anything that had earlier been disclosed or used in this particular art and required that degree of inventive power to merit a patent.

ACTION by plaintiff herein to have it declared that a certain patent to the use of which the plaintiff is licensed by the patentee, is valid and has been infringed by defendant company.

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

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

*W. D. Herridge, K.C.* and *W. A. MacRae* for defendant, Spun Rock Wools Limited.

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

THE PRESIDENT, now (July 2, 1942) delivered the following judgment:

This is an action taken by the plaintiff for a declaration that, as between the parties hereto, letters patent No.

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333,788, granted on July 4, 1933, is a valid one, and has been infringed by the defendant Spun Rock Wools Limited, and for the remedies usual in such an action.

The defendant, Spun Rock Wools Limited, is a body politic and corporate carrying on business in Thorold, Ontario, and the second named defendant, the Custodian, is the officer whose duties and rights are defined by the Consolidated Regulations respecting Trading with the Enemy, 1939 (P.C. 3959 and 5353 of 1939).

The plaintiff is licensed, by various agreements, to use and exercise the rights granted by the said letters patent, No. 333,788, to N.V. Mij. tot Beheer en Exploitatie van Octrooien (otherwise known as Maatschappij tot Beheer en Exploitatie van Octrooien) as assignee of Frederich Rosengarth and Fritz Hager, the inventors, in respect of the new and useful improvements in the production of fibres or threads from glass slag and the like meltable materials. It was contended by the defendant that the conditions of these licensing agreements had not been fulfilled and that therefore the plaintiff acquired no rights thereunder, but in any event, this allegation of fact was not established by the defendant, and upon it rested the burden of doing so.

It perhaps should be stated that the said N.V. Mij. tot Beheer en Exploitatie van Octrooien is a company incorporated under the laws of Holland, with its principal office at The Hague, in the Kingdom of Holland, and in the month of May, 1940, became an enemy, whereupon its interest in the said patent and under the agreements hereinbefore referred to became vested in The Custodian by virtue of the provisions of section 21 of the Consolidated Regulations respecting Trading with the Enemy, 1939.

The object of the invention in question, which relates to certain new and useful improvements in the Production of Fibres or Threads from Glass Slag and the Like Meltable Materials, is set forth in the early paragraphs of the Specification as follows:

The production of fibres or threads from molten glass, so-called glass silk, is hitherto performed by means of spinning machines on which the threads are drawn from prepared glass rods or from the molten mass through nozzles, while in the manufacture of slag wool the threads are produced by the aid of steam or air blowers

It is the object of the invention to provide a novel method and device for making fibres or threads of the kind stated According to this invention, the hot liquid glass or slag mass is flown in a continuous and uniform thin stream onto a rapidly rotating body, such as a disc of suitable material. On the disc the liquid mass is scattered into minute drops, which are thrown off by the centrifugal force and simultaneously formed into thin threads which sink down in the space around the rotating disc and can be collected as a uniform fibrous web.

Owing to the higher momentum imparted to heavier particles, such as thicker drops and threads, these are thrown off the disc to a greater distance and thus can be easily separated from the threads of the normal or desired thickness.

The Specification then proceeds to state that in order to allow of the invention to be more clearly understood, an embodiment of a device for carrying the invention into effect is shown in accompanying drawings. The description of such device which follows might usefully be recited, and I think the same may be readily understood and followed, without a reproduction of the drawing. The Specification describes the device for carrying the invention into effect as follows:—

1 designates a furnace for melting the working material, such as glass or slag, the furnace being heated by burners 2. 3 is an opening for filling in fresh material and $3^1$ is a cover for the said opening. 4 designates the outlet of the furnace with which co-operates a plug 5 which is adapted to be raised and lowered for regulating the quantity of material discharged through the outlet. The outlet mouth 4 is surrounded by a rim 6. The annular space between the mouth 4 and rim 6 is designed to be heated by gas flames or the like for regulating the temperature of the glass or slag discharged through the mouth. The space below the outlet 4 is enclosed by annular guard walls 7 and 8 which reduce the outward radiation and avoid premature cooling of the down flowing mass. A narrow gap 9 is left between the two walls 7 and 8. Arranged below the outlet 4 at a predetermined distance therefrom is a centrifuging disc 10 This disc consists of a circular plate 11 of a suitable, preferably refractory material and of a metal ring or casing 12 holding and encircling the plate 11 in such a manner as to prevent breaking of the latter due to the high number of revolutions. The disc 10 is mounted on a shaft 13 which has the required high speed imparted to it from an electromotor or other source of power through a pulley 14 and belt 15 or any other suitable drive. The upper edge of the wall 8 lies substantially on the same level as the top surface of the centrifuging disc 10, so that the glass or slag particles which are too heavy will be thrown over and beyond the said edge into the gap 9. They are thus separated from the fibres or threads which have the prescribed weight. The particles entering the gap 9 fall into a collecting gutter 16 from which they can be returned to the melting furnace 1.

The liquid mass flowing out of the mouth 4 is scattered on the disc 10 into minute particles and thrown off the disc in horizontal direction forming a kind of gloriole of thin threads which sinks down between the disc 10 and the guard wall 8. This sinking mass constantly increased by the succeeding fresh threads surrounds the shaft 13 as a jacket-like envelope which deposits on an inclined bottom plate 17.

The fibrous envelope is continuously or intermittently severed by means of cutting shears 18, which may be operated mechanically, and

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then glides down over the inclined bottom 17 to a winding device, not shown. The fibrous web produced by the cutting corresponds in width to the circumference of the fibrous jacket formed about the disc 10 and shaft 13.

The thickness of the fibres can be regulated in various ways, such as by working with more or less high temperatures of the liquid mass, by changing the distance between the disc 10 and the mouth 4 or by controlling the quantity of liquid mass discharged through the outlet 4.

The centrifuging disc 10 which is shown in the drawing with a vertical axis, may for certain purposes be arranged so as to have its axis in an inclined or horizontal position. The other structural parts are then changed accordingly. In this case, the liquid mass may be flown onto the circumference instead of onto the top surface of the disc.

The plaintiff, in its Particulars of Breaches, states that it will rely on Claim No. 1, and that Claim reads as follows:

> 1. A method of producing fibres from molten glass, slag and the like meltable material, consisting in setting-up a flow stream of molten material, delivering this stream onto a rapidly rotating surface and causing it to be thrown off the said surface by centrifugal force in the form of fine fibres

The defendant in its statement of defence admits "that it produces fibres by delivering a stream of molten material on to a rapidly rotating surface as stated in claim 1 of the patent in suit", but it further adds "that it has not thereby infringed the rights of the plaintiff because the said patent and particularly claim 1 thereof, is and always has been invalid for the reasons stated in the particulars of objections delivered herewith". The defendant's particulars of objections allege lack of novelty, and lack of invention.

In view of the admission made by the defendant in its statement of defence, and the evidence adduced on this phase of the case, it would appear clear that the defendant's method of manufacturing "rock wool" is quite similar to or the equivalent of the method described and claimed in the patent in suit, and it therefore becomes unnecessary to pronounce upon the question of infringement.

There remains therefore to consider only the question as to whether or not the invention in question was anticipated by any of the pleaded prior published art, and also whether or not it contained subject-matter for a patent of invention, and I shall direct myself to the question of anticipation. First, I might observe that the test of anticipation has been dealt with in many cases, but I need refer to but a few of them. In the case of *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ld.* (1), Viscount Dunedin, in discussing the defence of anticipation, said:

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. (1928) 45 R P C. 1. At page 23 the judgment runs thus· "In *Otto* v. *Linford* (1881) 46 L T, N S 35, at page 44, Lord Justice Holker expresses himself thus· 'We have it declared in *Hill* v *Evans,* 31 L J. Ch 457, as the law and it seems very reasonable, that the specification which is relied upon as an anticipation of an invention must give you the same knowledge as the specification of the invention itself' And in *Flour Oxidizing Company* v. *Carr & Co.* (1908) 25 R P.C, at page 457, Mr Justice Parker (afterwards Lord Parker) says "When 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 be made to produce this or that result; it must also be shown that the specification contains clear and unmistakable directions so to use it". I may add that my own remarks in *Armstrong Whitworth & Co* v. *Hardcastle* (1925), 42 R.P.C. 543, at page 555, are quite in line with these dicta' In the same case the test is stated at page 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".

Then, in the case of *Canadian General Electric Co.* v. *Fada Radio Ld.* (2), their Lordships of the Judicial Committee in discussing the subject of anticipation by a prior publication stated the law in the following words:

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 also 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

In support of the defence of anticipation the defendant pleaded a large number of prior publications, and they appear in the record as Exhibits A to O inclusive. Without attempting to discuss these several publications in detail, but after a perusal of all of them, it is my opinion that in none of them is to be found the disclosure described

(1) (1929) 46 R P C. 23 at 52. (2) (1930) A.C 97 at 103.

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in the patent in suit, and in many cases they are utterly irrelevant. In no case do these prior publications give the same information, knowledge or directions to be found in the specification of the invention in question, in other words, they do not disclose that which is described in the patent which is here attacked on the ground of anticipation. It cannot be said, I think, that any of the prior publications cited have so presented to the public the method of manufacture, or the device for producing fibres from molten glass, slag and the like meltable material, which is described in the invention in question so as to put it out of the power of any subsequent person to claim the invention as his own. All the prior publications, in my opinion, fell far short of meeting the test of anticipation laid down by the authorities to which I have just referred, and from which I have quoted.

Now, I come to the final question for decision and that is whether or not the patent in suit contains subject-matter and is a valid patent. I think it may fairly be said that the art here involved is old, and that the invention in question is a narrow one. Broadly stated, any alleged invention must be new and useful, that is the statutory requirement, and it is always a question of fact if any patent fulfills those requirements. There must be a substantial exercise of the inventive power or inventive genius, though it may in cases be very slight, and slight alterations or improvements may produce important results, and may disclose great ingenuity. On the evidence, I think that the method of manufacture described in the patent in suit was something new and useful, and it possessed certain marked improvements and advantages over anything that had earlier been disclosed or used in this particular art. The rotating disc was earlier known but the invention in question was the first to direct the use of a rotating disc for the purpose of disintegrating or atomizing the molten material in order to form the desired fibres. It was explained by Mr. Slater that owing to this invention the drawing speed of the fibres was increased eight or ten fold. In none of the prior publications was the process of manufacture there described a continuous one as in the patent in suit; in other cases the fibres had to be drawn to a drum to start winding; and in order to get the material off the drum, the drum had to be stopped. In the inven-

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tion in question the process is automatic and continuous. The specification here in question for the first time disclosed the importance of regulating the temperature of the glass or slag discharged through the outlet, thus preventing any premature cooling of the down flowing mass, and the specification describes just how this is done. Then, besides these improvements and advantages, the product produced under the invention in question was made immediately ready for use for insulation purposes because of what was called in the evidence the "jack straw arrangement" of the fibres, which avoided the necessity for carding or mixing the fibres and this was, I think, a very substantial improvement over any prior practice and this resulted in a much higher volume of production, a saving of time, and a reduction in manufacturing costs. In the spinning process under earlier known methods of manufacture the fibres were drawn in parallel on the drum, and these had to be mixed or carded, to ensure the desired insulation qualities, and this, as already stated, involved considerable labour and time which was obviated by the invention in question. The invention in question may be a narrow one, but I think it disclosed such new and useful improvements and required that degree of the inventive power as to merit a patent.

At the trial Mr. Smart made a formal application for leave to join the Owens-Corning Fiberglas Corporation as a plaintiff herein, which leave is granted, upon the filing of the appropriate consent.

It will follow from what I have said that the plaintiff succeeds, and it will have its costs of the action.

*Judgment accordingly.*

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ONTARIO ADMIRALTY DISTRICT

1941

March 20.

BETWEEN:

THE INSURANCE COMPANY OF NORTH AMERICA ............ } PLAINTIFF;

AND

COLONIAL STEAMSHIPS LIMITED...DEFENDANT.

*Shipping—Bills of Lading Act, R S C., 1927, c. 17, s 2—Variation in contract of shipment of cargo of grain—Bill of lading not a fully negotiable instrument—Sinking of vessel with cargo due to peril of the*

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THE INSURANCE COMPANY OF NORTH AMERICA *v.* COLONIAL STEAMSHIPS LIMITED.

*sea and not to negligence—Endorsee of bill of lading accepting same with knowledge of variation in contract is not entitled to recover damages from owner of vessel for loss to cargo not resulting from negligence of owner.*

The plaintiff, having paid a loss under a marine insurance policy, secured possession of certain bills of lading and now claims in this action, as endorsee, holder and owner of those bills and as the owner of the cargo represented thereby, damages for injury to 115,600 bushels of wheat from the sinking of the steamer *Northton* at Port Colborne, Ontario. The defendant counterclaimed for general average expenses.

The damaged grain had formed part of a cargo of 225,005·30 bushels of wheat originally shipped from Fort William on October 11, 1938, on defendant's steamer *Mathewston* The bills of lading gave the defendant the right to tranship the whole or any part of the cargo at any transfer elevator in Canada *en route* for forwarding to destination. While the grain was in transit between Fort William and Port Colborne it was agreed between the owners of the cargo and the defendant that the carriage contract would be terminated at Port Colborne Under a further agreement the entire cargo was loaded into two smaller steamers to be held in these vessels for winter storage at Port Colborne, Ontario On February 1, 1939, one of these vessels, the *Northton,* with her portion of the cargo on board, sank at her moorings with resultant damage to the grain. A claim for total loss was settled by plaintiff which acquired as part of the proof of loss the bills of lading covering the portion of the grain on board the *Northton*. The Court found as a fact that plaintiff became endorsee of the bills of lading with full knowledge of the variation made in the contract.

*Held*. That the plaintiff gave no consideration for the bills of lading and that the ss *Northton,* before loading, was seaworthy and sank as a result of a peril of the sea and not because of any negligence on the part of defendant

2 That a bill of lading is not a fully negotiable instrument but is merely evidence of the contract between the parties to it

ACTION by plaintiff as endorsee of certain bills of lading, to recover from defendant damages paid by plaintiff in settlement of a claim for loss of part of a cargo of grain.

The action was tried before His Honour Judge Barlow, District Judge in Admiralty for the Ontario Admiralty District, at Toronto, Ontario.

*Francis King, K.C.*, and *C. Russell McKenzie, K.C.*, for plaintiff.

*F. M. Wilkinson, K.C.,* and *R. J. Dunn* for defendant.

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

BARLOW D.J.A. now (March 20, 1941) delivered the following judgment:

This is an action to recover the sum of $48,370.28 on a bill of lading dated the 11th day of October, 1938, made by the defendant to the order of the Bank of Nova Scotia, Montreal, as consignee, and subsequently endorsed to the Reliance Grain Company Limited, and by the latter endorsed to the plaintiff. The defendant by counterclaim claims under general average the sum of $4,059.67. Upon the opening of the trial counsel agreed that if either or both parties were found entitled to recover, that judgment should go for the amount claimed. The facts are:

Upon instructions from Consolidated Shippers Limited of Winnipeg, Reliance Grain Co. Limited, as brokers and agents for Consolidated Shippers Limited, purchased on the Winnipeg Grain Exchange from the Grain Board 225,005·30 bushels of wheat. The Reliance Grain Co. Limited arranged for shipment of the same and the same was received on board the ss. *Mathewston,* owned by the defendant company, at Fort William and Port Arthur for carriage and delivery at Montreal. The said grain was shipped by the Reliance Grain Co. Limited to the order of the Bank of Nova Scotia, Montreal, subject to the terms and conditions of bills of lading as shown in Exhibit 2. The bills of lading provided for a voyage from Fort William to Montreal, via Port Colborne, with the right of the carrier to tranship the whole or any part of the cargo at any transfer elevator in Canada *en route.* The evidence shows that the bills of lading were pledged by the Reliance Grain Company Limited to and deposited with the Bank of Nova Scotia. See *Sewell* v. *Burdich* (1). The evidence further shows that the Reliance Grain Co. Limited was acting as agents for Consolidated Shippers Limited, that the latter became responsible to the Reliance Grain Co. Limited for the freight, insurance and a brokerage charge, all of which have been duly paid and settled by Consolidated Shippers Limited with Reliance Grain Co. Limited. On the 14th day of October, 1938, the plaintiff Insurance Company of North America issued an insurance certificate M 10453 to Reliance Grain Co. Limited covering the cargo on the voyage from Fort William to Montreal, the loss, if any, being payable to

(1) (1884) 10 A C. 74

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Reliance Grain Co. Limited. The cargo in question arrived at Port Colborne on the 19th or 20th day of October and was unloaded into the Government Elevator. The ss. *Mathewston* is an upper lakes vessel and the practice is to unload into the Government Elevator at Port Colborne and then load the cargo into canal size vessels for the remainder of the voyage to Montreal. There is a fifteen-day free time in the elevator. Acting on instructions from Consolidated Shippers the grain was retained in the elevator until the 25th or the 28th day of November, 1938. Consolidated Shippers, believing that there might be a better market for the grain at Port Colborne than at Montreal, settled with the defendant for the carriage from Fort William to Port Colborne at 2 cents per bushel and paid the same. Consolidated Shippers further arranged with the defendant to load the grain in question on two vessels of the defendant, the ss. *Gilchrist* and the ss. *Northton* for winter storage. On the 25th day of November a certain portion of the cargo in question was loaded on the ss. *Gilchrist* and on the 28th day of November the remainder of the cargo, 115,600 bushels, were loaded on the ss. *Northton.* On the 28th day of November, 1938, the plaintiff, Insurance Company of North America, issued an endorsement to be attached and made part of certificate No. 10453 insuring the grain while in winter storage in the ss. *Northton.* On the 28th day of November the defendants by letter wrote R. S. Meisner, the president and manager of Consolidated Shippers Limited, enclosing copies of bills of lading covering cargoes of grain loaded at Port Colborne for storage on the ss. *Gilchrist* and the ss. *Northton* and also enclosed a memorandum bill of lading from the transhipping port which is affixed and is part of this Exhibit. The copies of the bills of lading were in the form used for winter storage. The evidence shows that although there were several requests by the defendant to Consolidated Shippers to have these bills completed, the same were never filled out and signed. About midnight on the 1st day of February, 1939, or early in the morning of the 2nd day of February the ss. *Northton* sank at her berth at Port Colborne. On February 2nd the Insurance Company of North America was advised of the sinking of the ss. *Northton* and on February 3rd they instructed Albert R. Lee & Co of Buffalo to make a survey of the vessel. On the same date the Insurance Company of North America gave instructions to take over the cargo of the ss. *Northton* for disposition. On February 4th Reliance Grain Co. Limited obtained from the Bank of Nova Scotia bills of lading covering 116,300 bushels of grain, being the quantity of grain stored in the ss. *Northton*, giving the Bank of Nova Scotia a bailee receipt for the same. The bills of lading were endorsed by the Bank of Nova Scotia to Reliance Grain Co. Limited. Reliance Grain Co. Limited then endorsed the bills of lading to Insurance Company of North America and handed the same together with the other necessary papers to prove loss under the insurance policy to Johnson and Higgins, Limited, of Winnipeg, insurance brokers, who on the same date forwarded the bills of lading to the Insurance Company of North America. On the 10th day of February Reliance Grain Company received a cheque from Insurance Company of North America for $86,700 in full settlement of the insurance claim with respect to 116,300 bushels which was the quantity of grain stored in the ss. *Northton*. Reliance Grain Co. Limited then deposited this cheque in the Bank of Nova Scotia and took up the bailee receipt. Insurance Company of North America salved the cargo and now claims for the balance owing, after having given credit for the amount obtained by salvage.

Much evidence was given as to the cause of the sinking of the ss. *Northton* at her berth at Port Colborne. It must be found on the evidence that the ss. *Northton* was seaworthy, that she was properly inspected for a storage cargo and also properly inspected as to loading and berth and the proper certificates issued. It also must be found that she was well and properly laid up for the winter. The evidence shows that on the 30th day of January, 1939, the water at Port Colborne dropped to the lowest point in history. The evidence shows that ordinarily there would be about ten feet of water between the bottom of the ss. *Northton* and the floor of the harbour where she was berthed providing that such floor were clean. The water, about 11 a.m. of the 30th day of January, 1939, dropped to a point which would leave about 6·54 feet between the bottom of the vessel and the harbour floor. Within a few hours the water had risen to its normal height. The shipkeeper's evidence shows that on the 1st

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day of February at 10 p.m. the vessel was in her usual position. About 12 p.m. the shipkeeper was awakened and found that the vessel was sinking and that she had settled at this time about five feet at her stern. About 2 a.m. on the 2nd day of February, 1939, the stern settled to the bottom so that her decks were under water. The evidence shows that upon subsequent examination the plates of the vessel under the engine room hold had been stove in in a semi-circular form about 11 inches or 12 inches deep and that this was the cause of her filling with water. The best evidence is that she settled upon some obstruction at the time of the low water on the 30th day of January, that by some means the hole in question was blocked until towards midnight of the 1st day of February. The best evidence is that whatever the obstruction was it broke off and cannot now actually be located. It must be found that there was no negligence on the part of the defendant, that the explanation given as to the sinking is a reasonable one under all the circumstances and that the defendant has satisfied the onus placed upon it; *Dominion Tankers* v. *Shell Petroleum* (1). What happened, therefore, comes within a peril of the sea. See *The Xantho* (2).

The plaintiffs do not make any claim under the doctrine of subrogation.

The plaintiff's claim is as endorsee of the bills of lading. The Bills of Lading Act, R.S.C., 1927, Chapter 17, Section 2, is as follows:

> 2. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned passes upon or by reason of such consignment or endorsement, shall have and be vested with all such rights of action and be subject to all such liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

Prior to the passing of the Bills of Lading Act the contract of carriage was not transferred by transfer of the bill of lading or of the property in the goods. The transferee did not acquire any right to sue for a breach of the contract in his own name. In order to overcome this situation the Bills of Lading Act was enacted. The bills of lading as issued to the Bank of Nova Scotia as consignee, were for a voyage from Fort William to Montreal with the right of transhipment at Port Colborne into canal size vessels.

(1) (1939) Ex. C R. 192 at 203; (1940) 3 D L R 115
(2) (1887) 12 A C 503.

The agreement made between Consolidated Shippers, the owners of the cargo, and the defendant for the holding of the grain at Port Colborne and the storing of the same in the ss. *Northton* or the ss. *Gilchrist*, was undoubtedly a deviation from the contract of carriage and would have given the Bank of Nova Scotia, as consignee, a right of action for such breach. Consolidated Shippers Limited, the owner of the cargo, subject to the pledge of the bills of lading to the Bank of Nova Scotia, gave the instructions to the defendant which brought about the deviation, which instructions were acquiesced in by Reliance Grain Co. Limited, the agents of Consolidated Shippers Limited. The bills of lading were endorsed by the Bank of Nova Scotia to the Reliance Grain Co. Limited. Immediately the bills of lading came into the hands of Reliance Grain Co. Limited, as endorsees, there attached to such bills of lading the variation made in the contract of carriage by which the grain was stored on the ss. *Northton* pursuant to agreement between the defendant and the owners, Consolidated Shippers, and acquiesced in by the latter's agent, Reliance Grain Co. Limited. In any event, Reliance Grain Co. Limited by reason of the fact that either it or its principal, Consolidated Shippers Limited, was responsible for the change from the through voyage to Montreal to an arrangement for storage at Port Colborne, would as holders of the bills of lading be estopped from setting up a claim on the bills of lading as against the defendant. Does the transfer of the bills of lading by Reliance Grain Co. Limited to the plaintiff give the plaintiff any higher rights than its transferor, the Reliance Grain Co. Limited? A bill of lading is not a fully negotiable instrument; it is merely evidence of the contract between the parties. If an endorsee receives a bill of lading without notice of any variation of the contract, such endorsee takes the bill of lading free from variation. In this case the plaintiff became endorsee of the bills of lading by transfer from Reliance Grain Co. Limited with full knowledge of the variation which had been made in the contract. The plaintiff knew of the variation of the contract on the 28th day of November, 1938, when it issued its endorsement to its insurance policy covering the grain for winter storage. It also had full knowledge at the time of the receipt of the bills of lading of the change in the contract,

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and that it was purchasing a damaged cargo. Reliance Grain Co. Limited as endorsees of the bills of lading could only have had a claim against the defendant upon the complete agreement with the defendant which would include the subsequent agreement for winter storage. As it has been found that the defendant was not negligent, such a claim could not succeed. If the Reliance Grain Co. Limited is estopped from enforcing the terms of the bills of lading without regard to any variation in the same, then the plaintiff is also estopped because, in my opinion, the plaintiff could acquire no higher rights than Reliance Grain Co. Limited possessed. The plaintiff relies upon the case of *LeDuc* v. *Ward* (1) where it is held that a deviation from the contract of carriage by reason of some arrangement between the shipper and the ship owner is not binding upon the endorsee and does not affect the endorsee's rights under the bill of lading. That, however, is not this case. In *LeDuc* v. *Ward* the endorsee of the bills of lading took the same without notice of the arrangement between the shipper and the ship owner. Furthermore, the bill of lading in question did not come into the hands of the endorsee from the shipper after the deviation had taken place but prior thereto.

Counsel for the defendant contends that the plaintiff gave no consideration for the bills of lading. The plaintiff, as shown above, was the insurer of the cargo in question. The money which it paid was in satisfaction of its insurance contract with Reliance Grain Co. Limited and was not paid as the purchase price of the bills of lading. The fact that the plaintiff did not give any consideration for the bills of lading and that they were taken by the plaintiff with full notice of the agreement between the plaintiff's transferor and the defendant is a further reason why the plaintiff cannot acquire any higher rights than its transferor, Reliance Grain Co. Limited.

Counsel for the defendant further contends that the endorsements of the Bank and of the Reliance Grain Co. Limited on the bills of lading have not been proved. The only witness who gave any evidence as to this was Gordon Smith, a Director and the export manager of Reliance Grain Co. Limited. He stated that he sent on the bills of lading to the plaintiff or its agents with the

(1) (1888) 20 Q.B.D. 475.

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endorsements. Except for this there is no evidence in proof of the endorsement by the Bank or the endorsement by Reliance Grain Co. Limited; and while witnesses doubtless could have been called to prove such endorsements, there is no evidence before the Court. In order that the plaintiff may properly prove its case the endorsements should be specifically proved. If it were necessary for the determination of the action, I would be forced to find that there is not sufficient proof before me of the endorsements on the bills of lading.

The defendant counterclaims for general average. The plaintiff as transferee and endorsee of the bills of lading became responsible for any liabilities attaching to the same. Furthermore, it became the owner of the cargo and was the owner at the time the general average claim was incurred. I am of the opinion that the defendant must succeed on its counterclaim.

Judgment will therefore, go:

1. Dismissing the plaintiff's action with costs;

2. For the defendant on its counterclaim for the amount claimed with costs.

*Judgment accordingly.*

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Oct. 28 & 29.

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June 18.

BETWEEN:

KELLOGG COMPANY .................PLAINTIFF;

AND

HELEN L. KELLOGG .................DEFENDANT.

*Patents—Conflict action—Conflicting applications for patents—Action by plaintiff as assignee from one applicant against the assignee of the other applicant for a declaration that the plaintiff's assignor was the inventor.*

In 1937 McKay and Penty filed an application in the Canadian Patent Office for a patent for a process for making a ready-to-eat cereal food product. In 1938 Mary M. Kellogg, as administratrix of the estate of John L. Kellogg Jr., deceased, filed an application in the Canadian Patent Office for the same invention.

The Commissioner of Patents declared a conflict between the applications, and plaintiff, as assignee of McKay and Penty, commenced an action in this court against defendant as owner of the invention of John L. Kellogg Jr., claiming *inter alia* a declaration that McKay and

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Penty and not John L. Kellogg Jr. were the inventors of the invention. Defendant alleged that John L. Kellogg Jr. was the inventor and counterclaimed for a declaration to that effect.

*Held:* That McKay and Penty had completed their invention by October, 1936, and that John L Kellogg Jr. had not been proved to have made the same invention before that date.

2. That whether or not John L. Kellogg Jr. had the idea in mind, as was alleged, he had not reduced it to a definite and practical shape and he was not the inventor of the process.

ACTION brought before this Court under section 44 of the Patent Act for a declaration as to who, as between plaintiff's assignors and John L. Kellogg Jr., was the first inventor of the subject-matter of their applications for a patent, in respect of which the Commissioner of Patents had declared a conflict.

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

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

*S. M. Clark, K.C.* and *A. MacDonald* for defendant.

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

THE PRESIDENT, now (June 18, 1942) delivered the following judgment:

This is a proceeding taken under sec. 44, subs. 8, of the Patent Act and relates to conflicting claims in an application for a patent of invention made, on January 27, 1937, by Eugene H. McKay and William P. Penty, the inventors and assignors of the plaintiff company; and in an application for a patent of invention made, on February 25, 1938, by Mary M. Kellogg, administratrix of the estate of John L. Kellogg Jr., deceased, who, it is claimed, was the inventor of the invention described in the said application, and which invention by various assignments is claimed by the defendant herein. There would appear to be no doubt but that the two pending applications here in question are in conflict, and that they define and claim substantially the same invention.

The title given to the plaintiff's invention is "Prepared Food And Process Of Gun-Puffing The Same", and that given to the defendant's "Puffed Cereal Product And

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Process Of Making Same". The processes defined in the conflicting applications for producing the desired product may be briefly described in the following manner: An appropriate quantity of corn grits (hulled and screened kernels of corn) are cooked, with a quantity of water, for about an hour and a half, in a rotary steam cooker at a predetermined steam pressure. The grits are then removed from the cooker and partially dried. The internal structure of the grits are then modified by what is termed "bumping", an operation in which the grits are passed between revolving rolls which slightly flattens each grit without reducing it to a flake. The flattened or bumped grits are then dried to a moisture content of about 12 per cent, and then allowed to temper or equalize for some twelve to eighteen hours, when they are subjected to a puffing operation by the usual method employed in making the so-called "gun-puffed" cereals, the instrumentality used for so doing being a container called "a gun". In the puffing operation a quantity of the dried and tempered grits is placed in the gun, and heat is applied thereto until the pressure within the gun reaches about 200 pounds per square inch, when the gun is opened and the pressure suddenly released. Under this action the grits explode or expand, and puff up, as they issue from the gun, producing the product which is described and claimed in the specification of each of the applicants. This brief description will afford a general idea of the method employed in producing the cereal food product produced under the inventions in question.

Typical of the claims in issue are No. 1, in the application of McKay and Penty, which reads:

> 1. A process for making a ready-to-eat cereal food product, comprising cooking grain particles in moisture, thereafter heating the grain particles in a closed container until pressure develops therein and within the grain particles, and suddenly releasing the pressure in the container to cause the pressure within the grain particles to puff them

and No. 1 in the application of Mary M. Kellogg which reads:

> 1 Process of producing a puffed and ready-to-eat cereal product from maize which comprises· cooking the maize with water; drying the cooked material to a moisture content of substantially 30-40%; subjecting the grains to mechanical pressure to alter the internal structure of the grain without reducing it to a flaked condition; drying the material to a moisture content of about 9% to 15%; and explosively puffing it.

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John L. Kellogg Jr., the defendant's inventor, (hereinafter called "Kellogg Jr.") was the son of John L. Kellogg Sr., and was born in 1911. He entered the employ of the Kellogg Company, in 1930, at Battle Creek, Michigan, U.S.A. The head of the internationallly known company was W. K. Kellogg, the grandfather of Kellogg Jr., and the father of John L. Kellogg, Sr. The latter had been in the service of the Kellogg Company from 1908 until 1928, and within that period had occupied therein high and responsible executive positions. After 1928 John L. Kellogg Sr. appears to have carried on some business of his own, in cereal products, I understand, at Chicago, and Kellogg Jr. appears to have worked with his father from an early age until 1930 when he became associated with the Kellogg Company. In 1932 Kellogg Jr. was elected a member of the Board of Directors of the Kellogg Company, and later a Vice-President of that Company. By 1935 he was in receipt of an annual salary of $10,500. He continued to fill such offices until June 1, 1935, when he resigned therefrom, and also as a member of various executive committees of the Kellogg Company. Apparently he remained on the pay roll of the Kellogg Sales Company, a subsidiary of the Kellogg Company. His withdrawal from the Kellogg Company in 1935 was due to the fact that he suffered a concussion of the brain after a fall from a horse. During the latter half of 1935 and the first half of 1936, he was either in a sanitarium or otherwise seeking a recovery from the effects of his serious accident. In October of 1936 he returned to work, at the suggestion of his grandfather, with the Kellogg Company, at first, I think, with the Kellogg Sales Company. In any event on or about October 15, 1936, he was assigned to service in the Experimental Department of the Kellogg Company at a salary of $86.70 half-monthly, and there he remained until the following December when he entirely severed all connection with the Kellogg Company and became engaged in some business of his own into which we need not enter. He died somewhere in the State of Illinois in February, 1938, as the result of a self-inflicted wound. For obvious reasons one may readily assume that the return of Kellogg Jr., in 1936, to the service of the Kellogg Company after his very serious illness would be a matter of profound interest and pride to his grandfather, W. K. Kellogg. This feeling no doubt would be sympathetically shared in by the departmental heads of the Kellogg Company, such as McKay, Superintendent, and Penty, General Foreman, of the Kellogg Company plant.

The Experimental Department of the Kellogg Company was, at the time material here, under the direction of McKay, and next under him and in actual charge of the operations of the Department was Penty. Penty was assisted by two persons named Swartz and Rochester, and on October 15, 1936, those three were joined by Kellogg Jr. The work of this Department was the carrying on of research and experimental work directed to improvements in the processing of food products, and the development of new cereal food products. The Department was assigned a particular room in the buildings of the Kellogg Company wherein to carry on its work, and only persons assigned for work in that Department had access thereto, though sometimes it was visited by executive officers of the Kellogg Company. The Department was equipped with cooking facilities, flaking rolls, shredding rolls, and generally with such machinery and equipment as was necessary or suitable for the conduct of any experimental work in which the Department was likely to engage. Penty testified that in June, 1936, at the instance of McKay, the Department began experimental work on gun-puffed cereal products, such as described and claimed in the conflicting applications here in issue. Penty testified: "We had been trying a corn similar to what we make our Corn Flakes from; but Mr. McKay suggested that we cook it without flavouring, just in water, and to treat it similar to what we did the rice, which we call bumping or flattening and changing the structure of the grain. We were trying that in two ways. One we called 'oven-puffed' with gas heat; and also prepared some for puffing in the gun". Penty explained the difference between "oven-puffed" and "gun-puffed" to be that in the former case the process was carried out at ordinary atmospheric pressure, and in the latter case under high pressure. On June 18 and 19, 1936, experiments were carried on with corn, cooked and prepared according to the directions of McKay, and a record was made of such experimental work. This prepared material was placed in a container called a "gun", the head thereof being closed tightly, and then

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a gas burner would be lighted under the gun. The gun would then rotate and when brought up to a high pressure the head thereof would be released and the contents would explode outwards into a cage, and this would expand the material that issued from the gun. Four ounces of the corn were first used in the gun, and then quantities up to a pound; but on account of the gun, which was of weak construction, leaking at the head, steam would escape from it, and sufficient pressure could not be obtained, and this would cause some of the material which came from the gun to char. The result was not satisfactory because while fifty per cent of the product was satisfactory yet the balance was charred and therefore unsuitable. This being reported to McKay he suggested that a gun known as "Big Husky" be used and one was acquired and delivered at the Experimental Department early in August of 1936. During August, September and early October this new gun was used for shooting raw grains of wheat and corn; to a small extent cooked corn, which had been partially flaked and bumped, and which had been puffed in a rotary gas popper, was used, but this was before Kellogg Jr. joined the Department.

The new gun was used for puffing on October 28, 1936, on which occasion Kellogg Jr. was present. The materials experimented with on this occasion were cooked corn, which had been partially flaked, puffed wheat, and also raw corn. Penty instructed Rochester and Kellogg Jr. to try these several materials in the new gun to see what results would be got from them. It was found that the corn material was not all coming from the gun, and what came out was in slugs or dry pieces. Samples of this were shown Penty by Kellogg Jr. and he enquired of Penty what had caused it to char and Penty thereupon explained to him that the flake was too thin for the high pressure of the gun and that this would cause the material to char, and he further remarked that a material of more body was required. Penty then informed Kellogg Jr. that plans would be laid out during the night for cooking some corn the next day, at different intervals of cooking, and that each cooking would be bumped in three different ways, "very slight, and a little more, and then a little more than that", but that the material should not be so thin as that used that day and which was then known to char. Swartz

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and Rochester were instructed accordingly. On October 29, Swartz and Rochester proceeded to cook some corn in a rotary steam cooker, and this cooking continued for thirty minutes when a portion of it was taken out. The balance was cooked for another thirty minutes or altogether one hour when another portion was removed, and the balance was allowed to cook for an hour and twenty minutes altogether when it was removed; each portion as removed was later put through a drier. During these several steps or operations, Penty, Swartz, Rochester and Kellogg Jr. were present, Penty supervising the operations. After this the cooked material was put through a flaking mill for the purpose of changing the structure of the corn by slightly bumping or deforming it, the three different samples of cooked material being bumped or deformed in three different ways as already mentioned. This means merely the application of different degrees of roll pressure. but the flakes were not flattened out as much as those used the day before. In the end it was found that the sample that was cooked one hour gave the best results and this was nearest to the material experimented with in the previous June, which had been cooked for about the same time. The material was then dried down to a moisture content of about 12 per cent and then allowed to temper or equalize until the following day. The next day Penty directed Rochester and Kellogg Jr. to try the three different cooks so prepared in the gun, instructing them first to use raw grain (wheat) to heat the gun, and which would cause it to function more satisfactorily. Penty states that he went to lunch at 12 o'clock noon, as also did Rochester who was relieved by Swartz. The latter and Kellogg Jr. remained because it was thought undesirable to cease operations with the gun in the noon hour and thus allow it to cool off. When he returned he found on his desk in the Experimental Department a carton of the best of the material shot from the gun and he remarked to Kellogg Jr. on his return from lunch, "John, we have got something pretty good here", and Kellogg's response was, "Well, we shot that in the gun in the noon hour". Kellogg suggested that it be shown to McKay and this was done by Penty and Kellogg Jr. Penty explained to McKay that it had been shot by Swartz and Kellogg Jr. in the noon hour. McKay then suggested that it be shown

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to W. K. Kellogg and thereupon McKay, Penty and Kellogg Jr. went to the office of W. K. Kellogg. McKay remarked to W. K. Kellogg: "Look what John has made". W. K. Kellogg then asked who was to get the credit for that, and Penty remarked that Swartz and John had shot it in the gun in the noon hour, and Kellogg Jr. remarked that McKay and Penty had supervised the cooking of the corn and that he had done the work with the gun. Penty testified that on leaving the office of W. K. Kellogg he said to McKay that Kellogg Jr. did not make the material, that it was the same as had been made back in June, 1936, but satisfactory results were not then obtainable because the little gun leaked, but with the use of the new gun, and by doing practically the same thing as was done in June past, the improved results were obtained. Then, the same day, or shortly thereafter, Kellogg Jr. informed Penty that McKay had told him he could take a patent out in his name, and McKay had earlier expressed the same view to Penty. Penty agreed to this but testified that he said to Kellogg Jr. that if he took out the patent in his name it was to belong to the Kellogg Company. I had almost forgotten to add that Penty in cross-examination testified that McKay had said to him that: "We will let John take that out in his own name as the inventor. It will please John and encourage him in his experimental work". I have no doubt whatever that McKay made use of such words to Penty.

Following the understanding that Kellogg Jr. was to be allowed to apply for a patent in his name there was drawn up, on a printed form in use by the Kellogg Company, a document intituled "Invention Conception Data", the purpose of which is self-explanatory. In this document Kellogg Jr. is mentioned as the inventor of something which is not described but which clearly had reference to the invention here in question; the date of the conception of the said invention is given as October 28, 1936; the persons to whom disclosure of the invention was made are stated to be Penty and Swartz; and the date when the invention was first successfully practised is stated as being October 30, 1936, and in the Experimental Department of the Kellogg Company. It will be observed that all the dates therein mentioned are days on which experimental work was being carried on with the new grain puffing gun,

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and all within fifteen days after Kellogg Jr. entered upon his work in the Experimental Department of the Kellogg Company. This document was signed by Kellogg Jr. as inventor, and his signature was witnessed by Penty, Rochester and Swartz. The preparation of this document would be a logical step once it was decided to allow Kellogg Jr. to take out a patent in his name, and apparently it was left in the possession of the Kellogg Company. It makes clear that the invention related to the experimental work being carried out under Penty at the direction of McKay, in the latter days of October. Another matter on which the defendant places some reliance is that McKay, on October 29, 1936, had made on a desk pad the notation: "John here, big day for John. Invented new corn puff, best we ever had". This notation of itself adds nothing to the facts already narrated; it is in effect merely a restatement of what McKay had already suggested should be done, that is, that in order to please "John" and encourage him in his experimental work he should be allowed to take out a patent in his own name. The notation on the pad does not and could not mean more than that, and if any greater weight were to be given it then McKay should have been called as a witness in this proceeding, or his evidence should have been procured in some way, to explain precisely what was meant by this notation. I should perhaps add that sometime in 1937 McKay severed his connection with the Kellogg Company and became the manager of the National Biscuit Company, whose plant was also located at Battle Creek, Michigan, and thereafter he seems to have kept aloof from this and all other proceedings having reference to this controversy.

It became apparent later in November that Kellogg Jr. had determined that he would not assign the invention under discussion to the Kellogg Company, which I have no doubt McKay and Penty believed he should and would do, and his grandfather apparently entertained the same expectation as that of McKay and Penty because he requested his son John L. Kellogg Sr. to ask Kellogg Jr. to do so. Early in December Kellogg Jr. severed his connection with the Kellogg Company, and on January 27, 1937, McKay and Penty, as joint inventors, applied for a patent in Canada, for the same invention, and this they assigned to the Kellogg Company. In an affidavit

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filed with the Commissioner of Patents, under s. 44 (5) of the Patent Act, Penty states that the invention described in this joint application was conceived on or about June 19, 1936, and that the invention was reduced to practice on the same day, and that a record was made of the experiments constituting the reduction to practice on the same day as the invention was conceived. The affidavit further states that "after the reduction to practice on June 19th, 1936, it was decided to carry out the process in a larger gun, which gun was obtained in the latter part of August, 1936, and further tests were made on various dates including particularly October 28th, 1936, October 30th, 1936, and November 11th, 1936". The fact that McKay and Penty applied for a patent in Canada when Kellogg Jr. refused to assign his invention to the Kellogg Company is but further evidence of what I think they always believed, namely, that in truth they were the real inventors of the invention in question, and this, notwithstanding the fact that they were willing, for the reasons already explained, though imprudent, to accord to Kellogg Jr. the distinction of being the inventor of the subject-matter here in conflict, but of course in the belief that the Kellogg Company would in any event become the assignee of such invention.

In so far as the events of 1936, as revealed in the evidence are concerned, I have no difficulty whatever in concluding as a question of fact, that as to priority of invention between McKay and Penty on the one hand, and Kellogg Jr. on the other hand, everything indubitably points to the former as being the first to make the invention here in question. I have not to decide whether or not the disclosure made by either constitutes invention. In this proceeding I am to assume there was invention on the part of both, in respect of the same subject-matter, and the sole question I have to decide is who was first in point of time to make the invention. I have considered all the evidence carefully and I cannot conceive of anything done by Kellogg Jr., in 1936, to warrant one in holding he made the invention here claimed for him. In fact, such a claim would seem to me to rest on the flimsiest sort of foundation. On the other hand, it appears to me rather clear that McKay and Penty had conceived the idea behind their invention in June of 1936. The container or gun which they used at that time did not yield satisfactory results in the last step of their process, but they knew what it was they sought to accomplish by this step, and the mechanical means for effecting it. The obstacle which confronted them was soon overcome by the use of the new gun, which was on the market, one of which they caused to be acquired by the Kellogg Company, for the Experimental Department of the Kellogg Company; and with it they soon achieved production, with satisfactory results, of the thing they had earlier conceived. It is not necessary to say that their invention was conceived and reduced to practice in June, 1936, but at least this can be said of October, 1936. Everything that was done in June and on till the end of October, 1936, was at the suggestion and direction of McKay and Penty. At no time does it appear that Kellogg Jr. proffered any idea or suggestion calculated to promote the successful issue of the experimental work that McKay and Penty then had in hand. He only appeared on the scene on October 15, and he appears to have had nothing to do with the direction of the preparation of the material for shooting in the gun. His operation of the gun with Swartz, which they were directed to do, was purely a mechanical act, with an instrumentality purchased by the Kellogg Company to do the very thing that was done by it. It seems to me utterly untenable to say that this of itself was invention, or was an element contributed by Kellogg Jr. in making the invention. It might well have happened that Kellogg Jr. would have been off duty at the important lunch hour in question here and replaced by some other of the Experimental Department staff, and there would not seem to be any reason why any one else could not have achieved the same result with the same gun. I can conceive of no ground whatever for suggesting that anything Kellogg Jr. did had any of the elements of invention in it. The whole train of ideas put into motion in respect of the invention, even to the selection of the gun, were those of others. The fact that later Kellogg Jr. was to be allowed to apply for a patent in his name, or was to be treated as the inventor, cannot change these facts, and the reasons for permitting Kellogg Jr. to apply for a patent have, I think, been satisfactorily explained. McKay and Penty seemingly regarded

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it as of no importance who was to have the credit for the work they had successfully directed, so long as their employer had the benefit of the same.

It was contended that Kellogg Jr. conceived his invention in 1935. His father, John L. Kellogg Sr., testified at the hearing of this proceeding that while accompanying his son (Kellogg Jr.) in June, 1935, to a sanitarium following his accident, the son discussed with him the subject-matter described and claimed in the patent applications in question. This evidence is uncorroborated by any contemporary documentary evidence, and there is no evidence of any research or experimental work carried on by him at that time, which was directed to such an end. That sort of evidence cannot be allowed to weigh against the evidence adduced in support of the application of McKay and Penty. Kellogg Jr. may have had some vague idea of something comparable to that later demonstrated in a practical way by McKay and Penty, but that is not sufficient to support invention. The evidence of John L. Kellogg Sr. falls well within the principle laid down in the case of *The Permutit Company* v. *Borrowman* (1): "It is not enough for a man to say that an idea floated through his brain, he must at least reduce it to a definite and practical shape before he can be said to have invented a process". All that was claimed by Mr. Clark on behalf of Kellogg Jr. was that he had evolved the idea of his invention in 1935, but there is no evidence of an acceptable character that even that was done, and in any event there is no evidence that his idea was ever reduced to definite and practical shape in 1935. Such a suggestion seems altogether improbable when one takes into consideration his line of conduct in the last days of October, 1936, while working in the Experimental Department of the Kellogg Company, along with others. It is hardly conceivable that if he had in 1935 evolved any idea comparable to that which was then engaging the thought and attention of McKay and Penty, he would not have disclosed that idea or knowledge to those with whom he laboured, in the interests of his employer; but the fact is that he appears to have played the role of a silent and humble worker, and the only thing he apparently spoke about afterwards was that he had assisted in the opera-

(1) (1926) 43 R.P.C. 356.

tion of the gun. Then, some further evidence was introduced by the defendant to the effect that Kellogg Jr. had conceived his invention on December 7, 1935. It appears that sometime in November, 1936, Kellogg Jr. requested Penty, Swartz and Rochester to sign, as witnesses to the signature of Kellogg Jr., a copy of the original Invention Conception Data Sheet, to which I have earlier referred, and in which Kellogg Jr. was given a conception date of October 28, 1936. This copy, so presented by Kellogg Jr., the persons mentioned signed. I am satisfied upon the evidence that when they signed the same it either did not contain the date of December 7, 1935, as the date of conception, or if it did this new conception date was not called to their attention. Rochester stated he had no knowledge regarding any corn-puffing experimental work prior to June of 1936, and that he would not have signed the document if it had contained any such date, and that would seem both reasonable and probable. I am quite satisfied that Penty and Swartz were unaware at the time that a date of conception of December 7, 1935, was mentioned in this document and that their attention was not called to it, if it then were in the copy presented for their signature. It appears to me that this conception date was entered in this document by some one, at some time, in an effort to lay a foundation for the claim that Kellogg Jr. was entitled to priority over any claim that might be made for invention based on the work done in June or October of 1936 by McKay and Penty. There is no evidence whatever to support a conception date of December 7, 1935, by Kellogg Jr., and one cannot well avoid the suspicion of lack of good faith on the part of some one in procuring the signatures of Penty, Swartz and Rochester to this copy of the original Invention Conception Data Sheet. In view of all the facts and circumstances disclosed it would seem a very improbable thing for them knowingly to sign such a document intending it to be a copy of the original Invention Conception Data Sheet. Therefore, in my opinion, the contention that Kellogg Jr. conceived his invention in 1935 cannot be upheld.

Before concluding on this phase of the case I must refer briefly to the evidence of Miss Gibbons, a witness called on behalf of the plaintiff, and to which I should perhaps have referred earlier. Miss Gibbons, over a number of

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years, had acted as secretary to several of the executive officers of the Kellogg Company, including at one time Kellogg Jr. She appears to have had quite an intimate knowledge of the matters here in controversy. She was intimately acquainted with Kellogg Jr. before and after he met with his accident, and she attended to many of his personal affairs after he rejoined the Kellogg Company in October of 1936. From McKay and Penty she had become aware of their experimental work in June of 1936, and later, in connection with the subject-matter of this litigation; and Kellogg Jr., before leaving the company in December, 1936, spoke to her about his invention. As he was about to leave, or had left the Kellogg Company, she appears to have upbraided him for claiming this as his invention and in any event for refusing to make an assignment to the Kellogg Company. She testified: "I said, John, you can't do this, because you know it is not your invention. I said I know they have let you sign the Conception Data. And he said that they were willing to let him sign the Conception Data . . . . He said he knew it was not his invention". She testified that later, about a week before his death, he stated to her that "he was sorry he had not taken my advice", meaning, I understand, that he should have followed her advice in regard to the making of an assignment of the invention to the Kellogg Company. The evidence of Miss Gibbons impressed me very much and I have no hesitation in accepting her evidence without any qualification whatever. I think she understood clearly the genesis and development of the whole affair leading to this controversy, the reason why Kellogg Jr. was allowed to be treated as the inventor, and she, feeling strongly about the equities of the dispute that later arose about the assignment, felt free to speak with frankness to Kellogg Jr., whenever the subject became the matter of conversation between them.

From the foregoing it will appear that it is my opinion that McKay and Penty, and not the late Kellogg Jr., were in fact the first inventors of the subject-matter described and claimed in their application for a patent, and that is my finding. It is also my finding that the plaintiff is entitled to the issue of a patent as claimed by it in its statement of claim.

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There remains one more matter to be mentioned. The plaintiff pleaded and contended that if it should be found here as a fact that Kellogg Jr. was the first inventor of the subject-matter of the patent application filed by Mary M. Kellogg, and which by assignment or otherwise came into the possession of the defendant, then such invention was made by Kellogg Jr. during and in the course of his employment with the plaintiff and when he was carrying out work which he was instructed to do on the plaintiff's behalf; that by virtue of his contract of employment and the circumstances under which such invention was made, Kellogg Jr. became and was a trustee of the invention for the plaintiff, which was and is entitled to the benefit of it; and that by reason of Kellogg Jr. being such a trustee he was unable to transfer any right, title or interest in the invention to any other party and that the plaintiff is now the owner of any invention covered by the application of Mary M. Kellogg. Inasmuch as I have found as a fact that McKay and Penty, and not Kellogg Jr., were the inventors of the subject-matter described and claimed in the patent application of Mary M. Kellogg, it becomes unnecessary for me to discuss this point. Had I felt obliged to find that Kellogg Jr. was the first inventor of the subject-matter described in the application claims here in conflict I may say I would have found no difficulty in sustaining the plea and contention of the plaintiff in respect of this point, and in granting it the relief claimed in this connection, in its statement of claim. The facts and circumstances disclosed in the present case are such that I would have followed readily the reasoning and decision of Farwell J. in *Triplex Safety Glass Co. Ltd.* v. *Scorah* (1), but which case I need not now pause to discuss.

In the result the plaintiff succeeds upon the issue here standing for decision, and with costs.

*Judgment accordingly.*

(1) (1937) 55 R.P.C 21.

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Sept. 12 & 13.

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May 30.

BETWEEN:

NATIONAL PETROLEUM CORPORATION LIMITED .......... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE .......................... RESPONDENT.

*Revenue—Income War Tax Act, R.S.C., 1927, c. 97, secs. 5 (a), 6 (a) & 6 (b)—Capital expenses—Discretion of the Minister—"Disbursements or expenses not wholly, exclusively and necessarily laid out or expended for the purpose of earning the income"—Income—Costs of drilling oil wells—Deductions for depreciation, development costs and depletion—Appeal from decision of the Minister of National Revenue dismissed.*

Appellant obtained commercial production of oil from two wells which it drilled in Alberta. Appellant was assessed for income tax for the taxation year 1938, which assessment was affirmed by the Minister of National Revenue. An appeal from that decision was taken to this Court.

Appellant contends that certain allowances for depreciation and depletion were made in an arbitrary manner without regard to any principle under the circumstances and were inadequate.

Appellant contends that development costs and all capital costs should be amortized before any income tax is imposed.

*Held:* That the discretion of the Minister of National Revenue was not exercised in an arbitrary manner or contrary to the provisions of the Income War Tax Act, nor can the allowances made be termed unreasonable, unjust or unfair.

2. That the Minister having exercised his discretion and having allowed deductions for depreciation, development and depletion the appeal must be dismissed.

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 Calgary.

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

*C. J. Ford, 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 (May 30, 1942) delivered the following judgment:

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This is an appeal from a decision of the Minister of National Revenue (hereafter called "the Minister") affirming an assessment for the income tax made by the Commissioner of Income Tax (hereafter called "the Comsioner") against the National Petroleum Corporation, Limited, for the year 1938, in the sum of $13,513.45. The appellant is a company incorporated under the Dominion Companies Act and is engaged in the development and operation of oil bearing lands in the Turner Valley, in the Province of Alberta. Prior to or early within the taxation period in question the appellant had drilled to completion two oil wells, on lands leased and controlled by it, and both wells are still producing oil in commercial quantities.

For the purpose of clarity it may be desirable at the outset to define the meaning attributed to certain terms used throughout this proceeding by the parties thereto. The term "depreciation" apparently is here used in its commercial sense to apply only to wasting fixed assets, such as plant, machinery and equipment, which inevitably diminish in value while applied to the purpose of seeking profits, or advantage otherwise than by purchase and sale. In measuring annual depreciation in such cases the nearest approach to accuracy will ordinarily be obtained by estimating the whole-life period, in years, of each class of industrial plant, with due regard to all known facts, as well as to future probabilities, and distributing the cost, less the estimated remainder or scrap value, to future revenue accounts, in equal instalments over each year of the estimated whole-life period. An illustration of this is the fact that the appellant owned certain plant and equipment, a rotary rig, a truck, an automobile, and certain office equipment, and in 1938 it wrote off certain sums on account of "depreciation" of this plant and equipment, at different percentages, as will later appear, and this deduction was allowed by the Commissioner. Then the term "depletion" is frequently used, and that here has the same meaning as "exhaustion", as used in sec. 5 (*a*) of the Income War Tax Act, and it has reference to an allowance for the "depletion" of the oil reserves recoverable from the appellant's oil leases; it is a measure of the annual exhaustion of the mass or source of oil intended for sale, and ordinarily there the chief

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factor to be taken into consideration is the proportion which the volume of oil exhausted or won in any year, and which becomes stock in hand, bears to the estimated whole volume of oil likely to be recovered in the life time of the oil bearing leases. In other words, in the case of an oil producing property, a deduction for "depletion" is an allowance for another division of wasting capital assets before estimating net annual revenue. Another term here employed is "development" or "development costs" and it signifies here only the cost of drilling the two oil wells of the appellant, and apparently does not include the cost of plant and equipment used in drilling the wells, or the casings; and this cost amounted to $219,216.23. The cost of the well casings, that is the steel core which lines the wells, or the holes in the ground, is treated apparently in the same way as plant and equipment, but it is not definitely classified as such, there being apparently some doubt as to whether it should be classified as part of the development cost, or as plant and equipment, but while it is apparently treated as something apart from both yet in practice "depreciation" was allowed here just as if the casings were part of the plant and equipment. However, nothing turns upon this as there is no dispute as to what was allowed as a deduction in connection with the casings.

The appellant filed an income tax return for the year 1938 showing no taxable income. Accompanying the return was the appellant's Balance Sheet, Production Account, Profit and Loss Account, and the Profit and Loss Appropriation Account, for the year in question. The Profit and Loss Account showed a net profit of $166,975.31 for 1938, but against this, in the Profit and Loss Appropriation Account, were written off the following amounts:—

| | | | |
|---|---|---|---|
| Depletion | | | $ 54,608 45 |
| Depreciation:— | | | |
| Plant and Equipment | 15%.... | $11,689 45 | |
| Rotary Rig | 15%.... | 12,048 90 | |
| Truck and Auto | 20%.... | 340 80 | |
| Office Equipment | 10%.... | 40 59 | 24,119 74 |
| Balance—Written off against Development Expense | | | 88,247 12 |
| | | | $166,975 31 |

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These book appropriations against net profits left the appellant without any taxable income for the year 1938, and its tax return for that year was made accordingly.

The Commissioner in making the assessment in question charged back the sum of $54,608.45 written off for depletion, and the sum of $88,247.12 written off for development expenses, but the amount written off for depreciation of plant and equipment, $24,119.74, was not charged back and was therefore allowed. The sum of $5,708.19 was allowed for depreciation of the casings for the two wells, based upon their respective costs, and an adjustment was made in connection with the Workmen's Compensation Board assessments or charges, and in the result there was found a taxable income of $88,025.95 earned by the appellant for the year 1938. The adjustment of the appellant's income tax return as found by the Commissioner appears in the notice of assessment in substantially the following form:—

| | | |
|---|---|---|
| Net profit as per Profit & Loss Account...... | | Nil |
| Added: Amount written off against Development Expense .................. | | $ 88,247 12 |
| " Amount written off for Depletion.. | | 54,608 45 |
| " Adjusted amount of Workmen's Compensation Board charges ...... | | 487 02 |
| | | $143,342 59 |
| Less: Depreciation for casing: | | |
| No. 1 Well, $15,241.46, 15%.... | $2,286 22 | |
| No. 2 Well, 22,813.17, 15%.... | 3,421 97 | 5,708 19 |
| Total Income .................. | | $137,634 40 |

The assessment in question, as adjusted by the Commissioner, thus showed a net profit of $137,634.40 before any allowance for development and depletion.

I may next explain how the Commissioner dealt with the matter of allowances for development and depletion. First, I should state that the appellant's Production Account for 1938 showed a gross income from sales of production in the sum of $218,433.79 before deducting any

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operating expenses or anything on account of development costs, but after deducting certain gross royalties paid or payable in that year, and amounting to $65,195.88. I was told by counsel that it had been the rule or practice of the Department of National Revenue for several years prior to and including the year 1938 to make one allowance for both depletion and development in the case of the Alberta oil producing properties, reached by taking 25 per cent of the gross revenue of such oil properties, after allowing for over-riding royalties, and this allowance was to be the maximum amount to be allowed for both development and depletion. In the case of the appellant, for the year 1938, this allowance would be 25 per cent of the sum of $218,433.75, or $54,608.45, and this amount would be apportioned between development and depletion. I would infer that before the adoption of this rule allowances were made for development and depletion on another basis, but that was not, I think, explained to me. Now the $54,608.45 thus allowed for both development and depletion was apportioned in such a way that 25 per cent of the net profit, after the allowance made for development, was allowed for depletion, and the balance of the $54,608.45 would be the allowance for development. In order therefore to ascertain the precise amount to be allowed for development the amount to be allowed for depletion had first to be determined. The formula by which this was worked out was, I think, rather clearly put by Mr. Ford in his written argument, and he expressed that in the following way:—

*1938 Assessment*

| | |
|---|---|
| "Net Income before Development and Depletion Allowances .................... | $137,634 40 |
| Less Development and Depletion Allowances of 25% of gross proceeds from production, less over-riding royalties...... | 54,608 45 |
| Taxable Income ............... | $ 83,025 95 |

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*Apportionment of Development and Depletion Allowance:*

| | |
|---|---|
| Depletion is 25% of the net income after all other allowances have been made. | |
| Taxable income is, therefore, 75% or 3/4ths of net income. | |
| 3/4ths of net income=taxable income or.. | 83,025 95 |
| 1/4th of net income=depletion or........ | 27,675 32 |
| Total Allowance ............... | 54,608 45 |
| Less Depletion Allowance........ | 27,675 32 |
| Development Allowance ....... | $ 26,933 13" |

By this method of apportionment the allowance for development depends upon the flow or yield of the oil wells, the larger the flow or yield of the wells the larger the allowance for development, and the sooner the development costs would be amortized, while the allowance apportioned for depletion is based on net profits. By this method of computing the allowance for both development and depletion, and by this method of apportionment, the Commissioner determined the net taxable income of the appellant, and this is expressed in the Commissioner's notice of assessment in the following manner:—

| | |
|---|---|
| Net profit before allowance for depletion and development ......................... | $137,634 40 |
| Allowance for development costs........... | 26,701 13 |
| Net profit after allowance for development.. | $110,701 27 |
| Allowance for depletion 25% of above net profit ................................ | 27,675 32 |
| Taxable income ......................... | $ 83,025 95 |

It was upon the net taxable income of $83,025.95 so found that the appellant was assessed for the year 1938 in the sum of $13,513.45, and, as I have already stated, this method of ascertaining the allowance for both development and depletion, and apportioning the same between development and depletion, had been followed for some years.

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The total deduction allowed the appellant for depreciation of plant and equipment, for depreciation of the well casings, for depletion, and for development costs, for the taxation period of 1938, may therefore be stated as follows:

| | |
|---|---|
| For depreciation on plant and equipment... | $ 24,119 74 |
| " " on casings ............. | 5,708 19 |
| " depletion ........................... | 27,675 32 |
| " development ........................ | 26,933 13 |
| A total of ....................... | $ 84,436 38 |

Before proceeding further I should perhaps explain that the method of computing the deductions for development and depletion in the taxation period in question was varied for the year 1939, and following years. I was informed that, at a conference between the taxing authorities and representatives of oil producing companies in Alberta, the latter urged a definite annual allowance for development, on the basis of the cost of the same, and not on the basis of gross or net income, and that, as a result of this conference, a deduction of 30 per cent, on account of actual development costs, was thereafter allowed by the taxing authorities for the first year, and a diminishing percentage for the next succeeding five or six years, until such costs were fully amortized, and that allowances for depletion were thereafter made on the basis of 25 per cent of net income from production, after allowing for the deduction for development and all other charges. This revised method was seized upon by Mr. Patterson as evidence in support of his contention that the assessment for 1938 had been arbitrarily made, and not upon any sound principle, and while conceding that the revised method of dealing with deductions for development afforded some relief to operators of oil producing properties, yet, it did not go far enough in that amortization of development costs extended over too long a period of years, and that the allowance for depletion was not yet fixed upon any sound principle.

The matters in issue here, and the position taken by the taxpayer and the revenue authorities respectively, are fairly well revealed in certain documents found in the Official File, here in evidence, and to those documents I may now refer. The appellant in its notice of appeal, *inter alia,* states:—

It has been the practice of the Department to treat oil companies in somewhat the same manner as mining companies, but we would respectfully point out to you that oil and mining are two very different things.

Mining Companies before they spend any considerable sum on development, have been able to assure themselves that gold or other ores are available in quantities sufficient to warrant development. On the other hand, oil companies drill wells in likely places picked out by geologists, but there is absolutely no assurance whatsoever that any oil will be found.

It is contended that the drilling of the two oil wells referred to by this Company should be regarded in the light of a single transaction and that part of the expense of producing the oil is the drilling of the wells, and that no profit can be earned from the wells until the total costs have been recovered.

If for any reason the well has to be abandoned, the development costs are a dead loss, as there is no recovery value. In other words, the development costs are an expenditure for which the owner gets no tangible asset. The only return it is possible for the owner to get is oil, and as before stated, part of the cost of obtaining that oil is the drilling cost.

We feel that the fairest way would be for accounts to be taken covering the whole operation when the well finally has ceased to produce and that the whole of the development costs should be written off at that time However we realize that this is not feasible and suggest that the only other fair way is to allow the whole of the development cost as a charge against production until such time as the development costs have been recovered.

It is apparent that the Income Tax Department has endeavoured to meet this situation by new regulations applicable to 1939 income but we contend that even these regulations are only a palliative and do not effect a cure.

We are therefore of the opinion that the Company had no income in the year 1938, and that the assessment is wrongfully issued.

Then followed the decision of the Minister and in one paragraph he states:—

The Honourable the Minister of National Revenue having duly considered the assessment and the objections thereto raised by the appellant, and having reconsidered all the facts connected with the assessment, hereby affirms the same on the ground that the appellant's claim to recover out of production its full capital expenditures in bringing the wells into production cannot be conceded, they being capital expenses the deduction of which is prohibited by paragraph (*b*) of section 6 subsection 1 of the said Act, and that, on the other hand, the allowances made to the appellant in the assessment herein appealed against on account of depreciation or amortization of the said pre-production capital expenditures, on account of depreciation of capital equipment used in the wells, and on account of depletion or exhaustion of the oil wells are reasonable and fair and have been duly determined by the Minister under and in accordance with the provisions of paragraph (*a*) of section 5 of the said Act.

Following the Minister's decision the appellant, by its solicitor, Mr. Patterson, filed with the Commissioner a

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Notice of Dissatisfaction as authorized by s. 60 of the Act, which signifies the dissatisfaction of the appellant with the decision of the Minister. I may recite this notice in almost its entirety as it would appear to reflect substantially the grounds advanced by Mr. Patterson on the hearing of this appeal. The notice states:

National Petroleum Corporation Limited is a Company which has drilled two oil wells in Turner Valley. The Minister of National Revenue has assessed this Company on a basis applicable to ordinary mining Companies. It is submitted that in view of the short life of wells in Turner Valley investment in such wells should not be treated as a capital investment. The Minister has treated development costs in whole or in part as a capital investment when the nature of the undertaking is in reality not a capital investment. The proper assessment should have allowed deduction for expenses in connection with drilling and other development costs.

The Minister, taking the position that the operations of the Company above referred to constitute an investment in capital, has not allowed depreciation to an amount appropriate in the circumstances having regard to the period of the life of wells in Turner Valley and the nature of development of oil wells in said area.

The Minister did not make a proper allowance in the said assessment for depletion in respect of properties developed by the appellant.

The allowance for depreciation of casing in the said well was not sufficient in the circumstances.

The concluding step in this phase of the case was the Reply of the Minister to the appellant's Notice of Dissatisfaction, the important portions of which are:

1. That the costs of drilling the oil well and the necessary buildings, roads, etc., were expenses incurred in the creation of capital assets or expenses of putting the taxpayer in a position to earn income and not expenses wholly, exclusively and necessarily incurred in the earning of income within the meaning of section 6 (*a*) of the said Act.

2. That the said expenses were outlays or payments on account of capital within the meaning of section 6 (*b*) of the said Act.

3. That the facts and circumstances in regard to the taxpayer's affairs have been considered and the discretionary power referred to in section 5 (*a*) of the said Act (so far as discretionary power in such circumstances has been provided for by the Statute) has been exercised with respect to depreciation of capital assets and depletion of oil wells, and the allowance made is deemed a just and reasonable exercise of the statutory discretion.

I perhaps should add that in his written argument Mr. Patterson made the following submissions in support of the appeal: (1) The Minister has a duty to fix a reasonable allowance in respect to depreciation, (2) the Minister "shall make an allowance" for the exhaustion (or depletion) of the wells, (3) there is nothing to show that the Minister has made any allowance in respect of either depreciation or depletion, (4) if any allowances have been made they are purely arbitrary and based on no principle having regard to the circumstances of the case, and (5) the actual allowances made are inadequate in the circumstances. These several submissions were in turn amplified but into that I do not propose to enter.

One has only to consult some of the many text books wherein authors of experience discuss the matter of allowances for depreciation of wasting capital assets, and allowances for depletion of mining and gas or oil properties and their cost of development, to learn how difficult is the problem, the variety of views prevailing in respect of the same, and the difficulty of formulating any rule of broad application whereby these matters can be determined with entire satisfaction to all concerned, particularly when the controversy lies between the taxpayer and the taxing authorities and where the net income of the taxpayer has to be determined. The Income War Tax Act provides no rules, in the case of mining and gas or oil producing properties, for ascertaining allowances for depreciation, depletion, or development, and no doubt it was because of a realization of the inevitable difficulties surrounding such matters that this duty was left to the discretion of the Minister. There is no mention of "development costs" in the Act and I assume that in theory and in the strict and proper sense a coal mine shaft, or the shaft of a metalliferous mine, or the hole in the ground through which oil is recovered, is plant and equipment; but it has been found by experience that such development costs had to be treated as a branch or division of the matter of depreciation of plant and equipment, because the problem there cannot be disposed of on the same basis, or with the same approximation to accuracy, as in the case of fixed assets, such as buildings, machinery or equipment, because their life and the life of the industry in which such assets are employed may be measured with some certainty. It was stated that in the case of coal mines allowances for depletion are computed at so much per ton of coal raised, and in other types of mining operations on the basis of a certain percentage of net profits. In computing allowances for depreciation, development and depletion in respect of oil producing properties in the United States, certain rules appear to have been

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established, and certain options seem to be made open to the taxpayer in respect of such matters. However, these rules are so complicated that I cannot safely venture upon any explanation of them.

I come now directly to the question here to be decided, and it will be well first to refer to s. 5 (*a*) of the Income War Tax Act, the provision of the statute relevant to the issue here, and as in force at the material time. That section reads:—

> "Income" as hereinbefore defined shall for the purposes of this Act be subject to the following exemptions and deductions: (*a*) Such reasonable amount as the Minister, in his discretion, may allow for depreciation, and the Minister in determining the income derived from mining and from oil and gas wells and timber limits shall make such an allowance for the exhaustion of the mines, wells and timber limits as he may deem just and fair. . . . .

I am asked to say that here the Minister exercised his discretion, if at all, arbitrarily, and on no principle having regard to the circumstances of the case; that development costs, and in fact I think it was said all capital costs, should first be amortized before any income tax was imposed, notwithstanding that the Act requires a tax upon net income to be imposed annually, which contention, if sound, would appear to virtually nullify the whole Act, in respect of cases of this kind; and that the actual allowances made were inadequate in the circumstances. It is not, I think, necessary for me to say that the several contentions of the appellant are without merit in the practical sense, or that the allowances made for development and depletion by the taxing authorities were reached by a method which was beyond all controversy. But I do not think that it can be said, in all the circumstances of the case, that the discretion of the Minister was exercised arbitrarily or haphazardly, or contrary to the provisions of the Act, or contrary to well established practice, or upon what can be said to be obviously unsound principles, or that the allowances made can fairly be termed unreasonable, unjust or unfair. The points in issue seem to have been the subject of careful consideration by the taxing authorities, in respect of matters about which there may well be a variety of opinions. The fact that in the assessment of the appellant for 1939, and since, I believe, the allowance for development was based upon actual costs, over a period of years, and not upon gross income or net

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income, does not impugn the validity of the discretion exercised by the Minister in 1938 and earlier years, and I do not think such an argument is a tenable one. The Minister having exercised his discretion in the manner I have already described, and having allowed deductions for depreciation and development, and also for depletion or exhaustion, that I think is the end of the matter, and I do not think I can usefully add anything further. I have not been satisfied that the assessment in question should be disturbed. My conclusion therefore is that the appeal must be dismissed and with costs.

*Judgment accordingly.*

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Sept. 23.

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June 29.

BETWEEN:

WILLIAM H. MALKIN .............APPELLANT;

AND

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

*Revenue—Income tax—Income War Tax Act, R.S.C., 1927, c. 97, s. 2 (l), (r) and (s), s. 3 (e) and s. 34—Income—"Personal and living expenses"—Personal and living expenses when such form "part of the profit, gain or remuneration of the taxpayer, or the payment of such constitutes part of the gain, benefit or advantage accruing to the taxpayer under any estate, trust, contract, arrangement or power of appointment, irrespective of when created"—"The expenses of properties maintained by any person for the use or benefit of any taxpayer or any person connected with him . . ."—"The expenses, premiums or other costs of any policy of insurance, annuity contract or other like contract . . . for the benefit of the taxpayer or any person connected with him"—Rentals received by appellant constitute taxable income although applied to purchase price of rented property by agreement entered into after receipt—"Year"—Fiscal period—Income for two fiscal periods ending in one calendar year assessed for taxation purposes.*

Appellant entered into a trust agreement with his four children and a trustee pursuant to the terms of which he transferred to the trustee his interest in a parcel of real estate known as Southlands; certain shares of stock in The W H Malkin Co. Limited; certain life insurance policies on appellant's life in existence at the date of the agreement; and certain new insurance policies issued subsequent to the date of the agreement. Southlands had been owned by appellant and his children. All joined in transferring it to the trustee The upkeep of Southlands was provided by the trustee who was to sell

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it as soon as a reasonable price could be obtained for it. By permission of the children the appellant lived in Southlands without paying rent therefor during the taxation year in question. The trust agreement also provided for the payment of the premiums on the insurance policies. The only income received by the trustee during the taxation year in question was the sum of $5,600. The outlay by the trustee in carrying out the trust was $11,104 13 of which amount the sum of $10,344.68 went for the maintenance of Southlands and the payment of the premiums on the life insurance policies.

On December 1st, 1935, The W. H. Malkin Company Limited sold and conveyed to appellant and his two brothers certain property in Vancouver for the sum of $77,000. The appellant and his brothers rented to the W. H. Malkin Company Limited the said property from December 1, 1935, to November 3, 1938. Appellant received his share of the rentals and for the period from December 1, 1935, to February 28, 1937, reported these as income and paid the tax thereon. He did not report as income his share of the rentals received from March 1, 1937, to November 19, 1938.

On November 3, 1938, the appellant and his brothers entered into a verbal agreement with The W. H. Malkin Company, Limited whereby the property was to be sold and conveyed by the brothers to the Malkin Company for the same price paid for it by the brothers. All rentals received by the brothers since 1935 were to be credited as part payment by the Malkin Company for the property. On November 19, 1938, the property was conveyed to the Malkin Company and the company credited with the rentals received by the transferrors. Appellant contends that these rentals became capital receipts by virtue of the oral agreement and subsequent transfer of the property.

The Commissioner of Income Tax assessed appellant for income tax on the income received by the trustee and also on the rentals received by appellant for the period from March 1, 1937, to November 19, 1938. These assessments were affirmed by the Minister of National Revenue from whose decision an appeal was taken to this Court.

*Held:* That the expenses of the maintenance of Southlands, or the payment of the insurance premiums under the Trust Settlement do not form part of the profit, gain or remuneration of the appellant nor do they constitute part of any gain, benefit or advantage accruing to the taxpayer under any estate trust, contract, arrangement or power of appointment, irrespective of when created.

2. That all the rental receipts in question constituted income in the hands of appellant and taxable as such.

3. That since appellant had chosen to treat the rentals as a separate business apart from his other interests and had adopted the date of February 28 as being the end of the fiscal year as far as the rentals were concerned, he was correctly assessed for two fiscal periods in the year 1938, namely, the fiscal year ending February 28, and the fiscal period from March 1 to November 19, the date on which the rental business terminated.

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 Vancouver, B.C.

*W. Martin Griffin, K.C.*, for appellant.

*E. Meredith* and *A. A. McGrory* for respondent.

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

THE PRESIDENT, now (June 29, 1942) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue affirming an assessment for income tax levied against the appellant, by the Commissioner of Income Tax (hereafter referred to as "the Commissioner"), for the calendar year 1938.

On April 29, 1939, the appellant, who is a retired merchant residing in the City of Vancouver, B.C., duly made his income tax return for the taxation year ending December 31, 1938, and, therein, returned a net taxable income of $33,719.78 upon which an income tax of $7,041.11 would be payable. On April 2, 1940, the Commissioner assessed the appellant on a net taxable income of $52,625.41, instead of $33,719.78, upon which there would be payable a tax of $13,459.72, instead of $7,041.11, there being a further tax of $6,418.61; and the said sum of $13,459.72, together with interest amounting to $483.81, making in all $13,943.53, was the income tax levied by the Commissioner against the appellant, for the taxation year 1938.

The additional income for which the appellant was assessed consisted of the following items:—

| | |
|---|---|
| (*a*) Appellant's proportion of the rents of a certain warehouse, received between March 1, 1937, and November 19, 1938 .............................. | $13,217 76 |
| (*b*) The income of the Toronto General Trusts Corporation under a Trust Settlement made by the appellant for the benefit of his children, dated November 29, 1934................ | 5,600 00 |
| (*c*) Two small items against which no appeal was lodged by the appellant ........ | 87 87 |

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The amount of additional tax assessed against the appellant in respect of the aforesaid rents ($13,217.76) and the aforesaid income of the Toronto General Trusts Corporation ($5,600) is the sum of $6,390.93.

There are, therefore, two questions involved in this appeal. The one has to do with the amount received by the appellant on account of the rental of the warehouse, and the other is concerned with the amount of $5,600, the income of the Toronto General Trusts Corporation for the year 1938, under the Trust Settlement mentioned, but which income is here assessed as the income of the appellant, namely, as "personal and living expenses of the appellant, as defined in section 3, sub-s. (*e*) of the Income War Tax Act", as stated in the statement of defence of the Crown. It is the latter question which I shall first discuss.

The question as to whether or not the income of the Toronto General Trusts Corporation under the Trust Settlement in question was assessable as income of the Settlor, the present appellant, arose in connection with the assessment of the appellant herein for income tax for the taxation year ending December 31, 1935. In that year the appellant was assessed for the said income of the Toronto General Trusts Corporation, and from that assessment he appealed, and ultimately the matter came, on appeal, before me for decision, and my judgment in that matter will be found reported in the case of *Malkin* v. *The Minister of National Revenue* (1). The facts appearing in that case appear to be sufficiently stated in the head-note of the report of that case and it might be helpful if I should quote the same, and they are as follows:

Appellant entered into a trust agreement with his four children and a trustee pursuant to the terms of which he transferred to the trustee his interest in a parcel of real estate known as "Southlands" which had been owned by appellant's wife in her lifetime, and on her death had devolved to the appellant as to an undivided one-third interest, and to the children as to the remaining two-thirds; certain shares in the Malkin Company; certain life insurance policies on appellant's life in existence at the date of the agreement, and certain new insurance taken out on appellant's life, subsequent to the date of the agreement. The children joined with appellant in transferring Southlands to the trustee, the upkeep to be provided by the trustee who was to sell it as soon as a reasonable price could be obtained for it. By permission of the children the appellant lived in Southlands without paying rent therefor during the taxation period in question.

(1) (1938) Ex. C.R. 225

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The trust agreement provided *inter alia* for the payment of the premiums on the insurance policies, the upkeep of Southlands, the giving to the appellant of an irrevocable proxy to vote the shares of the Malkin Company, the sale of such shares subject to certain conditions, the investment of the trust moneys, the appointment by appellant of a new trustee and the division of the trust estate at the termination of the trust.

The only income received by the trustee during the taxation period in question was the sum of $6,400 as dividends from the shares of the Malkin Company. The Commissioner of Income Tax assessed the appellant on this income and that assessment was confirmed by the Minister of National Revenue from whose decision the appellant appealed.

I held that the appellant there was not liable for income tax upon the income of the Toronto General Trusts Corporation under any provision of the Income War Tax Act by reason of his occupancy of Southlands during the taxation period there in question, or otherwise. My reasons for judgment will, of course, appear more fully in the report of that case, and from that decision there was no appeal.

In the present case the income of the Toronto General Trusts Corporation under the Trust Settlement for 1938, the taxation year here in question, was $5,600 and the outlay by the corporation in carrying out the trust was $11,104.13. Of this amount the outlay for the maintenance of Southlands and for the payment of the premiums on the life insurance policies was $10,344.68.

There being no material change in the facts appearing in the present case, and those in the former one, it will, of course, follow that, unless there has been some amendment of the relevant sections of the Income War Tax Act since 1936, applicable to the taxation year here in question, my opinion still would be that the income of the Toronto General Trusts Corporation is not assessable as the income of the appellant in the present case, as "personal and living expenses", or otherwise. The relevant and important section of the Act as it stood at the time of the former case, was sec. 3 (*e*) and it read:

For the purposes of this Act "income" means the annual net profit or gain or gratuity . . . , and also the annual profit or gain from any other source including (*e*) personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer.

This section of the Act was amended by Chap. 46 of the Statutes of Canada for the year 1939, and now reads:

For the purposes of this Act "income" means the annual net profit or gain or gratuity . . . , and also the annual net profit or gain from any other source including (*e*) personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer *or the*

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*payment of such constitutes part of the gain, benefit or advantage accruing to the taxpayer under any estate, trust, contract, arrangement, or power of appointment, irrespective of when created.*

The italicized words are those added to the original section by the said amendment.

The same amending statute added to sec. 2 of the Act, as sub-s. (*r*), the following definition of "personal and living expenses", and that sub-s. (*r*) reads as follows:—

(*r*) Personal and living expenses shall include *inter alia*—

(i) the expenses of properties maintained by any person for the use or benefit of any taxpayer or any person connected with him by blood relationship, marriage or adoption, and not maintained in connection with a business carried on *bona fide* for a profit and not maintained with a reasonable expectation of profit.

(ii) The expenses, premiums or other costs of any policy of insurance, annuity contract or other like contract if the proceeds of such policy or contract are payable to or for the benefit of the taxpayer or any person connected with him by blood relationship, marriage or adoption.

The above provisions of this paragraph (*r*) were made to extend to expenses of properties and establishments, maintained by a personal corporation, estate or trust, for the benefit of any of its shareholders or beneficiaries, but that does not seem to concern us here.

The foregoing recited amendments to the Income War Tax Act were made applicable to income of the year 1938 and fiscal periods ending therein, and to all subsequent periods.

The question for decision then seems to be whether the amendments made to the Act in 1939, the amendments which I have recited, have so altered the situation obtaining in 1935, the taxation year considered in the former appeal, that they authorize the assessment of the appellant for the expenses incurred by the Toronto General Trusts Corporation for the maintenance of Southlands, and also for the payment of insurance premiums under the terms of the Trust Settlement, as "personal and living expenses" of the appellant, within sec. 3 (*e*) of the Act. I should perhaps make it clear that the appellant occupied Southlands in 1938 under precisely the same terms and for the same reasons that obtained in 1935, and as explained in my judgment in the other appeal.

It is to be pointed out that the new sub-s. (*r*) of s. 2 of the Act, the Interpretation section of the Act, would appear to have been intended only to define what "personal and living expenses" shall include, and accordingly it does not say when, or in what state of facts, such "personal and living expenses" would be included as annual net profit or gain and therefore taxable income; in fact, one would not expect to find any such provision in the Interpretation section of the Act, but one would look for something to that effect in sec. 3 of the Act, and there we find that s. 3 (*e*) provides when "personal and living expenses" constitute taxable income. It is difficult to say what meaning is to be ascribed to certain words found in this amending section, s. 2 (*r*), and I have particular reference to the words beginning with "or any person connected with" and then on to the end of both subsections (i) and (ii) of s. 2 (*r*), and which appear as they stand to be not only confusing but incomplete. Any attempt to construe those words literally and without some further statutory provision would appear to lead to some strange results, results which one can hardly believe could ever have been contemplated by the legislature. Then, when we find in the very next section of the Act, s. 3 (*e*), a provision as to when "personal and living expenses" shall constitute taxable income, it becomes all the more difficult to regard or construe s. 2 (*r*) as being intended for any other purpose than a definition of terms, or to read it as a provision enacting when such "personal and living expenses" are to be included as taxable income.

Sec. 3 of the Act is the one which defines in general terms what is "income", and it is only "income" as so defined that is taxable, but of course there are other provisions in the Act which exempt certain incomes from the tax, and which provide for certain deductions and exemptions. The annual net profit or gain made subject to the income tax by s. 3, are made, by the amended sub-s. (*e*) thereof, to include the following: "personal and living expenses when such form part of the profit, gain or remuneration of the taxpayer, or the payment of such constitutes part of the gain, benefit or advantage accruing to the taxpayer under any estate, trust, contract, arrangement or power of appointment, irrespective of when created". Sec. 3 (*e*) thus purports to enact when, and under what state of facts "personal and living expenses", constitute taxable income. Now, I think it is clear that the appellant is not here taxable under s. 3 (*e*) of the

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Act, first, because the expenses of the maintenance of Southlands, or the payment of the insurance premiums under the Trust Settlement, do not form part of the profit, gain or remuneration of the appellant; and, in the second place, because the payment of such expenses by the trustee under the Trust Settlement do not constitute part of any gain, benefit or advantage "accruing to the taxpayer under any estate, trust, contract . . . ." Now if I am correct as to that, and that would seem to be fairly clear, then there is no other provision in the Act which specifically enacts what, or when, "personal and living expenses" are taxable as income. It seems to me therefore that it is only "personal and living expenses" which fall within the terms of sec. 3 (*e*) of the Act that are taxable as income. I do not think therefore that the appellant can be held liable for the particular item of tax assessment under discussion, and which was levied against him. It is quite manifest that it was one of the purposes of the amending statute to capture the tax assessed in this case, but I think the draftsman has not succeeded in doing so. At least that is the conclusion which I have reached and therefore, I think, in so far as this particular item of the appeal is concerned the appellant must succeed.

The second question involved in this appeal is quite separate and distinct from the matter just disposed of. It has to do with the liability of the appellant for income tax on certain moneys received by him by way of rentals.

The appellant and his two brothers were the owners of a warehouse in the City of Vancouver which was rented to The W. H. Malkin Co. Ltd. (hereafter called "the Malkin Company"), during the period with which we are here concerned, that is, from March 1, 1937, to November 19, 1938. The respondent claims that in respect of the fiscal period from March 1, 1937, to February 28, 1938, these three owners received by way of rentals from the Malkin Company the sum of $15,144.55 of which amount the appellant received $9,086.73; and that in respect of the fiscal period from March 1, 1938, to November 19, 1938, the said owners similarly received rentals amounting to $6,885.05 of which sum the appellant received $4,131.03. The appellant was therefore assessed for income tax on $13,217.76, the total rentals received by him in those two periods. The appellant alleges in his statement of claim

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and the fact is that on November 3, 1938, a verbal agreement was entered into between the appellant and his two brothers and the Malkin Company whereby the warehouse was to be sold and conveyed by the three Malkin brothers to the Malkin Company, for the same price at which the said brothers had purchased it from the Malkin Company in 1935, namely, $77,000; and they were to credit on the said sales price all rentals received by them since 1935 as part payment of the price payable by the Malkin Company for the said warehouse. The appellant further states that on November 19, 1938, in pursuance of this agreement, the appellant and his two brothers conveyed the warehouse to the Malkin Company and the latter was credited with all rentals received by the three Malkin brothers, just as explained.

In respect of this question certain admissions of fact were made in writing on behalf of the appellant, and for purposes of accuracy it is probably better that they should be recited. They are as follows:

(1) On December 1st, 1935, The W. H. Malkin Company Limited sold and conveyed to Appellant and his two brothers, J. F. Malkin and J. P. D. Malkin, the property located at 57 Water Street, and being Lots 9 and 10. . . . . for the sum of $77,000.

(2) From the date of the said sale and until November 3rd, 1938, the Appellant and his two brothers rented the said property to The W. H. Malkin Company Limited.

(3) The Appellant received as his share of the net rentals of the said property for the period 1st March, 1937, to 3rd November, 1938, the sum of $13,217.76.

(4) Net rentals received by the Appellant in respect of the said property from December 1st, 1935, to February 28th, 1937, were reported by Appellant as income received by him and relevant income tax paid thereon.

(5) The Appellant has not reported as income to him rentals received by him from said property from 1st March, 1937, to November 19th, 1938, nor has he paid any income tax thereon.

The appellant's contention is that while the rentals in question received by him in 1937 and 1938 constituted income, yet by virtue of the oral agreement of November 3, 1938, and the conveyance of the warehouse to the Malkin Company on November 19, 1938, these income receipts were converted into capital receipts. The appellant contends also that in any event only the rentals received in the period from January 1, 1938, to November 19, 1938, should be assessed for income tax for the year 1938. And I understood Mr. Griffin to say that the appeal

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in respect of this particular question should be limited to a consideration of the rentals paid and received in 1938 and if he failed on that the appellant would account for the tax upon the rentals received in 1937.

It seems to me quite clear that the rentals in question as and when received by the appellant constituted taxable income in his hands, and so far as we are here concerned they could not, I think, become anything else. At no stage in the hearing of the appeal in respect of this question could I feel inclined to entertain as at all tenable the argument of Mr. Griffin in support of this point, and I have no doubt he advanced every argument that could possibly be urged in support of his contention. The appellant in his income tax returns made in 1936 and in 1937 treated the warehouse rentals as income, and the question of the resale of the warehouse back to the Malkin Company never arose for consideration until November of 1938. The rentals received by the appellant and his brothers since 1935 might be treated as capital receipts as between themselves and the Malkin Company, by reason of the terms of the contract of sale of the warehouse in November, 1938, but this would not be binding upon the Crown, and particularly in respect of such a subject-matter as the one under discussion. The appellant had the right, of course, to deal with his income as he saw fit after its receipt by him, but such income would remain taxable income under the taxing statute. The appellant could not by any *ex post facto* act alter the destination of these moneys, or the purpose for which they were paid to and received by him. I know of no principle of law or equity which the appellant can summon to his aid to support his contention. I am therefore of the opinion that all the rental receipts in question constituted income in the hands of the appellant and were therefore taxable as such.

Before concluding upon this question it seems necessary that I should discuss the contention advanced by the appellant that in any event he should not be taxed for the rental payments received during the last ten months of 1937, in the calendar year of 1938. This matter is a little complicated and requires a brief reference to certain facts and to certain provisions of the Act which appear to me to be relevant to this contention. Under s. 2 (*l*) of the Income War Tax Act "year" means the calendar year. Under s. 2 (*s*) of the Act there is such a thing as a "fiscal period", and this means the period for which the accounts of the business of the taxpayer have been, or are ordinarily made up and accepted for purposes of assessment under the Act, and in the absence of such an established practice the fiscal period shall be that which the taxpayer adopts, but it must not exceed a period of twelve months. Then, s. 34 of the Act provides:

> A member of a partnership or the proprietor of a business whose fiscal period or periods is other than the calendar year shall make a return of his income and have the tax payable computed upon the income from the business for the fiscal period or periods ending within the calendar year for which the return is being made, but his return of income derived from sources other than his business shall be made for the calendar year.

Since the warehouse property was sold by the Malkin Company to the three Malkin brothers on November 30, 1935, or thereabouts, the operation of the warehouse has been treated by the appellant and his brothers as a separate business, a partnership business, and as I understand it, they filed a tax return for the fiscal period from November 30, 1935, to February 28, 1936, and this procedure was accepted by the taxing authorities in accordance with the provisions of sec. 34 of the Act. Accordingly, since that time the appellant and his brothers who were individually taxed on their income on a calendar year basis have been taxed on the rental income, for the adopted fiscal period of the warehouse business, which ended within the calendar year, namely, on February 28th, and this was the making of the appellant and his brothers. Whether there existed in fact or law a partnership in respect of the operation of the warehouse is immaterial because such operation was treated by the appellant as a separate business, or a partnership business or as something apart from his other interests from whence came his other income, and which income was reported on the calendar year basis. Accordingly the appellant, and I understand his brothers as well, were individually assessed for the warehouse rentals for the fiscal period ending February 28th of each year subsequent to 1935, and this fiscal period would end within the calendar year. When the warehouse was resold to the Malkin Company in November, 1938, it resulted in a closing of the then current fiscal period pertaining to the business operation of the warehouse, the so-called partnership busi-

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ness, thus ending two fiscal periods within the calendar year 1938; that is, one for the twelve months ending February 28, 1938, and one for the eight and a half months for the period ending November 19, 1938; but this result was, as I have already stated, of the appellant's own making. It seems to me therefore that the taxing authorities were authorized to assess the rental income for those two fiscal periods ending within the calendar year 1938 as they did, and that is all I can usefully say about the matter.

Judgment will therefore be according to the conclusions which I have expressed upon the two questions involved in this appeal. In the circumstances there will be no order as to costs.

*Judgment accordingly.*

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Feb. 23-25.
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July 24.

BETWEEN:

WALKERVILLE BREWERY LIMITED . . APPELLANT;

AND

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

*Revenue—Income War Tax Act, R.S.C., 1927, c. 97, s. 5, ss. 1 (a)—Depreciation—Discretion of the Minister—Income—Appeal from decision of Minister of National Revenue dismissed.*

Appellant company purchased the assets of another company of the same name and commenced business on January 1st, 1931. These assets had been valued for the purpose of sale at figures established by an appraisal made in 1928 by an appraisal company, which figures were greatly in excess of the cost value at which these assets had been carried in the books of the vendor company.

The Commissioner of Income Tax in assessing appellant for income tax for the years 1936 and 1937 allowed depreciation based on the cost value of the assets This assessment was affirmed by the Minister of National Revenue whose decision was appealed to this Court. The appellant contends that the depreciation should be based on the appreciated value established by the appraisal.

*Held:* That the Minister exercised his discretion in a reasonable and proper manner and in accordance with the provisions of the Income War Tax Act in basing the assessment on the cost value of the assets.

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

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WALKERVILLE BREWERY LIMITED v. MINISTER OF NATIONAL REVENUE.

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

*S. L. Springsteen, K.C.* for appellant.

*G. L. Fraser, 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 (July 24, 1942) delivered the following judgment:

This is an appeal from the decision of the Minister of National Revenue (hereafter called "the Minister") affirming an assessment levied against the appellant company for income tax for the calendar years 1936 and 1937. The only issue involved in the appeal relates to the matter of depreciation. For the year 1936 the appellant claimed depreciation in the sum of $29,528.03 while the amount allowed by the Commissioner of Income Tax was $13,864.30, the amount of the disallowance being $15,663.73. For the year 1937 the appellant claimed depreciation in the sum of $30,952.09 while the amount allowed by the Commissioner of Income Tax was $17,175.08, the amount of the disallowance being $13,777.01. The appeal herein is from the amounts disallowed for depreciation during the two taxation periods in question, and which disallowance the Minister affirmed. The issue is therefore confined to the one point, and I think all the relevant facts may be stated in brief terms.

The dispute as to depreciation for the years 1936 and 1937 relate almost entirely to those items of fixed assets usually classified as "machinery, plant and equipment". At some stage in the proceedings I was informed by counsel for the Minister that the amount claimed for the year 1936 under this head was $19,405.52 of which $15,378.22 was disallowed, and $4,027.30 only was allowed. I think these figures may be assumed to be substantially accurate. As the total amount disallowed for depreciation for the year 1936 was but $15,663.73 any difference between what was claimed and what was allowed in respect of other fixed assets such as buildings, office furniture, retail store equipment, and delivery equipment, was very slight indeed, only a few hundred dollars. And the

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corresponding figures were given me in respect of the year 1937, and, there, the amount in dispute in respect of depreciation related almost wholly to that of machinery, plant and equipment, the amount claimed under that head being $19,264.84, and the amount disallowed being $13,459.90, so that the amounts disallowed under other heads for depreciation would be rather insignificant, just as in the year 1936. I understood Mr. Springsteen to say that the appeal in question might be regarded as one relating entirely to the allowance for depreciation on account of machinery, plant and equipment.

The appellant company was incorporated under the laws of the Dominion of Canada, and it began business on January 1st, 1931, then taking over the assets of another company of the same name and which was incorporated under the laws of the Province of Ontario. The consideration paid for the transfer of the assets from the old company to the appellant company was in the form of an issuance of preferred and common shares of the latter company. The fixed assets of the vendor company were valued for the purposes of this transaction at figures established by an appraisal made in 1928, by an appraisal company. These figures were greatly in excess of the net value at which these assets had been carried in the books of the vendor company, approximately in the sum of $328,000, whereas the appraisal value was $1,096,000. The shareholders of the appellant company were the same as the vendor company, and no new capital was introduced at the time of the transfer of the assets from the vendor to the appellant company.

The depreciation allowed by the Income Tax Division of the Department of National Revenue throughout the years in question, and in earlier years, was based on the value given to the fixed assets by the vendor company and which had been applied by the appellant company when it began business in 1931. In a business journal of the appellant company there is to be found a statement showing the original cost of the fixed assets to the vendor company, and this was taken to be the value of the assets to the appellant company for depreciation purposes by the Minister. The original cost to the vendor company was undoubtedly that found in the business journal of the appellant company and this appears also on the books of the vendor company, and I understand that it was upon this valuation of fixed assets that the vendor company based its claim for depreciation in the computation of its taxable income. However, any new assets acquired from time to time were always taken into consideration, increasing the amounts allowed for depreciation according to the cost of such new assets.

For the first two years in its business career, 1931 and 1932, the appellant company claimed depreciation on the basis of the original cost of the fixed assets to the vendor company, and, as this was in accordance with the views of the taxing authorities, they, of course, readily agreed to the claim for depreciation made for those two years. In both of those years the appellant operated at a profit and accordingly paid income tax and, of course, without objection being made as to the amount allowed for depreciation and the method of determining the same.

In the years 1933, 1934 and 1935, the appellant in its tax returns claimed depreciation based on the appreciated asset values, that is, the values found by the appraisal company in 1928. But as the appellant operated at a loss in those three years the question of depreciation was not material to the appellant company, and probably the taxing authorities did not feel obliged to express any formal dissent in respect of the claim made for depreciation based on the valuation of fixed assets found by the appraisal company. One, however, may fairly assume that the revenue authorities would only have allowed depreciation for those three years on the same valuation of assets claimed and allowed for the years 1931 and 1932, had the appellant earned a net taxable income and a decision had to be made in respect of the amount to be allowed for depreciation.

Thus the revenue authorities continued to base the allowance for depreciation in respect of the fixed assets acquired by the appellant from its predecessor company on the original value or cost of the same, as did the appellant company itself in the years 1931 and 1932. However, in 1933, and in the following years, as I have explained, the appellant company began to base its claim for depreciation on the appreciated values established by the appraisal to which I have referred, but this issue never arose in concrete form till the years 1936 and 1937, and

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they are now the subject of this appeal. In short the dispute here revolves around the valuation of the assets acquired in 1931 and does not concern any assets subsequently acquired, because due allowance was made from time to time for depreciation of such additional assets, replacements or renewals, as the case might be.

Sec. 5, ss. 1 (*a*) of the Income War Tax Act states that "income" as defined in the Act shall for the purposes of the Act be subject to certain exemptions and deductions and one was "such reasonable amount as the Minister, in his discretion, may allow for depreciation." The facts here seem to indicate that the Minister based his valuation of fixed assets for the ascertainment of "depreciation" largely upon the cost of the same to the vendor company from which the appellant company acquired the same, and which basis was adopted by the appellant itself for two years. Due allowance was made for depreciation of any new assets in the meanwhile acquired by the appellant company. It seems to me that the Minister, in the exercise of his discretion, in fixing the "reasonable amount" that should be allowed for depreciation adopted a method or basis that is hardly open to attack, and at least I was shown no authority to the contrary. I have not been satisfied that the Minister adopted any wrong principle in determining the amount that should be allowed for depreciation, or that the amount allowed was not a reasonable and proper one. I do not see how it can be alleged that the Minister acted against proper legal principles in fixing the amount he allowed for the years 1936 and 1937, for depreciation, or that he exercised his discretion improperly or in any way against proper legal principles. Mr. Springsteen referred to and discussed at length the Pioneer Laundry case (1), but in that case no allowance at all was made for depreciation and the grounds upon which the disallowance of depreciation was arrived at were held to be against proper legal principles. It seems to me that the decision in that case is not applicable to the facts of this case and really affords no assistance in the question here to be decided.

The appeal is therefore dismissed and with costs.

*Judgment accordingly.*

(1) (1940) A.C. 127.

BETWEEN: 1941 Dec. 1. 1942 Jul. 21.

CANADIAN PERFORMING RIGHT SOCIETY LIMITED ............. PLAINTIFF.

AND

RAYMOND VIGNEUX, ARTHUR P. VIGNEUX AND MARIA ANNA CHAUVIN, CARRYING ON BUSINESS UNDER THE FIRM NAME AND STYLE OF VIGNEUX BROTHERS, AND THE SAID VIGNEUX BROTHERS, AND RAE RESTAURANTS LIMITED.. DEFENDANTS.

*Copyright—Infringement action—The Copyright Amendment Act, 1931, 21-22 Geo. V, c. 8, Secs. 10, 10A and 10B—An Act to amend The Copyright Amendment Act, 1931, 1 Edw. VIII, c. 28, s. 2—An Act to amend The Copyright Amendment Act, 1931, and the Copyright Act, 2 Geo. VI, c. 27, Secs. 1 and 4—Copyright Appeal Board—Copyright in musical composition—Injunction—"Owner or user" of a gramophone giving public performances.*

Plaintiff owns the exclusive right to the public performance of a musical composition known as "Star Dust". This musical composition was played or performed on a gramophone in a public restaurant belonging to the defendant, Rae Restaurants, Limited, such gramophone having been placed there by the other defendants under an arrangement whereby they placed the gramophone, with records to be played, in the restaurant, for the use of which they charged a fee. The defendants were not licensed by the plaintiff to perform such musical composition, nor was such public performance made with the consent of any authorized person. Plaintiff is such a society or company as is referred to in 21-22 Geo. V, c. 8, s. 10. Plaintiff seeks an injunction to restrain defendants from infringing its copyright in the musical composition "Star Dust".

*Held:* That defendants do not fall within the class of persons protected by ss. 6 (*a*) of s. 10B of the Copyright Act as enacted by 2 Geo. VI, c. 27, s. 4.

2. That defendants are not the "owner or user" of a gramophone giving public performances in the sense contemplated by the Copyright Act.

ACTION by plaintiff praying for an injunction restraining defendants from infringing plaintiff's copyright in a certain musical composition.

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

*O. M. Biggar, K.C.* and *Christopher Robinson* for plaintiff.

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*S. Rogers, K.C.* and *J. C. Osborne* for defendants.

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

THE PRESIDENT now (July 21, 1942) delivered the following judgment:

The plaintiff is a company incorporated under the laws of the Dominion of Canada, and having its principal office in the City of Toronto, Province of Ontario. It is a company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyrights subsist. It is such a society or company as is referred to in Sec. 10 of Chap. 8 of the Statutes of Canada for the year 1931, The Copyright Amendment Act, 1931, as amended by Sec. 2 of Chap. 28 of the Statutes of Canada for the year 1936, and Sections 1 and 4 of Chap. 27 of the Statutes of Canada for the year 1938. The Copyright Amendment Act, 1931, as amended, is to be read and construed with, and as part of, the Copyright Act.

The defendants Raymond Vigneux, Arthur F. Vigneux and Maria Anna Chauvin carry on business under the firm name and style of Vigneux Brothers at 273 Wyandotte Street West, in the City of Windsor, in the Province of Ontario, and the defendant, Rae Restaurants Limited, carries on business on the Lake Shore Boulevard near the City of Toronto, in the said Province. The business carried on by the defendants Vigneux Brothers consists in the installation and servicing of electrically operated devices adapted, upon the insertion of a coin therein, to make audible a series of sounds corresponding to markings on one or other of a number of discs or records with which the device is equipped by the said defendants.

The said devices are installed by the said defendants in the premises of persons operating restaurants, cafes and other places frequented by the public in order that the said persons and members of the public may, by the insertion of coins in the said devices, obtain the public performance of musical compositions recorded on the discs supplied as aforesaid, which the said defendants from time to time replace with records of fresh compositions. Installations of the said devices in the places aforesaid by the said defendants are made with the intention that the said persons in control of the said places should afford members of the public access to the said devices, and under agreements with the said persons pursuant to which the sums represented by the coins inserted in the said devices from time to time are divided between the defendants and the person operating the said place. Pursuant to such an agreement the said defendants installed a device of the kind described in the premises of the defendant, Rae Restaurants Limited, and among the records supplied by the defendants Vigneux Brothers for use in the said device there was included one of a musical composition known as "Star Dust", of the exclusive right to the public performance of which the plaintiff is the owner.

By a series of assignments the plaintiff is the owner of the copyright in the said musical composition called "Star Dust", the lyrics being by one Parish and the music by one Carmichael. This musical composition was, on a certain date mentioned in the pleadings, played or performed on a gramophone in a public restaurant belonging to the defendant Rae Restaurants, Ltd., such gramophone being placed there by the other defendant Vigneux Bros. under an arrangement arrived at between them and as presently to be explained, and neither of the said defendants was licensed by the plaintiff to perform such musical composition, nor was such public performance made with the consent of any authorized person. The arrangement was that Vigneux Bros. would place the gramophone with the records to be played, in the restaurant, for the use of which Vigneux Bros. charged the other defendant the sum of $10 a week. The gramophone might be operated by anyone, and was operated chiefly by the patrons of the restaurant, by inserting therein a five, ten or twenty-five cent coin, according as the patron might desire to hear one, two or five musical compositions on the records in the gramophone. Each week two representatives of Vigneux Bros. came to the restaurant, one to open or unlock the gramophone in the presence of some one representing the restaurant owner, and to take therefrom the money deposited in it by the patrons of the

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restaurant during the past week as described, from which $10 would be paid over to Vigneux Bros., and the balance to the restaurant; the other person would make arrangement for the particular records to be placed in the gramophone for use during the succeeding week. These receipts amounted to between $30 and $40 per week, which meant a revenue to the owner of the restaurant of from $20 to $30 a week, or at the rate of $1,000 to $1,500 a year, and a revenue of $520 a year to Vigneux Bros.

I now turn to certain provisions of the Copyright Amendment Act, 1931, as amended in 1936 and in 1938, by the Statutes already mentioned. These amendments to the Copyright Amendment Act, 1931, had largely to do with societies or companies, such as the plaintiff society, and copyright in musical works acquired by such societies and companies. Sec. 10 of the Copyright Amendment Act, 1931, as amended in 1936 and in 1938 now reads as follows:

10. (1) Each society, association or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or performing rights therein, and which deals with or in the issue or grant of licences for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the Minister at the Copyright Office lists of all dramatico-musical and musical works, in current use in respect of which such society, association or company has authority to issue or grant performing licences or to collect fees, charges or royalties for or in respect of the performance of its works in Canada.

(2) Each such society, association or company shall, on or before the first day of November, one thousand nine hundred and thirty-six, and, thereafter, on or before the first day of November in each and every year, file, with the Minister at the Copyright Office statements of all fees, charges or royalties which such society, association or company proposes during the next ensuing calendar year to collect in compensation for the issue or grant of licences for or in respect of the performance of its works in Canada.

(3) If any such society, association or company shall refuse or neglect to file with the Minister at the Copyright Office the statement or statements prescribed by the last preceding subsection hereof, no action or other proceeding to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such association, society or company shall be commenced or continued, unless the consent of the Minister is given in writing.

The above provisions signify that any society acquiring the performing rights in any musical works was required to file with the Minister, the Secretary of State, a statement of the fees, charges or royalties it proposed to collect during the next calendar year in compensation for the grant of licences in respect of the performances of its works in Canada. For refusal or neglect to file such statement any such society was prohibited by sub-s. (3) of sec. 10 from commencing or continuing any action or other proceeding to enforce any civil or summary remedy for infringement of the performing right in any musical work claimed by any such society, unless the consent of the Minister was given in writing.

Then follows sec. 10A which provides that after receipt of the statements prescribed by sub-s. 2 of sec. 10 the Minister is required to publish them in the *Canada Gazette* and to notify any person having any objection to the proposals contained in the said statements that he must lodge with the Minister particulars of his objection within a prescribed time. As soon as practicable after the date fixed in the said notice the Minister is required to refer the statements and any objections received in response to the notice to a Board to be known as the Copyright Appeal Board.

Then, the earlier sub-sections of sec. 10B provide for the creation of the Copyright Appeal Board, and other matters pertaining to the functions of the Board, but those sub-sections require no comment. Then follow sub-sections 6, 6 (*a*), 7, 8 and 9, which had better be recited in full because they are of importance in this controversy, and they are as follows:—

(6) As soon as practicable after the Minister shall have referred to the Copyright Appeal Board the statements of proposed fees, charges, or royalties as herein provided and the objections, if any, received, in respect thereto, the Board shall proceed to consider the statements and the objections, if any, and may itself, notwithstanding that no objection has been lodged, take notice of any matter which in its opinion is one for objection The Board shall, in respect of every objection, advise the society, association or company concerned of the nature of the objection and shall afford it an opportunity of replying thereto.

(6) (*a*) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre which is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone, but the Copyright Appeal Board shall, so far as possible, provide for the collection in advance from radio broadcasting stations or gramophone manufacturers, as the case may be, of fees, charges and royalties appropriate to the new conditions produced by the provisions of this subsection and shall fix the amount of the same. In so doing the Board shall take into account all

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expenses of collection and other outlays, if any, saved or savable by, for or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection.

(7) Upon the conclusion of its consideration, the Copyright Appeal Board shall make such alterations in the statements as it may think fit and shall transmit the statements thus altered or revised or unchanged to the Minister certified as the approved statements. The Minister shall thereupon as soon as practicable after the receipt of such statements so certified publish them in the *Canada Gazette* and furnish the society, association or company concerned with a copy of them.

(8) The statements of fees, charges or royalties so certified as approved by the Copyright Appeal Board shall be the fees, charges or royalties which the society, association or company concerned may respectively lawfully sue for or collect in respect of the issue or grant by it of licences for the performance of all or any of its works in Canada during the ensuing calendar year in respect of which the statements were filed as aforesaid.

(9) No such society, association or company shall have any right of action or any right to enforce any civil or summary remedy for infringement of the performing right in any dramatico-musical or musical work claimed by any such society, association or company against any person who has tendered or paid to such society, association or company the fees, charges or royalties which have been approved as aforesaid

Now it is to be pointed out that ss. 6 (*a*) of sec. 10B was enacted by Chap. 27 of the Statutes of Canada for the year 1938, all the other subsections of that section having been enacted in 1936, two years earlier. The importance of ss. 6 (*a*) here lies in the fact that it purports to enact that in respect of public performances of musical works by means of any gramophone in any place other than a theatre ordinarily and regularly used for entertainments to which an admission fee is charged, no fees or royalties shall be collectable from the owner or user of the gramophone, but the Copyright Appeal Board " shall, so far as possible ", provide for the collection in advance from gramophone manufacturers, of fees or royalties appropriate to the new conditions produced by the enactment of ss. 6 (*a*). Thereafter the plaintiff society filed no statement of the fees or royalties it proposed to collect from the " owner or user " of gramophones by means of which musical works were publicly performed, but it did, I understand, following the enactment of ss. 6 (*a*) include in its next annual statement filed with the Minister, the fees or royalties it proposed to collect from gramophone manufacturers, in consequence of the enactment of ss. 6 (*a*). The Copyright Appeal Board for what it deemed practical reasons, was unable to approve and certify the fees so proposed by the plaintiff society, or any other fees, to be collected from gramophone manufacturers for the purpose mentioned, with the result that no fee, royalty or compensation was made available to or collectable by the plaintiff society in respect of public performances of its musical works by means of any gramophone as was the case prior to the enactment of ss. 6 (*a*). Subsection 6 (*a*) did not make it imperative upon the Board to provide for the collection of the fees therein mentioned, from gramophone manufacturers, because it is therein stated that this was to be done only "so far as possible". But in any event the Copyright Appeal Board did not approve of any fees to be collected in respect of public performances of musical works by means of any gramophone, and consequently the plaintiff society since then has not been in receipt of any fee for any public performances of its musical works, except as mentioned in ss. 6 (*a*). It is to be observed also that ss. (9) of sec. 10B states that no society shall have any right of action for infringement of the performing right in any musical work owned by it against any person who had tendered or paid to such society the fees which had been approved and certified under section 10B. But in the case under discussion no fees were approved in respect of public performances by means of a gramophone, as already explained, and none was ever tendered the plaintiff society by any of the defendants herein, Sub-s. (9) of sec. 10B was enacted prior to the enactment of ss. 6 (*a*) of that section, and it would seem therefore that sub-s. (9) would not apply to the state of facts in this case where no fees had been approved and certified.

It is perhaps proper first to enquire what was the purpose intended to be accomplished by amending sec. 10B by adding ss. 6 (*a*) thereto. Mr. Biggar suggested that ss. 6 (*a*) was designed to eliminate the numerous complaints registered against the demand for the payment of fees or royalties by performing right societies upon numerous owners of small businesses, who used gramophones in a small way to improve the amenities of their business premises, and for the amusement of their patrons. There is a sound basis for that suggestion. There is no doubt but that the fee or royalty that this numerous class could pay would be relatively small, and the cost of collecting

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the same by any performing right society would be relatively high. Sub-s. 6 (*a*) proposed that instead of collecting a royalty from this numerous class engaged in business in a small way a fee be collected in advance from gramophone manufacturers presumably for the benefit of the owners of any musical works performed by means of such gramophones. I am satisfied that the idea prompting the enactment of ss. 6 (*a*) was to obviate the collection of any fees or royalties from the user of gramophones, by which means were performed musical works which were the subject of copyright, in the cases where the user was in a small and rather inconsequential way, and where any direct or incidental profit from such user was small, if any at all. Again, this may be inferred from the concluding words of ss. 6 (*a*) because the Copyright Appeal Board in fixing the amount to be collected from gramophone manufacturers, if any, was directed to take into consideration "all expenses of collection and other outlays, if any, saved or savable by or on behalf of the owner of the copyright or performing right concerned or his agents, in consequence of the provisions of this subsection". And no doubt there would be a great saving in the cost of the collection of the fees and royalties suggested by ss. 6 (*a*), from a few gramophone manufacturers, as compared with the cost of the collection of any fees or royalties likely to be approved and certified by the Copyright Appeal Board and payable by this numerous class of "owners or users" which I have suggested, and who would be widely scattered about the country. That it was for the relief of that numerous class ss. 6 (*a*) was enacted seems to me to be fairly plain, and I think that may fairly be assumed from the language of the subsection itself.

The question then arises, and Mr. Biggar raised and discussed it, does ss. 6 (*a*) apply to the facts developed in this case and was it intended that it should? Was ss. 6 (*a*) designed to protect persons, such as the defendants in this case, from an action for an injunction restraining them from the public performance of the plaintiff's musical works, in the manner and by the means I have described without being duly licensed therefor? That is all the plaintiff seeks by this action. This is not an action for compensation or damages for infringement of copyright, or for the collection of fees or royalties, for the use of the plaintiff's copyright in musical works; it is simply a question as to whether or not the plaintiff in the facts in this case, and the statute, is entitled to an injunction restraining the defendants from infringing its copyright in a certain musical work for profit, without licence or authorization. That seems to me to be the neat point for decision, and when it is stated it does not seem to be one that permits of any extended discussion. The conclusion which I have reached is that the defendants do not fall within the class protected by ss. 6 (*a*) of sec. 10B. They are not I think the "owner or user" of a gramophone giving public performances in the sense contemplated by that statutory provision. They are virtually partners in a distinct class of business, in a venture of publicly performing musical works purely for profit, for a fee in the form of a coin or coins deposited in the gramophone by the person desiring the performance of certain musical works, and presumably for the gratification of that person. The whole scheme is entirely one for profit making, something apart from the restaurant business itself, or the ownership of the gramophone, one contributes the gramophone and the records and services the same, and the other contributes the premises, and they invite such of the public as desire the performance of musical works to deposit a certain coin in the gramophone, and this automatically causes the gramophone to perform musical works for the person who has paid a fee in the form of coins of a certain denomination. This is not I think what was contemplated by ss. 6 (*a*) of sec. 10B. In the case before me it would seem inequitable and unjust if the defendants could do as they are doing, with impunity, using the plaintiff's copyright without licence or compensation, something which is entirely against the whole purpose and spirit of the Copyright Act, something which might affect the interests not only of Canadian subjects but those of foreign countries, under the provisions of the Berne Convention. Moreover, sec. 10B does not purport to take from the owner of a musical work the right to restrain infringement of his copyright where no licence has been granted, or where no definite provision has been made for compensation to the owner for the right to perform his musical work. Sec. 17

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of the Copyright Act does not seem to provide any defence for the defendants here and it is to be noted that by the very statute which enacted ss. 6 (*a*) of sec. 10B there was added to the list of performances which shall not constitute infringement of copyright. And further, it is, I think, a well settled principle of law that a legal right in property, such as copyright in a musical work, can be taken away only by express language, which is not, I think, to be found in any provision of the statute here relevant, and if the defendants can do what they are doing with impunity it means they are able to divert the plaintiff's property to their own use and profit.

I have come to the conclusion that the plaintiff is entitled to the injunction asked for. Should the defendants give a notice of appeal from this judgment within the time prescribed, and pursue the same promptly, there will be a stay of proceeding herein until the determination of such appeal. The plaintiff will have its costs of the action.

*Judgment accordingly.*

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Sept. 5 & 6.

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March 1.

BETWEEN:

MERCO NORDSTROM VALVE COMPANY AND PEACOCK BROTHERS LIMITED ........................ PLAINTIFFS;

AND

J. F. COMER............................ DEFENDANT.

*Patent—Infringement action—Common knowledge—Old principle—Invention—Subject-matter—Combination patent—Necessity of claiming invention for subordinate parts as well as for the whole.*

The action is one for infrigement of Patent No. 270,557 granted to the plaintiff, Merco Nordstrom Valve Company as assignee of Sven Johan Nordstrom, the inventor. Peacock Brothers Limited, is the licensee of Nordstrom Valve Company under the patent. The invention claimed in the patent relates to an improvement in valves, and more particularly to an improvement in plug valves of the type in which lubrication of the bearing or seating surfaces of the valve is effected by forcing lubricant under pressure into the contact point between the plug and the valve seat in the casing.

The Court found that the common knowledge of the art at the date of the letters patent here in issue was such that the invention relied on could not be said to disclose any new principle or method of attaining a new result.

*Held:* That in order for a patentee to claim for a combination and any part or parts of it separately, he must set forth clearly his claim for invention for the subordinate integers entering into the whole.

2. That the plaintiff must be limited by his claims to the precise mechanism described, and there can be no infringement since the defendant's combination and parts are distinguishable in essential particulars from those of the plaintiff and constitute a different method of attaining an old object or result.

3. That every subordinate integer in plaintiff's combination was well known or was obvious, as was the function to be performed by them separately or in combination, and that there was no invention in combining them together.

ACTION by plaintiffs herein to have it declared that patent No. 270,557 owned by them is valid and has been infringed by the defendant.

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

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

*E. G. Gowling* for defendant.

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

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

This is an action for infringement of a patent, numbered 270,557, granted in May, 1927, to the plaintiff Merco Nordstrom Valve Company, the assignee of Sven Johan Nordstrom, the inventor, the application therefor having been filed in August, 1926. The plaintiff Peacock Brothers Ld. is the licensee of the plaintiff Nordstrom Valve Company under the said patent. Two other patents were sued upon at the same time but action upon those patents was later abandoned. It will be convenient at times to refer to the patent in suit as "Nordstrom," and to the infringing article as "Milliken."

The invention in question relates to an improvement in valves, and more particularly to an improvement in plug valves of the type in which lubrication of the bearing or seating surfaces of the valve is effected by forcing lubricant under pressure into the contact joint between the plug and the valve seat in the casing.

The specification states that:

The pressure lubrication principle as applied to plug valves has heretofore been largely restricted to the heavier and more expensively constructed plug valves, but since pressure lubrication assures a properly

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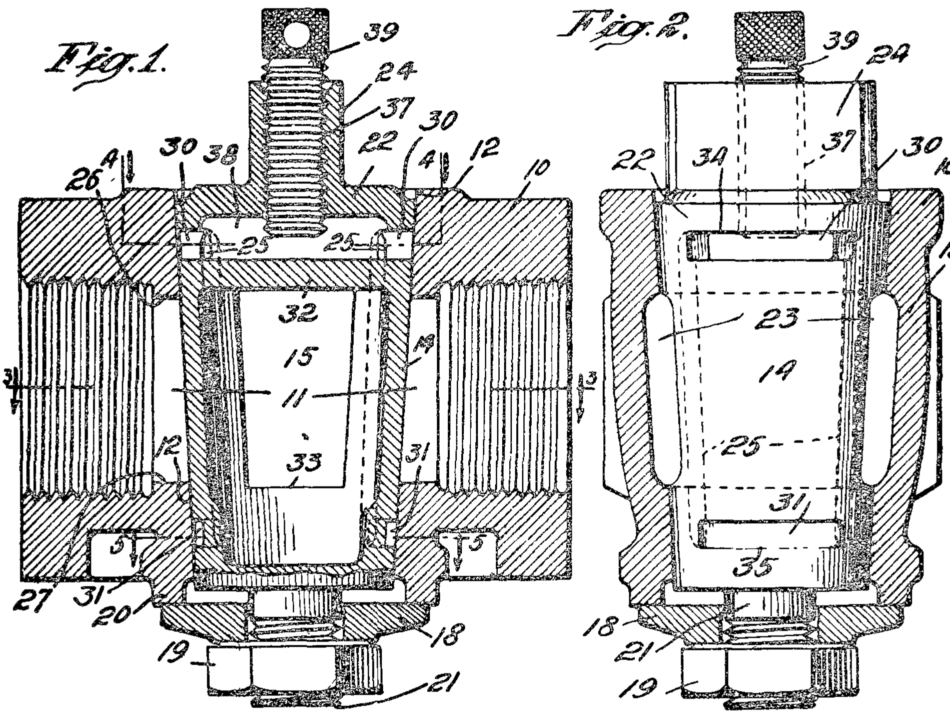
lubricated and positively non-leakable valve, it has been proposed that this principle be applied to plug valves of the cheapest and lightest construction, such as are used for gas and similar service. One of the requirements of this kind of service is that the valve be absolutely non-leakable. To prevent the valve from leaking it has been necessary to lap or grind carefully the bearing or seating surfaces between the plug and its seat. This, of course, adds to the cost of the valve.

The objects of the invention are stated in the specification to be the following:

One object of the present invention is to incorporate the pressure lubrication principle in plug valves of the very cheapest and lightest construction so that these valves may be manufactured even more cheaply than heretofore and yet be properly lubricated and positively non-leakable. Another object of the invention is to arrange the lubrication system of the valve in such manner that the plug may be turned completely round, that is, through an angle of 360°, without exposing the lubricant under pressure to the fluid passing through the valve. A more specific object of the invention is to provide a plug valve of this type with a system of lubricating grooves of such arrangement that when the plug is in closed position the grooves on each side of the passageway through the valve seat co-operate to constitute a continuous groove which may be filled with lubricant under pressure to positively prevent leakage past the plug. To the accomplishment of these objects the invention consists in the improved plug valve more fully described hereinafter and particularly pointed out in the appended claims.

The specification describes the invention in considerable detail and as I propose to recite fully that description as it appears in the specification it will assist in understanding the same if Figs. 1 and 2 of the drawings be reproduced, and they are as shown hereunder.



The patentee described the construction and operation of his invention in the manner following:

The improved valve as illustrated in the drawings comprises a body part or casing 10 having a longitudinal passageway 11 therethrough and a tapered valve seat 12 formed transversely of the passageway 11. Seated in the tapered valve seat 12 is a tapered plug 14 having a hole 15 adapted to register with the passageway 11 when the valve is open, as shown in Fig. 3. These parts are formed as usual, but it will be observed from a consideration of the figures that the plug and the casing are of the lightest and cheapest construction. The side walls 16 of the casing are made as thin as practicable, and the plug 14 is hollowed out leaving only the relatively thin concentric walls 17 in its middle part. The longitudinal recesses 23 in the valve seat 12 facilitate reaming the valve seat and so reduce the cost of manufacture. The parts are formed in this manner by casting.

The tapered valve seat 12 extends entirely through the casing 10. The plug 14 is held in the valve seat by means of a collar 18 and a nut 19. The collar 18 bears against a circumferential flange 20 formed on one side of the casing and the nut 19 is threaded onto a stem 21 projecting from the smaller end of the plug. The larger end 22 of the plug closes the larger end of the tapered opening through the casing. Projecting outwardly from the larger end of the plug is a valve stem 24 flattened to accommodate a wrench by which the plug may be manipulated to open and close the valve. It will be observed that this arrangement of parts and the means for holding the plug against its seat is of the simplest, and is correspondingly cheap to produce. Usually the plug 14 is lapped or ground into its seat in order to make a tight joint between them. According to the present invention the necessity for making a tight joint by protracted lapping or grinding is eliminated, since by means of the present invention the joint between the plug 14 and the valve seat 12 is lubricated under pressure and any irregularities in the seating or bearing surfaces of these parts are filled with lubricant and a tight joint thereby established. Moreover, according to one of the features of the invention, when the plug is in closed position a seal of lubricant is established completely surrounding the passageway through the casing, thereby positively preventing any leakage from one side of the line into the other.

The means provided by the present invention for lubricating the contact joint between the plug and the valve seat and for positively sealing this joint and the passageway through the casing, when the plug is turned to closed position, as shown in Fig. 1, comprises a plurality of longitudinally arranged lubricating grooves 25 formed longitudinally in the bearing surface of the valve seat 12. These grooves are V-shaped in cross section and are preferably cast in the casing to save the cost of machining. In the illustrated embodiment of the improved valve there are four longitudinal grooves 25 spaced substantially 90° apart. Each groove is located adjacent to one of the lateral sides of the passageway 11 through the valve seat. The upper and lower ends of the grooves 25 extend above and below the upper side 26 and the lower side 27, respectively, of the passageway 11. (The use of the terms "upper" and "lower" with respect to various parts of the valve is understood to be relative only and refers to the position of the valve as shown in the drawings) Formed in the bearing surface of the upper or larger end of the plug and on opposite sides thereof are two transverse lubricating grooves 30, each groove being substantially 90° in length. . . . . . .

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It will be observed by reference to Figs. 1 and 2 that the grooves 30 are located above the plane passing through the upper edge 32 of the hole 15 and that the lower grooves 31 are located below the plane passing through the lower edge 33 of the hole 15. The upper edges 34 of the grooves 30 are substantially in the same plane as the upper ends of the longitudinal grooves 25, and the lower edges 35 of the grooves 31 are substantially in the same plane as the lower ends of the longitudinal grooves 25, as clearly shown in Figs. 1 and 2. The two sets of grooves 30 and 31 are cast in the plug 14 to save the cost of machining.

By means of this arrangement of lubricating grooves the novel mode of operation and the advantages of the improved valve are attained. It is possible to turn the plug through an angle of 360° without exposing a groove or grooves in which there is lubricant under pressure to the fluid passing through the line. It is possible to seal the passageway through the casing by surrounding the passageway with continuous grooves filled with lubricant under pressure when the plug is in closed position. And it is not necessary to accurately lap or grind in the contact joint between the plug and the valve seat because the travel of the plug past the longitudinal grooves 25 causes the plug to take up lubricant and smear it over the valve seat 12, thereby filling the irregularities of the incompletely machined surfaces, with the result that the bearing surfaces are effectively lubricated.

When the valve is closed with the plug turned so that the hole 15 is arranged transversely of the passageway 11 and the side 17 of the plug closes the opening through the valve seat, the two upper transverse grooves 30 span the upper ends of the two pairs of longitudinal grooves 25 and the lower grooves 31 span the lower ends of the longitudinal grooves 25, thus establishing around each end of the opening through the plug and the valve seat a continuous groove adapted to be filled with lubricant under pressure. And on the other hand, when the valve is open with the plug turned so that the hole 15 is in alignment with the passageway 11, the upper transverse grooves 30 span and bring into communication the upper ends of the two grooves 25 on each side of the casing, in Fig. 4, as shown, and the lower transverse grooves 31 span and bring into communication the lower ends of the two grooves 25 on each side of the casing, as clearly indicated in Fig. 5. But in any intermediate position of the plug, the grooves 30 and 31 can be in effective communication with only two diametrically disposed longitudinal grooves 25. The diametrically disposed pairs of longitudinal grooves 25 with which the transverse grooves 30 and 31 are in communication while the plug is in its intermediate positions are never exposed to the fluid passing through the line, because the grooves 30 and 31 are arranged parallelly with the hole 15. The other pair of diametrically disposed grooves 25, the pair with which the grooves 30 and 31 are not in communication, are exposed to the fluid passing through the line. But since these longitudinal grooves are cut off from the transverse grooves at this time, only the small amount of lubricant that is in the exposed grooves can pass into the line or be attacked by the fluid passing through the valve. Thus by the present construction it is possible to stop the plug at any point in its 360° of rotation and put the lubricant in the grooves under pressure without forcing any of the lubricant into the line. And there is no waste of lubricant, except the relatively small amount which may be dissolved or washed out of the exposed grooves.

The means for introducing the lubricant under pressure into the grooves comprises a reservoir consisting of a hole 37 formed axially in the valve stem 24 and cored hole 38 formed transversely in the upper or larger end of the plug 14 and connecting at its outer ends the two opposite transverse grooves 30, as shown in Fig. 4. The hole 37 in the valve stem 24 is threaded to receive a pressure screw 39 by which the lubricant in the various connected passageways and grooves is put under pressure.

I should perhaps attempt to describe Nordstrom in more general terms, however imperfectly that may be done. Nordstrom comprises a body part, usually referred to as a "casing," having a longitudinal opening running through it and a tapered plug seat which extends entirely through the casing and formed transversely of the opening, and wherein is seated a tapered plug. The plug has also an opening running through it adapted to register with the opening in the casing. The assembled valve, which is called a plug valve, is adapted for pipe lines conveying liquids such as gas or oil, or as the case may be, and when the valve is open and a liquid is being conveyed through the pipe line it will pass through the openings in the casing and plug, which are then in alignment, to its intended destination. By rotating the plug the opening therein is put out of alignment with the opening in the casing and the valve is then said to be closed and the flow of liquid ceases. In Nordstrom the plug may be turned completely around in its seat, that is, through an angle of 360°. In such a valve it is necessary to lubricate the bearing surfaces between the plug and its seat in order to avoid rust and so that the plug will revolve easily in its seat, and at the same time it is desirable that these bearing surfaces be exposed as little as possible to the fluid passing through the valve. This was accomplished prior to Nordstrom by the use of certain communicating grooves or recesses formed in the plug and plug seat, or in the plug only, into and through which a lubricant might move under pressure from a pocket or chamber provided in one end of the plug, usually, and first, into circumferential or transverse grooves and from there into vertical grooves, and by rotating the plug the bearing surfaces of the plug and plug seat would be lubricated. A patent had many years back issued to Nordstrom, or his assignee, in which he disclosed the use of two vertical grooves in the plug seat and transverse grooves in the end of the plug nearest to and in communication with the lubricant source, and such a plug valve was for many years commercially produced and marketed. In the construction of the present Nordstrom there are four vertical grooves, 90° apart, in the seat of the casing, and two

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transverse grooves each 90° in length, and opposite one another, in both the top and lower ends of the plug, that is, two transverse grooves, each one-quarter of the circumference of the plug and arranged opposite one another, at both the top and the bottom of the plug. These vertical and transverse grooves are so arranged that when the valve is in closed position the two upper transverse grooves span the upper ends of two pairs of the vertical grooves and the two lower transverse grooves span the lower ends of the two pairs of the vertical grooves, thus establishing a continuous groove surrounding the two openings in the casing and adapted to be filled with lubricant under pressure, that is to say, by rotating the plug a certain pair of the vertical grooves and a certain pair of the transverse grooves are moved into continuous communication with one another, which results in the formation of a continuous groove, a parallelogram in shape, entirely surrounding each of the two opposite openings in the casing, so that they may be filled with lubricant under pressure, and it is only when the grooves are in that connected position that they can all be filled with lubricant under pressure. On the other hand, when the valve is in open position and the openings in the casing and the plug respectively are in alignment for the passage of the fluid, two sets of continuous or connected grooves are similarly formed opposite one another but now they appear between the two openings in the casing, and there appears but one vertical groove on each side of these openings; in that position the upper and lower transverse grooves do not appear around the valve openings because they have been moved to the right and left of the openings to form the intermediate communicating grooves and are thus "cut-off" from the vertical grooves appearing on each side of the valve openings and by reason of this "cut-off" there can be no movement of the lubricant under pressure around the valve openings while a fluid is passing through the same. In that position only two of the vertical grooves are at all exposed to the fluid, and it is claimed that the lubricant in those vertical grooves acts as a barrier against the fluid entering beyond that point or past the plug; and as stated in the Specification of Nordstrom only small amounts of the lubricant in the exposed grooves can pass into the pipe line or be attacked by the fluid passing through the valve, and this is called a "sealing" of the valve. It is this "sealing" and the arrangement of the "cut-off" when the valve is open that is claimed to be the chief merit in the invention of Nordstrom. The lubricant, I might add, used in plug valves is of a viscous or plastic character, called "hard oil" by some, and it is because it is of this character that it may act as a barrier against the possible flow of fluid between the bearing surfaces of the plug and the plug seat. It is not necessary to describe in further detail the construction of Nordstrom except to mention that as Nordstrom is manufactured and sold two additional grooves are formed in the plug, leading downwardly from the two lower transverse grooves, so that the lubricant may move into a small recess or pocket under the extreme end of the plug, which when filled with lubricant has the effect of elevating the plug somewhat, thus preventing it from sticking or jamming in the bottom of the seat. But the patent itself makes no provision for this particular feature of the valve and it is not there mentioned or described. This is called "jacking" the plug, and it is said by the defendant to be necessary in Nordstrom because a tapered plug within a tapered seat has a tendency to jam—which, I think, is quite true—and apparently this is not so liable to occur in a cylindrical plug valve such as Milliken; this difference in the shape of the plug and plug seat of the rival valves is relied upon by the defendant as one of the grounds for distinguishing them, and in resisting the charge of infringement.

I may now attempt to describe Milliken, the infringing valve. In this case the plug is cylindrical in shape and consequently the valve seat is of the corresponding formation. The means of lubrication consists of four vertical grooves on the plug and at equal distance from one another, and two annular or transverse grooves also on the plug, one of which completely encircles the top of the plug and the other the bottom of the plug. These annular and vertical grooves are connected with one another save that two of the diametrically opposite vertical grooves are incomplete and stop a little short of the bottom annular groove and at the extreme top the same vertical grooves are considerably attenuated, and are called "dwarf" or "scratch" grooves, that is to say, these two vertical grooves

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are much narrower and shallower at the extreme top than elsewhere. It is only the two incomplete grooves that cross the valve openings, in opening or closing the same. As I understand it, the idea of the incomplete groove with the "dwarf" end is to restrict the flow of the lubricant in such grooves because they alone cross the flow of the fluid when the valve is being opened or closed. In Milliken, the plug revolves only 90° when it is checked by stops on the top of the casing and on the stem of the plug. The lubricant is inserted in a well or pocket at the top of the plug and by means of a screw and other means it is compressed outwards into the top annular groove, thence into the vertical grooves and from there into the lower annular groove. The lubricant thus moves under pressure into the annular groove in the top of the plug and from there into the vertical grooves, and thence into the lower annular groove, save as to the two vertical grooves which do not quite reach the lower annular groove, as I have already explained. There are no grooves leading from the bottom annular groove towards the bottom of the plug as in Nordstrom, and there is no "jacking" of the plug. The degree of pressure to be applied upon the lubricant is something to be determined by experience and, it is said, it should be greater, if possible, than the line or fluid pressure. Such are the main structural features of Milliken. It is to be observed particularly that in Milliken the communication between the vertical grooves and the annular grooves, and between the annular grooves and the lubricant supply, are never interrupted in any way by the rotation of the plug. The lubricant grooves being all on the plug alone they could not be made to appear in any other position than that in which they are actually recessed on the plug. Whether the valve is open or closed the grooves appear always in the same form and position, that is to say, the two annular grooves and the vertical grooves are always in continuous communication, except that two of the latter stop a little short of the lower annular groove as I have already explained. It is claimed that there is in Milliken no "cut-off" of the annular grooves from the lubricant supply, or from the vertical grooves, as in Nordstrom.

The main structural and functional differences between Nordstrom and Milliken may more clearly appear if stated in the manner following. In Nordstrom the plug and plug seat are tapered while in Milliken they are cylindrical; in Nordstrom the vertical grooves are located on the plug seat and therefore immovable and the transverse grooves are on the plug and may be moved by rotating the plug, whereas in Milliken all the grooves are recessed on the face of the plug, in fixed relation to one another, and all must move together with the rotation of the plug; in Nordstrom there are two transverse grooves at both the top and the bottom of the plug, each 90° in length, and diametrically opposite one another, while in Milliken the transverse grooves completely encircle the top and bottom of the plug; in Nordstrom, on opening the valve for the passage of the fluid, the transverse grooves are moved by the rotation of the plug and are cut off from communication with the vertical grooves on either side of the openings through the casing, whereas in Milliken all the grooves are in fixed position on the plug, always in communication with one another, and they surround the openings through the casing, and their relation to one another cannot be altered nor can they be cut off from one another on the rotation of the plug, in opening or closing the valve; in Nordstrom there is no lubricant check valve but in Milliken there is means for preventing the backward flow of the lubricant; in Nordstrom the plug turns through an angle of 360° and this, so the Specification states, without exposing the lubricant under pressure to the fluid passing through the valve, while in Milliken the plug, due to the provision of stops at the top of the plug seat and plug stem, revolves only one-quarter of the way round the plug, or 90°, and two of the vertical grooves, the incomplete pair thereon, are more or less exposed to the fluid passing through the valve as they must cross the face of the openings through the casing, both in opening and closing the valve; and finally, it might be mentioned, in Nordstrom as commercially produced there is provision for "jacking" up the plug—though it is not mentioned in the patent—while in Milliken there is no corresponding provision and apparently there is no necessity for it.

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It will be convenient at this stage to refer to the Claims in Question. The Claims 1 to 5 inclusive are sued upon but it will be sufficient to mention the following:

3. A valve comprising, a casing having a passageway therethrough and a tapered valve seat formed transversely of the passageway, a tapered plug seated in the valve seat and having a hole adapted to register with the passageway, longitudinal and transverse grooves in the seating surface of the valve arranged to form when the plug is in its open and closed positions two diametrically opposed closed circuit grooves, a reservoir for containing plastic substance, connections between the reservoir and all the grooves when the plug is in its open and closed positions only, and means for putting the plastic substance under pressure.

4. A valve comprising, a casing having a passageway therethrough and a tapered valve seat formed transversely of the passageway, a tapered plug seated in the valve seat and having a hole adapted to register with the passageway, longitudinal and transverse grooves in the seating surface of the valve arranged to form when the plug is in either its closed or open position two diametrically opposed closed circuit grooves, and means for introducing a plastic substance under pressure into the grooves, the longitudinal grooves being so arranged that they are only supplied with lubricant under pressure when they are not exposed to the fluid passing through the valve, but are cut off from the supply of lubricant under pressure when they are exposed to the fluid passing through the valve.

Two defences only were put forward at the hearing of the action, namely, non-infringement, and, that the patent in question is invalid for want of subject-matter. The defence of non-infringement is based on the proposition that Nordstrom, construed in the light of the common knowledge in the art at the date of the letters patent, is a patent only for the precise mechanism described and claimed, and that the Claims cannot therefore cover mechanical equivalents for the mechanism described. Mr. Gowling particularly stressed the point that Nordstrom is expressly limited by the Specification to a tapered plug and plug seat, as distinguished from the cylindrical construction of the same elements in Milliken, and that this of itself marks such a difference between the construction or combination described and claimed by Nordstrom and that of Milliken as to preclude the plaintiffs from maintaining infringement against the defendant. This view, he urged, was supported not only on a fair construction of the Specification, but on other grounds which I am about to mention. He pointed out that Nordstrom in an earlier United States patent, corresponding to the one here in suit, described and claimed a tapered plug and plug seat but in two reissues of that same patent the plug and plug seat were not restricted to a "tapered" form, that is to a cylindrical or a tapered plug and plug seat. Further, say, they were so described and claimed as to include either it was pointed out that the assignee of Nordstrom was granted a patent in Canada, subsequent to the one in suit, referable to precisely the same subject-matter, and in that patent the plug and plug seat are described and claimed without limitation as to form or shape, the word "tapered" being eliminated from that Specification. This patent was one of the three originally sued upon in this action, but, as already mentioned, by an amendment to the Statement of Claim, infringement in respect of this patent, and another, was abandoned, and the action for infringement thus became restricted to the patent presently under discussion; it was urged that this indicated that the plaintiffs themselves distinguished the particular combination described and claimed in the patent in suit from that described and claimed in the patent just referred to and upon which action for infringement was abandoned, and that by electing to sue upon the patent in which the invention is limited to that particular combination which comprises a tapered plug and plug seat the plaintiffs are to be limited strictly to the precise combination described, and, it was claimed, that these several circumstances virtually operate as a disclaimer of any Claim for the use of any other form of plug and plug seat, or for mechanical equivalents for the mechanism described. Mr. Gowling urged also that there is no " cut-off " in the arrangement of the lubricating grooves in Milliken, at least in the sense described by Nordstrom, and that this very materially differentiates the two valves in question. On those two grounds particularly it was contended that the rival valves were to be distinguished and that consequently there was no infringement of Nordstrom by the defendant. But it was also urged that the plaintiffs, because of the tapered plug and plug seat in Nordstrom, were obliged to adopt measures for " jacking " the plug, by the means and for the reason I have already mentioned, very shortly after going into the commercial production of Nordstrom, and that this fact should be regarded as evidence of a material and practical distinction between Nordstrom as described and Milliken, and that the adoption of a cylindrical plug and plug seat construction in Milliken was because it afforded a practical improvement over the tapered plug

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and plug seat, and added to its general utility. These were the principal grounds on which it was urged that in any event there was no infringement of the patent in suit by the defendant; other grounds of a similar nature were advanced but I do not think they need be mentioned.

Assuming there to be subject-matter, Nordstrom is not, I think, the kind of invention which consists in the discovery of any new principle, or for a method of attaining a new result the novelty of which is part of the merit of the invention, in which case the claims may be construed to cover mechanical equivalents of the mechanism described. The common knowledge of the art at the date of the letters patent here was such that it would be hardly possible, in my opinion, to say that Nordstrom discloses any new principle or a method of attaining a new result, but in any event, in such a class of invention, the principle or the new result must be definitely stated in the claims, and there is no suggestion of that here. It seems to me that all that is claimed here is the combination of parts as described, and nothing else. There is no claim for invention for any of the subordinate integers entering into the whole, and if a patentee is going to say that the claim is for the combination, and any part or parts of it separately, then it must be made clear that the patentee had this in mind. That does not seem to be the case here as there is no claim for any part or parts of the combination, as well as of the whole. In fact, I do not think such a view was advanced by Mr. Smart, and it would be rather difficult to conceive how a valid claim could in the facts of this case be worded to claim any one part independently of its special position and working in the group of parts constituting the combination. The Claims here are directed to the combination only, and they are only for an improved method of attaining an old object, in which case the use of other methods is not contemplated by the patentee, and the monopoly is limited to the particular mode described, and it is only by making use of the particular mode described by the patentee, or by means substantially the same, will a man be held to have infringed. In connection with the propositions I have just stated, I might refer to *Ridd Milking Machine Co. Ld.* v. *Simplex Milking Machine Co. Ld.* (1); *Ackroyd and Best Ld.* v. *Thomas* (2); the judgment of Fletcher-Moulton L.J. in

(1) 1916 33 R P C. 309 (2) (1904) 21 R P.C 737.

*British United Shoe Machinery Co. Ld.* v. *Fussell & Sons Ld.* (1); the judgment of Lord Cairns in *Clark* v. *Adie* (2); *Curtis* v. *Platt* (3); and Terrell on Patents (4). Therefore, in my opinion, Nordstrom is limited by his claims to the precise mechanism described and he must abide by the result of his limitation, and there can be no infringement unless the defendant has taken the same thing and attains the same result in substantially the same way.

I have already endeavoured to describe the chief differences in the plug valves of Nordstrom and Milliken respectively. In some cases distinctions between two mechanisms may be quite marked and yet these distinctions may have no significance in determining whether or not there is infringement, and on the other hand, there may be a general resemblance between two mechanisms, and in many of their parts, and yet they may be so distinguishable that one could not be an infringement of the other. The structure and function of a plug valve is such that at the date of the letters patent here in question one would not expect to find any very conspicuous distinctions between any two of such devices. The two major elements in a plug valve, the casing with its plug seat and the plug, must more or less conform to the conventional type because of their very purposes or functions; all systems of lubrication under pressure of the surfaces of the plug and plug seat by means of grooves in the plug seat and plug, or in the plug alone,—which in principle was not novel— must inevitably bear a general resemblance to one another, but that might but point to the narrowness of the field open for invention, if any at all, in the patented plug valve, and that fact would render it all the more necessary to see that the patentee should not extend very largely the interpretation of the particular means which he has adopted for carrying his invention into effect, and that must not be overlooked in an invention such as Nordstrom. I have already pointed out with some particularity the differences between Nordstrom and Milliken, and I do not propose to repeat them. The main distinction between them, I think, lies in the arrangement, operation and functioning, of the lubricating grooves which each adopts. In Nordstrom the vertical grooves are on the plug seat and the transverse grooves

(1) (1908) 25 R.P.C. 631.
(2) (1877) A.C. 315.
(3) (1863) 3 Ch. D. 135.
(4) 7th Ed Chap 7.

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on the plug itself, and their respective positions are so arranged that they may be put into or out of communication with one another manually, by rotating the plug, much like the passageways in the casing and the plug are put into or out of registration. In Milliken the grooves are all on the plug in a fixed relation to one another and being immovable they cannot be put into any different relationship by rotating the plug, and therefore could not be any part of the conception of means or operation disclosed in Nordstrom. It seems to me that this constitutes a material distinction between the two plug valves in respect of the arrangement and functioning of the means of lubrication, and represents a different conception of means for accomplishing particular results. Then, I think, there is no such thing as a "cut-off" in Milliken in the sense disclosed by Nordstrom, in fact the vertical grooves in Milliken cannot possibly be cut off from the annular grooves because they are all recessed on the exterior face of the plug, nor are any of them at any time cut off from the lubricant supply. Moreover, in Milliken two of the vertical grooves, the incomplete ones, must cross the flow of the fluid in opening or closing the valve, and therefore be directly exposed thereto, something which Nordstrom seems to claim to avoid altogether, and he appears to make this the chief merit of his invention. There may be an identity of results produced by the two valves but the distinctions which I have just pointed out, constitute, I think, material differences in important particulars between the rival methods or means for accomplishing this. There are other distinctions in the construction and operation of the two valves, but I have already sufficiently indicated them. I have reached the conclusion that while there is a general resemblance in the two complete combinations and their parts yet they are distinguishable in essential particulars and constitute different methods of attaining an old object or result. I am of the opinion, therefore, that there is no infringement of Nordstrom by Milliken and that the latter has not taken the particular means described and claimed by the former.

Having found that there is no infringement I might here rest, but upon reflection I have concluded that the case is one in which I should proceed further and express my opinion upon the other point in the case, the validity of Nordstrom, and this, I think, I may do in fairly brief terms. I may begin by saying that there is nothing novel in the application of the lubrication pressure principle to plug valves, in some form or other, and which is said to assure a properly lubricated and positively sealed or non-leakable valve. This would appear to be conceded in an early paragraph of the Specification of Nordstrom. It is next to be pointed out that in 1925 Nordstrom was granted a patent in Canada, No. 248,356, the object of the invention therein described being the production of a valve that was tight and non-leakable, and to this end Nordstrom proposed that the seating surface of the valve, or the plug, or both, be provided with a groove or grooves encircling the passageway through the valve and adapted to be filled with an insoluble sealing substance, such as a viscous lubricating grease, from a reservoir located in the valve structure. Nordstrom, in his evidence in the present case, stated that the valve described in that patent disclosed a continuous lubricant channel or groove completely encircling the passageway through the valve, which he called a "seal," so that the encircling channel or groove, when filled under pressure with an insoluble lubricant substance, prevented leakage past the seal when the valve was closed; and he also stated that the only difference between the valve structure disclosed in that patent and the one in suit was that the latter had the "cut-off" means which the former did not have. So, therefore, it would appear that the only novel element in the patented combination in suit is the so-called "cut-off," the operation and function of which I have already explained.

For many years a plug valve was manufactured under a patent granted to Nordstrom, in 1916 I think, and which patent expired just a few years before the patent in suit was applied for and granted. In this valve there were but two vertical grooves in the plug seat, one each appearing on the right hand side of the inlet and outlet of the passageway in the casing. As I understand it, there were transverse grooves on and near the top of the plug, but none at the other end of the plug, and the vertical grooves were or might be put in communication with the transverse grooves. In the patent in suit, as already explained, Nordstrom places a vertical groove on each side of the inlet and outlet of the passageway in the casing, making

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four altogether, and transverse grooves at the top and bottom of the plug. Nordstrom explained in his evidence how he came to adopt the additional vertical grooves in his valve. He testified that in the use of a single vertical groove on the right hand side of each end of the passageway in the casing he had observed that the lubricant therein prevented any leakage past that point when the valve was open, while on the other side of the passageway where there was no vertical groove there would appear to be a leakage, that is to say, he observed that the lubricant in the vertical groove acted as a seal against the flow of the fluid beyond that point. He stated it was "obvious" therefore, that if a vertical groove were placed on both sides of the inlet and outlet of the passageway, they would act as a complete seal against leakage when the valve was closed and thus make a tight joint around the passageway. It is fair to assume that what was "obvious" to Nordstrom would also be obvious to some of the numerous users of Nordstrom's old valve, but, in any event, the idea or object of sealing, and a means for so doing, were described and disclosed by Nordstrom in his 1925 Canadian patent, and there would therefore be nothing novel in the idea of "sealing" at the date of his invention of the patent in suit, or in the means he adopted.

In the patent in suit it is therefore only the feature of the "cut-off" that can be claimed as novel in the integers comprising the patented combination, that is to say, Nordstrom shows how the transverse grooves may be cut off from the vertical grooves when the valve is in a certain position. There would not, I think, be invention in so arranging his grooves in the plug and plug seat, so that those in the former could be put out of communication with those in the latter, once the idea was conceived. That, I think, would be obvious to any person competent in the art and any such person on being asked to make such an arrangement of grooves would, I think, be able to do so without having to do any serious experimental work. To cut off transverse grooves, of a limited length, on a plug from vertical grooves in a plug seat would be much the same as arranging that the openings in the plug be put in or out of registration with the passageway in the casing, by rotating the plug. I would not think that such a statement was open to the criticism that it was wisdom coming after the event. If it be said that there was invention in the idea of the "cut-off" then it is to be observed that the same idea was quite clearly disclosed in the United States patent, No. 1,365,116, to one, Martin, in 1921, and which patent related to improvements in plug valves. The complete combination of Martin might not be an anticipation of the combination of Nordstrom but the former does disclose plainly the idea, and also the means, for cutting off communication between transverse lubricating grooves in a plug and vertical grooves in a plug seat, and so control the movement of the lubricant. I do not think there is any inventive step in the idea of a "cut-off," or the means for effecting this, if one desired to incorporate such idea and means in a plug valve, the practical utility of which is possibly much exaggerated.

I do not think that the patented combination of Nordstrom required such an exercise of the creative faculties of the human mind as to merit the distinction of invention or a claim to monopoly. It has been authoritatively stated that the art of combining two or more parts, whether they be new or old, or partly new and partly old, so as to obtain a new result, or a known result in a better, cheaper, or more expeditious manner, is valid subject-matter if there is sufficient evidence of presumption of thought, design, or skillful ingenuity in the invention and novelty in the combination. I do not think that Nordstrom reaches up to this requirement. If there be no invention—and I do not think there was—in providing an arrangement of grooves and means, whereby the transverse grooves might be put into or out of register with the vertical grooves, then, in my opinion, there is nothing novel in any of the several parts of the combination, and in that event it is hardly conceivable that there could be invention in uniting these old parts with one another so that the combination would function as a plug valve. Every slight difference in the application of a well known thing should not and does not constitute ground for a patent and there would be no end to the interference with trade and with the liberty of adopting any mechanical contrivance if such were the case: See Lord Westbury in *Harwood* v. *Great Northern Railway* (1). I am of the opinion that every subordinate integer in Nordstrom was either well known,

(1) (1865) 11 H.L. Cases at p. 682.

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or was obvious, as was the function to be performed by them separately or in combination, and that there was no invention in combining them together. It seems to me that what was done here represents more nearly an ingenious effort to prolong the life of a monopoly that would shortly expire rather than the production of a new and useful device that required the exercise of the inventive faculty. I therefore am of the opinion that there is no invention in Nordstrom.

In the result the action of the plaintiffs is dismissed and with costs.

*Judgment accordingly.*

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1941
Apr. 10.
Sep. 4.

BETWEEN:

MERCO NORDSTROM VALVE COMPANY AND PEACOCK BROTHERS LIMITED ............. PLAINTIFFS;

AND

J. F. COMER...................... DEFENDANT.

*Practice—Reconsideration of Judgment after pronouncement—Exchequer Court Rules 172 and 174—Motion dismissed.*

*Held:* That the Court is powerless to reconsider a judgment after the date of its pronouncement and its concurrent entry.

MOTION for reconsideration of judgment.

The motion was heard before the Honourable Mr. Justice Maclean, President of the Court, in chambers.

*R. S. Smart, K.C.* for the motion.

*E. G. Gowling contra.*

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

This was an action for infringement of a patent which related to improvements in plug valves of the type in which lubrication of the bearing or seating surface of the valve is effected by forcing lubricant under pressure into the contact joint between the plug and the plug seat. The cause was heard by me and in due course I pronounced judgment therein, holding that there was no infringement of the patent sued upon, and that the said patent was invalid for want of subject-matter.

The plaintiff now moves that the judgment be reconsidered upon the ground that the reasons for judgment were based on a misunderstanding of the evidence and that there was a failure to appreciate the bearing of certain facts disclosed by the evidence relative to the construction, operation and function, of both the patented and the offending valve, particularly the latter, and that this misunderstanding led the Court to erroneous conclusions. This misunderstanding would in any event be applicable only to my finding upon the issue of infringement and could have no reference whatever to my finding upon the issue of the validity of the patent, and that I think would be obvious. Therefore, the suggested misunderstanding of the evidence would only affect my determination of the issue of infringement and not that of the validity of the patent sued upon; so, if the patent is invalid there could be no infringement of the same and, therefore, it would seem to me, assuming the grounds advanced for a reconsideration of the judgment to be well founded, no particularly useful result would be gained by a reconsideration of the isue respecting infringement, prior to the judgment pronounced going to appeal, which I understand may be taken as already definitely determined upon.

I fear I did fall into some error in describing the construction and operation of the offending valve, the nature and extent of which I do not propose discussing, and if the sole issue to be determined had been limited to infringement I would be inclined, if satisfied I had authority to do so, to agree to a reconsideration of my judgment because upon the question of infringement I proceeded to my determination of it largely, if not altogether, upon a conception of the facts and evidence which are now claimed to have been erroneous. A great deal of confusion here arose by designating, at the trial, as a " scratch groove " what might have been more properly designated as a " duct ", on the seat of the infringing valve, and there was on the plug of that valve what was appropriately called a " scratch groove ", but all that is hardly worth discussing now. And I would point out that the defence

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of non-infringement was put forward on grounds other than those I discussed on this aspect of the case, and the conclusion which I reached thereon may be right though my reasons may be thought insufficient. In any event these other defences on the issue of infringement will be open to the defendant if and when the case goes to appeal. Therefore it seems to me that it will be more satisfactory to allow matters to stand as they now are and thus allow the case to go to appeal.

I was referred to several English and Canadian cases which appear to have decided that until a judgment pronounced has been entered, a judge may reconsider his decision and may withdraw or vary the same. Burbidge J., in the case of *Copeland-Chatterson* v. *Paquette* (1), reconsidered a judgment pronounced by him in a patent case on a motion made on behalf of the plaintiff to vary the same on certain stated grounds—which in the end he refused—but I am not inclined to think that under the practice of this Court he was free to do so, except possibly in the case of clerical mistakes or some such other slight error. In this Court the practice is to enter judgment concurrently with the pronouncement of any judgment by the Court. Rule 174 states that where any judgment is pronounced by the Court or a Judge in Court, " entry of the judgment shall be dated as of the day when such judgment is pronounced." Here, when judgment was pronounced by the Court, judgment was the same day entered in a certain book of record, in the words " judgment dismissing the action with costs ", and the time for the entry of appeal runs from the date when the judgment was given. It seems to me, therefore, that when a judgment is pronounced and entered that is the end of the matter so far as this Court is concerned. If I am right in my interpretation of the Rules of this Court and its practice, then it follows, I think, that I am powerless to entertain a motion to reconsider and vary my judgment, in the manner and to the extent here proposed. And if this view is in conflict with that of Burbidge J., in the case mentioned, then it is desirable that the point be settled by a pronouncement of the Supreme Court of Canada thereon. In fact this point has for some time been a debatable one with practitioners before this Court.

(1) (1906) 10 Ex. C.R. 425

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Perhaps I should mention that Rule 172 provides that the Registrar shall settle the minutes of any judgment or order pronounced by the Court, but that does not, I think, affect the view I have just expressed, namely, that there was an entry of the judgment pronounced in this cause and that I am now powerless to reconsider the same in the manner which the motion suggests.

I think therefore that the motion must be refused. The costs thereof will be costs in the cause.

*Order accordingly.*

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BETWEEN:

1941

April 7, 8 & 9

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March 16.

PARRISH & HEIMBECKER LIMITED AND INSURANCE COMPANY OF NORTH AMERICA ............... PLAINTIFFS;

AND

BURKE TOWING & SALVAGE COMPANY LIMITED .................. DEFENDANT.

*Shipping—Marine insurance—Cargo of wheat—Loss of ship and cargo in Lake Superior—Loss due to peril of the sea—Water Carriage of Goods Act, 1 Edw. VIII, c. 49, and Rules thereto—Bills of Lading—Exceptions—"Perils of the sea".*

The plaintiffs seek to recover from defendant the value of a cargo of wheat delivered to and received by the defendant on its *SS Arlington* at Port Arthur, Ontario, on April 30, 1940, for carriage to and delivery at Owen Sound, Ontario, subject to the terms of bills of lading issued and delivered to the plaintiff, Parrish & Heimbecker Limited, the shipper and owner of the cargo. The *Arlington* foundered in Lake Superior on May 1, 1940, and with her cargo, became a total loss.

The plaintiff, Insurance Company of North America, was the insurer of the cargo and paid the amount of the insured value of the grain to the plaintiff Parrish & Heimbecker Limited, which plaintiff acknowledges that the Insurance Company of North America is entitled to any recovery herein from the defendant.

The defendant pleads that the shipment of grain in question was subject to all the terms, conditions and exemptions from liability contained in the defendant's bills of lading and in particular was subject to all the terms, conditions and exemptions from liability contained in the Water Carriage of Goods Act, 1936 (1 Edward VIII, c. 49) and the Rules scheduled thereto; that the *Arlington* was at the commencement of the voyage and prior thereto, seaworthy and properly manned, equipped and supplied, and that the defendant exercised due diligence to make the vessel seaworthy; that the loss resulted from perils of

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the sea which would create an exemption under the Water Carriage of Goods Act and its Rules; or in the alternative that the vessel was lost by reason of the negligence or default of the master or the servants of the owners of the vessel in the management or navigation of the ship, and that the defendant was not liable by reason of the Water Carriage of Goods Act and its Rules.

The plaintiffs contend that the exemptions provided by the Water Carriage of Goods Act and its Rules should not apply because of (1) improper loading and storage of cargo, (2) unseaworthiness of the ship in that the tarpaulins covering the hatches were deficient in quality and that the equipment used to maintain the same in place was inadequate, (3) commencing the voyage with a partly filled water tank in the after part of the ship.

The Court found that the cargo was properly loaded and stored; that the tarpaulins were in good condition and that the equipment used to maintain the same in place was proper and adequate and generally the vessel and her equipment were in good condition at the commencement of the voyage; that the ship was seaworthy; and that the presence of the water in the tank did not contribute to the disaster.

*Held:* That the loss of the *Arlington* was caused by a peril of the sea.

2. That the question of the degree of a storm at sea is not of importance and to say that there was no peril of the sea because the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about such an event as the foundering of the *Arlington*, is not the true test.

3. That the question is whether there was such a peril of the sea as that against which the insured undertook to indemnify the carrier.

ACTION by the plaintiffs to recover from the defendant the value of a cargo of wheat lost in Lake Superior after delivery to the defendant for carriage from Port Arthur, Ontario, to Owen Sound, Ontario.

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

*C. Russell McKenzie, K.C.* for plaintiffs.

*F. Wilkinson, K.C.* and *Ross Dunn* for defendant.

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

THE PRESIDENT, now (March 16th, 1942) delivered the following judgment:

The plaintiffs in this action seek to recover from the defendant the value of a cargo of wheat, 97,778 bushels, delivered to and received by the defendant on board its ship *Arlington*, at Port Arthur, Ontario, on April 30, 1940, all in good order and condition for carriage to and delivery at Owen Sound, Ontario, in like good order and condition, subject to the terms of the defendant's executed Bills of Lading issued and delivered to the plaintiff Parrish & Heimbecker Ld., the shipper and owner of the cargo. The *Arlington* foundered in Lake Superior on May 1, 1940, and with her the said cargo, valued at $86,865.05, became a total loss.

The plaintiff, Insurance Company of North America, was the underwriter or insurer of the said cargo, and in accordance with its policy covering the same, and on proof of the loss thereof, paid the amount of the insured value of the cargo to its assured, the plaintiff Parrish & Heimbecker Ld., which plaintiff acknowledges that the Insurance Company of North America, as insurer of the said cargo, is entitled to any recovery herein from the defendant as may be declared by final judgment in this action. The amount claimed as damages is the sum of $86,865.05 together with interest.

The defendant pleads that the shipment of grain in question was subject to all the terms, conditions and exemptions from liability contained in the defendant's bills of lading covering such cargo, and in particular was subject to all the terms, conditions and exemptions from liability contained in the Water Carriage of Goods Act, 1936, and the rules scheduled thereto; that the *Arlington* at the commencement of its voyage and prior thereto was in all respects seaworthy and properly manned, equipped and supplied, and that the defendant exercised due diligence to make the said ship in all respects seaworthy and to make the holds and all other parts of the ship fit and safe for the reception, carriage and preservation of the cargo; that the loss resulted from perils of the sea, or by reason of the neglect or default of the master or servants of the defendant in the management of the said ship during the height of a storm which she encountered while on her voyage and shortly after leaving Port Arthur, or in not altering the course of the said ship as circumstances may have required; and that the loss of the said cargo was not due to any cause for which the defendant was liable, and

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that, therefore, under the contract of carriage and by law the defendant was exempt from liability for the loss of the said cargo. The case for the plaintiffs may be said to have been particularly directed to three points: (1) Improper loading and storage of the cargo, (2) unseaworthiness of the ship in that the tarpaulins covering the hatches were deficient in quality and that the equipment used to maintain the same in place was inadequate, and (3) in commencing the voyage with a partially filled water-tank in the after part of the ship.

The *Arlington,* built in 1913 and acquired by the defendant in 1936, was a ship of 1,118 tons, 244 feet in length, and with a beam of 43 feet. Her hatches, six in number, numbered 1 to 6 forward to aft, were protected by wooden hatch covers, which in turn would be covered from the weather by tarpaulins. The ship was known as a two-hold ship, a large hold forward and another just aft of that, virtually one open space divided by one bulkhead running transversely in the centre, thus making two cargo holds but with no longitudinal partitions. There was a collision bulkhead separating the fore part of the ship from the cargo space, and another bulkhead at the after end of the hold No. 2, called the engine room bulkhead. The latter bulkhead extended above the weather deck about 4 feet 6 inches, and aft of that was the boiler-room which was separated from the engine room by a screen bulkhead. The wheel-house was in the forward part of the ship. The *Arlington* was a double bottom ship. There were four tanks in the double bottoms in the fore and after deck. No. 1 tank extended about one-third of the length of No. 1 hold, and from side to side of the ship with a longitudinal division, and tanks Nos. 2 and 3 were similarly constructed and divided. No. 4 tank, underneath the engines in the boiler room, was not divided. The tank tops would be the bottom of the two cargo holds. I may here state, as I have already mentioned, that on the commencement of the voyage in question there was some slack water, about 18 inches, in No. 3 tank, the depth of which tank was about 3 feet, and some water was put in or left in this tank on the loading of the ship, at the instance of the master of the *Arlington,* in order that a little more grain could be put in the forward cargo hold, otherwise the ship would be down at the head. This, the first mate of the *Arlington* stated, was not an unusual practice. It was contended that to have slack water in No. 3 tank was inviting the risk or danger of causing the ship to roll by reason of the water moving from side to side, and this, it was alleged by the plaintiffs, caused or contributed to a shifting of the cargo, and to a list in the ship which ultimately caused her to founder.

I may now turn to a review of portions of the evidence which was directed to the duty of the carrier in this case to exercise due diligence to make the ship seaworthy, to properly man, equip and supply the ship, and to make all parts of the ship fit and safe for the carriage and preservation of cargo. Mr. MacMillan, the surveyor for the British Corporation Register of Shipping, Canada, duly delegated by the Canadian Government to allot or assign freeboard and freeboard measurements and markings, assigned freeboard to the *Arlington;* freeboard means the distance from the water up to the deck of a ship. The freeboard assigned the *Arlington* by Mr. MacMillan, applicable at the beginning of the voyage in question, called "intermediate freeboard", was 3 feet $5\frac{1}{2}$ inches, which corresponds to a draft of about 17 feet $8\frac{1}{2}$ inches, and under this allotment the *Arlington* would not be considered overloaded if she had a draft of less than 17 feet $8\frac{1}{2}$ inches. The draft of the *Arlington* on the commencement of her voyage was 17 feet 2 inches in the fore end and 17 feet 5 inches in the after end and this was not put in question. On April 20, 1940, the *Arlington* was inspected by Mr. MacKenzie, the Steamship Inspector for the Canadian Department of Transport. He examined the holds, the shell of the ship, the bilges, the bulkheads, the hatch covers, the boilers, the navigating machinery, and also the life saving, steering and fire extinguishing equipment, and all were found in good condition, sufficient, and up to all requirements, and a certificate issued enabling the ship to operate for a full year. Mr. Morris of the American Bureau of Shipping, a Classification Society, surveyed the *Arlington* on April 15 and 16, 1940. This survey included an examination of the cargo holds, engines and machinery, boilers, bulkheads, tanks, hatches, hatch coamings, hatch covers,

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tarpaulins, decks, and generally the ship and her equipment were found in very good condition and the appropriate certificate issued in due course.

I may refer more specifically to the tarpaulins and the equipment for maintaining them in place, and the hatch covers. The hatch covers, which were found in good condition by Mr. Morris, were supported by what is called "strong backs" on the underside, which, as I understand it, are beams which run across the hatches transversely, and also fore and aft. In all there were twelve tarpaulins, two for each of the six hatches, or "double tarpaulins" as they were called, and it was customary to employ "double tarpaulins" in the spring and fall when the weather might be unfavourable, for the protection of the cargo. The tarpaulins were kept in place by battens and wedges, and by two angle irons or wind-bars on each hatch, three inches in width, which ran across the top of the hatches from side to side, and they were in some way strapped down to the deck and secured in place with bolts at each end. The first mate stated that before leaving port he made sure that "the tarpaulins and the battens and the angle bars were all on." The general manager of the defendant company testified that the tarpaulins were new when the ship was purchased by the owners in 1936, and the odd tarpaulin was renewed or repaired at different times. At certain times the *Arlington* had been employed in carrying pulp wood, but on such occasion the tarpaulins used in grain carrying voyages were put aside and other tarpaulins were used. Mr. Morris, of the American Bureau of Shipping, whom I earlier mentioned, stated that in his annual survey of the *Arlington* in April, 1940, he spread all the tarpaulins on the deck and examined every one of them and he found them in "good condition, or else they would have had them renewed. I would see to that." The first mate described the tarpaulins as being "passable" and by that I think he meant "serviceable", and some others of the crew expressed the opinion that the tarpaulins were in good condition at the commencement of the voyage.

I may next turn to the loading of the ship which was the subject of considerable complaint by the plaintiffs.

The entire loading of the cargo was under the supervision of the first mate, one Macksey, who testified that the *Arlington* was completely filled except for about 300 bushels in No. 1 hatch, which he regarded as of no consequence. The *Arlington* was loaded in the usual way, by spouts and chutes, in order to shoot the grain under the wings of the ship underneath the hatches, or, as expressed by one witness, to fill up the wings and pack the grain in there good. The first mate stated that the whole six hatches were filled up into the coamings, and level with the strong backs. The hatches rise about 11 or 12 inches above the deck, and these raised portions are called the "coamings". In respect of hatch No. 1 the first mate stated that one corner might have held 300 bushels more, but otherwise this hatch he said was filled up into the coamings, and that at any rate the grain could not shift under the coamings; and he said that the reason the additional 300 bushels were not loaded was that the ship was then on an even keel, and had this additional quantity been put in it would, or might have, given her a slight list. Paradis, the wheelsman, who was on watch while the ship was being loaded, and who assisted in securing the hatches after the loading was completed, confirmed the testimony of the first mate on this point, and he stated that any slackness in hatch No. 1 did not extend below the hatch coaming. Another witness, Mr. German, for the plaintiffs, was shown what was said to be the capacity plan of the *Arlington* when built in 1913, and from this he calculated that the *Arlington* was short 5,694 bushels of her capacity, and not 300 bushels, which if correct would leave a void space of 9,875 cubic feet in the holds of the ship. From this he inferred that on account of there being no longitudinal bulkheads in the holds, the cargo of grain shifted, causing a list to port, and this, he said, was responsible for the foundering of the ship in the state of weather that prevailed. I should perhaps mention that just a few days before the fatal voyage in question, the *Arlington* carried a cargo of grain from Port Arthur to Owen Sound, Ont., approximately the same quantity as on the occasion in question, and when the hatch covers were taken off at Owen Sound the cargo was found just as it was when loaded; the grain on that

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occasion was loaded level with the strong backs which run across the ship's hatches, and that was the first voyage of the *Arlington* in the season of 1940.

Another aspect of the question of the loading of the ship must be mentioned. It was urged that the ship was unseaworthy in that she was not provided with either longitudinal bulkheads in the cargo holds, or with shifting boards. Chap. 186, s. 696, of the Revised Statutes of Canada, 1927, provided that no grain cargo should be carried on board any ship registered in Canada, unless such grain cargo were contained in boxes, sacks, or barrels, or properly secured from shifting by boards or otherwise, and ss. 2 of the same section empowered the Governor in Council to make regulations prescribing the manner in which grain cargoes should be loaded at ports in Canada on ships bound to ports outside of Canada not within the limits of inland navigation. These provisions were repealed by chap. 52 of the Statutes of Canada for 1932-33 and substituted therefor was a section which empowered the Governor in Council to make regulations prescribing the manner in which grain cargoes and deck cargoes might be carried on any British ship registered in Canada, and this provision was carried into the Canada Shipping Act of 1934, which came into effect in 1936, but apparently no regulation was ever enacted, under the statutory authority mentioned, respecting the loading or carriage of grain on the Great Lakes, and I was informed there was no such regulation in the United States applicable to the Great Lakes. I understand there is some regulation regarding the loading and carriage of flax in Canada. The voyage of the *Arlington* in question was to have been completed on the Great Lakes, and apparently she operated only in the Upper Great Lakes. The classification societies have no regulation requiring shifting boards or anything of that sort, so far as the Great Lakes are concerned. Mr. Smith, a shipbuilder, called by the plaintiffs, stated that he knew of no ship engaged in the Great Lakes trade, that was equipped with shifting boards, since 1910, so that whatever the practice was prior to 1910 there was no requirement as to shifting boards since that year. Several masters of ships usually operating in the Great Lakes, and in the grain trade, testified that shifting boards were not used in the case of such cargoes, apparently for many years.

The next, and, I think, the most vital point for consideration in this case, is whether or not the loss of cargo resulted from perils, danger, and accidents of the sea or other navigable waters, and it becomes necessary to review at some length the evidence relative to this phase of the case. The *Arlington* left Port Arthur about noon on April 30, 1940, with a full crew on board, laden with a cargo of grain, the weather being described by the first mate as "pretty good" with a northeast wind blowing which was described as "between a fresh and a strong wind". The draft of the ship on her departure was 17 feet 2 inches in the fore end and 17 feet 5 inches in the after end, and this was not in any way put in question. On her first course the ship reached a point outside Passage Island, where she would first reach the lake proper, late in the afternoon of that day, or near dark, when she headed for White Fish Point on the usual course. During all this time and until 6:15 p.m. the first mate was on watch in the wheelhouse, and he stated that after getting outside Passage Island there was a strong northeast wind, accompanied by heavy seas catching the ship pretty well on her port side. At midnight the first mate again came on watch and he stated that the wind was then still blowing from the northeast, of gale force and increasing in velocity, and that the seas had also increased and some waves were going over the ship, and others as high as the landing booms which were 18 feet above the main deck. The first mate was unable to get aft for his usual midnight meal, or to take the log reading, just before or shortly after midnight, because of the heavy seas, and because he thought it was unsafe to make his way aft along the deck, although it might have been done. When he came on duty at midnight he found that boxing about 8 feet square, like a heavy crate, placed around two of the cargo winches to protect the same from breakage, and which boxing was formed of two-inch planks passing through angle irons with bolts, had been washed away, and a punt which had been fastened to the boxing around one of the aft winches had

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broken away and was lying loose on the deck near No. 6 hatch. This boxing completely enclosed the winches except that a sufficient space was provided through which a man could enter in order to run the winches.

At this time, about or shortly after midnight, the first mate stated that the hatch covers were in order, each covered with two tarpaulins and secured in the manner I have already described. With the aid of two lights on the forward house, and two on the after house, and the running lights, and by turning the ship before the sea, the first mate was able to see from the wheel-house that the deck-hatch covers were in order, but he along with the watchman intended making an actual inspection of the hatches and were about to do so when the master of the ship appeared in the wheel-house and put the ship back on her former course, and accordingly no inspection was made, any more than could be done by observation from the wheel-house, in the way I have just described. Sometime after 2 o'clock in the morning, a time not clearly fixed, the watchman got back aft a certain distance and returning reported to the first mate that the tarpaulins on No. 3 hatch were torn or ripped, that the tarpaulins on No. 5 hatch were not only in the same way but worse, and that the angle bars on this hatch were about one foot off the hatch in the centre and were bent up like a bow. Later, the first mate called the master so that he could go down himself with others of the crew to see if they could fix the tarpaulins, and they reached as far as hatch No. 2 or hatch No. 3, when they were forced to return on account of the seas. The first mate testified that up to this time the ship had not commenced to list. Shortly after this unsuccessful effort to fix the hatches and tarpaulins, the first mate and the forward deck crew proceeded to get their life preservers which were in their rooms forward, where they stayed for a short time. The seas were going over the hatches at this time and it was observed, according to the first mate, that the ship had in the meanwhile developed a list, but he was unable to fix definitely the time he first observed this, though he thought it was less than an hour before the ship sank. The listing of the ship was at first gradual but towards the end it became very fast, but the first mate seemed to be quite clear that the list

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commenced about a half or three-quarters of an hour before the ship sank, or shortly after he and the forward crew decided to put on their life preservers, and who later worked their way aft to a life boat on the boat deck which the engineer was trying to launch, and this they did along the starboard side of the deck, and eventually the whole ship's crew, except the master who went down with his ship, got into the life boat at the stern of the ship. Soon after the *Arlington* sank, about half past five o'clock in the morning of May 1st. Those in the life boat rowed about half a mile to starboard where they were taken on board the steamship *Collingwood*. The first mate stated that while on his way to the life boat, along the starboard side, he could not see the port side of the hatches, only the starboard side, and when launching the life boat some of the hatch covers were seen floating about.

The facts narrated above derive largely from the evidence of the first mate, and in the main they are supported by others of the ship's crew. The fireman, Hall, was on duty from 6 p.m. until midnight, as I understand it, of April 30th, and everything seemed to be in order when he went off duty; he came on duty again at 3:15 a.m. on the morning of May 1st and he stated that he then observed no sign of a list on the ship. After being on duty some time the bulkhead at the forward end of the stoke-hold, which would be after the end of the cargo space, began to snap and crack apparently high up on the port side. The ship then had a slight list, and water began to come in from the top of the bulkhead and the list gradually increased. The watchman, Braithwaite, came on duty at midnight on April 30th, and he stated that the ship was then in good condition, showing no list. It was this witness who examined the tarpaulins on hatch No. 3 and hatch No. 5, and in my view of the first mate's evidence I have already stated the result of his examination, but I might add that on that occasion this watchman found it was too rough to get back to No. 6 hatch, and at that time the water was going over the ship about 4 feet, and he found, as already stated, that one wind-bar on No. 5 hatch was bent up a foot in the centre. Callam, a wheelsman, went on watch at noon of the day of sailing and he stated the ship was then on an even keel; he went on watch again

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at midnight on April 30th, but he had been unable to get aft for dinner, which I assume to be a midnight meal, on account of the seas going over the deck. After midnight, this witness stated, it was blowing "very fresh" and "it seemed to be getting worse all the time", with a lot of water going over the ship. He stated that the ship acquired a list some time after midnight, the time he could not fix exactly, but he thought it was in the neighbourhood of half past three in the morning of May 1st. Another witness, Wood, the second engineer, came on duty at about 12:15 a.m. on May 1st, and he stated that everything seemed to be in good order on the ship at that time, the engines were running at full speed and continued so until 4:17 a.m. when they were checked to "half speed", and it was just a few minutes before that time he first noticed that the ship had a list. What transpired afterwards in the engine room is not of importance.

Evidence was introduced by the defendant regarding the experience of other ships in adjacent areas of Lake Superior, on April 30th and May 1st. Capt. Poidevin, master of the *Kenora,* a ship corresponding in size to the *Arlington,* stated that he was on Lake Superior on April 30th and May 1st, downbound from Port Arthur, having left Port Arthur on April 29th at about six o'clock in the afternoon. At 6 o'clock in the afternoon of April 30th the *Kenora* was running towards Slate Island, towards the north shore and off the regular course, and her master stated that he left the regular course for the reason that when he came out to Passage Island the wind was northeast, there being what he "considered a gale of wind", a big sea was running and there was every indication of it continuing, and being unable to make speed, he decided to head for the north shore; he made White Fish Point, which is out of Lake Superior, at 7 o'clock the next afternoon, on May 1st, and he stated that during most of this time the wind continued northeasterly and this he described as a northeasterly gale in his log, the seas were running quite high, and he was shipping water. About the time the *Arlington* sank, 12 miles southeast of Superior Shoal, the *Kenora* would be about 25 miles away from that point, and the master of the *Kenora* states that it then "was blowing strong northeast, with occasional snow" which his log described as a northeast gale, and the freezing spray had got up so high that it broke his aerial down, which was about 50 feet above the deck of the ship. On April 30th, the master of the *Kenora* received a message of the weather forecast for May 1st from Port Arthur, and his recollection was that it said: " continued northeasterly wind strong to gales with snow". Capt. Poidevin stated that he would note in his log as a gale anything above 35 miles an hour, and also that the storm he encountered on this occasion was more violent than any he had experienced in the spring of other years in Lake Superior. Captain Anderson, master of the *Edmonton,* stated that on April 30th he was bound from Toronto to Fort William, loaded, and on April 30th at 5:20 p.m. he passed White Fish Point. Explaining why he did not follow the regular course as he proceeded west he said: " I started up the middle for the regular course to Passage Island and when I got two hours above Cariboo Island the wind freshened up from the northeast and got quite strong, and I pulled for the north shore. We had a big deck load, and we were rolling and labouring heavily and I went to the north shore"; when he hauled off for the north shore he stated there was a " big sea ", and his deck load began to shift by reason of the seas and the shipping of spray over the side. This brought the *Edmonton* to Point Porphyry on the north shore at 7:52 a.m. on May 1st. At the time the *Arlington* sank, the *Edmonton* was abreast of Lamb Island by log, and the wind was then still northeast, but the *Edmonton* herself was at that time under the lea of the north shore and would not be getting so much wind. Capt. Burke, master of the *Gleneagle,* a ship just below 600 feet in length, and of modern construction, was on Lake Superior April 30th, without cargo, bound for Port Arthur from Saulte Ste. Marie, having arrived at Port Arthur on May 1st at 1:50 a.m. On April 30th, at 10:40 a.m. when the *Gleneagle* was about 32 miles outside of Passage Island, the master stated that his ship rolled so badly in the trough of the seas that she rolled her steel patent hatch covers off. Capt. Meisner, master of the *Laketon,* an Upper Lake type of ship, about 416 feet in length, was on Lake Superior on April 30th and May 1st, 1940, bound for Fort William, without cargo. He passed White Fish Point at 6:30 p.m. on April 30th, the wind at that time being light but shortly after that it

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went "northeast strong", and he was forced to haul to the northeast "on account of the sea rolling the ship". He did not continue the regular course from White Fish Point to Passage Island but altered his course to the eastward of Michipicoten Island in expectation of getting more favourable weather, but the wind continued northeast, and "increased until it assumed gale force". He estimated the velocity of the wind to be not less than 35 miles per hour at any time and up to 60 miles per hour at other times, and the seas "were very big when I worked up under the land". It was, Capt. Meisner stated, the strongest storm he had ever seen on Lake Superior, or any lake, in the spring.

Evidence of the same character was presented on behalf of the plaintiffs, and to that I must also refer. The master of the *Harry K. Ewig,* an American registered ship, testified that at approximately 11:30 p.m. on the night of April 30th, he was at a point abreast of Eagle Harbour light, where he "experienced a typical northeaster, a combination of northeast wind with snow", and that at 5:24 a.m. on the morning of May 1st he was at some undefined point about northeast of Superior Shoal; and he stated that between these two points the wind had diminished, although there were times when the velocity was greater than at other times. He further stated that the weather on this occasion was characteristic of the usual spring weather on Lake Superior, that while there was a northeast storm there was nothing abnormal about it and that he had experienced worse weather in the corresponding period of other years. The *Collingwood,* the ship which rescued the crew of the *Arlington,* laden with about 145,000 or 185,000 bushels of grain, departed from Port Arthur about the same time as the *Arlington.* The second mate of the *Collingwood,* who was on duty from 6:20 p.m. to midnight of April 30th, stated that there was a "pretty strong wind" from the northeast, with "a bit of a sea running", and "the weather increased a little towards midnight and got a little bit stronger". At a quarter to five o'clock in the morning of May 1st he was called, and then the weather "did not seem to be as strong as it was at midnight". The *Arlington,* he said, was then in sight, on the port side and a little way ahead, and she then had a very bad list. He also stated that the weather on this occasion was usual for that time of year, and that he had experienced the same weather in the corresponding period of other years, on Lake Superior. A wheelsman of the *Collingwood*, who came on duty at 12:20 a.m. on the morning of May 1st, also gave evidence, and he stated that a half hour or so after coming on duty he noticed a bad list on the port side of the *Arlington*, then about half a mile away, and this he called to the attention of the mate in the wheelhouse; that when he came on duty there was a strong northeast wind and that the *Arlington* was "kind of rolling"; and that the weather on this occasion was normal for that time of year on Lake Superior.

It was because a determination of this case depended so much upon the facts, if not entirely so, that I have reviewed the evidence at such length. Upon the evidence I have no hesitancy in holding, in fact I do not think it was contested, that the hull, decks, bilges, engines, machinery, tanks, cargo holds, bulkheads, hatch covers, and generally the ship and her equipment, excepting the tarpaulins, the equipment for securing the same in place, and the tank with the slack water, were seaworthy at the commencement of the voyage, and that the carrier used due diligence to make them so. And I may be understood as using the same language in respect of the tarpaulins. The plaintiffs seemed to contend that because the tarpaulins, or some of them, were found loosened or torn before the *Arlington* sank that therefore they were unseaworthy or insufficient at the commencement of the voyage, but there is nothing whatever in the evidence which would sustain this contention. I am not aware that the carrier was required to provide new tarpaulins at the beginning of each season. There was criticism of the type of equipment used to maintain the tarpaulins in position on the hatch covers and that more suitable means than the angle-bars or wind-bars employed by the defendant were available or were in use by other ships, which again may be true, but the equipment used was approved of, and found up to requirements, by competent persons, and upon the evidence I have no doubt as to their sufficiency. Nor have I any reason to doubt but that the hatch covers and tarpaulins were properly secured when the loading of the ship was completed,

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and in fact I do not think that was seriously put in question. Then, as to the slack water in one of the tanks, which was apparently placed there upon the direction of the master of the ship in order to permit of more cargo in the forward hatch, I do not think it can be inferred from the evidence that any list appeared in the ship until it was found that the tarpaulins were loosened or torn, which was well on in the morning of May 1st, when water was obviously getting into the cargo hold through some of the hatches, so the slack water up to that time could not have contributed to a listing of the ship or shifting of the cargo, and therefore its presence would not seem to have any real bearing upon the case. I have already described the construction of the tank in question, and the quantity of water therein, one-half of which would be on the starboard side of the ship. I am not satisfied upon any evidence before me that this slack water would impair the stability of the ship to any such degree as would cause a list in the ship, or any movement in the cargo. Another point might be mentioned at this stage, lest I forget it altogether, and that is one which the defendant raised in its defence. It was that if it appeared that the ship had been put head to wind until the storm abated, or had been headed for the north shore, and that this would have avoided the disaster, then, that was a default in the navigation or management of the ship for which the carrier would not be responsible, and with which I agree. This point was not developed at the trial, and I had no assistance whatever from any of the witnesses which I regret, because I think the point was one of importance and of probable weight. In the circumstances I do not feel obliged to make any pronouncement upon the point.

As already mentioned, it was claimed that the *Arlington* was unseaworthy in that she was not provided with shifting boards, and that the stowage of bulk grain in this ship without being provided with shifting boards caused a movement of the cargo which led to the disaster, and consequently the carrier was precluded from invoking the benefit of the exemption conferred by the Act. I have already referred to the absence of any enactment or regulation in Canada requiring shifting boards, or some equivalent, in grain carrying ships on the Great Lakes, and also to the fact that for the past thirty years shifting boards have not been used in grain carrying boats on the Great Lakes, which would make it appear that in the opinion of those best able to judge their use was not a necessary precaution, and that is true of the United States as well. I have no doubt that many ships loading grain at the head of the Great Lakes, particularly those required to pass through the St. Lawrence canals, are not loaded to full capacity. This would be well known to all engaged or interested in the grain carrying trade on the Great Lakes, including marine underwriters. Now, in the state of facts here it does not appear to me that it can be urged that the *Arlington* was unseaworthy by reason of the lack of shifting boards, although I can imagine that in certain circumstances such a contention might be advanced with force. I do not think that in the present case any shifting of the cargo occurred by reason of the lack of shifting boards. The evidence is to the effect that no listing had developed until around 3:30 a.m. or 4 a.m., on the morning of May 1st. It is true the wheelsman Brais, of the *Collingwood,* stated that he observed a list on the *Arlington* somewhere around one o'clock in the morning of that day, but I prefer to accept the evidence of the first mate and others of the crew of the *Arlington* upon this point. I formed the impression that the witness Brais was speaking without having any clear or reliable idea as to the time he observed the listing of the *Arlington.* Considering the state of the weather for some considerable time before midnight of April 30th, it does seem to me that if there could have been any movement of the cargo due to the lack of shifting boards, it would have made itself manifest long before 3:30 a.m. or 4 a.m. on the morning of May 1st. Moreover, the list that developed was to port, and if that had been due only to the shifting of the cargo, one would expect that with the force of the wind and sea striking the ship on her port side, the list would have appeared on the starboard side and not on the port side. I see no reason for holding that any movement of the cargo occurred, or that any list developed on the ship, due to the lack of shifting boards.

Now as to the loading and stowage of the cargo in the ship at Port Arthur. First, it may be said safely that she was loaded according to the practice of the port of loading,

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a large and important grain loading port, and one might fairly assume that the stowage of any cargo laden on a ship there would be carried out in a proper manner. As the evidence shows, the grain was forced or shot underneath the hatches by spouts and chutes, and then "trimmers", by the appropriate means, would trim the cargo in the holds of the ship, if that is the proper way of expressing it. The evidence would indicate that she was fully loaded except that some 300 bushels more of grain could have been loaded on the port side of No. 1 hatch in hold No. 1, but that hatch would appear to have been loaded up to the coaming at least, and it was stated by the first mate that he regarded the 300 bushels, or the deficiency in a completely full cargo, as "neither here nor there, because that little bit would not have given her a list . . . It was not enough to bother with, so we did not bother taking it", and he stated that there could be no shifting of the cargo below the coaming of that hatch; all other hatches had been filled as full as reasonably possible, according to the evidence. Mr. German, a naval architect, in testifying, was shown by Mr. Mackenzie certain capacity plans of a ship which were tentatively received in evidence, subject to proof later that the *Arlington* was constructed according to such plans, or that they were the capacity plans of the *Arlington,* which was not shown. The owners of the *Arlington* did not have the capacity plans of their ship, and as the ship had frequently changed ownership one can understand why it was possible that such plans were not in the possession of the defendant. Mr. Mackenzie was informed that he could have authority to take commission evidence in the United States, where the *Arlington* was built, to show that the plans in his possession were the capacity plans of the *Arlington,* or duplicates thereof, and there the matter was left. There is nothing on these plans to indicate that they were the capacity plans of the *Arlington,* although her name appears thereon in red pencil, by whom it was not stated. These plans, it is plain, were standard plans prepared by a builder for the construction of a certain size and type of ship when and if ordered from the builder, which possibly would be modified in some particulars to suit the purposes of any particular purchaser, and while the *Arlington* may have been constructed substantially from those

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plans, yet they may have been modified at the instance of the original purchaser, or since by other of the subsequent owners before she was acquired by the defendant. However, Mr. German computed the cargo capacity of the *Arlington* from those plans, and, as earlier pointed out, he estimated that she was short of her full cargo by about 5,700 bushels, which would leave an actual void space of 7,118 cubic feet in the cargo space, whether in both holds or in only one was not stated. I am not disposed to accept evidence of the cargo capacity of this ship, based upon a measurement of the cargo space appearing on the plans to which I have referred, and I cannot accept as a fact that there was such a void space in the cargo holds, in face of the evidence before me. I accept the evidence of the first mate as to the loading and stowage of the cargo, and as to the fact that she was a ship practically fully loaded. The difference between the fully loaded draft of the *Arlington*, 17 feet 8 inches, and her actual mean draft which was 17 feet 3½ inches, I should think would indicate a substantially complete loading of the actual cargo space of the ship, after taking into consideration the fuel, water ballast, and so forth, on board.

It was agreed, I think, that water must have entered into the cargo holds through the tarpaulins and hatch covers, of at least two of the hatches, and this undoubtedly would in time cause the ship to list, and ultimately result in the foundering of the ship. I accept the evidence of the defendant's witnesses as to the character and extent of the storm, and a review of all the evidence discloses little real difference as to the fact that there was a storm of wind and sea of substantial proportions, otherwise what happened could hardly have happened. The evidence coming from several other ships on Lake Superior at the time material is corroborative of that fact and is not to be minimized or destroyed by reason of the fact that none of these ships suffered in the same way as did the *Arlington*. It is irrelevant, I think, that the *Collingwood*, which was nearby, did not suffer any injury. The question of the degree of a storm at sea is not of importance, nor does it afford ground for the inferences which the plaintiffs ask me to draw. The question is, was there such a peril of the sea as that against which the insured undertook to indemnify

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the carrier. To say there was no peril of the sea because the weather was what might be normally expected on such a voyage in the spring of the year on Lake Superior, or that there was no weather bad enough to bring about what happened here, appear to me to be not a true test. In *Canada Rice Mills Ld.* v. *Union Marine and General Insurance Co.* (1), Lord Wright refers to certain remarks of Lord Herschell in the case of the *Xantho,* which he quoted with approval, and he said:

> In the House of Lords in *Wilson Sons & Co.* v. *Owners of Cargo per the Xantho* (2), which was a bill of lading case, but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* Lord Bramwell in *Hamilton, Fraser & Co.* v. *Pandor & Co.* (3)), Lord Herschell said: "The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea, which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities, or by common understanding."

I do not think it can be said that the storm which the *Arlington* encountered was not a peril of the sea, or one impossible of causing the result which happened. I think it did, and on a consideration of all the facts before me that is the conclusion which I have reached.

I might add that I was referred to the case of *Paterson Steamship Ld.* v. *Canadian Co-operative Wheat Producers Ld.* (4), but the facts of that case are in such contrast to the facts of the present case that I do not think that any useful purpose can be served by discussing it.

In the result the action of the plaintiffs is dismissed and with costs.

*Judgment accordingly.*

(1) (1941) A.C. 55 at 67.
(2) (1887) 12 A.C. 503 at 509.
(3) (1887) 12 A.C. 518 at 527.
(4) (1934) A.C. 538.

BETWEEN:

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Sep. 22.
Sep. 25.

PIONEER LAUNDRY & DRY CLEANERS LIMITED ......... APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ........................... RESPONDENT.

AND

EMPIRE CLEANERS LIMITED.. APPELLANT;

AND

MINISTER OF NATIONAL REVENUE ........................... RESPONDENT.

*Revenue—Income War Tax Act—Depreciation—Deduction—Reasonable amount—Nominal sum.*

*Held*: That a nominal sum is not a reasonable amount to allow for depreciation of the value of machinery, plant and equipment, within the meaning of the Income War Tax Act.

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

The appeals were heard before the Honourable Mr. Justice Robson, Deputy Judge of the Court, at Vancouver.

*W. Martin Griffin, K.C.* and *V. R. Hill* for appellants.

*Dougald Donaghy, K.C.* and *A. A. McGrory* for respondent.

ROBSON, Deputy Judge, now (September 25, 1942) delivered the following judgment:

It is clear from the circumstances of this case that the machinery, plant and equipment which were the subject of discussion in the earlier litigation (1) had considerable working value at the time it was purchased by the present appellant. The Minister had declined to make allowance for depreciation thereafter because of depreciation allowances made to the previous owner. The reason was that it was the same shareholding ownership, to put it briefly. The result of the litigation was that this was held to be

(1) (1938) Ex. C.R. 18; (1939) S.C.R. 1; (1940) A.C. 127.

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erroneous in law and not a sound exercise of a judicial discretion and that the appellant company must be treated as a new owner and, as a new owner, entitled to the allowance by the Minister of what in his judgment would be a reasonable sum in each taxation period from the time of acquisition by the appellant company. Such depreciation is in effect an operating cost. Percentages reached by practical experience are usually employed and the percentages would be on the value of the plant in question in any case, into which percentages and value the Minister could make independent inquiry. It is in harmony with sound business which must recognize that the value of plant will, in varying degree, shrink with each operating year. In keeping with that, the sum to be allowed for depreciation would be computed on a lower figure in each taxation year. But so long as there is any operating value and operation there is at least some reduction in value by use—which goes by the name of depreciation and which is part of the cost of earning profits.

As I read the judgments, the appellant company is in the position of purchaser of used machinery and equipment and would be entitled at least to the benefit of the Minister's judgment, judicially exercised, as to what should be allowed, in plain language, for loss by wear and tear of that machinery in the course of its use and operation while earning profits in a taxation period. The Minister was required by the judgment as rendered by the Judicial Committee to take the matter up again and exercise his judgment as to reasonable depreciation allowances. In proceeding to do that the Minister, or the Commissioner with his subsequent confirmation, allowed the nominal sum of one dollar for that depreciation, i.e., for the operating cost resulting from wear and tear in business use.

I am pressed to take the view that the Minister's judgment was final even if his figure, reached by calculation, was erroneous. Familiar cases were cited. But I must consider the judgment of the Judicial Committee. Doing so, I cannot think that this mere allowance of a nominal sum was a possibility within the contemplation of the learned Lords when they referred the question back to the Minister. I have to say, with deference, that I think the course pursued was not a consideration of a reasonable

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amount for depreciation within the intention of the Act. I have not had the benefit of any explanation, simply the Minister's decision.

It seems to me that the experience of this case shows that the sums allowed the previous owners for depreciation were too large and that the property had not depreciated to the extent of the sums allowed. The then owners possibly made a gain to which they were not entitled, but nothing can be done about that here.

I do not consider that the allowance for depreciation of later acquired goods can be attributed to the whole of the property in question and so form a decision of the Minister upon an amount not merely nominal and applicable to the whole.

In the Empire Cleaners Ltd. case there is an additional ground of appeal as to later items, but it has not been made out that the Minister exceeded the scope of his authority.

I think that the appeals in respect of the merely nominal allowance for depreciation must be allowed to the extent herein indicated and the matter be referred back to the Minister for further consideration of allowance of reasonable sums for depreciation within the Act. I think that the appellant—Pioneer Laundry Company—should have costs. No costs to or against the Empire Cleaners Limited.

*Judgment accordingly.*

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1940
Sept 9 & 10.

1941
June 18.

BETWEEN:

YUKON SOUTHERN AIR TRANSPORT LIMITED AND PHOENIX ASSURANCE COMPANY LIMITED ............................ SUPPLIANTS;

AND

HIS MAJESTY THE KING ............ RESPONDENT.

*Crown—Petition of Right—Negligence—Exchequer Court Act, R S C., 1927, c. 34, s. 19, ss. 1 (c)—War Measures Act, 1914, R.S C., 1927, c. 206, secs. 7 & 8—Evidence—Onus of proof—Res ipsa loquitur—Aeroplane accident—Damages—Subrogation.*

The action is one to recover from the respondent damages suffered by the suppliant Yukon Southern Air Transport Limited through the

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total loss of an aeroplane owned by it due to the alleged negligence of officers and servants of the Crown acting within the scope of their duties or employment.

The respondent pleaded *inter alia* that this Court was without jurisdiction to entertain suppliants' petition.

The Court found that the accident was attributable to certain officers or servants of the Crown acting within the scope of their duties or employment.

*Held:* That the maxim *res ipsa loquitur* is applicable in suits against the Crown and that the onus was upon the respondent to establish absence of negligence on the part of its officers and servants, which he failed to do.

2. That the War Measures Act, 1914, R.S.C., 1927, c. 206, does not restrict the jurisdiction of this Court.

PETITION OF RIGHT by suppliants herein to recover from the Crown damages for the loss of an aeroplane due to the alleged negligence of officers and servants of the Crown acting within the scope of their duties or employment.

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

*J. J. O'Connor, K.C., C. Becker* and *H. E. Crowle* for suppliants.

*A. B. McDonald, K.C.* and *R. V. Prenter* for respondent.

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

ANGERS J. now (June 18, 1941) delivered the following judgment:

The suppliants, by their petition of right, seek to recover from His Majesty the King the sum of $49,260.48 with interest and costs.

The sum of $49,260.48 represents damages which the suppliant Yukon Southern Air Transport Limited is alleged to have suffered as a result of a collision between a Hawker Hurricane aeroplane belonging to the respondent and a Ford tri-motor aeroplane, property of the Yukon Southern Air Transport Limited, at the Vancouver airport at Sea Island, province of British Columbia, due to the negligence of officers and servants of the Crown acting within the scope of their duties or employment.

The Phoenix Assurance Company Limited was added as co-suppliant as it had allegedly paid to the Yukon Southern Air Transport Limited, in respect of the loss suffered by the latter, the sum of $15,000 pursuant to the terms of an insurance policy.

[The learned Judge here refers to the pleadings and continues].

In reply to the respondent's statement in defence, suppliants plead the Petition of Right Act (R.S.C., 1927, chap. 158) and the Exchequer Court Act (R.S.C., 1927, chap. 34) and particularly subsection 1 (*c*) of section 19 of the Exchequer Court Act as amended by section 1 of chapter 28 of the Statutes of Canada, 1938, and say that the Court has jurisdiction to entertain the present petition.

The evidence discloses the following facts.

On March 2, 1939, the Ford tri-motor aeroplane above mentioned, property of the suppliant Yukon Southern Air Transport Limited, was parked at the spot indicated by an X and initials G.A.M. on the plan of the Vancouver Airport marked 1 for identification with the examination for discovery of George Albert Mercer and filed at trial as exhibit 1. The parking of this aeroplane as well as of other aeroplanes operated by the Yukon Southern Air Transport Limited was a common occurrence with the permission of the authorities of the Sea Island Airport, at Vancouver, which, by the way, was the property of the Crown.

On the said date Sergeant Pilot Robert Lawrence Davis, in charge of a Hawker Hurricane aeroplane, property of the Crown, endeavouring to take off from the East-West runway drove it off the said runway and brought it into collision with the said Ford aeroplane and demolished it beyond repair. The Hawker Hurricane aeroplane, as a result of the collision, caught fire and was entirely destroyed.

It was submitted on behalf of respondent that this Court has no jurisdiction to hear the present case; in support of his contention counsel relied on the War Measures Act, 1914, R.S.C., 1927, chapter 206, concluding from the fact that, in virtue of section 7, it grants jurisdiction to, among others, the Exchequer Court to fix compensation for appropriation by His Majesty of property or the use thereof despite the existing provisions contained in the Expropriation Act, R.S.C., 1927, chapter 64, that it means to exclude

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the jurisdiction of this Court in all other matters consequent upon activity authorized under the War Measures Act. I may note incidentally that section 7 is not the only section of the Act dealing with the powers of the Court but that section 8 also contains provisions in that respect concerning the seizure and forfeiture of ships, vessels and goods dealt with contrary to any order or regulation made under the Act; it seems to me apposite to quote these sections:

> 7. Whenever any property or the use thereof has been appropriated by His Majesty under the provisions of this Act, or any order in council, order or regulation made thereunder, and compensation is to be made therefor and has not been agreed upon, the claim shall be referred by the Minister of Justice to the Exchequer Court, or to a superior or county court of the province within which the claim arises, or to a judge of any such court.
>
> 8. Any ship or vessel used or moved, or any goods, wares or merchandise dealt with, contrary to any order or regulation made under this Act, may be seized and detained and shall be liable to forfeiture, at the instance of the Minister of Justice, upon proceedings in the Exchequer Court or in any superior court.

I think that the contention advanced by counsel for the respondent that the Court "lacks jurisdiction in matters consequent upon activity authorized under the War Measures Act other than that given by sec. 7 (and sec. 8 presumably) of that statute" is unfounded. To abolish the jurisdiction of the Court, in time of war, in all matters not mentioned in the War Measures Act, it would require a definite and specific statement of the law; there is no such statement in the statutes. I do not believe that the object of the War Measures Act was to restrict the jurisdiction of the Court; in fact it rather increased it.

The Court is competent to hear the present case under the provisions of section 19 (*c*) of the Exchequer Court Act, assuming that the accident was the result of the negligence of an officer or servant of the Crown while acting within the scope of his duties or employment; I shall deal with this question, which is the main one at issue, in a moment.

Counsel for the suppliants submitted that the maxim *res ipsa loquitur* applies in the present case and that it was incumbent upon the respondent to establish that the collision had not been the result of the negligence of an officer or servant of the Crown acting within the scope of his duties or employment. On the other hand, it was urged on behalf of the respondent that the said maxim does not apply to the Crown seeing that paragraph (*c*) of subsection 1 of section 19 of the Exchequer Court Act (R.S.C., 1927, chap. 34), which determines the responsibility of the Crown in cases of accidents, enacts formally that every claim against the Crown arising out of any injury to property must, in order to be valid, result from the negligence of an officer or servant of the Crown. Counsel for respondent contended that the only conclusion to draw from section 19 (*c*), with respect to the burden of proof, is that the suppliant is always bound, whatever the facts may be, to prove negligence on the part of an officer or servant of the Crown while acting within the scope of his duties or employment. I must say that I cannot share this view; such an interpretation of paragraph (*c*) of subsection 1 of section 19 seems to me too strict and rigid. I am inclined to believe that the maxim applies in the case of an accident causing death or injury to the person or to property in so far as negligence is concerned; the suppliants however will have to prove that the person who caused the accident was an officer or servant of the Crown acting within the scope of his duties or employment.

There are very few decisions concerning the applicability of the maxim in suits against the Crown. In the case of *Dubé* v. *The Queen* (1), in which the claimant was seeking to recover damages for a personal injury suffered as the result of the derailment of a train of the Intercolonial Railway owned and operated by the Government, counsel for the suppliant, at the opening of the case, made the statement that it would be sufficient for him to prove that the suppliant was a passenger on the train and that he was injured as a result of the accident and that the Crown then would have to answer the *prima facie* case of negligence made out against it; replying to this statement of counsel, Burbidge J. made the following observations (p. 151):

> I do not think that is sufficient in a petition against the Crown in an accident on a Government railway. You will, I think, have to go further and show in the terms of the statute that the accident was occasioned by the negligence of some officer or servant of the Crown while acting within the scope of his duties or employment.

(1) (1892) 3 Ex C.R. 147.

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In the case of *Western Assurance Company* v. *The King* (1), in which the suppliant subrogated to the rights of the Dominion Bridge Company, owner of the scow *Dominion No. 2,* which had been sunk in the Lachine canal, a public work of Canada, by a submerged log, Cassels J. expressed the following opinion (p. 293):

> In the case of *Dubé* v. *The Queen* (2), it is laid down that the suppliant must prove affirmatively that there was negligence. The fact of the accident is not sufficient to establish a *prima facie* case of negligence.

Counsel for the suppliant, in support of his contention that the maxim applies in cases against the Crown, relied on the decision of the Supreme Court in *Montreal Transportation Company* v. *The King* (3); this decision does not hold that the maxim is applicable.

Anglin J., dealing with the subject, says (p. 812):

> I find it unnecessary to determine whether the doctrine *res ipsa loquitur* is or is not applicable against the Crown. The authorities relied upon for the contention that it can never be invoked where the Crown is defendant in my opinion do not so decide. With the trial Judge, I am of the opinion that it does not apply in the present instance and that the Crown has discharged any burden of proof cast upon it.

Mignault J., referring to the same question, expresses a similar opinion (p. 816):

> It is unnecessary to discuss in this case the question whether the so-called rule *res ipsa loquitur* applies where the Crown is liable for the negligence of its servants. It is moreover no more than a presumption of negligence arising out of a *prima facie* case, and if the Crown had to rebut this presumption and answer this case, it has in my opinion done so.

Reference may also be had beneficially to the case of *Sincennes-McNaughton Lines Ltd.* v. *The King* (4). The suppliant, by its petition of right, sought to recover from the Crown damages for injury to one of its tug boats as a result of the gates between a basin in the Lachine canal and lock No. 1, in which she was moored, giving way.

The learned President of the Exchequer Court, after commenting upon the observations of Lord Dunedin in the case of *Ballard* v. *North British Railway Co.* (5) and those of Sir Lyman Duff (then Mr. Justice Duff) in the case of *Montreal Transportation Co.* v. *The King* (6), previously mentioned, expressed himself as follows (p. 157):

(1) (1909) 12 Ex. C.R. 289.
(2) (1892) 3 Ex. C.R. 147.
(3) (1924) 4 D.L.R. 808.
(4) (1926) Ex. C.R. 150; (1928) S.C.R. 84.
(5) (1923) S.C. (H.L.) 43, at 53.
(6) (1924) 4 D.L.R 808.

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On the whole, I think it is unnecessary to debate in cases like the one at present before me. the applicability of this maxim when we have an authoritative rule of the common law, plainly and succinctly laid down for us in the well-known case *Scott* v. *London Dock Company* (1). There the plaintiff Scott sued the defendant company, for personal injuries sustained in an accident, due to the negligence of the defendant's servants, in operating a machine for lowering goods from a warehouse of the defendant company to the street. Erle C.J., delivering the judgment of the majority of the court, said:—

"There must be reasonable evidence of negligence . . . But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Newcombe J., who delivered the judgment of the Supreme Court affirming the judgment of the President of the Exchequer Court, stated (p. 85):

The evidence is found to exclude the suggestion of any defect in the construction of the gates, but it is found that they were not well closed, or, as said by the learned trial judge, that "they broke owing to improper mitring" His view was that when, in the process of closing, the gates were swung together by the lockmen under the direction of the lockmaster, they did not meet evenly, and that in consequence the bearing surfaces did not properly articulate. The witnesses who were charged with the work maintained that the gates were safely closed. But the circumstances of the case, the appearance of the gates after the accident, and the injuries which they had received, were consistent with and suggestive of the view that the damage was produced by pressure of the gates upon each other when in contact, but not truly joined; and there was ample evidence that the closing ought to have been effected with care in order to avoid such a result, and that a faulty bevel- or mitre-joint would be potential and not improbable cause of their failure to withstand the great pressure to which they became subject when the level of the water in the lower lock was reduced.

It must be remembered that it was the duty of the lockmaster and his men to see that an accident did not happen through lack of reasonable and proper care in the working of the gates, and the fact that such an extraordinary occurrence took place from a cause which, upon the evidence, may probably have consisted in their neglect, affords the basis of a finding, especially when, as in this case, there is no proof of any competing cause. I think there is here a preponderance of probability which constitutes sufficient ground for the finding of the learned trial judge.

As I have already said, I am of opinion that the maxim *res ipsa loquitur* applies in suits against the Crown, save the duty on the part of the suppliant to show that the cause of the accident is attributable to an officer or servant of the Crown acting within the scope of his duties or employment.

(1) (1865) 3 H. & C. 596 at p. 601.

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The matter at issue is governed by paragraph (*c*) of subsection 1 of section 19 of the Exchequer Court Act, which reads thus:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:
>
> (*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.

After a careful perusal of the law and precedents, I am satisfied that Fullerton and Davis were, at all times material herein, officers and servants of the Crown within the meaning of paragraph (*c*) of subsection 1 of section 19 and that consequently, if the accident were caused by their negligence or the negligence of either of them, the respondent is responsible therefor. See *Larose* v. *The King* (1); *Moscovitz* v. *The King* (2). In the latter case Sir Lyman Duff C.J. expressed the following opinion (p. 408):

> If you interpret "public work," "chantier public," as the learned President has done, as embracing a public service of that kind, then the case, of course, falls within the statute.

[The learned Judge here reviews the evidence given at trial and on discovery and continues].

The respondent, as we have seen, rests his defence on inevitable accident. The suppliants, alleging negligence on the part of officers of the Crown, rely on the maxim *res ipsa loquitur*. Having reached the conclusion that the maxim applies in suits against the Crown, the present case is one in which, in my opinion, the maxim is particularly applicable. The respondent's aeroplane collided with the Ford tri-motor of the suppliant Yukon Southern Air Transport Limited, which was stationary. In this respect the following decisions seem to me relevant: *United Motors Service, Inc.* v. *Hutson et al.* (3); *Fosbroke-Hobbes* v. *Airwork Ltd. et al.* (4).

In the case of *United Motors Service, Inc.* v. *Hutson et al.* (*ubi supra*), Duff C.J. made the following observations (p. 297):

> The phrase *res ipsa loquitur* is, however, used in connection with another class of cases where, by force of a specific rule of law, if certain facts are established then the defendant is liable unless he proves that

(1) (1901) 31 S.C.R. 206.
(2) (1934) Ex. C.R. 188; (1935) S.C.R. 404.
(3) (1937) S.C.R. 294
(4) (1936) 53 T.L.R. 254.

the occurrence out of which the damage has arisen falls within the category of inevitable accident. One of these cases is that in which a ship in motion has run into a ship at anchor. The rule of law in such a case is set forth by Fry L.J. in *The Merchant Prince* (1):

"It is a case in which a ship in motion has run into a ship at anchor. The law appertaining to that class of case appears to be clear. In the case of *The Annot Lyle* (2), it was laid down by Lord Herschell that in such a case the cause of the collision might be an inevitable accident, but unless the defendants proved this they are liable in damages. The burden rests on the defendants to shew inevitable accident."

The remarks of Goddard J. in the case of *Fosbroke-Hobbes* v. *Airwork Ltd. et al.* (*ubi supra*) at page 255 are well in point:

That this disastrous accident was due to the fault of the pilot is, in my opinion, abundantly clear. In the first place, I hold that the doctrine *res ipsa loquitur* applies While it is unnecessary to decide whether the doctrine would apply to any accident occurring to an aeroplane in the course of a prolonged flight, here we have a disaster at the very beginning, just as the machine had taken off and well before it had attained the height at which the journey would be performed. It was an accident which, I think, all are agreed ought not to have happened. It was argued that I ought not to apply this doctrine to an aeroplane, a comparatively new means of locomotion, and one necessarily exposed to the many risks which must be encountered in flying through the air, but I cannot see that this is any reason for excluding it. Large numbers of aeroplanes are daily engaged in carrying mails and passengers all over the world and, as is well known, they arrive and depart with the regularity of express trains. They have indeed become a commonplace method of travel, supplementing, though not superseding, rail and sea transport Railways were just as great an innovation when they took the place of the stage coach, yet the courts found no difficulty in applying to them by the year 1844 the same doctrine which had formerly been applied to stage coaches. see *Carpue* v. *London and Brighton Railway Company* (3).

Assuming, as I do, that the maxim *res ipsa loquitur* is applicable in suits against the Crown and that it applies particularly in the present instance, the onus was upon the respondent to establish absence of negligence on the part of its officers and servants. I do not think that the respondent has succeeded in doing that; on the contrary, after a careful perusal of the evidence, I believe that the weight thereof is favourable to the suppliants' contention. I am satisfied that the accident is attributable to the negligence of officers or servants of the Crown acting within the scope of their duties or employment, namely, Squadron Leader Elmer G. Fullerton and Sergeant Robert Lawrence Davis.

(1) (1892) P. 179, at 189. (2) (1886) 11 P.D. 114.
(3) (1844) 5 Q.B. 747.

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Fullerton was negligent in allowing Davis to fly a Hawker Hurricane when he knew that the latter had no experience with this type of aeroplane, that the Hawker Hurricane was more than any other plane yet flown by Davis subject to torque, that as a consequence the Hawker Hurricane, unless properly driven, was liable to swerve to the left instead of following a straight line and to hit any obstacle in its way, e.g., the Ford tri-motor or the administration building, and in not advising Yukon Southern Air Transport Limited that its aeroplane was liable to be struck and that it should be removed and parked elsewhere.

Davis was negligent in not properly listening to or at least not following the instructions which I am inclined to believe were given to him by Fullerton, in putting on inconsiderately full power at the start, in not shutting off the throttle as soon as he noticed that his plane was leaving the runway and swerving to the left and in not stopping it when he had plenty of room to do it; I may note incidentally that on this last point all the witnesses are unanimous.

There remains the question of determining the damages suffered by the suppliants as a consequence of the accident.

It is established beyond doubt that the Ford tri-motor aeroplane of the Yukon Southern Air Transport Limited was a total loss, save for the pontoons, the skis, the radio equipment and spare engines and propellers. It is also abundantly proved that the suppliant Yukon Southern Air Transport Limited endeavoured to replace the said aeroplane by a similar machine but that it did not succeed. The Ford tri-motor was obsolete and was no longer manufactured; more modern and improved types of machines had taken its place. On the other hand, the evidence discloses that if this all metal aeroplane had been kept in good condition and carefuly handled it could have lasted almost indefinitely. Yukon Southern Air Transport Limited made a thorough investigation, both in Canada and in the United States, to secure another Ford tri-motor or another plane of the same type, but was unable to get one and it had to purchase a Barkley Grow at a much higher cost.

Notwithstanding the fact that the Ford tri-motor aeroplane was giving to Yukon Southern Air Transport Limited entire satisfaction and that it could be depended upon for

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an almost indefinite period of time, provided it was properly taken care of, I do not think that the said suppliant is entitled to recover from the respondent the price which it paid for its Barkley Grow; it has a new, modern and better machine than it had before the accident; if Yukon Southern Air Transport Limited were awarded the sum which it paid for the Barkley Grow, it would be put in a more advantageous position than the one in which it was prior to the accident.

One cannot, in the present circumstances, get at the market value; there was no market for this obsolete type of plane. The suppliant Yukon Southern Air Transport Limited is however entitled, as I think, to full and complete indemnity for the loss it has sustained. After giving the matter my best consideration, I have reached the conclusion that the damages suffered by the said suppliant comprise the value of the Ford tri-motor aeroplane to its owner at the time of the accident, which, in my opinion, includes the purchase price and the amount of repairs, improvements and additions made thereto, and the accessories thereof as well as the revenue derivable therefrom lost as a result of being deprived of its use. See *The Harmonides* (1); *The Ironmaster* (2); *F. K. Warren & R. P. and W. F. Starr Limited* v. *The Ship Perene* (3); *The Trustees of the Clyde Navigation* v. *The Bowring Steamship Company Limited* (4).

[The learned Judge here considers the various items of damage suffered by Yukon Southern Air Transport Limited and continues.]

The damages suffered by Yukon Southern Air Transport Limited as a consequence of the collision in question amount to $20,025.17.

The evidence shows that the suppliant Phoenix Assurance Company Limited paid to Yukon Southern Air Transport Limited the sum of $14,500 in virtue of an insurance policy issued by the former to McConachie Air Transport Limited and United Air Transport Limited, dated January 1, 1939 (exhibit 5). As appears by a document attached to the said policy, dated June 23, 1939, the name of the assured was changed to Yukon Southern Air Transport

(1) (1903) 72 L J P. 9

(2) (1859) 166 E R. 1206.

(3) (1924) Ex C.R. 229, at 233; (1925) S.C.R. 1.

(4) (1929) Sess. Cas. 715.

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Limited. The evidence also discloses that Phoenix Assurance Company Limited received $1,500 from salvage. This reduces the total of the damages recoverable by the suppliants from the respondent to $18,525.17.

The policy contains the usual clause regarding subrogation, which reads thus:

> 18. This company may require from the assured an assignment of all right of recovery against any party for loss or damage to the extent that payment therefor is made by this company.

No evidence was adduced to show that the assured Yukon Southern Air Transport Limited had assigned to the insurance company its claim against the respondent. Nevertheless, I am of opinion that the principle of subrogation applies in the present case where the suppliant Yukon Southern Air Transport Limited obtains a judgment against the respondent for the full amount of the damages which it has suffered and will eventually recover the same, assuming that the judgment which I am now delivering is upheld. The assured is entitled to be fully indemnified for the loss it has suffered but is entitled to no more: Porter's Laws of Insurance, 8th ed., pp. 223 *et seq.;* Laverty, The Insurance Law of Canada, 2nd ed., pp. 329 *et seq.; Globe & Rutgers Fire Insurance Company* v. *Truedell* (1). Stone's Insurance Cases, vol. I, p. 626.

I believe it is convenient to quote a passage from Laverty's treatise, which is clear, concise yet comprehensive, and well in point (p. 329):

> The principle of subrogation applies in all cases where a third party is liable to make good the loss as well as the insurer, and it is immaterial whether the liability of such third party arises from contract, or rests upon delict or negligence. But it goes further than that in indemnity insurance, for it then becomes merged into the principle of indemnity, so that under no condition of affairs can the insured be twice indemnified for the same loss. Therefore, the insurer is not only substituted for the insured in respect of any indemnity the latter is entitled to recover from the *tort feasor,* but he is entitled to recover from the insured, after paying him his entire loss, any indemnity over and above the actual loss the latter has received or may receive from a third party causing the loss, whether such indemnity be paid or handed over voluntarily or not. The true test of the right to subrogation is whether the enforcement of the right will diminish the insurer's loss.
>
> Under the English law subrogation is an equitable right and partakes of all the ordinary incidents of such rights, one of which is that in administering relief, the court will regard not so much the form as the substance of the transaction. The primary consideration is to see that

(1) (1927) 60 O.L.R. 227, at 237.

the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the company.

In the absence of anything to the contrary, upon payment of the loss the right of subrogation follows without any assignment from the insured, and the insurer is entitled to bring action in the insured's name.

The authorities mentioned in the above quotation may be consulted with benefit.

There will be judgment in favour of the suppliants against the respondent for the sum of $18,525.17, with interest at the rate of 5% per annum from the date on which the petition of right was left with the Secretary of State, such date to be determined by the Registrar when the minutes of the judgment are settled, the said sum to be paid as follows: $5,525.17 to the suppliant Yukon Southern Air Transport Limited and $13,000 to the suppliant Phoenix Assurance Company Limited.

The suppliants will be entitled to their costs.

*Judgment accordingly.*

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Nov. 5 & 10.

Nov. 20.

BETWEEN:

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

AND

ROWLEY S. HOOPER ................ DEFENDANT.

*Expropriation—Motion for judgment on pleadings—Expropriation Act, R S C , 1927, c. 64, secs. 9, 23 and 34.*

*Held:* That the Court should not make any declaration as to the sufficiency or justice of the compensation money in proceedings under the Expropriation Act merely on the pleadings of the parties and without having before it proper evidence as to the value of the property in question upon which the Court could make an adjudication as to the value of such property and the amount of compensation money to which the defendant is entitled.

2 That section 34 of the Expropriation Act, R.S.C., 1927, c. 64, contemplates a judgment of the Court, in virtue of the provisions of the Act, based upon an adjudication by the Court as to the compensation money to which the defendant is entitled, which adjudication is based upon proper evidence as to the value of the property in question and does not extend to a fixation of the compensation money at the amount agreed upon by the parties either before action brought or by the pleadings.

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MOTION by the defendant for judgment on the pleadings.

The motion was heard before the Honourable Mr. Justice Thorson, President of the Court, at Ottawa.

*L. A. Kelly, K.C.* for plaintiff.

*A. G. McHugh, K.C.* for defendant.

THE PRESIDENT, now (November 20, 1942) delivered the following judgment:

This motion for judgment on the pleadings was made by counsel for the defendant with counsel for the plaintiff concurring therein. It was subsequently re-argued at the request of the Court by counsel for both parties.

The information exhibited by the Attorney-General of Canada contained, *inter alia,* the following paragraphs:—

1. The lands hereinafter described were taken under the provisions and authority of the Expropriation Act, being Chapter 64 of the Revised Statutes of Canada, 1927, by His Majesty the King, for the purposes of the public works of Canada, by depositing of record on the 20th day of August, 1938, under the provisions of section 9 thereof, a plan and description of such lands in the office of the Registrar for the Registry Division of the City of Ottawa, whereby the said lands have become and now remain vested in His Majesty the King.

4. His Majesty the King is willing to pay to the defendant or to whomever by this Honourable Court may be adjudged entitled thereto the sum of $39,830 in full satisfaction of all estate, right, title and interest free from encumbrance and discharge of all claims in respect of damage or loss, if any, that may be occasioned by reason of the said expropriation and the construction of any building that may be hereafter erected thereon.

The Attorney-General of Canada on behalf of His Majesty the King made the following claims:—

(*a*) That it may be declared that the above described lands and real property are vested in His Majesty the King.

(*b*) That it may be declared that the sum of $39,830 is sufficient and just compensation to the defendant for and in respect of the above described lands and real estate so taken as aforesaid and for the said claim for alleged loss and damage mentioned in the third paragraph of this information.

(*e*) That it may be declared and adjudged what amount is a sufficient and just compensation to the defendant for and in respect of the above described lands and real property so taken as aforesaid.

The defendant by his statement of defence admitted the allegations of fact contained in the information and alleged that he was the absolute owner free from encumbrances of the lands described in the information and went on to say:—

3. The defendant is willing to accept the sum of $39,830 mentioned in the fourth paragraph of the said information as being in full satisfaction of all estate, right, title and interest, free from encumbrances (if any) and in discharge of all claims in respect of damage or loss, if any, that may be occasioned by reason of the said expropriation and the construction of any building that may be hereafter erected thereon.

The defendant consented to the declaration asked for in clauses (*a*), (*b*) and (*e*) of the claim of the Attorney-General of Canada. On these pleadings counsel for the defendant moved for judgment on the pleadings and counsel for the plaintiff concurred in the motion.

No evidence of the value of the property in question was adduced.

The Court can, of course, make the first declaration asked for, namely, that the lands in question are vested in His Majesty the King for such a declaration would be in accordance with the provisions of section 9 of the Expropriation Act.

The Court should not, however, make any declaration as to the sufficiency or justice of the compensation money in proceedings under the Expropriation Act merely on the pleadings of the parties and without having before it proper evidence as to the value of the property in question upon which the court could make an adjudication as to the value of such property and the amount of compensation money to which the defendant is entitled.

Section 23 of the Expropriation Act provides that the compensation money agreed upon or adjudged for any land or property acquired or taken for or injuriously affected by the construction of any public work shall stand in the stead of such land or property. The Act contemplates that there are two ways by which the amount of compensation money for property expropriated in virtue of the Expropriation Act may be fixed—namely, by agreement as between the parties or by an adjudication by the Court.

Where the parties have already agreed between themselves as to the amount of the compensation money there is no need of coming to the Court for an adjudication as to the amount of compensation money to which the defendant is entitled.

It would not be difficult to infer from the course of conduct of the parties in this case that an agreement as to the amount of compensation money had been arrived

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at before these proceedings were launched. The expropriation commenced with the deposit of the necessary plans on August 20, 1938. The information was filed on October 19, 1942, and the statement of defence on November 2. Notice of motion on behalf of the defendant for judgment on the pleadings was made on November 3rd, returnable on November 5th. Indeed, counsel for the defendant on the re-argument of the motion stated that the price had been settled before the information was filed.

This being so, there is no need to come to this Court for an adjudication as to the amount of compensation money to which the defendant is entitled, for the rights of the parties have already been determined by the agreement of the parties.

It was stated by counsel that the action was brought in order to obtain a judgment of the Exchequer Court in favour of the defendant since otherwise there was no provision in the government department concerned under which the defendant could immediately be paid the amount of compensation money which had been agreed upon, and the defendant might have to wait until the necessary appropriation had been voted by Parliament.

This does not appear to be a sound ground for intervention by the Court, since the parties are not asking the Court to make an adjudication as to the value of the property in question but are in effect asking the Court to approve by judicial sanction an arrangement already made between them.

Section 34 of the Expropriation Act provides as follows:—

> 34. The Minister of Finance may pay to any person, out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any sum to which, under the judgment of the Court, in virtue of the provisions of this Act, he is entitled as compensation money or costs.

It is not contemplated by this section that the Exchequer Court should become merely an agency for the convenience of the parties who have already agreed upon the amount of the compensation money in a particular expropriation but desire a judgment of the Court approving of their agreement so that the defendant may be paid out of the Consolidated Revenue Fund, without any specific appropriation.

If the parties wish to rely upon the agreement arrived at between them as to the amount of the compensation money they are, of course, free to do so, but they should not ask the Court to become merely an instrument of convenience to them for the purpose of overcoming difficulties or delays of government departmental arrangements.

If the judgment of the Court cannot be obtained merely on the pleadings and without proper evidence of the value of the property in question and the parties wish to rely upon the amount of compensation money agreed upon between them the question of payment of such amount is a matter to be worked out between the parties with the government department concerned.

Furthermore, the judgment asked for on this motion on the pleadings is not the kind of judgment contemplated by sec. 34 of the Expropriation Act. That section does not contemplate mere approval of a settlement made between the parties, whether before action brought or by the pleadings.

Section 34 of the Expropriation Act contemplates a judgment of the Court, in virtue of the provisions of the Act, based upon an adjudication by the Court as to the compensation money to which the defendant is entitled. This means an adjudication based upon proper evidence as to the value of the property in question and does not extend to a fixation of the compensation money at the amount agreed upon by the parties either before action brought or by the pleadings, for the amount of compensation money agreed upon by the parties may not represent the value of the expropriated property as it might be adjudged by the Court.

The Court should not be asked in proceedings under the Expropriation Act to give judicial sanction to an arrangement between the parties as to the amount of compensation money to be paid for expropriated property, without having the opportunity of determining, on the basis of the necessary evidence, the propriety of such arrangement.

If the parties wish to have the judgment of the Court in order to obtain the benefit of section 34 of the Expropriation Act, they must contemplate a judgment of the Court in virtue of the provisions of the Act by which the

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amount of compensation money to which the defendant is entitled is determined not by agreement between the parties but by an adjudication by the Court. The Court has a duty under expropriation proceedings, when its judgment is asked for, to determine judicially the amount of compensation to which the defendant is entitled. Since the compensation money takes the place of the property that has been expropriated, it is incumbent upon the Court, when it is asked to do so, to fix the compensation money at an amount equivalent to the value of the property so that the expropriated party shall be in the same position, so far as monetary compensation can effect such result, as he was in before his property was expropriated. The Court must therefore make an adjudication as to the value of the expropriated property in order to determine the amount of compensation money to which the defendant is entitled. Such adjudication cannot be made except upon proper evidence as to the value of the property. The Court cannot, in its adjudication as to such value, be restricted to the amount already predetermined by the parties, either by an agreement before action or by the pleadings since such amount may not necessarily represent the value of the property. Such an adjudication would be no adjudication at all.

The motion for judgment on the pleadings is therefore dismissed. The parties may, of course, proceed to trial of the action on its merits. There will be no order as to costs.

*Judgment accordingly.*

# INDEX



**COPYRIGHT**—*Infringement and conversion of infringing copies—Inquiry to assess damages—Referee's report and appeal therefrom—No actual loss or damage sustained by plaintiffs—Nominal and exemplary damages—Report varied by increasing amount of exemplary damages—Copyright Act, R.S.C., 1927, c. 32.*]—In an action for infringement of copyright in

PATENTS—*Infringement action — Anticipation — Novelty — Invention — Patentability*.]—The action is one for infringement by defendant, Spun Rock Wools Limited, of a patent, the plaintiff being the licensee of the patentee The invention relates to new and useful improvements in the production of fibres or Threads from Glass Slag and the Like Meltable Materials The defendant admitted that its method of manufacturing rock wool is quite similar to or the equivalent of the method described and claimed in the patent in suit. The defendant pleaded that plaintiff's patent was invalid and alleged lack of novelty and lack of invention *Held:* That since none of the prior publications cited by the defendant has so presented to the public the method of manufacture or the device for producing fibres from molten glass, slag and the like meltable material which is described in the invention in question, so as to put it out of the power of any subsequent person to claim the invention as his own, the plea of anticipation was not substantiated. 2 That the method of manufacture described in the patent in suit was something new and useful and possessed certain marked improvements and advantages over anything that had earlier been disclosed or used in this particular art and required that degree of inventive power to merit a patent FIBERGLAS CANADA LIMITED *v.* SPUN ROCK WOOLS LIMITED AND THE CUSTODIAN ........................ **73**

2.——*Conflict action—Conflicting applications for patents—Action by plaintiff as assignee from one applicant against the assignee of the other applicant for a declaration that the plaintiff's assignor was the inventor*.]—In 1937 McKay and Penty filed an application in the Canadian Patent Office for a patent for a process for making a ready-to-eat cereal food product. In 1938 Mary M. Kellogg, as administratrix of the estate of John L Kellogg Jr , deceased, filed an application in the Canadian Patent Office for the same invention. The Commissioner of Patents declared a conflict between the applications, and plaintiff, as assignee of McKay and Penty, commenced an action in this court against defendant as owner of the invention of John L. Kellogg Jr , claiming *inter alia* a declaration that McKay

**PATENTS**—*Concluded*

and Penty and not John L Kellogg Jr. were the inventors of the invention. Defendant alleged that John L. Kellogg Jr. was the inventor and counterclaimed for a declaration to that effect *Held:* That McKay and Penty had completed their invention by October, 1936, and that John L. Kellogg Jr had not been proved to have made the same invention before that date. 2. That whether or not John L Kellogg Jr. had the idea in mind, as was alleged, he had not reduced it to a definite and practical shape and he was not the inventor of the process KELLOGG COMPANY *v.* HELEN L. KELLOGG..... **87**

3—— *Infringement action — Common knowledge — Old principle — Invention — Subject-matter — Combination patent — Necessity of claiming invention for subordinate parts as well as for the whole*.] —The action is one for infringement of Patent No 270,557 granted to the plaintiff, Merco Nordstrom Valve Company as assignee of Sven Johan Nordstrom, the inventor. Peacock Brothers Limited, is the licensee of Nordstrom Valve Company under the patent. The invention claimed in the patent relates to an improvement in valves, and more particularly to an improvement in plug valves of the type in which lubrication of the bearing or seating surfaces of the valve is effected by forcing lubricant under pressure into the contact point between the plug and the valve seat in the casing The Court found that the common knowledge of the art at the date of the letters patent here in issue was such that the invention relied on could not be said to disclose any new principle or method of attaining a new result *Held:* That in order for a patentee to claim for a combination and any part or parts of it separately, he must set forth clearly his claim for invention for the subordinate integers entering into the whole. 2. That the plaintiff must be limited by his claims to the precise mechanism described, and there can be no infringement since the defendant's combination and parts are distinguishable in essential particulars from those of the plaintiff and constitute a different method of attaining an old object or result. 3 That every subordinate integer in plaintiff's combination was well known or was obvious, as was the function to be performed by them separately or in combination, and that there was no invention in combining them together. MERCO NORDSTROM VALVE COMPANY ET AL. *v.* J. F. COMER..... **138**

**PATENTABILITY.**

*See* PATENTS, No. 1.

**"PERILS OF THE SEA."**

*See* SHIPPING, No. 3.